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MESSAGE OF THE EDITOR-IN-CHIEF

I am privileged to present to all our dear readers the fifth volume of Delhi Journal of Contemporary Law. Publishing this journal annuallyby the entire editorial team at a regular frequency without fail has been really praiseworthy. The editor and her entire editorial board need to be specially thanked for their consistency in efforts and selecting the best articles for publication. The previous issues of this journal have included the latest and contemporary issues of law which needed to be discussed, examined and annotated. Carrying this legacy further, the present volume has also selected articles on topics, such as intellectual property rights, artificial intelligence, cyber warfare, new techniques of crime investigation, human rights violations of women, penology, environmental protection and indigenous people. Eleven articles on these topics have been carefully peer-reviewed and sincerely edited by the entire editorial team. In addition, an attractive section, i.e., book review, adds another feather in the cap of this journal as it has selected a book on drug regulation for it. The book review section has been added for the first time in the journey of this journal. After the subsidence of Covid-19 pandemic, it is a treat for the readers to see the soft copy of this volume. I wish the entire editorial team a great success in broadening the base of readers of this research journal. Lastly, I beseech the prospective readers and authors to keep contributing to the scholarly tradition started by this journal five years ago.

Prof. Dr. Anupam Jha
Editor in-Chief
Professor In-Charge, Law Centre-II
Faculty of Law, University of Delhi

EDITOR'S NOTE

Law centre-II, University of Delhi is acclaimed worldwide as an institution par excellence imparting legal education with our alumni holding prestigious positions across the globe.

Academic excellence is our forte and towards that end, Law Centre-II publishes two journals with annual periodicity. Delhi Journal of Contemporary Law is our online journal committed to coverage of latest developments in the field of law.

It has always been our endeavour to publish well researched articles on contemporary and groundbreaking work in the legal field and it is my proud privilege to present the fifth volume of Delhi Journal of Contemporary Law. All the articles have been selected through a rigorous peer review process and thereafter edited by our proficient editorial team. I am grateful to all the contributors for their scholarly articles and my editorial team for their diligent expertise in editing, formatting, designing and publication of the journal. The inspirational statesmanship of our Professor in-Charge has inspired us to assiduously take our work a notch above.

Wishing our readers a delightful academic odyssey as they pore through this volume.

Prof. (Dr.) Vageshwari Deswal
Editor
Professor, Law Centre-II,
Faculty of Law, University of Delhi

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PROPERTY OR PROPRIETY? A PARADOX BEFORE THE ACADEMIA

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ABSTRACT

In the wake of neoliberalism, institutional governance of modern university poses a concern- if not crisis- since the same emerged a millennium ago. The political economy always plays a critical qualifier toward gradual institutional rise of university across the world. By courtesy colonialism, the Occidental institutional cult was followed by all other regions; albeit, exceptions apart. With the rise of neoliberal political economy around, university governance struggles with a critical threshold; more so vis-à-vis social studies faculty resource governance by means of intellectual property (hereafter IP). While natural science research involves instrumentation and, therefore, involves material cost, social studies research is by and large devoid of material cost. Besides, unlike the way natural science research does, social studies hardly showcase tangible deliverable output to attract commercial entrepreneurship to fund research project. Versatility vis-à-vis resource governance in poles apart knowledge domains needs reasonable classification to patron mutually exclusive research mindscapes by default. Default commercial resource governance with IP mark © on the count of legality- upon whatever product created by social studies research in the institutional academia named university- stands contested on the count of its institutional legitimacy since import of individual property discourse undermines the stake of collective propriety discourse available in university since time immemorial. The Author hereby unfolds a conundrum of choice for university to get the institution and its sui generis resource characterized by poles apart political economy either way.

I. Neoliberalism: A Gamechanger in Higher Education

There was a time when academia was society's refuge for the eccentric, brilliant, and impractical. No longer. It is now the domain of professional self-marketers. As for the eccentric, brilliant, and impractical: it would seem society now has no place for them at all.

-David Graeber.[1]

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1 Quoted in Ivan Franceschini, *The Work of Culture: Of Barons, Dark Academia, and the corruption of Language in the Neoliberal University*, Made in China Journal, Article, *available at:* https://madeinchinajournal.com/2021/07/20/the-work-of-culture/ (last visited on Dec. 10, 2023).

Intellectual property (IP) commercialization in higher education institutions (HEIs) and public research institutions (PRIs) receives patronage of the neoliberal state-sponsored regulatory agencies in India. IP governance in the HEIs appears a distant dream and sporadic lip services- such as advisory extended by University Grants Commission- cannot change the writings of the wall. Even advisory appears problematic by default since the same is hardly relevant to the social studies scholarship. Whether and how far hitherto intended IP regime brings in good governance vis-à-vis academic creativity poses a moot point. This effort is meant to generate a literature vis-à-vis public policy with focus upon the social studies discipline; thereby prompt the regulatory agencies proceed for case-sensitive policy regime in higher education.

While patent and copyright comprise the core corpus of hardcore IP regime, copyright and not patent is relevant to the social studies discipline at large. The recent advisory- issued by the Commission- suffers from want of case-sensitive IP governance in HEIs since the same has equalized these otherwise unequal disciplines. While the IP verticals diversified to such extent that they often than not stand poles apart, they are applicable to diversified variables. The scientific and technological inventions are patentable and the advisory appears unproblematic since the same may get fit into the natural science discipline. Indeed, creativity in the social studies scholarship is a subject of copyright, research output in humanities and social studies but belongs to different genus and, therefore, deserves altogether different genre of governance; anything but the IP regime. In final count, both of them merge into creativity of mind. A scientific invention needs to be patented since the same may and does involve phenomenal cost and, therefore, the same needs direct financial investment of funding agencies to accomplish research and development to get the product prepared. On the contrary, a human wisdom needs no copyright since no direct financial investment is involved anyway. If copyrighted, the same ought to defect very object of the IP jurisprudence to get the balance optimized between public good and private gain since © barricades public access to knowledge without *bona fide* reasoning due to want of direct financial investment for the product. In a nutshell, the regulatory agency treats dissimilar domains with similar means[2] and here lies space to improve the public policy regime; thereby prove the HEI governance case-sensitive. While patented products to the credit of HEIs enrich institutional legacy through revenue generation, copyrighted products impoverish institutional legitimacy;

[2] Correspondence of the Secretary, University Grants Commission, New Delhi, to the Vice-Chancellors of all Universities, D.O.No.1-1/2016(Secy), dated 15th July, 2016, *available at*: https://www.ugc.ac.in/pdfnews/4866021_IPR.pdf (last visited on Dec. 10, 2023).

so far as etymology of its nomenclature is concerned. As a nomenclature, 'University' cannot be justified by economics alone, but by politics alike,[3] through its service toward universal public good and there lies its litmus test as a 'University'.

Before entry to operative part of this effort, another inquiry vis-à-vis faculty incentive for additional drive toward creativity deserves befitting response. A faculty position in HEIs resembles a seat of trust reposed upon the person by default. Such a position is unlike other sundry occupations. Minimal class hours, work hours, work days, etc., throughout the secure service career- albeit, such privileges get increasingly decreased nowadays- corroborate the statement by default. The cadre engaged in faculty position receives maximal payment for minimal services out of unwritten fiduciary agreement- not a contract in technical sense of the term- that they will stay committed to return best gesture to the community during the service career. Academic social responsibility, therefore, constitutes *sine qua non* for members of the faculty during their tenure; more so while the underprivileged struggles to survive odious poverty line, the gentry pays tax through the nose and the Inc. is compelled to spend resource for the society; out of corporate social responsibility. Consequently, either jointly or severally, faculty needs no pecuniary incentive by means of the given copyright regime since they remain incentivized by default; irrespective of creativity. To be more candid, incentive is paid in advance, also, on the basis of assumption in good faith irrespective of the delivery of goods and/or services; as the case may be. Therefore, while they deliver through research in social studies, they return to the community what they are required to do as per reasonable expectation. Therefore, if at all, claim for copyright may be justified on the ground of recognition. A member of the faculty cannot claim copyright to gain individual pecuniary advantage since the same resembles unjust enrichment; albeit, not in technical sense of the term under the law of direct taxation. A copyright claim for revenue generation of members of the faculty, therefore, lacks logic. The policy paradox but deserves public discussion elsewhere.

A subsequent engagement of the author with copyright advocacy for HEIs is charged with *pro-bono* reasoning and the same is driven by arguendo pleading for recognition of the creator(s) since the same contains non-pecuniary interests; rather than pleading for their pecuniary (read commercial) interests out of copyright. The statutory rights of the faculty are

[3] Albeit, ill-defined, to Aristotle, politics resembles household management. For details, refer to http://files.libertyfund.org/files/819/0033-02_Bk_SM.pdf(last visited on Dec. 10, 2023).

thereby divided by the author in two clusters: (i) pecuniary interests and (ii) non-pecuniary interests. The author extends legal arguments to get the latter (non-pecuniary interest) fortified on the count of propriety; thereby claims recognition for the institution and its individuals alike. Whatever earned by the former (pecuniary interest) may be shared between the institution and its individuals on equitable basis; so far as consultancy, project, etc., are concerned. The benefit sharing arrangement is driven by a prudent argument advanced of the IP jurisprudence that pecuniary incentive is often than not a default locomotive for creativity. Pecuniary benefit out of generation of academic literature, authored by individual academic enterprise, deserves to be left to faculty concerned. While patent out of creativity in the natural science discipline is primarily meant to earn the revenue, copyright out of creativity in the social studies discipline is but primarily meant to earn recognition. Taken together, creativity creates 'University' in its letters and spirit. While patent resembles the hardware, copyright but resembles the software of knowledge profession. Both complement and supplement one another to sync revenue and reputation. In course of commercial IP management, HEIs need to engage a case-sensitive approach since- much more than commerce- creativity constitutes a core concern of the given IP regime. Products patented and copyrighted deserve altogether different treatment since they differ vis-à-vis jurisprudence behind. Copyrightability apart, the dominant IP discourse- that whatever may be copyrighted ought to be copyrighted even if it is devoid of commercial character- stands contested; followed by corollary innuendo toward alternative discourse vis-à-vis faculty resource management beyond the commonplace mercantile discourse; as if the copyrightability of faculty resource is meant to gain the pecuniary advantage irrespective of character of the faculty position getting incentivized by default with reasonable expectation that those in office are pledged to the community to attain public good without further gain. Here lies a core focus of the IP governance.

II. University: A Social Enterprise toward Public Good

The legal status apart, few- too few- institutions with the nomenclature of 'University' could justify themselves befitting to the status of 'University' after public perception since University of Bologna; the eldest surviving university of the world since 1088. What turns a seat of education worthy enough to be named as 'University'? Rather than legal status, what matters is quality assurance; reflected in human resource, followed by generation of academic resource through creation and dissemination of cutting-edge unprejudiced knowledge to serve public good. Here lies difference between industry and institution: the former is economic

enterprise while the latter is social enterprise. In the age of New International Economic Order (read neoliberal world order), after the withdrawal of minimalist state from patronage to knowledge practice, institutions are required to attain economic sovereignty and university is no exception to this end. Therefore, products out of scientific creativity get patented by HEIs and PRIs toward revenue generation since the same have had commercial potential in market economy. Unlike these scientific products, products out of academic creativity in social studies scholarship lack commercial potential since: (i) they are not required by the industry; (ii) they are required by individuals or groups who lack capability to purchase products out of social entrepreneurship. Unlike patented products, therefore, academic products cannot earn revenue for the university. However, if copyrighted, they earn reputation (read goodwill) for the university and the same is no less critical to build a university. At times, the soft potential of academic propriety copyrighted exceeds the actual value of industrial property patented. Goodwill has had stake of its own in the IP discourse; something with potential of the gamechanger. Had telescope been patented to Galileo, he would not have been immortal to the posterity. Same is the case for Wright brothers sans aviation technology patented to their credit. Even without institutional affiliation with university, these inventors have got elevated to professors of mankind. Despite getting the world revolutionized with his invention, the world remembers Bill Gates more for his charity foundation; meant to spend his fortune democratizing public access to cyberspace across the world. Indeed, neoliberal world order has reversed the trend to turn faculty another fortune-seeker and university another Inc. Knowledge practice has thereby turned knowledge business and university an industry to serve the market. Individual virtue is sacrosanct, institutional virtue is but defunct.

Historical background reflects somewhat secular politics behind rise of the university. How the university was born in the Occident? Indeed, the University was established by few clergymen in Bologna, an intention behind its establishment was independence from mundane ecclesiasticism omnipresent within the then seats of public education.[4] Not without reason that DNA of its institutional ecosystem reflects freedom of thought and expression by default. There lies identity of the university since time immemorial. Global best practices, therefore, leave individual credit for research and development- followed by faculty publication- to authors themselves. The IP management, however, differs while faculty

[4] 1088 is widely considered the date in which free teaching began in Bologna, independently from the ecclesiastic schools, *available at:* https://www.unibo.it/en/university/who-we-are/our-history/university-from-12th-to-20th-century (last visited on Dec. 10, 2023).

engages research and development with institutional affiliation, e.g., output of funded research through consultancy, project, and the like. In such cases, fund stands divided between individual and institution with wide variety; after policy of the given time and space. In a nutshell, myriad issues are involved in the university IP regime; followed by several variables operative to leave the policymakers clueless of means and methods to get the balance between creativity and commerce optimized.[5] In the South-Asian scenario, while multi-disciplinary HEIs run parallel disciplines alike, revenue-generation and reputation-generation must be shared by natural sciences and social studies respectively. The arguendo is meant to advance functional division; rather than watertight compartment. So far as the institutional IP policy is concerned, authorship is another moot point and hyperlinked to authenticity of the policy regime. Who owns the largest stake in HEIs? Students spend years while faculty spend decades and possess more potential to leave lasting impact upon the ecosystem. Voice of faculty in the policymaking process, therefore, carry critical edge toward fruition of the policy into democratic praxis in the premises.[6] Here lies reasoning behind fiduciary relations between faculty and the community. Faculty with regular tenure and service security- with reasonable rest and leisure including semester vacation- alone may and does credit HEIs with creativity. Democratic institutional governance has had a higher likelihood to accelerate individual creativity than authoritarian rule.

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[5] Intellectual property issues in higher education are many, and they are often more complex than in other settings. Five factors largely make this so. First, colleges and universities are at once major suppliers and consumers of intellectual property. Faculty perform research, scholarship, and other creative work and then consume research and other creative work in their teaching, service and administrative tasks. Second, the intellectual property created in colleges and universities is often the product of multiple creators who share other important relationships (such as graduate student and supervisor). Third, both the creation and use of intellectual property within the academy are carried out by a diverse array of individuals- including faculty, administrators, librarians, staff and students. Fourth, creative activity within colleges and universities is supported by a variety of sources, including direct government investment, and private funds from endowments, alumni, foundations and business. Fifth, and perhaps most important, the creation and use of intellectual property within colleges and universities are intrinsically related to the core activities of these institutions- teaching, research, scholarship and service- and to the values essential to those activities. Academic freedom of faculty and the preservation and interpretation of our cultural heritage are among the most important of these values. Finally, the rapid and far-reaching proliferation of powerful information technologies complicates and intensifies intellectual property issues in education and elsewhere.
Fred H. Cate *et al*, "Copyright Issues in Colleges and Universities", 84(3) *Academe* 39 (May-June, 1998), also *available at*: https://www.jstor.org/stable/40251265?seq=1 (last visited on Dec. 10, 2023).

[6] The real concern is not who adopts the policy, although that can obviously be significant, but rather who is involved and what issues drive the adoption or revision (of IP policymaking) process. It is critical that faculty play an integral role in the policy process, and that the process not focus exclusively on, or be driven primarily by, ownership, commercialization, and revenue issues. A policy developed without faculty involvement, or one that fails to address other significant issues or to take into account values more central to the academy than mere fundraising, is certain to be inadequate.
Id. at 45.

Here lies reasoning behind the failure of contemporary HEIs owned by profiteering private players to generate the IP since they ignore the threshold of faculty resource utilization; thereby indulges in resource exploitation to push the IP potential to peril. Whether private property serves public good poses a moot point in itself; Visva-Bharati apart. Indeed, Visva-Bharati appears exception to this end. While commercialization constitutes a birthmark of pseudo HEIs, the IP generation falls short since creativity is subject to germination in the fertile human mind and the same needs rest and leisure toward fruition of ideas; worthy enough to be patented or copyrighted. Human mind differs from machine and turns functional with altogether different algorithm behind. In profiteering HEIs, by courtesy want of service security in technical sense of the term, faculty cadre often than not find themselves trapped to every sundry non-intellectual exercise for shops and establishments around. What concerns more, trade of education stands legitimized by erroneous construction of the outcome-based pedagogy (intended to improve technical education),[7] nowadays imposed upon the social studies discipline, under the aegis of regulatory agencies since the minimalist state withdraws patronage from public education; more from the HEIs. Lesser fiscal resource allocation for HEIs and larger land resource allocation to profiteering establishments with their legal status of universities taken together, a systemic design appears on its rise to gross detriment of higher education. With its given trend, double jeopardy ought to leave educational institution and institutional education directionless in time ahead.

Consequently, outcome-based learning paradigm followed by the HEIs and consequent incentive by standard-setting agencies, such as National Assessment and Accreditation Council (NAAC) as an advisor to institutional authorities for minute micro-management in the HEIs taken together, state intervention in disguise with the indigenous pedagogy of social studies discipline in the South-Asian subcontinent constitutes part of larger macro-systemic project to penetrate into the liberal pedagogy in vogue and to bring in posterity customized to the neoliberal political economy of education with a core focus on livelihood alone. While profiteering HEIs face the challenge of commercialization, public HEIs face the challenge in politicization of High Offices; followed by travesty of higher education, by getting succumbed to such a macro-systemic design otherwise. In either case, the plausibility of engagement with creativity turns into a distant dream to the faculty. The IP management

[7] For details, refer to International Engineering Alliance Secretariat, *Washington Accord 25 Years (1989-2014): Celebrating International engineering standards and recognition*, Washington, 2014, *available at:* https://www.ieagreements.org/assets/Uploads/Documents/History/25YearsWashingtonAccord-A5booklet-FINAL.pdf (last visited on Dec. 10, 2023).

attracts attention of the faculty toward productivity while creativity often than not stands set aside. Due to want of conducive ecosystem, creativity ought to get reduced to naught; followed by corollary syndrome, e.g., want of concern for the IP management in HEIs since creativity will be reduced to fiction. In university, faculty is meant to drive for production of newer knowledge, much more than commonplace collegiate role to drive for dissemination of the given knowledge; thereby contribute to public good. In the wake of information revolution, production of newer knowledge needs quality academic time while faculty is getting overloaded with otherwise reasonable administrative assignments; due to severe shortage of staff. Consequently, cognitive faculty stands exhausted by mundane repetitive assignments- befitting to staff- to gross detriment of the potential of individual and institution alike. The HEI ecosystem thereby suffers phenomenal loss vis-à-vis faculty talent and time, followed by resignation of faculty; something to be read as reflection of the negation by these inseparable stakeholders to systemic anarchy indulged in by neoliberal state. If unattended, the impugned policy in HEIs ought to succumb to the governance failure in time ahead. State patronage is a proven locomotive of HEIs since time immemorial. Withdrawal of state patronage amounts to withdrawal of sustainability without fault. While getting placed to the threshold of knowledge economy, the vacuum- if not void-in HEIs ought to hit the emerging economy of India hard in time ahead.

III. Goodwill: A Teleological End of Educational Enterprise

Let us explore another otherwise least explored genre of the IP discourse nowadays and the same is goodwill. Albeit, not apparent, goodwill may and does generate dividend far-reaching in the long run, more than all regular IP variants (e.g., patent, copyright, and the like) since goodwill knows no end vis-à-vis time limit; unlike these variants. For economic enterprise, the value named goodwill turns quantified during its sunset.[8] For university, a social enterprise, goodwill is quantifiable within its lifetime. As it is apparent out of its nomenclature, university earns universal relevance by the goodwill earned so far. Thus, goodwill of HEIs, cannot stand limited to territorial jurisdiction. The Second Circuit Court in

[8] A going business has a value over and above the aggregate value of the tangible property employed in it. Such excess of value is nothing more than the recognition that, used in an established business that has won the favor of its customers, the tangibles may be expected to earn in the future as they have in the past. The owner's privilege of so using them, and his privilege of continuing to deal with customers attracted by the established business, are property of value. This latter privilege is known as good will.
Haberle Crystal Springs Brewing Co. v. Clarke, Collector of Internal Revenue. No. 89. Circuit Court of Appeals, Second Circuit. January 14, 1929, *available at:* https://law.justia.com/cases/federal/appellate-courts/F2/30/219/1473859/ (last visited on Dec. 10, 2023).

USA once held that even the plaintiff possesses priority issued under the federal registration in the entire country, the plaintiff could not show likelihood of confusion unless he could show likelihood of its entry into the territory of subsequent enterprise.[9] In recent times, however, the Dawn Donut rule was set aside with another reasoning that the reputation of trademark has had potential to get spread even without the use of trademark; by courtesy, modern means of communication run by electronic gazettes with internet. These courts have recognized that a(ny) trademark should be protected where it has established goodwill among consumers, not within an artificially created boundary alone.[10] For HEIs, the position is more appropriate since goodwill constitutes a core capital of social enterprise; even long after the same ceases to exist. For instance, the very goodwill of *Nalanda* in ancient Indian antiquity has rekindled imagination of contemporary experiment even in the present millennium. Unlike economic enterprise, social enterprises like university possess unique potential to slingshot its goodwill faraway (read far ahead) vis-à-vis its given time and space. With resurrection of the legacy of *Nalanda* long after decline of the ancient institution so named, *Murry* ratio,[11] that the value of goodwill in a nonprofitable social enterprise is nominal, stands contested by the recent development in India; with reestablishment of Nalanda University at *Rajgir* toward revival of the ancient legacy once again,[12] also, sited in proximity

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[9] Even prior to the passage of the Lanham Act the courts held that the second user of a mark was not entitled to exclude the registered owner of the mark from using it in a territory which the latter would probably reach in the normal expansion of his business.
Dawn Donuts, Co. v. Hart's Food Stores (1959), *available at*: https://casetext.com/case/dawn-donut-company-v-hart39s-food-stores inc#:~:text=In%20Dawn%20Donut%20Co.,mark%20exclusively%20in%20that%20market (last visited on Dec. 10, 2023).

[10] Maxim Grinberg, "The WIPO Joint Recommendation Protecting Well-known Marks and the Forgotten Goodwill", 5 *Chicago-Kent Journal of Intellectual Property* 5 (2005), *available at:* https://studentorgs.kentlaw.iit.edu/ckjip/wp-content/uploads/sites/4/2013/06/01_5JIntellProp12005-2006.pdf (last visited on Dec. 10, 2023).

[11] A business may have goodwill for legal purposes even though its trading losses are such that its sale value would be no greater than its "break-up"' value. Once the courts rejected patronage as the touchstone of goodwill in favour of the "added value" concept, it might seem impossible for a business to have goodwill for legal purposes when its value as a going concern does not exceed the value of the identifiable assets of the business. But the attraction of custom still remains central to the legal concept of goodwill. Courts will protect this source or element of goodwill irrespective of the profitability or value of the business.
For details, refer to FC of T v. MURRY, High Court of Australia, 16 June 1998, a*vailable at:* https://iknow.cch.com.au/document/atagUio539109sl16708085/fc-of-t-v-murry (last visited on Dec. 12, 2023).

[12] The establishment of ancient Nalanda as an undisputed seat of learning was a historical consequence of its context. … Historical sources indicate that the University had a long and illustrious life which lasted almost continually for 800 years from the fifth to the twelfth century CE. … The profound knowledge of Nalanda's teachers attracted scholars from places as distant as China, Korea, Japan, Tibet, Mongolia, Turkey, Sri Lanka, and South East Asia. … When the former President of India, the Hon'ble Dr. A.P.J. Abdul Kalam mooted the idea of reviving the ancient Nalanda University while addressing the Bihar State Legislative Assembly in March 2006, the first step towards realizing the dream of reinventing the old Nalanda had been taken. Almost simultaneously, the Singapore government presented the "Nalanda Proposal" to the

of the original seat of *Nalanda*. The Murry ratio may get contested by traditional juridical discourse as well; albeit, through circuitous route. For instance, due to its indefinite life, goodwill is not taken into count in course of amortization.[13] Besides, as per prior literature, goodwill constitutes a *sui generis* intangible property and deserves soft law regime for those with stake in propriety; rather than cognizance of goodwill as another conventional intangible property under the regular IP regime.[14] A similar jurisprudence is available in the Indian legal regime vis-à-vis direct taxation with rationale that goodwill has had no default depreciation out of regular use.[15] Rather, on the contrary, goodwill often than not delivers dividends with the passage of time. To get candid, despite its befitting characteristic, intangibility cannot *ipso facto* turn a property subjected to the IP regime by default; similar to the reasoning behind faith in Almighty not getting subjected to the IP regime despite the same carrying potential to get construed as an intangible spiritual property. *Amen*!

Besides, the Indian legal regime vis-à-vis commercial law leaves all respective cases of valuation of goodwill to contract between parties concerned in time of dissolution of the business.[16] Even a recent IP regime provides for means and methods of valuation of goodwill in a manner similar to commercial law regime; quite unlike an IP regime.[17] Thus, diversified laws, e.g., taxation law, commercial law, IP law, etc., taken together, the lesson learnt lies in advisory toward treatment of goodwill as a poles apart genre; more so while the same is meant to spread brand value of an institutionalized academia named university. A social enterprise by default, university serves larger public good. Even if the same is owned by private proprietor, the same is expected to serve public in final count; irrespective of extent of

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Government of India suggesting the re-establishment of ancient Nalanda to make it as the focal point of Asia once again. About Nalanda University: History and Revival, *available at:* https://nalandauniv.edu.in/about-nalanda/history-and-revival/ (last visited on Dec. 10, 2023).

[13] Amortization. In accounting, the allocation (and charge to expense) of the cost or other basis of an intangible asset over its estimated useful life. Intangible assets which have an indefinite life (e.g., goodwill) are not amortizable. Black's Law Dictionary 83 (West Publishing Co., St. Paul, Minn, 6th edition, 1990), *available at*: https://karnatakajudiciary.kar.nic.in/hcklibrary/PDF/Blacks%20Law%206th%20Edition%20-%20SecA.pdf

[14] Goodwill is more status-neutral, … and it is that broader meaning which I intend. A formal definition of my subject might be the sentiments of friendship and the sense of diffuse personal obligation which accrue between individuals engaged in recurring contractual economic exchange. Ronald Dore, "Goodwill and the Spirit of market Capitalism", 34(4) *The British Journal of Sociology* 460 (December 1983), *available at:* https://www.jstor.org/stable/590932?seq=1 (last visited on Dec. 10, 2023).

[15] In this Act, unless the context otherwise requires,
"block of assets" means a group of assets falling within a class of assets comprising-
(*a*) tangible assets, being buildings, machinery, plant or furniture;
(*b*) intangible assets, being know-how, patents, copyrights, trade-marks, licences, franchises or any other business or commercial rights of similar nature, *not being goodwill of a business or profession,* in respect of which the same percentage of depreciation is prescribed. S. 2(11) of the Income Tax Act, 1961.

[16] *Vide* s. 55 of the Indian Partnership Act, 1932.

[17] *Vide* ss. 38, 39 and 42 of the Trade Marks Act, 1999.

services. Resort to monopoly upon knowledge through the IP regime ought to hit institutional legitimacy hard since university is meant to do reverse. Here lies difference between industry and institution. While the former struggles for earning, the latter struggles for learning. Therefore, property is priority to the former while propriety is priority to the latter. With the passage of time, goodwill is born and grown to turn propriety into property in itself, by means of its indefinite life; thereby enrich institution beyond industrial reach out. There are plenty of institutions on the run for several centuries, few for millennium. No industry but survives likewise since the market may and does turn upside down by a decade or two.

IV. Social Studies Scholarship: Conscience of Academia

Political economy apart, social studies scholarship deserves patronage of "the State"[18] from transcendental approach. Justice Marshall emphasized upon stake of the judiciary to determine law of the land.[19] Likewise, academia ought to put emphasis upon its stake to dream what should be law of the land; thereby develop a discourse between realism and idealism, of existing law- *de lege lata*- on one side, and public policy advocacy vis-à-vis what law ought to be- *de lege ferenda*- on the other. In larger public interest, therefore, both judiciary and academia need to get their judgments issued to the public. While a judgment issued by judiciary has had legality out of judicial cloak to its credit, a judgment articulated by academia ought to attain legitimacy by judicious character of the same. Not legal academia alone, but the social studies scholarship in its entirety has had stake to add value to this end; albeit, with a caveat or two vis-à-vis propriety. (i) As a relevant institutional peer, academia must be versed to procedural nitty-gritty; thereby advance arguendo toward pragmatic end of the matter pending before court. (ii) As a responsible institutional peer, academia needs to reach reasonable expectation of "the State" with constructive spirit toward progressive development of the society. Subject to these two qualifiers, academia add value to dialogue on law and governance. There lies rationale behind state patronage toward academics.

Despite otherwise accomplished competence, academia in India meets neither of these two qualifiers, e.g., basic juridical awareness on one side and systemic responsibility on the other. Except a few, too few, social studies academia lacks ability and agility to develop basic juridical awareness. Consequently, empty vessels often than not sound nonsense; thereby

[18] *Vide* definition clause under Art. 12, read with Art. 36, of the Constitution of India.

[19] It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. *William Marbury v. James Madison*, US Supreme Court (1803).

reduce the credibility to naught. A larger problem but lies in lack of propriety as institutional peer of the State itself. With acceptance of fiscal patronage from the state, university is an emissary of "the State" under the Constitution of India. Getting funded by the state exchequer, toxic criticism by professors against the state- often than not unadulterated activism to foment anti-establishment ideologue schism in the disguise of academics- amounts to disowning themselves and academia alike. In recent times, they subverted their own cause; thereby fortified argumentative castle of authoritarian governance to tame themselves with realpolitik they use to blackmail statecraft since long back. Subject to fair use of the freedom of speech and expression, social studies scholarship has had potential to emerge as the conscience of academia and the messiah of public life in time ahead. For disaster management, academia must bridge the given gap between university and statecraft with constructive contribution toward good governance. A need of the hour lies in joining systemic role for academia to bring in social transformation through state-funded project, consultancy, and the like. In democratic governance, those elected run statecraft and those in academia- more so while paid by public exchequer- engage research to facilitate elected representatives run good governance; something ignored by academia so far. The earlier academia does away with colonial non-cooperation appears better to India.

In recent times, another distance- if not difference- has shot through the roof; between academia and judiciary in general. The criminal contempt case against Arundhati Roy[20] is a classic illustration of hostile miscommunication between academia and judiciary; mutually damaging one another. The following passage reflects her distrust in judiciary:

"In India over the last ten years the fight against the Sardar Sarovar Dam has come to represent far more than the fight for one river. This has been its strength as well as its weakness. Some years ago, it became a debate that captured the popular imagination. That's what raised the stakes and changed the complexion of the battle. From being a fight over the fate of a river valley it began to raise doubts about an entire political system. What is at issue now is the very nature of our democracy. Who owns this land? Who owns its rivers? Its forests? Its fish? These are huge questions. They are being taken hugely seriously by the State. They are being answered in one voice by every institution at its command - the army,

[20] *In re: Arundhati Roy, Contemner*, Contempt Petition (Criminal) 10 of 2001; judgment delivered on 06/03/2002, *available at*: https://main.sci.gov.in/judgment/judis/18299.pdf (last visited on Dec. 10, 2023).

the police, the bureaucracy, the courts. And not just answered, but answered unambiguously, in bitter, brutal ways."[21]

A guardian of the Constitution, the judiciary is expected to guard the people of India. Ms. Roy but went devoid of coverage by constitutional safeguards since she left the priests of justice unhappy (sic.):

"We are unhappy at the way the leaders of NBA (Narmada Bachao Andolan) and Ms. Arundhati Roy have attempted to undermine the dignity of the Court. We expected better behaviour from them."[22]

The rhetoric ought to remind the readership of the draconian law of sedition in India where incitement to disaffection went criminalized; followed by severe retribution.[23] Also, in technical count, contempt of court offends natural justice principle since court plays plaintiff and usurp as judge in the same trial proceedings. What went apparent is want of restraint in either side. With due stake in democratic governance, academia and judiciary should offer better gesture to other.

Last yet not least, inhouse regime of the HEIs in India deserves minute introspection. After express pronouncement under the Constitution, "the State" is obliged to strive for a social order in which justice shall inform all the institutions of national life;[24] including university. The inhouse ecosystem of the HEIs, therefore, deserves freedom of speech and expression, along with other tributaries, to secure democratic governance. A lucid illustration may be cited from lived experience of a state-of-the-art university:

The central purposes of a University are the pursuit of truth, the discovery of new knowledge through scholarship and research, the teaching and general development of students, and the transmission of knowledge and learning to society at large. Free inquiry and free expression within the University community are indispensable to the achievement of these goals. The freedom to teach and to learn depends upon the creation of appropriate conditions and opportunities not only in classrooms and lecture halls but also on the campus as a whole.[25]

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[21] Arundhati Roy, "The Greater Common Good", 16(11) *Frontline* (May 22-June 04, 19991), *available at*: https://web.cecs.pdx.edu/~sheard/course/Design&Society/Readings/Narmada/greatercommongood.pdf (last visited on Dec. 12, 2023).

[22] *Supra* note 20 at 3, second paragraph.

[23] *Vide* s. 124A of the Indian Penal Code, 1860.

[24] *Vide* Art. 38(1) of the Constitution of India.

[25] Quoted from Ashoka University Guidelines on Protecting Freedom of Expression; first paragraph, *available at*: https://www.ashoka.edu.in/static/doc_uploads/file_1519105915.pdf (last visited on Dec. 12, 2023).

Well known for its potential promise vis-à-vis social studies scholarship, Asoka University hereby demonstrates its leadership potential to deliver inhouse democratic governance while the same university applied yellow cards to discipline its individual colleagues as and whenever occasions required such otherwise democratic institution restrain them from enticing odious embarrassment for the university family. A major challenge lies in the maintenance of *Lakshmanrekha* between autonomy and anarchy. What the HEIs in India strives to secure is intellectual property upon their product; something devoid of intellectual propriety. Instead, they ought to afford their otherwise lawful IP rights left to public domain; thereby enable public access toward public good in time ahead. A(ny) university (sic.) ought to be worthy enough to its own nomenclature: university.

V. University in India: A Call for Unity in Diversity

So far as the social studies discipline is concerned, contemporary India has had a great range of diversity; something apparent in the glossary of our hitherto landscape of higher education. For instance, there are different variants like central universities, state universities, deemed universities, discipline-specific universities, and the like. The higher education regime under the statutory agency hardly reflects such diversity. The definition under the University Grants Commission Act of 1956 speaks for itself:[26]

"*University means a university established or incorporated by or under a Central Act, a Provincial Act or a State Act, and includes any such institution as may, in consultation with the University concerned, be recoginsed by the Commission in accordance with the regulations made in this behalf under this Act*."

Such an otherwise correct black-law-letter definition apart, what appears missing is very soul of the academia; something seen in a prudent epistemic definition, given by a veteran academic leader of USA. While he was quizzed, "what is university for?" Thus spoke David Watson:[27]

"*I received my copy of a glossy coffee table book, published by subscription from my undergraduate college. It is called Clare through the twentieth century. On the fly-leaf it repeats the charge of our Founder- Elizabeth de Burgh, Lady Clare- in 1359 that "through*

[26] The University Grants Commission Act, 1956; s. 2(f), *available at*: https://www.ugc.gov.in/oldpdf/ugc_act.pdf (last visited on Dec. 15, 2023).

[27] Sir David Watson, Vice-Chancellor of the University of Brighton, on the future role of universities, The Guardian, 15 January 2002, *available at*: https://www.theguardian.com/education/2002/jan/15/highereducation.news (last visited on Dec. 15, 2023).

their study and teaching at the university, the scholars should discover and acquire the precious pearl of learning so that it does not stay hidden under a bushel but is displayed abroad to enlighten those who walk in the dark paths of ignorance" (sic.). As you see, Lady Clare was an early advocate of services to business and the community."

Here lies IP policy paradox before the academia. Indeed, institutional interface with industry serves the purpose of survival for the academia through all its enterprises toward employment of its pupils; as a legitimate expectation after their enlightenment. The litmus test for the academia but lies in its independence from so-called 'market'; institutional face of the system. In a way or other, academia ought to usurp the ideation of corporation in itself; meant for pursuit of knowledge with functional independence from the market. In final count, the institution is meant to extend service and not servitude to the industry. There lies a litmus test for independence of the institution:[28]

"*University means a self-governing corporation, a complete entity in its own right, a totality, In Latin it is a universitas magistorum at scholarium- an independent institution of masters and students. Sometimes in Italy an older university may still be called by its full Italian title- universita degli studi- an independent corporation for study*."

Independence of the priests of wisdom is held no less essential to independence of the priests of justice since both are engaged in quest of truth; something available to those individuals engaged in performance of duties of their offices to the best of their ability, knowledge and judgment, without fear or favour, affection or ill-will.[29] Besides, the temple of wisdom resembles the temple of justice since both deserve non-intervention in course of internal discourse. Likewise, as it is applicable to the temple of justice,[30] the temple of wisdom is expected not to exceed domain for deliberation upon others' internal proceedings, e.g., of the Legislature, the Executive, the Judiciary, to name few among them; something abetted by the temples and the priests of wisdom, albeit, in sporadic cases. On the contrary, institutions operative in the public sphere by default ought to heighten threshold of tolerance, if not endurance, about criticism; even if the fiction may not stand corroborated by the fact. Let truth prevail by merit, *Satyameva Jayate*; rather than might of the coercive forces at the cost of free speech. Let there be public discussion- followed by public debate- founded upon

[28] David Willetts, *A University Education*, Chapter 1, *available at*: https://books.google.co.in/books?id=bfUDwAAQBAJ&printsec=frontcover&source=gbs_atb#v=onepage&q&f=false (last visited on Dec. 15, 2023).
[29] *Vide* Form IV, Third Schedule, of the Constitution of India, 1950.
[30] *Vide* art. 121 to art.122, read with 211-212, of the Constitution of India, 1950.

reasoning behind the respective polemics. The unity and integrity of the Nation[31] lies in diversity; including the diversity of competing- if not conflicting- propositions at loggerheads; subject to national security, though. However, otherwise legitimate concern vis-à-vis national security ought not to fall prey to ideologue politics to silence dissident voice by means of the Preambular provision to assure the unity and integrity of the Nation. In a nutshell, the cornerstone of the academia lies no less in its institutional integrity.

Back to policy advocacy for the academia, the author cites maiden incubation of the intellectual property jurisprudence by means of ideation of 'industrial property' as clear and unambiguous expression of commercial interest in exclusion of others;[32] even before ideation of literary and artistic works. A clarion call for the protection of works as 'intellectual property' in technical sense of the term got documented little afterwards.[33] Therefore, while industrial property was subjected to patent regime, literary and artistic works represented the maiden expression of intellectual property and got subjected to copyright since then. Thus, unlike blunt commercial ownership of industrial property, the ownership of literary and artistic works stands subjected to intellectual propriety. Since the origin and early development of property rights, therefore, propriety is inbuilt in the very ideation of copyright and the characteristic is on its rise in recent times. Here lies the discursive diversity between two regimes; of Paris and Berne respectively; something applicable to appreciate cultural propriety involved in the social studies scholarship; more than commercial property alone, involved in the natural sciences scholarship. For the academia as a societal enterprise, therefore, spiritual propriety ought to get priority over and above material property; otherwise patented by commercial enterprises. While industrial property is meant to serve private gain alone, intellectual propriety is also meant to subserve public good; besides getting individual and communitarian interests optimized. The basic ideation of interesting balance vis-à-vis balance of interests prevails over the monopolization of interests upon the inventions since Paris and Berne in the late-nineteenth century. There lies the idealist hypothesis behind emerging (intellectual) property discourse toward progressive societal development by means of newer knowledge of science and technology; followed by largescale application of the same in commercial usage toward larger public good.

[31] The Preamble to the Constitution of India, 1950.
[32] Paris Convention for the Protection of Industrial Property, 1883.
[33] Berne Convention for the Protection of Literary and Artistic Works, 1886.

VI. Productivity or Probity? Paradox before the Academia

The author advanced a paradox between property and propriety. In final count, he has arrived at another; between productivity and probity. In general circumstance, similar to the IP jurisprudence, the author advocates synergy between these options. In cases of irreconcilable conflict between them, however, a public policy advocacy is hereby extended to favour the latter over and above the former in both cases, e.g., propriety over and above property, probity over and above productivity, and the like. The causal relations behind sequenced duos deserve deliberation. While productivity yields to property, probity yields to propriety. Here lies a consequential connectivity; with the cause and its effect. While the human lifeworld is getting increasingly neo-liberalized, fundamental civilizational norms- probity has proved one among them- remain non-negotiable even in an otherwise weird lifeworld; devoid of humane values in the wake of a market; getting flooded with commodity fetishism.

In the given neo-liberalized world order, the academia cannot afford to do away with either the intellectual property or the productivity behind since the same ought to keep pace with its time for survival of the university as a repository of knowledge. A corollary conclusion, however, cannot be derived out of the following premise that access to and availability of the intellectual property- consequential to productivity of the faculty as human agency- can be earned with price of propriety; consequential to the probity after humane values. The same is relevant to every sundry institution; more so to the university since the same is more societal than commercial enterprise by default. Thus, university-run researchers ought not to succumb to vested interests; thereby produce vitiated findings, even if their project is backed by corporate capital, or even by state governmentality. In final count, there is a remarkable resemblance between the temple of justice and that of knowledge since both engage their priests in quest of unadulterated truth. Therefore, functional autonomy (read independence) is a locomotive for both the judiciary and the academia to reach desired destination.

Last yet not least, here lies rationale behind the policy priority for the academia toward intellectual propriety; more than intellectual property. A coveted seat- either in the Judiciary or in the academia- is a seat of trust by default and the same derives public trust from capability of the priest- either of justice or of knowledge- to grace the seat of trust with propriety; more than capability to grace the seat with property. The litmus test for leadership insignia toward progressive development lies in passion for public good; not in profession for

private gain. Consequently, to the priesthood, what matters is penance for the discredit; not pride for the credit. To quote *Tagore*:[34]

"*O humble me beneath the dust of your feet*

O drown all my arrogance in my tears

In giving glory to myself, I only abase myself

In being immersed in me, I only go around in circles,

O drown all my arrogance in my tears

Let me not project myself in my work

Let your will be done in my life."

Spiritual rhetoric apart, Tagore hereby extends clear and unambiguous negation to narcissism in the institutional lifeworld of the university and individual lifeworld of the academia alike; something celebrated by the international community through recognition of his Visva-Bharati cult as World Heritage; declared by the UNESCO.[35] The slow-yet-steady development of a private educational enterprise for public good to a first-generation central university in India to a world heritage proves the premise.

[34] Ratna De (tr.), "*O humble me beneath the dust of your feet …*", in Rabindranath Tagore, *Gitabitan* (Garden of Songs, 1931), *available at*: https://www.geetabitan.com/lyrics/rs-a1/aamar-matha-nato-kore-dao-english-translation.html (last visited on Dec. 15, 2023).

[35] *Available at*: https://whc.unesco.org/en/list/1375/ (last visited on Dec. 15, 2023).

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GLOBAL ENVIRONMENTAL CHALLENGES

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ABSTRACT

In today's world the problem of environmental pollution is of great concern for all the countries despite their size, development or ideology. The environmental pollution is contributed by all the nations on this globe. Some countries have contributed it in earlier times and some countries are still not following the international treaties and convention and contributing the pollution which resulted to the global warming and many other effects. Though in developed states the governments has started taking the remedial measures in ensuring the minimum pollution, but still much more is needed and required to minimize the pollution. The situation in the developing nations and the poor nations is alarming, as more efforts are needed to overcome the environment pollution. It is the basic right of every person to live in a healthy environment and for that it is prime requirement that international bodies must check the appropriate implementation of the Laws relating to Environmental Pollution Worldwide. Here the role of the developed states is also equally important, as they have to take care the needs of the poor and developing nations. All these issues with the important suggestions are discussed in this paper.

I. Introduction

"*A nation that destroys its soils destroys itself. Forests are the lungs of our land, purifying the air and giving fresh strength to our people*."

—Franklin D. Roosevelt[1]

With the famous quote of Franklin D Roosevelt, the importance of environment and preservation of environment is reflected. Major concern is to take care of the environment and we should not pollute it, otherwise it will pollute us.

When we search the relationship between the living being and environment, then it appears that relationships is fraught with complexities. All creatures depend on one another. In our surrounding, every matter from environment, whether organic or inorganic, is full of life. The environment encompasses the external physical and biological system which is inter related to each component. The environment as a whole consist of components like rocks, soil, minerals, water, land, all flora and fauna including the climate. The whole mankind is totally

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[1] 32nd President, United States of America.

dependant upon environment, so we always praise it by saying 'Nature is beautiful, mother nature'etc. Hence, before talking about the protection of environment, it is pertinent to understand the term environment.

In the present times environment pollution is a global concern and to protect the environment is a global issue, it is not a problem which is restricted to a particular area or the international boundaries.The history of environmental pollution on the globe is as old as the emergence of Homo Sapiens and it was realized in the times of Plato the great philosopher, but the main concern to the environment pollution started with the industrialization in Europe during Eighteenth century and in the last 250 to 300 years, due to industrialization, urbanization, population explosion, poverty, overexploitation of resources, depletion of sources of energy and raw materials, almost every country of the world has contributed to the pollution. Main concern of today's world are Nuclear tests, use of pesticides, dumping of electronic waste and use of chemicals, which resulted into contamination of water present on the surface and under the surface of the earth, polluting the air and presence of the heavy metals in the environment and on the surface of the earth.As per the news dated 15 August, 2022[2], Tons of fish died because of chemicals, pollutants and heavy metals present in the water and were found in the Oder river running through Germany and Poland. The danger of environmental pollution is much greater then the danger of full-fledged war.

In today's world the problem of environmental pollution is the problem of both developed and underdeveloped or poor nations. At one hand poverty and lack of development constitute an essential element of environment pollution, on the other hand develop countries have problem of their own, which consist of overproduction, nuclear radiations, over exploitation of resources, industrial waste and industrial accidents are some of contributing factors for environment problem.Now Air pollution has the world's fourth leading risk factor for early death, as per this report of 2019[3], 4.5 million deaths were linked to outdoor air pollution exposures and another 2.2 million deaths were caused by indoor air pollution.As per the report of UN[4], world will face 40% water shortfall by 2030. As per another report of UN[5], of the year 2010, contaminated water kills around 2.2 million people every year. The report of

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2 News of 'France 24' News Channel, dated 15/08/2022.

3 State of Global Air Report 2020, *available at:*https://www.stateofglobalair.org/(last visited on December 10, 2023).

4 Voa news, 22 March, 2015, 'UN report: world faces 40% water shortfall by 2030' *available at:* https://www.voanews.com/a/un-report-world-faces-40-percent-water-shortfall-by-2030/2690205.html(last visited on December 10, 2023).

5 News, 22 March, 2010, 'UN: Dirty water kills more than war' *available at:* https://news.un.org/en/story/2010/03/333182(last visited on December 10, 2023).

UN FAO (Food and Agricultural organization) of 2020[6] reflected that there is loss of 4.7 million hectares of forest per year since 2010 and as per the report of Intergovernmental Science-policy Platform on Bio-diversity and Ecosystem Services (IPBES)[7]of July, 2022, about one million species are at risk of extinction on the globe.

These are the most startling facts in today's world. Human are not the only victim of such pollution rather whole flora and fauna is in danger. It is the basic right of all to live in a healthy environment. No doubt the acute poverty in the underdeveloped countries requires development process to be accelerated, but we cannot do so at the cost of environment thereby endangering not only the present generation but also the future generation and for that we have to think about the sustainable development, where we can meet the need of the present without compromising the ability of future generations to meet their own needs.The idea of sustainable development and environment protection was first time reflected in the year 1972 in UN Conference at Stockholm.Beside this to check the problem of environment pollution, there is need to abide by the domestic laws and the international rules and regulations framed in the treaties and the conferences.What we can do to control pollution is ensure properimplementation of legislation with the bottom-line and to "Refine, Recycle and Reuse" of materials.

II. Environment: Meaning and its Components

In our sun family, earth has life, so it is also called blue planet. "There are some specific conditions which are suitable for presence of life. Earth's location in our solar system makes it perfect for moderate temperature for survival. The other important factors are presence of atmosphere and other life supports cycles like water cycle and energy transformation. All of them make the earth full of life. The earth had undergone with thousands of changes in millions of years. All the flora and fauna have their own specific evolution path and are inter-defendable upon each other to set equilibrium on earth. The whole ecosystem, environment, its living, non-living components are the real assets of the earth. It is Bio-diversity of Earth which balance the whole process through which all kind of lives become possible on earth".[8]

[6] FAO.2020.Global Forest Resources Assessment2020- Key findings. Rome. https://doi.org/10.4060/ca8753en(last visited on December 10, 2023).

[7] News, 'The Indian Express' by Esha Roy, July8,2022

[8] *Ibid.*

When we go by the term, 'Environment' then it appears that it is easier to understand but difficult to define. According to Caldwell[9], 'Environment is the term which is understood by each and everyone but no one can define it finely'.

As per the Merriam Webster dictionary[10], Environment is i. the circumstances, objects or conditions by which one is surrounded; ii (a). The complex of physical, chemical and biotic factors such as (such as climate, soil and living things) that acts upon an organism or an ecological community and ultimately determines its form and survival; ii (b). the aggregate of social or cultural condition that influence the life of an individual of a community; iii. the position or characteristic position of a linguistic element in a sequence.'

The Cambridge Dictionary defines Environment[11] as'The Air, Land and Water where people, animals and plants live'.

The Oxford Dictionary defines Environment[12] as 'Surroundings, circumstances, influences'.

"The major contributors define, environment that which is familiar to everyone, so we can say that everything in our surrounding is environment except oneself or environment is every things which includes one self too. The outer physical and biological system including all organisms is called environment as a whole. Environment consisting of many micro and macro components, it include Rocks, Minerals, Soils and Water, land and their present and potential vegetation, animal life and potential for livestock husbandry and climate".

Environment in the literal sense is the favorable life factorthat influence the growth and development of all living beings. All components, Sun rays, Water, Air, Soil, Vegetation, and Animals collectively make the environment. Indian Law on environment i.e. The Environment (Protection) Act, 1986 gives a precise defining of 'Environment', as – 'Environment includes water, air and land the inter-relationship which exists among and between water, air and land and human beings, other living creatures, plants micro-organisms and property[13]'.

Environment and its Components

The Environment Components are classified in to the Biotic, the living and the Abiotic, the non-living components.

Non-living (Abiotic) Component

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[9] Kailash Thakur,*Environmental Protection Law and Policy in India* 1-2 (Deep and Deep Publications, Delhi, 2003).

[10] *Available at:* Merriam-webster.com/dictionary/environment(last visited on December 10, 2023).

[11] *Cambridge Learners Dictionary* 22(Cambridge University Press, 2003).

[12] A.S. Hornby, *Oxford Advanced Learner's Dictionary of Current English*(Oxford University Press, 2001).

[13] S. 2(a), The Environment (Protection) Act, 1986.

The Abiotic components mean inorganic component of the Earth. It includes land, water, air, magnetic field, minerals, chemicals and other physical cycles and process like water cycle, energy cycle, floods, rain, weather conditions etc. All the physical spheres i.e. Lithosphere, Atmosphere and Hydrosphere collectively form Abiotic component of Environment.

Living (Biotic) Components

The Biotic component are organic components which includes all the animal and plant life within it.It is a lively sphere, where a birth and death cycle is followed by every organic creature.

III. Environment Pollution and its History

The grave and present problem of environment pollution is not more than 300 years old, but the origin of the environment pollution is as old as Homo Sapiens on the earth, same was reflected in the ideas of Plato 2500[14] years back..It is right that dimension of the problem which exist in today's world, was not there during that time. In India the concern for the environment protection can be traced back to the period between 321 to 300 BC. The ancient law on environment protection is there in Kautilya's Arthashastra[15].It was the dharma of each individual in the society to protect the nature, people worship the object of nature. During ancient times, people worship trees, water, land and animals[16]. In Hinduism environment was the part of ethos of ancient people. According to one indigenous theory established in the Upanishads[17], the universe consists of five basic elements, these are: Earth, Water, Air, Fire (light) and Ether (space), these five elements are basis of life and we must conserve it. It is also there that no body will destroy vegetation and kill the animals, which shows compassion for both animals and plants. In one of the shalok(sages) of Atharva Veda[18]:

"What of thee I dig out,
let that quickly grow over,
let me not hit thy vital, or
they heart."

This means that one can take from our planet only so much as can give back. In present times it is considered one of the most important principle of sustainable development. Manusmiriti

[14] Hambro, E, "The Human Environment- Stockholm and After", Year Book of World Affairs20 (1974).
[15] Armin Rosencranz, Shyam Divanand, *et.al.*, *Environment Law and Policy in India- Cases, Material and Statutes*27 (OUP, Oxford, 1991).
[16] C M Jariwala, "Changing Dimensions of Environmental Law" in P. Leelakrishanan(ed.),*Law and Environment*2 (Eastern Book Company,1992).
[17] Shaloka of Aitareya Upanishad 3.3.
[18] News: By DTE Staff, Published: Tuesday 31 May 2022, Looking back at Stockholm 1972: What Indira Gandhi said half a century ago on man & environment

also mentions about the optimum use of the resources of the nature, same is another way to maintain the ecosystem.

The principle of Buddhism reflect the idea that man should not overexploit the natural resources. The thrust of Jainism is on the minimum destruction of living and non-living resources for the benefit of man, this principle is based on the close harmony of land owner with nature and help in protecting and preserving the nature.

Koran declares that everything is created from water, Alah is considered to be the owner of land which reflect the close harmony between man and nature. Christians are baptized in water, as a sign of purification. Pope Paul VI[19], in his massage to the UN conference on the Human Environment held at Stockholm in June 1972 stated that environment and resources for everyone, they are inalienable property of everyone. The link between the Christianity and environment and the thrust is for sustainable development.

IV. Environment Pollution andits Forms

Environment Pollution relate to harming the environment and the eco-system. It is not confined to the boundaries of the state, rather pollution effect the whole globe. As per the Webster dictionary[20]"Environmental Pollution means the introduction of contaminants in to a natural environment that causes instability, disorder, harm or discomfort to the eco system i.e. physical system or living organism". Pollution can be converted in to chemical compound which may exist in the form of heat, energy, noise and contaminated water etc. The annual report of Pure Earth 2018-19[21], showed that "the ten highly polluted places are Mexico, Brazil, Peru, India, Bangladesh, Colombia, Armenia, Philippines, Tajikistan and Africa".

As observed by Richard Fuller[22](Environmentalist), "Environmental pollution is now the largest cause of deaths in low and middle-income countries (LMICs), having thus become the scourge of the 21st Century. No one is spared. The rich and poor in both developed and developing countries are all vulnerable".

The vital forms of pollution along with the main pollutants:

Air Pollution

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[19] Message of His Holiness Paul VI to Mr. Maurice F. Strong, Secretary-General of the Conference on the Environment. https://www.vatican.va/content/paul-vi/en/messages/pont-messages/documents/hf_p-vi_mess_19720605_conferenza-ambiente.html (last visited on December 20, 2023).

[20] Definition of Pollution as provided in *Supra* note 10.

[21] Pure Earth, *Annual Report 2018-19*, *available at:* https://www.pureearth.org/wp-content/uploads/2021/03/PEAnnualReport2018final.pdflast visited on Dec. 15, 2023).

[22] R. Fuller, Landirgan R, *et.al., "*Pollution and global health – A time for action" *available at:* https://www.pureearth.org/wp-content/uploads/2021/04/IHF-Pollution-scourge.pdf (last visited on Dec. 15, 2023).

The nonstop mixing of chemicals and unwanted particulate in to the air caused air pollution. The common pollute particles are CO (Carbon monoxide), CFCs (Chlorofluorocarbons), SO2 (Sulphur dioxide) and Nitrogen Oxide which is released by automobiles and industries. Small dust particles in size of PM10 to PM25 also pollutes the air. All these are ingredients which cause air pollution and situation like smog and unhealthy air to breathe always standby.

Littering Pollution

The unscientific unplanned throwing of waste material came out from house hold and factories cause littering pollution.

Noise Pollution

It includes vehicular noise, industrial noise, air and ship noise, constructions projects, machinery and other sonar rays of higher intensity.

Soil Pollution

Soil is said to be contaminated when soil undergoes some changes in which, it loose its property and became barren and physically unsuitable for any purpose.

Water Pollution

The forms of water pollution are as under:

i. Mixing of wastewater in to ground water or surface water by industries and factories.
ii. Dumping of untreated house hold sewage in to running water or in any water body.
iii. Spreading of chemically contaminated water in to agriculture water flows.
iv. Mixing of surface contaminated water in to ground water by holes and boring.
v. From 20th century onwards, a significant growth in nuclear energy has been taken place. Numbers of nuclear power plants are setup in different parts of Globe. Time and again humanity faced numbers of nuclear accident in such power plants. The leakage of radiation in atmosphere causes many kinds of health and mental problems to people which can affect not only present but the future generation also. This is called Radio-active pollution.
vi. The electro-magnetic radiations emitted from communication towers, electronic devices and from microwaves ovens are slow poisons.They have a very deep impact on our health; mainly metal health problems are very common." This is called Electro Magnetic Pollution.[23]

V. Environment Pollution and Global Issues

[23] *Ibid.*

The global issues relating to environment pollution, which are matter of concern for the whole world are mainly-

Speedy Growing Population

The unchecked growth in population is a main reason to cause pollution and damages the environment. The living standard of human being is the mirror of the quality of environment. The accelerating rates of use of all natural resources are making the consequences of misuse, more drastic, wider spread and more readily evidence to large numbers of people. The growth in population imposes an extra pressure on the existing natural resources to fulfil their needs. This all leads to indiscriminate use of natural resources.

Urbanization

Urbanization is an inevitable mechanism in modern civilization. In metropolitan cities the need of good quality transport facility, infrastructure, civic amenities, storage capacity of food, waste disposal, are the factors highly affected the environmental healthy condition.

The urbanization have two vital impacts on environment, firstly, by using the agricultural land for expansion of cities and second one is the process of 'ruralisation'of average cities and towns agricultural land. To fulfil the needs of infrastructure projects million tons of agricultural soil is used by bricks kilns. The upper most layer of soil is formed after thousand years, now the unplanned exploitation of such fertile land causes soil erosion and water logging, which terns these lands in to salinity and unsuitable for agriculture.

Unplanned Industrialization

Unplanned Industrial actions caused a load quantity of dust and smoke in environment.In winter season the dust and smoke when mixed with fog turns in to harmful 'smog', which cause very serious respiratory problem, vision disability and create a shield which restrains the sun heat to reach on earth, resultantly the temperature decrease steadily.This will lead to an ice age.From the last decade India is also suffering the dangerous effect of smog during cold weather.Industrial waste is a big threat to environment for the world, not only developing countries but the developed ones is also not able to resolve it.The mankind has a firsthand experience of the effect of industrial disasters in Bhopal (India) in 1984[24], Where 'Methyl Isocyanate gas', was leaked from a plant called 'Union Carbide'and thousands of people have lost their lives. In one of the disaster, which is popularly known as Chernobyl

[24] AlanTaylor, "Bhopal: The World's Worst Industrial Disaster, 30 Years Later", *available at:* https://www.theatlantic.com/photo/2014/12/bhopal-the-worlds-worst-industrial-disaster-30-years-later/100864/#:~:text=Thirty%20years%20ago%2C%20on%20the,number%20of%20other%20poisonous%20gases (last visited on Dec. 15, 2023).

Accident 1986, In Russia a leakage of radioactive matter from an atomic plant caused a giant destruction of property. It is worthwhile to mention here that there are numbers of revolution which takes place to make life more comfortable, no doubt industrial unplanned race always creates problems to mankind.

Deforestation

Forest is a natural habitat for a vast wildlife.They are so many kinds of Genus and Species of animals, having life suitable conditions in forest only. Thousands of organisms are facing threat of extinction due to human intervention.On Earth every living thing is placed in a specific stairs of food web or energy pyramid in order to maintain ecological balance.So as per systematic management of ecosystem, there must be more than 30 percentage of forest area needed on earth, but factually it is below thirteen percent due to rapid growth of deforestation, urbanization and industrialization.Forest are called an ideal and complete ecosystem, which provides oxygen to breathe, vegetation to eat, shelter to live and rain to survive.Deforestation leads many problems like; it affects the rain consistency and causes soil erosion and imbalance the flood and drought situations. The high rate of deforestation resulted in disturbance in ratio of oxygen and carbon dioxide in atmosphere and causes green-house effect.

Depletion of Ozone Layer and its effects

Depletion of ozone layer and the global warming is a major problem before the world.The global warming and the green-house effect weakens the ozone layer, which plays an important role in protecting the earth.Ozone is colorless gas having three atoms of oxygen.It protects the earth from the ultraviolet radiations from the sun in the upper layer of the atmosphere.It is found in the stratosphere and extends from 12 Km to 35 Km.It is considered to be the protective umbrella of the earth.It plays a crucial role in controlling the earth's temperature, wind pattern and rain etc.

Ozone layer in the upper atmosphere is under threat by a wide range of human activities, the highest concentration of ozone has been noted in the polar region, this is due to the global air circulation. In the year 1985 a gap or a whole in the ozone layer was noted over the Antarctica region of the earth by the team of the scientist, same is termed as Antarctica hole or Ozone hole, which has many adverse effects. The harmful effects are mainly:

i. Increase in Ultra Violet radiations which result in increase of skin cancer in living beings i.e. humans and animals.
ii. Increase in Ultra Violet (UV) radiations reduces considerably the photosynthetic pigment of plants, adversely affect the productivity and growth of plants.

iii. The Ultra Violet radiations weakens the immune system of the body, which invite new diseases.

iv. As the Ultra Violet radiations is behind the killing of living being and the plants, agricultural outputs in the which resultantly disturb the food chain and affect the eco-system. Ultra Violet radiations help's the carbon dioxide (CO_2) gas increases near the surface of the earth, which result in global warming and make the life of the earth planet impossible.

Green House Effect

Ozone layer depletion in the stratosphere, the upper surface of the earth result into the blanket or layer of carbon dioxide gas (CO_2) in the lower atmosphere. Because of thin layer of the Ozone layer when ultraviolet rays are absorbed by the carbon dioxide gas layer, which result into heating of the atmosphere is called the green-house effect. This greenhouse effects are:

i. Melting of ice peaks, which lead to rise of sea level, threatening the cities of the world situated on the coasts of sea.

ii. Global warming may change the rainfall pattern, effecting the various agricultural outputs in the world.

iii. Rise in temperature may lead to the death of micro-organism like phytoplankton, zooplanktons and bacteria, by which the eco system will be disturbed.

iv. Green-house effect will disturb the human life, human activities and the coral reef ecosystem.

Asian Haze or Asian Brown Cloud

In the beginning of 21st century, scientist identified a new threat to the world climate, they discovered a 3 KM thick deep blanket of brownish layer of pollution spread over South Asia and the most tropical Indian ocean, this was termed as Asian haze. It includes ash, acids, sulfates, nitrates, black carbon and several other damaging air-borne pollutants. This may lead to reduction of rainfall, respiratory and other diseases, increasing the temperature of the surface of the earth and many other problems.

V. Environment Protection and International Concern

International concern for environment protection and sustainable development is not very old. The UN conference on Human Environment and development at Stockholm in 1972[25] is considered to be the Magna Carta of Environment Protection and sustainable development. It

[25] United Nations Conference on the Human Environment, 5-16 June 1972, Stockholm

was the first time that the world community got together to deliberate seriously on an important issue of environment protection and sustainable development. This conference resulted in the Stockholm Declaration on the Human Environment. The declaration besides the preamble consist of seven universal truths and twenty-six principles. It proclaimed that,"man is both creator and molder of the environment which gives him physical sustenance and affords him the opportunity of intellectual, moral, social and spiritual growth. Both aspects of man's environment, the natural and manmade are essential of his well-being and to enjoyment of basic human rights even the right to life itself."

Earth summit of 1992[26] at Rio at Janeiro Conference two important conventions were signed, first one was climate change and the second one was on Biological diversity. The convention on climate change puts an obligation on every signatory state to take effective steps to reduce the emission of greenhouse gases to protect the earth.

In 1997[27] the world climate conference was held at Kyoto (Japan) where a historic accord was signed by the participating countries for mandatory cuts in emission of green-house gases particularly by the industrialized nations in the next millennium to help in saving the planets from global warming.

In August-September, 2002[28], the world summit on sustainable development was held in Johannesburg, South Africa. In this summit the representative of the people of the world adopted the Johannesburg declaration on sustainable development and reaffirm their commitment to build a humane, equitable and caring global society for the human dignity of all. In the October 2002[29] the 8th conference of the Parties to the UN framework convention on climate change was held in Delhi, in the declaration on climate change, it was stressed that the parties, which have not rectified the Kyoto protocol should ratify it in a timely manner, consequently the government of India enacted Ozone Depleting Substances (Regulation and control rules,2000. It is worthwhile to mention here that time to time the international conference and summit have taken place and international bodies and organizations are committed to check the environment issues world-wide. It is also there that developed countries sensing the grave problem of environment pollution, has started taking steps to minimize the pollution and to avoid the risk of pollution. It is there that in the year 2011[30]

[26] United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992
[27] United Nations Kyoto Climate Change Conference - December 1997
[28] World Summit on Sustainable Development, 26 August-4 September 2002, Johannesburg
[29] United Nations Climate Change Conference took place from 23 October – 1 November 2002, in New Delhi, India
[30] News BBC, "Fukushima disaster: What happened at the nuclear plant?", *available at:* https://www.bbc.com/news/world-asia-56252695(last visited on Dec. 15, 2023).

after the earthquake, the disaster of Fukushima Nuclear plant in Japan, where about 18000 people died and wiping entire town off the map, the countries like Japan, Germany decided to close the nuclear power plants in phased manner. As per the news of BBC[31], Germany is going to close its all-nuclear plants by the end of 2022.

VI. Environment Protection and the Indian Scenario

Indian Constitution is rare constitution of the world which contain specific provisions relating to environment protection, it puts duty on the State[32] as well as citizens[33] to protect and improve the environment. The Indian Judiciary has played remarkably very important role in interpreting the provisions of constitution and developing new environmental jurisprudence in India. The Supreme court interpreted Article 21[34]as Right to Life and Personal Liberty in the manner that Protection of Environment and Environment Issues become the integral part of Article 21 (a very important and basic fundamental right).

The Environment related matters are filed through Public Interest Litigation in the Higher Courts, which include the High Courts and Supreme Court of the country. Though the legal remedies are also available under statutory provisions where cases related to environment can be filed in ordinary courts/ district courts, but the constitutional remedy is preferred as it is speedy, affectious, cheap and simple and cases are directly filed in Higher Courts.

All this leads to the base of environment protection, importance and improvement measures. Our judicial system has played an important role in strengthening the concept of environment protection. The Supreme court of India has laid down some important precedents, which include:

i. The state is committed to ensure and implement the 'environmental laws', as per the true objectives and not by just letters codified[35].
ii. 'The polluter pays'Principle, is to be applied as a restoration method for environment protection, it also includes victim compensation scheme by the polluters[36].
iii. 'The Precautionary principle', is an obligation to Government to act in anticipation to prevent and stop future pollution causing factors[37].

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[31] News BBC, "Germany: Nuclear power plants to close by 2022", *available at:* https://www.bbc.com/news/world-europe-13592208(last visited on Dec. 15, 2023).
[32] Art. 48A discussed in Gopal Sankaranarayanan, *Constitution of India* (Eastern Book Company, Nagpur, 2014).
[33] *Id.* at art. 51.
[34] *Id.* at art.21.
[35] *Indian Council for Enviro-Legal Action* v. *Union of India*(1996)5SCC 281.
[36] *Vellore Citizens Welfare Forum*v. *Union of India*, AIR 1996 SC 2715., *S.Jagan Nath* v. *Union of India*, AIR 1997 SC 811.

iv. 'The Doctrine of Sustainable Development', is to be followed, it is the kind of development which can fulfil the needs of today without compromising the needs to tomorrow. It also consisted, 'Inter-Generational Equity Principle'[38].

It is worthwhile to mention here that in the year 1986, the government of India framed the specific law i.e Environment Protection Act, 1986, in which specific provisions were made to protect the environment and for taking action against wrongdoer.

In one of the important case of *M.C. Mehta*v. *Union of India*,'[39]the Apex Court emphasize the necessity of establishing 'Environmental Courts' for speedy and effective disposal of Environmental Issues. Later on the 'National Environment Tribunal Act, 1995'and 'The National Environment Appellate Authority Act, 1997' were enacted by Indian legislative assembly. In 2010, 'National Green Tribunal Act, 2010'[40],was enacted by Indian parliament to deal all such cases of environmental issues. Now the NGT plays a significant role to protect environment and ensure speedy disposal of such cases effectively. In one of the important case of National Green Tribunal the court observed[41], "The Courts have consistently taken the view that right to life includes the right to a decent environment. The right to a clean environment is a guaranteed fundamental right. The Courts could even impose exemplary damages against the polluter. Proper and healthy environment enables people to enjoy a quality of life which is the essence of the right guaranteed under Article 21. The right to have congenial environment for human existence is the right to life. The State has a duty in that behalf and to shed its extravagant unbridled sovereign power and to forge in its policy to maintain ecological balance and hygienic environment".

VII. Conclusion and Suggestions

In the present time, we need to focus on preserving our common assets and furthermore improving the status of our environment. World bodies like the United Nations and the World Commission on Environment and Development have been figuring thoughts for environment assurance and sustainable development. Before the world the issues of concern are deforestation, land pollution, water pollution, air pollution, industrial waste and nuclear radiations threat. To check these threats the international bodies and the states have made the laws and rules.

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37 *Ibid.*
38 *State of Himachal Pradesh* v. *Ganesh Wood Products*, AIR 1996 SC 149.
39 AIR 1987 SC 1086.
40 Herein after called NGT.
41 *Durga Dutt*v.*State of HP*, Application No. 237 (THC)/2013 (CWPIL No.15 of 2010) decided on 6 February, 2014, (Para-15)

The need of the hour is, at world platform environment related courts are to be set up. There should be proper implementation of the laws and rules made by the international bodies. It is also to be monitored by the international organizations that the municipal laws of the nation's relating to environment be implemented in true sense. There should be check world-wide that the government agencies or law enforcing agencies should not violate the environment related laws and in default, heavy penalties be imposed on the wrong doer by the International bodies.

All essential, conceivable and powerful measures ought to be taken by the International Bodies and the Nations to stop deforestation, spare agrarian land, minimize the pollution (whatever its kind), focus and turn towards green energy from thermal or nuclear energy. Waste administration strategy should be framed.

Here, to check the environment pollution and for switching towards the green energy, provisions for the separate fund at international level be created and special help be done of developing or poor nations, as the problem of environment pollution is of our own planet and it effect whole of the world. Today the international boundaries have no significance, it is need of the hour to make a joint effort to minimize the problem of environment.

It is also there the self-assistance is the best assistance. Individuals ought to be empowered through mass instruction mission to battle against environmental contamination. The government's world-wide should dispatch mass instruction program in large manner uniquely in rural zones and ghetto groups, where issue can't be adequately handled with the simple lawful establishments. Function of NGO's working in environment field must be perceived and empowered. More assets ought to be given and made accessible to willful associations.By taking all these measures, we certainly put a step forward for a superior tomorrow for our kids.

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PARODY, PASTICHE AND SATIRE: A COMPARATIVE STUDY OF COPYRIGHT LAW IN US, UK, AND INDIA

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ABSTRACT

The advent of the printing press in the fifteenth century made wide dissemination of ideas and creations possible, and thus, artistic creations began to acquire a significant economic value. Since every author is desirous of clearly defining and demarcating the legal interest in his creation, the widespread dissemination of an author's work began to pose a serious challenge to copyright pundits the world over. Modern society has seen the introduction of digital technology, and this challenge has been further intensified. Today, creative arts are seen as big business opportunities, and avenues to achieve a higher degree of economic return. Thus, it can be said that economics rather than patronage, is the driving factor behind arts in the digital era.This Paper has been written with four major objectives in mind, and each of these have been dealt with separately. The first objective is to define and elaborate the concept of parody, and to understand how it is different from other analogous works such as pastiche and satire. The author has attempted to critically analyze the parody exceptions under the copyright regime prevailing in three major areas of the world *viz.*, the United States (US), the United Kingdom (UK) and India. Thirdly, this Paper attempts to evaluate the essential incompatibility between authors' moral rights and the idea of parody. Lastly, an attempt has been made to examine how modern-day technology has changed the way creative works are viewed, perceived, and consumed, and what changes are required in the legal framework to satisfy these new expectations.

I. Introduction

Parody can be seen everywhere in contemporary culture – whether we look at theatre, literature, television, cinema, Over The Top (OTT)[1], advertisements, memes, or for that matter, even everyday

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[1] Television and film content which is broadcasted using a high-speed internet connection instead of cable connection or satellite service. The available that is available is not free, and the user is required to pay a certain amount to be able to watch the content for a specific period. For example, Amazon Prime Video, Netflix, iTunes, Hotstar and HBO Now are various OTT platforms. Available at: https://www.javatpoint.com/ott-full-

speech[2]. It is also at the heart of contemporary digital revolution. Before delving deep into the issues around the practice of parody in modern digital culture, we must first understand the meaning of the term 'parody', and how it differs from other often analogous terms like 'pastiche' and 'satire'.

When we consider Greek and Latin usage, the word *parodia* signifies a specific form of mock poetry or ode, which used the manner and diction of the high forms and applied them to a trivial topic. However, it also denoted a more widespread and more neutral practice of quotation and allusion[3]. In the neoclassical usage of the seventeenth and eighteenth centuries, the term 'parody' could not have meant anything more than an extended allusion to another writer's work in a subsequent longer work[4]. However, with the efflux of time, the term parody attained a very restrictive meaning, and in the predominant modern usage, it is used to denote a critique of an existing work with humor as an essential component of it. Today, the word 'parody' may bring to mind several YouTube or TikTok videos which have been made in the style of a popular song, which certain changes made to the lyrics or the tune, or comedy scenes or sketches which draw inspiration from cinema, television, or other forms of popular culture.

To make it more explicit, and to reduce confusion around the definition and meaning of the term 'parody' to the minimum, it should be understood in the following sense: "A parody is a work of art, whose central theme revolves around an existing work of authorship, and its main purpose is to criticize the latter in a humorous and mocking manner"[5].

On the basis of the above discussion, we can deduce that there are two essential features of a parody – firstly, it is a work which is based upon an existing work, and secondly, the purpose of it is to criticize that work, albeit in a humorous manner. Pastiche, on the other hand, is a work of art which imitates the central theme, characters, scenes, and situations of the original work, but the dominant purpose of pastiche is not to criticize or mock the original work, but only to create an association between the two works. For this very reason, Jameson has defined 'pastiche' as a blank parody without any political or personal comments[6].

A true satire not only criticizes, but also makes the reader/viewer laugh. This places satire very close to parodies. However, satire is not necessarily based upon any particular work of authorship, which is the case in both parody and pastiche; rather, it offers criticism and commentary about the world in

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form#:~:text=OTT%20%3A%20Over%20the%20Top,cable%20connection%20or%20satellite%20service (last visited on Aug. 19, 2023).

2 "The Parody Defense to Copyright Infringement: Productive Fair Use after 'Betamax'" 97(6) *Harvard Law Review* 1395-1413 (1984), *available at*: https://doi.org/10.2307/1340971 (last visited on Aug. 19, 2023).

3 Simon Dentith, *Parody: The New Critical Idiom* 9 (Routledge, 2000, 1st edn.).

4 *Id.* at 10.

5 Christina Bohannan, "Reclaiming Copyright" 23 *Cardozo Arts & Entertainment Law Journal* 609 (2006).

6 Fredric Jameson, *Postmodernism, Or, the Cultural Logic of Late Capitalism* 16 (Duke University Press, Durham, 1992).

general[7]. Having now understood the term parody in general, it will now be appropriate to look at the legal aspects around the concept of parody in the next part of this Paper.

II. Parody and National Copyright Laws

Like all other intellectual property laws, copyright law is also territorial in nature, with very few elements of extra-territoriality[8]. Since it is generally agreed that in principle, copyright laws are territorial in nature, the author shall proceed to discuss the various approaches which have been adopted in three major copyright regimes across the world, under the following headings.

The U.S. Approach

US copyright law is based on the Intellectual Property Clause in the US Constitution, which grants to Congress, the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"[9]. The purpose of this constitutional grant is to promote science and useful arts, and it is generally accepted that the securing of exclusive rights to authors and creators is a means to an end, and not an end in itself[10]. This approach of the US copyright law has made the Congress and the courts quite receptive of the practice of parody[11]. Parodies are therefore not seen as a threat to authors' rights, rather they have been viewed as an independent form of art capable of generating a separate market for themselves.

The Doctrine of Fair Use

When a parodist decides to make a parody based on any previously published work, it is quite natural that (s)he will be inclined to take material out of it, either verbatim or with a few alterations. This practice may give rise to an action for infringement, from the original author. Most of the infringement actions concerning derivative works involve lifting of an idea, sequence, or story, rather than verbatim copying. Since there is no copyright in an idea, howsoever brilliant it may be, and since cases involving verbatim copying are rather rare, courts have traditionally required 'substantial' copying of the physical expression of the copyrighted work as the principal element in any action for infringement. There may be a case however, and this is happening more frequently in the case of

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7 Sotiris Petridis, "Postmodern Cinema and Copyright Law: The Legal Difference Between Parody and Pastiche" 32(8)*Quarterly Review of Film and Video*728-736 (2015).

8 Donald S. Chisum, "Normative and Empirical Territoriality in Intellectual Property: Lessons from Patent Law"37 *Virginia Journal of International Law*603, 605 (1997).

9 U.S. Const., art. 1, § 8, cl. 8.

10 R. Anthony Reese, "The Story of *Folsom v. Marsh*: Distinguishing Between Infringing and Legitimate Uses" in Jane C. Ginsburg and Rochelle Cooper Dreyfuss (eds.), *Intellectual Property Stories*267 (Foundation Press, New York, 2006).

11 A. Hunter Farrell, "Fair Use of Copyrighted Material in Advertisement Parodies" 92(6) *Columbia Law Review*1550-1591 (1992), *available at*: https://doi.org/10.2307/1123001 (last visited on Aug. 30, 2023).

digital parodies, that the court finds that there has been substantial copying of the original work. In such situations, the doctrine of fair use may serve as the only fall back for parodists.

The doctrine of fair use has proved to be rather flexible[12], and despite recurring attempts, it has not been possible to provide a universal definition which would cover its entire reach and extent[13]. Justice Story[14]in thecase of *Folsom* v. *Marsh*[15] attempted to define the term fair use as "a use which will not seriously discourage the progress of science and useful arts, and its social value greatly outweighs any detriment to the artist whose work is borrowed". This case is widely regarded having established the principle of fair use in US copyright law. While delivering the judgment in this matter, the learned judgedesigned what later came to be known as the 'four-factor test': "Look to the nature and objects of the selections made, the quantity and value of the materials used, the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work"[16]. Later, this four-factor test was adopted by Congress, and incorporated into § 107 of the US copyright law[17].

Folsom and certain other cases decided by Justice Story began to transform the discourse of the traditional legal and intellectual framework in the US[18]. The importance of the judgment in *Folsom* also rests on the fact that the works which were at the root cause of this litigation were no ordinary books, rather they were the letters of George Washington, thus creating a rather dramatic clash between private property rights guaranteed by copyright law and public accessibility of materials which were deemed to be of public, cultural and national importance[19]. In order to understand the doctrine of fair use and its implication for parodies, the author shall discuss one of the most celebrated cases on this subject, namely that of *Campbell* v. *Acuff-Rose Music, Inc.*[20]. In 1964, Roy Orbison[21] and William Dees[22] wrote and recorded the song *Oh Pretty Woman*[23], and the rights in the song were

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12 Sidney Ditzion, "The District School Library, 1835-55" 10 *Library Quarterly*545, 549, 565 (1940).

13 Richard A. Posner, "When is Parody Fair Use" 21(1) *The Journal of Legal Studies* 67-78 (1992),*available at*: http://www.jstor.org/stable/724401 (last visited on Aug. 29, 2023).

14 American lawyer, jurist, and politician who served as an associate justice of the US Supreme Court from 1812 to 1845. He is most remembered for his landmark decisions in *Martin* v. *Hunter's Lessee* and *United States* v. *The Amistad*, and for his *Commentaries on the Constitution of the United States*, first published in 1833. Available at: https://www.supremecourt.gov/about/members_text.aspx (last visited on July 31, 2023).

15 9. F. Cas. 342 (C.C.D. Mass. 1841).

16 *Ibid*.

17 17 U.S.C., § 107 (2022).

18 *Gray* v. *Russell*, 10 F. Cases 1035 (C.C.D. Mass. 1839), *Emerson* v. *Davies*, 8 F. Cases 615 (C.C.D. Mass. 1845). *See* also Joseph Story, *Commentaries on Equity Jurisprudence; As Administered in England and America*930-943 (C.C. Little and J. Brown, Boston, 3rd edn.1843).

19 Meredith L. McGill, "Copyright and Intellectual Property: The State of the Discipline" 16 *Book History*387-427 (2013), *available at*: http://www.jstor.org/stable/42705793 (last visited on Aug. 27, 2023).

20 *Campbell* v. *Acuff-Rose*, 510 U.S. 569 (1994).

21 American singer, songwriter, and musician who is famous for his impassioned singing style, complex song structures, and dark, emotional ballads. *See* Jeff Slate, Alex Orbison, Roy Orbison and Wesley Orbison, *The Authorized Roy Orbison*27 (Center Street, New York, 1st edn., 2017).

22 Began his career as a singer but enjoyed his most fruitful period as Orbison's friend, collaborator, and bandmate. His song *Oh Pretty Woman* topped the charts in 1964, and went on to inspire the title of Julia

assigned to Acuff-Rose Music Inc. The song had achieved a significant degree of popularity amongst the public, when in 1989, Luther Campbell, lead vocalist and song writer for an obscure band called *2 Live Crew*, rewrote the famous song by substituting some of its lyrics with ones which were alleged to be obscene and offending. Later, Campbell's music company, Luke Records released an album which included the parody. The credits in the album recognized Orbison and Dees as the writer, and Acuff-Rose as the publisher of the original song. The district court found in favor of Campbell, and held the use to be fair. However, the Sixth Circuit relying upon the decision in the case of *Corporation of America* v. *Universal Studios*[24], held that the song was not a fair use and constituted infringement of the original work because the blatantly commercial purpose of the derivative work prevented the latter work from qualifying as fair use[25]. Finally, the US Supreme Court ended the controversy, and held the song to be fair use of the original work.

The Supreme Court rejected the decision of the Sixth Circuit that all commercial parodies are presumptively unfair, and held that every parody must pass the fair use test as enunciated under § 107 of the Copyright Act. The Court defined parody as "the use of some elements of a prior author's composition to create a new one, which, at least in part, comments on that author's work"[26]. The court laid down that what was relevant was to find out as to what extent the subsequent work was transformative, *i.e.* to what extent the new work altered the original, and gave it a new expression and message. The court further noted that market substitution was rather unlikely, since the original work and the parody served two completely different markets[27]. This doctrine has found favour in several other jurisdictions including India.

The decision of the Supreme Court in *Campbell* received support from all contours of society, and has been hailed as a significant victory for parodists. In the subsequent cases of *Dr. Seuss*[28], *Leibovitz*[29] and *Suntrust Bank*[30], the principles enunciated in *Campbell* have been upheld, and scrupulously followed. Hence, we can summarize that the copyright regime in the US has been rather supportive of creators of derivative works such as parody, and it has successfully shielded them, and provided them required support so that they could foster their creative activities.

Roberts' hit 1990 movie. *See* BBC News, "Bill Dees, US songwriter, dies aged 73", *available at*: https://www.bbc.com/news/entertainment-arts-20165752 (last visited on Aug. 12, 2023).

[23] Song written by Roy Orbison and William Dees, and recorded by Orbison. After its release as a single in August 1964, it spent three weeks at number one on the *BillboardHot 100* from September 26, 1964, and was the second and final single by Orbison to top the US charts. It was also Orbison's third single to top the *UK Singles Chart*, for a total of three weeks. *See* Jo Rice, *The Guinness Book of 500 Number One Hits*85 (Guinness Superlatives Ltd., Enfield, 1st edn., 1982).

[24] *Sony Corporation of America* v. *Universal Studios*, 464 U.S. 417, 451 (1984).

[25] *Campbell* v. *Acuff-Rose Music, Inc*., 972 F.2d 1429, 1439 (6th Cir. 1992).

[26] *Supra* note 20.

[27] *Ibid*.

[28] *Dr. Seuss Enterprises* v. *Penguin Books USA Inc.,* 109 F.3d 1394 (9th Cir. 1997).

[29] *Leibovitz* v. *Paramount Pictures Corp.*,137 F.3d 109 (2d Cir. 1998).

[30] *Suntrust Bank* v. *Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

The Position in the United Kingdom

The road for the parody exception under UK copyright law, has been somewhat long and bumpy. Until 2014, when Parliament introduced an exception for the purposes of "caricature, parody or pastiche", there was no explicit provision in the law relating to parody[31]. Scholars had questioned the application of the 'substantial use' test, which was the law applied in infringement cases prior to the 2014 amendment, by arguing that even though a successful parody may copy a 'substantial' amount of the original work, it would still deserve protection against infringement[32].

The earliest English case which implicitly involved parody defense was *Hanfstaengl* v. *Empire Palace.*[33] This case involved paintings of a well-known artist, which were represented by the Empire Theatre in the form of tableaux vivant. Two British newspapers, namely *Daily Graphic*[34] and *Westminster Budget*[35] printed sketches of the tableaux vivant in their copies without the permission of the theatre. The House of Lords did not address the question as to whether, the sketches offered any possible criticism of the original work, and decided in favor of the defendants. It was held that "the rough sketches were made for a very different purpose, that purpose being not to give an impression of the plaintiff's pictures but to give a rough idea of what is to be seen at the Empire theatre"[36]. Thus, while reaching the desired conclusion, the court applied the 'dominant purpose' and 'market substitution' test. In the more recent decision of *Allen* v. *Redshaw*[37], the court applied the substantial copying test to determine the question of infringement[38] Thus, it will be seen that in cases prior to 2014, 'substantial taking' and 'market substitution' remained the tests which were repeatedly applied by the courts interchangeably, depending upon the facts and circumstances of the case at hand. The courts applied either or both tests in isolation, and no general protection of fair dealing provision was granted to parodies[39].

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31 Copyright, Designs and Patents Act 1988, s. 30A.

32 James Richard Banko, "Schlurppes Tonic Bubble Bath":In Defense of Parody" 11 *University of Pennsylvania Journal of International Law.* 627, 652-54 (1990).

33 (1894) 2 Ch. 109 (H.L.).

34 Illustrated weekly newspaper published in the UK in the late 19th and early 20th centuries, whose influence within the art world was immense, and its many admirers included Vincent van Gogh and Bavarian-born British painter Hubert von Herkomer. Available at: https://onlinebooks.library.upenn.edu/webbin/serial?id=graphicuk1869 (last visited on Aug. 04, 2023).

35 British national newspaper from 1893 to 1904, *available at*:https://web.archive.org/web/20140308220310/http://www.bl.uk/reshelp/findhelprestype/news/diffnews/ (last visited on Aug.04, 2023).

36 Amy Lai, *The Right to Parody: Comparative Analysis of Copyright and Free Speech*130-162 (Cambridge University Press, Cambridge, 2019).

37 [2013] 2013 WL 2110623 (P.C.C.).

38 *Supra*note 36 at 147-149.

39 *Ibid*.

In 2006, the Gowers Review of Intellectual Property[40] recommended that the UK should also interpret 'parody' on the lines of the European Union Copyright Directive[41], and provide for a separate clause providing for the parody exception. In the absence of such a clause, the country was missing out on economic and social benefits which could be derived from this transformative creativity[42]. These recommendations provided fuel to the ongoing demands for a broad-based explicit exception for parody, culminating in the insertion of section 30A in the Copyright, Designs and Patents Act (CDPA) 1988, proving for "fair dealing with a work for the purposes of caricature, parody or pastiche"[43]. Although 'fair dealing' has not been substituted by the American idiom of 'fair use', several new factors have taken over the 'substantial use' test with the insertion of this provision.

Even as parodists and transformationalists were celebrating the 2014 amendment, it soon became apparent that the Legislature, while inducing the amendment, did not define terms such as 'parody', 'caricature' and 'pastiche', and it was left to the courts to determine their meaning and extent in future cases. This lack of explicit definitions in the statute proved to be a double-edged weapon for litigants. On the one hand, courts now have a free hand to decide the question as to what is a parody or pastiche, and there are no explicit requirements which must be satisfied, in order to fall under the umbrella of this amendment, but on the other hand, this has led to confusions among the creators of parodies. They have no guideline as to how they should design their work or what precautions they are required to take, so as not to be left unprotected. In such a situation, the case of *Deckmyn*v. *Vandersteen*[44] serves as a guiding light to the courts across the country.

The Deckmyn Case

Coincidently, around the same time that the parody exception came in to force, the European Court of Justice (ECJ)[45] got the opportunity to analyze and answer certain questions pertaining to the parody exception provided under the EU Copyright Directive 2001/29/EC in the case of *Deckmyn*[46] *supra*. In this case, an infringement action was brought against a far-right politician Johan Deckmyn[47] who had

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40 Independent review of UK intellectual property (IP) focusing on UK copyright law, published in December 2006, *available at:* https://www.gov.uk/government/organisations/gowers-review-of-intellectual-property (last visited on July 29, 2023).

41 European Parliament, Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, Article 5(3)(k).

42 Andrew Gowers, *Gowers Review of Intellectual Property*66-68 (HMSO, Norwich, 2006).

43 S. 30A inserted (1.10.2014) by The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (S.I. 2014/2356), regs. 1, 5(1).

44 Case C-201/13, 2014 (ECJ).

45 Headquartered in Luxembourg, this court comprises of one judge from each EU member-country, alongwith 11 advocates general. It ensures uniform implementation of EU law in all member countries, and settles legal disputes between EU institutions and member-countries, *available at:* https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/court-justice-european-union-cjeu_en (last visited on Aug. 17, 2023).

46 *Supra*note 44.

47 Belgian-Flemish politician who belongs to the *VlaamsBelang* party, *available at*: https://www.vlaamsparlement.be/vlaamse-volksvertegenwoordigers/2838 (last visited on July 14, 2023).

distributed calendars with the front page depicting the Mayor of Ghent[48] throwing coins at citizens, who appeared to be from diverse ethnic and religious groups. This front page was apparently inspired by the famous *Suske en Wiske*[49] comic series created by Vandersteen, in which one of the characters throws coin at the residents of the town. When an infringement action was brought by Vandersteen's legal heirs, Deckmyn argued that the case fell under the exception for caricature, parody, or pastiche, under the EU Copyright Directive, as implemented by article 22(1)(6) of the Belgian Copyright Act. In view of the inconsistencies in various legal tests to deal with the parody exception, the Brussels Court of Appeal referred three questions to the ECJ for its decision[50].

The first question was whether the concept of parody was an independent concept under EU Law. The court answered the first question in the affirmative, and propounded that in the interest of uniform application of EU Law, parody should be considered as an autonomous concept, and not in relation to other categories of derivative works[51]. The second question was whether every parody is required to pass the three-tier test of original character, provoking humour, and mentioning of the source. The ECJ confirmed that there were only two essential characteristics of a parody, namely, it must be based upon an existing work whose should be clearly identified, and secondly, the work must be an expression of humour and mockery[52]. The last question was as to whether there were any other conditions or characteristics which the work in question was required to satisfy before it could be classified as a parody[53]. The court did not answer this question, and left it open for national courts to decide on a case-to-case basis.

After *Deckmyn*, the law with regard to the parody exception in the EU, became quite certain. Today, there appears to be a broad consensus in the UK, as in many other countries of the world, that all the elements of free speech in a critical parody should be protected, and actively encouraged, while the rights of owners of copyright should also be respected and honoured[54]. However, with the UK coming out of the EU, a new question has emerged as to whether Brexit[55] would diminish or negate the

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48 Capital and largest city of the East Flanders province, it is the third largest city in Belgium, after Brussels and Antwerp. *See* Serena Fokschaner, "The adoration of Ghent: art, history and flavours in Flanders"*The Guardian*, Feb. 23, 2020, *available at*: https://www.theguardian.com/travel/2020/feb/23/ghent-fine-art-medieval-belgium-holiday-city-break-beer (last visited on July 30, 2023).

49 Belgian comics series created by comics author Willy Vanderstee. It was first published in the Flemish language newspaper, *De NieuweStandaard* in the year 1945, and became popular thereafter, *available at*: https://suskeenwiske.ophetwww.net/intro/engintro.php (last visited on Aug. 22, 2023).

50 Case C-201/13, paras. 14-33, 2014 (ECJ).

51 Case C-201/13, paras. 14-17, 2014 (ECJ).

52 Case C-201/13, paras. 18-23, 2014 (ECJ).

53 Case C-201/13, paras. 24-33, 2014 (ECJ).

54 Sabine Jacques, "The Scope of the Parody Exception" (Chapter 3) in *The Parody Exception in Copyright Law*70-77 (Oxford University Press, Oxford, 2019).

55 Withdrawal of the UK from the EU, which officially took place at 23:00 GMT on January 31, 2020. Prior to its withdrawal, the UK had been a member country of the EU or its predecessor, the European Economic Community (EC), since January 1, 1973. Following Brexit, EU law and the decisions of the ECJ will no longer enjoy primacy over domestic laws in the UK. The European Union (Withdrawal) Act 2018 retains

influence of *Deckmyn* upon the courts in the UK when they seek to determine how parody would be defined and construed, in the absence of a definition in the statute. The answer to this question probably lies in the fact that the *Deckmyn* principles have now become established norms of law as far as the parody exception is concerned, and even if we were to assume that no caselaw would come up before the courts in the country which would provide them the opportunity to model the UK law on the lines of these principles, the interpretation of the law made by the ECJ in *Deckmyn* will continue to play a guiding role in copyright jurisprudence in the country.

The Humor requirement and the moral rights

Even after the decision in *Deckmyn*, and the 2014 amendment in the UK copyright law, there remain two significant obstacles in the way of parodists when it comes to suits involving copyright infringement. Even though the ECJ ruled in *Deckmyn* that "a parody must constitute an expression of humour and mockery", there is no trace in the judgment as to what humor or mockery must necessarily entail[56]. Thus, the ECJ has, once again, left it upon the national courts to decide this question on a case-to-case basis, leaving parodists in a not so comfortable position because the law is still uncertain as to what is the standard of humour or mockery which is expected from their works. In this backdrop, how is a court expected to create a scale to measure humour, and are courts really equipped to handle such an exercise? Further, what kind of a test is required to measure the level of humorousness of a work, and whether such a test should be an objective or a subjective one? If the test is required to be subjective in nature, who is the expert whose opinion matters? These are some of the questions which remain unanswered, and there is thus a need for a new reference to the ECJ for clarification on these aspects as and when the opportunity arises.

Taking the argument further, even if the humorous nature of a parody has been successfully established despite the above noted challenges, a parodist may still not get the protection of the exception. The new parody exception is subject to the moral rights of the author of the original work, and if the nature or content of the parody is such that it may pose threat to the reputation of the author or the integrity of his work, it will not qualify for protection[57]. This question has been further developed in Part III of this Paper.

The Indian Scenario

The Copyright Act, 1957 [58] does not contain any explicit exception for parodies, on the lines of the CDPA in the UK, after the 2014 Amendment. The statute provides for the general exception of fair

relevant EU law as domestic law, which the UK can amend or repeal. Available at: https://www.bbc.com/news/uk-politics-32810887 (last visited on Aug. 19, 2023).

56 *Supra* Note 44.

57 *Supra* Note 7 at 733-36.

58 Act No. 14 of 1957.

dealing[59], and this is the only fallback option which is available to parodists seeking to save their artworks. In continuance of the global trend of providing protection to creators of derivative works, the Indian statute was amended in 2012 in order to broaden the purview of the fair dealing provision under section 52 of the Act[60]. The 2012 amendment has extended the fair dealing exception to "any work, not being a computer programme", whereas previously, this exception was limited to only "literary, dramatic, musical or artistic works"[61]. As a result of this amendment, various works of modern origin such as cinematographic films and sound recordings can now be brought within the umbrella of fair dealing[62].

If we take a relook at the definition of parody as discussed in the introductory part of this Paper, we will find that the essence of parodies is to criticize the original work in a humorous and mocking manner. Thus, section 52(1)(a)(ii) which provides for fair dealing for the purposes of criticism and review, is the relevant provision we need to consider. In the *Civic Chandran* case[63], the Kerala High Court had the occasion to thoroughly analyze this provision in the context of parodies. Civic Chandran was a dramatist who wrote a play titled *Ningal Are Communistakki* which was based on a previous play titled *NingalenneCommunistakki*, which was written by the famous Malayalam playwright Thoppil Bhasi[64]. The author of the original play immediately sued the defendant arguing that the defendant's play involved substantial reproduction of the original play, and a case of infringement was made out. It was argued therein that large sections of the populace were emotionally connected with the original play because it had inspired communist sensibilities in the state. The play written by the defendant not only criticized the original work with regard to its theme and plot, but also made certain general mocking comments on the failure of the Communist Party in uplifting the standard of living of the backward classes in the state of Kerala. The Kerala High Court ruled in favor of the defendants, and observed that the 'counter drama' of the defendant was not a whole or substantial copy of the original play, and the underlying idea behind both the works was very different. The court ruled further that the theme and context of both the works in question could not be said to be identical or similar; in fact, the underlying message which both the playwrights sought to convey to the viewing public, was contradiction of each other. Hence, there was no possibility of market substitution of the original work by the counter drama the defendant.

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59 Copyright Act, 1957 (Act No. 14 of 1957), s. 52.

60 The Copyright Amendment Act, 2012 (Act No. 27 of 2012).

61 *Id.*, s. 32(i) (w.e.f. 21-6-2012).

62 Pranesh Prakash, "Analysis of the Copyright (Amendment) Bill, 2012"*The Centre for Internet and Society*, May 23, 2012, *available at*: http://cis-india.org/a2k/blog/analysis-copyright-amendment-bill-2012 (last visited on Aug. 25, 2023).

63 *Civic Chandran* v. *Ammini Amma*, 1996 PTR 142 (Ker).

64 Malayalam-language playwright, screenwriter, and film director, who was associated with the communist movement in Kerala. His play *NingalenneCommunistakki* (*You Made Me a Communist*) is widely perceived as a groundbreaking event in the history of Malayalam theatre, *available at:* https://www.imdb.com/name/nm0080270/ (last visited on Aug. 22, 2023).

When we compare *Civic Chandran* with *Campbell*[65], the major differences between the reasoning of both these cases becomes evident. Firstly, one of the major setbacks of the *Campbell* case was that the court while holding parody to be criticism of the original work greatly emphasized upon the fact that parody had to necessarily target the original work, whereas in *Chandran*, the court was more receptive of the idea that a parody may have a broader scope of not only targeting the original work, but also a general political ideology. Secondly, while *Campbell* was decided after taking into account, the transformative nature of the subsequent work, in *Civic Chandran*, it was the intended character of the work which proved to be the determining factor[66]. In other words, *Campbell* was decided more from the author/authorship perspective, whereas the decision in *Chandran* is inspired more by the general consideration of freedom of speech and expression[67].

Despite the worldwide wave of modernization of copyright laws to suit the needs of technology driven economies, the copyright regime in India has been slow to recognize and grant protection to derivative works, such as parodies. We have, so far, not been able to keep pace with our foreign counterparts because even after the 2012 amendment, the protection accorded to parodists, has been fairly limited. Indian lawmakers have, in the absence of explicit definitions and exceptions, left it entirely to the courts to devise the scale and methods which are required to bring these new categories of works within the purview of section 52, on a case-to-case basis. Uniformity of law is the very essence of every legal system, and it can only be guaranteed through a legislative enactment. Thus, the time is ripe for the Indian Parliament to introduce an amendment in the Indian copyright law to provide for explicit provisions to deal with derivative works involving artforms like satire, parody, and pastiche.

III. Parody and Moral Rights

Every work of art is considered to be the brainchild of its creator, and an extension of the personality of the original author. Under the moral rights regime, certain rights have been granted to original authors of the work to protect and control their work even after assignment of rights in the work[68]. These rights include the right to claim paternity, and the right to ensure integrity of the work. In the ensuing paragraphs, the author has attempted to understand how these moral rights have become relevant for creators of parodies.

The emergence of derivative works such as parodies has created a dichotomy wherein between two basic principles of the copyright system appear to be working at cross purposes. On the one hand, we have the principle to incentivize creators of the works, and give them a sense of control over their

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65 *Supra*note 20.
66 Lawrence Liang, "Fair Use of Cinematograph Films and Sound Recordings: Finding the Solution in the Amendment"5 *NUJS Law Review*687 (2012).
67 *Id*. at 691, 693.
68 *Supra* note 59, s. 57.

creations which would inspire them to create more; and on the other, we have to open the doors of law for new entrants in various creative fields, by recognizing and promoting new categories of work. The common aim of both these principles is to ensure that more and more citizens enter the arena of creative arts, which, in turn, would lead to the creation of a wide variety of works, leading to growth of the nation's economy, and improvement in the cultural image of the country. No modern system of copyright protection can survive until and unless it balances these two, often opposing, considerations.

Of the three countries which have been studied in the previous section, the US has adopted a very progressive approach. By virtue of the wordings of § 107 of the US copyright law, moral rights provided under § 106A have been made subservient to the doctrine of fair use[69], and therefore, the US law has tilted more towards the second principle when it comes to promoting unconventional art. Such a provision has made the life of parodists easy, as can be seen in the case of *Shostakovich* v. *Twentieth Century-Fox Film Corp*[70] where the New York district court rejected the claims of the plaintiff that the use of his music in an anti-Soviet movie violated his moral rights in his music. The court observed that there was no evidence to show that the composition of the original music was, in any manner, altered or distorted by its use in the subsequent production, or that the original music was not faithfully reproduced in the movie. The court observed that "with reference to works which are in public domain, a conflict arises between the moral rights of the creator, and the rights of others to use such works. As far as the use is fair and is not accompanied by malice, the use of such works should not be restricted"[71].

However, when we see the situation in countries like UK and India, we see that the legal position with regard to moral rights in both these nations, is still very restrictive. The protection granted by the parody exception and the fair dealing provision is conditional on the fact that they do not hinge upon the moral rights of original creator. This is not a very satisfying position of law, especially in the present times when the requirements of 'originality' as a prerequisite for protection of copyright are being relaxed, the world over. Lawmakers must understand that the arena of copyright law is no longer limited only to conventional works such as books, plays, paintings and sculptures which may be required to have some kind of an essence of originality. The invention of digital technology and social media has given birth to new forms of creative works which are mostly derivative in nature[72]. The reason for this boom in the creation of derivative works is that the duration of demand and relevancy of a particular work has been greatly shortened by the rapid speed and global access of the

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69 *Supra*note 16.

70 *Shostakovich* v. *Twentieth Century-Fox Film Corp.*, 80 N.Y.S.2d 575 (N.Y. Sup. Ct. 1948).

71 *Ibid*.

72 Axel Hunda, Heinz-Theo Wagnera, Daniel Beimbornb and Tim Weitzel, "Digital innovation: Review and novel perspective" 30(6) *Journal of Strategic Information Systems*(Dec., 2021), *available at*: https://www.sciencedirect.com/science/article/pii/S0963868721000421?via%3Dihub (last visited on June 29, 2023).

world wide web. Taking the example of memes, we see that various memes are created based on pre-existing works, and such works may, in some cases, have extremely short lifetimes of even a day or two. However, this does not mean that these works are, in any way, less deserving of copyright protection. In fact, the easy availability of these works over the internet, makes it easier for others to commit piracy of such works. Again going back to the discussion in the previous part of this section, the author recommends that UK and Indian copyright law needs to accommodate the second principle as well, in order to properly balance both these principles to provide unhindered support to creative activity, whatever be its nature.

IV. The Digital Threat

One of the most striking features of the present era has been the rise of digital technologies. The traditional modes communication such as print and electronic media have been forced to share space with digital and social media as far as the general public, especially the younger generation, is concerned[73]. Today, more and more people are opting for other modern ways such as social media websites and content streaming platforms for not only obtaining and sharing information, but also to express their opinions and contribute towards important discussions on socio-political issues. This development has converted a major chunk of passive content recipients to active content creators. In this new digital landscape, forms of political speech have also changed. We see that periodic elections are no longer the only means for people to express their political stand.The development of modern digital and communication technologies has provided a channel to the general public to express their stand on diverse topics of national interest, and writing a post on social media may not be the only manner to do so. Parodies and satire have become a new, and increasingly important, medium of government critique, especially in the case of countries with a high amount of internet penetration. Since India is amongst the fastest growing internet markets in the world[74], the importance of parodies is only going to increase further, in the years ahead.

The use of parodies in the commercial sector to mock and criticize rival products, or a well-known brand in general, is also not uncommon. The case of *Tata Sons* v. *Greenpeace International*[75] presents a good example of this new trend. This case centered around the use by the defendants of the trademark of the plaintiff company, namely "T" enclosed by a circle, in an online game called 'Turtle vs. Tata', without the authorization of the plaintiffs. The plaintiffs alleged that their trademark was used in a malignant way which resulted in a loss of reputation for them[76]. On the other hand, the case of the defendant was that their use of the logo was protected under the Trade Marks Act, 1999 as the use of trade mark was for the purpose of criticism, fair comment, and parody.

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[73] Esteban Ortiz-Ospina, "The rise of social media" (2019), *available at*: https://ourworldindata.org/rise-of-social-media (last visited on July 19, 2023).

[74] "India among fastest growing Internet market: Study"*The Economic Times*, July 14, 2023.

[75] *Tata Sons* v. *Greenpeace International*, 178 DLT 705 (2011).

[76] Trade Marks Act, 1999 (Act No. 47 of 1999), s. 29(4).

The court decided in favor of the defendants, and laid down the concept of 'paradox of parody', whereby the closer the object of the parody was to the parody itself, the more intense would the paradox itself be. The court noted that "a good parody is both original and parasitic as well as creative and derivative. A parodist may have various motivations for a making a parody. He may be making it for the purposes of entertainment or for political and social commentary or simply for making money out of it and there is no established rule of law that if commercial propriety is one of the driving factors, the parodist will be left defenseless"[77].

V. Conclusion

It is no doubt true that the protection of authors' rights has been the primary aim of copyright laws since their very inception. That being the case, it should not be forgotten that the reason behind providing these specific rights to authors of creative works was to further promote and foster creative activity in the society. With the advent of parody in its various forms, a rather piquant situation has often arisen when the law itself has begun to challenge the very reason for its existence. This is the challenge which confronts all major copyright realms in the present times, and it may therefore be a good time to reconsider the various theories and arguments behind the rights of authors, in order to properly accommodate the concerns of authors of various derivative works.

As far as the law on parody is concerned, it is still far from clarity and universality. The three jurisdictions of US, UK and India which have been studied by the present author, have taken three rather different routes to deal with the issue of parodies. While the US has been at the forefront of embracing new art even in the absence of an explicit provision for parodies, the position of law is not very satisfactory in the case of both the UK and India. The time is there ripe for the World Intellectual Property Organisation (WIPO)[78] to come forward and propose a uniform law with minimum protections which could be provided to makers of parodies. Such an intervention by WIPO will not only remove various complications which arise in the application of general doctrines of fair use and fair dealing to parodies, but will also provide a clear and stable law on the subject matter, which will ensure the unhindered creation of parodies within the confines of law.

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[77] *Supra* note 75. (Discussing the *Laugh It Off Promotions* v. *South African Breweries* case, wherein the Constitutional Court of South Africa held that, "…it should not make any difference in principle whether the case is seen as a property rights limitation on free speech, or a free speech limitation on property rights").

[78] Headquartered in Geneva, it is one of the fifteen specialized agencies of the United Nations (UN), and was created to promote and protect intellectual property (IP) across the world by cooperating with countries as well as international organizations. Available at: https://www.wipo.int/portal/en/index.html (last visited on Aug.03, 2023).

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LEGAL MECHANISM AND CHALLENGES IN THE INHERITANCE RIGHTS OF MUSLIM WOMEN: A REFLECTION ON SOCIETY OF KASHMIR

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ABSTRACT

The property rights of women have always been a matter of prestige as well as challenge for their upliftment. The right to inherit the property is one of the main forms of receiving property rights for women. However, so many challenges are attributed to this very right in the context of social, legal and familial paradigm. In spite of the legislative intervention, the women suffer on account of various familial and social disparities vis-à-vis securing property rights in the form of inheritance. The present research paper is an attempt to assess the different dimensions involved in the inheritance law and the challenges which are faced by Muslim women in different parts of Kashmir Valley.

I. Introduction

The Law of Inheritance deals with the distribution of estate among the legal heirs as per the rules prescribed. Inheritance laws are known as *ilm-ul-Farai* in Islam. Characterized as divinely ordained, the Islamic law of inheritance defines women's right to property of the deceased with specific roles and responsibilities for each individual. Women are considered as important legal heirs in different capacities like mother, daughter, wife, sister etc. In the Pre-Quranic Arab, all the estates were devolved into the male successors as a customary practice. There was complete deprivation of property rights of women. Women were recognized not more than as mere chattel. The basic law of inheritance is laid down in the Holy Quran in Surah Al-Nisa.[1] This law deals with the division of estate of a deceased person among his or her legal heirs. In Madina, various familial and social issues confronted the Prophet like remarriage of widows, property rights of orphans, issues pertaining to guardianship, rights of heirs, after the battle of Uhud. It is reported that a widow of one *Sayeed-ibn-rabi*, who had three daughters complained before Prophet of Allah that the brother of Sayeed ibn Rabi has usurped the whole property (date orchards) of sayedd ibn rabi, and has left nothing for the orphans. In this backdrop the verses of surah Al-Nisa regarding

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[1] The *Holy Quran:* Chapter 4.

inheritance were revealed.[2] The Prophet of Allah also emphasized forcefully the great need for acquiring the knowledge of the (*ilm-ul-Faraiz)* law of inheritance and transmitting it to others.

"Learn the laws of inheritance and teach them to the people, for they are one half of useful knowledge"[3]

"Learn the laws of inheritance with the same sincerity as you learn the Holy Quran."[4]

"Allah instructs you concerning your children: for the male is equal to the share of two females. But if there are only daughters, two or more, for them is two thirds of one's estate. And if there is only one daughter, for her is half. And for one's parents, to each one of them is a sixth of his (deceased's) estate if he left children. But if he had no children and the parents alone inherit from him, then for his mother is one third. And if he had brothers or sisters, for his mother is a sixth, after any bequest he may have made or debt. Your parents or your children, you know not which of them are nearest to you in benefit. These shares are an obligation imposed by Allah. Indeed, Allah is ever Knowing and Wise".[5]

II. Rules for Women as a Legal Heir under Islamic Law of Inheritance

Wife

The Quran fixes share of the Wife of the deceased as: one-eighth (1/8) in case of presence of child/children of deceased. One-fourth (1/4) in case of no child /children of deceased. 1/8th or 1/4th mutually in case of being more than one at the time of death of husband.

Daughter

The Quran awards the share of the daughter of the deceased as: one-half (1/2) of share in the property in case there is no son of deceased and daughter is only child of deceased. 2/3rd mutually in case a deceased person has two or more than two daughters and does not have a son. In case there is/are son(s) of such person, then such daughter(s) is/are entitled to share in the ratio of 2:1 i.e two shares to son and one share to daughter.

Mother

A deceased person's mother gets one-third (1/3) of the share in the net estate provided the deceased had no children. The general rule is that mother is gets one-sixth (1/6) of share in the net estate of deceased when there is a child of deceased or son's child (h.l.s) or two or more brothers or sisters of deceased or there is a brother, a sister and the father of deceased.

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2 Syed Abul A'la Maududi I, *Tafheemul Quran* 235 (Markaza Maktaba Islami, New Delhi, 2011).
3 Narration of Hazrat Abu Huraira reported by Bahiqi and Hakim in Durri Mansoor
4 Darmi reports the narration of Hazrat Umar.
5 *Supra* note 1 at *Surah Al Nisa* : 11

If the deceased leaves behind spouse and father, then mother of such deceased is entitled to 1/3 of residue. If the deceased leaves only father and mother behind, then mother is entitled to 1/3 of share in the net estate of deceased.

True Grand-Mother

True Grand Mother is entitled to 1/6 of share if there is no mother and no nearer true grandmother. If there is no mother of deceased but father's mother and mother's mother is alive, then both these grandmothers shall get 1/6 mutually. Father's mother is otherwise excluded by father.

Son's Daughter

Son's Daughter is entitled to one-half (1/2) of share in the property of deceased if such son's daughter is alone and when there is no son or daughter of deceased. If there are more than two or more son's daughters and no son or daughter of deceased, then such son's daughters are entitled to 2/3 mutually. If there is a daughter or higher son's daughter, but no son or son's son of deceased then such SD is entitled to 1/6 whether one or more. If there is a equal son's son then such son's daughter becomes residuary.

Full Sister

Sister of the deceased is entitled to 1/2 (one- half) of the share (if alone) and 2/3 (if two are more) when there is no child, child of a son, father, true grandfather, or full brother of the deceased. In case of brother, such sister is converted into residuary i.e 2:1 rule. In case of father of deceased, sister of deceased is excluded. In the presence of mother of deceased, sister is not excluded, provided there is no child of deceased.

III. Laws of Inheritance in Kashmir Valley

Customary laws

Customary Law of Jammu and Kashmir incorporate inheritance matters on large scale as compared to other matters of personal law. These customs mainly outweigh the lengthy rules of Muslim law regarding inheritance, wills and legacies and these customs were primarily based on male chauvinism and agnatic relationships. The customs perpetrated inequality regarding females and obstructed the socio-economic empowerment of women. These customary practices were based on old feudalistic practices. Agriculture accounted for most of income. The land owning class or landlords exploited the labour class or serfs and land tillers by paying them very less. All rights in the lands and other property were vested in the landlords and the laws were formulated to serve their interests. In this scenario men were in a dominant position to take over property rights of women. In the year 1872 A.D. the Dogra

Rulers of the State promulgated Jammu and Kashmir Laws Consolidation Regulations, 1872 which was later enacted as Sri Pratap Jammu and Kashmir Laws Consolidation Act, (1977 Samvat Vikrami) 1920 A.D. It provides that the Law of Shariah, will apply to Muslims only in the following matters:[6]

i. "Marriage, divorce, dower, adoption, guardianship, minority, bastardy, and female relation
ii. Succession, inheritance and special property of females and partitions,
iii. Gifts, waqfs, wills, legacies and;
iv. Caste or religious usages."

However, the above rule laid down in sec. 4(d) was subject to two exceptions regarding the application of Personal law i.e. "the Courts cannot apply such personal law where:

i. Any enactment has altered or abolished the Personal law;
ii. Any valid custom had modified the Personal law."

Jammu and Kashmir Shariat Act, 2007

After the enactment of Jammu and Kashmir Shariat Act, 2007 (hereinafter J&K Shariat Act, 2007), any customs that were not in conformity with the new law were abrogated.[7] As per Section 2, "the personal law of the Muslims (which is based on Shariat) shall have overriding effect on the customary law and parties shall be governed by Muslim Law and not by Customary Law in the matters of intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of personal law, marriage, dissolution of marriage, including talaq, illa, zihar, lain, khula and mubarat, dower, guardianship, gifts, trusts, and trust properties".

Section 3 of the Act states that "the provisions of the Sri Pratab Jammu and Kashmir Laws Consolidation Act, Samvat 1977(1920A.D.) shall be repealed in so far as they are inconsistent with the provisions of this Act. This means by this enactment the customs which were being followed by the Muslims particularly the agriculturist class in the State, were abrogated in so far as they are inconsistent with the provisions of this Act".

Repeal of J&K Shariat Act, 2007 and Extension of Shariat Act, 1937

With the abrogation of Article 370[8] by Parliament of India and enactment of Jammu and Kashmir Reorganization Act, 2019 the erstwhile J and K stands bifurcated into two union

[6] Sri Pratap Jammu and Kashmir Laws (Consolidation) Act, 1977, s.4(d)
[7] The Jammu and Kashmir Muslim Personal Law (Shariat) Application Act, 2007, s.2.
[8] By Virtue of Article 370 Jammu and Kashmir had special status within the Constitution of India i.e. Parliament of India was competent to frame laws for Jammu and Kashmir regarding three matters: Defence,

territories i.e. J&K UT and Ladakh UT. With the result many local laws applicable to Jammu and Kashmir stand repealed now by virtue of Reorganization Act, and the Central laws are extended to Jammu and Kashmir. The Shairat (Application) Act, 1937 is one such legislation which is extended and applicable to Jammu and Kashmir[9] and has replaced Jammu and Kashmir Muslim Personal Law (Shariat) Application Act, 2007.

IV. Women in Kashmir and Inheritance Rights: An Empirical Study

One needs to understand varied factors while evaluating the position of women in Kashmir vis-à-vis inheritance rights. Above all customary norms and patriarchal mindset which makes its presence felt in all periods and phases of Kashmir's society**.** Despite the legislative intervention vis-à-vis inheritance rights, the challenges and denials are enormous for women to get their due share of property by way of right to inheritance. The multistage random sampling (purposive and simple random) was adopted for this study given as under:

I. Four Districts by purposive sampling.

II. Two taluka/tehsil from each district by random sampling by lottery method.

III. 08 tehsils as ultimate sample units.

IV. 15 samples from each Tehsil (8) are equal to 120 respondents.

The respondents numbering **120** were accessed by the author to know the present status of inheritance rights of women and the challenges involved. The detailed profile is as follows:

District Wise

District	**Tehsil**	**Tehsil**	**No. of Respondents**
Srinagar	A: 15	B:15	30
Budgam	A:15	B:15	30
Baramulla	A:15	B:15	30
Anantnag	A:15	B:15	30
Kashmir Valley			**120**

Age Group

Foreign Affairs and Communication. Rest all the matters were within the competence of Jammu and Kashmir Legislative Assembly.

[9] Act 34 of 2019, s. 95 and the fifth schedule (w.e.f. 31-10-2019).

Age group	No. of Women	Percentage
18-40	87	72.5%
41-60	27	22.5%
61-80	06	05%
Above 80	Nil	Nil

Marital Status

Marital Status	No. of Women	Percentage
Married	45	37%
Unmarried	70	58%
Widow	03	02%
Divorced	02	0.01%

Educational Status

Education	No. of Women	Percentage
10th Pass	10	8.33%
12th Pass	15	12.5%
Graduates	30	25%
Masters	35	29.6%
Ph.D.	10	8.33%
No Education	20	16.6%

Employment Status

Status	No. of Women	Percentage
Employed	55	45.8%
Unemployed	50	41.6%
House Wives	15	12.5%

Income Group

Income Status	No. of Women	Percentage
Lower Income	11	9.1%
Middle Income	97	80.8%

Higher Income	08	6.6%

Findings of the Empirical Study

Denial

It is believed by 63% of total respondents that inheritance rights are denied to women in Kashmir. On the other hand, 24% did not agree with the proposition of denial. While as 13% preferred to stay neutral.

Category

It is believed by 39% of women that working women (employed) are mostly not given their share of inheritance. While as 29% believe that Widows are deprived of of inheritance. Unmarried daughters are deprived of share according to 17% of women while as 15% believe that Divorced Women are deprived of right to inheritance.

Reason

34% of respondents believe that lack of knowledge amongst women about their inheritance rights primarily accounts for women not getting their share. While 26% blame family norms and practices for such denial. Customary law is the reason of denial according to 14.5% of women. According to 7% of total respondents, it is the expenditure incurred on the marriage of women due to which women are later on denied the share of inheritance in the property. 14.5% women blame themselves for not looking for their share and being so much reluctant.

Role of Family

Family members play a very important role in terms of granting share to fellow female co-sharers. However, the position seems very dismal. 73% of total respondents are of this opinion that sons /brothers play the major role in denying the women (daughter/sister) the share of inheritance from the property of their deceased father or mother. On the other hand, 16.5% blame even fathers for denying the share of daughters directly or indirectly. 6% respondents blame daughters and sisters who deny it to fellow women while as 4% even blame mothers that they deny share of inheritance.

Social Taboo

A Muslim Women who asks for her share of property from the deceased is seen in negative light and faces rebuke by the society according to 80% of women. Even if the share of inheritance is given to the women it is considered as 'charity rather than a right' by more than 60% women.

Relinquishment

There is another dimension of women not receiving their share of inheritance and thereby jeopardizing their right to inherit. It is revealed that 68.9% of women (in the capacity of sister**)** relinquish (waive) their share in favor of their brothers because they don't want to spoil their relations with their brothers. They are under this fear that incase their in-laws or husbands may subject them to cruelty at least they have cushion of brothers to save them. So they don't want to spoil their relations with their brothers by taking their share which is otherwise due to them. 21% believe that relinquishment is out of love and affection only while as remaining 10% believe that it is out of social insecurity and social compulsion. Out of total respondents, 71.7% believe that it is married working woman who top in relinquish their share; divorced women constitute 10.6% while as unmarried daughters also constitute 10.6% in relinquishing their share. 7.1% women believe it is widows who relinquish their share.

Consequences

Since inheritance and succession constitutes an essential component of institution of family structure, therefore it needs to be dispute free. However, 45.8% of women strongly agree that denial of inheritance rights to woman is not only a serious threat to the family structure but has also increased family disputes. While as 36% strongly agree that lack of awareness and denial of right results in social and economic backwardness among Muslim women in Kashmir.

Legal Mechanism

The J&K Shariat Act, 2007 governed the inheritance matters in J&K before it was replaced by Sharit (Application) Act, 1937 after the abrogation of Article 370. However, 44.1% of women plead ignorance about the Act of 2007 stating that they don't have any knowledge about the said law. On the other hand, 36.4% have knowledge about the said law. 19.5% claim that they have never heard about this Act. In other words, we can say 63.6% women are unaware about the legal mechanism involved.

Settlement in the Court

Generally, women hesitate to ask for share in property from their brothers. However, if the property dispute vis-à-vis share in property as a result of inheritance reaches court for the settlement it still gets tough for the women to get the speedy settlement of issue. Out of the total number of women who have approached court for the settlement of issue; 43% believe that it takes more than five years to settle the matter; 09% believe the duration is two years.

Possible Measures

According to 63% respondents' inheritance cases should be settled within 12 months in the Court of law, if suit is filed. Moreover, religious platforms, Seminars, and Public Meets shall be used to aware the people regularly about the issue. 8% believe that mutation transfer of a deceased should be done by revenue officials within a month after the persons demise in accordance with rules to be formulated by the appropriate government.

V. Conclusion

From the above study it can be concluded that even though Islam has placed a dignified position for women in family and society at all levels. Particularly the Holy Quran has guaranteed much valued right to inherit the estate of deceased to women fifteen centuries back by clearly stating the principles of inheritance of property. But still Muslim Women in present times continue to be treated as per discriminatory customary laws, traditional prejudices, and patriarchal family norms in the matters of inheritance. It is seen in the Muslim societies that many woman are deprived in terms of inheriting property after the death of their parents. Kashmir valley is one such example. Awareness level at the grass root level both of right to inherit as well as legal mechanism among women in particular is not satisfactory. The female folk in the Valley seem to be reluctant in talking about their shares in the property. Expenditure incurred on the marriage of Muslim Women in the society is also cited as a reason to deprive them of the right to inherit. As a result of the denial of the inheritance rights, a woman has to suffer throughout her life; she struggles for remarrying after being divorced because of the financial crisis. She has to depend on her parents or brother and in such situation, she often surrenders or waives her inherited property to them as a price of her social security. With the non-implementation of inheritance laws and denial of inheritance rights there is serious threat to family structure and family relations. The impression one gets from the above study is that even the women with very good educational and professional status are also victim of this denial. Working women take lead in relinquishing their share, so are widows. The existing discrimination among men and women at the social and economic level will be eradicated if the Muslim families follow the principles of distribution of Inheritance as per their religious norms.

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LEGAL STATUS OF JANJATIES (THE SCHEDULED TRIBES), THEIR IDENTITY AND FUTURE

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ABSTRACT

Janjaties(Scheduled Tribes) have been identified as a separate category in the Constitution. This paper deals with the origin of term tribe and their constitutional status. This also covers the constituent assembly debate over special protection to tribes and protection to their cultural identities. Now religious conversion is creating a serious threat to the cultural identity of tribes. If this issue has not been discussed properly then it can cause a massive damage to the non-converted tribes.

I. Introduction

There are around 700 tribes identified under article 342 of the Indian Constitution and the possible actual number can be much more than this and their total population is somewhere near around 12.5 crore as per the census of 2011. Among them 2/3rd inhabit in the ten States prescribed under the area prescribed under fifth Schedule and 13% in the North Eastern States including 6th Schedule area and remaining in other parts of the country. Few States like Punjab, Haryana, Chandigarh, and Delhi have no ST population.

The term "tribe" has been used for centuries to describe various social and cultural groups. Its origin can be traced back to the Latin word "tribus," which referred to a division of the Roman state, typically based on geographic and social factors. In ancient Rome, citizens were often divided into tribes for administrative and political purposes. The term "tribe" has a long history and has been used in various ways across different cultures and languages. Its origin can be traced back to Latin and Old French. The term "tribus" in Latin referred to one of the three political divisions of the early Roman people. These divisions were based on social and economic classes. Each tribus was further subdivided into smaller groups. Over time, the term "tribus" evolved to refer to a social group or division of people. The term "tribe" was borrowed from Latin into Old French as "tribu" or "tribe," retaining its general meaning of a social division or group of people.

As the concept of tribes evolved over time, the term was adopted and adapted by different cultures and languages. In the context of anthropology, the term "tribe" gained prominence as

a way to classify and categorize various indigenous and traditional societies based on their social structures, cultures, and practices.

However, it's important to note that the term "tribe" has been criticized for its potential to oversimplify and stereotype diverse groups of people. Many indigenous and marginalized communities have preferred terms that better capture the complexity and richness of their cultures and societies.

II. Coining of the Term 'Tribal'

In the Indian context, the term "tribe" has its origins in British colonial classification. In 1871 census first reference to tribes was done. Three categories were mentioned namely aboriginal tribes, semi hiduised tribes and hill tribes. In 1901 three parameters were set-religion, profession and geographical location. After 1871 census Criminal Tribes Act was enacted and by 1924 it was extended to entire country. This Act was annulled in 1949 and those tribes which were included under this Act were given status of Scheduled Tribes under our Constitution.

Here one point is extremely relevant to be considered that unlike English, neither the Hindu religious framework nor any other Indian language possesses an exact equivalent term with the same connotations as "tribe." This absence of an equivalent term suggests that, conceptually, Indian languages did not inherently differentiate these communities from the broader population.[1]

In the early 20th century, there was a compassionate nationalist approach that sought to redefine the perception of tribes by viewing them as "culturally lagging Hindus." This approach aimed to assimilate tribal communities into mainstream society and involve them in the broader national narrative. The efforts were somewhat idealistic and involved bestowing tribal communities, particularly those in the Chhotanagpur region, with Kshatriya status or a "civilized" designation. Several initiatives were undertaken as part of this approach. One notable effort was the Arya Samaj's "shuddhi" program. This program aimed to reclaim those tribal individuals who had converted to Christianity, encouraging them to return to Hinduism. Additionally, various census reports since 1921 began classifying tribes, including followers of Sarna (the indigenous tribal religion), as Hindus, thereby attempting to integrate them into the Hindu fold. The Indian National Congress also played a role in these initiatives by

[1] *Available at:* http://www.igntu.ac.in/eContent/IGNTU-eContent-590220362838-MSW-2-AjeetKumarPankaj-TribesinIndia-1,2.pdf. (last visited on December 25, 2023).

mobilizing tribal communities and attempting to include them in the nationalist movement. However, the success of these endeavors was limited. While a small fraction of the Hinduized Tana Bhagats responded positively to the Congress' appeal, the majority of tribes, such as the Mundas and Uraons, largely rejected these efforts to assimilate them into mainstream society. Despite the concentrated efforts, the concept of viewing tribes as "culturally lagging Hindus" and the attempts to redefine their identity and integrate them into mainstream society faced significant challenges and met with resistance from many tribal communities.[2]

The evolution of the "tribe" concept within pre-colonial and colonial India serves as a concise emblem of the profound cultural suppression endured by tribal communities. During the era of British colonial rule, the colonial ethnography assimilated this concept into the framework of the caste system. Placed at the lower echelons of the caste hierarchy, tribes became the antithesis of the "brahmanical" order. This conceptual degradation reached its zenith with the enactment of the Criminal Tribes Act in 1871, which criminalized tribes. The strong link between the development of this concept and colonialism has led scholars to view the "tribe" as a construct of colonial origin.

However, this perspective overlooks the significant reliance of colonial ethnographers on the same traditional Sanskritic sources that underpinned the pre-colonial conception. This reliance essentially perpetuated the portrayal of tribes by colonial powers as uncivilized as their predecessors. Yet, colonialism injected new vitality and relevance into the concept, introducing elements of social Darwinism and spawning a plethora of regional terms, all equally pejorative in nature.[3]

III. Constitutional Provisions Relating to Scheduled Tribes

Scheduled Tribes (STs) hold a significant place within the constitutional framework of India. The Constitution of India includes provisions aimed at safeguarding the rights, interests, and well-being of Scheduled Tribes. Here are some key aspects of the constitutional scheme pertaining to STs:

Scheduled Tribes (Article 366(25))

[2] Joseph Bara, "Alien Construct and Tribal Contestation in Colonial Chhotanagpur: The Medium of Christianity", 44 (52) *Economic and Political Weekly*, 90–96 (2009), *available at:* http://www.jstor.org/stable/25663944. Accessed 27 Apr. 2022 (last visited on December 25, 2023).

[3] *Ibid.*

The Constitution defines Scheduled Tribes as those communities or tribal groups who are deemed as such under Article 342. The President of India is empowered to notify specific communities or groups as Scheduled Tribes based on the advice of the Governor of a state.

Fifth Schedule (Article 244, 244A, and Schedule V)

The Fifth Schedule delineates areas that are designated as Scheduled Areas, where tribal communities predominantly reside. This schedule provides special provisions for the governance, administration, and development of these areas. The Governor of a state with Scheduled Areas has the authority to make regulations to safeguard the rights and interests of tribal communities.

Directive Principles of State Policy (Article 46)

Article 46 emphasizes the promotion of the educational and economic interests of Scheduled Tribes, along with other weaker sections of society, to ensure their upliftment and advancement.

Reservation and Representation (Articles 330, 332, 334, 335)

These articles pertain to the reservation of seats for Scheduled Tribes in the Lok Sabha (lower house of Parliament) and state legislative assemblies. Article 334 places a time limit on the reservation for Scheduled Tribes in the Lok Sabha and state assemblies, while Article 335 ensures that the claims of Scheduled Tribes to services and posts in government employment are taken into consideration without compromising efficiency.

Protection against Exploitation (Article 23 and 24)

Articles 23 and 24 prohibit trafficking in human beings and forced labor, providing protection to Scheduled Tribes and other marginalized groups.

Developmental Measures (Article 275)

Article 275 empowers the Union government to provide grants to states with Scheduled Tribes for their socio-economic development. These constitutional provisions collectively reflect the Indian government's commitment to addressing historical disadvantages faced by Scheduled Tribes, protecting their distinct cultural identities, and ensuring their overall well-being. The implementation of these provisions involves a combination of legislative, administrative, and policy measures to uplift and empower Scheduled Tribes across the country.

III. Relevant Extracts

Under the constitutional order, 1950 as amended in 1990, SCs can be only from Hindus, Sikhs and Buddhists while STs can be from any of the religions.[4] Many people are unaware that the Indian government does not formally recognize the Scheduled Tribes as Hindu groups. The original constitution made the same error with the SCs as well. However, it was fixed in 1950 when the then-government modified the regulations of the game by a Presidential Order. According to the third provision of the Constitution (Scheduled Castes) Order, 1950, "no person who professes a religion other than Hinduism shall be deemed to be a member of a scheduled caste." This one modification assured two things:

i. The Indian state formally acknowledged that SCs were an important component of Hindu society. and
ii. Only SCs who were Hindus (or would not convert) could benefit from the reservation system.[5]

There is no denying that STs are Hindus. During the era of Islamic attacks, most of these groups were part of mainstream Hindu society but were forced to seek safety in forests. As historian K.S. Lal writes in his 'The Legacy of Muslim Rule in India':

> *"*Every populated area was destroyed wherever the army marched, according to Amir Khusrau. When the army landed in Warangal, Deccan, the Hindu residents hid in the hills and forest."
>
> "…During Muslim reign, there was a massive increase in forest population."
>
> "….The vanquished Rajas and weak agriculturists fled to the jungles." "Those who went to the jungle remained there, eating wild fruits, tree roots, and the coarsest grain when it was available, but always retaining their freedom." But, with time, a peasant turned as a tribal, and a tribal became a beast*."*
>
> "The thought, purpose, and action of leaving nothing but basic sustenance was the most heinous of all those listed above that led to the impoverishment of the peasantry."
>
> "And the peasants, finding continued agriculture unprofitable and the regime's treatment intolerable, fled into the bush, where they created resistances."

[4] *Available at:* https://censusindia.gov.in/tables_published/scst/Introduction.pdf(last visited on December 25, 2023).

[5] *Available at:* https://swarajyamag.com/politics/memo-to-modi-sarkar-its-time-india-officially-declared-scheduled-tribes-as-hindus (last visited on December 25, 2023).

> "Even Babur, who was usually a careful observer, had noticed that peasants in India were sometimes relegated to the status of tribals. In our nations, dwellers in the wilds (i.e. nomads) obtain tribal names; here (i.e. Hindustan), the established inhabitants of the cultivated regions and villages get tribal names, says he in his Memoirs [Babur Nama, II, p. 518]."

> "In summary, the avalanche of Turco-Mughal invaders and their Government's agenda transformed many established agriculturists into jungle tribals. Many vanquished Rajas and harried Zamindars sought refuge in forests and distant strongholds. They had been vanquished in battle and had been demoted to the status of Scheduled Castes / Tribes / Backward Classes as a result of the policy of making them nest-o-nabud (destroy root and branch)."

> "As a result, the numbers of what are now known as Scheduled Castes, Scheduled Tribes, and Other Backward Classes increased."

> "During the medieval time, during the years and centuries of persecution, they lived in makeshift huts in forest settlements, separated and secluded, suffering and striving, almost like wild creatures. However, by residing in forest settlements, they were able to retain their independence, faith, and culture. Their martial techniques, which were maintained in their Akharas, are being practiced in various ways in many states today. Such an occurrence had never occurred in West Asian countries. People in the vast open deserts could not defend themselves from forced conversions in the face of invading Muslim troops. There were no trees where people might run, hide, or organize resistance. As a result, they all converted to Islam."

What Muslim domination could not totally achieve, the British did via their clever tactic of 'split and destroy' the Hindu community. K. S. Lal once more:

> "….Their resisting spirit had made them good combatants. Fighting kept their health refreshed, making up for the lack of nutritious food in the woods. Because of their fighting mentality, the British saw them as thugs, thieves, and outlaws. However, the British, as well as other Europeans, began anthropological and sociological research on these destitute forest people. In order to find a term for these groups, British census

> authorities labeled them as Aboriginals (1881), Animists (1891-1911), and Adherents of Tribal Religions (1921-1931) in succeeding censuses."[6]

Historian R.C. Mazumdar holds that castes are closed groups in which hereditary transmission of one's own group status is transmitted.[7]

The Presidential order of 1950 on STs is silent on the converted STs unlike the SCs. This issue is continuously into discussion since 1950 and has been a matter of great concern for the STs who have continued to follow the faith of their forefathers- the Sanatana or Eternal faith.

Discussion and Debate in the Lok Sabha

This pertinent issue was very effectively raised by the great veteran Janjati leader Shri Kartik Oraon in the Parliament in late seventies. The occasion arose when the Union Government introduced the Scheduled Castes and Scheduled Tribes Orders (Amendment) Bill, 1967 in Lok Sabha and finally referred to JPC for detailed deliberations. Ultimately a proposal was given by Shri Kartik Oraon, which recommended as-

> .....No person who profess a religion different from the animism (tribal religion) and has been converted to any other religion according to the recognised religious ceremony of conversion of particular faith, shall be considered a member of the Scheduled Tribes.

But, unfortunately it could not be passed in voting.

Benefits being Enjoyed by STs in Service and Posts

Data referred during the debate on the bill in 1970 and memorandum to the then Prime Minister Shri Kartik Oraon clearly mentions that 5.53% Christians among STs (at that point of time) were consuming 80% share of the reservation and welfare fund while the STs following the Sanatan Faith, who were 94.47% of the ST population got just 20%.

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[6] *Available at:* https://timesofindia.indiatimes.com/blogs/voices/scheduled-tribes-who-are-they-how-to-mainstream-them/?source=app&frmapp=yes (last visited on December 25, 2023). Also see, https://niti.gov.in/planningcommission.gov.in/docs/reports/sereport/ser/stdy_scmnty.pdf(last visited on December 25, 2023).

[7] J. H. Hutton, *Caste in India: Its Nature, Function and Origins* (Bombay: Indian Branch, Oxford UP, 1963) *available at:* https://timesofindia.indiatimes.com/blogs/voices/scheduled-tribes-who-are-they-how-to-mainstream-them/?source=app&frmapp=yes (last visited on December 25, 2023).

Still the situation more so ever is same except that the percentage of Christians converts among STs has become 15-18% who are now grabbing the lion share of 80% and just 20% share remains available to 82-85% of STs who remain steadfast in their Sanatan faith.

Dual Benefits to Converted STs

Such converted STs are getting dual benefits- those meant for STs and those meant for Minorities. The claim benefits of minorities when it is beneficial to them and next moment they claim benefit of STs as per their comfort ability. There are examples where a person who contested election for assembly and Mayor reserved for STs and a few years later was appointed as member of the State Minority Commission. Converted tribe students are getting benefits of Coaching meant for minorities which is discriminatory to non converted STs.

This is creating a reverse discrimination against non-converted tribes and for this reason demand of delisting is back. According to Janjatiya Suraksha Manch those who have converted to Christianity and Islam and do not follow the customs and traditions of Tribes should be delisted from the Scheduled Tribes List. According to them claiming scheduled tribes status by the converted people is the root cause of their marginalisation.

IV. Relevant Judicial Precedents

Chinni Appa Rao* v. *State of A.P[8]

The Hyderabad High Court has made it clear that once a member of Schedule Caste or Scheduled Tribe converts to Christianity or some other religion, such a person ceases to be a member of SC or ST and is no longer covered under the provisions of the SC and ST.[9]

C.M. Arumugam* v. *S. Rajgopal[10]

A three-Judge Bench of the Supreme Court of India in this case referred to the pronouncements in *Coopoosami Chetty* v. *Duraisami Chetty*[11], *Muthusami* v. *Masilamani*[12] and *G. Michael* v. *S. Venkateswaran*[13], and opined that:

> It is no doubt true, and there we agree with the Madras High Court in G. Michael case that the general rule is that conversion operates as an expulsion from the caste, or, in

[8] 2015 SCC OnLineHyd 564; (2016) 1 ALD (Cri) 545.
[9] Scheduled Tribes (Prevention of Atrocities) Act, 1989.
[10] MANU/SC/0283/1975.
[11] ILR 33 Mad 57.
[12] ILR 33 Mad 342 : Mad I.J. 49.
[13] MANU/TN/0198/1952 : AIR 1952 Mad. 474

other words, the convert ceases to have any caste, because caste is predominantly a feature of Hindu society and ordinarily a person who ceases to be a Hindu would not be regarded by the other members of the caste as belonging to their fold. But ultimately it must depend on the structure of the caste and its rules and Regulations whether a person would cease to belong to the caste on his abjuring Hinduism. If the structure of the caste is such that its members must necessarily belong to Hindu religion, a member, who ceases to be a Hindu, would go out of the caste, because no non- Hindu can be in the caste according to its rules and Regulations. Where, on the other hand, having regard to its structure, as it has evolved over the years, a caste may consist not only of persons professing Hindu religion but also persons professing some other religion as well, conversion from Hinduism to that other religion may not involve loss of caste, because even persons professing such other religion can be members of the caste. This might happen where caste is based on economic or occupational characteristics and not on religious identity or the cohesion of the caste as a social group is so strong that conversion into another religion does not operate to snap the bond between the convert and the social group. This is indeed not an infrequent phenomenon in South India where, in some of the castes, even after conversion to Christianity, a person is regarded as continuing to belong to the caste.

Rajamannar, C.J., who, it can safely be presumed, was familiar with the customs and practices prevalent in South India, accepted the position "that instances can be found in which in spite of conversion the caste distinctions might continue", though he treated them as exceptions to the general rule**.**

(Emphasis supplied)

K.P. Manu* v. *Chairman, Scrutiny Committee for Verification of Community[14]

In this case the Supreme Court, referring to *C.M. Arumugam* v. *S. Rajgopal and Ors.*[15]held that it cannot be laid down as an absolute rule uniformly applicable in all cases that whenever a member of caste is converted from Hinduism to Christianity, he loses his membership of the caste. It is true that ordinarily on conversion to Christianity, he would cease to be a member of the caste, but that is not an invariable rule, and it would depend on the structure of the caste and its rules and on conversion to Hinduism, a person born of Christian converts

[14] MANU/SC/0189/2015.
[15] *Supra* note 11.

would not become a member of the caste to which his parents belonged prior to their conversion to Christianity, automatically or as a matter of course, but he would become such member, if the other members of the caste accept him as a member and admit him within the fold.

***State of Kerala* v. *Chandramohanan*; *State of Kerala* v. Chandramohanan (28.01.2004 - SC)[16]**

Whether member of tribe can be regarded as such member despite his conversion to another religion? The Supreme Court held that he may remain member of tribe if he continues to follow tribal traits and customs.

The question as to whether a person is a member of the Tribe or has been accepted as such, despite his conversion to another religion, is essentially a question of fact. A member of a Tribe despite his change in the religion may remain a member of the Tribe if he continues to follow the tribal traits and customs. If, by reason of conversion to a different religion, a long time back, he/his ancestors have not been following the customs, rituals and other traits, which are required to be followed by the members of the Tribe and even had not been following the Customary Laws of Succession, Inheritance, Marriage etc., he may not be accepted to be a member of a Tribe. In this case, it has been contended that the family of the victim had been converted about 200 years' back and in fact, the father of the victim married a woman belonging to a Roman Catholic, wherefore he again became a Roman Catholic. The question, therefore, which may have to be gone into is as to whether the family continued to be a member of a Scheduled Tribe or not. Such a question can be gone into only during trial.

Upon conversion, a person may be governed by a different law from the law governing the community to which he originally belonged but that would not mean that notwithstanding such conversion, he may not continue to be a member of the Tribe.

C.M. Arumugam relied on. Although it cannot be accepted as a broad proposition of law that a person ceases to be a member of a scheduled tribe simply by changing religion, the question of whether he ceases to be a member thereof or not must be determined by the appropriate court as such a question would depend on the facts of each case. In such a case, it must be proven that a person who has converted to another faith is still suffering from social

[16] MANU/SC/0094/2004.

impairment and adhering to the practices and traditions of the society to which he formerly belonged.

***S. Paul Raj* v. *The Tahsildar, Mettur Taluk and Ors.* (17.11.2021 - MADHC)**[17]

Religious conversion does not change a person's caste, rules Madras High Court. It held that the caste of a person does not change owing to religious conversion and an inter-caste marriage certificate cannot be issued on the pretext of his community certificate when he originally belonged to another caste and religion. This Court is of the considered opinion that Conversion from one religion to another will not affect a person's caste to which he belongs. In the present case, the petitioner admittedly belongs to the Christian Adi-Dravidar group and was granted the Backward Class certificate as a result of his conversion to Christianity. However, the petitioner is a 'Adi-Dravidar' by birth, and changing faith will not affect the community. The designations of Scheduled Caste, Scheduled Tribes, The majority Backward Classes, Backward Classes, and Other Castes have no effect on the caste.

P. Rajan* v. *State of Kerala[18]

The Kerala HC ruled that the Committee's findings were reached after thorough investigation and that there was no basis for the Court to overturn them. This Court finds no reason to disagree with the findings of the Scrutiny Committee for verification of Community Certificates, entered into after anthropological enquiry. This Court finds that the conclusions in Ext.P8 order of the Scrutiny Committee is based on material evidence collected by the Committee.

S. Anbalagan* v. *B. Devarajan[19]

The convert must renounce his or her caste, and only then can a person lose Scheduled Caste classification. Simply changing faith does not imply that the convert is not subject to the disadvantages experienced by Scheduled Castes. If the convert wishes and wants to remain a member of the caste, and the caste continues to regard him as a member, he will remain a member of the caste notwithstanding his conversion.

[17] MANU/TN/8512/2021.
[18] 2021 SCC OnLine Ker 436.
[19] (1984) 2 SCC 112.

V. Judgments on Applicability of Hindu Personal Laws

In *Lakshmi Narayan Tudu* v. *Smt. Basi Majhian*[20],substantial question of law has been raised, whether Hindu Succession Act or Hindu Law in applicable in the matter of inheritance among the members of Scheduled Tribes, if they are sufficiently Hinduised. Held, yes.

In *Manjhi and Ors.* v. *Bhabani Majhan and Ors.*[21],it was observed that *tribals can be governed in matters of inheritance and succession if they become sufficiently Hinduised*. It was further observed by the court that the question *whether the tribes are sufficiently hinduised or not is a mixed question of fact and law*.

In *Budhu Majhi and Anr.* v. *Dukhan Majhi and Ors*[22],it was held by court that it is not necessary that parties should be completely hinduised. It is enough that the person concerned is sufficiently Hinduised. Court also observed that no formal ceremony is required for a person to become a Hindu.

In *Labishwar Manjhi* v. *Pran Manjhi and Ors.*[23],it has been clearly held that if the members of tribes follow customary and practices of Hinduism, the Hindu Succession Act, 1956 would be applicable. The said case related to the Santhal Tribe, who were seen following Hindu customs, and hence the Supreme Court held that the *HSA would be applicable* to their situation, in spite of the said tribe being a notified tribe.

In a recent judgment, the Himachal Pradesh High Court in case of *Bahadur* v.*Bratiya*[24]held that daughters in the tribal areas in the state shall inherit the property in accordance with the Hindu Succession Act, 1956 and not as per customs and usages in order to prevent the women from social injustice and prevention of all forms of exploitation.

VI. Excerpts from Constituent Assembly Debates

Constituent Assembly of India Debates (Proceedings) - Volume V

"Conversion from one religion to another brought about by coercion or undue influence shall not be recognized by law."

Sardar Vallabhbhai J. Patel

[20] AIR 2004 Jhar 121.
[21] AIR (33) 1946 Pat 218.
[22] AIR 1956 Pat 123.
[23] (2000) 8 SCC 587.
[24] ILR 2015 (III) HP 1259.

The Honourable Sardar Vallabhbhai J. Patel stated that: Much of this debate may be shortened if it be recognised that there is no disagreement on the merits of the issue that forceful conversion should not or cannot be acknowledged by law. On that principle there is no difference of opinion. The question is only whether this clause is necessary in the list of fundamental rights. Now, if it is an objective for the administration to act, it has a place in the Second Part which consists of non-justiciable rights. If you think it is necessary, let us transfer it to the Second Part of the Schedule because it is admitted that in the law of the land forcible conversion is illegal. We have even stopped forcible education and, we do not for a moment suggest that forcible conversion of one by another from one religion to another will be recognised. But suppose one thousand people are converted, that is not recognised. Will you go to a court of law and ask it not to recognize it? it only creates complications, it gives no remedy. But if you want this principle to be enunciated as a seventh clause, coming after clause 6, in the Second Schedule, it is unnecessary to carry on any debate; you can do so. There is no difference of opinion on the merits of the matter. But at this stage to talk of forcible conversion on merits is absurd, because there cannot be any question about it.[25]

Constituent Assembly of India Debates (Proceedings) - Volume III

"Any conversion from one religion to another of any person brought about by fraud, coercion or undue influence or of a minor under the age of 18 shall not be recognized by law."

Mr. K. M. Munshi

The Hon'ble Shri Purushottamdas Tandon (United Provinces: General): *[Mr. President, I am greatly surprised at the speeches delivered here by our Christian brethren. Some of them have said that in this Assembly we have admitted the right of every one to propagate his religion and to convert from one religion to another. We Congressmen deem it very improper to convert from one to another religion or to take part in such activities and we are not in favour of this. In our opinion it is absolutely futile to be keen on converting others to one's faith. But it is only at the request of some persons, whom we want to keep with us in our national endeavour that we accepted this. Now it is said that they have a right to convert young children to their faith. What is this? Really this surprises me very much. You can convert a child below eighteen by convincing and persuading him but he is a child of

[25] *Available at:* http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C30081947.html (last visited on December 25, 2023).

immature sense and legally and morally speaking this conversion can never be considered valid. If a boy of eighteen executes a transfer deed in favour of a man for his hut worth only Rs. 100, the transaction is considered unlawful. But our brethren come forward and say that the boy has enough sense to change his religion. That the value of religion is even less than that of a hut worth one hundred rupees. It is proper that a boy should be allowed to formally change his religion only when he attains maturity.

One of my brethren has said that we are taking away with the left hand what we gave the Christians with our right hand. Had we not given them the right to convert the young ones along with the conversion of their parents they would have been justified in their statement. What we gave them with our right hand is that they have a right to convert others by an appeal to reason and after honestly changing their views and outlook. The three words, 'coercion', 'fraud' and 'undue influence' are included as provisos and are meant to cover the cases of adult converts. These words are not applicable to converts of immature age. Their conversion is coercion and undue influence under all circumstances. How can the young ones change their religion? They have not the sense to understand the teachings of your scriptures. If they change their religion, it is only under some influence and this influence is not fair. If a Christian keeps a young Hindu boy with him and treats him kindly the boy may like to live with him. We are not preventing this. But the boy can change his religion, legally only on attaining maturity. If parents are converted, why should it be necessary that their children should also change their religion? If they are under the influence of their parents, they can change their religion on maturity. This is my submission.[26]

VII. The Constitution (Scheduled Tribes) Order, 1950 C.O. 22

The Order of The Constitution (Scheduled Castes), 1950 (C.O. 19) - Regardless of what is stated in paragraph 2, no individual who practices a religion other than Hindu [Sikh, or Buddhist] will be considered a member of a Scheduled Caste.

Mythological Shreds of Evidence

The Mahabharata has elaborate details of Arjuna's marriage connections with Naga princess Ulupi and Manipur princess Chitrangda, their roles in some crucial events, and the

[26] *Available at:* http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C01051947.html (last visited on December 25, 2023). Also see, *available at:* https://www.news18.com/news/opinon/what-the-indian-law-says-on-conversion-religious-identity-of-scs-431797.html (last visited on December 25, 2023).

participation of their respective sons Iravan and Babruvahana on Pandava's side in the Kurukshetra battle.

VIII. International Comparison

Nepal Criminalizes Christian Conversion and Evangelism[27]

The constitution prohibits converting persons from one religion to another and bans religious behaviour disturbing public order or contrary to public health, decency, and morality. A new criminal code, which became effective in August, reduces the punishments for "convert[ing]… the religion of another person" or for engaging in any act that undermines the religion, faith, or belief of others from six to five years' imprisonment.[28]

Sri Lanka Anti Conversion Bill

It is aimed at discouraging if not exactly criminalizing conversions including genuine conversions. Why should this be so if the Bill is aimed only at unethical conversions? The Bill does not cover persons who have no religion although their parents may be Buddhists and they may be discouraged to genuinely convert for they run the risk of becoming branded as criminals owing to the requirement to report their conversion to the Divisional Secretary. Christians alleged this bill as violating the International Covenant on Civil and Political Rights.[29]

IX. Conclusion

On the basis of above discussion, it is clear that tribes are the cultural identities who believe in nature and also worship the same. They believe in original bhartiya value and culture and originally Hindus. Religious conversion of tribes through deception, inducement or fraud is in the violation of their right. A converted tribe is converted on behest of certain promise of benefit. Once a tribe converts into any minority religion, they get double benefit. Firstly, the benefit of the tribes and secondly, the benefit of religious minority. They also get benefit of conversion. The result is majority of benefit of reservation and other rights are availed by these converted tribes and non-converted hindu tribes remained deprived of the same. Thus, itcreates a discrimination between converted and non-converted tribe. Conversion even

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[27] *Available at:* https://www.christianitytoday.com/news/2017/october/nepal-criminalizes-conversion-christianity-evangelism-hindu.html (last visited on December 25, 2023).

[28] 2018 Report on International Religious Freedom: Nepal, *Available at:* https://www.state.gov/reports/2018-report-on-international-religious-freedom/nepal/.(last visited on December 25, 2023).

[29] *Available at:* https://groundviews.org/2009/01/25/the-anti-convrsion-bill-violtes-the-fredom-of-conscience-and-the-freedom-of-expression/.(last visited on December 25, 2023).

otherwise is a threat to national integration. This issue should be addressed immediately and urgently to protect the rights of non-converted tribes and to protect the interest of the nation.

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IMPORTANCE OF FORENSIC FACIAL RECONSTRUCTION IN CRIME INVESTIGATION IN INDIA

Dr. Sumiti Ahuja[*]

ABSTRACT

Improper and unscientific investigation of crime by police has been pointed out to be one of the major reasons for lower conviction rate in our country. To increase the conviction rate, present government has been making efforts in capacity building and promotion of forensic science in India. Our criminal justice system needs to be integrated with forensic science-based investigation to give better results. Certainly, there has been transition from application of traditional typical methods to scientific methods, for the purpose of crime investigation by the police authorities. However, there is a long road yet to be traversed. One of the contributions of science and technology for aiding in identification of otherwise unidentifiable bodies, decomposed bodies, disfigured faces, skeletal remains, is the technique of facial reconstruction. This technique is supposed to help in recreating facial features of unidentified individuals through skeletal remains. The author in her paper has tried to throw light on the importance of forensic facial reconstruction. Superimposition, which is one of the forms of facial reconstruction has been highlighted in the paper with examples of instances in India, wherein, this technique has provided a breakthrough in crime investigations.

I. Introduction

"In forensic science, everything is a clue, and every clue is a potential breakthrough."

- Jefferson Bass[1]

Forensic science is the art which involves application of scientific principles to crime investigation[2]. It perceives everything around, to be a clue or a tell-tale sign when seen in the context of commission of a crime, or identity of accused or the victim of crime. Every such

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[1] 'Jefferson Bas' depicts the writing partnership between Dr. Bill Bass and Jon Jefferson, and is their pen name. Dr. Bass is a world-renowned forensic anthropologist, who had established the Anthropology Research Facility (the 'Body Farm') at the University of Tennessee around 25 years ago. He is the author or coauthor of over 200 scientific articles, as well as Death's Acre, a critically praised memoir about his career. Jefferson is an accomplished journalist, author, and a documentary filmmaker. His work has appeared in the *New York Times*, *Newsweek*, *USA Today*, *Popular Science*, and *National Public Radio*. He is the author or co-author of over 200 scientific articles, including *Death's Acre*, and the writer and producer of two National Geographic programmes about the Body Farm. *See* Fantastic Fiction, "Jefferson Bass", *available at*: https://www.fantasticfiction.com/b/jefferson-bass/ (last visited on Aug. 10, 2023).

[2] Anil K. Jain and Arun Ross, "Bridging the gap: from biometrics to forensics" 370 *Philosophical Transactions of Royal Society B.* 3 (2015).

clue or a sign, may provide a potential breakthrough in solving a criminal case.[3] An expert who testifies before the court plays an important role, more so because the entire purpose behind this exercise is to assist the court to form its opinion. This opinion could deal with questions concerning foreign law, science, art, and other areas which the court may lack the technical expertise to form an opinion on its own[4]. Such questions in criminal cases may touch upon areas such as ballistics, fingerprints, handwriting comparison, and even DNA testing or superimposition techniques[5].

Amongst the various known branches of forensic science, 'Forensic Anthropology' is also one. It helps in solution of legal issues in which humans, their dead bodies, skeletons, bones, or their fragments are involved[6]. The main aspect or division of anthropology that helps in the process of dissemination of justice is recognized as physical anthropology. Physical Anthropology mainly focusses on the physical aspects of human body, its characteristics, developments, and the changes which continue to take place in the body, even after death of a person[7]. Such characteristics of a human body, and the development and changes in them, provide a Forensic Anthropologist with the requisite evidentiary clues to assist the courts in deciding anthropological issues in criminal and civil cases. In a way, forensic anthropology is an important sub-field of physical anthropology[8].

Over the years, technology has played a critical role in enhancing forensic science, notably in modern-day criminal investigations. Significant improvements in forensic equipment and devices in recent years have enabled investigators to capture and analyze evidence more efficiently than ever before. The police have used a range of methods to aid their investigations, ranging from technology such as Call Data Records to DNA tests[9]. In recent times, the technique of forensic facial reconstruction has proven to be extremely useful in criminal cases where there are no clues or tell-tale signs to track a person whose face has

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3 Joseph Peterson, Ira Sommers, *et.al.*, "The Role and Impact of Forensic Evidence in the Criminal Justice Process" 2, 17 (Sep., 2010), *available at*: https://www.ojp.gov/pdffiles1/nij/grants/231977.pdf (last visited on Aug. 03, 2023).

4 The Indian Evidence Act, 1872 (Act No. 1 of 1872), s. 45.

5 *Pattu Rajan* v. *State of Tamil Nadu* (2019) 4 SCC 771 at 790.

6 H. James Birx, "Forensic Anthropology" in *Encyclopedia Britannica*, Apr. 12, 2023, *available at*: https://www.britannica.com/science/forensic-anthropology (last visited on Aug. 04, 2023).

7 Luis Fondebrider, "Forensic Anthropology: Definition" in Claire Smith (ed.), *Encyclopedia of Global Archaeology* (Springer, New York, 2014).

8 National Museum of Natural History, "Forensic Anthropology", *available at*: https://naturalhistory.si.edu/education/teaching-resources/social-studies/forensic-anthropology#:~:text=When%20human%20remains%20or%20a,hard%20tissues%20such%20as%20bones. (last visited on Aug. 04, 2023).

9 Mohamed Thaver, "Explained: Importance of Forensic Facial Reconstruction in crime investigation" *The Indian Express*, May 20, 2019.

been destroyed or bodies that have deteriorated due to passage of time[10]. Herein, superimposition techniques are used for the purpose of identification of the suspected victim from the skull photograph and the life-size photographs of such victim. Life-size photos of the head of the deceased and transparency of the skull are superimposed. In the case of identity, the positions of the nose, eyes, ears, and the chin will correspond, whereas, in the case of non-identity, the various positions do not superimpose.[11] Specific points are to be measured and compared, during the comparison of facial features of ante-mortem life-size photograph and morphology of the skull, *viz.*, 'eyebrows, medial margins of the slit, lateral margin of eyes, position of moustache, position of closed mouth, face outline, nasion, position of ear, position of nostrils, height of nose, width of nose, width of mouth, maximum width of the nasal bridge, and lip height'[12].

Recently, the Union Minister for Home Affairs and Cooperation, Shri Amit Shah, had highlighted the concern regarding the low conviction ratio in our country even after 75 years of independence[13]. According to the 239th Report of the Law Commission of India[14], one of the major factors contributing to low conviction rates is 'improper and unscientific police investigation'[15]. To achieve the goal of a conviction rate above 90%, the current government has taken various steps to enhance forensic science and promote forensic based criminal investigations. An important provision has been added in the *Bharatiya Nagarik Suraksha Sanhita Bill, 2023* [16], towards this end. The Bill makes forensic investigations to be compulsory, for crimes punishable with at least seven years of imprisonment[17]. In all such cases, it will be mandatory to have a forensic expert to visit the crime scene to collect

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[10] Comparing skull features to antemortem pictures of a head and/or face is the craniofacial superimposition method. Forensic scientists utilise this procedure when a positive identification cannot be achieved but authorities assume the recovered skull belongs to a certain missing person [Douglas H. Ubelaker, Yaohan Wu, *et.al.*, "Craniofacial photographic superimposition: New developments" 1 *Forensic Science International: Synergy* 271 (2019)].

[11] B R Sharma, Forensic Science in Criminal Investigation & Trials 1349 (LexisNexis, Gurgaon, 6th edn., 2020).

[12] *Id.* at 1351.

[13] Press Information Bureau Delhi, "Union Home Minister and Minister of Cooperation, Shri Amit Shah introduces the Bhartiya Nyaya Sanhita Bill 2023, the Bharatiya Nagarik Suraksha Sanhita Bill, 2023 and the Bharatiya Sakshya Bill, 2023 in the Lok Sabha, today" (Ministry of Home Affairs), Aug. 11, 2023, *available at*: https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1947941#:~:text=Prime%20Minister%20Shri%20Narendra%20Modi%20has%20taken%20a%20historic%20decision,conviction%20ratio%20above%2090%20percent. (last visited on Aug. 15, 2023).

[14] Law Commission of India, "239th Report on Expeditious Investigation and Trial of Criminal Cases Against Influential Public Personalities-Submitted to the Supreme Court of India in W P (C) NO. 341/2004, *Virender Kumar Ohri* v. *Union of India & Others*" (March, 2012).

[15] *Id.* at 12.

[16] Bill No. 122 of 2023.

[17] *Id.*, s. 176.

forensic evidence. The expert will be required to record the process on any electronic device, including mobile phone. In cases where a particular state does not have a forensics facility, forensic facility in another state shall be used. By following such practices, the prosecutors will have access to scientific evidence, and the culprits' chances of getting acquitted in court will be considerably reduced[18].

II. Forensic Facial Reconstruction: Meaning, Scope and Origin

"Out of the great number of faces that have been formed since the creation of the world, no two have been so exactly alike, but that the usual and common discernment of the eye would discover a difference between them."

- William Hogarth[19]

There are no two human faces that are alike, not even the faces of identical twins[20]. A human face is suggestive of details such as age, gender, health, ethnic group, to name a few. We are all capable of detecting the slightest differences between faces, and it is this skill that enables us to perform personal recognition and identification.[21]

Forensic Facial Reconstruction: Meaning and Scope

Forensic Facial Reconstruction is the study of the skull to recreate lost or unknown facial features of a deceased person. Forensic facial reconstruction involves recreation of the face of a generally unidentified individual, from his/her skeletal remains; the entire process is a blend of 'artistry, forensic science, anthropology, osteology, and anatomy'[22]. When there are unidentified remains in a crime scene, it is mostly used to determine identities. The approach compares specific spots on the skull to an existing image. It is an old procedure that is now mostly executed by computers.[23] Forensic facial reconstruction is a quick, non-invasive, and efficient procedure that can be repeated at any time if necessary. This technique is utilized not just for identifying persons from skeletal remains, but also for archaeological purposes.

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18 *Supra* note 13.

19 William Hogarth, *The Analysis of Beauty* 123 (John Reeves, London, 1753), *available at*: https://archiv.ub.uni-heidelberg.de/artdok/1217/1/Davis_Fontes52.pdf (last visited on Aug. 03, 2023). William Hogarth was a famous English painter and an engraver; his moral and satirical engravings and, paintings are his most well-known works (*See* Britannica, "William Hogarth: English Artist", *available at*: https://www.britannica.com/biography/William-Hogarth (last visited on Aug. 03, 2023).

20 Caroline Wilkinson, *Forensic Facial Reconstruction* 5 (Cambridge University Press, United Kingdom, 2004).

21 *Ibid.*

22 Sonia Gupta, Vineeta Gupta, *et.al.*, "Forensic Facial Reconstruction: The Final Frontier" 9(9) *Journal of Clinical & Diagnostic Research* 26 (Sep., 2015).

23 Renowned Forensic Expert, Rukmani Krishnamurthy, as cited in Swati Deshpande, "Sheena Bora case: How skull-face superimposition process identified remains" *The Times of India*, Nov. 25, 2015.

Visual identification by the family of an individual and his/her associates becomes simpler and more definite.[24]

Facial reconstruction is generally classified into four categories: i) replacement and repositioning of destroyed or distorted soft tissues onto a skull; ii) utilization of photographic transparencies and drawings in an identikit-type system[25]; (iii) graphic, photographic or video superimposition; (iv) plastic or three-dimensional reconstruction of a face over a skull, with the help of sculpting clay[26]. Facial reconstruction, whether it is through sketch, sculpted, superimposed or computer-generated from skeletonized remains, gives a face to the faceless or the otherwise unidentifiable[27].

Facial recognition and reconstruction is a rapidly growing field with many applications. It is a great instrument that is frequently utilized in criminal investigation. During the course of the previous two decades, there has been a significant evolution and advancement in the field of facial recognition and reconstruction.[28] The term facial reconstruction is generally used interchangeably as 'facial approximation', which indeed seems to be a more accurate term, as it is not possible to achieve exact appearance, because there are some features which can not be predicted just on the basis of skull. The forensic expert, in best case, can only approximate to the real appearance.[29] The listed anthropometric measurements of the actual skull, life-size photograph, and ante-mortem life-size photograph of the person are taken and super-imposed *inter se* for a match or non-match: 'total face height, face width, upper face height, lower part face width, nasal aperture – height and width, intra orbital width, and orbital – height and width'[30].

Facial reconstruction is frequently used as a last resort after other methods of identification have failed[31], and it must be supported by radiographic, dental, or DNA evidence to be

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24 *Supra* note 22 at 28.

25 *See* Central Intelligence Agency, "The Identi-Kit", *available at*: https://www.cia.gov/static/The-Identi-Kit.pdf (last visited on Aug. 15, 2023).

26 W A Aulsebrook, M Y Işcan, *et.al.*, "Superimposition and reconstruction in forensic facial identification: a survey" 75(2-3) *Forensic Science International* 101 (Oct. 30, 1995).

27 Karen T. Taylor, *Forensic Art and Illustration* (CRC Press, USA, 2001) as cited in Jenny Omstead, "Facial Reconstruction" 10(1) *Totem: The University of Western Ontario Journal of Anthropology* 37 (2002).

28 Ankita Guleria, Kewal Krishan, *et.al.*, "Methods of forensic facial reconstruction and human identification: historical background, significance, and limitations" 110(2) *Naturwissenschaften* 8 (Feb., 2023).

29 Ryan M. Campbell, Gabriel Vinas, *et.al.*, "Towards the restoration of ancient hominid craniofacial anatomy: Chimpanzee morphology reveals covariation between craniometrics and facial soft tissue thickness" 16(6) *PLoS ONE* 2 (2021).

30 *Supra* note 11 at 1350.

31 *See State of Assam* v. *Upendra Nath Rajkhowa*, 1975 Cr LJ 354.

considered a positive identification[32]. It would not be incorrect to state that, this procedure is used in forensic science to identify an individual when traditional methods of identification have failed. For instance, in the celebrated case of Sheena Bora, wherein the mother was alleged to have committed the murder of her own daughter, digital superimposition techniques, amongst others, were applied to determine the identity of the skull[33]. It was a very contentious and cruel occurrence that goes back to April of 2012, when Indrani Mukerjea (who was the mother of the deceased Sheena), her then-driver Shyamvar Rai, and her husband Sanjeev Khanna allegedly strangled Sheena Bora, aged 24 years, to death in a car. Following that, the body was burned in a jungle in Raigad district of Maharashtra.[34] DNA analysis, forensic odontology, and digital superimposition techniques were used in this case to determine the identity of the skull[35].

The superimposition technique is used to identify a dead body whose face has degraded beyond recognition. The approach is based on the idea that the contour of the face is dictated by the bones behind it in the skull. The width of the forehead, for example, is determined by the size of the frontal bone in the skull. Similarly, the shape of the upper lip is determined by two maxillae that support the upper lip; the shape of the chin is determined by the size and shape of the mandible, which is the lower jaw bone in the skull. The technique can only be used if a current photograph of a deceased individual is available. Such photograph is superimposed on the skull image. It should be noted that the superimposition technique can only be utilized as corroborative evidence and not as substantive piece of evidence.[36]

The *Daubert*[37] standard[38] is a legal precedent which has been established by the United States Supreme Court in 1993, to govern the question of admissibility of the findings of an expert, during legal proceedings. When many forensic artists make approximations based on the same set of skeletal remains, no two reconstructions are will ever be identical. It has also been found that the data which is used to create these approximations is often insufficient. As a result, forensic facial reconstruction violates the *Daubert* standard, and is therefore, not one

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[32] Adarsh Kumar and Tulika Banerjee, "Importance of Facial Reconstruction in Forensics", *available at*: https://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/S000016FS/P001353/M019178/ET/1516254407FSC_P11_M26_e-text.pdf (last visited on Aug. 04, 2023).

[33] *See* Swati Deshpande, "BHU professor 'proves' in court Pen skull is Sheena Bora's" *The Times of India*, Jan. 04, 2020.

[34] Ishika Yadav, "Sheena Bora murder case: A timeline of twists and turns" *Hindustan Times*, May 18, 2022.

[35] *Supra* note 33.

[36] *See* The Editorial Note appended to *Inspector of Police, Tamil Nadu* v. *John David* (2011) 5 SCC 509.

[37] *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311 (9th Cir. 1995).

[38] Legal Information Institute, Cornell Law School, "Daubert Standard", *available at*: https://www.law.cornell.edu/wex/daubert_standard#:~:text=Established%20in%20the%201993%20U.S.,%22gatekeepers%22%20of%20scientific%20evidence. (last visited on Aug. 10, 2023).

of the legally recognized procedures for positive identification. Since reconstructions fail to satisfy the rule laid down in *Daubert*, they are currently only made to aid the process of positive identification, when used alongiwth other proven procedures[39]. In other words, according to some reviewers, forensic facial reconstruction is a method of facial approximation, which means that several facial patterns can be generated from the same skull. On the other hand, the other set of researchers, are of the belief that each skull could only produce one face, which would lead to positive identification of an individual; hence, the name "Facial Reconstruction" was coined[40].

Origin and Evolution of Forensic Facial Reconstruction

Making faces, or facial reconstruction, has an old history. Scientists in ancient Egypt worked hard to retain as many details about their ancestors as possible. Excavations in Jericho in 1953 uncovered the earliest examples of facial reconstruction. Plaster heads with shells inserted into eye sockets to imitate eyes were discovered beneath the floors of buildings dating from 7500 to 5500 BC.[41]

Forensic facial reconstruction began as an art form until individuals realized its utility as a science form. Hermann Welcker (1883)[42] and Wilhelm His (1895)[43] were the first ones to recreate three-dimensional facial approximations based on remains of the human skull. Most sources, however, credit His as the pioneer in developing the approach. His also produced the first data on average face tissue thickness, which was followed by Kollmann and Buchly[44],

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[39] Aditya Singh, "An Overview of Forensic Facial Reconstruction" 13(7) *Journal of Forensic Research* 1 (2022). Also *See* Erica Beecher-Monas, "Blinded by Science: How Judges Avoid the Science in Scientific Evidence" 71 *Temple Law Review* 55-102 (1998).

[40] *Supra* note 22.

[41] Ch. Stavrianos, I. Stavrianou, *et.al.*, "An Introduction to Facial Reconstruction" 11 *Balkan Journal of Stomatology* 76 (2007).

[42] Hermann Welcker was a German anatomist and anthropologist who was born in Germany on April 08, 1822 and died on September 09, 1897. He was trained in anatomy and was particularly interested in deciphering a person's face based on the shape and form of their skull. Welcker postulated in 1883 that the shape of muscles and soft tissue on face of a person might be characterized and placed on an actual skull to get an impression of what that individual looked like originally. This procedure provided the foundation for both criminal and anthropological forensic face reconstruction today [Guinness World Records, "First forensic facial reconstructions", *available at*: https://www.guinnessworldrecords.com/world-records/first-use-of-forensic-facial-reconstructions (last visited on Aug. 10, 2023)].

[43] Wilhelm His (1831–1904) was a Swiss-born physician who pursued a career in embryological and anatomical research in Basel and then Leipzig. He created an early example of forensic craniofacial reconstruction, using the presumed skeleton remains of Johan Sebastian Bach, a German composer [Michael K. Richardson and Gerhard Keuck, "The revolutionary developmental biology of Wilhelm His, Sr." 97(3) *Biological Reviews* 1131-1160 (June, 2022)].

[44] Kollmann and Buchly also made a facial approximation of Dante in 1898 from the tissue depth measurements. Kollman then went on to reconstruct the face of a stone-age woman from Auvenir, France, which became known as the first scientific reconstruction, by producing technical drawings from tissue depth measurements of hundreds of women in the area, with finishing touches provided by Buchly [*See* Rinchon S., Arpita S., *et.al.*, 3D Forensic Facial Reconstruction: A Review of the Traditional Sculpting

who later collected additional data and compiled tables that are still used in most facial reproduction laboratories today[45]. Mikhail Gerasimov[46], a 20th-century Russian archaeologist, and anthropologist, was known to have researched skulls and precisely rebuilt the faces of excavated *homo sapiens* to middle-aged kings, including the Mongol conqueror Timur[47]. Although well known, facial reconstruction was not frequently used as a forensic tool until the mid-1900s, when it was used along with photo superimposition to identify victims of World War II concentration camps[48].

The prosecution of Buck Ruxton, famously known as 'Jigsaw Murders' case[49], was amongst one of the first important cases, in which the two victims who were the wife and housemaid of the accused, were identified with the help of skeletal remains through the superimposition of photographs. The technique proved to be effective in the distinction and identification of the two slain ladies.[50] Since its introduction in this case, the technique has been extensively used. In contemporary times, computers have made the entire process of superimposition much faster; the accuracy of the process has also improved many times.

III. Procedure involved in Forensic Facial Reconstruction

Two main facial reconstruction techniques have been recognized, *viz.*, two-dimensional (2D) and three-dimensional (3D)[51]. Each technique is further classified as manual or computerized, i.e., by using a particular software. The 2D technique is categorized into sketching and computerized, and the 3D technique is categorized into claying and computerized. The 2D reconstruction technique is used to reconstruct a face from the skull using soft tissue depth

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Methods and Recent Computerised Developments" 3(1) *International Journal of Forensic Sciences* 2 (2018)].

45 Encyclopedia, "Forensic facial reconstruction", *available at*: https://www.bionity.com/en/encyclopedia/Forensic_facial_reconstruction.html#_note-Rhine/ (last visited on Aug. 10, 2023).

46 Professor Michail Gerasimov, a Russian palaeontologist, has often been referred as 'father of facial reconstruction technique'. He established the Russian method of facial reconstruction in 1924, which emphasizes the development of the musculature of the skull and neck as being significant. Gerasimov worked on the faces of the earliest known fossil men, *Neanderthaloid* and *Pithecanthropus*, and rebuilt over 200 skulls of our prehistoric ancestors. He also had the opportunity to put his expertise to use by solving murder cases (*Supra* note 41 at 77).

47 *Supra* note 9.

48 *Supra* note 27 at 38.

49 *Rex* v. *Buck Rexton* (1935).

50 *See* Robertson Crichton, "Rex v. Buck Ruxton Manchestor Winter Assizes, 1936" 4(2) *Medico-Legal and Criminological Review* 144-158 (1936); R.H. Blundell and G. Haswell Wilson (eds.), *Trial of Buck Ruxton* (William Hodge and Company Limited, Great Britain, 1937), *available at*: https://ia902908.us.archive.org/5/items/in.ernet.dli.2015.173614/2015.173614.Trial-Of-Buck-Ruxton_text.pdf (last visited on Aug. 10, 2023).

51 Pagorn Navic, Chanatporn Inthasan, *et.al.*, "Facial reconstruction using 3-D computerized method: A scoping review of Methods, current Status, and future developments" 62 *Legal Medicine* (May 2023), *available at*: https://www.sciencedirect.com/science/article/abs/pii/S1344622323000494 (last visited on Aug. 04, 2023).

estimates. Karen Taylor[52] pioneered this technique in the 1980s in Austin, Texas. This procedure, which is based on antemortem pictures and the skull which is to be reconstructed, requires an artist and a forensic anthropologist to collaborate on facial reconstruction[53].

Anatomical, anthropometrical, and combination approaches are among the 3D manual (claying) methods. Anatomical approach is the Russian method of facial reconstruction, anthropometrical approach is American method, whereas, combination approach is British method of manual facial reconstruction. Variance in nomenclature has resulted from difference in approach (discipline-specific) as well as different regional origins. The anatomical method, developed by Mikhail Mikhaylovich Gerasimov[54], relies on the primary influence of muscles in constructing facial form and features; the anthropometrical method, developed by Wilton M. Krogmann[55], emphasizes upon average facial tissue depths in facial depiction rather than the anatomical relationship between skull and facial structure. The combination approach, as developed by Richard Neave[56] in the year 1977, combines the anatomical and anthropometrical approaches, in which average soft tissue outlines serve as confirmation of structural details offered by muscle and bone morphology.

Manual reconstruction approaches have been mostly replaced by computers. The computer is fed with the skull structural data, and other facial feature data and cranial structure are created in 3D on the monitor with special software. The flesh-like facial features are produced and sculpted using depth and thickness data previously stored in the computer. The obtained facial figure is digitised, and the resulting data is compared to similar data created with the suspected subject. The automated reconstruction has not only sped up the procedure but also

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[52] Karen T. Taylor is an author, art educator, portrait sculptor, forensic artist, and facial identification specialist. She has contributed towards solving of criminal cases for numerous law enforcement organisations worldwide [Behance, "Karen T. Taylor", *available at*: https://www.behance.net/karenttaylor (last visited on Aug. 14, 2023)].

[53] Arpan Manna, Tanha Khan, *et.al.*, "Facial Reconstruction: A Boon to forensic practice" 5(1) *International Journal of Forensic Medicine* 22 (2023).

[54] *Supra* note 44.

[55] Dr. Krogmann, an American Anthropologist, was amongst the pioneers of forensic and physical anthropology in the US. Over the course of his remarkable career, which lasted almost six decades, he gained widespread admiration and respect for his , scholarship, teaching, research, wit, and humanism. Although skeletal remains studies have long been utilized to support the medicolegal system, it was Krogmann who brought these fields together to evolve the field of forensic anthropology [M.Y. Iscan, "Wilton Marion Krogman, Ph.D. (1903-1987): the end of an era" 33(6) *Journal of Forensic Science* 1473 (Nov., 1988)].

[56] Richard Neave is a forensic facial reconstruction expert from the United Kingdom. He is credited with the development of Manchester Technique of Forensic Facial Reconstruction (combination method) at the University of Manchester in the UK between 1973 and 1980 [New Scientist, "I Know that Face", Nov. 23, 2016, *available at*: https://www.newscientist.com/lastword/mg23231011-500-i-know-that-face/ (last visited on Aug. 20, 2023)].

boosted its accuracy significantly. It is also more manoeuvrable.[57]

IV. Breakthrough in Crime Investigation Through Forensic Facial Reconstruction

The usage of superimposition technique for investigation of crimes in Indian subcontinent is not a new phenomenon. The same was pointed out by the Hon'ble Supreme Court of India in the case of *Pattu Rajan* v. *State of Tamil Nadu*[58]. The technique has managed to provide breakthrough in many investigations, especially those pertaining to the Nithari murders (2006), the Morni Hill murder case and the Paharganj bomb blast case[59] (1996), the Udhampur murder case (2005), and the Russian murder incident in Goa (2008).[60]

In the well-known Nithari case, police authorities had the challenge in determining the identification of skulls discovered in the drain. The investigative agency then chose to go for DNA tests, facial reconstruction, and facial superimposition on all skulls found. In 2006, Noida police had sent 19 skulls and DNA samples to Forensic Science Laboratory (FSL), Chandigarh for testing. The DNA experts at the FSL, namely, Dr. Sanjiv and Dr. Rajiv Giroti, used superimposition and 3D techniques to identify 16 children.[61]

In the Morni Hill murder case, three young people went to Morni Hills and consumed alcohol and drugs. Late in the evening, they got into a fight, and one of them was strangled to death by the other two. The deceased body was dumped in ravines that are rarely visited by humans. The skeleton of the deceased was found after a long time. The identification of the victim was established with the help of skull superimposition.[62]

Maria Monica Susairaj, an aspiring model and actor, and her partner, former navy officer Emile Jerome, were arrested in 2008 on suspicion of plotting the death of creative ad director, Neeraj Grover. He was supposedly stabbed to death, his body was dismembered, and his remains were burned in the forest by the two accused. Finally, his skull had to be sent for facial reconstruction in order to confirm his identity.[63]

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[57] P. Vanezis, R.W. Blowes, *et.al.*, "Application of 3-D computer graphics for facial reconstruction and comparison with sculpting techniques" 42(1-2) *Forensic Science International* 69-84 (July, 1989).

[58] *Supra* note 5 at 791.

[59] *See* John F. Burns, "Kashmiri Separatists Claim Delhi Bomb That Killed 17" *The New York Times*, April 22, 1996, *available at*: https://www.nytimes.com/1996/04/22/world/kashmiri-separatists-claim-delhi-bomb-that-killed-17.html (last visited on Aug. 12, 2023).

[60] *See* Justice K. Kannan (ed.), *Modi: A Textbook of Medical Jurisprudence and Toxicology* 267-271 (LexisNexis, 26th edn., 2018).

[61] Tanseem Haider, "Sheena Bora can be identified with help of 2D facial reconstruction: Forensic experts" *India Today*, Sep. 02, 2015.

[62] *Supra* note 11.

[63] Headlines Today Bureau, "Susairaj, Jerome guilty in Neeraj Grover murder case" *India Today, June 30, 2011.*

In the year 2020, a forensic science professor from BHU[64] testified as a witness of CBI in court that, using digital superimposition, which was a type of forensic facial reconstruction, he had established that the skull recovered in the Sheena Bora murder case was a complete match with her smiling photographs. The match was based on 'facial landmarks'[65] and teeth. Four different perspectives or angles of Sheena's photographs were chosen for forensic identification. Corresponding skull photos were chosen. A software was used to do the superimposition. In addition, forensic odontology[66] was used to compare exactness in superimposition over visible teeth of the victim in order to achieve precise superimposition.[67] Recently, the Mumbai Police opted to go for the forensic facial reconstruction technique to find out the identity of the deceased victim, and sent the decomposed body or dismembered body parts for identification of the unidentified. In one of the cases of January 2020, a son had killed his mother and thereafter, chopped and disposed of her body parts. It was the technique of facial reconstruction which came to the rescue of police in confirmation of the victim's identity. The forensic department of King Edward Memorial (KEM) Hospital assisted the Ghatkopar police in this matter, confirming the identification of a 45-year-old lady whose body parts were discovered in two different parts of the city. Generally, the entire procedure of facial reconstruction takes atleast a week to complete; but in this case, the forensic department of KEM hospital, managed to efficiently finish the process in two days.[68] In another case of July 2023, even after days of the incident and repeated efforts, the Worli police failed to determine the identity of the decomposed body found at the Worli Sea Face. They then resorted to facial reconstruction technique, and sent the unidentified body to the

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[64] Dr. Sunil Kumar Tripathi, a 72-year-old retired professor in the Department of Forensic Medicine at Institute of Medical Sciences, BHU, had deposed before special Judge J.C. Jagdale, in the matter, claiming the photographs of Bora provided to him were 100% match with the skull.

[65] Facial landmarks, also known as facial key points or facial feature points, are mostly found around the eyes, mouth, nose, and chin. Commonly utilised landmarks are the eye corners, nose tip, nostril corners, mouth corners, terminal points of eyebrow arcs, ear lobes, chin, and so on. Landmarks such as the corners of the eyes or the tip of the nose are known to be less impacted by facial expressions, making them more dependable, and are referred to as fiducial points or fiducial landmarks in the face processing literature. *See* Congyi Wang, "The Development and Challenges of Face Alignment Algorithms" 1335 *Journal of Physics: Conference Series* 1 (2019); Hamid Ouanan, Mohammed Ouanan, *et.al.*, "Facial landmark localization: Past, present and future" in *2016 4th IEEE International Colloquium on Information Science and Technology (CiSt)* 487 (IEEE, Tangier, Morocco, 2016).

[66] Forensic Odontology is the branch of dentistry that applies dental knowledge to legal issues. Dental evidence can be used to establish human identity by comparing a deceased person's dental characteristics to ante-mortem dental information. *See* Alexander Stewart Forrest, "Forensic Odontology" in Max M. Houck (ed.), II *Encyclopedia of Forensic Sciences* 630-645 (Elsevier, 3rd edn., 2023).

[67] Swati Deshpande, "Skull given by CBI is a match with Sheena Bora's face, says expert in court" *The Times of India*, Jan. 03, 2020.

[68] Rupsa Chakraborty, "Son kills woman, dumps body parts: Facial reconstruction at KEM helps police confirm victim's identity" *Hindustan Times*, Jan. 10, 2020.

forensic department of KEM hospital.[69] It is believed that even though the procedure may not lead to 100 percent accurate results but it definitely provides with a fairly proximate representation of the victim, which certainly is, what is required for the purpose of identification[70].

V. Judicial Response to Applicability of Forensic Facial Reconstruction

In the current era of continuous technological advancement and digitalization, collected photographs and recordings of criminal incidents have propelled facial recognition into the forefront of the judicial system.[71]

In *Henry Westmuller Roberts* v. *State of Assam*[72], a young boy was kidnapped for ransom, and later, murdered. The skeleton bones were brought to the FSL for analysis, and the police got numerous photographs of the victim with negatives from the deceased's family, which were also provided to the laboratory. The Scientific Officer (SO) of the Photography Section of that FSL determined that the skull and the image belonged to the same person after completing a superimposition test with an enlarged photograph.

The Supreme Court ruled in *Ram Lochan Ahir* v. *State of West Bengal*[73] that, the superimposition test of the skull of the deceased was trustworthy. The appellant, who was the accused in the case, had murdered the deceased and buried his body. Based on the statements made by the accused person, a human skeleton, a knife, and a rubber sole were seized during the police investigation. Section 27 of the Indian Evidence Act, 1872 makes such statements admissible. The retrieved materials, such as garments, rubber soles, and other objects, matched those of the deceased. Furthermore, using scientific tools, the photograph of the deceased was superimposed on the discovered skeletons. The photos matched to the deceased[74].[75]

In *Pattu Rajan* v. *State of Tamil Nadu*[76], the Supreme Court pointed out that it is the settled practice of our courts in India, that they usually do not rely upon opinion evidence as the sole

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69 Vinay Dalvi, "Cops to order facial reconstruction to ascertain identity of murder victim" *Hindustan Times*, July 18, 2023.

70 *Ibid.*

71 Payal V. Bhat, Piyush K. Rao, *et.al.*, "Facial Recognition and Reconstruction" in Deepak Rawtani and Chaudhery Mustansar Hussain (eds.), *Modern Forensic Tools and Devices: Trends in Criminal Investigation* 85-106 (Scrivener Publishing, Beverly, USA, 2023).

72 (1985) 3 SCC 291.

73 AIR 1963 SC 1074.

74 *Ibid.*

75 *See* K. Sita Manikyam and J. Lakshmi Charan, "Forensic Facial Reconstruction in Rape-Cum-Murder Cases in India: An Emerging Arena of Forensic Identification" 10(1) *International Journal of Research and Analytical Reviews* 935-936 (Feb. 2023).

76 *Supra* note 5.

incriminating circumstance, given its fallibility. The same also holds true for the superimposition technique, which cannot be regarded as infallible[77].

In the matter of *Inspector of Police, Tamil Nadu* v. *John David*[78], three distinct branches of forensic science were brought in play for identification of the dead body, *viz.*, DNA fingerprinting, forensic odontology, and superimposition technique. Various parts of the body of the deceased, like skull, torso and certain other limbs were recovered from different places, and the three techniques were applied to get the result. These techniques successfully helped to establish the identity of the deceased victim.

In *Swamy Shraddananda* v. *State of Karnataka*[79], expert conducted the photo superimposition method test on the skull, along with the admitted photograph of the deceased. According to the said expert, anthropometric characters or landmarks of the skull and the superimposed admitted photographs matched[80]. In *Mahesh Dhanaji Shinde* v. *State of Maharashtra*[81], the investigating authorities, *inter alia*, relied on superimposition test for the purpose of identification of extremely decomposed dead bodies of victims. This shows there is no dearth of cases where the facial reconstruction technique has been relied upon by the courts for identification purposes.

VI. Conclusion

Mankind is continuously treading on the path of development, be it technological, economical, etc., and always finding ways to sustain such development. Similarly, modernized ways of commission of crimes must be met with equally modernized methods of crime solving. Forensic science is a field which is continuously developing and simultaneously providing support to any legal system in crime investigations. In our country, slowly and gradually transition has happened from application of traditional investigation techniques to appreciation of scientific techniques as supported by forensic science. Still, there is a long distance which has to be traversed, because we are yet to have specific legal provisions which support and make forensic-science based investigations mandatory. In order to bring the techniques used in crime investigations in India at par with global standards, we need to understand and appreciate the importance of forensic science and forensic expert testimony, in our criminal justice system. Efforts are being made by the current government on these lines. The recently introduced *Bharatiya Nagarik Suraksha Sanhita Bill, 2023*,

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77 *Id.* at 791.
78 *Supra* note 36.
79 (2007) 12 SCC 288.
80 *Id.* at 306. Also See, *Shankar alias Gauri Shankar* v. *State of Tamil Nadu* (1994) 4 SCC 478.
81 (2014) 4 SCC 292.

incorporates a provision which makes it mandatory to hold forensic investigations in case of crimes punishable with imprisonment of more than seven years, i.e., heinous crimes.

Forensic facial reconstruction technique, which has emerged from physical anthropology, is a forensic-science based technique which has not been utilized much in India. Although, it has certainly achieved breakthroughs in various hard criminal cases, like, Nithari killings, Sheena Bora murder case, Neeraj Grover case, to name a few. Perhaps, like many other forensic science techniques or procedures, the evidence obtained through forensic facial reconstruction is also used as corroborative evidence, and not substantive evidence. It has even been said that when everything else fails, then this technique should be put to use, or, facial reconstruction or superimposition (which is a type of facial reconstruction only) must be supported by radiographic, dental, or DNA evidence to be considered a positive identification. The main usage of the forensic facial reconstruction technique is found in the cases of identification of decomposed or disfigured dead bodies. It is highly sought after in incidents of mass deaths site, but is also of assistance in identifying the 'unidentified remains' found at any scene of crime, even ponds, rivers, wells, trains, hotels, houses, buses, etc.

Facial reconstruction is classified into two categories, *viz.*, 2D and 3D techniques. Both these techniques are sub-classified into manual and computer-generated. In modern times, computers have made the entire superimposition process much faster; precision of the technique has also increased several times. One of the primary advantages of this technique is that facial reconstruction is a quick, non-invasive, and efficient procedure that can be done at any time it is required to be done. In India, forensic reconstruction is still at a very nascent stage. For betterment of results of facial reconstruction, India needs to create state-of-the-art infrastructural facilities, as well as competent and experienced forensic professionals in the area of facial reconstruction.

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CYBER WARFARE AND THE PRINCIPLE OF DISTINCTION UNDER INTERNATIONAL HUMANITARIAN LAW: SOME CRITICAL REFLECTIONS

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ABSTRACT

Cyber warfare is one of the emerging realities of the current age. It is termed, by many, as a fifth domain of warfare after land, water, air and space. The cyber space is mostly man-made and provides many unique opportunities to the hostile parties to achieve desired results even without involving any kinetic force. It is the space where anonymity is the rule and to find a causal link of any effect is a bit difficult in comparison to other natural mediums. This medium seriously compromises the principle of distinction that is one of the cardinal principles International Humanitarian Law. The article analyses the application of the principles of distinction in respect of definitions of combatants and military objectives in the contexts of cyber warfare. It concludes that there are many situations during cyber warfare that may compromise the scrupulous application of the principle of distinction.There is a need to develop legal thinking in respect of these grey areas and one aspect of such thinking may be that cyber warfare should not be considered as a means and methods of warfare but as a separate weapon. This may herald new approaches to regulate cyber warfare.

I. Introduction

The computer and internet technology provide immense opportunities to human civilizations. Both states and private actors are now heavily relying on this technology in regulation and smooth functioning of almost all of their activities. Atomic reactors, electricity grids, air, rail and metro traffic controls, banking systems, essential and life-saving facilities at the hospitals are the major examples of use of computer and internet technology. The modern human civilizations have become much accustomed to the computer technology that any disturbance or manipulation in it may be of catastrophic outcome.

Thus, for the states to use the cyber mediums to conduct military operations against the computer systems of adversaries during armed conflict is very attractive option. The bottom

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line of all the uses of computer technology is the flow of data from one computer system to another in a manner designed by human agents. Computer networks programs developed by human agency facilitate this design of flow of data and the stipulated results. The nexus between the human agents and the particular design and result, though, may be remote but it is *sine qua non*. A specific computer programming may use many intermediate automatic steps before bringing the final desired outcome but the initial design by human being is essential. The causation link may be remote or difficult to ascertain but it always exists. A large-scale worldwide physical infrastructure like satellites, routers, undersea cables etc. provide necessary support to this designed data transfer. Thus, any activity in cyber space is the result of human induced designed data transfer from one computer system/s to another computer system/s with howsoever-intermediate steps and facilitated by worldwide infrastructures.

Further, any military operations through cyber medium involve three important factors. First, the human agents operating the data transfer – it includes the persons who are instrumental in inserting or operating the specific computer program into the system. The technicians that are part of the development of such program does not *ipso facto* becomes part of any warfare activities in cyber realm. It does not seem that time has ripen to discuss the stockpiling and production of computer programs into the disarmament debate. The second important factor is the designed data transfer i.e. the program itself. The designed program and the intermediate steps used by it and its spread over other system/s are all the important factors in the cyber realm. The third important factor is the infrastructures that support such data transfer. They include the routers, sea cables, satellites, computer systems etc.

The term 'cyber warfare' is indeed the term of art and its various definitions cover primarily two criteria. First, that it is warfare conducted in the cyber space using programming based on computer network systems. In more simple term, it is the 'warfare conducted in cyberspace through cyber means and methods'.[1]Thus, to kill or capture the persons involved in cyber warfare or to damage or destroy cyber infrastructure by the kinetic force are not the subject matter of cyber warfare. It, however, does not preclude the discussions about who are the persons involved in cyber warfare or to ascertain how the infrastructure supporting the cyber warfare become the military objective.

[1] Nils Melzer, 'Cyber Warfare and International Law' *UNIDIR Resources* 4 (2011), *available at*: https://unidir.org/sites/default/files/publication/pdfs/cyberwarfare-and-international-law-382.pdf(last accessed on 23 August 2023) .

The second criteria restricts it to only those activities that can be the subject matter of International Humanitarian Law (IHL). Thus, as per one definition "cyber warfare" only refers to the small subset of cyber-attacks that do constitute armed attacks or that occur in the context of an ongoing armed conflict.[2]CordulaDroege, defines 'cyber warfare' as 'means and methods of warfare that consists of cyber operations amounting to or conducted in the context of an armed conflict within the meaning of IHL only'.[3] Thus, the term 'cyber warfare' includes only those cyber means and methods of warfare that are conducted in the context of an ongoing armed conflict in the sense of IHL. It does not include cyber criminality or cyber terrorism where IHL does not involve.[4]Going in the same vein, the term 'cyber warfare' for the purposes of this paper, includes the cyber operations conducted in the context of an ongoing armed conflict in the sense of IHL. It does not entertain any discussion on whether a particular cyber operation constitutes a use of force or threat to use of force.

Thispaper first discusses the specificity of cyber world and the reason for their proneness to serve as one of the prominent mediums of warfare. In the next part, it analyses the meaning of the term 'attack' and its possible interpretationswhen transposed to the realities of the cyber warfare. After this, it discusses the principle of distinction in respect of cyber warfare in little detail. This discussion has been undertaken in respect of requirements of being considered as combatants during cyber warfare so as to enjoy combatant privileges and immunities and the understanding about military objectives in respect of cyber world. The last section discusses the conclusion and notes down some suggestions.

II. Specificity of Cyber Space

Cyberspace is a 'globally interconnected network of digital information and communication infrastructures, including the internet, telecommunications networks, computer systems and the information resident therein'.[5]It has been created by human beings and in contrast to the other mediums of warfare like land, air, sea and space that are governed by the law of nature, the cyber space is governed by law of human technology. Whereas in natural mediums, the challenge is to discover the law of nature to ascertain cause and effect relationship but in

[2] Oona A Hathaway, Rebecca Crootof, Philip Levitz, Haley Nix, Aileen Nowlan, William Perdue & Julia Spiegel, 'The Law of Cyber Attack' 100 (4) *California Law Review* 821 (2012).
[3] Cordula Droege, 'Get Off My Cloud: Cyber Warfare, International Law and the Protection of Civilians' 94 (886) *International Review of the Red Cross* 538 (2012).
[4] *Supra* note 1at 21.
[5] *Id.* at 4.

cyber mediums that isresult of inventions, the expertise over invented rules are always subjected to new inventions.

Thus, the cyber space is the space where both the framework as well as the rules are developed by human intellect. It is easier to establish cause-effect relationship in natural mediums like land, sea, air and space than that of cyber space. Hence anonymity is the rule than exception in cyber space and the concrete information about source of any activity is always not easy to ascertain. Moreover, the physical infrastructures like cables, satellites etc. through which the cyber operations are carried are used simultaneously by many actors at a time. Hence, it will be difficult to classify the nature of the use of these infrastructures at any given time.

This uniqueness of the cyber space and the inherent challenges therein are well describedin the following wordsof Nils Melzer:

> "[C]yberspace is the only domain which is entirely man-made. It is created, maintained, owned and operated collectively by public and private stakeholders across the globe and changes constantly in response to technological innovation. Cyberspace not being subject to geopolitical or natural boundaries, information and electronic payloads are deployed instantaneously between any point of origin and any destination connected through the electromagnetic spectrum. These travel in the form of multiple digitalized fragments through unpredictable routings before being reconstituted at their destination. While cyberspace is readily accessible to governments, non-state organizations, private enterprises and individuals alike, IP spoofing and the use of botnets, for example, make it easy to disguise the origin of an operation, thus rendering the reliable identification and attribution of cyber activities particularly difficult."[6]

The computer systems around the globe are most vulnerable to be attacked nowadays. The reasons for its vulnerabilities are many. First, it is very much cost effective and involves almost no kinetic efforts to get the desired results. Even without firing any shot and shedding away the life of a soldier, the enemy's capabilities to sustain war may be weakened to the desired result. Second, the complexity of the cyber operations makes it a desired target at anytime. The aggressor or attacker just needs to know only one or a few weak points in the

[6] *Id.* at 5.

whole system and the desired result could be achieved easily. Commenting on the complexity of the cyber world and the chances of its exploitation, Jack Goldsmith, most vividly said that:

> "Most computers connected to the Internet are general purpose machines designed to perform multiple tasks. The operating-system software that manages these tasks, as well as the computer's relationship to the user, typically has tens of millions, and sometimes more than 100 million, lines of operating instructions, or code. It is practically impossible to identify and to analyse all the different ways these lines of code can interact or might fail to operate as expected. And when the operating-system software interfaces with computer processors, various software applications, web browsers and the endless and endlessly complex pieces of hardware and software that constitute the computer and telecommunications networks that make up the Internet, the potential for unforeseen mistakes or failures becomes unfathomably large."[7]

Third, the benefits that cyber medium gives to the attacker in respect of difficulty in identity and attribution. The cyber space is the space of anonymity that is always puzzled with the precise location from where the impugned cyber activity started. Fourth is the geographical ease to attack any part of the world from anywhere.[8]It provides the combatants to fight the war from the distance and the cyber attackers are mostly emotionally detached from the effects of their activities.[9]These are the primary reasons that make cyber medium now the most desired framework for combat purposes. This has prompted some of the scholars to term cyber space as fifth domain of warfare after land, water, air and space.[10]

The need that states must put in order a technically sound and reliable cyber security regime is now the most urgent task of the hour. However, the challenge to the cyber security during the time of war is more severe than that at the time of peace. The war permits the conduct of military operations against the cyber security of the adversary, provided it has become the military objective. However, the peacetime attacks against cyber security involve the issues related to wrongfulness, jurisdiction and evidence; the concerns of wartime attacks against cyber security are of different character. They mostly involve the determination of nature of

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7 Jack Goldsmith, 'How Cyber Changes the Laws of War' 24(1) *EJIL*, 130 (2013)
8 *Id*. at 131.
9 Michael Grevais, 'Cyber Attacks and the Laws of War' 30(2) *Berkely Journal of International Law* 532 (2012).
10 *Supra* note 1 at 3.

military operations, extent of attack and analysis of outcome within the framework of IHL. Now the next sections would further elaborate some of these issues.

III. Attack in the Cyber Space

Before going further, it is pertinent to discuss the meaning of the term 'attack' in cyber space. The basic idea here is to analyse the notion of attack as it is in IHL and to see whether this definition can be useful to describe the activities in cyber space. It is also important for the reason that most of the protection of IHL are granted against attack.[11] It will further help one to understand what kinds of operations will come under the regulation of IHL.

Article 49 of the Additional Protocol I defines attack as "acts of violence, against the adversary, whether in offence or defense". The phrase 'acts of violence' has created much controversy in respect of the non-kinetic nature of the cyber-attacks. Cyber-attacks are basically the actions taken through the use of computer networks to disrupt, deny, degrade or destroy information in computers and computer networksand it also includes the damage to the computer network themselves.

However, it has not always been the case where only kinetic nature and inbuilt violence of the object has been considered as attack for the purposes of IHL. The example of chemical and biological weapons are very pertinent in this respect. These weapons are non-kinetic and free from inbuilt kinetic characterbutthere use has been recognized as attack for long because of their violent outcome. In a similar manner, the cyber-attacks could also be termed as attack by considering their outcome. However, this approach further raises two questions based on the probable outcome of the cyber-attacks. The outcome of the cyber-attacks may be sometimes violent and sometimes may not be violent. They may cause destruction, damage (violent effect) or they may only neutralize (non-violent outcome) the functions of some systems. Thus the issue emerges what kinds of outcome of cyber operations can be considered as attack. Primarily there are two kinds of approaches supporting each stands.

Michael N. Schmitt has advocated the position in 2002 that only such cyber operations could be termed as attack under IHL that necessarily have violent outcome.[12]He has stipulated that the principle of distinction contained in article 48 of the Additional Protocol I doesnot

[11] Additional Protocol I to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977. See articles, 12 (1), 41 (1), 44(3) 51 (2), 52 (1).

[12] Michael N. Schmitt 'Wired Warfare: Computer Network Attack and the Jus in Bello' 84(846) *International Review of the Red Cross* 377-378 (2002).

encompass all kinds of military operations and thus some kinds of military operations may remain outside from the scope of this principle, like psychological operations against civilians.He further stressed that article 48 only prohibits the attack on civilians and civilian objects and does not prohibit targeting them in any other manner that does not qualify as an attack.[13]

By establishing these points, he further defined attacks as the activity that must have violent consequences and thushe does not accept any cyber operations that do not have violent consequences as an attack. He was of the view that all other cyber operations are not prohibited and thus may be used without inviting any IHL inquiry. He further termed itpermissive approach probably in a sense that it permits all those cyber targeting that are not violent in consequences.

Knut Dorman propagated the second approach and advocated that not only the violent outcome but also any neutralization of the object would also be termed as attack under IHL.[14] He developed his argument onthe definition of military objectives contained in article 52(2) of Additional Protocol I. Military objective is one "whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage".[15]Knut Dorman pointed out that:

> "The fact that CNA does not lead to the destruction of the object attacked is irrelevant. In accordance with Art. 52(2) of AP I only those objects, which make an effective contribution to military action and whose total or partial destruction, capture or neutralization offers a definite military advantage, may be attacked. By referring not only to destruction or capture of the object but also to its neutralization the definition implies that it is irrelevant whether an object is disabled through destruction or in any other way."[16]

However, criticizing both the versions for falling short of satisfactory interpretation of the notion of attack in context of cyber operations, Nils Melzer advocated that thrust should be to ascertain whether the cyber operations constitute part of the hostilities within the meaning of

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[13] *Id.* at 378.
[14] Knut Dormann, 'Applicability of the Additional Protocols to the Computer Network Attacks' (2004) 4, *available at*: https://www.icrc.org/en/doc/assets/files/other/applicabilityofihltocna.pdf(last visited on Aug. 23, 2023).
[15] *Supra* note 11, art. 52(2).
[16] *Supra* note 14 at 6.

IHL.[17] Any cyber operations if conducted in nexus with the armed conflict fall under the ambit of armed conflict irrespective of its nature to becharacterized as attack in standard IHL formulations. For this, he pointed out that the basic rule of distinction is formulated in terms of military operations and not in the term of attacks.

CordulaDroege,while supporting the point that other military operations that though may not strictly be termed as attack are not immune from IHL scrutiny, indicated thebasic problem with Melzer's theory that it fails to answer what would strictly be fall under the concept of hostilities.[18]Further, while elaborating on the concept of attack, she concluded that attack should also encompass such operations that disrupt the functioning of objects without physical damage or destruction, even if the disruption is temporary.

Rule 30 of Tallinn Manual defines cyber-attacks as "a cyberoperation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects".[19]The most of the experts at the Tallinn deliberations were also of the view that damage includes the loss of functionality if it requires the replacement of physical component.[20]Though there was disagreement also about the extent of repair,Michael N Schmitt while rewriting his view in 2014 observes that the "loss of functionality would include situations requiring reloading of the operating system or any software essential to operation, but would not include replacing data that was merely stored on the system."[21] Moving the debate further, CordulaDroege highlighted in the most succinct way the notion of loss of functionality and the related question in the following words:

> "However, not all cyber operations directed at disrupting of the functioning of infrastructure amount to attacks… the difference lies in the fact that in some cases it is the communication function of cyber space alone that is being targeted; in other cases, it is the functioning of the object beyond cyber space in the physical world. While interference with cyber systems that leads to disruption in the physical world

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17 *Supra* note 1 at 27. He states that "the applicability of the restraints imposed by IHL on the conduct of hostilities to cyber operations depends not on whether the operations in question qualify as "attack" … but on whether they constitute part of the "hostilities" within the meaning of IHL."

18 *Supra* note 3 at 555.

19 Michael N. Schmitt, *Tallinn Manual on the International Law Applicable to Cyber Warfare*106 (Cambridge University Press, Cambridge, 1st ed., 2013).

20 *Id.* at 108.

21 Michael N Schmitt, 'Rewired Warfare: Rethinking the Law of Cyber Attack' 96(893) *International Review of the Red Cross* 203 (2014).

constitutes attacks, the question of interference with communication systems such as email systems or the media is not entirely solved."[22]

Thus, now a days, there is wider agreement among the scholars that disruptions of functionality of some higher degree must also be termed as damage and thus comes under the IHL's inquiry if happened in nexus with the armed conflict. The current literature on the subject has moved forward from the original debate between Knut Dormann and Michael N Schmitt about the requirement of violent consequences of any cyber operation. However, there seem to be disagreement about the extent of damage of functionality and there are attempts to measure this threshold vis- a-vis the efforts that are necessary to restore back the original functionality.

Thus, what the functionality test does at last is to depend the applicability of IHL on the technical requirement that is needed to restore the original function. This may further cause problem with the development of new technologies because some technically sound countries may achieve functionality without doing something extraordinary and for some countries the restoration of functionality may take some arduous attempts. Given the nature of the cyber operations, it would also not be an easy task to precisely determine the efforts needed to restore functionality and to decide on this basis whether particular cyber operations would fall under IHL scanner or not.Thuseven the functionality is not immune from further problems of understanding.

IV. The Principle of Distinction in Cyber Space

The principle of distinction limits the options of attack for the parties to the conflict. It requires that only combatants and military objectives would be the target of any military operation and civilians and civilians objects must not be subject to attack. It is one of the manifestations of the basic principle of laws of armed conflict that any conflict must be conducted by limited means and the rights of the conflicting parties to adopt the means of injuring the enemy is not unlimited.[23] The International Court of Justice has termed it as one of the cardinal principle of IHL.[24]

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22 *Supra* note 3 at 560-561.

23 Robert Kolb and Richard Hyde*An Introduction to the International Law of Armed Conflict,* 125 (Hart Publishing 2008)

24 *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*[1996] ICJ Rep. 226, para 78.

The principle of distinction, in its most precise and clear sense, has been stated under article 48 of the Additional Protocol I of 1977. It states that:

> "In order to ensure respect for and protection of the civilian population and civilian objects,the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."[25]

The protocol further positively defines the terms 'combatants' and 'military objectives' and prescribes certain conditions to be fulfilled for being characterized as such. However, the terms 'civilians' and 'civilian objects' have been defined negatively and all those persons who are not combatants are termed as civilians and all those objects that are not military objectives are considered as civilian objects.

The basic idea behind the negative definitions of the terms 'civilian' and 'civilian objects' is to avoid any gap in the protection given by law.There should be only two categories and all those persons that are not combatants and all those objects that are not military objectives must be protected from military operations. In case of any doubt, the civilian nature of the individual or objectwould prevail.[26]

These definitions are immune from the methods of warfare and they must apply with all their sanctity in case of any cyber warfare. However, due to the unique nature of cyber warfare, the application of these principles needs a fresh insight in various factual situations. The paper now discusses these concepts in respect of cyber warfare.

Combatants in Cyber Warfare

The characterization of any person as combatant makes such individual immune from any liability for lawful violence committed by that person during armed conflict and it also entitlessuch person tothe status of prisoner of war if caught.Combatants have the right to participate in the hostilities and they are required to distinguish themselves from the civilian population during attack or while making preparation to the attack.[27]IHL providesmainly three categories of persons that may be termed as combatants.

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[25] *Supra* note 11, art. 48.
[26] *Id.*atart. 50 and art. 52(3)
[27] *Supra* note 11, art. 44(3)

First, the members of the armed forces of the parties to the conflict, other than medical personnel and chaplains,and the members of the militias or volunteer corps forming part of the armed forces. Second, themembers of other militias and volunteer corps could also be considered as combatants if they fulfill the requirements of – being under responsible command, carrying arms openly, fixed distinctive signs recognizable at distance. These three requirements are not specifically mentioned in respect of the first category of combatants only for the reason that the members of the armed forces and other volunteer corps forming part of such force are always supposed to follow these requirements. This becomes very specific by article 44(3) of the Additional Protocol Ithat requires that all the 'combatants are obliged to distinguish themselves from the civilian population while they are engaged in attack or a military operations preparatory to an attack.[28]Thus, the members of the armed forces are also required to follow these requirements if to be considered as lawful combatant under IHL.Even in case of guerrilla warfare where surprise attack is the norm, combatants are required always to carry arms openly during each military operation or preceding the launching of an attack in which he is to participate.

Third category is the category of *levee in masse*. According to this, the inhabitants of non-occupied territories who spontaneously take arms on the approach of the enemy are also considered as combatants provided they carry arms openly and respect the laws and customs of war.[29]

However, if one applies these requirements in context of cyber warfare, the following problematic areas may emerge. First, how the requirement of carrying arms openly should be understood? Nils Melzer has suggested that this requirement may be fulfilled "when the cyber operation are not conducted by feigning protected, non- combatant status within the meaning of the prohibition of perfidy"[30]. Talinn manual summarily neglects this requirement by observing that 'the requirement to carry arms openly has little application in the cyber context'.[31]

However, this requirement is the part of the basic principle of distinction. The requirement of carrying arms openly atleast during operations or during immediate preparation before attack

[28] *Id.*atart. 44(3).
[29] Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) of 12 August 1949, art. 4A (6).
[30] *Supra* note 1 at 34.
[31] *Supra* note 19 at 100.

helps the adversary locate the exact points of origin of violence so that counter attacks can avoid unnecessary civilian causalities. The insertion of this term has a definite purposive meaning and not a mere addition of figurative words. Thus, it does not seem proper to declare this requirement meaningless.

It is the duty of the combatant to distinguish itself from the civilian and carry arms openly. Primarily, it seems wrong to neutralize this requirement at the altar of convenience or technology. The basic philosophy of IHL that any new technology if it is to be used in the armed conflict must correspond itself to the requirement of IHL. The burden of adjustment lies towards the technology and not on the IHL. The debate may be on the mechanism of the applicability but it is not proper to reject summarily the applicability of any IHL requirement in respect of some technological advancement. The same sort of obligation has also been stated in article 36 of the Additional Protocol I in the following words:

> "In the study, development, acquisition or adoption of a new weapon, means or methods of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of International law applicable to the High Contracting Party."[32]

Thus, the requirement of carrying arms openly could be completed in the cyber world by designating a specific IP addresses from where the cyber attack is emanating and making all the computer systems that are participating in such military operations explicit on the cyber web. This argumentation may seem absurd and as observed by Dinniss[33]may amount to putting computers directly on the target by the adversary. If it is not possible in advance, atleast when the cyber-attack starts all the IP addresses from where it is emanating must be explicitly manifested. The camouflage use of any civilian computersfor launching an attack must be considered as human shield in the language of IHL.

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[32] *Supra* note 11, art. 36.

[33] Heather Harrison Dinniss 'Participants in Conflict – Cyber Warriors, Patriotic Hackers and the Laws of War' in Dan Saxon (ed.) *International Humanitarian Law and the Changing Technology of War* 257 (MartinusNizhoff Publishers 2013). The author observes"requiring a computer to be marked as a military computer is tantamount to placing a target on any system to which it is connected. The internet is constantly searched or crawled by millions of software boat searching for military designated IP addresses would be able to find them in a matter of minutes. Once identified, the only way to effectively move the computer or system out of range is to disconnect it, a solution which is likely to disrupt its normal running or usefulness."

All the persons who are engaged in the cyber-attack must always bear the uniform or any distinctive signs. This is directly important in the cyber warfare that are fought in close proximity with the adversary but its importance also remains intact when the person operating the cyber warfare are sitting miles away from the battlefield. This will help the respective operators to distinguish themselves so that any attack in the form of physical violence against them distinguish between civilians and the respective combatants.

The idea behind this requirement is to show explicitly who the combatants are during any operation so that unnecessary causalities to the civilian population may be warded off. The requirement of being under the responsible commandmust be fulfilled and all the cyber combatants must be under responsible command. The private hackers and individual cyber patriots etc. must not be accorded the status of combatants unless they otherwise become eligible on some other grounds, like *levee en masse*.

The phenomenon of *levee en masse* indicates the general uprising of the population to resist the invading army from their territory. This is a people's uprising to take up cyber-attacks against the adversary in order to resist its progress. Though, in its classical application, it does not contemplate any sort of military operations deep inside the enemy territory but in the context of cyber warfare, it is not reasonable to curb the effects of such cyber operations only towards the approaching army. Though some authors seem to argue for application of this concept even in cases of non-physical invasion of the territory by the enemy[34] but this should be understood in the sense of physical invasion of the enemy because this is the basic condition on which its application depends. The majority of the experts in their deliberation over Tallinn manual also support this view.[35]

Military Objectives in Cyber Warfare

Article 52(2) of the Additional Protocol Idefines the term 'military objectives' as follows:

> "[M]ilitary objectives are limited to those objects which by their nature, location,purpose or use make an effective contribution to military action and whose

[34] *Supra* note 1 at 34. The author observes "indeed in cyber warfare, territory is neither invaded nor occupied, which may significantly prolong the period during which a *levee en masse* can operate".

[35] *Supra* note 19 at 103.

> total or partial destruction, capture or neutralization, in the circumstances ruling at the time,offers a definite military advantage."[36]

This definition lays down two conditions to be complied simultaneously for categorizing any attack as directed against military objectives. First, an attacked object must effectively be contributing to the military capacity of the adversary and second, the attack must offer a definite military advantage.There must be a close nexus between potential target and military action and the definition proposed that this nexus should be established in relation to the nature, location, purpose and use of the object.

These four yardsticks are the very source of conflict in the realm of cyber warfare. Tallinn Manual Rule 39 specifically states that "an object used for both civilian and military purposes- including computers, computer networks and cyber infrastructure – is a military objective". The most of the cyber infrastructure are the so-called 'dual use' infrastructure. Both civilians and military use the cyber infrastructure simultaneously and the cyber infrastructures are largely interconnectedworld wide. This rule makes all such infrastructure as military objective because they are dual use character.

Though in traditional warfare, it is easier to classify the exact nature and use of any infrastructure at any given point of time. However, itbecomes a difficult or complex task in respect of cyber infrastructure. At any given time of cyber-attack, the millions of civilian users are also active on cyber world using the same infrastructure. This multiplies the chances of unimaginable spillover of the effects of the cyber war to the civilians.There is a potential and real danger that any part of the cyber infrastructure could be targeted.[37] Depicting a very grim and hostile situation where the whole cyber infrastructure could be turned into military objective, CordulaDroege observed:

> "In a world in which a large part of civilian infrastructure, civilian communication, finance economy, and trade rely on international cyber infrastructure it becomes all too easy for parties to conflicts to destroy this infrastructure. There is no need to argue that a banking network is used for military action, or that an electrical grid is dual use. Disabling the major cables, nodes, routers, or satellites that these systems rely on will

[36] *Supra* note 11 atart. 52(2).
[37] *Supra* note 3 at 563.

almost always be justifiable by the fact that these routes are used to transmit military information and therefore qualify as military objectives."[38]

Though, Tallinn Manual rejects such possibility by terming it 'purely theoretical at the present time' but it accepts the possibility of limited attack against certain discrete segments of cyber infrastructure.[39] Considering the possibility that a computer programmecould beinjected through one or another route, primarily it seems, as argued by Droege, that all possible routes of military information will become military objective.[40]

But such possibility must also correspond to the requirement of proportionality and precaution. However, it seems impossible to realise that any such contingency would arise where the world-wide destruction of cyber infrastructure will be justified on the ground of proportionality and precaution. Any such possibility would also seriously compromise the principle of neutrality that commands from the warring parties that there adoption of means and mechanism of warfare must not do any harm to any third country or its inhabitants that are completely neutral to that warfare.It also challenges the prohibitions imposed against indiscriminate attack. It means one can not use such methods and means of warfare that cannot be directed at a specific military objective.[41]Such possible extent of cyber warfare would also come under these prohibitions.

Despite this remote possibility that whole cyber infrastructure can become military objective, the problematic dual use characteristics of cyber infrastructure always presents potent question of determination of its exact nature. The basic question how to define accurately and precisely the military objectives in cyber realm is still evasive to any concrete answer.

V. Conclusion and Suggestions

The threat to cyber security of any country through cyber means is now a reality. This threat multiplies at the time of armed conflict for the reason that armed conflicts permit the lawful use of force against the military objectives.IHL regulates the situation of armed conflict and this paper has attempted to understand the applicability of IHL to the situations of cyber warfare.

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38 *Id.* at 564.
39 *Supra* note 19 at 136.
40 *Supra* note 3 at 564.
41 *Supra* note 11, art. 51 (4) (b).

Cyber warfare throws many challenges like understanding about cyber-attacks, principle of distinctions and proportionality etc. There are problematic areas where one gets perplexed about how to apply the established principles of IHL to the situations of cyber warfare. These areas may briefly be mentioned as requirement from combatant to distinguish themselves, need to carry arms openly during the hostility or preparation preceding thereof, determination of proportionality and determination of military objectives etc. There are problematic areas of application but it does not mean that IHL will not apply to the situation.

IHL as *lexspecialis* will always remain applicableduring the situations of armed conflict and any attack through cyber means that have nexus with the ongoing armed conflict will always be under the gaze of IHL. Even in the challenging situations, where the application of direct provision of IHL is not ensured because of definitional and technological issues, the protection under the Martens Clause will always remain applicable. In all those conditions where the direct applicability of IHL principles are in question, the Martens clause provides the protection to the individuals as per the notions of humanity and public conscience.

However, there is also a need to further develop international legal thinking to the gray areas of application of particular IHL norms to the situation of cyber warfare. There is no doubt that emphasizing too much on established IHL conventions and treaties may result in extending them too much to a new reality that may ensue the apprehension of encrypt incoherency in such extension. Cyber warfare is definitely a warfare through new mediums, through new methods and through new instruments. It is very difficult to say that when the Geneva Conventions and the Additional Protocols were being negotiated, the realities of the cyber warfare were even envisioned.Thus, there is a need to separately look at the specific IHL issues highlighted by cyber warfare.

Tallinn Manual is an attempt in this direction, but it also does not satisfactorily answer all the relevant issues.There is also an issue whether the cyber warfarecan be conducted as per the IHL principlesat all. It means whether it is inherently possible to conduct warfare through cyber means as per the strictures of IHL principles. This line of thought is important because if there are inherent impossibilities of the precise application of IHL principles, then it is better to consider cyber warfare not as a means and methods of warfare but as a weapon that may be subjected to prohibition or regulation under specific weapons' convention, particularly a new one.This area of study is quite new and still to find its own place in the

academic discourse. The abovementioned points are some important concerns that may further affect the development of this area and thus regulate the cyber warfare in better way.

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INTERPLAY OF ARTIFICIAL INTELLIGENCE AND TECHNOLOGY IN THE INSOLVENCY AND BANKRUPTCY ECOSYSTEM: AN ANALYSIS

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ABSTRACT

An effective and robust system of insolvency is instrumental for a nation's economic growth and stability. For decades India had fallen behind the global trend but in 2016 India took an unprecedented step by introducing Insolvency Bankruptcy Code,2016 to improve its domestic Insolvency regime. With the adoption of a strong, contemporary, and comprehensive bankruptcy framework, India has made a significant advancement in the domain of insolvency and bankruptcy legislation. Each major development in the area of law has been nothing short of revolutionary so as the interface of Artificial Intelligence and Law. The world today is not the one we were born into. The way we communicate, conduct business, shop, live, and work has altered as a result of technology in recent years. It is now an essential component of existence and has assimilated into our daily routine. The government and the Insolvency and Bankruptcy Board of India have been working continuously to speed up the insolvency resolution and liquidation procedure in India. With the aid of technology and with assistance of Artificial Intelligence, it can help to reduce the delay in corporate insolvency resolution process, unnecessary pilling up of the cases before the adjudicating authorities, and can make the entire process much simpler and clearer for all the interested stakeholders involved in the process. The aim of the article is to provide an insight into the future and examine how technology can change the way when insolvency rules are applied to resolution process and liquidation stages enhancing the efficiency of insolvency professional swhich can aid in obtaining desired outcomes.

I. Introduction

"*…AI is present to provide a facilitative tool to judges in order to recheck or evaluate the work, the process, and the judgments*"

-Justice (Dr). D.Y Chandrachud

India has frequently been criticised for falling behind the other nations in the development of its corporate economy by failing to follow trends in the western countries.[1] In line with the vision of

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India's prime minister Narendra Modi, various initiatives had been undertaken so as to improve the international image of India's corporate economy by introducing ground-breaking legislation that will go a long way in paving the path for economic growth and development in the country. India had made a substantial improvement in the corporate sector's legalprocedural since 2014. The laws which were in existence to tackle the insolvency and bankruptcy had aged and grown obsolete, impeding the expansion and development of businesses.[2] Significant improvements to the financial and corporate ecosystem have been made since the new government was elected in 2014, including the implementation of the goods and services tax, the amended Arbitration and Conciliation Act, labour reform, and, most importantly, the Insolvency and Bankruptcy Code, 2016.

The introduction of the Insolvency and Bankruptcy Code, 2016 (herein after referred to as Code)has been considered as the most important economic reform in the history of Indian legislative framework as it has revamped the entire credit ecosystem of India.[3]It marked a paradigmshift from the erstwhile existing laws which were highly fragmented, ineffective, and insufficient to address and resolve the domestic Insolvencies.[4] The Code provides a consolidated mechanism for resolving the corporate Insolvency in India. By separating the business and judicial components of the insolvency and bankruptcy procedure, it aims to increase efficiency within the insolvency and bankruptcy law framework. The legislative framework governing the liquidation, rehabilitation, and rebirth of failing commercial companies has been significantly reinforced, which has raised India's ranking on the ease of doing business index. The Code switches from the previous strategy of "debtor in possession" to "creditor in possession"embarking a significant change.

Insolvency and restructuring could be compared with the corporate version of critical care, bringing together a team of specialists to provide certain businesses a palliative care while helping the others on the road to recovery.[5]The procedure of insolvency involves the application of established laws, rules, and procedures to address unique conditions that vary between companies. This typically entails the management of extensive collections of corporate papers. The integration of rules and variables renders this domain very suitable for the use of artificial intelligence in the realms of data acquisition, categorising, and procedural streamlining.And just as in medicine, advanced technology is transforming how critical care is delivered, identifying key challenges, and smoking guns and

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1 Ankeeta Gupta, "Insolvency and Bankruptcy Code 2016: A Paradigm Shift within Insolvency Laws in India" 36 *The Copenhagen Journal of Asian Studies*76 (2018).

2 Rajeswari Sengupta (*etal*), Evolution of the Insolvency Framework for Non-financial Firms in India Indira Gandhi Institute of Development Research (June, 22, 2016). *Available at*: http://www.igidr.ac.in/pdf/publication/WP-2016-018.pdf (Last visited on 11th August 2023).

3 Saumy Kanti Gosh and Saket Hishikar, "Economic and Financial Impact of IBC" *Quinquennial of Insolvency and Bankruptcy Code, 2016* 109(Insolvency and Bankruptcy Board of India, New Delhi, 2021).

4 M.S Sahoo, "A Journey of Endless Hopes" Insolvency and Bankruptcy Code a Miscellany Perspectives 4 (Insolvency and Bankruptcy Board of India, New Delhi,2019).

5 Joanna Goodman "Artificial Intelligence in Insolvency Work: Transforming Critical Care." Euro Fenix 8 (2018). *Available at*file:///C:/Users/Sandhya/Downloads/SR-EU-2018_AUTUMN-AI%20(2).pdf. (last visited on 10th may 2023).

predicting outcomes more accurately to improve a patient's chances, manage uncomfortable procedures and terminal cases with care and efficiency while, importantly, providing pain relief throughout[6].

What is Artificial Intelligence?

Before proceeding to deliberate upon the role of technology and Artificial Intelligence (AI) in the Insolvency and Bankruptcy ecosystem, it is important to discuss what do we understand by the concept of Artificial Intelligence?John McCarthy, known as the "father of AI,"coined the term "Artificial intelligence".[7]

In 1848, an anonymous author used the same word in legal scholarship to lament the ineffectiveness of the jury system.[8]The middle of the 1950s marked the beginning of AI as a distinct topic within the discipline of computer science.[9]It is generally agreed that John McCarthy, Marvin L. Minsky, Nathaniel Rochester, and Claude Shannon first used the term "artificial intelligence" in a research proposal they wrote in August 1955.[10]One of the pioneers of the field, Marvin Minsky, defined AI as "the science of making machines do things that would require intelligence if done by man" in 1968.

There are various ways to define the term, but one place to start with is by thinking about the kinds of issues that AI technology is frequently applied to solve the problem. In that vein, we could characterize AI as the use of technology to automate processes that"normally require human intelligence".[11]This definition of AI stresses upon the fact that it is typically employed to automate certain kinds of tasks that are deemed to include intelligence when performed by humans.[12] Bruce and Thomas stated the study of cognitive processes through the conceptual

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6 *Ibid.*

7 S.L Andresen, "John McCarthy: Father of AI" 17 IEEE *Intelligent system* 84 (2002) available at: https://ieeexplore.ieee.org/stamp/stamp.jsp?tp=&arnumber=1039837. (Last visited on 31st August 2023).

8 Alzbeta Krausova, "Intersection between law and Artificial Intelligence" 27 *International Journal of Computer*55-56 (2017).

9 Pamela Mc Corduck, *Machine Who Think* (A.K Peters Ltd, 2004) (describing history surrounding the Dartmouth Conference and its lasting effects in Al community).

10 Raja Kamal Ch and Biju M, "The Wave of Innovation Artificial Intelligence and IP rights" 12 *International Journal of Aquatic Science*863 (2021).

11 Artificial Intelligence, English Oxford Living Dictionaries, https://en.oxforddictionaries.com/definition/artificial_intelligence https://perma.cc/WF9V-YM7C.(lastvisited on 12th May 2023);*See also* Stuart Russell & Peter Norvig*, Artificial Intelligence: A Modern Approach* (Pearson,3rd Ed. 2010).

12 Sonia K. Katyal, "Private Accountability in the Age of Artificial Intelligence", 66 *UCLA Law Review*59(2019).

frameworks and toolkits of computer science is what we comprehend when we talk about artificial intelligence.[13]

Playing chess, solving calculus problems, discovering new mathematics, comprehending short stories, learning new concepts, analysing visual scenes, diagnosing diseases, and so on are all examples of the kinds of intelligent behaviour that fall under the umbrella of artificial intelligence.[14]So, to simply describe an intelligent machine that possesses the capacity for independent thinking, comprehension, and action, as well as the ability to emulate selected human behaviours, may be characterised as Artificial Intelligence.

II. Interaction of Artificial Intelligenceand Law

After providing a fundamental overview of artificial intelligence, it is time to move on to the specific applications of AI in legal practice. At its core, the concept of "AI and law" refers to the implementation of computer and mathematical processes with the goal of rendering the legal system more comprehensible, tractable, helpful, accessible, and predictable.[15]

Since the middle of the twentieth century, researchers have actively applied concepts from computer science and artificial intelligence to the field of law.[16]Gottfried Leibniz, the co-inventor of calculus and a lawyer by profession, was an early proponent of applying mathematical formalisms to legal problems.The trajectory of AI development in the legal field has nearly tracked that of the field as a whole.[17]

Knowledge representation and rule-based legal systems were early priorities for AI in law, as they were for AI in general.[18]However, like the rest of the AI field, the focus in AI and law has shifted away from knowledge-representation technique towards machine-learning-based approaches beginning around 2000.[19]

Interplay of Technology and AI in Insolvency Ecosystem

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[13] For one of the earliest discussions of AI and law, See Bruce G Buchanan, and Thomas E. Headrick "Some Speculation About Artificial Intelligence and Legal Reasoning" 23 *Stanford Law Review* (1970) See Also; Gardner, Law Applications, in the Encyclopaedia of Artificial Intelligence 456 (S. Shapiro ed. 1989).

[14] Edward L. Rissland, "Artificial Intelligence and Law: Stepping Stones to a Model of Legal Reasoning" 99 *The Yale Law Journal*1963(1990).

[15] Dickfos, Jennifer (et al),"The Impact of Artificial Intelligence on the Insolvency Profession" *Insolvency Law Bulletin* (2017).

[16] Frans Coenen and Trevor Bench-Capon, "A Brief History of AI and Law". *Available at*https://cgi.csc.liv.ac.uk/~frans/KDD/Seminars/historyOfAIandLaw_2017-12-12.pdf. (Last visited on 15th May 2023).

[17] *Ibid.*

[18] Christopher Collins, Denis Dennehy, Kieran Conboy, Patrick Mikalef, "Artificial intelligence in information systems research: A systematic literature review and research agenda" 60 *International Journal of Information Management* 2 (2021)

[19] *Ibid.*

Technologyis often a critical element that enables a bankrupt company to turn itself around and become a competitive business, although it is often the most overlooked transformation aspect in bankruptcy.[20]Since we are living in a tech driven era, technology plays a very important role in our society.Artificial intelligenceis rapidly changing the way litigation and bankruptcy cases are being handled. On high-volume document-review cases, AI systems are being used to improve the efficiency and accuracy of document analyses.[21] The world today is the not the one we were born into. The way we communicate, conduct business, shop, live, and work has altered as a result of technology in recent years. It is now an essential component of existence and has assimilated into our daily routine. Technology plays a very vital role especially after the covid outbreak which has shifted everything on online mode. Everything today is at the click of our hand from ordering food and grocery to attending online lecture.

Use of Technology and AI in Insolvency Process

The Insolvency and Bankruptcy Code, 2016 fundamentally re-oriented the Indian financial distress resolution framework and has driven a paradigm shift towards institution a lising a predictable, market-led, and time-bound insolvency and bankruptcy system in India.[22] However, evidences show that legal proceedings under the Code are being plagued by prolonged delays, which is antithetical to the Code's objective and purpose.[23] Informational asymmetry and lack of access to reliable financial information is an observed causeof delay in this context and to address this,Code builds measures like reporting requirements and mandates Information Utilities (IUs) to boost informational synergies between various stakeholders.[24] Yet it appears that these measures have not proved sufficiently efficacious.[25]

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[20] Shannon Stucky Pritchett and Rachel Chesley, Rethinking Bankruptcy the importance of focusing on Talent, a*vailableat*:https://www.fticonsulting.com/insights/articles/rethinking-bankruptcy-importance-focusing-technology (last visited on 18th February 2023).

[21] Jarrod Munro and Emily Jarman, The Impact of AI on the Insolvency Industry" *available at*: https://www.cornwalls.com.au/the-impact-of-ai-on-the-insolvency-industry/ (last visited on 21st August 2023)

[22] Chatterjee, Sreyan (et al), "An Empirical Analysis of The Early Days of The Insolvency and Bankruptcy Code, 2016", 30*National Law School of India Review* 95-97 (2018), *available at:* https://www.jstor.org/stable/26743938 (last visited on 18th February 2023)..

[23] M.S Sahoo and Anuradha Guru, "Indian Insolvency Laws" 45 *VIKALPA The journal of decision making*72-75 (2020).

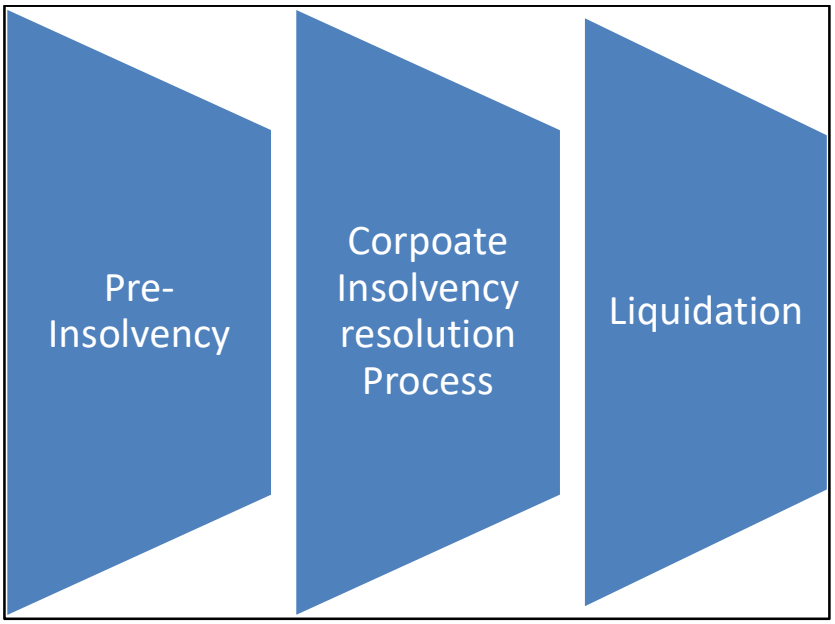
[24] Ankeeta Gupta, "Addressing Challenges of InformationAsymmetry in Financial Sector using Information Utility" 50 *University of Western Australia Law Reviewavailable at*: https://www.able.uwa.edu.au/__data/assets/pdf_file/0009/3687921/3.-Addressing-Challenges-of-Information-Asymmetry-in-Financial-Sector-Using-Information-Utility_.pdf (last visited on 19th August 2023).

[25] Debanshu Mukherjee and Aditya Ayachit, "Delays and Information Asymmetries: Can Block Chain Help?, 5th October 2021, *Available at*:https://vidhilegalpolicy.in/research/ibc-delays-and-information-assymetries-can-blockchains-help/. (last visited on 15thFebruary 2023).

Due to the need for concerned parties (like resolution professionals and creditors) to run from pillar to post in order to determine the financial position of the corporate debtor and obtain pertinent information regarding its debts and defaults, information asymmetry and lack of access to reliable financial information about the corporate debtor that is undergoing insolvency are frequently a major cause of procedural delays.[26]

Technology Impacting Three-stages of Insolvency.

Figure-1- Three Stages of Insolvency



Source: https://ibclaw.in/blog/

Pre-Insolvency

Due to the lengthy and demanding nature of the insolvency procedure in India, elaborated strategies and papers must be created. Predicting insolvency at an early stage or pre-insolvency stage is one feasible option for speeding up the process.[27] Investors who can anticipate a company's collapse will be in a better position to manage risks. Prior to technological improvements, experts used to make predictions about insolvency based on a company's financial condition. The introduction of AI, however, has been a breakthrough in

[26] *Supra* note 27.

[27] Jane Colstone and Christian Toms "The Role of Artificial Intelligence and Technology in Global Bankruptcy and Restructuring Practices. *available at*: https://brownrudnick.com/article/insol-international-the-role-of-artificial-intelligence-ai-and-technology-in-global-bankruptcy-and-restructuring-practices/ (last visited on 18th August 2023).

the assessment of insolvency because it has the power to completely transform the procedure in terms of time and resource efficiency.[28]

During the evaluation of insolvency, corporations accumulate enormous quantities of data to aid them in meeting the demands of their customer base and attaining the maximum level of profitability.[29] The management of huge amounts of data, characterised by its substantial volume, rapid velocity, and diverse variety, commonly referred to as Big Data, necessitates a significant investment of time when undertaken by human agents.[30] In contrast, AI algorithms have been specifically engineered to effectively handle databases of such magnitude within a significantly reduced timeframe and resource allocation, circumventing the otherwise extensive demands. In addition, experts in the field of AI are incorporating various machine learning techniques, such as logistic regression, support vector machine, lasso regression, bagging, and decision tree, to effectively predict insolvency.[31]

CIRP (Corporate Insolvency Resolution Process)

The corporate insolvency resolution process is initiated under the code when the corporate debtor or creditors make default in payment.[32] It involves various procedure from filling of application, initiation moratorium period, formation of committee of creditors, appointment of resolution professionals and so on. It is exhaustive process which involves big data which is generally handled by the resolution professions. The induction of AI in Corporate Insolvency Resolution Process (CIRP) can significantly reduce the time consumption as AIs are designed to manage such Big Data with ease. AI can help Resolution Professionals in quick and firm decision-making by evaluating the Key Performance Indicators of a business.[33] AI is able to find connections between performance indicators and insolvency

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[28] Sakshi Pandey and Harshvardhan Singh Sikarwar, Placing the ArtificialIntelligence on the Insolvency Spectrum.*available at*:https://ibclaw.in/placing-the-artificial-intelligence-on-the-insolvency-spectrum-an-analysis-by-sakshi-pandey-and-harshvardhan-singh-sikarwar/ (last visited 15thFebruary 2023).

[29] Tibor Kezelj and Rudlolf Gruenbichler "A Systematic Literature Review on Corporate Insolvency Prevention using Artificial Intelligence Algorithms" 16 *Journal of Strategic innovation and sustainability* (2021).

[30] Franco Varetto "Genetic Algorithms Applications in Analysis of Insolvency risk" 22 *Journal of Banking and Finance*15 (1998).

[31] *Ibid.*

[32] Insolvency and Bankruptcy Code,2016 s. 6. This section states out the person who can initiate the CIRP. Where any corporate debtor commits a default, a financial creditor, an operational creditor, or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided under this Chapter.

[33] Samal, Manohar. (2022). International Insolvency, Bankruptcy Law and Artificial Intelligence. *Available at*: https://www.researchgate.net/publication/359082201_International_Insolvency_Bankruptcy_Law_and_Artificial_Intelligence (last visited on 15th August 2023).

risk, which can be used to warn organisations before they fail.[34] These AI algorithms might be used by investigators to do file discovery searches on important email servers and storage repositories.[35] The AI algorithm improves its capacity to identify sources and documents, hastening the development of cases and the dissemination of results.[36] As a result, there is a significant reduction in the time between filing and the start of the CIRP. In the near future, the interaction of AI with CIRP can increase professionals' efficiency while concurrently reducing cost. Recently in a statement issued by National Company Law Tribunal (NCLT), Justice Ramalingam Sudhakar said "One aspect for early resolution is the development of Artificial Intelligence technology..."'We are focusing on leveraging artificial intelligence and standardisation of processes. This will help in reducing delays. We are also focused on evolving a code of best practices so that there is certainty in decision making.[37]

Liquidation

Time-bound liquidation has been a cornerstone of IBC,2016 since its inception, although it has not yet been accomplished. The liquidator must complete the liquidation procedure within a year in accordance with the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Rules, 2019.[38]But according to the most recent Insolvency and Bankruptcy Borad of India (IBBI) data, more than 79% of all active liquidation processes have gone over the allotted time period.[39] Authorities have been working hard, which is why the IBBI amendment on streamlining liquidation was released in June 2022.[40] The excessive delay in the liquidation process has interfered with the goal of the code, which is to maximise

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[34] Jose Garrido (etal), "The Use of Data in Accessing and Designing insolvency systems" International Monetary Fund (2018), *available at*: https://www.elibrary.imf.org/view/journals/001/2019/027/article-A001-en.xml. (last visited on 15th August, 2023).

[35] Jose Garrido (etal), "The Use of Data in Accessing and Designing insolvency systems" International Monetary Fund (2018), *available at*: https://www.elibrary.imf.org/view/journals/001/2019/027/article-A001-en.xml. (last visited on 15th August, 2023).

[36] Akshaya Kamalnath, "The Future of Corporate Insolvency Law - A Review of Technology and AI Powered Changes",*available at*: https://deliverypdf.ssrn.com/delivery.php?ID=413074031111067094006080125076027106002054027061023062027093010090013017030100069124042100017007024022045012108086094020028099039010011061018095097097092082093014067050087064064117122100089011120028091064065080001086107001070096073095122122016090114116&EXT=pdf&INDEX=TRUE (last visited on 19th August 2023).

[37] The Economic Times, "Artificial Intelligence could be used for early resolution of matters say NCLT President" *Available at*: https://economictimes.indiatimes.com/news/india/artificial-intelligence-could-be-used-for-early-resolution-of-matters-says-nclt-president/articleshow/90464442.cms?from=mdr (last visited on 22 Aug 2023).

[38] Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019.*Available at:*https://www.ibbi.gov.in/webadmin/pdf/whatsnew/2019/Jul/Liquidation%20Regulations%2025072019%20final%20English_2019-07-25%2020:13:32.pdf (Last Visited on 11th August 2023).

[39] Insolvency and Bankruptcy Board of India, "Discussion paper on streamlining the Liquidation Process" *Available at*: https://ibbi.gov.in/uploads/whatsnew/b3a47a6df67ffb00832dc7baec47123c.pdf (Last Visited on 11th August 2023).

[40] *Id.*

value of assets.[41] A supervisory committee, a mandate on a shorter time restriction, and other IBBI redressal recommendations require creative solutions to be successful. One such innovation is the incorporation of AI and data analytics tools into the liquidation process.

Apart from these there is another important challenge which needs to be looked after is inconsistency in the e-auction. IBBI suggested a number of corrective measures, including a specific auction portal, clear gaps between subsequent auctions, etc.[42] Despite these recommendations authorities will face the problem while implementing these suggestions. In such scenarios use of the artificial intelligence will come as a saviour as there are promising AI tools that utilise Machine Learning and perform optimal auctions. Because the liquidator is currently alone responsible for handling both traditional and non-traditional data processing, the issue of time-bound liquidation still exists.

III. International Perspective

The involvement of courts in formal insolvency procedures is traditionally been significant, thus warranting an examination of the potential transformative effects of technology on court processes. In recent years, a deliberate endeavour has been undertaken to digitise and automate diverse processes and actions within the court system. The ongoing global pandemic has served to intensify and concentrate these efforts, thereby directing attention towards the advancement of this trajectory.In Developed nations like the United States and the European Union, AI appears to be accepted in the legal system, including insolvency. Insolvency laws have benefited greatly from the introduction of artificial intelligence technologies like Data 61, Data Lex AI, and ROSS, which are trained for sophisticated analytics, modelling, and scenario planning based on financial performance.[43] With the creation of its AI tool "Accelerator," which helped the professional service firm provides

[41] Ravi Mittal, "Leveraging the Behavioural Change". *Available at*: https://ibbi.gov.in/uploads/resources/2022-11-16-184743-zunjd-92a2b5cb9c6906035c2864fa225e1940.pdf (Last Visited on 23rd August 2023)

[42] Insolvency and Bankruptcy Board of India, "Discussion Paper on Streamlining the Liquidation Process" *available at*: https://ibbi.gov.in/uploads/whatsnew/b3a47a6df67ffb00832dc7baec47123c.pdf (Last Visited on 11th August 2023).

[43] Aditya Narvekar and Debashis Guha, "Bankruptcy Prediction using Machine Learning and an Application to the Case of the COVID-19 Recession, Data Science in Finance and Economics". *Available at*: https://www.aimspress.com/article/doi/10.3934/DSFE.2021010?viewType=HTML (Last Visited on 23rd August 2023).

good outcomes in the insolvency procedure, LDM Global[44] can be considered a classic example of the deployment of AI.[45]

As a result of its extraordinary legislative powers and in reaction to the economic crisis, the Colombian government issued a decree in 2021 allowing the use of artificial intelligence in the management of insolvency operations. In the same year, the Superintendence of Companies, a governmental entity that has served as Colombia's bankruptcy court for nearly fifty years, has implemented novel digital functionalities into its Insolvency Module (MI, denoting its Spanish acronym).[46] The implementation of this artificial intelligence tool, which is conveniently accessible through the agency's website, introduces a novel and transformative encounter for users engaging with the insolvency system.The same year, the UK government made good on its commitment to implement a "national AI strategy" to oversee AI governance in the nation and promote the use of AI in law and enforcement, including insolvency laws.[47]The electronic pilot method was implemented at the Rolls Building Jurisdictions in London in 2015.[48] Within this framework, which has currently been mandated in certain judicial settings, electronic filing, commonly referred to as e-filing, is accessible around the clock.

Portugal has demonstrated a proactive approach in implementing diverse technological solutions aimed at streamlining and digitalizing court procedures. Citius, an exemplary platform, facilitates the accessibility and utilisation of its services by esteemed members of the legal profession, including judges, public prosecutors, lawyers, solicitors, enforcement agents, and insolvency practitioners.[49] Finland in July 2019, made an amendment to its

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[44] LDM Global delivers eDiscovery, AI Analytics, Forensics, Document Review & Contract Management solutions to Corporations, Government Agencies, and Law Firms. Its Insolvency experts help to unravel the mysteries of insolvent entities by leveraging technology to build chronologies of events, perform tracing exercises and uncover whether there was fraud using bank statements to follow the money, etc.

[45] Gavurova Beata (E.tal) (2022). Artificial Intelligence in predicting the Bankruptcy of Non-financial Corporations. 1217 *Oeconomia Copernicana* (2022), *available at*: http://economic-research.pl/Journals/index.php/oc/article/view/2149/1992 (Last visited on 22nd August 2023).

[46] Nicolas Polania Tello, "Columbia is using AI to improve Insolvency Proceedings" *available at*: https://www.dlapiper.com/insights/publications/panorama/2022/colombia-is-using-ai-to-improve-insolvency-proceedings (Last Visited on 25th August 2023).

[47] Bianca Piachaud-Moustakis, "An Overview of the UK's National AI Strategy" 46 *Pharmaceutical Techonology* (2022).

[48] Akshaya Kamalnath, "The Future of Corporate Insolvency Law - A Review of Technology and AI Powered Changes" *Available at*: https://deliverypdf.ssrn.com/delivery.php?ID=413074031111067094006080125076027106002054027061023062027093010090013017030100069124042100017007024022045012108086094020028099039010011061018095097097092082093014067050087064064117122100089011120028091064065080001086107001070096073095122122016090114116&EXT=pdf&INDEX=TRUE (Last Visited on 19th August 2023).

[49] "Towards People-centred and Innovative Justice in Portugal: Case Study Highlights'. *Available at:*https://www.portugal.gov.pt/download-

Bankruptcy Act with the aim of addressing many issues, including the enhancement of administrative efficiency in the implementation of the legislation, and digitising the same.[50] The revisions encompassed the reduction of administrative expenses and the mitigation of judicial intervention in order to expedite legal proceedings.

As a result of these technical developments, it can be deduced that AI is more widely applicable in insolvency law enforcement than it is in India. Recently, the government of India has extended an invitation to solicit valuable insights and opinions pertaining to the intended modifications to the insolvency legislation. The proposed modifications encompass the amalgamation of diverse stages within the insolvency procedure onto a unified electronic platform.

IV. Conclusion

Introduction of Insolvency and bankruptcy code, 2016 has been a ground breaking legislation which has revamped the entire credit ecosystem of the country. There is no doubt in saying that the code has resolved the domestic insolvency of the country to a greater extent but the reality begs to differ as there subsists a backlog of insolvency cases.[51]The worldwide Covid-19 outbreak made the backlog even worse and encouraged the officials to suggest changes to the IBC regime. Sushant Sarode, Director, CRISIL Ratings Ltd, said that "The IBC's effectiveness can be increased using CDE approach, where C stands for *Capacity augmentation*, D for *Digitalisation* and E for *Expansion of pre-pack resolutions* to large corporates." Although IBBI has taken various corrective measures like consolidation of multiple insolvency procedure stages onto a single electronic platform[52] but, AI acceptability is still lacking so using technology is not a choice, rather it is the need of current situation.In this article authors have discussed how the use of AI can improves the various stage of insolvency like predicting of the insolvency at early stage and handling the Big Data that can help the resolution professionals in quick and firm decision by evaluating the key performance indicators of the business. Further the discourse surrounding advancements in different jurisdictions have been deliberated upon like Colombia deployed an artificial

ficheiros/ficheiro.aspx?v=%3D%3DBAAAAB%2BLCAAAAAAABAAzNzUwAQA5%2BuqQBAAAAA%3D%3D (Last Visited on 25th August, 2023)

[50] "Amendment to the Finish Bankruptcy Act Approved" *Available at*: https://www.borenius.com/legal-alerts/2019/05/17/amendments-to-the-finnish-bankruptcy-act-approved-today/ (Last Visited on 24th August 2023)

[51] Falling Recovery Rates and Increase in Resolution Time Dent IBC's Success, says CRISIL", The Hindu (Nov.24, 2023). Available at; https://www.thehindu.com/business/falling-recovery-rates-and-increase-in-resolution-time-dent-ibcs-success-says-crisil/article67570542.ece (Last visited on 10th December 2023)

[52] Ministry of Corporate affair, "Invitation of comments from the public on changes being considered to the Insolvency and Bankruptcy Code, 2016" (18th January 2023). *Available at:*https://www.mca.gov.in/content/dam/mca/pdf/IBC-2016-20230118.pdf.

intelligence application to guarantee prompt access to the official insolvency process. The chairman of ASIC, the corporate and securities regulator in Australia, highlighted the significance of technology for the organization, although no specific and concert plans have been put out.India and other countries seeking to enhance their insolvency systems through technology might learn valuable lessons from international experiences and by carefully assessing the associated risks. After making a cross jurisdiction overview it can be concluded that it is necessary for Indian government and IBBI to embrace AI in the insolvency ecosystem. And to dispel the myth that it would displace attorneys' lawyers and other legal professionals; rather, AI will be a useful tool for delivering improved legal services.

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CRIME AND ATROCITIES AGAINST WOMEN: A STUDY OF CHHATTISGARH

Dr.Ayan Hazra[*]

ABSTRACT

India has a high rate of violence against women due to its predominately masculine culture. One of the most severe types of gender inequality is violence against women and girls (VAWG), which obstructs women's and men's equal participation in social, economic, and political realms. Gender equality and a number of other development goals are hampered by such violence. According to the data reported by the National Crime Records Bureau (NCRB), there were over 2,28,650 recorded incidences of crime against women in the year 2011, which saw an upsurge of 87% within a decade. In other words, by 2021, the number of recorded incidents had reached the figure of 4,28,278. It has also been highlighted by the 2021 Report published by NCRB, that 7.5% of the affected women in India reside in West Bengal, which accounts for 12.7% of all reported crimes against women. It also indicates, the number of gender-based violence in India risen by 15% in 2021 to that of previous year. The state with most number of reported rape cases was Rajasthan, and the one with most suicides was Maharashtra, whereas, the most unsafe major city in India is Delhi. Keeping the increase in crime against women in consideration, the author in his paper has tried to study the various patterns of crime towards women in our country; special focus is on the data reported from the state of Chhattisgarh.

I. Introduction

According to the Rigveda and other ancient texts, women in ancient India enjoyed a high status in society. The social standing of our ladies and their valiant acts from the Vedic era to the present can fill volumes. Women lost their prestige and were reduced to the background as a result of later shifts in society, politics, and the economy. Many pernicious practices and traditions entered the scene and restricted women to the confines of the home.[1] Men and women are both liberated by gender equality. However, harassment against women has emerged as a global issue that requires quick attention.

Women who face any form of exploitation or violence generally should first approach to the law enforcement authority. However, they face many challenges in approaching the authority,

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[1] A. Goel, *Violence and Protective Measures for Women Development and Empowerment*3-4 (Deep & Deep Publications, New Delhi,2004).

which include a reluctance to issue an FIR, conduct of investigation, delay in receiving medical reports from experts and forensic laboratory, where investigation is under progress, attitudinal and behavioural approach of police, lack of institutional and infrastructural mechanism, unwillingness of witnesses to come forward and support the prosecution, and lack of stakeholder convergence and political influence. These are only few of the bottlenecks that need to be addressed.

On the other hand, many women who face exploitation or violence generally do not come forward to report to the police often due to their own prevailing cultural, social, and economic pressures. Therefore, there is an urgent need to protect such victims during exigencies. The Constitution of India focuses on two key concepts: equality and non-discrimination, which are fundamental rights guaranteed to every citizen. Issues around gender are not merely about male andfemale and how they socialized, but also about the understanding of gender perspectives which include identity, labour, power and violence based on gender, as effective management of these issues will help not only in sensitizing people about curbing gender bias prevailing in the society, but also in empowering girls and women to achieve their goals. The objective behind imparting knowledge on gender sensitization is to bring about a change in people's mindset across various socio-economic strata. Inappropriate expression of masculinity, violence against women and children and gender-based discrimination are all pernicious orientation of our society today.

II. Atrocities and Women

The connotationbehind the definition of "crime against women" is the intentional or unintentional physical or psychological abuse of women. According to Awadhesh,[2] "crimes against women" are those that are "directed specifically against women" and in which "only women are victims." Clarifying the idea of "violence" against women is also crucial. Abuse is another name for violence, which includes any physical aggressiveness or misbehaviour. It prevents women from participating fully and equally in society and has major short- and long-term health, economic, and psychological effects on them. The extent of its influence on people's lives, families, and society at large is enormous.[3] Crimes do not only occur in a certain group, class, culture, or nation. Women in India are experiencing crime against them from ages not just in the modern era. The government has taken numerous legal and other steps, but the rate of crime against women has not decreased.

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2 A.K. Singh and J. Choudhury, *Violence against Women and Children-Issues and Concerns* 1 (Serials Publications, New Delhi, 2012).

3 United Nations I.R. Iran, FAQ's, 2020.

Violence refers to a physical act with the intent or capability to injure. It may be in varied forms like sexual harassment, acid attack, rape, obscenity and pornography, domestic violence, dowry, female foeticide, genital mutilation, etc.

Domestic violence out of these is the most common spread kind of violence, which can take many different forms, including striking, kicking, biting, shoving, restraint, and item hurling. Generally speaking, it includes economic exploitation, sexual assault, abduction, killing (all instances of criminal violence), spouse battering, sexual harm, abuse of a widow and for a senior citizen (all instances of domestic violence), eve-teasing, pressuring a wife/daughter-in-law to commit foeticide, etc. (all circumstances of criminal violence).[4]Before a girl may become the victim or the target of a crime, or even at the moment of her birth. Let's examine each period of a woman's life and then briefly talk about the threats. The nature of crimes might vary just like the stages.

Table 1. Stages of Atrocities on women

S. No	Stages	Nature of Atrocities
1.	Foeticide and infanticide	Pregnancy diagnosis techniques can result in female foeticide in situations where there is a social or cultural preference for sons.
2.	Young Girls	Compared to boys, many girls do not have access to or complete a full elementary or secondary education, and they may also experience discrimination from their parents and teachers during their formative years.
3.	Adolescence	Most of the adolescent girls suffer from sexual assault, exploitation and violence from acid attacks, rape, early marriage, online sexual abuse etc.
4.	Marriage	After being married, many women experience physical, financial, and emotional abuse at the hands of their husbands and in-laws, for example: Dowry, unable to reproduce.
5.	Maternity	Sometimes, pregnant women are not given the right medical attention or a nutritious diet. She frequently feels forced to abort a female foetus.

[4] *Supra* note 2 at 3.

6.	Workplace	It is common for women to experience exploitation, unequal compensation for equal work, denial of promotions despite merit, and physical, financial, and psychological abuse.

Throughout all of these stages, the woman suffers in silence, and even if she speaks up, it is muffled or stifled. She is unaware of her legal rights to oppose these crimes or the legal protections that are available to her.It's time for women to stand up and defend themselves.

Methodology

The current study is a descriptive and qualitative study that uses secondary data from the National Crime Record Bureau's compendium to develop a research logic by analysing data using simple statistical measures.

Purpose of the Research

The study's main objective is to determine the patterns of crime towards women in India. The current study studies the data of last decade in depth and will produce useful findings. The analysis is made mostly on current data for Chhattisgarh state due to the paucity of old data.

Interpretation & Analysis

Crime against women: India

According to recently revealed National Crime Record Bureau (NCRB) data, women-based violence increased in India by 15.3% in 2021, which is concerning given the country's history of gender-based violence. The frequency and overall number of women based crimes has increased, from 56.5 in 2020 to 64.5 in 2021, instances recorded per lakh of the female population rose. In India, there were 4,28,278 instances of gender-based violence registered in total in 2021, a 15.3% increase from the year before.

According to the NCRB report, the bulk of gender-based crimes were categorised as "Cruelty by thehusband or his family members/relatives" (31.8%), "Assault on Women with the intention to Outrage her Modesty" (20.8%), "Kidnapping and Abduction of Women" (17.6%), and "Rape" (7.4%). More than half (23,178) of the 45,026 female suicide victims, according to the NCRB, were housewives. The survey also showed that women were more likely to commit suicide due to marital problems, notably dowry-related problems, impotence, and infertility. In 2020–21, there were 26,513 cases of domestic abuse reported by

women to the National Commission for Women, which was a steep rise of 25.09 percent from the 20,309 incidents recorded in 2019–20.[5]

Violence against women can take many different forms, including during pregnancy, early childhood, adolescence, adulthood, and old age. Violence against children, persons with disabilities, and people suffering from severe mental illness happens in a variety of places, including the home, place of employment, hospitals, prisons, governmental and non-profit facilities for the poor, and the community. Every socioeconomic and cultural class is affected by it. The World Health Organization promotes the use of national action plans as part of a global strategy to avoid violence. The rise in domestic violence cases, workplace sexual harassment, dowry-related violence, honour murders, acid attacks, and gang rapes are all serious issues.[6]

Table 2: Crime against women from2008 to 2021

S.no	Year	Dowry Deaths	Rape	Domestic Violence
1.	2008	8,172	21,467	81,344
2.	2009	8,383	21,397	89,546
3.	2010	8,391	22,172	94,041
4.	2011	8,618	24,206	99,135
5.	2012	8,233	24,923	1,06,527
6.	2020	6,843	28,046	3,71,503
7.	2021	6,589	31,677	4,28,278

*Source: ncrb.gov.in

NCRB data shows that, there were 4.28.278 cases of womenbased crimes in 2021 compared to 3.71.503 the year before, representing a 15.3% increase.[7] A large percentage of these incidents (31.8%) fall under the heading "Cruelty by husband or his relatives," which is followed by "Assault on women with the intent to outrage her modesty," kidnapping, abduction, and rape. The study found that Assam had the highest rate of violence towards women in 2021, despite a minor reduction over the preceding three years. The state reported about 29,000 such instances in 2021.

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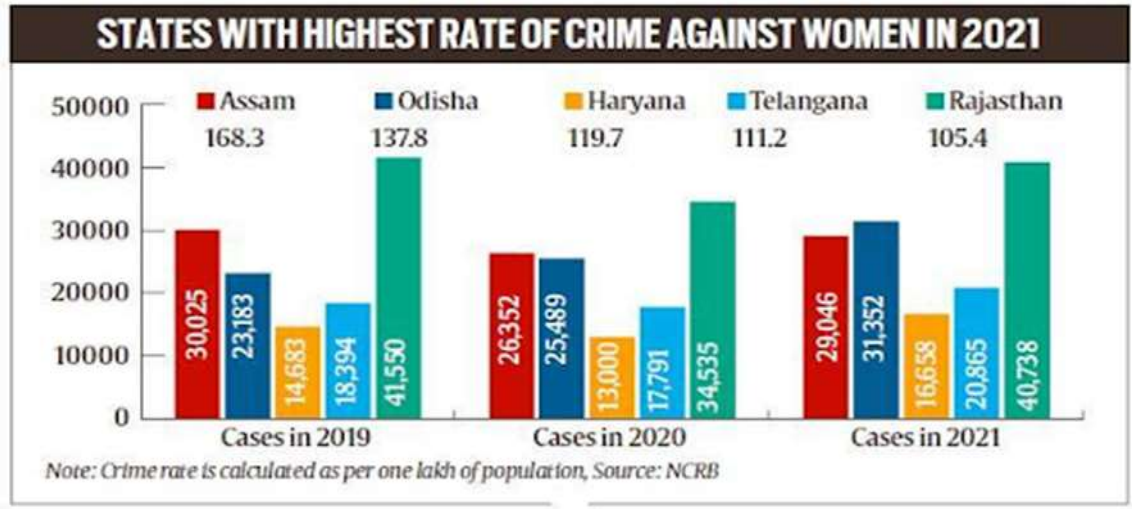
5 Outlook Web Desk 2022, "Crime against women", *available at*: https://www.outlookindia.com/national/crimes-against-women (last visited on August 30, 2022).

6 N. Bohra, I. Sharma,*et.al.,* "Violence against women",57*Indian Journal of Psychiatry*(Suppl 2), S333 (2015).

7 Government of India, "Annual report on Crime in India", National Crime Records Bureau (Ministry of Home Affairs,2021)

Fig: 1 States showing rate of crime.



***Source:ncrb/journals of India/ncrb report.**

The other leading states in this group are Rajasthan, Odisha, Haryana, and Telangana. Rajasthan, like Assam, showed a slight decrease in the real number of reported cases, however Odisha, Haryana, and Telangana experienced rises. Despite the fact that the prevalence rate is smaller at 50.5%, Uttar Pradesh is ranked first in the report in terms of the actual number of instances reported in 2021 (56,083). Nagaland stood out because it had the fewest recorded offences against women in each of the three years prior—2019, 2020, and 2021.[8] Furthermore, in 2021, it had the lowest number of offenses towards women. Delhi has the highest rate of violence towards women across Union Territories in 2021, at 147.6%.

Data on Crime against Women Chhattisgarh

The statistics for reported IPC crimes against women in Chhattisgarh are shown in the table below.

Table 3: Statement on IPC Crimes in Chhattisgarh during 2020 &2021

S.no	Crime Head	2018	2019	2020	2021
1	Attacking women with the intent to offend their modesty	1854	1316	1461	1248
2	Rape	2091	1036	1210	1093
3	Attempt to Commit Rape	27	9	118	7
4	Miscarriage, Infanticide, Foeticide and Abandonment	48	81	70	61
5	Dowry Deaths	79	76	71	65

[8] *Id.*at Annual report on Crime in India 2019.

6	Cruelty by Husband or his Relatives	503	732	641	963
7	Insult to the Modesty of Women	184	232	279	238
8	Kidnaping and Abduction of women	1842	2033	1341	1158
9	Cyber-crimes against women	17	23	36	91
10	Sexual violence against girl child	1803	2021	2038	2321

***Source: ncrb.gov.in**

The table clearly shows a dip in crime against women over the years in comparison to 2018 to 2021. It is clear that the crimes like Miscarriage, Infanticide, Foeticide and Abandonment; Cruelty by Husband or his Relatives; Insult to the Modesty of Women; Cyber-crimes & sexual Violence has shown a phenomenal growth, whereas, the crimes like Assault on women's modesty; Rape& Attempt to Rape; Dowry deaths etc have shown a decreasing data, which is a good sign indicating protected environment for women in the society.[9]

The table is indicating a steep rise in Cruelty by Husband or his relatives, the reason may also be due to Covid most of the family members were at home, in 2020 & 2021, providing more opportunities for domestic violence. Also, there is a hike in Cybercrimes against women in 2017 the number was only 17,[10] which has been drastically increased to 91 in 2021, due to increased internet usage and less awareness, among the youngsters has given a good opportunity to the criminals to perform their tasks easily. As M K Gandhi said, "Woman is the complement of man and not Inferior". It is clear that many people still do not comprehend the meaning of Gandhi's statement. On the other hand, it is evident that one-fourth of intimate partners have mistreated one-half of women.

In regards to crime against women and young girls in Chhattisgarh, a recent National Crime Records Bureau (NCRB) report provides warning indications. According to the NCRB 2021 report, Chhattisgarh had the third-highest incidence of rapes of young girls in the country 12.3 (1,808 instances), as well as the fourth-highest rate of all POCSO (Protection of Children from Sexual Offences Act) cases (2,321) involving females.

According to NCRB data, Chhattisgarh was rated fifth for rape in the year 2018 and would be placed eleventh in 2021. Top states on this list include Maharashtra, Uttar Pradesh, and Madhya Pradesh. In terms of attempted rape cases, Chhattisgarh was rated 14th in 2018; however, in 2021, it improved and was ranked 16thin the country. The data up until December 2018 and the most recent stats in Chhattisgarh demonstrate how the state's criminal charges are steadily declining.

[9] *Id.* at Annual Report on Crime in India 2018.
[10] *Id.* at Annual Report on Crime in India 2017.

In response, the Chhattisgarh government has chosen to launch the "Hamar Beti Hamar Maan" (our daughter, our honour) campaign, which will focus on raising awareness of safety precautions among girls enrolled in high school and college and prioritizing the registration and investigation of crimes involving women.

Crime against women in the state of Chhattisgarh

The women of Chhattisgarh have a special place for themselves within the country in a number of ways. Women in Chhattisgarh are outspoken, visible, and play a significant role in public production, in contrast to many other regions of India where the culture of isolation and seclusion seems to rule.

Although women in Chhattisgarh have several rights that are not granted to their sisters in other parts of the nation, this does not mean that the philosophy of female subservience is not prevalent in this state. Simply put, patriarchy manifests itself in a variety of ways. Male domination and authority are quite evident in social and cultural life in Chhattisgarh. With or without alcohol intoxication, wife beating is a typical occurrence. In both rural and urban Chhattisgarh, drinking among men is on the rise, and with it, so is violence against women. In several regions of the state, women's groups have been at the forefront of protests against alcohol. In several regions of the state, women's groups have been at the forefront of protests against alcohol. In traditional social decision-making systems, women are underrepresented politically, and their inclusion in local decision-making processes is insufficient. Witchcraft is a widely held societal belief. Chhattisgarh's Tonhi are invariably female, frequently widowed, and frequently embroiled in property conflicts with their male family members.

According to the most recent National Crime Records Bureau (NCRB) data, crimes against women decreased by 10.5% in 2019 compared to the previous year,[11] placing Chhattisgarh at 13th place in terms of crime rate in this category and according to previous statistics of 2018 by NCRB,7,689 cases of crimes against women were reported in Chhattisgarh, down from 8,587 in 2018 and 7,996 in 2017. Up to 2,413 of these offences include rape, with 1,377 (a startling 57%) of those cases involving children. More than 2,042 young girls suffered sexual assaults.

Violation associated with the traditional practices

The sex ratio in Chhattisgarh indicates a favourable ratio of females to males per thousand. Although women play significant economic and social roles in Chhattisgarh. However, there are several socio-cultural customs pertaining to marriage, divorce, and parental rights that are

[11] *Supra* note 8.

biased against women. In this region, it is extremely normal for girls to get married before they reach puberty and child marriages are common, which leads to early age pregnancies which adversely affects health of women.

Physical Atrocities and Domestic Violence

Domestic violence and other physical atrocities are widespread in Chhattisgarh, as they are in other regions of the nation. This is a serious issue, but another one that is starting to emerge is the rise in the frequency of crimes against women as a result of changes being made to society's conventional norms. Today, especially in cities, rape, child molestations, rape of minors, eve-teasing, and other forms of female torture are extremely prevalent in Chhattisgarh.

Witch Hunting practice

In this custom, a woman is labelled as a witch and is then blamed for all the bad fortune and seen as a terrible omen for the entire community. If any child becomes ill, if animals are harmed for whatever cause, or if any other unfavourable circumstance arises, the witch or the village tonhi is held responsible. A man known as a Baiga is called to identify a tonhi, and he chooses the witch at random. After that, the entire town turns against her and abuses her in the most brutal and inhumane ways possible. The women classified as tonhi are typically unmarried and have children who are engaged in cases involving property disputes. Too often, the relatives' desire to possess the Tonhi's property and other possessions is what leads to the charges of witchcraft.

Sex Determination

Prenatal sex detection of the foetus is a practise that is widely used. The clinics that clearly state on a board that they do not perform an ultrasound for gender determination of the foetus have found this to be a major source of profit. The price of every test is tenfold the amount of the original amount charged, yet it is nearly impossible to verify, as they are done secretively.

Anti- Liquor movement

Women in Chhattisgarh have heroically led the fight against violence and alcohol and have been at the forefront of the national anti-alcohol campaign. A volunteer group in Chhattisgarh's Balod district developed the unique women's brigade known as "Mahila Commandos," who have been fighting drunkenness and other social ills in their community for ten years. They may soon be classified as Super Police Officers (SPO). Balod Superintendent of Police introduced the concept of SPO to give the commando concept a fresh perspective. According to a senior police official, approximately 100 women commandos who wear maroon sarees and hats and carry batons have been made SPOs as part

of a pilot program. A proposal to create 1,000 SPOs has also been given to the state government.[12]

'Hamar Beti Hamar Maan' Campaign in Chhattisgarh

Bhupesh Baghel, the chief minister of Chhattisgarh, tweeted on September 23, 2022, that the state would be launching the creative campaign "Hamar Beti-Hamar Maan" in support of women's safety, particularly for the safety of daughters, as well as to uphold their dignity, make life easier for them, and provide them with essential services.

Main features of the scheme

i. In a tweet about the initiative, Chief Minister Mr. Bhupesh Baghel stated that as part of the "Hamar Beti-Hamar Maan" campaign, female state police officers and employees will visit schools and colleges in each district of the state to inform and counsel daughters on their legal rights as well as the good and bad touches, eve-teasing, sexual abuse, cybercrime, and social media crime prevention.

ii. As part of the effort, police will set up special women's patrols in girls' schools, colleges, and other significant locations where there are plenty of women and young women.

iii. A telephone number will also be provided for the "Hamar Beti-Hamar Maan" helpline, where girls can report any abuse or crimes committed against them and have them dealt with in the shortest possible time.

iv. The state government has also decided that investigations into crimes involving women will be prioritized by female investigators, who will also be in charge of making sure that such investigations can be finished within the allotted time and that the challan can be presented. officials from the IG range.

Apart from the above campaign, the state of Chhattisgarh, fighting drunkenness, domestic abuse, and social vices like dowry has been taken on by about 7000 civilian women. They also helped more people take advantage of new government initiatives by raising awareness of them. ladies who were the victims of domestic abuse by alcoholic males. Some of them have also been victims of human trafficking who, after being saved, decided to fight for the fundamental human rights of others in their community. These ladies are driven by the straightforward idea of shielding their kids from the horrors they had to endure. The Chhattisgarh police classified the group as 'Super Police Commandos' (SPOs) after it had

[12] The Indian Express, "Women brigade may soon be revamped as 'super cops' in Chhattisgarh", *available at:*https://indianexpress.com/article/india/india-news-india/women-brigade-may-soon-be-revamped-as super-cops-in-chhattisgarh (last visited on August 12, 2023).

grown to include more than 30 villages. These SPOs collaborate with the Chhattisgarh police to reduce the state's rife crime, alcohol abuse, and illicit liquor trade, all of which qualify as unsafe work environments. To look out for these activities, they constantly monitor the walkways of the villages they belong to as a team. The "Mahila Commando" campaign is a component of a wider initiative by the Chhattisgarh policemen to re-establish peace and order in the region and empower women. In particular, it depends on numerous women from various areas banding together to battle the problems that beset them. At the same duration, the majority of these women are stay-at-home moms who subsequently join the teams they belong to for tasks like patrolling. Additionally, each and every woman who works in welfare is given access to a sizable community, a strong support network, and the feeling of knowing she made a difference.

During the evening time, the women from the community gather around in the large groups, armed with sticks, whistles etc walk in the whole village investigating for the suspicious activities like alcohol consumption, beating by the husbands etc, they agitate to shut down of the local alcohol shops in their area. These women use to wear same colour saree either blue or Pink as a uniform to indicate their solidarity against alcoholism. They have battled long and hard for the ban on alcohol consumption in the community, and this daily watch has become a crucial component of enforcing it.

Later on, the State government of Chhattisgarh, recognised their effort and has started Bharat matavahini scheme, in the year 2011-12 in the form of empowerment scheme for rural women of the state.

Broad objective of the scheme are as follows:

i. To develop awareness among the general public about de-addiction through slogans, wall writing, posters, pamphlets, street plays, rallies in favour of drug de-addiction by women self-help groups in Gram Panchayat.
ii. To take action for survey of drug victims at the Gram Panchayat level, for the motivation and treatment of drug de-addiction, to get them admitted in the de-addiction centres organized by the Department.
iii. To ensure proper arrangements for supervision and monitoring of drug de-addiction campaign.
iv. To ensure the deliver facilities/ services to be provided by the concerned departments in coordination with the schemes/ programmes for de-addiction.
v. To ensure the fulfil of sensitive society by creating a safe, fear-free environment in Gram Panchayat.

vi. To provide wide publicity to drug de-addiction campaign at all the levels.

Formation and Registration of Bharat Mata Vahini

There will be a group of 8 persons per gram panchayat and dependent village, in which there will be a female president and a maximum of 3 male members can also be in the group. In the selection of members, preference will be given to disabled persons, widows, abandoned women, transgenders, dwarf persons, drug de-addict persons.

Bharat Mata Vahini Group will have to apply for registration at Office of Joint/ Deputy Director, Social Welfare Department after approval from Gram Sabha with the names of President, Vice President, Secretary, Treasurer and members.

Joint/ Deputy Director, Social Welfare Department after obtaining approval from the District Collector in the application received, the group will be registered as Bharat Mata Vahini byentering it in a separate register and will be sent to the website created for this purpose at the Directorate level.

III. Conclusion & Recommendations

So far according to data, it is possible for women of all ages, colours, and socioeconomic statuses to become victims of the horrifying violence that occurs. Nobody is more likely to become the victim of a crime against women than another. A person may be more susceptible to becoming a victim of a crime against women depending on a number of different circumstances.

In comparison to older women, younger women are more likely to experience rape or sexual assault. This is because younger women are typically less likely to possess the physical stamina to repel an assault and are therefore more physically alluring to attackers. Additionally, because they are frequently living away from home for the first time and might not be aware of the possible hazards they face, college-age women are particularly vulnerable to sexual assault.

Poverty puts women at higher risk of committing crimes. This is because, in order to survive, desperation brought on by poverty may result in criminal conduct. Furthermore, disadvantaged neighbourhoods frequently have higher levels of overall violence, which can raise the possibility of becoming a victim of crime.

Furthermore, any woman who has previously been the victim of domestic abuse or violence faces a higher risk of becoming a victim of crime in the future. This is due to the fact that these women frequently lack self-confidence and may think they deserve the abuse or are unable to stop it. Domestic abuse can also result in PTSD, which can raise a person's risk of

being a victim of crime even more. Although the issue of crime against women is complicated, it must be dealt with in order to protect women from harm. According to the above findings following recommendations can be suggested:

i. Sexual assault victims should have access to legal representation.
ii. Law enforcement agencies are obligated to notify the victim about her entitlement to seek legal representation prior to questioning herself, and the report they file ought to indicate that she was so informed. The victim's advocate is supposed to help the victim in filing the complaint, but also point her toward acquiring further aid, such as psychiatric, healthcare, and financial support.
iii. The victim's troubled mental state must be taken into account while legal aid must be provided at the police station.
iv. A directory of advocates who were ready to represent these clients should be created.
v. There should be a criminal injury compensation committee established, and regardless ofwhether there was a conviction, the court should award compensation to the victim if the culprit was found guilty.
vi. Lack of cooperation between investigative police officers and public prosecutors is to blame for the weak acquittal rate in rape cases.
vii. To reduce gender bias beliefs regarding rape victims, training workshops for judges and lawyers are required. It is strongly urged that specialized courts be set up to hear cases of sexual assault. These tribunals should be presided over by female judges so that the victim believes comfortable disclosing the particulars of the sexual assault that she underwent.
viii. Giving the victim's relatives counselling is an additional essential component. Such facilities must to be built all over the country to provide medical aid and counselling to rape survivors. The best support through difficult times and mental distress can come from family members;
ix. Particularly for heinous crimes like rape, there is an urgent need for the formation of a state-sponsored compensation for victim’s fund. This compensation must be determined by the victim's requirements and must have no bearing on whether the accused is found guilty or not. It ought to be put into effect right away as an FIR has been submitted or a complaint is acknowledged.

x. The main stream media must be aware of the rape victim's situation and refrain from drawing attention to the victim's identification or any other details that might be utilized in determining them, as doing so would be harmful.

xi. The state's administration should support a minimum of one women's group in every district to ensure the protection.The government shouldn't meddle with NGOs' autonomy or operations in return for their patronage, support, or cooperation.

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UNVEILING THE VEILED THREAT: GAPS IN THE LEGISLATION ADDRESSING EVE TEASING IN INDIA AND PAKISTAN

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ABSTRACT

The pervasive prevalence of eve teasing in Indian and Pakistani society continues to be a source of discomfort and restriction for women. Eve teasing is defined differently from state to state in India and this contributes to disparities in law enforcement. In addition, survivors are typically discouraged from coming forward because of pervasive victim-blaming attitudes and ingrained patriarchal standards. Underreporting and inadequate prosecution are exacerbated by the lack of sensitivity on the part of law enforcement authorities and the lack of training they get on the subject. Similar difficulties are experienced in Pakistan. It is difficult to enforce the legislation since there is no universally accepted definition of eve teasing. In addition to the delays and inaccuracies inherent in the court system, cultural factors such as honour-based societal beliefs discourage victims from coming forward and demanding justice. A lack of explicit laws on eve teasing has led to uneven enforcement and poor protection for victims, despite efforts by both India and Pakistan to combat gender-based violence. Possible responses include more accurate laws, standardizing legal definition, training law enforcement to be more sensitive to victim's needs and creating expedited justice systems. This article uses a comparison of the two nations to stress the need for new laws that define eve teasing precisely, impose heavy fines, and provide a safe space for victims. Finally, some recommendations are made regarding how to strengthen the application of laws addressing eve teasing in India and Pakistan. A literature review method is adopted for this article.

I. Introduction

In recent years, the abuse of Eve teasing has been considered one of the most controversial issues. The topic is quickly becoming a national issue in all corners of our society.[1]Eveteasing includes gestures, signals, as well as whistling, staring and rubbing of women. The unusualness of this term includes the intervention of unusual strangers. In

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[1] S. Talboys, M. Kaur*et al*., "Is eve teasing a public health problem? Public sexual harassment in rural India and its association with commonmental disorders and suicide ideation among young women ages 15-24,"82(3)*Annals of Global Health*561(2016).

addition, it is in the public domain, which includes streets, roads, parks, restaurants and any form of public transportation.[2]As a form of street harassment and public sexual harassment, "eve teasing" affects many groups worldwide, including those in India and Pakistan. Harassment, intimidation, and unwelcome attention are all aspects of this issue that contribute to women feeling uncomfortable and threatened in public.

The practice of eve teasing is a sort of social harassment towards women that has persisted in many societies for quite some time. Eve teasing and sexual harassment of women on the street have greatly impacted their everyday lives in India and Pakistan. The societal and cultural conventions that devalue women worldwide are the root cause of this issue. Name-calling and other forms of mild verbal harassment are as frequent as sexual harassment and even physical assault in India and Pakistan. Lack of comprehensive laws, ineffective law enforcement systems, and a gender imbalance have all contributed to making the issue difficult to confront and eliminate in both nations. It is concerning that certain nations, including India and Pakistan, have not yet implemented sufficient legislation and enforcement procedures to deal with this problem.

Due to a lack of effective legislation in both countries, cycles of gender-based violence and injustice are allowed to flourish in homes. Eve teasing in public places have reached an alarming level of popularity in India, a country with a rich heritage and culture. Because the Indian legal system does not have any regulations that prohibit eve teasing, those who do such acts are free to avoid prosecution. The Indian Penal Code has anti-harassment and anti-assault measures, but it is not detailed enough to account for the subtleties of enforcement conflict. This shortcoming leads to mild punishments that fail to discourage criminal behaviour. While there have been isolated initiatives at the state level, there is still a lack of uniform policy on the national level. Patriarchal standards that enable harassment are reinforced by the legal grey area and the social tolerance that surrounds it.

Inadequate legislation in Pakistan has led to a similar eve-teasing crisis. While the law in Pakistan does protect people from harassment, there is not a law in place that expressly addresses the danger of eve teasing. The country's capacity to confront the issue straight on is hampered by the absence of precise definitions, severe fines, and efficient enforcement procedures. This monitoring has a chilling social effect and helps to maintain a culture in which women are targeted and harassed in public. A lack of specific legislation compounds

[2] M. Dhillon, S. Bakaya, "Street harassment: A qualitative study of the experiences of young women in Delhi"*available at:* https://doi.org/10.1177/21582440145437 (last visited on Dec. 25, 2023).

the effects of ingrained gender stereotypes, a lack of education, and economic inequities, all of which contribute to the issue.

In India and Pakistan, there are not enough laws in place to protect women from eve teasing and this reflects more than simply a gap in the legislation. These perspectives contribute to the normalisation of harassment and assault since they are reinforced by cultural norms and historical precedents. The message sent by the absence of a robust legal structure is that society does not see these acts as particularly significant. This sends the incorrect message to would-be attackers and discourages victims, who are forced to navigate a hostile system with few options for redress.

Consistent data collection and reporting is lacking in both nations, which hinders attempts to curb eve teasing. The full scope of the issue is likely underreported because of prejudice, fear of reprisal, and questions about the judicial procedure. This lack of data makes it harder to create well-thought-out policies and precise actions. Investment in effective reporting mechanisms, public awareness campaigns, and thorough law changes are crucial if India and Pakistan are to make public areas safer for women. Clear definitions of eve teasing, harsh fines, streamlined reporting processes, and protective measures for victims are all necessary components of any such changes.

One of the main reasons eve teasing persists in India and Pakistan is because there are no comprehensive laws in place to prevent it. In both nations, the legal systems contribute to a culture of impunity because they fail to fully address the complexities of this kind of harassment. Specialised legislation, supported by robust fines and efficient enforcement procedures, must be introduced in both nations to address this issue. Broad public awareness campaigns and initiatives to change deeply ingrained gender stereotypes should accompany such legislative reforms. Only by taking a comprehensive strategy can India and Pakistan expect to eliminate eve-teasing and build communities where everyone feels welcome.

II. Concept of Eve Teasing

Eve teasing, shorthand for sexual harassment in public places, is a worldwide epidemic that negatively impacts the lives of numerous people, particularly women. Subtle forms of harassment include things like baiting and unpleasant remarks all the way up to stalking and physical violence. In addition to being a form of harassment, eve-teasing creates a hostile atmosphere that limits women's independence and ability to fully participate in society.When women, particularly young ladies, are alone in metropolitan areas at night, they are vulnerable to “eve teasing,” also known as “street comments” or “ambitious comments by

men."[3] It would seem that women are restricted from responding similarly to statements made by males. The remarks range from the innocuous "hello honey" to the rudely suggestive and even threatening. The focus is almost always on the woman's attractiveness. Whistles, laughing, pinches, and finger snaps may be substituted for (or added to) this remark.[4]Because it does not take into account the visual or non-verbal components of street bullying, the phrase "eve teasing" encompasses all forms of harassment, including verbal, nonverbal, and physical harassment, inflicted on girls and women in public spaces by men they don't know.[5]

There are a number of interrelated elements that make it tough to find a solution. First, individuals may take advantage of their anonymity in public settings since they are unlikely to run into one other again. Second, the transient and ephemeral character makes it impossible for the culprit to be caught. Third, they may be executed covertly, with only the victim and the offender being aware of what has happened. It is easy to fight and deny such charges, which often encourages the perpetrator to verbally harass the victim.

Other factors that make it easier for victims to stay silent include: the difficulty in gathering evidence; the lack of public support; the victim's reluctance to confront the offender; the victims' natural inclination to avoid drawing public attention to his ways; the victim's propensity to withdraw or alter their behavior in response to abuse; the victims' need to conform to a non-aggressive social stereotype; and her insecurity about boldly pursuing her accusations in the face of denial or aggressive abuse. Women who lack self-assurance seldom raise their voices. Harassment of women and girls on the street is an unfortunate reality. There is a disparity between the sexes when it comes to the degree to which each feels at ease in a public setting.Darker streets, larger numbers of males than women, unruly crowds like those at festivals, and a lack of publicity all added to a feeling of insecurity. Women feel more comfortable in public when stores are open, they can hear their own language, there are billboards, other women are about, and the streets are well-lit.

III. Eve Teasing in India

[3] Carol Brooks Gardner, "Passing by: Street remarks, address rights, and the urban female, 50 *Sociological Inquiry*,328 (1980).

[4] Elizabeth A Kissling, "Street harassment: The language of sexual terrorism, 2 *Discourse & Society* 45 (1991).

[5] Habiba Chafai, "Contextualisingstreet sexual harassment in Morocco: A discriminatory sociocultural representation of women" 22 *The Journal of North African Studies* 821 (2017).

India and other South Asian nations use the phrase "Eve teasing" to describe the widespread practice of verbally harassing, taunting, and frequently sexually objectifying women.[6] Even though itis sometimes written off as just teasing, bullying may have serious effects on a person's psychological, social, and even physical health. Eve teasing is still a serious issue in India, despite attempts to curb it, demonstrating the pressing need for systemic societal reform. The problem of eve-teasing permeates all levels of Indian culture and requires concerted effort.In India, eve teasing is commonplace in public locations including streets, shopping centers, marketplaces, parks, and even workplaces. Because exclusively women face this harassment due to their gender, it is emblematic of sexism in public institutions. In addition, when crimes and violence against women go undetected, the likelihood of them occurring and the impacts on women are amplified, which may sometimes make it infectious in terms of anxiety, sadness, and behavioral disorders.[7]

IV. Laws Addressing Eve Teasing in India

Recognizing the severity of the issue, Indian lawmakers have introduced several legal provisions to address eve teasing, such as Sections 354 and 509 of the Indian Penal Code (IPC),[8] the Protection of Women from Sexual Harassment at Workplace Act,[9] and various state-level laws.Nevertheless, anti-eve teasing legislation in India have been hampered by several obstacles, leaving women open to harassment.

The Constitution of India includes many clauses designed to protect women's rights and promote gender equality. In Article 51A (e),[10] all Indian citizens are obligated to treat women with respect. Article 14 further states that all citizens, regardless of their gender, are treated equally under the law and are afforded the same legal protections.[11] Article 15 (3) allows the state to take further precautions on behalf of women and children. Article 15 of the Constitution protects the right to discriminate in this manner.[12]

Although the word "eve teasing" is not used, Section 294 of the IPC[13] bans harassing a girl or woman with obscene gestures, statements, songs, or recitations and carries a maximum sentence of three months in prison. Imprisonment.Section 354[14] (Insulting a woman) states

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6 *Supra* note 2.
7 Soraganvi, "Safe public places: Rethinking design for women safety", 8 (1) *International Journal on Emerging Technologies* 304 (2017).
8 The Indian Penal Code, 1860. (Act No. 45 of 1860).
9 Protection of Women from Sexual Harassment Act, 2013. (No.14 of 2013).
10 The Constitution of India, art 51 (2) (e).
11 *Id.*at art. 14.
12 *Id.* at art. 15.
13 The Indian Penal Code, 1860. (Act No. 45 of 1860), s. 294.
14 *Id.* ats. 354.

that a person is responsible for damages and not subject to jail if he purposefully attacks a woman or uses violence to breach a woman's modesty in violation of this article. fines or jail time of up to five years. Section 509 deals with outraging the modesty of a woman.[15]

The Criminal Law (Amendment) Act,[16] which altered the Indian Penal Code, the Indian Evidence Act, and the Code of Criminal Procedure, also added the following crimes that are similar to the offense of Eve teasing. According to Section 354A, a man is guilty of sexual harassment if he exposes a woman to pornography against her will, makes sexually suggestive comments, or asks for sexual favors. He faces up to three years in prison, a fine of up to one million dollars, or both. In accordance with Section 354B, any man who assaults a woman or uses criminal force with the intent of disrobing her or forcing her to be naked shall be liable under this section and shall be punished with imprisonment for a period not less than three years and not more than seven years, and a fine. This is a really careless crime.Voyeurism is defined in Section 354C,[17] which states that any man who observes or photographs a woman engaging in a private activity that she expects not to be observed is guilty of a crime and subject to punishment by imprisonment for a term which may extend to three years, a fine of up to three thousand dollars, or both. If the same individual is convicted of a second or subsequent crime, he faces a minimum of three and a maximum of seven years in jail, as well as a fine or both.

Section 354D[18] provides that a male who follows or contacts a woman for the purpose of having sexual intercourse after she has made it apparent she is not interested may be arrested for assault. A conviction for stalking a woman over the Internet, mail, or any other electronic means of contact is punished by up to three years in jail and a fine, with the penalties increasing for additional convictions. could carry jail terms of up to five years and monetary penalties as well.

In this context, the phrases “insult” and “modesty” are both very contextual. However, this is not the only way in which the meaning of the term “modesty” is misconstrued. There has to be a robust discussion and debate on sexual harassment of women, including the perpetrator's actions and words. The current rules are inadequate because of their vagueness, lack of specificity, inconsistent application, and ineffectiveness, as well as their blind spot on public or criminal justice system abuse.

V. Eve Teasing in Pakistan

[15] *Id.* ats. 509.
[16] The Criminal Law (Amendment) Act 2013 (No.13 of 2013).
[17] *Id.* ats. 354C.
[18] *Id.* ats. 354 D.

Everyone, particularly members of marginalized communities, has the right to feel safe in their environment and to be able to move freely throughout society. But in a patriarchal country like Pakistan, it is difficult, and often dangerous, for a woman to stroll alone in public. Women of all ages and socioeconomic levels in Pakistan suffer from high rates of eve teasing, uneasiness in public spaces, anxiety, and fear of social advancement. Almost every woman in Pakistan will, at some point in her life, be the target of eve teasing or other forms of unacknowledged harassment.[19]Gallup found in 2017 that about one in four urban women in Pakistan experience eve teasing on their way to or from places including homes, schools, and marketplaces.[20]However, this is also a problem in public places like parks and eateries. Women of all ages and in all places, but especially young girls, are susceptible to eve teasing. The victim often has little option but to keep quiet when faced with such an ordeal on the streets of Pakistan. The societal genesis of silence is also linked to a wide range of socio-psychological elements.[21]

VI. Legal Framework Addressing Eve Teasing in Pakistan

The Constitution of Pakistan was written with the utmost care to ensure that women's rights and equality would always be guaranteed. The Constitution contains several laws and concepts that uphold the worth and rights of women in every sphere of society. Article 14 deals with dignity of person.[22] The phrase is inclusive of women's rights because it centers on the value of human dignity, which is universal and applicable to all people. Furthermore, the constitution of Pakistan guarantees non-discrimination and equal rights for all people. The foundation of this idea is found in Article 25,[23] which states that all people have equal protection under the law. All citizens, including women, are afforded the same rights and protections under this article. It also shields women from the unfairness and bias they may confront in numerous aspects of society. Violence and sexism against women are also addressed in the constitution. The state must prioritise the well-being of women and children in order to fulfil its duty to preserve the family, as stated in Article 34.[24] In addition, Article 35 specifies that steps must be done to achieve women's equal involvement in all spheres of

[19] N. M. Ahmad, M. M. Ahmad & R. Masood, R. "Socio-psychological implications of public harassment for women in the capital city of Islamabad"27 (1) *Indian Journal of Gender Studies* 77 (2020).
[20] Shumaila Imtiaz, Anila Kamal, "Sexual Harassment in the Public Places of Pakistan: Gender of Perpetrators, Gender Differences and City Differences among Victims"25 *Sexuality & Culture*1808 (2021).
[21] Bilal Ahmed, Farhan Naveed Yousaf &Umm-e-Rubab Asif, "Combating street harassment: A challenge for Pakistan"31 (4) *Women & Criminal Justice*, 31(4), 283 (2021).
[22] Constitution of Pakistan. art. 14.
[23] *Id.* atart. 25.
[24] *Id.* atart. 34.

public life and highlights the necessity of defending women's rights.[25] When taken as a whole, these laws highlight the constitutional mandate to abolish discrimination against women and promote their full potential.

Several laws in Pakistan aim to address eve teasing and its various forms of harassment such as Sections 354A and 509 of the Pakistan Penal Code (PPC) deal with criminalizing the act of eve teasing. Section 354A[26] pertains to assault or use of criminal force against a woman and stripping her of her clothes, while section 509[27] targets the intentional insult aimed at a woman's modesty.Protection Against Harassment of Women at the Workplace Act[28] primarily focused on workplace harassment, this law also covers harassment in public spaces. It mandates the establishment of anti-harassment committees, complaint mechanisms, and penalties for offenders.The Anti-Rape (Investigation and Trial) addresses various forms of sexual harassment, including online harassment, and emphasizes the use of technology to report such incidents.[29]The Prevention of Electronic Crimes Act[30] criminalizes cyber-harassment and online stalking, providing a legal basis for dealing with digital forms of eve teasing.

VII. Challenges in Enforcement of Eve Teasing Laws in India & Pakistan

Despite the presence of these laws, several challenges hinder their effective enforcement in India and Pakistan:

Cultural Norms

In India &Pakistan, ingrained cultural traditions that have endured for decades have a substantial impact on the difficulty of executing anti-eve teasing legislation. Eve teasing is a pervasive issue that jeopardizes the safety and wellbeing of women all throughout the nation. Eve teasing is the act of making unwelcome and repeated sexual statements or gestures toward women in public. However, because of ingrained cultural values and social dynamics, it is very difficult to implement legislation intended to stop this practice. The profoundly established notion of “honour” is one of the key cultural conventions that prevents Pakistan from enforcing night warfare regulations in an efficient manner.

There has always been both success and opposition in India's fight against violence against women and girls. The opposition of the social order is primarily to blame for the failure of

[25] *Id.* at art. 35.
[26] Pakistan Penal Code (Act No. of 1860) S.354A.
[27] *Id.* ats. 509.
[28] Protection Against Harassment of Women at the Workplace Act 2010. (Act No. IV of 2010)
[29] The Anti-Rape (Investigation and Trial) Act, 2021.
[30] The Prevention of Electronic Crimes Act 2016.

many reforms and legislation safeguarding women. Of course, the suspected criminals are not the only ones who are on board with this pressure; the vast majority of criminal justice officials and the political elite are as well. When it comes to sexual assault or rape, for instance, the law is structured to penalize victims rather than offenders. The oppression of women and girls by patriarchal society is reflected in many criminal laws and reforms. They have to accept the standards of their families, which often reinforce submissive relationships.[31]

In Pakistani culture, the idea of honour is very important and is directly linked to how women are seen as being pure and dignified. This often results in the notion that any attention or contact a woman has with a male, even if it is unwelcome and upsetting, is harmful for her honour and the honour of her family. As a consequence, many instances of eve teasing go unreported because the victims are fearful of being stigmatized and facing potential repercussions if they speak out. It is difficult for police authorities to collect evidence and develop a case against the culprits as a result of this cultural unwillingness to discuss or recognize such instances. The patriarchal attitudes and conventional gender roles that are present in Pakistan also make implementation difficult.

Vague Definitions

Enforcement of eve teasing laws in India and Pakistan faces a significant challenge rooted in vague definitions. Eve teasing, a widespread form of public harassment and gender-based violence, has long been a concern in these countries, prompting legislative efforts to curb its spread and ensure women's safety and dignity. However, the effectiveness of these laws is hampered by ambiguity around the definition of premeditated harassment, leading to inconsistent implementation and obstructing justice for victims.The legislation addressing this issue sometimes lack precision when it comes to eve teasing in Pakistan and India. Due to the vagueness in the law, perpetrators are able to take advantage of legal pitfalls and escape punishment. Law enforcement and judicial authorities struggle to discern between innocuous encounters and incidents of eve teasing in the absence of a precise and comprehensive definition that incorporates all types and degrees of eve teasing, which results in inconsistent judgements and unfair justice.

Vague definitions have an impact on eve-teasing victim reporting procedures as well. Because they are unsure if the interactions they had with perpetrators were within the bounds of the law, many victims are deterred from reporting occurrences. Because there is no precise

[31] R. N. Singh, D. Hurley, *et.al.,*"Towards identifying and ranking selected types of violence against women in north India",*International Journal of Comparative and Applied Criminal Justice* 1 (2016).

definition, there is a culture of impunity and quiet that allows offenders to behave without fear of repercussions. Additionally, ambiguous definitions obstruct law enforcement organizations' ability to look into and prosecute war crimes. Without clear definition, there is a chance that complaints would be treated incorrectly, possibly rehabilitating victims and deterring them from pursuing justice.

Underreporting

Underreporting promotes a culture of impunity, makes it difficult to stop this pervasive type of gender-based violence, and makes it difficult for laws to be enforced. The public's mistrust of law enforcement only makes the underestimating issue worse. Due to rampant racism, corruption, and ineffectiveness, many women avoid calling the police. There was a decline in trust in law enforcement because victims worry that their complaints will not be taken seriously or that the police would harass them, there should be a reporting procedure that fosters confidence between victims and the authorities. Furthermore, victims may not be able to comply with the legislation owing to a lack of support services and legal counsel, making it more challenging for them to understand and follow the law. Victims are hesitant to report provocation because of cultural biases, ingrained patriarchal views, and fear of law enforcement.

Inadequate Implementation

The lack of sufficient implementation is a significant obstacle to the enforcement of anti-eve teasing laws in India and Pakistan. The safety, dignity, and rights of many women are threatened by eve teasing, harassment, and threats against women in public places. Although laws have been passed to address this threat, their efficacy is often compromised by a number of issues that make it difficult for them to be put into practice.Lack of understanding and sensitivity among law enforcement organizations and the general people is one of the key causes of the ineffective execution of eve teasing laws.Many police personnel lack the specialised gender training needed to deal with gender-based violence, and it may be difficult to prosecute such offences. It is difficult to conduct an investigation and file charges, and it is challenging for survivors to notify the police due to the lack of information. The paucity of female police officers who are sympathetic to the needs and worries of victims makes this situation worse since survivors can feel uncomfortable discussing their experiences with male officers.

Burden of Proof

In legal terms, the burden of proof refers to the prosecution's obligation to establish guilt beyond a reasonable doubt. The victim, who was often a lady who took part in the unpleasant

action, is given this responsibility. This load is brought on by deeply ingrained societal conventions, pervasive homophobia, and a guilt-based mindset. When women come forward to report being sexually harassed, they are often mistrusted by the police and the general public, who also sometimes harass them. One of the challenges to the execution of eve teasing laws is the lack of solid proof. Since these crimes are often perpetrated in public, it might be challenging to gather evidence like photos or recordings.Additionally, it is difficult to provide eyewitnesses due to the transient nature of such harassment. Therefore, cases often hinge on the veracity of the victim's statement, which is frequently contested because of societal preconceptions. The question of whether the burden of evidence can be satisfied in the absence of conventional evidentiary support is raised by this. The burden of proof is challenging because of the societal stigma attached to reporting these instances. The burden of proof, which is supposed to secure justice, often turns into a tool for further persecuting apocalyptic survivors. This not only erodes trust in the legal system but also prolongs the cycle of criminals going free.

Inadequate Penalties

Insufficient punishment for violators has long been a key obstacle to the enforcement of anti-eve teasing legislation. Eve teasing, a kind of public sexual harassment in which women are verbally or physically harassed in public areas, is still a major issue in the nation that has an impact on the safety, dignity, and wellbeing of countless people. Although there are laws intended to stop this practice, their efficacy is undermined by the absence of severe penalties for offenders.Lesser penalties convey a troubling message to eve teasing survivors that they are not taken seriously by the legal system. The judicial system loses credibility when perpetrators get little fines or brief jail sentences, which also deters victims from coming forward and reporting crimes. Inadequate sentences are also a symptom of a larger systemic issue with gender discrimination in the legal system.

Burdensome Legal Processes

Given that eve teasing is the unwelcome and often aggressive attention or harassment of women in public places, it is a widespread and upsetting problem. Although laws have been passed to combat this threat, their efficacy is hindered by a number of issues, with challenging legal procedures standing out as a major roadblock. The complicated and convoluted judicial system, which sometimes discourages victims from seeking justice, is one of the major obstacles to implementing the eve teasing laws. The process starts with filing a complaint, which may be a difficult act in and of itself owing to ingrained societal conventions that stigmatize doing so. The victim's resistance makes it more difficult to file a

complaint, which necessitates several trips to the police station and a ton of paperwork. This difficult procedure deters victims from coming forward and lessens their desire to seek legal recourse. Additionally, after the filing of a complaint, legal processes are slow and ineffective. Victims of eve teasing often engage in long court fights that last for months or even years, frustrating them and leaving them feeling let down. The sluggish wheels of justice fail to express a sense of urgency and severity to prospective offenders, which prolongs the pain of the victims and diminishes the deterrent power of the law.

Witness Protection

Enforcing eve teasing laws in Pakistan is difficult due to witness protection issues, which underlines a crucial part of the larger struggle against gender-based harassment and violence. Eve teasing, an issue that has long plagued the nation and undermined the safety and autonomy of women, is a word used to characterize general harassment and threats against them. Although legislation has been proposed to solve this problem, the absence of a strong witness protection system makes it difficult for these laws to be implemented effectively. This shortcoming taints the whole court system, discourages victims and witnesses from testifying, and feeds the cycle of impunity. In India and Pakistan, the cultural and social environment often deters victims and witnesses from coming forward with information about cases of eve teasing. Eve teasing may sometimes result from ingrained conventions and biases, which discourages survivors from coming forward. Witness protection becomes necessary due to the possibility of societal shame and ostracism as well as the fear of retaliation from the criminal. Many victims and witnesses worry that by speaking up, they would expose themselves and/or their family to disgrace and increase their vulnerability.

Corruption and Influence

Influence and corruption have been the biggest problems with law enforcement. Although there are laws in existence to safeguard women's rights and reduce the fear of harassment, these laws are often not effectively implemented owing to systemic corruption and the undue influence of influential people. This hinders attempts to make the nation a safer place for women while simultaneously maintaining a culture of impunity. It is quite difficult to execute the law at night since corruption is so pervasive there. Law enforcement organizations are often troubled by corruption, bribery, and a lack of accountability while having the duty to preserve justice and ensure the protection of civilians. As a result, it is more difficult for them to pursue violent offenders with impartiality. People with money and connections may take advantage of the system. Police officials have allegedly accepted payments to ignore bullying

cases or even colluded with offenders, weakening public confidence in the legal system and preventing victims from pursuing justice.

VIII. Reforming Eve Teasing Laws in India & Pakistan

A crucial step in fostering safer and more equitable societies is the reforms in the eve teasing legislation in India and Pakistan. Combating the pervasive issue of eve teasing against women is a challenge shared by these nations. Because current legal systems often fail to appropriately handle such conduct, victims frequently experience a culture of impunity and dread. These reforms will consist of:

Clear and Unambiguous Definition

In order to provide effective protection for women and disadvantaged people, it is imperative that all current laws and regulations be thoroughly reviewed in both India and Pakistan. The phrase “eve teasing” describes a number of sexually harassing actions that often take place in public settings and result in discomfort, anxiety, and embarrassment for the victims. Effective legal reforms in both India and Pakistan requires a precise definition of the pretext of hostilities as a fundamental building block. Currently, the absence of a single description leads to ambiguities within the legal system, which makes it difficult to correctly identify and bring charges against offenders. What one jurisdiction could deem a small infraction might turn into a more severe offense in another. Because of this, the gravity of the issue is diminished, a climate of impunity is maintained, and victims do not get the protection and justice they are due. The need for eve teasing legislation reform requires for a definition that encompasses the whole range of actions that qualify as harassment. The term should include all verbal and physical acts that lead to a hostile environment for women and oppressed groups, from shouting and unpleasant remarks to stalking and physical contact. Regardless of the kind of crime, legislators have the power to direct law enforcement and judicial authorities to take immediate action against offenders.

Clear and Comprehensive Legislation

Transparent and comprehensive legislation is the starting point for improving India and Pakistan's legal systems. By enacting laws that particularly handle targeted threats, both parties may make it clear that such behaviour will not be condoned. In order to seek justice without fear of reprisal or public disgrace, this will motivate victims to come forward.A thorough victim-centered strategy should be a part of any legislation addressing eve teasing. This includes laws for reporting, investigating, and prosecuting crimes that put the security and decency of victims first. Legislation should also impose harsh punishments for offenders,

reflecting the gravity of the act and the need to prevent future perpetrators. Furthermore, the much-needed overhaul of eve teasing laws in India and Pakistan must include clear and complete legislation. Such laws describe and ban eve teasing while also addressing broader societal norms that support such behavior. In the end, passing clear, thorough legislation demonstrates a dedication to respecting the rights and dignity of every person, regardless of gender, and lays the path for a more diverse, fair society.

Swift and Effective Reporting Mechanisms

The legal framework for eve teasing has to be completely revised in order to address the issue, but without appropriate reporting mechanisms that encourage victims to come forward, secure their safety, and hasten justice, such changes would remain useless.Once reported, it is crucial to protect the victim's privacy and safety. Law enforcement must get training in handling such instances delicately and ensuring the victim's privacy and safety at all times. In this sense, dedicated units and specialized female police may help to provide a more welcoming setting for hearings, investigations, and processes. In addition to ensuring justice is served after an incident, establishing timely and efficient reporting processes also aims to avert future occurrences of this kind of incident. Data gathered via reporting systems may be the foundation for prevention measures. The final conclusion is that more than just a change in the legislation is needed to eve teasing laws in Pakistan and India. It calls for a paradigm change in societal attitudes that would enable victims to report crimes without being afraid and ensure their security and privacy throughout the judicial procedure. Such improvements are supported by quick and efficient reporting mechanisms that encourage victims to speak out, gather baseline data, and promote the adoption of evidence-based regulations. The creation of such procedures is required as both nations work to provide safer public areas and a more equitable society. These steps may open the door for long-lasting change in the struggle against violence by shattering the ingrained culture of eve teasing and silence.

Stringent Penalties

Eve teasing has been a major issue in both India and Pakistan, making women of all ages anxious and afraid. The issue has often not been adequately addressed by the laws already in place, which has resulted in impunity for offenders. The legal systems of both nations may convey a clear message that such conduct will not be condoned and that those guilty will face significant repercussions by enforcing heavy fines for eve teasing.Unquestionably, strong penalties are required to change the harassment laws in Pakistan and India. It is impossible to stress the importance of taking strong legal action to stop this threat since it has a direct impact on women's safety, independence, and overall wellbeing.Many times, the current laws

against eve teasing are not strong enough to dissuade criminals. Offenders sometimes get short sentences or penalties that do not adequately represent the gravity of their crimes. This kind of reasoning just supports the culture of bullying and normalizes the objectification of women. The legal system may be a powerful deterrent to eve teasing by implementing severe punishments, such as high fines and protracted jail sentences. This in turn has the potential to alter societal views and cast doubt on widely held notions about the legitimacy of such activity.

The eve teasing laws should be reformed so that penalties are just one part of the message that society is against harassment and dedicated to providing a secure environment for women. Strong penalties would change the cultural norms that support gender-based violence in addition to serving as a deterrent. The act of eve-teasing becomes socially undesirable, creating a safer atmosphere for all parties when the negative effects exceed the positive effects for the offenders.

Fast-Track Courts

As they meet the pressing need for a quick and effective judicial procedure to solve this significant issue, fast track courts play a significant part in the revision of eve teasing legislation in India and Pakistan. Eve teasing, a kind of both public and sexual harassment, has long plagued both nations and made women feel unsafe and fearful. Fast-track courts seem to be a required remedy since the present legal system has often failed to provide justice and deterrence in a timely manner.Eve teasing is a menace that is firmly ingrained in societal norms in both India and Pakistan, and its eradication calls for a comprehensive legal strategy. Due to the backlog of cases in traditional judicial systems, there are delays that only serve to maintain the atmosphere of impunity that surrounds such crimes. On the other side, fast-track courts focus on accelerating trials and making sure that trials are heard and decided expeditiously. These courts function as a deterrence by swiftly bringing criminals to justice and sending a clear message that harassment of any kind will not be tolerated.

Fast-track courts have the capacity to provide victims a safe place to discuss their stories without worrying about a protracted legal struggle, which is one of its key benefits. Eve teasing victims often contend with societal pressure, victim guilt, and the psychological agony of repeatedly experiencing their ordeals. By decreasing the duration of trials, fast-track courts may allay these worries by easing the emotional strain on victims and enticing more survivors to come forward and report events. This is particularly true in places where reporting eve teasing still carries a major stigma.Furthermore, the creation of fast-track courts expressly designed to address the issue of eve teasing demonstrates the government's

commitment to placing a high premium on the security and rights of women. By demonstrating that the legal system is actively working to protect women from harassment, this may boost public confidence. Fast-track courts are a crucial instrument for improving how eve teasing laws are enforced in Pakistan and India. These courts send a clear message to future criminals while simultaneously addressing the essential need for prompt and efficient justice for survivors. The establishment of these courts demonstrates a dedication to putting women's safety first and combating a covert culture of harassment.

IX. Need for a Uniform Statute to Address Eve Teasing in India and Pakistan

Offences involving eve teasing come under many categories of legislation, including harassment, stalking, and obscenity, making it difficult to enforce uniformly. Because of the disjointed nature of the method, there is frequently inadequate deterrence because of discrepancies in how these offences are defined and punished. Therefore, there are many obstacles for victims of eve teasing to seek justice and offenders often evade appropriate punishments owing to gaps in the law. A single statute that encompasses all eve teasing offences is urgently needed to adequately tackle this menace. It would be easier to tackle this issue systemically if there was a single law that applied to all midnight nuisance crimes. Such a law would have the potential to leave no room for interpretation by providing a comprehensive definition of the term “eve teasing” which would apply to all forms of harassment from verbal to cyber. It may also help people understand the limits they have to stay inside and the repercussions they face if they cross them. The reporting and investigation of crimes committed with malice may be streamlined if they fell under a single body of law. Because victims would not have to go through multiple legal procedures to file a report, they would be more likely to do so. Clearer criteria would also help law enforcement authorities handle situations more effectively and sensitively. More suitable and effective sanctions for eve teasing offences might be provided by a distinct legislation. Potential criminals might be deterred by the establishment of universal punishment criteria. Offender evasion or reduced penalties are common effects of the existing sentencing variance among countries and under various legislative requirements. As with many other things in today's digital era, eve teasing has found new outlets in the shape of social media and other digital platforms. A complete agreement would make sure that cyberbullying and unwelcome explicit material are taken as seriously as other forms of harassment in the workplace. By doing so, criminals who use such technology for harassing purposes would have a solid foundation for punishment. A contentious topic that persists in violating women's rights and dignity is eve-teasing. We need

targeted legislation to address this issue head-on. In addition to consolidating a number of other criminal offences, a comprehensive legislation of this kind would define and strictly penalise the act of harassing another person. This statute would make our communities safer and more respectful for people of all genders by standardising the reporting procedure, improving the quality of investigations, and increasing public awareness. Human civilizations must take decisive action to end eve teasing once and for all by addressing the issue with a concerted legal strategy.

X. Conclusion

The issue of eve teasing and the laws surrounding it in India and Pakistan presents a complex and multifaceted challenge that requires comprehensive and coordinated efforts to address effectively. In order to properly address the complex and multidimensional challenges of eve teasing in India and Pakistan and the laws controlling them, a thorough and well-organized effort is necessary. It is obvious that more work needs to be done to safeguard women's safety, dignity, and complete equality in public life even if significant progress has been made in recognising and addressing this problem.

Dealing with eve-teasers presents issues for both India and Pakistan. The elimination of this practice is still being hampered by societal attitudes, victim blaming, and cultural prejudices. India and Pakistan may learn from one another's cross-border cooperation experiences and best practices. Developing a feeling of cohesion while addressing other problems may be facilitated by sharing ideas for legislative reforms, awareness campaigns, and support for survivor networks. The sharing of information and improved communication between the two nations may also be facilitated through regional and international organisations.

Existing laws provide some protection against eve teasing but they frequently lack the entire strategy necessary to tackle this menace. If India and Pakistan really wanted to end the eve teasing, they would pass a comprehensive law specifically addressing it. While certain forms of street harassments may already be criminalised under existing statutes, more comprehensive anti-eve teasing legislation would convey a stronger message that such conduct would not be condoned. Offenders would face harsh penalties if this legislation precisely defined eve teasing, which might include numerous types of verbal, non-verbal, and digital harassment. The proposal would serve as a powerful deterrence against possible harassment and bring attention to the gravity of the situation by focusing on this subject in particular. A special legislation would make it simpler for eve teasing victims to seek justice by streamlining the legal procedure for them. Social stigma and convoluted legal processes

are only two examples of how the existing legal system in both nations may be problematic for victims.

Moreover, enacting a separate and comprehensive statute addressing eve teasing may improve communication and coordination between government agencies, nonprofits, and other interested parties. Violence against women and sexism are not isolated problems; rather, they are symptoms of eve's disease. The legislation, by offering a consistent structure, might inspire many sectors to collaborate on a solution to these systemic issues.To create a future where eve teasing is prohibited, both nations must cooperate.We can create societies where everyone can thrive without the constant fear of persecution if we uphold the values of equality, empathy, and respect. Both countries must travel this difficult path in order to protect the rights and dignity of their women and advance an inclusive and fair society for everyone.

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RAREST OF RARE DOCTRINE FOR DEATH PENALTY SENTENCING: A CRITICAL ANALYSIS OF ASYMMETRIC REASONING IN EVIDENTIARY VALUE *VIS-A-VIS* AGGRAVATING AND MITIGATING CIRCUMSTANCES

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ABSTRACT

Whenever we hear of the death penalty, the term "rarest of the rare" comes to our mind, which was formulated by the landmark Bachan Singh judgement in the late 1980s. But with time, as noted by Law Commission of India Reports, and Death Penalty Reports by National Law University, Delhi, there have been several issues involved with the sentencing stage in cases which are qualified for the "rarest of the rare" category. The issue is inconsistency in weighing the pieces of evidence for aggravating and mitigating circumstances, where several inherent factors, biases, etc. decide the question of the life and death of a person. Even Supreme Court has in its various decisions held that it cannot rule out the possibility of errors and inherent deformities of the system which determines the question of the existence of a person. The big question for analysis in this paper is to highlight ifthe application of Rarest of the Rare doctrine follows asymmetric reasoning for its evidentiary value in the light of Aggravating and Mitigating circumstances. This paper focuses on knowingthe technicalities involved in the current regime governing the issue of Capital Punishment,highlighting the inherent inconsistencies in Judicial Determinations governing the issue of the Death Sentence and finding theconsiderations the Judiciary takes into account while calculating the balance of aggravating and mitigating circumstances.The author has analyzed the existing situation through doctrinal methods of research and has collected data from both primary as well as secondary sources. The primary source of research consists of the legislation, case laws and statistics from various authentic sources, such as National Crime Record Bureau, etc. Similarly, the secondary source includes the reports of various committees and commissions, legal commentaries and digests, journal articles, and lex lexicon. The

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conclusion has to be drawn from analyses and interpretation of data collected from the above-stated resources.

I. Introduction

"*I support the death penalty, but I also think there has to be no margin for error*."

-George H. Ryan, former American Politician

The aforesaid words are of immense relevance as they signify the superlative form of care that has to be exercised while severing someone with the greatest gift of God – Life. And the care has to satisfy a higher threshold when the life-taker is no one but the State. The question which emerges at this juncture is how to satisfy the aforesaid lofty benchmarks. The answer would be by uniform abidance of just, fair and reasonable principles which forms the basis of sentencing in cases of Capital Punishment. But if such principles are laid down, is that the end of the problem? The answer is again negative because there is no way out to combat the subjective human biases and inherent prejudices in persons applying those principles, who are Judges.

Although there has been a worldwide trend toward abolishing death punishment, India has not followed suit. The clear aspect of irrevocability associated with this kind of punishment distinguishes it from others. An individual who has been executed for a crime will never be resurrected.[1] As a result, if a mistake occurs during the decision-making process, it cannot be corrected later.[2]

The Supreme Court of India confirmed the legitimacy of the death sentence in *Bachan Singh v. State of Punjab*[3]. The judgement in *Bachan Singh v. State of Punjab*[4] was the Indian Supreme Court's inaugural effort to confine the use of capital punishment to the most severe circumstances, so to that object, the Court established a detailed sentencing framework for prospective death penalty trials. The Court's ruling in *Bachan Singh v. State of Punjab*[5] was based on the death penalty's perceived value, but it also recognised the necessity to restrict its usage and instil uniformity in its sentencing via an established mechanism.[6]

II. Developments in the death penalty jurisprudence in India

The Code of Criminal Procedure, 1898 applied to British India may be directly traced to the judicial and legislative origins of capital punishment in India. Section 367(5) of the Act made capital

1 Hood, Roger, and Carolyn Hoyle, "Abolishing the Death Penalty Worldwide: The Impact of a New Dynamic" 38(1) *Crime and Justice [The University of Chicago Press, University of Chicago]* 1 (2009).
2 Carol S. Steiker and Jordan M. Steiker, "Capital Punishment: A Century of Discontinuous Debate" 100(3) *The J. of Crim. L. and Criminology* 643 (1973).
3 (1980) 2 SCC 684.
4 *Ibid*.
5 *Ibid*.
6 W. J. Roberts, "The Abolition of Capital Punishment" 15(3) *International Journal of Ethics, University of Chicago Press* 263 (1905).

punishment the preferred sentence for murder, and it obliged the sentencing court to present written justifications if it chose life over death. This was interpreted to suggest that the legislature believed capital punishment to be the rule rather than the exception. Following that, in 1955, an update to the 1898 Code was made, which removed Section 367(5) totally and replaced it with a new sub-section dealing with a completely unrelated issue. This trend has been seen as reflecting a movement away from the death penalty as the "typical" or "default" sanction for murder, or, at the very minimum, a dearth of legislative inclination between the two punishments of death and life.[7] The first constitutional challenge against the death sentence, in the case of *Jagmohan Singh v. State of U.P.*[8], was defeated by the Indian Supreme Court within this legal structure. The Court acknowledged that the 1955 Amendment put the decision between life and death to a sentencing judge's discretion, but believed that any improper use of that prerogative could be addressed within the pre-existing appellate and procedural structures. However, due to a substantial legislative shift, this ruling was quickly overturned. A new Criminal Procedure Code was enacted in 1973. It replaced the 1898 Code and now regulates India's criminal proceedings. Section 354(3) of 1973 Code mandated that "special reasons" be documented by a sentencing judge when a court chooses the death penalty over life imprisonment or a period of years in jail if the offence allows for these options. This necessity of "special grounds" for the death penalty was seen to indicate a revised legislative strategy. life imprisonment had become the default punishment for murder, with the capital penalty being an exemption. As a result, the 1973 Code marked a full inversion of the 1898 Code's viewpoint.

The Supreme Court first explored the extent of the word "special reasons" under Section 354(3) in *Rajendra Prasad v. State Of Uttar Pradesh*[9]. In deciding if to apply the death penalty, the Court concluded that "special reasons" implied that courts must examine only the criminal's situation, not the crime itself (i.e., only mitigating factors, not exacerbating ones). This was overturned when a fresh challenge to the death penalty's legitimacy was filed in *Bachan Singh v. State of Punjab*[10]. While maintaining the death penalty, the Court noted that the aggravating and mitigating factors must be balanced for each other, laying the framework for evaluating both aggravating and alleviating factors. More crucially, the Court recognised that the need of "special reasons" meant that it was the parliamentary policy to restrict the use of the capital punishment to "exceptionally grave" or "extreme" circumstances. The Court made the inaugural major endeavour in Indian capital sentencing jurisprudence to draw out a complete sentencing framework for prospective courts in order to assist sentencing judges in dispensing the death penalty in this manner.

Nonetheless, before getting into the details of the framework, it's worth noting that the third and last objection to the legitimacy of the death penalty was undertaken in the matter of *Smt. Shashi Nayar v.*

7 Project 39A, National Law University, Delhi, "Death Penalty India Report Summary"22 (2016).
8 1973 SCR (2) 541
9 (1979) 3 SCC 646.
10 (1980) 2 SCC 684.

Union of India and Ors.[11], in which the petitioner sought that *Bachan Singh v. State of Punjab*[12] sentence be reconsidered. The Highest Court, on the other hand, was unconvinced. It simply stated that "the death penalty has a deterrent effect and it does serve a social purpose", notwithstanding the nation's deteriorating law and order condition. With the last constitutional challenge to the capital punishment defeated, the sentencing system established in *Bachan Singh v. State of Punjab*[13] came to an end.

III. The Disbalance of Aggravating and Mitigating Circumstances

Since what all can constitute Aggravating and Mitigating Circumstances would be the main point of contention of the instant research work, the same needs to be looked into its raw form, as laid down firstly in *Bachan Singh v. State of Punjab*[14]:

Some of the Aggravating Circumstances as laid down in the case, were briefly as follows: previous planning and severe brutality of the act of murder coupled with extraordinary barbarism, causing death of member of armed forces/police forces/public servant while on duty, murder of person who was lawfully discharging his duty or gave assistance to Magistrate, etc. [15]

On the other hand, some of the Mitigating Circumstances laid down were: offender's extreme emotional and mental turbulence while committing offence, youth or old age of accused, chances of abstaining from crime in future, accused acted under coercion, moral justification of accused, etc.[16]

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11 (1992) 1 SCC 96.

12 (1980) 2 SCC 684.

13 *Ibid*.

14 *Ibid*.

15 *Id.* at 202.
"(a) if the murder has been committed after previous planning and involves extreme brutality"
"(b) if the murder involves exceptional depravity"
"(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed while such member or public servant was on duty OR in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant"
"(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code "

16 *Id.* at 206
"(a) That the offence was committed under the influence of extreme mental or emotional disturbance"
"(b) The age of the accused. If the accused is young or old, he shall not be sentenced to death" "(c) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society"
"(d) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions c and d above"
"(e) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence"
"(f) That the accused acted under the duress or domination of another person"
"(g) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct."

The "rarest of rare" theory established in *Bachan Singh v. State of Punjab*[17]case compels judges to weigh aggravating and mitigating factors when deciding if a death penalty is justified. *Bachan Singh v. State of Punjab*[18] case compels courts to evaluate not only the heinousness of the act,[19] but also the prospect of prisoner rehabilitation and to guarantee that the other option (life sentence) is categorically excluded.[20] For their Death Penalty India Report, Project 39A of National Law University Delhi conducted primary inmate interviews, which demonstrated that the method in which sentencing proceedings are handled, appears to be a simple ritual after the guilt has been reached. The issues interviewers encountered includes advocates being absent for sentencing hearings, such hearings being carried out on the very day of conviction (without ample duration and opportunity given to put before court every relevant sentencing content), defence lawyers portraying very cursory punishment considerations restricted to the inmate's age, poverty, and amount of dependents, and judges illustrating a disinterest in sentencing reasonings.[21]

Furthermore, the research points out that the rarest of rare philosophy proposed by *Bachan Singh v. State of Punjab*[22]case has completely failed to be applied. The topic of reformation remained unaddressed in the judgements for 34 of the 50 offenders in the research whose death sentences had been affirmed by the Apex Court (68%).[23] The Supreme Court ruled out whatever hope of reformation forthe remaining offenders based solely on the character of the offence in issue. Furthermore, the death penalties of 62 percent of these inmates were upheld by several High Courts sans regarding for the potential of rehabilitation. The research points out that the trial courts' effectiveness on this point is deteriorating. Only 28 of these 50 offenders' trial court judgements were available to the interviewers.[24] In this study, judges have a tendency to rule out the potential of reformation based on pretty strange premises without offering any genuine justification as to why these factors are significant and comprehensive for ruling out the prospect of reformation. Persons fleeing during a police investigation, committing future crimes before being captured, and showing no evident signs of guilt during the trial were among the most often cited causes.[25]

Bachan Singh v. State of Punjab[26]case sentencing framework is unquestionably sound, and it is likely the finest that can be asked for in a retentionist setting. Nevertheless, there's been a total collapse in the execution of *Bachan Singh v. State of Punjab*[27] 'rarest of rare' philosophy. This breakdown isn't

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17 (1980) 2 SCC 684.
18 *Ibid*.
19 *Id.* at 202.
20 *Id.* at 209.
21 Project 39A, National Law University, Delhi, "Death Penalty India Report Summary"34 (2016).
22 (1980) 2 SCC 684.
23 *Supra* Note 21 at pg. 35.
24 *Ibid.*
25 *Ibid.*
26 (1980) 2 SCC 684.
27 *Ibid*.

just about uneven administration of the doctrine in considerations of results; it goes right to the heart of how sentencing proceedings are held. The *Bachan Singh v. State of Punjab*[28]case decision reinforces the idea that taking someone's life with the permission of the law has to be difficult. If the death sentence is to be used, it must be proven that the person whose existence the law intends to end is without redeeming qualities. The considerations evaluated in respect of mitigating circumstances can be divided into two types. The first group of variables explains (rather than 'justifies') certain aspects of a person's life building up to the crime.[29] The second group is concerned with the lives of individuals who portray an identity other than that of an offender. It serves to humanise the offender and show the court that a person's identity must not be limited to the offence he did. It'd be good to search for elements that influence behaviour prior to the offense in the first group. The objective must be to show that a person's general conduct and personality are impacted by a complex web of circumstances that intersect in a variety of manners on which the person has limited influence. It allows the person to be punished to be seen as more than merely a criminal, but as a totality of her life's influences. Only the offence is on show when this full picture is not presented to the sentencing court.[30]

IV. Justice in Death Penalty Cases *vis-à-vis* Judicial Discretion

Another study was conducted by the National Law University of Delhi and Bangladesh Institute of Law and International Affairs, in which 60 former Supreme Court of India Justices were interviewed.[31] In discussions, it was found that the rarest of rare idea failed to organise discretion power in capital sentence instances and consistency in sentencing. Furthermore, eight justices agreed that the doctrine's ambiguity was the most important aspect in allowing unrestricted discretion: "It's totally unfettered discretion. Where to choose?… What should the yardstick be?… The disparity is so huge! …there is no sound sentencing policy. It can be safely said that the Bachan Singh threshold of rarest of rare cases has been most variedly and inconsistently applied [giving] rise to a state of uncertainty in capital sentencing law which clearly falls foul of constitutional due process and equality principle."[32]Those Indian justices who made their understanding of the rarest of rare notions explicitly (as well as who had considered 80 capital cases and affirmed 41 death penalties) stated a wide range of meanings, frequently at odds with the *Bachan Singh v. State of Punjab*[33] paradigm. A few, incorrectly, took the view that the rarest of the rare was a matter of crime categorization (for instance, the rape and homicide of a minor). Another set of judges believed that some aggravating

[28] *Ibid*.
[29] Craig Haney, "The Social Context of Capital Murder: Social Histories and the Logic of Mitigation" 35 *Santa Clara Law Review*547 (1994–1995).
[30]Project 39A, National Law University, Delhi, "Death Penalty India Report Summary"59 (2016).
[31] Carolyn Hoyle & Saul Lehrfreund, "Contradictions in Judicial Support for Capital Punishment in India and Bangladesh: Utilitarian Rationales" 15 *Asian Journal of Criminology, Springer* 141 (2020)
[32]*Id.* at 154.
[33] (1980) 2 SCC 684.

facts, like the number of casualties or weapons employed, would satisfy the *Bachan Singh v. State of Punjab*[34] doctrine's standards, allowing no space for atonement.[35]

Whilst *Bachan Singh v. State of Punjab*[36]judgement gives an example of aggravating and mitigating elements, judges had vastly differing opinions on what comprised aggravation and mitigation, as well as how to balance them. Judges in India preferred to prioritise aggravating issues while ignoring some mitigating aspects. They accorded disproportionate weight not just to the severity and horrific character of crimes, and also to the victim's fragility. In the study[37], six judges, in direct opposition to *Bachan Singh v. State of Punjab*[38] judgement, proposed a blanket dismissal of mitigation as a condition in death sentencing. Others said that mitigation is only an explanation for the offence or that it is completely meaningless in the case of extremely horrific crimes. Likewise, exceptionally heinous crimes may prevent Indian courts from giving due regard to the potential of the defendant's rehabilitation. More ominously, 14 justices declared that the option of change should not apply to situations involving the death penalty: "A man who is determined to kill innocent persons…how do you expect to reform him?… and reform him for what purpose and how … and what will happen after he's reformed in the jail? Are we going to release him?"[39] Whereas the *Bachan Singh v. State of Punjab*[40] decision forbids sentencing judges from taking public opinion into account, 11 judges—who had affirmed 41 death sentences between them—explicitly mentioned "collective conscience" as a significant aggravating element: "[the collective conscience] is a relevant consideration so far as punishment is concerned because punishment has to be proportionate… It can only be judged with respect to … how the public feels about it, and what the public thinks about it."[41]

It has already been demonstrated that in India capital crime sentencing is judge-centric, with comparable instances yielding vastly different results. In the lack of defined sentencing criteria and uncertainty regarding what might be considered mitigating or aggravating factors, more than half of Indian judges said that their origins, especially their class, sociocultural position, and religious views, influenced their discretion markedly: "at the end of the day, every judge has his own concept of what is rarest of rare. Some people like to give the death sentence, some people say no, I have no right to take somebody's life. That depends on … a judge's background."[42] One judge who had decided 90 cases in the appellate courts summed up concerns expressed by many others: "On the same considerations, different people react differently. And that is the strongest reason why I am against the death penalty. I find it horrible and terrifying, the subjective element in death penalty sentencing. If X

[34] *Ibid.*
[35] Project 39A, National Law University, Delhi, "Matters of Judgement"26 (2018).
[36] (1980) 2 SCC 684.
[37] *Supra* Note 31 at 155.
[38] (1980) 2 SCC 684.
[39] *Ibid.*
[40] *Ibid.*
[41] *Ibid.*
[42] *Supra*note 31 at 156.

is hearing my case, I will end up hanging from a rope, but if Y is hearing it instead, I'll live…. What Amnesty International has said in the Lethal Lottery report describes it very well, really."[43]

In the survey, several judges believed that arbitrary death sentence administration, particularly judge-centric punishment, was solid argument for repeal. Others had fundamental objections to the value of human life or the ability of convicts to be rehabilitated, while some believed the death sentence served no penological function.

A number of Indian judges agreed that the 'Indian mentality' was still not prepared for repeal. In a separate case, two judges said that abolishing the death penalty would be contradictory to public norms. One thought the goal was to preserve social peace, while another said it was to keep people's faith in the legal system: "In our country, the people support the retention of the death penalty. They believe that society loses its balance if the death penalty is not awarded for serious offences."[44] In a disorderly or broken legal system, many judges believed the death sentence might hold perpetrators accountable. While there was not a strong consequentialist justification for preservation, it was a demonstration of confidence in the most severe penalty to maintain people 's trust in the judicial system, even though they knew it was untrustworthy. The great majority, on the other hand, cited purely utilitarian grounds for their preservation: "The main purpose of awarding the death penalty is to prevent people from committing heinous crimes. It works as an effective deterrent. I think the death penalty should be retained as a deterrent punishment so that no person in society has the audacity to kill any other person illegally. … a death sentence reduces the tendency of killing."[45]

Disparity in specific Apex Court Cases

Despite the fact that consecutive constitutional benches of the Apex Court have preferred judicial discretion over the establishment of comprehensive sentencing standards, judicial discretion has proven insufficient as a protection against absurdity and subjectivity.[46] In a number of cases, the judges, including that of the Supreme Court, have shown that they have not consistently followed the current law and jurisprudence on capital punishment cases uniformly. Several Supreme Court benches have handled comparable cases unevenly in the very same month, ostensibly showing their personal proor anti-death penalty views. While the accused's young age may be a mitigating factor enough to reduce the sentence of death in one instance, it may be disregarded in another. In one instance, the horrible seriousness of the incident may be adequate for the Court to overlook mitigating elements, whereas in another comparable murder was simply not terrible enough. Dhananjoy Chatterjee was hanged in August 2004 for the murder and rape of a girl at the housing complex where

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43 *Ibid.*
44 *Supra*note 31 at 158.
45 *Ibid.*
46 Pranav Verma, "The Inevitable Inconsistency of the Death Penalty in India" 6(2) *Cambridge Law Review* 27(2021).

he served as a security guard in 1990.[47] He was the only person in nearly six years to be hung in the nation, breaking a de facto halt on executions.

It is interesting to note that just three days after this execution, the Top Court adjudicated over an appeal in *Rahul alias Raosaheb v. State of Maharashtra*[48], a matter of rape and killing of a child, . Neither one of these offenders had a prior criminal record, and there was no evidence of wrongdoing while in jail in either case. Nonetheless, the Supreme Court found Dhanajoy Chatterjee a threat to society, and his punishment was not only maintained, but he was also executed. Rahul's sentence was modified to life imprisonment since he was no longer considered a threat. Even though the Supreme Court upheld Dhananjoy Chatterjee's capital punishment in 1994, Justice Anand acknowledged that there were enormous inequalities in sentencing. He mentioned, "Some criminals get very harsh sentences while many receive grossly different sentences for an essentially equivalent crime and a shockingly large number even go unpunished thereby weakening the system's credibility."[49]

The reality that most capital verdicts in India are founded only on circumstantial evidence is surprising. Bhagwati, J., noted a multitude of challenges with the criminal justice process in his contrasting opinion in *Bachan Singh v. State of Punjab*[50] case: "Our convictions are based largely on oral evidence of witnesses. Often, witnesses perjure themselves as they are motivated by caste, communal and factional considerations. Sometimes they are even got up by the police to prove what the police believe to be a true case. Sometimes there is also mistaken eyewitness identification and this evidence is almost always difficult to shake in cross-examination. Then there is also the possibility of a frame-up of innocent men by their enemies. There are also cases where an overzealous prosecutor may fail to disclose evidence of innocence known to him but not known to the defence. The possibility of error in judgment cannot, therefore, be ruled out on any theoretical considerations. It is indeed a very live possibility."[51]"The manner in which the investigating agency acted, in this case, causes concern for us" the Court remarked in *Rampal PithwaRahidas v. State of Maharashtra*[52]. In every civilised nation, the police force is given the authority to investigate crimes in order to assure the perpetrator's punishment, and it is in the best interests of societal structure for the investigating agency to act fairly and honestly, rather than fabricating evidence or making artificial clues solely to prove guilt, because such acts undermine the common man's trust not just in investigating agency but, in the end, in the machinery of justice dispensation.

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47 (1994) 2 SCC 220.
48 (2005) 10 SCC 322.
49 *Supra* Note 47 at ¶14.
50 (1980) 2 SCC 684.
51 (1982) 3 SCC 24, 61.
52 1994 Supp. (2) SCC 478.

In *Sudama Pandey and others v. State of Bihar*[53], the trial court had convicted five persons to execution for attempting murder and rape of a 12-year-old kid, and the High Court had mitigated the penalties, but the Constitutional Court recognised that the High Court had failed to correctly assess the evidence, as it relied solely on circumstantial evidence, leading to a travesty of justice. The Supreme Court stated in an indictment of the subordinate judiciary: "The learned Sessions Judge found the appellants guilty on fanciful reasons based purely on conjectures and surmises. It is all the more painful to note that the learned Sessions Judge, on the basis of the scanty, discrepant and fragile evidence, found the appellants guilty and had chosen to impose capital punishment on the appellants."[54] A three-judge court differed over the punishment given on one of the appellants in *Krishna Mochi and others v State of Bihar*[55], but concurred on the conviction and upheld the capital punishment given to three other appellants. In a differing view, Justice Shah noted that due to flaws in the probe and evidence that merely showed the accused's appearance at the site of the crime, this cannot be a suitable case for the death sentence to be imposed. He remarked, "This case illustrates how faulty, delayed, casual, unscientific investigation and lapse of a long period of trial affects the administration of justice which in turn shakes the public confidence in the system."[56]

The Supreme Court has admitted that the death sentence is applied in a discretionary and arbitrary manner: "even though Bachan Singh case intended principled sentencing, sentencing has now really become judge- centric"[57]Thus, "the confirmation of death sentence or its commutation by this Court depends a good deal on the personal predilection of the judges constituting the Bench."[58] Identifying this to be a "serious admission"[59] on its end, the Court in *Santosh Bariyar v. State of Maharashtra*[60] conceded that "there is inconsistency in how Bachan Singh case has been implemented, as Bachan Singh case mandated principled sentencing and not judge-centric sentencing."[61] Noting that "the Bachan Singh case threshold of the rarest of rare cases has been most variedly and inconsistently applied,"[62] the Apex Court has accepted that "the balance sheet of aggravating and mitigating circumstances approach invoked on a case-by case basis has not worked sufficiently well so as to remove the vice of arbitrariness from our capital sentencing system."[63] Whereas *Bachan Singh v. State of Punjab*[64] argued that well-established principles derived from judicial precedent would lead courts to capital punishment, the Supreme Court accepted in Mohd. Farooq that well-established principles

53 (2002) 1 SCC 679.
54 *Id.* at 685.
55 (2002) 6 SCC 81.
56 *Id.* at 116.
57 *Sangeet v. State of Haryana*, (2013) 2 SCC 452, 33.
58 *Swamy Shraddananda (2) v. State of Karnataka*, (2008) 13 SCC 767, 51.
59 *Santosh Bariyar v. State of Maharashtra*, (2009) 6 SCC 498, 54.
60 *Ibid.*
61 *Ibid.*
62 *Id*. at 109.
63 *Ibid.*
64 (1980) 2 SCC 684.

derived from judicial precedent should assist courts in death sentencing: "the precedent on death penalty … is [itself] crumbling down under the weight of disparate interpretations."[65]The Supreme Court has issued a list of situations in which different Benches have reached dramatically opposed conclusions in cases with comparable facts and circumstances. It has called "lack of consistency"[66] and "want of uniformity"[67] in capital sentencing, "a poor reflection of the system of criminal administration of justice."[68] The Court has expressed its worry that the "extremely uneven application of Bachan Singh has given rise to a state of uncertainty in capital sentencing law which clearly falls foul of constitutional due process and equality principle."[69]

In *State of U.P. v. Satish*[70], The defendant was found guilty of raping and murdering a youngster. After reviewing rulings that established principles for the application of the death penalty, the Court said that it had "no hesitation in holding that the case at hand falls in rarest of rare category and death sentence awarded by the trial Court was appropriate."[71] The ruling is utterly quiet on the case's aggravating and mitigating factors, and it makes no mention of why the case merited the imposition of death. This isn't a one-off occurrence. Following *Bachan Singh v. State of Punjab*[72] case, for instance, there has been a slew of similar cases, like *Lok Pal Singh v. State of MP*[73], *Darshan Singh v. State of Punjab*[74], *and Ranjeet Singh v. State of Rajasthan*[75], have upheld the death sentence without referring to the "rarest of rare" formulation at all. In some other cases, such as *Mukund v. State of MP*[76], *Ashok Kumar Pandey v. State of Delhi*[77], *Farooq v. State of Kerala*[78], *and Acharaparambath Pradeepan v. State of Kerala*[79], to name a few, the Court referred to the "rarest of rare" dicta, but did not apply it in imposing/commuting the death sentence, thereby paying mere lip service to the "rarest of the rare" test.

V. Conclusion and Suggestions

These talks highlight fundamental questions regarding the current judicial-centric application of capital punishment and the fashion in which judges exercise their discretion. They convey a tale of the various contradictions and inconsistencies that exist not just across precedents, but even inside the same decision. Even if the government creates standards to guide judicial discretion, the system's

65 *Mohd. Farooq Abdul Gafur v. State of Maharashtra*, (2010) 14 SCC 641, ¶165.
66 *Swamy Shraddananda (2) v. State of Karnataka*, (2008) 13 SCC. 767, ¶ 52.
67 *Ibid.*
68 *Ibid.*
69 *Santosh Bariyar v. State of Maharashtra*, (2009) 6 SCC 498, ¶ 110.
70 (2005) 3 SCC 114.
71 *Ibid.*
72 (1980) 2 SCC 684.
73 AIR 1985 SC 891.
74 (1988) 1 SCC 618.
75 (1980) 1 SCC 683.
76 (1997) 10 SCC 130.
77 (2002) 4 SCC 76.
78 (2002) 4 SCC 697.
79 (2006) 13 SCC 643.

inherent defects will persist to obstruct its fair use. This argument was stated by the Supreme Court of South Africa in *The State v. T Makwanyane and M Mchunu*[80]when it noted that "the differences that exist between rich and poor, between good and bad prosecutions, between good and bad defense, between severe and lenient judges…by factors such as race and class… (are) almost certainly present to some degree in all court systems."[81] The possibility of rehabilitation is an important aspect of death sentencing because it gives an accused person one final chance to make amends before their life is taken away. Nevertheless, there is no means of correctly forecasting a person's potential to transform in a nation like India with diverse socioeconomic realities and individual circumstances, insufficient legal help, and distinct cultural values.[82] As a result, it is unavoidable that in matters of death and life, the former is unfairly applied to the unfortunate few.[83]

When Justice Samuel Alito wrote the majority view in*Richard E. Glossip, Et Al. v. Kevin J. Gross, Et Al*[84], which supported the use of lethal injections as a form of execution for death row inmates. He stated"because capital punishment is constitutional, there must be a constitutional means of carrying it out."[85] Today, India's death penalty jurisprudence reflects this faulty use of reverse reasoning. In 1980, four Supreme Court judges established a standard to ensure that the death penalty is carried out with appropriate procedural protections. They had no idea that 40 years later, judges would use a muddled and twisted version of that criteria to take numerous lives in innumerable cases. In*Channu Lal Verma v. State of Chhattisgarh*[86], Justice Kurian Joseph referred to this inability to properly enforce procedural protections while presenting a persuasive argument for a re-examination of the necessity for capital punishment in India. Its continued existence serves as a sombre reminder of a system of justice that inappropriately incorporates society's retaliatory inclinations into an unjustified legal procedure. Probably the clearest reason for its repeal is because judges in the criminal justice process cannot consistently interpret precedents while issuing such a lifelong sentence.

The sentencing paradigm adopted in *Bachan Singh v. State of Punjab*[87]case requires that the choice to end a person's life be made with the ethical and legal obligation of establishing that the prisoner has no chance of redemption and that the person's life has no future worth. In death penalty instances, the restricted factors of age, poverty, and surviving family members can't be deemed a rigorous sentencing process. It is critical that a considerably more comprehensive strategy for presenting the worth of a person's life be adopted in the march towards terminating a person's life through the

80 1995 SCC OnLine ZACC 2.
81 *Id.* at 54.
82 Law Commission of India,"262nd Report on The Death Penalty" 69 (2015)
83 Ashna D, "Death Penalty Law in India: A Case of Consistent Inconsistencies"*Columbia Public Policy Review*(2019),*available at:*https://www.columbiapublicpolicyreview.org/2020/07/death-penalty-law-in-india-a-case-of-consistent-inconsistencies/ (last visited on April 21, 2023).
84 2015 SCC OnLine US SC 5.
85 *Id.* at 44.
86 (2019) 4 SCC (Cri) 402.
87 (1980) 2 SCC 684.

legislation. This comprehensive approach must include the physiological, psychological, social, economic, and emotional aspects that may have influenced the individual's development before the judge. Nevertheless, such a strategy cannot be restricted to knowing the individual before the act in issue; it must also take into account the person's existence in jail from a variety of angles.

Sentencing hearings can provide a chance to show the judge that the accused is more than simply the perpetrator of the crime. In order to aid the court in tackling the prospect of reformation, certain aspects of his existence must be addressed. It is critical for defence attorneys to provide material at the sentencing phase that indicates the accused's conduct and contributions in various situations. Information on the offender's conduct and attitude from her residence, co-workers, and prison officers would be crucial in assisting the court in determining the likelihood of reformation. Another important feature of the Indian death penalty law that is absolutely missing is a consideration of "future dangerousness" as a sentencing criterion. This is a problem that necessitates contextual study and sophisticated expert judgement at a level that the Indian criminal justice system now appears to be far away from. Hence what can be said at the end of the debate is that the subjectivity in capital punishment can never be abolished, so there are only two ways out. Firstly, the courts should dwell more deeply into an offender's life and its related aspects and follow a tailored approach in every case to ascertain which punishment is befitting for the offender, and apart from this, the spirit of *Bachan Singh v. State of Punjab*[88] case must be complied with more stringently. And secondly, if this is also a possibility, then the legislature must look into the issue of either reducing the death sentence for a number of crimes or abolishingit completely.

[88] *Ibid*.

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BOOK REVIEW

THE TRUTH PILL: THE MYTH OF DRUG REGULATION IN INDIA BYDINESH S. THAKUR AND PRASHANT REDDY T.

Rajashree Patil[*]

The Book titled "The Truth Pill - The Myth of Drug Regulation in India" runs into 11 chapters. The book begins with a Prologue: An Epidemic of DEG Poisoning and Regulatory Failure. The author clearly explains about Indian Companies quite often fail to test either the raw materials or the final formulationbefore shipping it to the market. This is despite having Good Manufacturing Practices (GMP) being prescribed under Indian law requiring mandatory testing of both the raw material before it is used in production and the final formulation before it is shipped to the market. Further, the author throws light on the incident of the mass poisoning in Jammu. The Himachal Pradesh Drug Control Administration (HPDCA) which has jurisdiction over the manufacturer of the alleged adulterated cough syrup-Digital Vision alleged before the Himachal Pradesh High Court that Digital Vision lacked an appropriate facility to test the furnished information for DEG contamination and that the analysis report from Digital Visions quality control department indicating the absence of DEG in dangerous quantities was misleading. Hence, author states there can be no cure without a diagnosis.

In the first chapter titled as The Birth of Modern Medicine and Drug Regulation, the author discusses about the birth of the 'cell and germ theory' and the nation's steps to regulate the science of drugs. The German and French regulatory models were path-breaking because they ensured perhaps for the first time in history, an assurance from the state regarding the quality of a drug that was being supplied to patients. The deaths of 13 children in St Louis, Missouri and Camden were the first instances of mass deaths from mass manufactured drugs and served as a reminder that these new life saving drugs could be dangerous if not manufactured and tested properly in completely sterilized premises. Further, the author suggests that if a country is governed by poorly designed and enforced drug regulatory system, people will die. The pharmaceutical industry cannot be trusted to regulate itself.

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The second chapter titled Controlling the Craze for Medicinal Drugs in Colonial India wherein detailed discussion is made by analyzing the Chopra Committee-The Report of the Drugs Enquiry Committee,1930-31. Many of the issues during the debate on Sir Jaffers motion in 1927 were not addressed by the new law. The present chapter covers the issues such as the lack of requirement for the pharmaceutical industry to provide any clinical proof of safety and efficacy of new drugs, lack of regulation of traditional medicinal industries like Ayurveda and Unani, exaggerated and misleading advertisements by the pharmaceutical industry, and finally, the unhealthy nexus between the pharmaceutical industry and the medical practitioners.

The third chapter titled Of Botched Investigations, Dodgy Prosecution Guidelines, and Lenient Judgeswhere the author has made intensive discussion on the drugs declared as "Not of Standard Quality (NSQ)". It is obvious that a NSQ drug poses a danger to public health, Indian Courts are known to have been very lenient. Under the Drugs and Cosmetics Rules, 1945, Pharmaceutical companies manufacturing drugs must have the manufacturing license. In case of Krebs Biochemicals, Andhra Pradesh court convicted the Managing Director for the manufacturing and sale of drug without obtaining valid a license in violation of section 18(c) of the Drugs and Cosmetics Act in 2019. Further, the Managing Director was sentenced to prison for a period of one year and a fine of Rs.20000.The author rightly pointed out that while acquittals and lenient sentencing discussed in the many cases and more worrying fact is only a very small percentage of cases where the system detects NSQ drugs are actually prosecuted by the drug inspectors. The author in the present chapter makes critical analysis of The Drugs and Cosmetics Act 1940 provisions and identifies the bottlenecks for implementation.

For the state of Karnataka, the authors managed to get data from the Karnataka Drug Control Department under RTI for a period of seven years from 2015 to 2021. These included prosecutions filed against manufacturers of NSQ drugs, pharmacists and a small number of cases pertaining to violation of price control laws. Similarly, authors got around 30 judgments from Tamil Nadu in prosecutions against pharmaceutical companies on the charges of manufacturing NSQ drugs. The lenient sentencing in prosecutions under the DCA 1940 will require the public prosecutors to push back against such sentencing practices by judicial magistrate and if required challenging such decisions before the higher courts. For this to happen, state governments must have the political will to order prosecutors to demand stricter sentencing or at least compliance with the minimum sentencing requirements in the law.

The fourth chapter is exclusively devoted for the discussion on Of Glass Particles and Bacterial Endotoxins. In the present chapter the author enumerates that one of the likely reasons for Indian pharmaceutical companies ignoring Good Manufacturing Practices (GMP) compliance in India is because the Indian Drug Regulatory machinery has always been more focused on surveilling and testing the quality of drugs sold in the market. Many states simply do not have sufficiently well-equipped laboratories and trained analysts to conduct a full pharmacopeial analysis of samples procured by drug inspectors from the market. Trying to protect public health through market surveillance is less rigorous than focusing on GMP compliance during the manufacturing process. Authors had filed applications under RTI asking whether they had specific guidelines in place instructing their drug inspectors on the type of drugs from the market for testing purpose. The authors finally conclude the chapter highlighting that the state laboratories are required to conduct a critical test called 'impurity testing'. Even the data available on the XLN website is not structured and there is no consistency in the way data is catalogued, making it difficult to perform any meaningful analysis.

The fifth chapter titled New Drugs and The Persistent Insolence of the Central Drugs Standards Control Organisation(CDSCO), where the author explains about the pharmaceutical industry's response to the pandemic by investing in the creation of new vaccines as well as in the creation of new drugs and re-purposing existing treatments to treat COVID-19 patients. There is absence of evidence-based medicine in India -wherein the individual Indian Doctors have been making an effort to spread the principles of evidence-based medicine, but institutional push appears to be lacking.

In the sixth chapter titled as Can Made in India Generic Medicine Be Trusted?,the author proposes that the government should introduce a mandatory labelling requirement for all drugs sold in India indicating whether the drug in question has successfully undergone bioequivalence and stability testing. Such a labeling requirement combined with a mandatory requirement of public disclosure will give doctors the necessary information to ascertain the trustworthy formulations for themselves.

The seventh chapter- The Losing Battle to Regulate Traditional Indian Medicine, conveys that the Ayurvedic product which demonstrates the potential to cure or treat a disease or ailment, it should go through the same regulatory pathways as any other new drug i.e. a rigorous three phased double blinded RCT to establish its safety and efficacy. Imposing such requirement on all Ayurvedic and Unani products will certainly face immense push back especially from the Ayurvedic industry.

The Eighth chapter is The Dangers Posed by Traditional Medicine and Its Practitioners to Public Health which focuses on regulating the traditional medicine industry. It is clearly an uphill task but given the danger posed to public health, there is no other alternative. The Indian medicine practitioners prescribing modern medicine, there are simple solutions. Leaving it to the courts to sort out these issues is quite simply a terrible approach to governance.

The Ninth chapter is The Chaos of Indian Pharmacies and their Supply Chains emphasis on tackling issues of prescription abuse. The Ministry of Health must seriously consider using this opportunity to dramatically upgrade the current bare boned licensing requirements to open and run a pharmacy or engage in the whole -sale trading of drugs. The author ends the chapter stating that there could be no better time for the ministry of health to completely rethink the regulation of pharmacies in a manner that guarantees better storage of drugs during transit and distribution while protecting against prescription abuse and guaranteeing supply chain integrity.

The tenth chapter is Of Drug Advertisements, Promotions and Trademarks, wherein the chapter explains about Drugs Inquiry Committee under Col Ramanath Chopra 1931. Further, the author highlights on Drug and Magic Remedies (Objectionable Advertisements) Act which has been enforced against a range of advertisements for bewildering products. In 1975, the Supreme Court heard a case involving an advertisement in the Hindi newspaper *Sanmarg* in West Bengal, for a machine of science and electric treatment to treat amongst other conditions weakness, laziness, oldness in youth etc. The conviction and penalty of 100/- imposed by the lower courts was upheld by the Supreme Court. Similarly, the Madras High Court in 1990 refused to stay the investigation by the drug inspector. Wherein the case involved with advertisement in the Tamil weekly “Kalkanadu” for a Durka Ayurveda Tumbler, it was claimed that water drunk from tumbler was capable of controlling diabetes, blood pressure, weakness etc. Furthermore, the author ends that chapter stating that a more efficient system of regulation could be achieved by putting in place regulations that require all pharmaceutical companies to submit all advertisements, promotional literature and brand names to the national drug regulator for its permission before communicating the same to the general public. The drug regulator would need to create internal capacity to screen all such material thoroughly from a public health perspective.

The eleventh chapter is The Politics and Levers of Reforming India's Drug Regulatory Framework, the author states that the demands by the middle class for reform in India generally begin with the filing of public interest litigations before the supreme court. PILs are

a controversial procedural innovation by the Supreme Court which significantly dilutes the locus standi requirement, allowing persons to challenge government action despite not being directly affected by the same.

From above discussion it can be concluded that the effective reform can be achieved only when we educate people, especially doctors, who prescribe medicine. In the present book, an attempt has been made on law making process in the country.

Any reader, after going through the work of authors would have a thorough understanding of all the legal aspects pertaining to drug regulation in the Indian context. The authors have made tremendous contribution to the society by focusing on many unfortunate drug incidents. The book is useful to the law student, researcher, lawyer, teacher, judge, chemical engineer and policy makers. The book deserves to be in the library of every law school, advocate office, court and chamber of every judge, law teachers and scholars.

However, the overall analysis of the book chapters itself are not adequate in order to overcome from the practical problems. The author could have highlighted more on the role of doctors in medical negligence cases in addition to illegal pharmaceutical practices. Many Pharmaceutical companies do not check the composition in manufacturing drug which is major drawback in India. Further, authors have rightly pointed out by analyzing various judgments wherein it can be seen that the rate of acquittal is more than the severe punishment.

The authors have collected data from various government offices by filing application under RTI.Around 400 applications were filed under the RTI Act with the drug controllers and other government departments for collecting data across the country to expose the dark side of the government department. The author had filed petition before Delhi High Courtagainst the drug controller for releasing government order. Here point is that the gathering information from government official was quite challenging for the authors and at the same time it requires lot of patience. Hence the author makes the readers to rethink on Drug regulation law in practical perspective.

The book poses a salient question to legal scholars: to what extent do the Drug Regulation law matter for the development of a well-functioning of the country. Here authors make serious concern on health which is a fundamental right of every citizen of India as stated in Art.21 of the Indian Constitution. This book is a result of combining the works of chemical engineer and advocate which needs more appreciation from a practical point of view wherein we can observe how right to health has been violated during health emergency.

Overall, the chapters contained in this book complement each other and overlapping has been avoided. The authors mention about the role of judiciary to overcome the procedural bottlenecks. The legal instrument covered in the book is bound to reduce the burden of any researcher. The uniqueness of the book is that it addresses practical problems and provides valuable insight on how the regulation of drug has evolved along with other associated issues. The language used, illustrations, case laws given, authorities cited the systematic arrangements of chapters are a few of the strengths of this book.

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