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VIPS STUDENT LAW REVIEW

VIVEKANANDA INSTITUTE OF PROFESSIONAL STUDIES - TECHNICAL CAMPUS

ISO 9001:2015 Certified Institution
(Affiliated to GGSIP University & Approved by BCI & AICTE)
The Institute is NAAC Accredited 'A' Grade, recognized by UGC under section 2(f)
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EDITORIAL NOTE

VIPS Student Law Review Volume 4 is the 4th issue of the annual law journal of Vivekananda School of Law and Legal Studies, Vivekananda Institute of Professional Studies-TC. It is a blind peer-reviewed journal which provides an opportunity to the legal fraternity to interchange contemporary thoughts on law and justice.

Evolving legal jurisprudence always try to give justice timely to a common man. Right to liberty has always been prioritised. In a recently decided case, the Supreme Court held that preventive detention is a serious invasion of personal liberty. Supreme Court further held that all safeguards allowed under the law must be adhered to and that any unreasonable delay between the proposal and passing of the order for preventive detention would make the order invalid. In today's arena we are enhancing the jurisprudential ambit and giving wider meaning to Right to liberty. In such a scenario Freedom of Speech and Expression also becomes very important to express freely.

Research writing is not an easy activity because it requires the human mind's undivided attention, and also the ability to put one's thoughts and solutions into coherent compositions for useful reference. The platform of our journal is what best exemplifies the most inadmissible aspects of academic writing, which ensures the continuity of conversation and confronts the hardest to face truths.

We want to applaud the authors of this volume for their unprecedented dedication towards Academia and their high calibre work. Thus, we hereby present the VIPS Student Law Review Volume 4. We are truly overwhelmed by the more than 100 submissions that the Journal has received this year. The chosen writings cover a wide range of modern subjects with unmatched judgement that extend beyond the bounds of just law.

Dr. J. Ravindran in his article titled "*Negative' And 'Positive' Obligations of The State – The Journey This Far*" has given a brief account of the development of law in the last seven decades on the inter-relationship between fundamental rights and directive principles of state policy.

Dr. Navjeet Sidhu Kundal in her article titled "*Clinical Legal Education and the Role of Legal Aid Clinics in India*" aims to evaluate the orientation of legal aid clinics in achieving the idea of social justice as envisioned in the Indian Constitution. She also looks into the transformative capacities of the legal aid programme with respect to the two constituencies that they cater to the students and the poor and the marginalised.

Dr. Deepa Kaushik in the article titled "*Section 115 of Mental Healthcare Act, 2017: A Lifeline to Suicide Attempters*" emphasizes that the need of the hour is to counsel and rehabilitate such persons who attempt suicide rather than punishing them. She also mentions about the new Mental Health Care Act, 2017 which has brought in a revolutionary change by decriminalising suicide under Section 115.

Mr. Aroup Raton Shaha in his article titled "*Convention on the Status of Refugees 1951: More Eurocentric than Universal*" explores the context of the Refugee Convention and dig out how this convention aid the sustenance of the racial segregation. He also discusses the balance between State sovereignty and obligation under the Refugee Convention and highlights the States obligation under Human Rights law. He further explains how the refugee Convention intentionally excluded certain factors out of the purview of the convention and also ponders upon the judicial interpretation of the different terms of the Refugee convention.

In the automobile manufacturing world, Standardization is the primary concern. Mr. Hansie Singh Nagpal in his article titled "*Principal-to-principal relationship with respect to Automobile manufacturer and dealer in consumer dispute cases*" explains, under what circumstances, the manufacturer will be liable for deficiency of services and dealer will be liable for the committing the same under the Consumer Protection Act.

In the article titled "*Domestic Violence during Pandemic: A Socio-Legal Analysis*", Ms. Nivedita Chaudhary attempts to analyse the status of women who were constantly subjected to domestic violence during the lockdown. She briefly discusses the ongoing trends all around the globe and also analyses the actions taken by the Indian government, other nations and International Organisations in response to this issue.

The article titled "*From Rio to Paris: What Have Developing Countries Really Achieved?*" mentions about climate change and how the developing countries have been the victims of the damage caused by the developed nations, resulting in violation of environmental justice in the global context. Mr. Niranjan E.V. and Ms. R. Divya Meenakshi have attempted to provide an overview of the incentives available to the developing countries towards commitment, magnitude of implementation of the obligations and prescribed practices, measures taken towards accountability and the challenges in relation to these. They conclude by asserting that the members of the UNFCCC have a long road ahead to reap the benefits of their negotiations on mitigation from climate crisis and adaptation to ecological responses.

Ms. Prarthna R. Markod in her article titled "*Intellectual Property Right: The Asset of New India*" discusses about the concept of IPR and its growth in India. The article revolves around the nuances of Intellectual Property Rights, Predominant areas of Intellectual Property Rights and the role of Intellectual Property Rights in India.

In the article titled "*The Concept of Judicial Review as A Process – An Analytical Study*", Ms. Riya Jacob mentions about the power of the judiciary to scrutinize any act of the legislative or executive bodies. She has carefully analysed the process of Judicial review and also discusses about the evolution and growth of this concept.

Ms. Arushi Anand in her article titled "*Third-Party Funding in International Arbitration: The Need for India to Step It Up?*" mentions about international arbitration and its importance. She also discusses the need for India to step up in this arena by making legal norms in this regard.

The article titled "*Explication on the Concept of Crowdfunding in The Indian Legal System*" follows a multi-disciplinary approach referring to the relationship of crowdfunding with elections, Intellectual Property regime. Mr. Saket Agarwal and Ms. Charu Agarwal have suggested for the introduction of Sharia Crowdfunding in India.

The article titled "*Need for Formalisation of Gig Workers: Towards A Paradigm Shift in Working Model*" tends to propose solutions to the problems that arise due to misclassification with the help of a comparative analysis made concerning the status of gig workers employment in different nations. Ms. Kinjal Keya and Mr. Aditya Pratap Singh have analysed the Social Security Code, 2020 to study the ambiguities the code has concerning gig workers and solutions for the same have also been proposed.

Mr. Ahan Gadkari in his article titled "*The Competition Commission of India's Attitude Towards Cross Border Mergers*" discusses the fundamentals of merger control. He also discusses the substantive position of India's cross border merger control under the Competition Act, 2002.

In the article titled "*Rising religious majoritarianism in India - the impediment to minorities rights and representation*", Mr. Divyanshu Dubey scrutinizes the status of minorities' constitutional rights and representation in the parliament in such a majoritarian environment. The question of law here is whether the decision of constitution framers of abolishing reservations for minorities in the legislature and granting a charter of rights under fundamental rights to the minorities was a feasible decision considering current

India's political scenario?

People from all walks of life coexist in modern society, yet they nevertheless have to contend with racism from time to time. Even in the world of sports, racism still exists. Mr. Yuvraj Sharma in his titled "*Racial discrimination in sports activity*" mentions about the racism seen in arena of sports and how to curb it.

In the article titled "*Evolving Interpretations of Legal Provisions of 'Intestate Succession' in Light of Judicial Precedents*", Mr. Samrat Bandopadhyay has discussed in detail about the 'Testamentary Succession'. He also mentions about the Schools of Hindu Law, in the form of Dayabhaga School of Hindu Law and Mitakshara School of Hindu Law.

The case comment by Ms. Yashvi Aswani titled "*Married women: Less than Humans? RIT Foundation v. Union of India*" explains the Exception 2 to Section 375 which pertains to the issue of marital rape. This paper highlights the submissions and arguments given for and against the criminalization of marital rape. It emphasizes on the Hon'ble judges' point of view while adjudicating the case and criminalization of marital rape in other jurisdictions. This paper also analyses the effect of the exception of marital rape on women and the plight of women who are not able to defend themselves against this statutory protection given to husbands.

Dr. Rashmi Salpekar
Prof. and Dean, VSLLS, VIPS
Editor

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TABLE OF CONTENTS

STUDENTS SECTION

CASE COMMENTS

'NEGATIVE' AND 'POSITIVE' OBLIGATIONS OF THE STATE – THE JOURNEY THUS FAR

J. Ravindran*

VIPS Student Law Review
August 2022, Vol. 4, Issue 1, 1-23
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Abstract

The goals of justice, liberty, equality and fraternity which we have resolved to secure to our citizens, as enshrined in the Preamble to the Constitution of India, find its concrete and most prominent expressions in both Parts III and IV that deal with the Fundamental Rights and Directive Principles of State Policy respectively. While the former is 'fundamental' to our living, the latter is a 'directive' to the State, which incidentally for the purpose of both Parts III and IV have the same meaning, to ensure that policies of the State are so directed as to make the rights and freedoms guaranteed enjoyed to the optimum. Initial attempts by both the State and Union Governments to take recourse to the directives to abridge the rights did not succeed as the Supreme Court, in the initial years, appeared to zealously guard the fundamental rights which were to a large extent largely if not wholly absent in the colonial period. After two decades of working of our Constitution, as a result of Indo-Russian Accord of 1971 and to further our goal of socialism seen in the aftermath of American support to Pakistan, Article 31-C was inserted subsequently to save laws giving effect to certain directive principles from being challenged on the touchstone of Articles 14, 19 and 31. Challenge to unconstitutionality of Article 31-C partly fell in that that the Court, in exercise of its power of judicial review, shall continue to have the last word as to the validity of the law. Later, Parliament amended Article 31-C with the result that no law giving effect to any of the principles could be tested with reference to Articles 14, 19, 31. However, this action of the Parliament to give preference

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to the directives over certain fundamental rights failed to appeal to the Supreme Court. The implication, therefore, is that Article 31-C as originally upheld holds the field. This research paper attempts to give a brief account of the development of law in the last seven decades on the inter-relationship between fundamental rights and directive principles of state policy.

***Key Words**: Part III and Part IV, Inter-relationship, pre-1971 position, Kesavananda, post Kesavananda, I R Coelho*

I. Introduction

The Constitution of Ireland which was adopted on 1st July 1937, now in place, repealing the Constitution then in force and the Constitution of the Irish Free State (Ireland) Act, 1922, runs into 50 Articles. Chapter III thereof contains the list of 'Fundamental Rights' from Articles 40 to 44. Article 45 figuring in Chapter IV lists the 'Directive Principles of Social Policy' that are intended for the general guidance of Parliament whose application in the making of laws shall be the care of Parliament exclusively and shall not be cognizable by any court under any of the provisions of the Constitution.[1] Less than a decade later, in 1945, such a distinction was also noticed by Sir Hersh Lauterpacht, formerly a Judge of the International Court of Justice at the Hague, Netherlands in his 'International Bill of Rights'.

Back home, at the All-Parties Conference in 1944, a Conciliation Committee under the Chairmanship of Shri Tej Bahadur Sapru came to be formed with the approval of Mahatma Gandhi with the object of understanding the view point of political parties by contacting leaders of all parties with a view to recommend a solution to India's political problems. The members of the Committee though apolitical were eminent men in Indian public life but not belonging to any of the organized political parties.[2] The subject of fundamental rights figured prominently in the deliberations of the Sapru Committee which was of the opinion that however inconsistent with British law it might be, in the 'peculiar circumstances of India' fundamental rights were necessary not only as 'assurances and guarantees to the minorities but also for prescribing a standard of conduct for the legislatures, governments and the courts'. The Committee felt that it was for the constitution-making body to settle first the list of fundamental rights and then to undertake their division into justiciable and

1 M V Pylee, Constitution of the World, Vol. 2, 4th Edition, Universal, New Delhi, 2012.

2 B Shiva Rao, Ed., The Framing of India's Constitution a Study, Select Documents Vol. V, 320, New Delhi, 1968.

non-justiciable rights and provide suitable machinery for their enforcement.[3]

The need for a written guarantee of fundamental rights in the Constitution of India was recognized by the Cabinet Mission in 1946 which while envisaging a Constituent Assembly for framing the Constitution of India, recommended the setting up of an advisory committee for reporting *inter alia* on fundamental rights. In the Objectives Resolution which stood against his name, Pandit Jawahar Lal Nehru moved *inter alia* in the Constituent Assembly on the 13th December, 1946, that the Assembly solemnly pledge itself to draw up for India's future governance a Constitution wherein 'shall be guaranteed and secured to all the people of India justice, social, economic and political, equality of status, of opportunity and before the law: freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality' and wherein 'adequate safeguards would be provided for minorities, backward and tribal areas, and depressed and other backward classes'.[4]

On the 22nd January, 1947, the said Resolution as moved by Pandit Nehru was adopted with members standing in their respective places.[5] On 24th January, 1947, Pandit Govind Ballabh Pant moved the resolution standing against his name for the constitution of an Advisory Committee for reporting on minorities, fundamental rights and on the tribal and excluded areas which was adopted, as amended.[6] The Advisory Committee in turn constituted on 27th February, 1947, five sub-committees one of which was to deal with fundamental rights. The Sub-Committee on Fundamental Rights at its first meeting on the same day had before it the proposals drafted earlier by the Constitutional Adviser, Sir Benegal Narsing Rau, to divide fundamental rights into two classes, justiciable and non-justiciable. Although the initial reaction of several members of the sub-committee appeared to be averse to Rau's proposal, eventually the sub-committee accepted the scheme of classifying the fundamental rights into justiciable and non-justiciable rights to be embodied in the Constitution.[7]

Pursuant to the resolution adopted by the Constituent Assembly on the 29th August, 1947, a Committee to scrutinize the draft of the text of the Constitution of India prepared by the Constitutional Adviser giving effect to the decisions already taken in the Assembly and including all matters which were ancillary thereto or which had to be provided in

3 *Ibid.*

4 Constituent Assembly Debates, Vol. I, 59.

5 *Id.*, Vol. II at 324.

6 *Id.* at 328-49.

7 Supra, note 2.

such a Constitution, and to submit to the Assembly for consideration the text of the draft Constitution as revised by the Committee, was appointed.[8] In his covering letter dated 21st February, 1948 to the Hon'ble President of the Constituent Assembly submitting the said Draft as settled by the Committee, its Chairman pointed out, with regard to fundamental rights, that the Committee had attempted to make those rights and the limitations to which they must necessarily be subject as definite as possible, since the courts might have to pronounce upon them. After the Draft Constitution remained in public domain for eight months, Dr. B. R. Ambedkar, in his capacity as the Chairman of the Drafting Committee, introduced the Draft Constitution as settled by the Drafting Committee in the Constituent Assembly on the 4th November, 1948 and moved that it be taken into consideration.[9] As he submitted, *"These Directive Principles have also come up for criticism. It is said that they are only pious declarations. They have no binding force. This criticism is of course superfluous. The Constitution itself says so in so many words. If it is said that the Directive Principles have no legal force behind them, I am prepared to admit it. But I am not prepared to admit that they have no sort of binding force in law."*[10]

Dr. Ambedkar further submitted that the Directive Principles were like the Instruments of Accession which were issued to the Governor General and to the Governors of the Colonies and to those of India by the British Government under the Government of India Act, 1935 and that the only difference between them was that they were instructions to the Legislature and the Executive. Justifying the inclusion of such instructions in the Constitution, he argued that who should be in power was left to be determined by the people, as it must be, if the system was to satisfy the test of democracy but whoever captures power would not be free do what he liked with it and that in the exercise of such power, he would have to respect those instruments of instructions which were called Directive Principles and that he would not afford to ignore them and though, he might not have to answer for their breach in a Court of Law, he would certainly have to answer for them before the electorate at the time of elections.

In the Draft Constitution as introduced in the Constituent Assembly, these directives were contained in Articles 30 to 40. After deliberations, these very articles were numbered from Article 38 to Article 51. The directive relating to organization of village panchayats[11] was not a part of the Draft Constitution. By virtue of the Constitution (Forty-second) Amendment

8 Constituent Assembly Debates, Vol. V, 293-310.

9 *Id.,* Vol. VII at 31.

10 *Id*. at 41.

11 The Constitution of India, Article 40.

Act, 1976, the directives relating to equal justice and free legal aid,[12] participation of workers in management of industries[13] and protection and improvement of environment and safeguarding of forest and wild life[14] were inserted. The existing directive to the State to secure a social order for the promotion of welfare of the people was renumbered[15] and a new directive[16] was inserted by the Constitution (Forty-fourth) Amendment Act, 1978. The Constitution (Eighty-sixth) Amendment Act, 2002 has omitted the directive relating to provision for free and compulsory education for children and in its place made provision for early childhood care and education to children below the children the age of six years.[17]

II. Inter-Relationship Between Parts III & IV of The Constitution of India

The inter- relationship between Fundamental Rights and Directive Principles and the manner in which it has been interpreted by the Supreme Court could be understood by making a reference to the position as it existed before the year 1971 followed by the Constitution (Twenty-fifth) Amendment Act, 1971 which was questioned in *Kesavananda Bharathi*.[18] A reference to their relationship finds mention in each of the nine judgements delivered by the Judges who constituted the Special Bench. Subsequently, the Constitution (Forty-second) Amendment Act, 1976 which sought to exclude any challenge to the implementation of any of the directives on the touchstone of fundamental right to equality and right to freedom came to be questioned successfully in *Minerva Mills*.[19] Thereafter, the Supreme Court had an occasion to survey the entire gamut of leading cases that has a bearing on the relationship between Fundamental Rights and Directive Principles in *Mirzapur Moti Kureshi Kassab Jamat* [20] culminating in the principle laid down in *I R Coelho*.[21]

1. Pre-1971 Position

Government Order providing for reservation in favour of various communities for admission to medical/engineering seats in Madras was struck down by the high court for violating

12 *Id.*, Article 39A.
13 *Id.*, Article 43A.
14 *Id.*, Article 48A.
15 INDIA CONST. art. 38 renumbered as cl.(1).
16 INDIA CONST, art 38(2).
17 *Id.*, Article 45.
18 Kesavananda Bharati v. State of Kerala and Anr, AIR 1973 SC 1461.
19 Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789.
20 State of Gujarat v. Mirzapur Moti Kureshi Kassab, AIR 2006 SC 212.
21 I R Coelho v. State of Tamil Nadu (2007) 2 SCC 1.

Article 29(2).[22] In appeal, in *State of Madras v. Champakam Dorairajan*,[23] it was contended by the State that having regard to the directive which commanded the State to promote the educational interests of the weaker sections of the people, it was entitled to maintain the Communal Government Order fixing proportionate seats for different communities and if because of the said Order, the respondents were unable to get admission into the educational institutions, there was no infringement of their Fundamental Rights. It was further contended that the said directive over rid the rights of a citizen not to be denied admission into educational institution which was either maintained by the state or in receipt of aid from the State. Rejecting the contentions so advanced, S. R. Das, J (as he then was) who wrote for a seven Judge Bench, observed that *"the directive principles which were made expressly made unenforceable by a Court, could not override the provisions found in Part III which, notwithstanding other provisions, were expressly made enforceable by appropriate writs, orders or directions"*. Holding that the chapter of Fundamental Rights was sacrosanct and not liable to be abridged by any legislative or executive act or order, except to the extent provided in the appropriate article in Part III, it was further observed that *"the directives had to conform to and run as subsidiary to the chapter on fundamental rights"*. However, it was also observed that *"so long as there was no infringement of any fundamental right, to the extent conferred by the provisions in Part III, there could be no objection to the state acting in accordance with the directives set out in Part IV, but subject again to the legislative and executive powers and limitations conferred on the state under different provisions of the Constitution."* [24] As a sequel, the Constitution (First Amendment) Act, 1951, inserted Article 15(4) to enable the state to make any special provision for advancement of certain communities.

The constitutional validity of legislative enactments banning the slaughter of certain animals passed by the States of Bihar, Uttar Pradesh and Madhya Pradesh were called in question in *Mohd Hanif Quareshi v. State of Bihar*. [25] The petitions were allowed partly as few of the provisions in each of the acts passed by the respective States were held to fall foul of the fundamental right to trade. Interestingly, the *amicus curiae* raised a preliminary objection to the effect that the impugned acts were made by the States in discharge of the obligations laid on them by the directive on organization of animal husbandry and that the impugned laws having thus been made in discharge of that fundamental obligation imposed on the

22 INDIA CONST. article 29(2) prohibits discrimination on certain grounds for admission to state maintained/ aided educational institutions.

23 State of Madras v. Champakam Dorairajan, AIR 1951 SC 226.

24 *Id.* at 228.

25 Mohd Hanif Quareshi v. State of Bihar, AIR 1958 SC 731.

State, the fundamental rights conferred on the citizens and others by Chapter III of the Constitution must be regarded as subordinate to those laws and that the directive principles were equally, if not more, fundamental and must prevail. Unmoved, Chief Justice S. R. Das heading the five Judge Bench ruled that the directive principles could not override the categorical restriction imposed on the legislative power of the State by Article 13(2). [26] Following *Champakam*,[27] it was observed that a harmonious interpretation had to be placed upon the Constitution and so interpreted it meant that the State should certainly implement the directive principles but it must do so in such a way that its laws do not take away or abridge the fundamental rights, for otherwise the protecting provisions of Chapter III will be 'a mere rope of sand.' [28]

A reference was made by the President of India under Article 143(1) [29] of the Constitution of India, on certain questions of law of considerable importance that had arisen out of certain provisions of the Kerala Education Bill, 1957 *In re Kerala Education Bill, 1957.* [30] After examining particularly certain directives relating to principles of policy to be followed by the State, right to work, to education and to public assistance in certain cases, provision for free and compulsory education for children and promotion of educational and economic interests of SCs, STs and other weaker sections, again S. R. Das, C J speaking for the majority of six Judges observed that although the legislation in question might have been undertaken by the State of Kerala in discharge of the obligation imposed on it by the directives enshrined in Part IV, it must, nevertheless, subserve and not override the fundamental rights conferred by the provisions of articles contained in Part III. It was also observed that *"in determining the scope and ambit of the fundamental rights relied on by or on behalf of any person or body, the court may not entirely ignore these directive principles of state policy but should adopt the principle of harmonious construction and should attempt to give effect to both as much as possible."* [31]

Authoring the leading opinion of the Constitution Bench in *Deep Chand v. State of U. P.*, [32] where the validity of the scheme of nationalization of State Transport Service formulated by the State Government was unsuccessfully challenged, K. Subba Rao, J (as he then

26 INDIA CONST. article 13(2) dealing with post Constitution law restrains the state from making any law restricting the fundamental rights.

27 *Supra*, note 23.

28 *Supra,* note 25 at 739.

29 INDIA CONST. article 143 deals with the advisory jurisdiction of the Supreme Court.

30 AIR 1958 SC 956.

31 *Id.* at 966.

32 Deep Chand v. State of U.P., AIR 1959 SC 648.

was) refused to accept any relevancy in the reference to the directive principles pointing out that the legislative power of a State is only guided by the directive principles of state policy and the directions, even if disobeyed by the State, cannot affect the legislative power of the State, as they are only directory in scope and operation.[33] In *I. C. Golak Nath v. State of Punjab*,[34] while adjudicating upon the validity of the Constitution (Seventeenth) Amendment, Act, 1964, K. Subba Rao, C J who led the majority opinion concluded that fundamental rights are given a transcendental position under our Constitution though Parts III and IV constituted an integrated scheme forming a self-contained code and that all the directive principles of state policy could reasonably be enforced without taking away or abridging the fundamental rights as the scheme itself was elastic. [35]

The validity of notification issued by the Government of Mysore fixing the minimum wages of different classes of employees in residential hotels and eating houses in the State of Mysore, under the provisions of the Minimum Wages Act, 1948, was unsuccessfully called in question in *Chandra Bhavan Boarding & Lodging, Bangalore v. State of Mysore*. [36] Dealing with the contention that the provisions of the Act were unconstitutional as they conferred arbitrary power without guidance to the Central and State Governments concerned to fix minimum rates of wages and thus interfered with the freedom of trade guaranteed under Article 19(1)(g) [37] of our Constitution, K.S. Hegde, J who wrote for the Constitution Bench observed that the freedom of trade did not mean freedom to exploit and that the provisions of the Constitution were not erected as the barriers to progress but they provided a plan for orderly progress towards the social order contemplated by the preamble to the Constitution. On the aspect of fundamental rights and directive principles, it was observed that *"it was a fallacy to think that under our Constitution, there were only rights and no duties and there was no conflict on the whole between the provisions contained in Part III and Part IV which were complementary and supplementary to each other."* With respect to Part IV it was observed that *"the provisions thereof enabled the legislatures and the Government to impose various duties on the citizens and the same were deliberately made elastic because the duties to be imposed on the citizens depended on the extent to which the directive principles were implemented. The mandate of the Constitution was to build a welfare society in which justice social, economic and political shall inform all institutions*

33 *Id.* at 664.

34 I. C. Golak Nath v. State of Punjab, AIR 1967 SC 1643.

35 *Id.* at 1656.

36 Chandra Bhavan Boarding & Lodging, Bangalore v. State of Mysore AIR 1970 SC 2042.

37 INDIA CONST. art 19(1)(g) grants to citizens freedom to practice any profession, or to carry on any occupation, trade or business.

of our national life and that the hopes and aspirations aroused by the Constitution will be belied if the minimum needs of the lowest of our citizens were not met." [38]

2. The Constitution (Twenty-Fifth Amendment) Act, 1971 & Kesavananda

Parliament sought to immunize, by insertion of Article 31C vide the Constitution (Twenty-fifth) Amendment Act, 1971, laws giving effect to certain directive principles from being challenged on the ground that it was inconsistent with certain fundamental rights, The Act also was a subject matter of challenge in *Kesavananda Bharathi*.[39] Though only that part of the Article 31C which gave a legislative finality to the law was held to be invalid, the inter-relationship between Fundamental Rights and Directive Principles were extensively considered in all the nine judgements pronounced by the court. As the opinion of Judges who composed the majority with regard to the question on hand has largely influenced successive benches which had to grapple with the question of whether or not to accord primacy to Fundamental Rights as enshrined in Part III of the Constitution, it may be worth to list them out in the words of Judges who adorned the Bench.

Observed J. M. Shelat & A. N. Grover, JJ thus, *"While most cherished freedoms and rights have been guaranteed, the government has been laid under a solemn duty to give effect to the Directive Principles. Both Parts III and IV which embody them have to be balanced and harmonised – then alone the dignity of the individual can be achieved. It was to give effect to the main objectives in the Preamble that Parts III and IV were enacted.* [40]*...Our Constitution makers did not contemplate any disharmony between the fundamental rights and the directive principles. They were meant to supplement one another. It can well be said that the directive principles prescribed the goal to be attained and the fundamental rights laid down the means by which that goal was to be achieved."* [41] For K. S. Hegde & A. K. Mukherjea, JJ, *"Our founding fathers were satisfied that there is no antithesis between the fundamental rights and directive principles. One supplements the other. The directives lay down the end to be achieved and Part III prescribes the means through which the goal is to be reached. Our Constitution does not subscribe to the theory that end justifies the means adopted."* [42] A. N. Ray, J (as he then was) wrote thus, *"The core of the commitment to the social revolution lies in Parts III and IV of the Constitution. They are described to be the 'conscience of the Constitution'. The object of Part III was to 'liberate*

38 *Supra*, note 36 at 2050.
39 *Supra,* note 18.
40 Supra, note 18 at 1582.
41 *Id.* at 1607.
42 *Id.* at 1641.

the power of man equally for distribution to the common good'. The State would have to bear the responsibility for the welfare of citizens. The Directive Principles are declaration of economic independence so that our countrymen would have economic as well as political control of the country...But the Directive Principles are also fundamental. They can be effective if they are to prevail over fundamental rights of a few in order to subserve the common good and not to allow economic system to result to the common detriment. It is the duty of the State to promote common good [43]*... Parts III and IV of the Constitution touch each other and modify. They are not parallel to each other. Different legislation will bring in different social principles. These will not be permissible without social content operating in a flexible manner."* [44] Observed P. Jaganmohan Reddy, J recording thus, *"There can be no doubt that the object of the Fundamental Rights is to ensure the ideal of political democracy and prevent authoritarian rule, while the object of the Directive Principles of State Policy is to establish a welfare State where there is economic and social freedom without which political democracy has no meaning. What is implicit in the Constitution is that there is a duty on the Courts to interpret the Constitution and the laws to further the Directive Principles which under Article 37 are fundamental in the governance of the country."* [45] Noted D. G. Palekar, J, *"The Preamble read as a whole, therefore, does not contain the implication that in any genuine implementation of the Directive Principles, a fundamental right will not suffer any diminution."* [46] In the words of K. K. Mathew, J, *"I can see no incongruity in holding, when Article 37 says in its latter part 'it shall be the duty of the State to apply these principles in making laws', that judicial process is 'state action' and that the judiciary is bound to apply the Directive Principles in making its judgement."* [47] M. H. Beg, J (as he then was) recorded, *"Perhaps, the best way of describing the relationship between the fundamental rights of individual citizens, which imposed corresponding obligations upon the State and the Directive Principles, would be to look upon the Directive Principles as laying down the path of the country's progress towards the allied objectives and aims stated in the Preamble, with fundamental rights as the limits of that path."* [48] Y. V. Chandrachud, J (as he then was) had this to say, *"Our decision on this vexed question must depend upon the postulate of our Constitution which aims at bringing about a synthesis between 'Fundamental Rights' and the 'Directive Principles of State Policy', by giving to the former a pride of place and to the latter a*

43 *Id.* at 1707.
44 *Id.* at 1714.
45 *Id.* at 1755.
46 *Id.* at 1815.
47 *Id.* at 1950.
48 *Id.* at 1970.

place of permanence. Together, not individually, they form the core of the Constitution. Together, not individually, they constitute its true conscience." [49]

Striking a different path, S. M. Sikri, C J who headed the largest ever bench to have assembled in the Summit Court till date, ruled that the question was not whether directive principles were important but whether they override the fundamental rights. In other words, could Parliament abrogate the fundamental rights in order to give effect to some of the directive principles.[50] In his view, *"It was impossible to equate the directive principles with fundamental rights though it cannot be denied that they are very important. But to say that the directive principles give a directive to take away fundamental rights in order to achieve what is directed by the directive principles seems to me a contradiction in terms."* [51] Incidentally, H. R. Khanna, J whose opinion was titled towards those on the bench who sought to put a check on Parliament's power to amend the Constitution, does not appear to have considered the inter-relationship between parts III and IV so also S. N. Dwivedi, J who dissented with the majority view, as is discernible in their respective judgements.

3. Post - Kesavananda

The question which arose for determination before a seven Judge Bench in *State of Kerala v. N M Thomas*, [52] was whether the State Government could grant exemption for specified period to employees belonging only to the scheduled castes or scheduled tribes from passing departmental test for the purpose of promotion under clause (1)[53]of Article 16 of the Constitution, by way of certificate[54] upon the High Court of Kerala having answered the question in the negative. Among those who allowed the appeals, by majority, Syed Murtaza Fazal Ali, J who concurred separately took the view that that a clear mandate to achieve equality and social justice is contained in the directive principles and they constitute the stairs to climb the high edifice of a socialistic state and that the means by which it could be achieved is by fundamental rights. He reiterated that both should be construed

49 *Id.* at 2021.

50 *Id.* at 1508.

51 *Id.* at 1510.

52 State of Kerala v. N M Thomas, AIR 1976 SC 490.

53 INDIA CONST. art.16 cl. 2 It states that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

54 INDIA CONST. article 133(1), as it then stood, stated that an appeal shall lie to the Supreme Court from any judgement, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies (a) that the case involves a substantial question of law of general importance; and (b) that in the opinion of the High Court the said question needs to be decided by the Supreme Court. After the passage of the Constitution (Forty-fourth) Amendment Act, 1978, certificate of the type contemplated by Article 134A is a *sine qua non* for invoking the appellate jurisdiction of the Hon'ble Supreme Court.

in harmony with each other and every attempt should be made by the court to resolve any apparent inconsistency.[55] As he summarized, *"it is clear that the directive principles form the fundamental feature and the social conscience of the Constitution and the Constitution enjoins upon the State to implement these directive principles. The directives thus provide the policy, the guidelines and the end of socio-economic freedom and Articles 14 and 16 are the means to implement the policy to achieve the ends sought to be promoted by the directive principles. So far as the Courts are concerned where there is no apparent inconsistency between the directive principles contained in Part IV and the fundamental rights mentioned in Part III, which in fact supplement each other, there is no difficulty in putting a harmonious construction which advances the object of the Constitution. Once this basic fact is kept in mind, the interpretation of Articles 14 and 16 and their scope and ambit become as clear as day"*.[56]

3. Directive Principles and Reasonableness of Restrictions

The vires of Maharashtra Debt Relief Act, 1976 was unsuccessfully challenged in *Fatehchand Himmatlal v. State of Maharashtra*.[57] Rejecting the contention as to money-lending being a trade, V. R. Krishna Iyer, J, for a Bench of five Judges took the view that every systematic, profit-oriented activity, however sinister, suppressive or socially diabolic, cannot ipso facto, exalt itself into a trade. As he observed, *"Incorporation of the Directive Principles of State Policy casting the high duty upon the State to strive to promote the welfare of the people by securing and protecting as effectively as it might a social order in which justice – social, economic and political – shall inform all the institutions of the national life, is not idle print but command to action"*. Therefore, economic activities shaped as trade or business or commerce could be so de-recognized in the face of state action defending the weaker sections from social injustice and all forms of exploitation and raising the standard of living of the people. [58]

In *Pathumma v. State of Kerala*,[59] similar challenge was unsuccessfully mounted on the Kerala Agriculturists' Debt Relief Act, 1970, and during the course of the arguments, appellants did not press the ground relating to legislative competence of the Act in question considering the fact that in *Fatehchand Himmatlal,*[60] similar or rather harsher provisions in

55 *Supra,* note 52 at 546.

56 *Id.* at 548.

57 Fatehchand Himmatlal v. State of Maharashtra, AIR 1977 SC 1825.

58 *Id.* at 1833.

59 Pathumma v. State of Kerala AIR 1978 SC 771.

60 *Supra,* note 57.

the Maharashtra Debt Relief Act, 1976, already stood upheld by the court. Dealing with the first plank of argument advanced on behalf of the appellants that the said Kerala Act was violative of Article 19(1)(f)[61] of the Constitution in as much as it took away the right to hold property, for the appellants having acquired valid title to the property after having purchased it at the auction sale in execution of decree against the debtors and after the sale the properties vested in the appellants, Syed Murtaza Fazal Ali, J who authored the leading opinion on behalf of four Judges observed that one of the tests laid down is that, in judging reasonableness of the restrictions imposed by clause (5) of Article 19, the court has to bear in mind the directive principles of state policy. In his view, the object of the impugned Act fulfilled the directive laid down in Articles 38[62] and 39(b)[63] of the Constitution and there was no conflict between the said directive principles and the restrictions placed by the Act.[64]

4. The Constitution (Forty-Second Amendment) Act, 1976, Minerva Mills And Thereafter

During the regime of emergency, Parliament sought to extend the umbrella of immunizing laws giving effect to all the directive principles from being questioned on the ground that it was inconsistent with certain fundamental rights by amending Article 31C vide the Constitution (Forty-Second) Amendment Act, 1976. The relevant section 4 of the Act came to be questioned in *Minerva Mills*.[65] Excepting P N Bhagwati, J (as he then was) who otherwise concurred with the majority in striking down section 55 of the Act, which sought to travel beyond the limitations imposed on the scope of amending power of the Parliament when tested on the anvil of *Kesavananda*,[66] Y. V. Chandrachud, C J authoring for the majority held that section 4 was beyond the amending power of Parliament and was void since it damaged the basic or essential features of the Constitution and destroyed its basic structure by a total exclusion of challenge to any law on the ground that it was inconsistent with, or took away or abridged any of the rights conferred by Article 14 or Article 19 of the Constitution, if the law was for giving effect to the policy of the State towards securing

61 INDIA CONST. art.19 cl. 1(f), All citizens had the fundamental right to acquire, hold and dispose of property and this now stands omitted by the Constitution (Forty-fourth) Amendment Act, 1978.

62 INDIA CONST. article 38 obligates the State to secure a social order for the promotion for the welfare of the people.

63 INDIA CONST. art, 39 cl.(b) This sub-article advises the State to secure that the operation of the economic system does not result in common detriment.

64 *Supra,* note 58 at 777.

65 *Supra,* note 19.

66 *Supra*, note 18.

all or any of the principles laid down in Part IV of the Constitution.[67]

The main controversy in these petitions centered round the question whether the Directive Principles of State Policy contained in Part IV could have primacy over the Fundamental Rights conferred by Part III, as the Constitutional Amendment in question by its section 4 subordinated the Fundamental Rights conferred by Articles 14 and 19 to the Directive Principles.[68] Since *Kesavananda* [69] had prescribed the limits up to which the Parliament could act while amending the Constitution, the question was, whether in view of its majority decision was it permissible to the Parliament to so amend the Constitution so as to give a position of precedence to Directive Principles over Fundamental Rights. The answer to this question necessarily depended upon whether Articles 14 and 19, challenge to which was sought to be now given up to laws passed in order to effectuate the policy of the State towards securing all or any of the principles of directive policy, were essential features of the basic structure of the Constitution. It was only if the rights conferred by these two Articles were not a part of the basic structure of the Constitution that they could be allowed to be abrogated by a constitutional amendment. If they were a part of the basic structure, they could not be obliterated out of existence in relation to a category of laws described in Article 31C or, for the matter of fact, in relation to laws of any description, whatsoever, passed in order to achieve any object or policy whatsoever.[70]

According to the court, the history of India's struggle for independence and the debates of the Constituent Assembly showed how deeply we value their personal liberties and how those liberties were regarded as an indispensable and integral part of our Constitution.[71] Also, fundamental rights which occupied a unique place in the lives of civilized societies and had been variously described in their judgements as `transcendental', `inalienable' and `primordial'[72] were not an end in themselves but means to the end specified in Part IV. As the Chief Justice observed *"the Indian Constitution is founded on the bedrock of the balance between Parts III and IV. To give absolute primacy to one over other is to disturb the harmony of the Constitution. This harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution"*.[73] Accordingly, it was held that the goals set out in Part IV had to be achieved without the

67 *Supra,* note 19 at 1795.
68 *Id.* at 1803.
69 *Supra,* note 18.
70 *Supra*, note 68.
71 *Supra*, note 19 at 1805.
72 *Id.* at 1806.
73 *Ibid.*

abrogation of the means provided for by Part III and it was in this sense that Parts III and IV together constituted the core of our Constitution and combined to form its conscience. [74]

The High Court of Madras had stayed the operation of the Tamil Nadu Stage Carriages and Contract Carriages (Acquisition) Ordinance, later replaced by the Act of 1973 that purported to nationalise transport. Appeals by the State in *State of Tamil Nadu v. L Abu Kavur Bai* [75] succeeded. Recourse to nationalization of the entire transport service as also a part of the entire assets of the units thereof was decided as a matter of policy and could not be enquired by the courts unless the policy was so absurd as to violate the provisions of the Constitution. Further, in view of Article 31C which gave protective umbrella against Article 31(2) also, the court could not strike down the Act merely because the compensation for taking over the transport services or its units was not provided for, the reason being that Article 31C was not merely a pragmatic approach to socialism but imbibed a theoretical aspect by which all means of production, key industries, mines, minerals, public supplies, utilities and services might be taken gradually under public ownership, management and control.[76] Speaking for the Constitution Bench, Syed Murtaza Fazal Ali, J observed that *"in recent decisions on the subject the view that has crystallised was that the courts should attempt to give a harmonious interpretation to the directive principles contained in Part IV of the Constitution even though not enforceable. Attempt should, therefore, be made to reconcile the two important provisions rather than to arrive at conclusions which bring into collision these two provisions – one contained in Part III and the other in Part IV. We must appreciate that the reason why the founding fathers of our Constitution did not advisedly make these principles enforceable was perhaps due to the vital consideration of giving the Government sufficient latitude to implement these principles from time to time according to capacity, situations and circumstances that may arise...there appears to be complete unanimity of judicial opinion of the various decisions of this court on the point that although the Directive Principles were not enforceable yet the court should make a real attempt at harmonising and reconciling the Directive Principles and the Fundamental Rights and any collision between the two should be avoided as far as possible."* [77]

Challenge to constitutional validity of the Kerala Industrial Establishments (National and Festival Holidays) (Amendment) Act, 1990 by virtue of which the Parent Act of 1958 was altered inasmuch as the national holidays were increased from 3 to 4 (with the addition of

74 *Supra,* note 18 at 1807.

75 State of Tamil Nadu v. L Abu Kavur Bai, AIR 1984 SC 326.

76 *Id.* at 334.

77 *Id.* at 331.

2nd October as Mahatma Gandhi's Birthday) and festival holidays were increased from 4 to 9, failed before a Single Judge and in appeal to a Division Bench of High Court of Kerala and finally before Supreme Court in *M R F Ltd. v. Inspector, Kerala Government*. [78] As S. Saghir Ahmed, J heading the Bench observed *"the Directive Principles of State Policy were not enforceable but were nevertheless fundamental in the governance of the country and had to be applied by the State in making the laws. They were essential articles of faith of the country and as such the Legislature, the Executive and the Judiciary had to follow them unless there was likely to be an infringement of any express provisions of the Constitution. They had to be regarded as the 'Wisdom' of the Nation manifested in the 'paramount law' of the country."* [79] According to the court, the idea behind Article 43[80] of the Constitution of India was that the workers would not be compelled to work on all days and that while other employees might enjoy national and festival holidays, the workers in an industry or an agricultural farm must work throughout and should not avail any of the holidays was not the philosophy of Article 43 and that as human beings, they were entitled to period of rest which would enable them to full enjoyment of their leisure and participate in social and cultural activities. Further, having regard to the factors enumerated in the counter affidavit as also to the Directive Principle of State Policy contained in Article 43, the court opined that the Act by which the national and festival holidays had been increased was fully constitutional and did not, in any way, infringe the right of the appellants to carry on their trade or business under Article 19(1)(g) and that the compulsory closure of the industrial concern on national and festival holidays could not be treated as unreasonable as the same was protected by clause (6) of Article 19 and therefore, could not be treated to be violative of the Fundamental Right under Article 19(1)(g). It was further observed that the Act was a social legislation to give effect to the Directive Principle of State Policy contained in Article 43 of the Constitution.[81]

The constitutional validity of sections 175(1)(q) & 177(1) of the Haryana Panchayati Raj Act, 1994 which disqualified a person having more than two living children from holding the post of Sarpanch or Panch of a Gram Panchayat or a member of a Panchayat Samiti or Zila Parishad was challenged by Writ Petitioners and appellants who had been

78 M R F Ltd. v. Inspector, Kerala Government AIR 1999 SC 188.

79 *Id.* at 192.

80 INDIA CONST. art 43, It states that the State shall endeavour to secure, by suitable legislation or economic organization or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

81 *Supra,* note 78 at 193.

disqualified or proceeded against for disqualification either from contesting the elections for, or from continuing in, the office of Panchas/Sarpanchas in *Javed v. St of Haryana*. [82] At the bar it was agreed that the grounds of challenge could be categorized into five; the first three submissions were based on Article 14[83]; the fourth on Article 21[84] and the fifth one on Article 25.[85] Though the challenge to the constitutional validity of the said sections failed on all the counts with the court holding that both the provisions were intra vires the Constitutions, the Special Leave Petitions [86] were dismissed with certain directions. Heading a Full Bench, R. C. Lahoti, J (as he then was) ruled that *"fundamental rights were not to be read in isolation and that they had to be read along with the Chapter on Directive Principles of State Policy and the Fundamental Duties enshrined in Article 51A."* [87] Inserted by the Constitution (Forty-second) Amendment Act, 1976, it figures in Part IVA of the Constitution of India. According to the court, none of the lofty ideals contained in Articles 38, 46 and 47 could be achieved without controlling the population inasmuch as our materialistic resources were limited and the claimants were many.

5. Principles Laid Down in Mirzapur Moti Kureshi Jamat and I R Coelho

As a new directive relating to safeguarding the wild life of the country was introduced only by the Constitution (Forty-fourth) Amendment, 1978, a duty was imposed on the citizens to protect and improve the natural environment and wild life and to have compassion for living creatures and that certain prior decisions by Constitution Bench of five Judges needed reconsideration as a consequence thereof, it was but natural for the constitution of 7 Judges Bench to adjudicate State's challenge to the decision of the High Court of Gujarat which had ruled that section 2 of the Bombay Animal Preservation (Gujarat Amendment) Act, 1994 which introduced certain amendments in Section 5 of the Bombay Animal Preservation Act, 1954 (as applicable to the State of Gujarat) as ultra vires the Constitution in *State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat*,[88] The effect of the amendment was total prohibition against slaughter of progeny of cow. Chief Justice R. C. Lahoti led the majority opinion on behalf of Six Judges in allowing the appeal and holding that the impugned provisions were intra vires the Constitution testing it also on the touchstone of Articles

82 Javed v. St of Haryana AIR 2003 SC 3057.

83 INDIA CONST. article 14 mandates equality before law.

84 INDIA CONST. article 21 affords protection for life and personal liberty.

85 INDIA CONST. article 25 guarantees freedom of conscience and free profession, practice and propagation of religion.

86 INDIA CONST. article 136(1) makes provision for special leave to appeal to Supreme Court.

87 *Supra,* note 82 at 3069.

88 *Supra,* note 20.

48A[89] and 51A(g)[90] of the Constitution. In dissent was A K Mathur, J who agreed with the order under appeal finding no justification for reversing the view taken by the earlier Constitution Bench judgements.

On the aspect of fundamental rights and directive principles, relying on *Kesavananda,* [91] it was noted that the interest of a citizen or section of a community, howsoever important, was secondary to the interest of the country or community as a whole. It was observed that *"for judging the reasonability of restrictions imposed on Fundamental Rights the relevant considerations were not only those as stated in Article 19 itself or in Part III of the Constitution; the Directive Principles stated in Part IV were also relevant. Changing factual conditions and State policy, including the one reflected in the impugned enactment, have to be considered and given weightage to by the courts while deciding the constitutional validity of legislative enactments. A restriction placed on any Fundamental Rights aimed at securing Directive Principles will be held as reasonable and hence intra vires subject to two limitations: first, that it does not run-in clear conflict with the fundamental right, and secondly, that it has been enacted within the legislative competence of the enacting legislature under Part XI Chapter I of the Constitution."* [92] It was also ruled that the several clauses of Article 37 themselves needed to be harmoniously construed and the end part of the said Article was not a pariah but a constitutional mandate. It was observed that the effect of judgements delivered thus far was that *"while interpreting the interplay of rights and restrictions, Part III (Fundamental Rights) and Part IV (Directive Principles) have to be read together. The restrictions which can be placed on the rights listed in Article 19(1) are not subject only to Articles 19(2) to 19(6); the provisions contained in the chapter on Directive Principles can also be pressed into service and relied on for the purpose of adjudging the reasonability of restrictions placed on the Fundamental Rights."* [93]

Testing the impugned legislation on the anvil of relevant directives and fundamental duty and according due weightage to them and overruling earlier decisions which went to the contrary, it was observed that *"faced with the question of testing the constitutional validity of any statutory provision or an executive act, or for testing the reasonableness of any restriction cast by law on the exercise of any fundamental right by way of regulation, control or prohibition, the Directive Principles of State Policy and Fundamental Duties as*

89 *Supra*, note 13.

90 INDIA CONST. article 51A(g) casts a duty on every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.

91 *Supra*, note 18.

92 *Supra*, note 20 at 226.

93 *Id.* at 228.

enshrined in Article 51A of the Constitution play a significant role." [94]

The enunciation of the "doctrine of basic features" and identification of new and more of fundamental features in decisions rendered thereafter did not, however, prevent the legislature from making certain laws and save it from challenge. The fundamental question, therefore, in *I. R. Coelho v. State of Tamil Nadu*,[95] was whether on and after 24th April 1973 when the basic structure doctrine was propounded in *Kesavananda* [96] was it permissible for Parliament under Article 31B [97] to immunize legislations from fundamental rights by inserting them into the Ninth Schedule and, if so, what was its effect on the power of judicial review of the Court. For Y. K. Sabharwal, C J who headed the Nine Judge Bench, fundamental rights were those rights of citizens or those negative obligations of the State which did not permit encroachment on individual liberties, the object of fundamental rights being to foster the social revolution by creating a society egalitarian to the extent that all citizens were to be equally free from coercion or restriction by the State. It was further observed that *"by enacting fundamental rights and directive principles which were negative and positive obligations of the States, the Constituent Assembly made it the responsibility of the Government to adopt a middle path between individual liberty and public good. Fundamental Rights and directive principles have to be balanced. That balance can be tilted in favor of the public good. The balance, however, cannot be overturned by completed overriding individual liberty. This balance is an essential feature of the Constitution."* [98] Resultantly, it was held that since the basic structure of the Constitution included some of the fundamental rights, any law granted by the Ninth Schedule deserved to be tested against these principles and if the law infringed the essence of any of the fundamental rights or any other aspect of the basic structure then it would be struck down.[99]

III. Conclusion

From 'directive principles could not override the provisions found in Part III' and that 'the directives had to conform to and run as subsidiary to fundamental rights' in *Champakam Dorairajan,*[100] that 'the directive principles could not override the categorical restriction

94 *Id.* at 230.

95 I. R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1.

96 *Supra*, note 18.

97 INDIA CONST. article 31B provides for validation of certain Acts and Regulations specified in the Ninth Schedule.

98 *Supra*, note 95 at 98.

99 *Supra*, note 95 at 111.

100 *Supra,* note 23.

imposed on the legislative power of the state by Article 13(2)' and 'on a harmonious interpretation of the reading of the Constitution, the state could certainly implement the directives without taking away or abridging the fundamental rights' in *Mohd Hanif Quareshi,*[101] and that 'the directives must subserve and not override the fundamental rights' and 'the court may not entirely ignore the directive principles but should adopt the principle of harmonious construction and should attempt to give effect to both as much as possible' in *In re Kerala Education Bill,*[102] the Supreme Court speaking through Chief Justice S. R. Das, coincidentally in all these judgements appeared to give a place of primacy to the fundamental rights indicating clearly that the laws made to implement directives could be validly made if and only if they did not run into clear irreconcilable conflict with fundamental rights. Even in *Deep Chand,* [103] K. Subba Rao, J (as he then was) felt that the directive principles of state policy are only directory and that their disobedience by the State did not affect its legislative power, as such.

It was in *Golak Nath*,[104] that the majority speaking through Chief Justice K. Subba Rao felt that both Parts III & IV constituted an integrated scheme forming a self-contained code and that all the directives could be enforced without taking away or abridging the fundamental rights. In *Chandra Bhavan Boarding & Lodging, Bangalore*,[105] the Constitution Bench speaking through K. S. Hegde, J went to hold further that there was no conflict between the provisions of both Parts III and IV which were complementary and supplementary to each other. All these interpretations placed by the Hon'ble Supreme Court, it is respectfully submitted, were de hors any specific constitutional sanction to implementation of any of the directive in the face of any fundamental right.

Subsequently, the enactment of Constitution (Twenty-fifth) Amendment, Act, 1971 sought to thwart a challenge to implementation of the directives contained in clause (b) & (c) of Article 39 on the touchstone of Articles 14, 19 and 31 in spite of the mandate of Article 13. The majority in *Kesavananda,*[106] held this part of section 3 of the Act to be valid on the basis of their interpretation as to the relationship between Parts III & IV of the Constitution of India and their premise was followed in *L. Abu Kavur Bai*.[107] Though *Pathumma* [108] dealt

101 *Supra,* note 25.
102 *Supra,* note 30.
103 *Supra,* note 32.
104 *Supra,* note 34.
105 *Supra,* note 36.
106 *Supra,* note 18.
107 *Supra,* note 75.
108 *Supra,* note 59.

with the question of fundamental right to property, it spelt out several guidelines which would indicate as to in what particular circumstances restriction on the freedom could be regarded as reasonable, and in particular, in judging the reasonableness of the restriction the Court had to bear in mind the Directive Principles of State Policy.[109] Thereafter, the Constitution (Forty-second) Amendment Act, 1976 which subordinated the fundamental rights as enshrined in Articles 14 and 19 to all the directive principles by way of amending Article 31C was successfully challenged in *Minerva Mills* [110] resulting in restoration of status quo ante with regard to the immunity given to implementation of the specific directive principles from being attacked on the ground that, inspite of what was contained in Article 13,[111] it was inconsistent with or took away or abridged certain fundamental rights.

With greatest respect to the Judges who were in the majority in *Minerva Mills*, [112] on the question of the validity of Article 31C, as amended, *Pathumma* [113] appears to have escaped their kind attention though P. N. Bhagwati, J (as he then was), in minority on this question alone, had relied on *Pathumma* [114] too to hold that the amended Article 31C, as interpreted by him, could not be in the circumstances be regarded as violative of the basic structure of the Constitution.[115] The evolution of law with respect to inter-relationship between Part III & IV has been elaborately explained in *Mirzapur Moti Kureshi Kassab Jamat* [116] with *I R Coelho* [117] outlining the limits of the exercise of power by the Parliament with regard to fundamental rights and directive principles of state policy.

Opinion has been expressed by certain commentators that it needs clarification as to whether Article 31C as it stood post *Kesavananda*[118] prior to its amendment in *Minerva Mills* [119] must survive the latter decision. Such a question, though in a different context arose before the Constitution Bench in *Supreme Court Advocates-on-Record Association v. Union of India* [120] which dealt with the constitutional validity of the Constitution (Ninety-

109 *Supra,* note 64.
110 *Supra,* note 19.
111 INDIA CONST. article 13 states that laws inconsistent with or in derogation of fundamental rights are void.
112 *Supra,* note 19.
113 *Supra,* note 59.
114 *Ibid.*
115 *Supra,* note 19 at 1857.
116 *Supra,* note 20.
117 *Supra,* note 21.
118 *Supra,* note 18.
119 *Supra,* note 19.
120 Supreme Court Advocates-On-Record Association v. Union of India (2016) 5 SCC 1.

ninth) Amendment Act, 2014 and National Judicial Appointments Commission Act, 2014. While upholding the challenge by the petitioners, all the four Judges who composed the majority, in their concurring judgements, recorded their findings which were identical *qua* the question posed as regards Article 31C. J. S. Khehar, J (as he then was) made a reference to English Common Law wherein a repealing enactment is repealed by another law, the repeal of the second enactment would revive the former *ab initio*. According to him, there would be a constitutional breakdown if the contention that the striking down of the impugned constitutional amendment would not result in the revival of the provisions which had been amended by Parliament is accepted.[121] Madan B. Lokur, J felt that the result of accepting the contention of the respondents would be calamitous as, as he demonstrated, the President shall have absolute power to appoint a Judge of the Supreme Court and High Court without consulting the Chief Justice of India. He, accordingly, held that the constitutional provisions amended by the 99th Constitution Amendment Act spring back to life on the declaration that the 99th Constitution Amendment Act was unconstitutional.[122] The arguments advanced on this score did not appeal to common sense so felt Kurian Joseph, J and in his brief order observed that once the process of substitution and insertion by way of constitutional amendment is itself to be bad and impermissible, the pre-amended provisions automatically resurface and revive which alone could be the reasonably inferential conclusion. He observed that though the legal parlance and common parlance may be different but that cannot be any legal sense of an issue which does not appeal to common sense.[123] Adarsh K. Goel, J did not find any logic for the stand taken by the respondents and held that in exercise of power of judicial review, a provision can be declared void in which case the legal position as it stands without such void provision can be held to prevail.[124] It is, therefore, no more res integra that Article 31C as it stood pre *Minerva Mills* [125] holds the field.

To sum up, any and every law which seeks to implement the directive principles of state policy as contained in Part IV save clause (b) or clause (c) of Article 39 is open to attack on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Article 14 or Article 19. However, on the strength of *Pathumma* [126] challenge to Article 19 is likely to fail. Likewise, challenge to Article 14, to pass muster, must satisfy the

121 *Id.* at 469.
122 *Id.* at 680.
123 *Id.* at 689.
124 *Id.* at 740.
125 *Supra,* note 19.
126 *Supra,* note 59.

twin test of reasonable classification and intelligible differentia as pointed out by S. R. Das, J (as he then was) in *State of West Bengal v. Anwar Ali Sarkar* [127] a test which has withstood the test of time or the test of absence of arbitrariness first propounded by P. N. Bhagwati, J (as he then was) in *E P Royappa v. State of Tamil Nadu* [128] or absence of manifest arbitrariness identified in *Shayara Bano v. Union of India*.[129] The authority for the proposition that if a challenge is made to a law implementing a directive principle, it is obligatory for the constitutional courts to look at fundamental duties as enshrined in Part IVA and testing it on its anvil is to be found in *Mirzapur Moti Kureshi Kassab Jamat*. [130] A law made to implement any of the directive principles for public good could be upheld but never at the cost of his individual liberty is an assurance which *I R Coelho* [131] gives to every individual on the principle that the balance between Parts III & IV is an essential feature of the Constitution of India.

127 State of West Bengal v. Anwar Ali Sarkar AIR 1952 SC 75

128 E P Royappa v. State of Tamil Nadu AIR 1974 SC 555.

129 Shayara Bano v. Union of India 2017(9) SCALE 178.

130 *Supra,* note 20.

131 *Supra,* note 21.

Clinical Legal Education and The Role of Legal Aid Clinics in India

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Abstract

Clinical Legal Education is a key strategy not only to strengthen the professional capacities of students but also fulfils the wider task of maintaining and promoting the rule of law in the country. The idea to involve law school clinics in the legal aid movement in India was considered to foster democratic governance by developing competent legal minds and provide inexpensive and speedy legal services to underprivileged and marginalised groups. Most if not all of the law schools have been playing an instrumental role and furthering the cause for which they were set up. However, there is much that is found wanting, law schools are not able to impart basic skills to students and get them engaged with the realities of litigation. Legal aid clinic can be used as a law laboratory to enable students to experiment with different approaches to studying and practicing law. If legal aid clinics are run effectively by providing proper training to the members spearheading the clinic it can bring a transformative change in the society. The paper aims to evaluate the orientation of legal aid clinics in achieving the idea of social justice as envisioned in the Indian Constitution. The paper will also look into the transformative capacities of the legal aid programme with respect to the two constituencies that they cater to: the students and the poor and the marginalised

Keywords: *Legal education, Legal aid clinic, Marginalised groups, legal services.*

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I. Introduction

Legal education is of unique importance in the justice delivery of any country. The success of democracy and rule of law in any society hinges on how well law is marshalled by lawyers for protecting the rights of the vulnerable and the marginalised. Legal education helps create not only professionals but also law-abiding citizens. The training and education provided to a law student plays an instrumental role in shaping the discourse on justice in any country.[1] Legal Education doesn't merely touch law alone but extends its arms to social, political, historical and economic aspects of life. Law as dynamic instrument can therefore be used for progress and betterment of the society.[2]

II. Clinical Legal Education

Clinical legal education is firmly rooted in the practice of learning by doing. "Life of law is not logic but experience"[3] emphasises the importance of bringing in experience to the practice and understanding of Law. Clinical legal education bridges the gap between theory and practice and builds deeper interactions between law schools and local communities. It engages the law students in clinical practice of law under the supervision of trained law professors. "Professional skills training, learning through experience, and imparting professional values of providing access to social justice are the three core components of the pedagogy of clinical education. Promoting social justice while preparing competent lawyers is inherent to most legal programmes".[4] Clinical programmes increase access to justice by providing access to a wide range of otherwise unavailable services. Early exposure of law students to clinical programmes not only introduces them to the practical component of law but also lays down the intellectual foundation for long-term engagement with social justice.[5]

"CLE is essentially a multi-discipline, multipurpose education which can develop human resources and idealism needed to strengthen the legal system… a lawyer, a product of such

1 D'Amato, Anthony, "On the Connection Between Law and Justice" (2011). Faculty Working Papers. Paper 2. http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/2. (Last visited Jan. 2, 2021)

2 B.C Nirmal, Rajesh Kumar Singh, *Contemporary Issues in International Law: Environment, International Trade, Information Technology and Legal education* (Springer 2014).

3 O.W. Holmes, *The Common Law* (M. Howe ed. 1963).

4 Frank S. Bloch, 'New Directions in Clinical Legal Education: Access to Justice and the Global Clinical Movement', 28 WASH. U. J.L. & POL'y 111, 121 (2000)

5 'The Relationship Between Social Justice and Clinical Legal Education: A Case Study of The Women's Law Clinic' Faculty of Law, University of Ibadan,) Nigeria (2014) International Journal of Clinical Legal education (2014) 20, 564.

education, would be able to contribute to national development and social change in a much more constructive manner."[6]

III. Social Justice

Access to justice is the hallmark of all civilised societies. Laws, legal institutions, social processes need to be responsive to the needs of the marginalised and the vulnerable. Social justice is a multifaceted concept and involves both social, economic and political dimensions. "The terms 'justice' and 'socialism' are mentioned in the Preamble of the Indian Constitution. In addition to social, economic, and political justice that the Preamble refers to, equal justice through equality before law is guaranteed as a fundamental right under Article 14. The Directive Principles of State Policy as outlined in the Constitution of India further support state action through running welfare programme to create a social order that is just (Article 38A)".[7] In order to fulfil this constitutional mandate of access to justice legal education must orient itself to socially oriented goals. [8]

Indian Society is neither equitable nor just. Access to justice is often denied to those in need, underlying the undeniable need for social justice. The concept of social justice represents a commitment to work on behalf of those who are marginalized, subordinated, and underrepresented.[9] Since most of the poor and marginalised don't have access to justice because of ignorance of law and legal provisions the first step in giving power to people can be achieved by providing legal empowerment to the poorest. This can be done by imparting basic legal literacy and legal awareness to the general population. Teaching social justice also gives opportunities to law students to improve their conceptual thinking which in turn improves the non- analytical skills like empathy, considered important for success as a lawyer.[10]Knowledge commission has highlighted in its report that the purpose of legal education is to create professional lawyers as well as to provide justice-oriented education

6 S.P Sathe, *Access to legal education and profession in India* in R Dhawan, N Kibble, W Twinning (ed) Access to legal education and legal profession 165 (Butterworths 1989).

7 Saurabh Sood, Convergence in the practice of legal Aid to improve access to Justice, 6(1–2) Asian Journal of Legal Education 18–28 (2019).

8 Asha Bajpai, *Learning by doing -Promoting access to Justice to the Marginalised and Vulnerable groups in India* 3(2) Asian Journal of Legal Education 201–208 (2016).

9 Julie D. Lawton, *The Imposition of Social Justice Morality in Legal Education* 4(1) Indiana Journal of Law and Social Equality, 57 (2016).

10 Paula A. Franzese, *Law Teaching for the Conceptual Age*, 44 SETON HALL L. REV. 967, 973–74 (2014).

for upholding constitutional values.[11] Inaccessible legal procedures lead to widening socio-economic disparities. Lack of well- deserved legal aid not only leads to unjust outcomes but also results in removed opportunities to access welfare oriented schemes of the government.[12] In many cases, access to such welfare schemes gives opportunities to the marginalised to become part of the mainstream socio-economic life.[13] Legal education therefore becomes important to ensure access to justice as it trains students to become skilled lawyers and competent judges , who are in the long run responsible for applying just legal procedures to ensure meaningful existence of law and justice in the society.

IV. Clinical Legal Education in India

Clinical education uses simulation and experiences as a primary teaching tool. According to Professor N.R. Madhava Menon, clinical legal education does not aim at creating future lawyers who are craftsmen and adept at manipulating advocacy skills in the traditional role of conflict resolution in courts. "It is rather a pedagogic technique which focuses on the learners and the process of learning."[14] When one brings actual experience and complexities of the real world in the teaching of law it not only enriches the learning experience of the student but also shapes the legal system of the country. Experiential learning of law not only brings practical aspects of advocacy in the teaching and learning of law but also involves teaching values like public service and social justice to legal education. [15]

An active legal education programme impacts not only the society but the practice of law and legal profession.[16]Clinical legal education in many parts of the world began as an offshoot of legal aid projects. Through the legal aid clinics set up under the projects. Whatever is learnt in the law school is put to practice in these clinics by meeting, helping real people with real problems. This not only deepens the understanding of law but also brings a realisation of social responsibility to the students. Indian legal education system has been subject to various reforms since independence. Most of the reform efforts were geared towards addressing issues pertaining to curriculum, attendance, teaching pedagogy,

11 National Knowledge Commission, Report to the Nation 2007 http://www.dauniv.ac.in/ downloads/NKC_ Report07.pdf (Last visited June 8, 2022)

12 Sood,*supra* note 7 at 18.

13 *Ibid*

14 N.R. Madhav Menon(Ed) , *Handbook On Clinical Legal Education* (EBC 1998)

15 Frank S. Bloch, *Access to Justice and the Global Clinical Movement,* 28 WASH. U. J. L. & POL'Y 111 (2008), https://openscholarship.wustl.edu/law_journal_law_policy/vol28/iss1/6 (Last visited June 8, 2022)

16 *Ibid*

quality of instructions and student assessment. Clinical legal education came on its own in India in the 1960's and 70's when clinical teaching was introduced in Legal education through the setting up of legal aid clinics.[17]

The first major effort was made in 1970s when Ministry of Law appointed an expert committee which proposed a model for legal aid programs that anticipated considerable involvement by law teachers and law students.[18] Emphasising the need for a statutory basis for legal aid, the committee noted that, "legal aid is an integral part of the legal system, not a matter of charity or confined to the four walls of the court building."[19]Further, the report has also recognized the need of providing legal aid services to the poor to deal with the nexus between law and poverty. Recommendations ranged from establishing an autonomous national legal aid authority, to compulsory public service as a part of law school curricula, to giving priority to candidates' social sympathies in filling judicial and police posts.

Further a committee was appointed in 1976 with Justice P.N. Bhagwati and Justice VR Krishna Iyer as its chairman to recommend ways and means of implementing the report on legal aid. In 1977, committee submitted a report to the then Law Minister Sen., titled "National Juridicare Equal Justice and Social justice" This committee was to work on the viability and working conditions of legal aid programmes. The committee emphasised that legal education must be used as a potential instrument to eradicate poverty by distributing material sources of the country. The committee submitted that a legal aid program must aim at radical transformation of the socio-economic structure, and concluded that the legal profession must recognize law as a potential instrument to eradicate poverty by securing equal distribution of material resources of the country.[20] Law ministry proposed model for legal aid in 1970's required considerable involvement of law teachers and students. Thus, the initial years of clinical legal education in India saw the involvement of law schools in legal aid reform movement. Legal academia joined this effort by including legal aid and social justice in their curriculum involvement of law students in the legal aid reform movement was anticipated to inculcate deep appreciation of legal aid in them coupled with

17 Frank S. Bloch & M.R.K. Prasad, *Institutionalizing a Social Justice Mission for Clinical Legal Education: Cross-National Currents from India and the United States*, 13 CLINICAL L. REV 165 (2006)

18 Govt. of India, Ministry of Law, Justice, and Company affairs, PROCESSUAL JUSTICE TO THE PEOPLE report of the expert committee on legal aid 16 (1973) http://reports.mca.gov.in/Reports/15-Iyer%20committee%20report%20of%20the%20expert%20committee%20in%20legal%20aid,%201973.pdf .

19 *Ibid*

20 P.N Bhagwati, REPORT ON NATIONAL JURIDICARE: EQUAL JUSTICE- SOCIAL JUSTICE, GOVERNMENT OF INDIA, (33-34) 1977.

sense of personal responsibility to ensure that the activities undertaken by them under the programme gather strength. In 1980's Committee was constituted under Justice PN Bhagwati to supervise legal aid programmes throughout the country. The committee came to be known as Committee for implementing legal aid services and started monitoring legal aid activities in the entire country. The Legal Services Authority Act, 1987 was enacted in to provide a statutory basis to legal aid programmes. There is a link between clinical legal education and social justice. In the 1970's many law schools introduced the clinical method of legal education by setting up legal aid clinics. Although the law Schools got involved in the clinical programmes in the initial years but their programmes were fairly small and they struggled with limited financial resources.[21] There was lack of trained faculty members who could provide supervision to the clinics. Initial efforts therefore laid emphasis on serving the poor without adequate upgradation of skills. "Nevertheless, the efforts in developing and employing clinical legal education programs in a voluntary manner in infrastructurally deficient conditions at least resulted in sensitizing student in socio-economic issues hitherto alien to class room discussions in the teaching of law."[22]

V. The Formal Inclusion of Legal Aid in Legal Education

In 1994, a three-member Committee comprising of Justice A.M. Ahmadi, Justice B.N. Kirpal and Justice Jaganaddha Rao dealt in detail with law school teaching methods. The Committee, made important suggestions relating to practical methods to be adopted for teaching law. It was because of the committee's efforts that the Bar Council of India introduced four practical papers into the curriculum, which was viewed at the time as a 'big step toward introducing clinical legal education formally into the curriculum and law schools have been required to introduce the four papers since academic year 1998-99'.[23] The following papers were introduced emphasising on the legal skills of the students:

i) Paper I - Moot-court, Pre-trial preparations and Participation in Trial Proceedings.

ii) Paper II: Drafting, Pleading and Conveyancing.

21 Nigel Duncan, *Ethical practice and clinical legal education* 7 Northumbria Journals International Journal of clinical legal education 15 (2005). See Nidhi Sharma, *Clinical Legal Education in India: A Contemporary Legal Pedagogy*, 8 INDIAN J.L. & Just. 165 (2017).

22 *Ibid*

23 Law Commission of India One Hundred and Eighty Fourth Report on Legal Education and Professional Training and Proposal for Amendments to the Advocates Act, 1961 and the University Grants Commission Act,1956, Law Commission of India (2002) https://lawcommissionofindia.nic.in/reports/184threport-parti.pdf .

iii) Paper III: Professional Ethics, Accountancy for Lawyers and Bar-bench relations.

iv) Paper IV: Public Interest Lawyering, Legal aid and Para-legal Services.

Till the introduction of these four papers hardly much efforts were made by law schools to train law students in litigation skills. It was felt that training them for legal practice was the job of the legal professionals and not law school. Introduction of these four papers was considered as a huge step towards formal inclusion of clinical legal education in law schools. These four papers can be seen as an attempt to introduce social-justice based reform in legal education. [24]

Despite this it needs to be seen that the mandatory directive of the Bar Council was not received very well by legal educators as law schools neither had the expertise in skills training nor the infrastructure and financial resources needed to implement these papers. Most of the law Schools failed to execute these directives because they were viewed as an additional burden on the faculty.[25] Finally based on the recommendation of the Ahmadi Committee. Law commission took up legal education reform in its 184th report and opined that clinical legal education should be made compulsory and should be seen as an excellent supplement to the legal aid system.[26] The Bar Council of India subsequent to the recommendations of the Supreme Court's three-member committee, adopted a resolution to set up legal aid clinics in every law school to provide inexpensive and speedy service to underprivileged groups in society.[27] A look at the reform efforts in India leads us to believe that social justice goal should remain central to the idea of legal education in India. This will help in establishing a fair, just and effective and competent legal system for all.[28]

VI. Challenges in Inclusion of Social Justice in Clinical Programmes in India

Legal aid therefore is a contact point between people in need of justice and those who want to facilitate access to justice. According to a UNDP lead study of Law School based legal aid Clinics in India in 2011. A look at the Indian experience with clinical legal education shows that nearly 82 percent of college have assigned faculty members to conduct legal aid

24 Frank S Bloch *supra* note 17 at 13 corroborated by UNDP Study on Law School based Legal aid clinics, 2011.

25 *Vijendra Kumar, Clinical Legal Education during Covid-19: Issues and perspectives*, ILI Law review Special Issue, *246* (2020).

26 The Law Commission of India, *supra* note 23.

27 Bar Council of India, three Member Committee Report on Reform of Legal Education (2009).

28 Processual justice to the people *supra* note 18 at 181.

activities in the law schools, however legal aid activity is still not an effective tool to redress injustices and provide experiential learning to all students. The study revealed that legal aid continues to be a non-credit, extra-curricular activity in law School and most law schools start legal aid programmes only to satisfy the mandatory requirements of the Bar Council of India [29] Law schools also struggle in collaborating with NGO's and local authorities. Promotion of ADR and other law reform activities is also absent in most colleges. Most of the colleges struggle with inadequacy of sources, lack of trained faculty, non-availability of information and overall absence of initiative and enthusiasm.[30]Recent findings show that the clinical legal aid is firmly entrenched in the legal education in India and there are great models to be followed within the country. However, there is much that is found wanting and in need of improvement.[31]

VII. Conclusion

Clinical legal education is an effective way to provide access to justice to the marginalised and weaker sections of the society. However, the experience of Clinical legal education in India so far shows that it is still at a developing stage. Skills necessary for imparting practical training and exposure to students is missing in most of the law schools. The Bar can also play a proactive role in these effort by providing appropriate training and resources to faculty members. For the Success of Clinical legal programme in India it is critical that BCI and NALSA should play a proactive role in implementation and strengthening of legal Aid programmes. One of the strongest critiques of legal aid programmes in India is that while most law schools have legal aid clinics but most of them lack direction and preparation. Law teachers must develop pedagogical tools and train students to develop partnerships with rural communities in pursuit of justice. A strategic mix of legal empowerment and social accountability would increase the grassroot efforts to advance social justice. The aim of clinical legal education can only be achieved if clinical legal education is institutionalised and students make strategic efforts to make legal aid accessible to the poor.

29 Department of Justice, Ministry of Law and Justice, Government of India and United Nations Development Fund project on Access to justice for marginalized people, A Study of Law School based legal Aid Service Clinics, 2011 http://www.undp.org/content/dam/india/docs/a_study_of_law_school_based_legal_services_clinics.pdf.

30 *Ibid*

31 Tushaus, David & Gupta, Shailendra & Kapoor, Sumit. *India Legal Aid Clinics: Creating Service Learning Research Projects to Study Social Justice*. Asian Journal of Legal Education. 2. 100-118. (2015).

VIII.Suggestions

If law is to be democratised and it has to reflect real societal concerns then legal curriculum should be structured in such a way that clinical legal education can be used as a powerful tool to chip away the massive pursuit of ruthless power. Limited focus on legal aid activities in law schools is not able to translate the constitutional mission of social justice into reality. The following suggestions can be instrumental in achieving the desired results:

1. Technology and Legal Aid

With the emergence of new concepts like artificial intelligence, block chain technologies, education 4.0 law schools must aim at upgrading the digital skills of the students. Law can no longer be taught in isolation. Legal education must inculcate intellectual, ethical and entrepreneurial capacities in students. As the knowledge commission states that legal education must prepare students to meet the challenges of internationalization, digitalization. The pandemic has proved that online legal education is here to stay. Law Schools should come with ideas to develop clinical programmes in online mode.

"Aside from influencing the place of clinical education in the new millennium, technological advances will affect the forms of clinical education by making possible new and different teaching and service opportunities and clinical models."[32] As technology becomes ubiquitous and impacts the lives of teachers and students alike. We must embrace the potential of online learning to enhance the quality of teaching and prepare students for the challenges of lawyering in the twenty first century.[33]

Virtual simulation exercises can play an instrumental role in bringing clinical legal education online. In the aftermath of Covid-19 as case load of the Supreme Court and High Courts are set to increase legal aid clinics can play a vital role in sharing the burden of the courts. Resort must be had to ADR and Mediation methods in clinical settings [34]

2. A Case for giving opportunity to Law Students and Faculty Members to Practice in Courts

For Access to justice in a country with adversarial litigation, access to bar is a sine qua

32 M Martin Barry, J Dubin, P Joy, *Clinical Education for this Millennium: The Third Wave* 7 Clinical L Rev 1, 53 (2001).

33 Les McCrimmon, Ros Vickers and Ken Parish, *Online Clinical legal education: Challenging the traditional Mode*, International Journal of Clinical Legal Education 23(5):33, See J Rosenberg, *Confronting Cliches in Online Instruction: Using a Hybrid Model to Teach Lawyering Skills*12 SMU Sci & Tech L Rev 19. 82.(2008-2009)

34 Vijendra Kumar, *Clinical legal education during Covid-19 pandemic: Issues and Perspectives*, 254 ILI Law Review Special Issue (2020).

non. Far too many times because of the heavy fee of the lawyers the poor are priced out of the judicial market. It becomes imperative to have other alternatives to give representation to the poor through faculty members and students serving in law school clinics "Direct representation in courts/tribunals by faculty members and students will not only help low-income clients' with inexpensive representation, it could also help reduce a backlog of cases pending in courts. This will further give students an opportunity to 'learn while doing'. Students participate more actively in such processes when they plan and work on finding a solution to client's problems"[35] However, the main hindrance in this regard is the Bar Council of India regulations that restraints full-time faculties and students of law to appear in courts.[36] . The Advocates Act, 1961, provides that only a person who is enrolled as an advocate can practice in court. Although it does give discretion to courts to permit any person who is not enrolled as an advocate to appear before the court and argue a particular case. It may take place only upon an application made in this regard. The courts have seldom made use of this discretion due to pressure from the bar. Justice Krishna Iyer in his Report, *Processual Justice to the People: Report of the Expert Committee on Legal Aid* 1973, also suggested an amendment to the Advocates Act in this regard to allow for law professor and student representation of indigent clients, clients who could not afford to pay a private attorney any way.[37] The Ministry of Justice, along with Bar Council of India and National Legal Service Authority must draft 'Student Practice Rules' along the lines of what exists in the US. All states and all but one federal court have adopted rules which allow students to practice under supervision in the US. [38]Bar Council of India should also come out with appropriate guidelines which enable faculty members to practice for a limited time.

3. Collaboration between legal Aid Clinics and Legal Service Authorities

Legal Aid service Authorities constituted under the Legal Aid Services Authorities Act 1987 provides free legal aid services to the needy people and ensures access to justice to people who are unable to secure justice on account of economic and social disabilities. Most of these authorities collaborate with legal aid clinics of law schools and provide technical and financial assistance to them. However, in practice very few authorities appreciate the true potential of law school clinics and confined their effort only to organizing legal literacy camps and providing para-legal training to law students.[39]

35 David W. Tushaus, *supra* note 31.

36 Bar Council of India Resolution No. 108 of 1996.

37 V.R. Krishna Iyer, "The Dynamics of Access to Justice", *The Hindu*, 29 May 2007. http://www.thehindu.com/todayspaper/tp-opinion/the-dynamics-of-access-to-justice/ article1848798.ece (Last visited July 12, 2022, 10:35 AM).

38 UNDP, *supra* note 29.

39 UNDP, *supra* note 29, at 112.

A fruitful collaboration between the two will not only provide access to adequate infrastructure but also give the authorities appropriate human resources in the form of students and faculty. The legal aid clinic in turn may stand benefitted from the technical and financial expertise of the Legal Aid services authorities. In addition to this, collaboration with NGO's, government departments and commissions can help improve network and is great for future activities of the clinic. Networking amongst the clinics should also be encouraged so that all emerging clinics benefit from the experience of the established ones. This can be done through clinic exchange programmes at the local, state, national and international level.[40]

4. Course Credits

Making clinical legal education as an elective subject where students get credits for their work in the clinic would be a positive step towards bringing sense of responsibility amongst the students.[41]

5. Establishing Mediation centres at legal Aid Clinic

It must be noted that Bar Council of India has made Mediation as a compulsory paper through a notification in August 2020. Without any additional infrastructure mediation can be made a spart of law school clinics. Law students can motivate people to opt for mediation as a dispute resolution method. The proper implementation of this step can go a long way in clearing backlog of cases and decreasing the burden on courts.

6. Modification of legal Aid clinics in accordance with International best practices

Law schools in India can learn from international best practices and replicate effective approaches adopted across the world in clinical legal education. There are excellent models for law schools to emulate and adopt. The Civil litigation clinic and Environmental law practum at the Boston University which have been one of the oldest running clinical law programmes in the United States help students represent clients with full responsibility and let them work on issues surrounding conservation of environment and cases falling on the intersections of environmental justice and civil rights. The clinical practicums at Boston University guarantee every interested student at least one clinical opportunity to work on cases that have a real-world impact.[42]

40 Les McCrimmon *supra* note 32, at 113.

41 *Ibid*

42 Clinics and Practicums, Boston University School of Law. https:// www.bu.edu/law/experiential-learning/clinics/ (last visited July 24, 2022, 1:30 PM)

SECTION 115 OF MENTAL HEALTHCARE ACT, 2017: A LIFELINE TO SUICIDE ATTEMPTERS

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Abstract

Changing lifestyle, competition, modernisation, a race to prove oneself has tremendously increased the incidence of suicide in the last few years in our so-called advanced society. Number of suicidal attempts supersede the actual commission of suicide. As per a report of WHO, a very large number of people who attempt suicide actually lose their lives and those who survive, their life is worse than death. Section 309, IPC has been often an issue of controversy in our legal history but the new Mental Health Care Act, 2017 has brought in a revolutionary change by decriminalising suicide under Section115. Making suicide non punishable will motivate people to seek help openly, thereby effectively controlling the suicidal incidents. The need of the hour is to counsel and rehabilitate such persons who attempt suicide rather than punishing them. Government, judiciary, mental health professionals and society need to work hand in hand to reduce the stigma that haunts the individual who attempted to terminate his life. There is a need to initiate large-scale awareness campaign across the nation to achieve the above said goal.

***Key words**: Decriminalization, Suicide, Euthanasia, Living Will*

I. Introduction

As we all know that life is the most precious gift of God, so committing suicide is considered to be an act against the will of God. But at the same time Constitution of India, the fundamental law of land under Article 21 states 'Right to life includes right to die with

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dignity' as was recently laid down by the Supreme Court in "*Common Cause v UOI & Others*".[1]

As per dictionary meaning, suicide is an act wherein a person terminates his life through some self-accomplished action. Earlier studies have shown that majority of the persons who attempted suicide were not in a sound state of mind (often suffering from mental stress, anxiety, depression) when they did so. As per the report of National Crime Record Bureau[2] out of various causes of suicides across the nation, family problems, illness, drug abuse/ addiction etc account for a large percent of suicides. This proves that inflicting punishment on a person attempting suicide is kind of punishing him thrice, firstly due to his stressful life circumstances, secondly humiliation he faces due to failure of suicidal attempt and thirdly by the penal provisions under Section 309, IPC. But Section 115, Mental HealthCare Act, 2017 considering this aspect, presumes that a person who attempts to terminate his life must be suffering from severe anxiety or depression and therefore it is the duty of state to provide him with psychological treatment and counselling instead of punishing him with imprisonment or fine.

II. Causative Factors

A number of common factors responsible for suicide in India are as follows:

1. Illness such as AIDS, Cancer, Mental Illness (anxiety, depression, substance abuse etc.)
2. Poverty
3. Unemployment, Property disputes
4. Drug addiction
5. Marriage related issues, divorce, domestic violence, impotency
6. Indebtedness (as observed in various sectors specially farmers, a rising trend of suicide is commonly observed in farmers who due to financial incapacity to repay loans or exploitation or droughts are compelled to end their life in despair).
7. Broken Families such as family history of child abuse, violence, trauma, sense of loneliness, hopelessness.

1 Common Cause v. Union of India and Others, AIR 2018 SC 1665.

2 NCRB, *Accidental Deaths and Suicides in India 2019,* 200 (Ministry of Home Affairs, 2019) https://www.legalserviceindia.com/legal/article-3705-from-right-to-die-to-right-todie-with-dignity.html) (Last visited Sept. 12, 2021)

III. Role Of Judiciary

Since decades, judiciary has played a crucial role to safeguard rights of vulnerable sections of society. In year 2001, the Court Suo motu took the cognisance of a heart shaking tragedy[3] where more than 25 persons confined in mental asylum in Tamil Nadu were charred to death as they could not escape fire (being chained to their beds and poles depicting the inhuman treatment of mentally challenged persons in the society) and directed state and Central government to take effective measures to protect rights of mentally challenged persons in the society. Section 309 of Indian Penal Code[4] lays down the punishment for attempt to suicide, making suicide the only offence whose attempt is punishable but not the commission. The object of this section was to have a deterrent effect on such attempts of terminating one's life. This section of IPC was often a challenging subject to be dealt in the courts especially in context of its constitutionality.

In *Maruti Shripati Dubal v. State of Maharashtra*[5] this provision was questioned and held to be violative of Article 14 & 21 and therefore *ultra vires* Indian Constitution. There was infringement of Article 14 as this section neither defined suicide nor it differentiated felonious suicides from non-felonious ones ignoring the relevance of circumstances at the time of attempt. Article 21 was stated to be violated by interpreting it in the light of Article 19 (that, since right to speak or right to form association includes right not to speak or not to form association, so right to life should also include right not to live). In this case, Court also analysed difference between suicide and euthanasia (Literal meaning of euthanasia is "good death/ gentle, easy death"/ mercy killing).

Afterwards similar view was expressed by the Apex Court in the matter of *P. Rathinam v. Union of India* [6] where Section 309 was criticised as cruel and irrational provision as Right to Life under Article 21 impliedly include right not to live a forced life. Section 309 was interpreted to be violative of Fundamental Right under Article 20 of Indian Constitution that no person should be punished twice for the same offence (here person is already punished by the stressful life circumstances, so inflicting punishment is double jeopardy).

Later in *Gian Kaur v. State of Punjab*[7] the decision given in *Maruti Shripati Dubal and P.Rathinam*",were overruled stating that right to life being a fundamental right cannot be

3 In Re: death of 25 chained inmates in asylum fire in Tamil Nadu v. Union of India, AIR 2002 SC 979.

4 Indian Penal Code, 1860, § 309, No.45, Acts of Parliament, 1860.

5 Maruti Shripati Dubal v. State of Maharashtra, (1986) 88 BOMLR 589.

6 P. Rathinam v. Union of India, AIR 1994 SC 1844.

7 Gian Kaur v. State of Punjab, 1996 AIR 946.

waived off. Court also differentiated between right to die a natural death (with dignity in terminally ill without any scope of recovery) or unnatural death. Court opined that only in the cases where patient is terminally ill or in a state of persistent vegetative state execution of (Physician assisted) termination of life will be interpreted as die with dignity.

After these landmark decisions it was "42nd report of the Law Commission of India" which endorsed that Section 309 of IPC be repealed. The commission clarified that repealing this section will not increase the incidents of suicide as is evident from the fact that Sri Lanka observed marked reduction in such incidents after its repeal. On the contrary Singapore has witnessed persistent rise in incidents of suicide despite of having it as a punishable offence. The report also took a note of Manu's code emphasizing on the fact that even our ancient shastras approved taking lives of ourselves as was practiced by our sages renouncing the world for salvation and peace.

Various unsuccessful attempts were made by the legislature as well as Law commission to repeal penal provisions laid down under IPC to punish those who attempted suicide as such provisions are stumbling block in their treatment and rehabilitation. As per the recommendations under 210th Report[8] of the commission: a) No mentally and physically sound person will ever take such grave step to end his life and if he does so and subsequently fail (which is another setback to him) it would be very cruel and inhuman to inflict punishment on him. b) Section 309 to an extent is violative of Article 20 of Constitution of India as the person is doubly punished by his fate, unsuccessful attempt and thereafter by law. c) There is a need to omit only Section 309 and not Section 306, IPC as it should only be the attempter and not the abetter of suicide who should not be allowed to go unpunished.

In *C.A. Thomas Master case*[9],"the accused was an eighty-year-old retired teacher who wanted to terminate his life not due to terminal illness or disability but after leading a contended and successful life. He argued that terminating his life voluntarily cannot be considered equivalent to suicide. But Court rejected this contention holding termination of one's life amounts to suicide, a punishable offence."

In Aruna Ramchandra Shanbaug v. Union of India[10]*, the Apex court differentiated between different types of euthanasia [active/ passive, voluntary (done with free voluntary consent of the subject)/ non voluntary (when patient is either unconscious or unable to make a*

8 Law Commission Report No. 210, *Humanization and Decriminalization of Attempt to Suicide* https://lawcommissionofindia.nic.in/reports/report210.pdf (Last visited September 10, 2021).

9 C.A. Thomas Master v. UOI, 2000 CriLJ 3729.

10 Aruna Ramchandra Shanbaug v. Union of India, (2011)4 SCC 454

decision)]. Active euthanasia is administration of some lethal injectables to terminate the life whereas in passive euthanasia, life is terminated by removing the life support system or by starvation. Although religious perspective disapproves acts of euthanasia as human life is sacred and since it is the god who gave us life, so only he has the right to take it away. *In this case a petition was filed to terminate the life of a nurse, Ms. Aruna to relieve her from PVS state she was in since last 37 years. India does not recognise/validate active euthanasia but permits passive euthanasia*[11] *in exceptional circumstances as per the guidelines enlisted by the Apex Court. But Court denied execution of euthanasia in this case because despite of being in vegetative state she could breathe without any artificial support system, she had feelings and also responded to stimulus. At the same time court laid down exhaustive guidelines and procedure*[12] *to be followed for executing passive euthanasia till the parliament enacts a law for the same.*

But in the year 2017with the enactment of Mental HealthCare Act, the act of attempting to commit suicide has been decriminalised as a special law overrides a general law. Therefore, even though Section 309 has not been removed from IPC, the Mental Healthcare Act (7th April 2017) to an extent decriminalizes attempted suicide by creating a presumption in favour of the person that he was suffering from some mental illness[13] which forced him to commit such serious act.

11 "Passive euthanasia is when the doctor switches to the support system or when the person is deprived of all the nutrition, foods and results in starvation."

12 The procedure laid down is as follows: in cases of a person being brain dead or so terminally ill that he/she can't be ever be come back from that stage then then close relatives/friends/medical staff of the hospital can apply to High Court under Art. 226 for withdrawal of life support. On filing of application, the Chief Justice of High court should constitute a bench of at least 2 judges to accept or reject. Before taking the decision, the bench should consult committee of 3 reputed doctors (to be nominated by bench after consulting such medical authorities or practitioners as it may deem fit) one of whom shall be psychiatrist, which shall examine the patient and attending record and thereafter submit its report to the bench. The bench, simultaneously with appointing committee, should issue notice to the state and close relative/next friend and supply the copy of report of committee, thereafter the bench should give the verdict.

13 Mental Healthcare Act, 2017, §2, No. 10, Acts of Parliament,2017: Mental illness means "a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognise reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterised by sub normality of intelligence"

IV. Section 115 of Mental Healthcare Act, 2017

Section 115, MHCA[14] has revolutionised the concept of "Right to Die with Dignity in India". As it is often observed that a large number of people in India are not aware of current laws and their amendments, so making suicide attempt a criminal offence section 309 IPC will not serve the deterrent purpose unless public is aware of it. Also, Person who attempts suicide is presumed to be already under severe stress and it is the duty of the government to provide him with due care and treatment rather than punishing him to reduce its recurrence. Section 115(1) presumes the person to be suffering from some kind of mental stress or disorder and Section 115(2) makes it obligatory for the government to ensure proper counselling of the person, medicinal/ psychological treatment and rehabilitation so that he can resume a normal stress-free life in the community and prevent any future recurrences.

In the matter of *Pratibha Sharma v. State of Himachal Pradesh*[15], a woman was accused of attempting suicide under Section 309 of IPC. Taking the defence of provisions laid down under Section 115 MHCA,2017 (that she suffered from severe mental stress due to demand for dowry made by her in laws), the decision was made in her favour that she needs counselling and support rather than punishment. Court also discussed the constitutionality/ unconstitutionality of Section 309, IPC and need to decriminalise it. Court stated that Right to life under Article 21 unlike Rights given under Article 19(1)(a) does not have negative right attached to it as terminating one's life is not a natural right and it requires a positive action to realise it. On the other hand, Court also brought into light the changing attitude of the nations across the globe towards decriminalizing suicide. Even the Britishers who framed our laws including IPC have repealed such provisions along with other nations such as North America, European countries, Canada etc. Nations like Netherland, Switzerland, Thailand have moved a step ahead by even legalising euthanasia in those patients who are terminally ill with least scope of any improvement. This is high time that India needs to change or repeal such obsolete, harsh provisions to meet the evolving/changing needs of the society.

14 Mental Healthcare Act, 2017, § 115, No. 10, Acts of Parliament,2017: (1) Notwithstanding anything contained in section 309 of the Indian Penal Code any person who attempts to commit suicide shall be presumed, unless proved otherwise, to have severe stress and shall not be tried and punished under the said Code (2) The appropriate Government shall have a duty to provide care, treatment and rehabilitation to a person, having severe stress and who attempted to commit suicide, to reduce the risk of recurrence of attempt to commit suicide.

15 Pratibha Sharma v. State of Himachal Pradesh, 2020 SCC OnLine HP 835.

Chapter III of the Mental Healthcare Act, 2017 deals with Advance Directive[16],which enables a person with mental illness to choose the mode/manner of treatment of his illness and also to nominate a person as his representative to decide the line of treatment on his behalf. This section empowers everyone to write Advance Directive except minor. So, it makes it compulsory for the treating psychiatrist to plan the treatment taking into consideration the Advance Directive. But Advance Directive is not applicable in the emergency situations.

In the latest landmark judgement of *Common Cause (Registered Society) v. UOI* [17], passive euthanasia was legalised whereby it permitted terminally ill persons or those patients suffering from incurable disease, or are in vegetative state to exit the world in a painless, dignified manner by consenting for it in Living Will. This step will be a great relief to those poor families who cannot afford prolonged, hopeless indoor admission of such patients. It was held by the honourable court that only in the cases where the patient is terminally ill such that end of life is inevitable as the process of natural death has begun right to die with dignity becomes a part of right to life with dignity. Court introduced a new concept of Advance Directives, Living Will and Nominated Representatives in our society to prevent misuse/ abuse of passive euthanasia.

The Indian Penal Code (Amendment) Bill, 2016: The Bill proposed to decriminalise suicide attempts by addressing relevant issues such as empowering appropriate authorities to intervene and take necessary steps in such attempts if posing threat to public order and to ensure that the abetter of suicide does not escape the liability.

V. Important Surveys and Targets

1. As per a WHO report, anxiety, depression are the most important causative factors of suicide worldwide.

16 Mental Healthcare Act, 2017, §5, No. 10, Acts of Parliament,2017: "A person with mental illness shall have the right to make an advance directive that states how he/she wants to be treated for the illness and who his/her nominated representative shall be. The advance directive should be certified by a medical practitioner or registered with the Mental Health Board." As per section 14(3) The "person appointed as the nominated representative shall not be a minor, be competent to discharge the duties or perform the functions assigned to him under this Act, and give his consent in writing to the mental health professional to discharge his duties and perform the functions assigned to him under this Act."

17 Common Cause (Registered Society) v. UOI, AIR 2018 SC 1665.

2. There is an alarming rise in the rate at which suicide is committed worldwide[18] such that suicide accounts for one of the commonest causes of death specially in females.
3. WHO has recognised Suicide as a "public health priority".
4. Year 2019 experienced enhanced number of suicides (Specially in the age group of 15-29) as COVID-19 increased mental stress across the globe.[19]
5. Under Agenda 30, "UN has set to achieve a sustainable goal of reducing rates of suicide by one third.[20]"

Around 25 nations across the world have decriminalised suicide as most of them have appreciated the fact that counselling and rehabilitation of suicide survivors will be more advantageous and fruitful for the whole society in place of punishing the one who is already tortured. Sri Lanka decriminalised suicide in 1998 and subsequently suicide levels have dropped remarkably. Setting examples of such nations India can also hope for the same. Despite of promise of commitment, only about 38 nations have "National suicide prevention strategy". Although terrorists and suicide bombers are excluded from such decriminalisation. Decriminalisation may in certain exceptional circumstances may be misused as some politicians might sit on protest fasts to an extent of renouncing their life to threaten or coerce the authorities if their demands are not accepted.

18 Following are the observations made as per the statistics from the World Health Organization (WHO) and the Centre for Disease and Control (CDC):
   a) 1 million people die of suicide every year
   b) Suicide rates have increased by 60%
   c) By 2020, 1 person will die of suicide every 20 seconds
   d) By 2020, 1 person will attempt suicide every 1-2 seconds
   e) Most suicide attempts are by the elderly but more youths are successful
   f) Youth suicide is increasing at the fastest rate and suicide now ranks among the three leading causes of death for those 15-44
   g) Males are 4 times as likely to die from suicide than females, but females attempt suicide 3 times more than males
   h) In Eastern Europe, the rates of suicide for men and women are the same
   i) Most deaths from suicide occur in Eastern Europe
   j) The second highest rates of suicide occur in the island countries of Cuba, Japan and Mauritius
   k) China and India report the most deaths but this number is due to their large population size
   l) The lowest rates of suicide are in the Eastern Mediterranean and Islamic countries
   m) Some of WHO's numbers are skewed by the fact that Africa has not reported suicide rates, Asia rarely does and the Eastern Mediterranean, Western Pacific and Latin American countries do so irregularly.

19 Report titled, "Suicide worldwide in 2019" published in 2021, org.in/news/health/world-not-on-track-to-reduce-suicide-mortality-rate-by-2030-who-77573 (Last visited Sept. 13, 2021)

20 *Ibid*.

VI. Conclusion & Suggestions

1) There is a need to spread awareness amongst people about the causes and prevention of suicide through media and mass campaigns.
2) National priority should be given to suicide prevention.
3) To reduce accessibility to suicide means such as pesticides, medications etc.
4) More focus should be laid on correcting causative factors of suicide specially in children and youth such as physical violence, torture, sexual abuse, unsoundness of mind etc.
5) Important community members such as doctors, teachers, parents should be trained in identifying as well as correcting causative factors of suicidal behaviour among younger generations and thereby prevent suicide attempts.
6) Media can play a crucial role in spreading awareness about the new laws relating to suicide amongst general public.
7) Framing and effective implementation of alcohol and drug policies to decrease the harmful use of such substances.
8) The early identification and treatment of vulnerable population can be useful.
    a. Special training should be given to the medical staff for timely detection, treatment, counselling of persons suffering from mental illness so that there will be significant decrease in the incidents of suicide.
    b. To keep a follow up for proper rehabilitation along with community support to suicide attempters.

A person who attempts suicide should be looked upon as a person in need of assistance by the society and not a criminal who should be punished and we need to correct the reason for such grave step taken by him. In an attempt to do so we may think that restricting availability of lethal means may help in lowering down the suicide rates. This was tried in few states but without any success as people merely shifted to a newer mean or mode of attempting to suicide. But this should not disappoint us as there are other possible preventive ways which will prove to be effective and fruitful, Section 115 of new MHCA, 2017 is one of those. Need of the hour is to explore even better means to prevent suicide attempts. Also, we cannot ignore the efficient role played by our judiciary in recognising fundamental right of an individual to not only live a dignified life but also right to die with dignity (Euthanasia) and giving importance to the psychological aspect of an individual while deciding upon a matter of his attempt to suicide. Role of Living Will and Advanced

Directive has also widened the scope of fundamental right under A-21, which interprets that Right to die (in exceptional circumstances in accordance with the guidelines laid down by the Apex Court) is another facet of Right to lead a dignified Life. So, it would not be wrong to say that new Mental HealthCare Act has proved to be a lifeline for the Suicide attempters. As is rightly said that a person who is mentally unsound, needs a doctor to treat and not the police to punish.

CONVENTION ON THE STATUS OF REFUGEES 1951: MORE EUROCENTRIC THAN UNIVERSAL

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Abstract

The Refugee Convention 1951 is supposed to be a mechanism through which certain Human Rights of all persecuted people are ensured. But, scholarships available on the subject reveals how European states drafted the Convention in order to deal with the refugee crisis exited at that time in Europe. They left behind all other refugee crisis happening at that time around the globe. It is extremely surprising that European refugees were considered fundamentally different from Asian Refugees and solution for the refugee crisis beyond Europe required outside of the Refugee Convention 1951. The Definition of Refugee had specific link with WWII European crisis which was later changed. In this backdrop, firstly this article explores the context of the Refugee Convention. It will dig out how this convention aid the sustenance of the racial segregation. This racially biased approach led a peculiar wording of the definition of Refugee in the convention. In addition, the article discusses the balance between State sovereignty and obligation under the Refugee Convention. This part also highlights the States obligation under Human Rights law. Thirdly, this research explains how the refugee Convention intentionally excluded certain factors out of the purview of the convention. These factors are so vital that without these the convention became incomplete and obsolete. Finally, this article ponders upon the judicial interpretation of the different terms of the Refugee convention. Unless the convention includes the contemporary reasons, which can lead a person into persecution, the judiciary has a role to play. This research highlights how judiciary

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around the globe are interpreting the various terms of the convention. The courts of different jurisdictions are sometimes inconsistent in interpreting the Refugee Convention. This article also argues that in order to make an effective refugee regime we need principles like Common but differentiate responsibility in refugee law.

Keywords: *Refugees, European crisis, Human Rights, Common but differentiate responsibility*

I. Introduction

The 1951 Refugee Convention of the Status of Refugees is one of the most talked international laws and one of the most important political agreements between States after World War II. Defining who is a refugee is not only deciding about the Status of person who is in desperate need of help, it about the responsibilities of a State agreed under the 1951 Refugee Convention. Initially 1951 Refugee Convention had words having special focus to the European Context. With the passage of time some changes were introduced in the 1967 protocol in order to take as many states as possible on board. Despite few fundamental changes in the convention there are certain grey area which still remain unanswered. Scholarship on International Refugee law reveals the international politics behind the 1951 Convention.

Theoretically, 1951 Refugee Convention is a depository of a portion of State Sovereignty, but in practice it is a compromise between the States Sovereignty and access to the foreigners inside the territory. States never wished to give an unfettered right to access inside to any one, this intention resulted the debated provision of the Refugee Convention. That is why the definition of Refugee was engineered in the 1951 Refugee Convention. This provision has put forth a restrictive definition of Refugee. It has failed to include persons who face displacement internally or externally due to an armed conflict, climate change, food security or epidemic.

This article will first explore the context of the Refugee Convention 1951. It will unfold the behind the scenes of the drafting process of the convention. As it has been already mentioned that convention was an effort to tackle the then Refugee crisis in Europe, therefore the voices of the global crisis were completely ignored. On the face of it Refugee Convention appears to be the last resort to people flew from their home land due to all kind persecution. But in reality, it is just opposite. Persecution is just not enough to be a Refugee if it has not done in way explained in the Refugee Convention. The sheer political concern of

Europe led the definition in this fashion. First part of the article will highlight this political backdrop along. It also unlocks how the Convention helps to sustain racial segregation. This racially biased approach was taken in the drafting process of the convention.

Secondly, this article connects the States obligation under Refugee Convention with States Sovereignty. The State parties of the Convention never wanted to open a floodgate to the foreigners. They always wanted to receive a criteria-based people which States decided in 1951 based on the European crisis. Although Human Rights and Refugee law are two different branches of Public International law but violation of the premier led to the rise of later. Denial of human rights leads to the creation of refugees. This part will also underline the obligation of States under other Human rights convention.

The definition of the Refugee in the Refugee Convention is incomplete in various way. This definition has always been the main focus of criticism. It has left behind the struggle, sufferings, sacrifices and plight of millions of people, their It has failed to include many other situations which may cause persecution and force a person to take refuge of flee. Hence is incomplete hence to greater extent frustrate the main objective. The third part of the article discusses the different other criteria of persecution and how the convention is frustrating its own object and purpose.

Lastly, the article will ponder upon the judicial interpretation of the different terms of the Refugee convention. This highlights the inconsistency of interpretation of the Refugee Convention by the judiciary. Many judiciaries of the States around the globe interpreting terms like “well-founded Fear”, “persecution”. Principle non-refoulment is a significant provision to the Convention. Despite of many political concerns, one right has been established by the 1951 Convention and 1967 Protocol is the non-refoulment. This obligates to every state party not to return any refugee to their home country where they could be persecuted. The article highlights meaning of these terms and synchronize jurisprudence set by different judiciary.

From the beginning of the 1951 Convention relating to the Status of Refugees has excluded women from their right to get protected from persecution. The Convention has set a gender-blind criteria exacerbated by the same qualities in the international legal system of which it is a part. The article has highlighted how women are being subject to persecution for homosexuality and for giving birth to more than one child. Although the decisions of the regarding these issues are divergent. Courts of different jurisdictions are divergent in these issues.

The preamble of the Convention set very high ideals for the mankind. It talks about fundamental rights and freedoms; it says States will do everything within their power to prevent this problem from becoming a cause of tension between States. These objectives of the convention are still a distant dream for the Human being. The article concludes how convention was projected during the drafting, what could have been achieved through this Convention and its present scenario. The article concludes with some recommendations as to how the definition of the term "Refugee" can be made more accommodative in order to meet the needs of the current refugee crisis of the world.

II. Refugee Convention was a Response to The Refugee Crisis of Europe after WWII

The Convention relating to the Status of Refugees 1951 appear to be a universal law by its name but this particular law was drafted in order to address the refugee crisis occurred in Europe after the Second World War.[1] The process of drafting the Refugee Convention started with the 8(1) resolutions of the United Nation General Assembly in 1946.[2] It is true that during this discourse there were a considerable representation of global south, but their voices remain unheard. For example, from Statement made by Brohi (Pakistan), it is clear that multiple States of global south raised their concern as to the Convention's lack of world-wide application.[3] They pointed out, how the applicability of the convention was about fail beyond Europe, which have been proved by many later scholarships.[4]

Hathaway viewed that the Convention was only made to serve the European refugee crisis. This law was never equipped to meet the global need[5] and it is structured according to the interests of the powerful European States.[6] This notion has been substantiated by the fact

1 Seyla Benhabib, *The End of the 1951 Refugee Convention? Dilemmas of Sovereignty, Territoriality, and Human Rights*, Jus Cogens 75–100 (2020).

2 Terje Einarsen 'Drafting History of the 1951 Convention and the 1967 Protocol' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* OUP (2011)

3 Statement by Brohi (Pakistan), UN ECOSOCOR, 11th Sess., SR 399 (1950) paras 29–30. See also Einarsen (n 15) 57.

4 Maja Janmyr, *the 1951 Refugee Convention and Non-Signatory States: Charting a Research Agenda,* Volume 33, Issue 2 *International Journal of Refugee Law*, 188–213, (2021), https://doi.org/10.1093/ijrl/eeab043

5 James C Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law,* 31 Harvard International Law Journal (1990). Lucy Mayblin, *Asylum after Empire: Postcolonial Legacies in the Politics of Asylum Seeking* (Rowman & Littlefield 2017); Ulrike Krause, *Colonial Roots of the 1951 Refugee Convention and Its Effects on the Global Refugee Regime,* 24 Journal of International Relations and Development (2021).

6 Ibid

that the Refugee crisis existed outside the Europe while the Convention being drafted and after 1951, but the plight of those refugees and the burden of the host countries have not been recognized by the Convention.

After the creation of Israel in May 1948, many Jewish Refugees from Europe were trying to settle down in Israel, led to great anarchy and created 6,50,000 Palestinian Refugee.[7] The partition of India and Pakistan in 1947, exodus in China between1949-50 and Korean War between 1950- 53 led a huge refugee crisis.[8] These situations occurred immediately after World War II and these were very rarely taken into account. Surprisingly, as Chimni points out, at the time of drafting of the Refugee convention 1951, it has been told that European refugees are fundamentally different from Asian Refugees[9] and solution for the refugee crisis beyond Europe required outside of the Refugee Convention 1951.[10] This racially biased approach aided the drafting of the 1951 convention in the following wording in article 1A (2) "for the purposes of the present Convention, the term "refugee" shall apply to any person who *as a result of events occurring before 1 January 1951.*" Later the convention further clarifies the above-mentioned provisions that mentioned event is the event occurred in Europe or elsewhere. This particular line made the entire convention more Eurocentric and less universal.

Hence, from the remarks of the Hathaway[11] and Chimni[12] it can be concluded that the Refugee Convention 1951 was mainly drafted in order to address a regional crisis, more specifically the refugee crisis took place post to World War II in Europe. Later, in 1967 a protocol to the convention got adopted. This later law was supposed to outweigh the loopholes of 1951 Refugee Convention and made the convention more inclusive. Although the protocol made the convention universal but it failed to set a progressive and humane criterion for being a refugee and it has also failed of appreciate the concerns of different

7 James L. Carlin, Significant Refugee Crises Since World War II and the Response of the International Community, 3 MICH. J. INT'L L. 3 (1982) https://repository.law.umich.edu/mjil/vol3/iss1/1

8 Lucy Mayblin, *Asylum after Empire: Postcolonial Legacies in the Politics of Asylum Seeking (*2017) (Rowman & Littlefield, Ulrike Krause, *Colonial Roots of the 1951 Refugee Convention and Its Effects on the Global Refugee Regime,* 24 Journal of International Relations and Development (2021).
Ibid

9 BS Chimni, *The Geopolitics of Refugee Studies: A View from the South*, 11 Journal of Refugee Studies 350, 351(1998). Glen Peterson, *Sovereignty, International Law, and the Uneven Development of the International Refugee Regime,* 49 Modern Asian Studies 439 (2015).

10 Ibid

11 James C Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 Harvard International Law Journal 129 (1990).

12 Supra 9.

countries and regions.[13]

III. Granting Refugee Status is a Sovereign Right

State sovereignty is one of the core principles of international law. It implies that a State has the absolute control inside its boarder and it is free from all alien interference. The State sovereignty also involves absolute right of the States to allow person inside and exclude people from crossing borders.[14] Apart from the principle State Sovereignty under International law, A State also has the duty to comply the norms UN Charter, UDHR and other international laws to which it is party or the applicable customary international law.

The Article 14.1 of Universal Declaration of Human Rights (UDHR) gives right to seek and enjoy asylum from persecution in other countries to everyone in the world.[15] Despite this universal right to asylum the Refugee Convention 1951 kept this prerogative with the State. After the adoption of the Refugee Convention the status of refugees fell within absolutely the domain of the respective States e.g., whether Bangladesh will allow Rohingyas inside, can Hungary allow the asylum seekers, is Slovakia's decision to only accept Christian refugees[16] are the decisions of these States.

States are barred from interfering within its sovereign jurisdiction of other States; therefore no one can challenge any State as to why or why not a person or group of have not been given refugee status. Arguably, principle of non-refoulment has become customary international law so the refugee convention has established a reign of surrogate protection.

International Law has imposed a limitation on State's prerogative to control entry into its land, is arguably well settled, at least in theory. But visa systems are often criticized as unfettered power of States'. The State can decide how long a foreigner can stay inside and under what condition.[17]

13 Sara Ellen Davies, *Legitimising Rejection: International Refugee Law in Southeast Asia,* Brill 14, 225, (2008). Nikolas Feith Tan, *The Status of Asylum Seekers and Refugees in Indonesia*, 28 International Journal of Refugee Law 365 (2016).

14 P. Weis, *the right of asylum in the context of the protection of human rights in regional and municipal law* 2nd international colloquy on the European Convention of Human Rights, Vienna (1965).

15 Nobel, P., *Refugees and Other Migrants Viewed with a Legal Eye -or How to Fight Confusion*, Sydney: Dangaroo Press (1988).

16 Lucas Bento, *Sovereignty Cannot Hold back the power of Humanity* , Harvard International Law Journal (April 27, 2022) https://harvardilj.org/2015/09/sovereignty-cannot-hold-back-the-power-of-humanity/

17 Francesca Pizzuteli, *The Human Rights of Migrants as limitations on state's control over entry and stay in their territory*, European Journal of International Law Blog (May 21, 2015) https://www.ejiltalk.org/the-human-rights-of-migrants-as-limitations-on-states-control-over-entry-and-stay-in-their-territory/

Hence, it is clear that claiming a refugee status is a right but ultimate decision lies in the whims and fancies of the State whether to grant the status or not. As per the provisions of the 1951 convention and 1967 protocol and available scholarship a state's action can be legally questioned anywhere. Many scholars argues that Refugee convention is intentionally kept restrictive and partial.[18] It is a compromise between unfettered State sovereignty and the access of foreigners.

IV. Refugee Criteria are Incomplete and Not Fit to Serve the Purpose of The Preamble of Refugee Convention:

The preamble of 1951 Refugee Convention expressed,

> *The wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States.*[19]

One major objectives of the Refugee convention which States have expressed in the preamble that they will do everything within their capacity to prevent the problem so that refugee crisis shall not lead to tension between States. But this objective gets frustrated by the wording of the definition of Refugee in the Convention.

The Refugee Convention explains the term "refugee" is a person i) found outside the country of his nationality and is unable or unwilling to avail himself of the protection of that country; or of his former habitual residence owing to ii) well-founded fear of being ii) persecuted for reasons of iv) race, v) religion, vi) nationality, vii) membership of a particular social group or political opinion.[20]

This definition has always been the crux of the entire Refugee regime.[21] A question may arise to the reader of the 1951 Refugee Convention that why only these criteria are placed in the convention. At the time of drafting the convention, representatives of, mostly European States, were not prepared to sign and assume an undefined and indefinite commitments in

18 J. Sztucki, *Who is a Refugee? The Convention Definition: Universal or Obsolete?*, Nicholson and Twomey 8, 57.

19 Convention relating to the status of refugees 1951, Preamble, Para 5.

20 Convention relating to the status of Refugees 1951, Art.1 A 2 .

21 K. Bem, *The Coming of a "Blank Cheque, Europe, the 1951 Convention, and the 1967 Protocol*, 16 International Journal of Refugee Law 609 (2004)

respect of all refugees.[22] This concern and tension of European States led the tailoring of the definition of Refugee. As a result of such anxiety the definition of Refugee was tailored and the prospective beneficiaries were almost fixed.[23] So, the Refugee convention frustrated to serve its actual purpose. It is because the definition has pick and choose the beneficiary of a group of people from the particular region of the world. The refugee law scholars around the world have been voicing for many other criteria which may very well persecute a person or she/he may have well-founded fear out of those criteria.

Extreme poverty or deprivation of mundane needs have never been recognized as the legitimate criteria of seeking refugee status.[24] There are many factors, like climate change, which making large number of people jobless.[25] Economic migrants are always considered making false claim.[26] These are some real time persecutions which people are facing around the globe, although not a valid argument under the Refugee law Jurisprudence. Hence the criteria of definition of Refugee are incomplete and it does not serve the purpose of the object of Refugee Convention. In order to make Refugee Convention more comprehensive few more contemporary factors such as persecution caused by Climate change and Global Warming, extreme economic hardship etc. which may threaten or endanger a human life needs to be included in the definition of the convention.

V. The Judicial Interpretation of the Criteria of Refugee

The Article 31(1) Vienna Convention on Law of Treaties (VCLT) 1969 enumerates that

> *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*[27]

Hence according to the rules of interpretation a treaty 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. As the article have already mentioned the criteria of being a Refugee under the Refugee Convention 1951. The Convention put forth certain

22 Mr Mostafa, UN Doc A/CONF.2/SR.20 (1951).

23 J. Sztucki, *Who is a Refugee? The Convention Definition: Universal or Obsolete?*', in Nicholson and Twomey

24 *Supra* 1

25 Sharan Burrow General Secretary, *How will climate change affect jobs?,* International Trade Union Confederation (ITUC)

26 *Supra 1*

27 Vienna Convention on Law of Treaties (VCLT) 1969, Art. 31.

criteria.[28] Several Court around the globe have embarked upon these criteria and made judicial interpretation. The first and foremost condition to Refugee status is to have a well-founded fear.

Well Founded fear: All forced migrants are not qualified to be a refugee. A subjective fear is an essential element of a Refugee Claim.[29] It is told that in the *Kamna*[30] and *Tabet-Zalta*[31] that both the elements of Refugee claim must be met, that subjective and objective and lack of evidence may frustrate the claim.*[32]*

The claimant needs to prove the subjective fear of persecution with credible evidence by being a credible witness.[33] The Canadian Court also mentioned that if children or persons are mentally disable then they might be incapable of feeling subjective fear.[34]

USA Supreme Court in Immigration *and Naturalization Service v. Cardoza-Fonseca* held that a person is not required to prove that he or she is more likely to be persecuted than not, in his/her home country.[35]

The UK House of Lords in R *v. Secretary of State for the Home Department, Ex parte Sivakumaran and Conjoined Appeals (UN High Commissioner for Refugees Intervening)* [1988] defined the well-founded fear. The court said that a reasonable degree of likelihood of fear have to be demonstrated to qualify a fear as well-founded. The court also said that the Secretary of state may take decision based on the fact known to him which may be unknown to the applicant if fear of the applicant justified.[36]

So, in order to prove well-founded fear, subjective and objective fear are essential elements. The subjective fear must be substantiated by evidence or credible witness. More likely to be persecuted than not is not a yardstick in US Supreme court. Most importantly, UK House of lords has required a demonstration of the reasonable degree of persecution.

28 Convention relating to the status of refugees 1951, Art. A 2.

29 Kamana, Jimmy v. M.C.I., 1999 (F.C.T.D., no. IMM-5998-98).

30 Ibid

31 Tabet-Zatla, Mohamed v. M.C.I. (1999) (F.C.T.D., no. IMM-6291-98), Tremblay-Lamer, November 2, 1999

32 Ibid

33 Chan v. Canada (Minister of Employment and Immigration), (1995) CanLII 71 (SCC), [1995] 3 SCR 593.

34 Yusuf v. Canada (Minister of Employment and Immigration) [1992] 1 F.C. 629; [1991] F.C.J. 1049; Canada (Minister of Citizenship and Immigration) v. Patel, Dhruv Navichandra F.C., no. IMM-2482-07.

35 Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421

36 R v. Secretary of State for the Home Department, [1988] AC 958, [1988] 1 All ER 193, [1988] 2 WLR 92, [1988] Imm AR 147.

VI. The Act of Persecution

Fear of persecution is also an important element to prove. Persecution has to qualify a certain standard. It has to be serious and imminent. In a Refugee Appeal, the New Zealand court relied on the provisions of the International Human Rights norms in order identify whether a serious harm qualify the scope of persecution or not.[37]

The US Court of Appeals have set out as to how an act or acts become persecution. In Korablina v. Immigration and Naturalization Services, the court held that when a person or his/her family suffers violence or harassments by series of acts, sporadic acts, is persecuted.[38]

A claimant's return to his homeland is always a very important question. If it is proved that claimant may re avail the home country, then it may frustrate his/her claim. The Claimant also need to prove that his/her well-founded fear of persecution occurred due to one of the grounds mentioned in the Refugee Convention 1951. The intention of the action, whether malafide or bonafide, is not important.[39]

VII. Principle of Non-refoulment

The Refugee Convention 1951 and 1967 Protocol makes one obligation to all the high contracting parties is non-refoulment. It implies a claimant cannot be returned to his home country or habitual residence where he has fear of persecution. In R v. Secretary of State for the Home Department, Ex parte Adan, Ex parte Aitseguer, (2001) case the court opined that the Secretary of State is not entitled to deport asylum seekers to a third country. The court also said that interpreted Article 1 A (2) of the 1951 Convention should not interpret restrictively so that "persecution" only covered conduct attributable to a State.[40]

VIII. Particular Social Group

One of the criteria of successful claim of Refugee status is membership of particular social group. In the Matter of Acosta, the US Board of Immigration Appeals held that membership of social group implies that an individual is a member to a group, it shares a common

37 Refugee Appeal No. 71427/99, New Zealand Refugee Status Appeals Authority, http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b7400

38 Korablina v. Immigration and Naturalization Services, 1998, 97-70361.

39 Danian v. Secretary of State for the Home Department, 2000 AR 96.

40 R v. Secretary of State for the Home Department, (2001) 2 WLR 143.

immutable characteristic. This characteristic cannot be changed by the individual member of the society. If any person suffers a well-founded fear of persecution for being a member of such group, he or she may qualify the term Persecution on account of membership in a particular social group.[41]

In Canada (Attorney general) v. Ward (1993) the court defined "Particular Social Group". It says that fundamental underpinnings of persecution comprise of three categories: (1) groups defined by an unaltered characteristic; (2) groups members of which associates for some basic reasons to their human dignity. These members of the group should not be forced to forsake".[42]

In *Islam v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, ex parte Shah* [1999] UKHL the court did not require a group to have cohesiveness, co-operation or interdependence. It may or may not form an organization and its question of human rights are irrelevant.[43]

The Refugee Convention is the extended part of the Human Rights laws. It has the potential to solve many significant crises of the humanity. The objectives of the UN Charter, CAT, UDHR other important Human rights conventions can only be fully realized when other supporting Conventions like 1951 Convention and 1967 Protocol are completely functional. The Refugee convention has many limitations. The Judiciaries can give us wonderful interpretation of different terms of the Convention in order to overcome limitations.

It has already mentioned that how USA, UK, Canada, New Zealand and others judiciaries are interpreting Refugee Convention. This endeavor hopefully one day creates a world where any genuine persecuted innocent person shall have the entry to any country in the world.

IX. Sexual Orientation

Persecution based on sexual orientation can be a ground for having successful Refugee Claim.

In a case, the New-Zealand Status Appeals Authority considered that in Iran homosexuals

41 Matter of Acosta, A-24159781, http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b6b910

42 In Canada (Attorney General) v. Ward (1993) 2 S.C.R. 689.

43 Islam v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another (1999)

are a social group with particular internal characteristic, namely their sexual orientation. This kind of sexual orientation is a very inherent and unchangeable characteristic. The judgment also says that when a person's fundamental characteristic or identity or human dignity ought not to be required to be changed.[44]

In another case called *Hernandez-Montiel v. Immigration and Naturalization Service*, the US Court of Appeal for the 9th Circuit considered a "particular social group" comprised of Gay men with female sexual identities in Mexico. One cannot change a Female sexual orientation. It was unchangeable and was inherent in the claimant's identity. A person with this kind orientation should be required to change it, in any event.[45] The Courts mostly in US, UK and New Zealand already interpreting that persecution due to sexual orientation can be ground of being a Refugee. They have also considered that homosexuals can be called that people of particular group due to their sexual orientation.

X. Restrictive Family Planning Policy

Restrictive Family planning system can also be form of Persecution under the Refugee law Jurisprudence. In a Case of *Cheung v. Canada (Minister of Employment and Immigration),* The Canada Federal Court of Appeal regarded that due to Chinese government policy Women in China were facing forced sterilization in order preventing birth of more than one child. This, as court opined form a particular social group. So, any women escaping this kind forced sterilization shall come within the purview of the definition of a Convention refugee.[46]

The Supreme Court of Canada in *Chan v. Canada (Minister of Employment and Immigration)* decided that if a person is having a well-founded fear of sterilization, he/she must be demonstrated subjective and objective fear persecution and in order to substantiate that his/her fear is well-founded in the objective sense.[47] Claimant's credible witness and consistent testimony will be sufficient to meet the subjective aspect of the test.[48]

Unlike the Canada Supreme Court, in the case of A and Another v. minister for Immigration and Ethnic Affairs and Another, the High Court of Australia decided not to consider that

44 Refugee Appeal No. 1312/93, New Zealand Refugee Status Appeals Authority, http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b6938

45 Hernandez-Montiel v. Immigration and Naturalization Service, 225 F.3d 1084.

46 Cheung v. Canada (Minister of Employment and Immigration (1993) 2 F.C. 314.

47 Chan v. Canada (Minister of Employment and Immigration (1995) 3 S.C.R. 593.

48 Ibid

forced sterilization can form a people of particular social group. The Court viewed that evidence was insufficient to prove that the parents of one child, when denied to follow the restrictive family policy, were ousted from the society and formed a collection of persons.[49]" The Supreme Court have not considered that this could be a basis of persecution and form a particular social group.

The definition of Particular Social group based on restrictive family policy has been found different in multiple jurisdictions. The Canadian Supreme Courts are considering that well-founded subjective persecution due to forced sterilization can make a particular social group. On the contrary the Australian Supreme Court are giving opposite view on this. The Australian Court is saying that there is no sufficient evidence to found to show that when parents were denying to follow the restrictive family policy, were persecuted, that too under the well-founded persecution.

XI. Conclusion

Movement of the people from one land to another is an ancient phenomenon. History reveals that this movement of people around the globe have been happening since the time immemorial from one land to another for various reasons, it ranges from religious, economic, trade, agriculture, war, epidemic etc. Surprisingly, the 1951 Convention has only mentioned four/ five criteria of forced migration, leaving the many others behind. Civil wars, cycles of poverty and corruption, domestic gang violence, climate change, and desertification[50] are some of the new reasons added with the old reasons.

The Study of the Refugee law jurisprudence and the current world affairs show a clear miss-match to a great extent and raise multiple questions. Some States from west, like USA, UK, Germany, France etc. pioneered the drafting or the adoption of Refugee convention. Despite the objections of the representatives of the Global South the mighty European States have designed the Refugee Convention in such a fashion that under the disguise of the United Nation and Universality, they actually made Convention for Europe. They pledged to comply many principles, like equality, Non-discrimination, non-refoulment. But surprisingly these States are abdicating their responsibilities time and again. Uncountable boats, such as from Libya, have been returned from the shores of Europe and America which caused thousands of deaths.

49 A and Another v Minister for Immigration and Ethnic Affairs and Another, (1997)

50 IOM UN Migrations Publications Platform, https://publications.iom.int/fr/books/global-migration-trends-factsheet-2015 (last visited June 29, 2016).

On the contrary there are some countries, like Bangladesh, Indonesia, not party to the convention even, have been complying with all the principles of Refugee Convention. This article has highlighted that the existing Refugee regime is inadequate, insufficient and jeopardizes the lives of millions of displaced people around the Globe.

The Refugee convention was drafted just three years after the UDHR, but still many scholars view that refugee regime excluded women from international right to protection from persecution. Refugee Women are often facing specific abuses, other than a man. Among the many kinds of abuses rape, sexual extortion, physical insecurity is very common. Refugee women face these abuses during their flight and in places of refuge. These problems with refugee women have no geographical limitation, it takes wherever crisis occurred. Women are often subject to sexual demand in exchange of Refugee Status, especially when not associated with father, brother or husband.

Economic migration is one most common type in the current world. Due to many reasons, like after the Arab Spring, USA invasion in Iraq, Afghanistan, recession of 2008, Corona pandemic forced people into untold hardship and marginalization. Thousands of people fled their land due this vulnerable situation. The article has mentioned several times that these hardships have not been framed within the contour of Refugee Convention.

Despite of the fact the preamble mentioned that State will do whatever they can to prevent this problem so that it does lead to a tension between States. Around 1.5 million of Rohingya population have migrated from Myanmar to Bangladesh. They are in Refuge of Bangladesh for more than decades. Due to geo-politics the tension is mounting between these two countries, Refugee convention is of very little help.

In my view, like environmental law, International Refugee Law should have the principles like Common but differentiated responsibilities. If we think about proportionately, Bangladesh, and many other, small, under-developed, and densely populated countries are sheltering Refugees, maintenance of which is beyond their capacity. Whereas, countries like Australia, Canada and many other States, in the world which have huge untouched area, but sheltering tiny number of Refugee population. Hence the Common but differentiated responsibilities in Refugee Law could be of great help. By this process burden could be shared equally by all the States.

Principal-To-Principal Relationship with Respect to Automobile Manufacturer and Dealer in Consumer Dispute Cases

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Abstract

In the automobile manufacturing world, Standardization is the primary concern. In India, the NCRB collects detailed data on traffic accidents including road accidents for inferring the trend and patterns of traffic accidents for the planners to devise appropriate preventive strategies. The Number of 'Traffic Accidents' in India have decreased from 4,74,638 in 2018 to 4,67,171 in 2019. (However, the rate of deaths in road accidents per thousand vehicles i.e., 0.6 has remained same as it was in 2018). Maximum increase in number of traffic accidents cases in States from 2018 to 2019 was reported in Madhya Pradesh (from 49,080 to 53,379) followed by Rajasthan (from 22,401 to 24,281) and Uttar Pradesh (from 40,783 to 42,368). On the other hand, maximum decrease was reported in Tamil Nadu (from 66,110 to 59,499)[1]. Globally, India ranks first in the number of road accident deaths across the 199 countries and accounts for almost 11% of the accident-related deaths in the World. A total number of 449,002 accidents took place in the countryduring the calendar year 2019 leading to 151,113 deaths and 451,361 injuries. As India develops more road-based infrastructure, it is equally important that the entire chain from manufacturing tovehicle scrap is understood in terms of contract law, especially, the contractual arrangement where three parties i.e., consumer (purchaser of the vehicle), dealer and manufacturer are involved. Accidents attributed to mechanical/electrical/electronic failure of the vehicle can be either a manufacturing defect or non-manufacturing defect in nature. The

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1 Government of India, Report on Accidental Deaths and Suicides in India (National Crime Records Bureau, Ministry of Home Affairs, 2019).

paper revolves around, under what circumstances, the manufacturer will be liable for deficiency of services and dealer will be liable for the committing the same under the Consumer Protection Act.

Keywords: *Manufacturing defect, deficiency of services, maintenance, dealership agreement, unfair trade practice*

I. Introduction

Many of us suffer from the confirmation bias that the legal relationship between a manufacturer and a dealer of motor vehicles would be of the kind of a principal-to-agent relationship under the contract law. That, there would be vicarious liability impinged upon the manufacturer for any defect found in the vehicle at the time of the use by the consumer. Surprisingly, the contractual relationship between the two as observed in many judgments/ orders in peculiar circumstances is of a different kind i.e., of principal-to-principal one.

Before beginning with the principal discussion, it is important to recall that in a recent judgment i.e., Hyundai Motor India Limited v. Shailendra Bhatnagar[2], vehicles are held to be goods withinthe meaning of Section 2(7) of The Sale of Goods Act, 1930 and they carry implied conditions asto their fitness. That is a statutory mandate and that mandate also operates in respect of goods, whose defect is subject of proceeding in a consumer complaint under the Consumer Protection Act, 1986.

Now, to understand how legal obligations and duties are distributed between the manufacturer andthe dealer, the dealership agreement is crucial to the understanding of the said principal-to- principal relationship. Generally, the complainants in such cases where manufacturing defects arefound, generally the relief sought is the replacement of the old with a new vehicle. The onus of proof is on the complainant to prove that a manufacturing defect is found in the vehicle causing deficiency of service which constitutes an unfair trade practice. Once proved, the onus shits to the manufacturer to deny the same. The peculiar circumstances being that, unless it could be proved that the defect so found is a manufacturing one and not one which is occurs due to operational wear and tear, the liability cannot be impinged on the manufacturer.

The article revolves around the essentials of the relationship between a manufacturer and the dealer operating in the automobile industry and the consumer disputes involving the above two parties against the complainant-consumer. It includes, in detail, the legal complexities

2 Hyundai Motor India Limited v. Shailendra Bhatnagar, Civil Appeal No. 3001 of 2022.

involved in cases where a defective vehicle is sold to the latter and the claims regarding the liabilityof the same are to be determined by the adjudicating authorities.

II. Is Manufacturing Defect Only to Be Established by Expert Evidence?

Many a times, confusion arises as to whether evidence of an alleged manufacturing defect could be established by regular maintenance workers or by a verified independent third-party engineer/technician. Section 66 of the Consumer Disputes Act, 2019[3] allows the state/national consumer forum to appoint an 'amicus curiae' to assist the same in technical complexities. Presently, the law on the same has been expounded in multiple National consumer forum orders.

The Hon'ble National consumer forum expressed in *Telco v. Hardip Singh*[4]*, Mahindra and Mahindra Ltd. v. Ram Lakhan*[5] *and Classic Automobiles v. Lila Nand Mishra*[6]*,*

> *"That if any vehicle is taken for repair time and again it does not mean that there is manufacturing defect unless there is report by competent engineer. It is opined therein that in the absence of expert opinion it cannot be presumed that there is manufacturing defect. In the present case also,there is no report of competent engineer about manufacturing defect. "*

Routine adjustment of dysfunctional parts of the car does not amount to indication of the manufacturing defect. The perusal of job cards at the end of maintenance checkup issued by the service provider largely informs about the exact issues the car faces along with the date on which the repair was done and most importantly how grave an impact the defect will have on a vehicle'sperformance. For example: non-starting of the engine, low pick-up, weak suspension, low AC cooling with the shifting of the gear. Such faults being repaired even multiple times still do not qualify as a manufacturing defect.

However, at the same time, if an engine assembly is replaced due to faulty functioning, then it certainly qualifies as a manufacturing defect as was observed in *Anand Kumar Bansal v. Premier Ltd. & Another.*[7] In this matter, the manufacturer and the dealer, both,

3 The Consumer Protection Act, 2019, S. 66.

4 Telco v. Hardip Singh, 2011 (3) CLT 382.

5 Mahindra & Mahindra Ltd. v. Ram Lakhan, 2014 (2) CPJ 760.

6 Classic Automobiles v. Lila Nand Mishra, 2010 (2) COPT, 363.

7 Anand Kumar Bansal v. Premier Ltd. & Another, 2019 SCC Online NCDRC 1048.

did not explain the reasonwhy the engine assembly was replaced two times within a year of the purchase of the car by the complainant. The said repairs with the date of repair were listed in the job card and was adduced as evidence. It was also pointed out by the National Consumer Forum that the report of expert opinion was signed only by the service engineer of the Manufacturer and not by an independent expert opinion given by a third party.

Therefore, as observed in the same order:

> *"Since 'defect' means any imperfection or shortcoming and 'manufacturing defect' is a shortcoming in a product resulting from departure from its design and is dangerous than the consumer expects the product to be, we are of the considered view that stoppage of engine and replacement of the same twice during the first year squarely falls within the definition of 'defect' and 'manufacturing defect.' For all the afore-noted reasons we hold that the vehicle had a manufacturing defect which is unexplained by the Manufacturer and we do not find negligence on the part of the Complainant in leaving the vehicle behind with the dealer and not accepting the delivery in such circumstances."*

However, in the present case, the revision petitions were partly allowed and only refund of the purchase-consideration was ordered and not the replacement of the vehicle.

III. Onus of proof to prove manufacturing defect

In Baljeet Kaur v. Divine Motors[8], it was categorically held that:

> "*When a manufacturing defect is alleged, the onus of proof has to be on the complainant. Admittedly, the petitioner/complainant had produced, in support of her allegation of manufacturing defect, her own affidavit along with affidavit of 7-8 more witnesses. The District Forum correctly held - and the state commission concurred-that that these affidavits are no substitute for an expert opinion, to hold that the vehicle was indeed suffering from some manufacturing defect (s).*"

In Suresh Chand Jain v. Service Engineer and Sales Supervisor MRF Ltd[9]

8 Baljeet Kaur v. Divine Motors, RP No. 1336 of 2017 [III (2017) CPJ 599 (NC)].

9 Suresh Chand v. Service Engineer & Sales Supervisor MRF Ltd., RP Nos. 3845and 3846 of 2006 [I (2011) CPJ 63 (NC)]

"Onus to prove that there was a manufacturing defect in the tyres was on the petitioner which he failed to discharge by leading any cogent evidence. The petitioner did not produce any expert evidence to either show the nature of defect or proof of manufacturing defect. The petitioner has failed to prove that the tyres purchased by him suffered from any manufacturing defect."

IV. The Law on Principal-To-Principal Relationship

The Supreme court had two occasions to examine the legal status of a contractual relationship between a manufacturing company and a dealer in which the greater emphasis was laid upon the dealership agreement and the clauses thereof. They are explained herein below:

In the case of Tata Motors Ltd v. Antonio Paulo Vaz & Anr[10], the complainant had been misled into purchasing a 2009 model instead of the 2011 model as promised by the dealer. The vehicle (car) had already completed 622 km. He requested for refund of the price paid or replacement of the car with one of 2011. The price was however not refunded; neither was the car replaced. He filed a complaint in the district forum. The district forum determined 'deficiency in service' and held the dealer and the appellant (i.e., manufacturer of the car) to be jointly and severally liable.

The district forum's order, (made on 27.09.2013) noted that the car had some defects; the undercarriage of the car was *"fully corrugated and had scratch marks on the body. The alloy wheels were also corrugated inside and the car also travelled almost 622 km. Also, some parts such as music system was not provided although agreed."* The district forum held that there was deficiency in the service committed by the dealer and the appellant (manufacturer), and allowed the complaint, holding the dealer and the appellant (manufacturer) jointly and severally liable to replace the car with a new one of the same model or to refund the entire amount of the car with interest @10% from the date given of delivery. Both were also jointly and severally directed to pay Rs. 20,000/- to the complainant towards mental stress and agony in addition to costs of Rs. 5,000/-.

Before the National consumer forum and the state commission, the appellant-manufacturer's made arguments that there existed a principal-to-principal relationship between the two were negatived. The national consumer forum observed that, *"the sale of its goods is undertaken by the Manufacturer through its dealers, the Manufacturer exercises superintendence over*

10 Tata Motors Ltd v. Antonio Paulo Vaz & Anr., 2021 SCC Online SC 125.

its dealers including the right to terminate their dealerships. It also relied on a termination letter issued by the manufacturer to the dealer for lack of maintaining quality standards and for committing serious breaches in rendering customer service."

In para 28, the Supreme court held as follows: -

> *"The record establishes the absolute dearth of pleadings by the complainant with regard to the appellant's role, or special knowledge about the two disputed issues, i.e., that the dealer had represented that the car was new, and in fact sold an old, used one, or that the undercarriage appeared to be worn out. This, in the opinion of this court, was fatal to the complaint. No doubt, the absence of the dealer or any explanation on its part, resulted in a finding of deficiency on its part, because the car was in its possession, was a 2009 model and sold in 2011. The findings against the dealer were, in that sense, justified on demurrer. However, the findings against the appellant, the manufacturer, which had not sold the car to Vaz, and was not shown to have made the representations in question, were not justified. The failure of the complainant to plead or prove the manufacturer's liability could not have been improved upon, through inferential findings, as it were, which the district, state and National consumer forum rendered. The circumstance that a certain kind of argument was put forward or a defense taken by a party in a given case (like the appellant, in the case) cannot result in the inference that it was involved or culpable, in some manner. "*

The court further held that:

> *"Special knowledge of the allegations made by the dealer, and involvement, in an overt or tacit manner, by the appellant, had to be proved to lay the charge of deficiency of service at its door. In these circumstances, having regard to the nature of the dealer's relationship with the appellant, the latter's omissions and acts could not have resulted in the appellant's liability."*

In para 30, the law laid as follows: -

> *"Unless the manufacturer's knowledge is proved, a decision fastening liability upon the manufacturer would be untenable, given that its*

> *relationship with the dealer, in the facts of this case, were on principal-to principal basis."*

While determining the manufacturing defect, the adjudicating authority usually takes in account the distance covered by the subject-vehicle before the problem arises in the smooth functioning ofthe same. In this particular case, it was highlighted that the complaint stated on affidavit that the car was an old one and had already run 622 km; however, the legal notice issued to the dealer, on behalf of Vaz (complainant) had, to the contrary, claimed that the car had done 1448 kilometers. It was submitted that in these circumstances, it was essential that special knowledge on the part of the manufacturer about the fact that the make of the car was represented to be 2011, and that someone on its behalf had made that representation, had to be both pleaded and proved. In the absence of such proof, the manufacturer-appellant could not be held liable.

In essence, the manufacturer, since, is not privy to the details of correspondence between the dealer and the consumer; he cannot be made liable for misrepresentation made on behalf of the dealer within the meaning of the expression under Section 2(1)(g) read with Section 2(1)(o) and Section2(1)(r) of the Consumer Protection Act. Dealers sometimes deliberately hide the number of kilometers the subject-vehicle had covered before, especially if it's a second-hand vehicle and therefore, it becomes necessary for the adjudicating authority to look into this controlling factor, in order to ensure that not enough kilometers are covered by the vehicle for the complainant's claim of an existing manufacturing defect to succeed.

In the case of Mercedes-Benz India Pvt. Ltd. v. Intercard (India) Ltd.[11] the complainant filed a complaint that misrepresentation made by the dealer to purchase a different than the one which was advertised had resulted into 'unfair trade practice'. The state consumer forum agreed to the contentions of the complainant that dealer was an agent or distributor of the manufacturer and that the Manufacturer is to be held liable for the mis-representation made by the Dealer.

The national consumer forum in its detailed order observed as follows: -

> *"We find substance in the submission made by the Ld. Counsel for the Manufacture that the relationship between the manufacture and the dealer was on principle-to-principal basis. Averment made by the manufacturer that its relationship with the Appellant No. 2- dealer was on principle-to-principal basis was admitted by the Appellant*

11 Mercedes-Benz India Pvt. Ltd. v. Intercard (India) Ltd., 2013 SCC OnLine NCDRC 480.

> *No. 2 in its written statement. Appellant No. 2 was the authorized dealer and not the agent or distributor of the manufacturer. The Manufacturer sold the vehicles and spares to the Authorized Dealer on principle-to-principal basis. The Manufacturer cannot be held liable for the mis-representation, if any, made by the Authorized Dealer. The only grievance of the Respondent was that had the Dealer disclosed about the latest C 200 K model, they would have purchased the said model instead of C180 K model. Sometimes, even the dealers are not aware about the launching of the latest model by the manufacturer. Even otherwise, there is no evidence on record to show that there was any mis-representation on the part of the authorized dealer as a result of which the Respondent suffered huge financial losses. Dealer had offered to sell model C 180K which the Respondent purchased. The Respondent had used the vehicle for 50,000-60,000 kilometers. There was no manufacturing or any other defect in the vehicle purchased by the Respondent. This is evident from the letter dated 30.07.03 written by the Respondent to the Appellant No. 1 in which Respondent had stated that they had business relations with the TNT Motors - Appellant No. 2 for quite long and that they had recommended to many people to purchase the model sold to them. State Commission was not justified in directing the manufacturer to refund the costs of the car on return of the same by the Respondent and to pay the compensation of Rs. 5,00,000/- to be equally shared by the dealer.*

In the case of Honda Cars India Limited v. Sudesh Berry & Ors.[12], the matter involved a Honda car purchased by the complainant which met with an accident and as a result of deficiency of service by dealer, the complaint was registered. The district and state consumer forum found no fault of the manufacturer but directed the dealer to return the car duly repaired with damages for mental agony and imposed litigation costs. The national consumer forum, however, modified the order and directed the manufacturer to deliver a replacement modelto the complainant as a gesture of 'goodwill'.

The Supreme court overturned the order and observed:

> *"As the facts on record show that the car was used by respondents no. 1 to 3 for more than10 years, whereafter it suffered an accident. There*

12 Honda Cars India Limited v. Sudesh Berry & Ors., 2021 SCC OnLine SC 1313

is not an iota of material that the accident occurred as a result of any manufacturing defect. If there be any deficiency in service by the dealer or the authorized centre in rendering assistance for repairs of the vehicle, the manufacturer of the vehicle cannot be held liable."

V. Doctrine of 'Res Ipsa Loquitur' in Motor Accident Cases

In the very recent matter of Hyundai Motor India Limited v. Shailendra Bhatnagar[13], the respondent-complainant suffered grave injuries during a head-on collision accident crash of his Hyundai car with a truck. The car's airbags failed to deploy as per the representation made by themanufacturer in advertisement. The state and national consumer forum found manufacturing defects in the airbag system of the car. They applied the doctrine of 'res ipsa loquitur' upon learning about the extent of enormous damage the car had suffered in its mangled frontal part including front pillar, RH front roof, side body panels front right hand side door panels and left- hand side front wheel suspension. The forums held that, in such circumstances, there was no needof any expert evidence, as the grave injuries sustained by the complainant is itself indicative of thefaulty airbag deployment system.

The appellant side in the appeal made the contention that, if force generated by the collision is lesser than a certain degree, there would not be deployment of the airbags. Further, the airbag deployment depends on a number of factors including vehicle speed, angle of impact, density andstiffness of vehicles or objects which the vehicle hits in the collision. They also raised the issue of privity of contract with respect to the impleadment of the dealer similar to what has emphasized in the above-mentioned cases. All the said contentions were rejected and found without merit by the court in appeal.

The Hon'ble Supreme court reiterated the national consumer forum decision based on the application of '*res ipsa loquitur*': -

"The impact/force required for triggering the front airbags was not made known to the Complainant. Nowhere has the minimum threshold force been quantified and this defense can never be refuted. Highlighting safety features including airbags while selling the car and not elaborating and disclosing the threshold limits for their opening is by itself an unfair trade practice."

The SC, then made its own observation in para 10 and 14 respectively: -

13 Hyundai Motor India Limited v. Shailendra Bhatnagar, Civil Appeal No. 3001 of 2022.

> *"A consumer is not meant to be an expert in physics calculating the impact of a collision on the theories based on velocity and force. In such circumstances, we do not find that there is any error in the findings of the two fora as regards there being defect in the vehicle" (para 10).*
>
> *"The safety description of the goods fell short of its expected quality. The content of the owners' manual does not carry any material from which the owner of a vehicle could be alerted that in a collision of this nature, the airbags would not deploy. Purchase decision of the respondent-complainant was largely made on the basis of representation of the safetyfeatures of the vehicle." (Para 14).*

In respect of Punitive damages awarded by the national consumer forums, the supreme court wassatisfied with the state forum order that the replacement of the car be made; the same was upheld by the NCDRC. The supreme court found the said relief to be justified despite the fact that the carwas repaired on insurance money.

To support its ratio, the court observed that the scheme of consumer protection Act, 1986 is such that the court can in accordance with Section 14 of the Act, award damages (punitive in nature) inexcess of what has been claimed by the complainant. This will include situations where damage can have potentially serious consequences especially like the ones suffered in motor accident cases. The purpose served by such damages is to create a deterrent effect on the manufacturers toinspect and screen the vehicle to identify fatal flaws in it, in order to avoid its sale.

VI. Conclusion

Thus, it is clear now that manufacturer-dealership arrangements are not one of principal-agent butof principal-principal one in circumstances where manufacturing defect could not be proved. Since, the manufacturing and safety standards have become stringent over the decades, it is nowadays unlikely that defects found in the vehicle assembly or its components are in the nature of manufacturing ones. The fault usually lies in the service rendered by the dealer duringmaintenance, repairing of the body parts or tweaking of the performance. The complainants mustbe careful in attributing the dealer's liability onto the manufacturer.

As far as evidence is concerned, job cards during maintenance service are essential piece of evidence. They contain the most crucial information regarding the car's performance in the

pre- service days. Another crucial piece of evidence is the third-party expert opinion. The number of kilometers a vehicle covers before the defect is first witnessed and informed to the service- workmen, also indicates the nature of the defect.

Generally, manufacturing defects showcase their defectiveness in the early days of purchase. In some cases, it is nearly impossible for the court/tribunals to determine the causation of malfunction which happens to be the principal cause of the defect in the vehicle. In such cases, the court resortsto the doctrine of 'res ipsa loquitur' where the court draws inference from the past actions of the defendant; in absence of a clear proof of negligence by the latter, it is highly likely that the presumption of negligence falls on the defendant, given that civil matters are determined on the basis of preponderance of probabilities. It is to be also reminded that 'res ipsa loquitur' is not a rule of evidence and therefore, it cannot constitute a principal argument on which the complainantmay rely to prove the culpability of the defendant.

DOMESTIC VIOLENCE DURING PANDEMIC: A SOCIO-LEGAL ANALYSIS

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Abstract

A recent report from United Nations revealed that around "243 million women and girls aged 15-49 have been subjected to sexual and/or physical violence perpetrated by an intimate partner in the previous 12 months globally". During the stipulated time the world was dealing with the deadly pandemic which resulted in mandatory quarantine to stop the spread of the disease. The lockdown situation, however, turned out to be detrimental for women around the globe as the UN data suggests. The pandemic has resulted in more cases of gender-based violence. The similar situation has been reported in India also. This paper thus attempts to analyse the status of women who were constantly subjected to domestic violence during the lockdown. The article briefly discusses the ongoing trends all around the globe. The article also analyses the actions taken by the Indian government, other nations and International Organisations in response to this issue which help to highlight some of the best practices that can be implemented in nations grappling with the issue at hand.

Keywords: *Pandemic, Domestic Violence, lockdown, COVID-19, Human Rights, Women Rights*

I. Introduction

There has always been gender violence, but this crisis makes it all worse.

- Simona Ammerata

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The Coronavirus disease (COVID-19) has had an adverse impact on every segment of society. The pandemic not only changed the lives of individuals but also the coexistence of the many. Yet, it can be witnessed that the impact is much worse on the weaker sections of the society. Amongst all, women have been disproportionately affected by the ongoing pandemic situation. There has been an evident increase in cases of domestic violence against women all around the world. In fact, UN-Women has termed this phenomenon as "Shadow Pandemic" due to the intensified shift in the number of cases exacerbated by the measures put in place to mitigate the spread of the virus, such as lockdowns, social distancing and other forms of restrictions on movement. Lockdowns have taken away a woman's opportunity to leave the house and therefore leave her assailant.

A recent report from United Nations revealed that around "*243 million women and girls aged 15-49 have been subjected to sexual and/or physical violence perpetrated by an intimate partner in the previous 12 months globally*".[1] Globally, domestic violence reports and emergency calls have risen by 25% since lockdown was implemented.[2] This increase in number of cases highlights the gravity of the situation and also demands immediate attention from governments globally. In response to the situation United Nations Secretary-General António Guterres appealed and implored governments to address the "horrifying global surge in domestic violence in April 2020".

According to various studies, the reasons behind this recent surge in the number of the cases can be attributed to the current circumstances of unemployment and economic instability. The mental health experts have, on the other hand, attributed this rise to rising stress levels, confined life, prolonged work from home, anger management issues, alcoholism, etc.[3] However, the underlying causes remain to be the same *i.e.,* an imbalance of power and control. This imbalance stems from inequality between men and women, discriminatory attitudes and beliefs, gender stereotypes, social norms that tolerate and perpetuate violence and abuse, and societal structures that replicate inequality and discrimination.[4] The virus has just

1 United Nations Women, *COVID-19 and ending violence against women and girls* (June, 2020), 15 July 2021. https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/issue-brief-covid-19-and-ending-violence-against-women-and-girls-en.pdf?la=en&vs=5006

2 Bella Christie, *The Link Between Lockdown and Increase of Domestic Violence Against Women*, THE ORGANISATION FOR WORLD PEACE (July 25, 2021), https://theowp.org/the-link-between-lockdown-and-increase-of-domestic-violence-against-women/ .

3 Rica Bhattacharyya, *Steep rise in domestic violence cases as Pandemic changes home dynamics,* THE ECONOMIC TIMES (December 28, 2020), https://economictimes.indiatimes.com/industry/miscellaneous/steep-rise-in-domestic-violence-cases-as-pandemic-changes-home-dynamics/articleshow/79983714.cms

4 María-Noel Vaeza, *Addressing the Impact of the COVID-19 Pandemic on Violence Against Women and Girls,* UN CHRONICLE (November 27, 2020), https://www.un.org/en/addressing-impact-covid-19-pandemic-violence-against-women-and-girls

added fuel in the running fire. Additionally, this crisis is generating more barriers for women and girls in accessing the essential life-saving services such as counselling and justice resources, and legal advice; sexual health and other crucial medical assistance; and the provision of refuge. These barriers have, therefore, proved to have an adverse impact on the mental as well physical health of women and increased the risk of violence. This has also resulted in violation of numerous human rights of women and girls. As the world is distracted by the pandemic, many perpetrators take on an ever-greater sense of impunity, assuming that they have the freedom to act without restriction.

This paper thus attempts to analyse the status of women who were constantly subjected to domestic violence by their husbands, other family members and relatives during the lockdown. The article therefore begins with the brief introduction to the ongoing trends and related issues all around the world. A part of this heading briefly delves into the current Indian situation also. Herein, data will be highlighted from various nations including India depicting the increase in number of cases of domestic violence against women. This helps to highlight the gravity of the issue. In second part, the paper will document the impact of the COVID-19 pandemic on the dynamics of gender-based violence which will also discuss the economic impact. The third part discusses the human rights implications of such violence against women. In later parts, the paper analyses the policy responses taken to prevent, reduce and support victims of violence by the Indian government and International Organisations in response to this issue. A comparative analysis has been done with the responses taken all around the world by other Governmental agencies which help to highlight some of the best practices that can be implemented in other nations also grappling with the issue at hand.

II. What is Domestic Violence?

In 1993 the UN Declaration on the Elimination of Violence against Women provided a definition of the term "domestic violence". The declaration defines it as:[5]

> Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation.

5 Declaration on the Elimination of Violence against Women, A/RES/48/104, UN. General Assembly (48th sess.: 1993-1994).

In 1996, the United Nations Commission on Human Rights defined "domestic violence against women" as violence that occurs within the private sphere, mainly between individuals who are related through intimacy, blood, or law.[6] The term 'domestic' denotes that violence which occurs within a domestic setting including all kinds of cohabitations and domestic relationships within a family. Domestic violence is a comprehensive term that includes many forms of abuse – physical, psychological, emotional, sexual, and even financial. Domestic violence (also named as domestic abuse/family violence) is a pattern of behaviour. Domestic violence is a pervasive violence of women's human rights and has been resistant to social advances because of its "hidden" nature. Such violence is a problem in every country of the world and almost universally under-reported. Domestic violence is one of the most common forms of torture in women[7] and is a major international social and public health problem in both developed and developing countries.

The Protection of Women from Domestic Violence Act, 2005 gives the legal definition of "Domestic Violence" under Section 3. The definition of Domestic Violence includes four categories of abuse namely: physical, sexual, verbal/emotional and economic.

> "Physical Abuse" is any act or conduct which causes bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person. It also includes assault, criminal intimidation and criminal force. "Sexual Abuse" is any sexual conduct that abuses, humiliates, degrades, or otherwise violates the dignity of a woman. "Verbal and Emotional Abuse" includes insults, ridicule, humiliation, name calling especially with regard to not having a child or not having a male child and repeated threats to cause physical pain to any person whom the aggrieved is interested in. Lastly, "Economic Abuse" is depriving the aggrieved woman from all sorts of financial resources to which she is entitled to under any law or custom or legal order or which she requires out of necessity, such as for running the household, taking care of the children etc. The definition provided by Indian legislation is quite expansive in nature. The judiciary also keep interpreting the definition which increases the scope of the Act. Domestic Violence can take many forms and is still the most common form of VAW,

6 Ms. Radhika Coomaraswamy (Special Rapporteur on violence against women), *Report on violence against women, its causes and consequences in accordance with Commission on Human Rights resolution 1994/45,* UN Doc. E/CN.4/1996/53 (February 5, 1996).

7 M. R. Rand and K. Strom, *Violence-related injuries treated in hospital emergency departments*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, 1-11, 1997.

with about 35% of women globally having experienced physical and/ or sexual violence in their lifetime by an intimate partner.[8]

III. Ongoing Trends

Since the outbreak of COVID-19, emerging data and reports from those on the front lines, have shown that all types of violence against women and girls, particularly domestic violence, has intensified. A recent report from United Nations revealed that around "*243 million women and girls have been subjected to intimate partner violence in the previous 12 months globally*".[9] It has also been reported that all around the world domestic violence reports and emergency calls have risen by 25% since first lockdown was implemented. The studies have also shown that there are certain groups of women which are particularly more at risk like older women, women with disabilities, poor women, women from minority communities, etc.[10] The newspaper and other reports highlighted a sharp increase in calls for help and requests for relief shelters by the victims of domestic abuse during the first lockdown worldwide. For instance, there is a 10% rise in emergency calls related to DV in UK, 18% in Spain, 20% in USA, 30% in Cyprus, 32% in France, 33% increase in Singapore, 39% in Argentina, 40-50% in Brazil, 48% in Peru, 53% in Mexico, 73% in Italy, and 90% rise in Colombia.[11] Similar drastic increase has been witnessed in Arab countries also. A survey called "Arab Barometer" reported an increase of 40-70% in

8 Ilaria Bottiglierorea, Abada Chiongson, et.al., Data, laws and justice innovations to address violence against women during COVID-19, WORLD BANK BLOGS (December 7, 2020), July 18, 2021. https://blogs.worldbank.org/developmenttalk/data-laws-and-justice-innovations-address-violence-against-women-during-covid-19

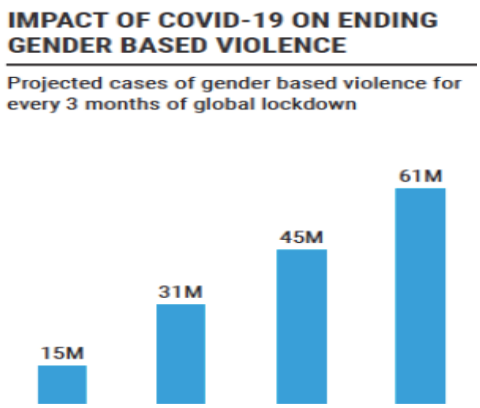
9 Supra note 1. UN Women, Issue Papers, COVID-19 and ending violence against women and girls.

10 Ashley Abramson, *How COVID-19 may increase domestic violence and child abuse*, APA (April 8, 2020), https://www.apa.org/topics/covid-19/domestic-violence-child-abuse

11 Emma Graham-Harrison, Angela Giuffrida, et.al., *Lockdowns around the world bring rise in domestic violence*, THE GUARDIAN (March 28, 2020), July 18, 2021,https://www.theguardian.com/society/2020/mar/28/lockdowns-world-rise-domestic-violence Akshaya Krishnakumar & Shankey Verma*, Understanding Domestic Violence in India During COVID-19: a Routine Activity Approach*, 16 ASIAN J. CRIMINOL 19-35 (2021); Daniel Fernandez-Kranz, *Understanding the rise of domestic violence during the Covid-19 pandemic: Evidence from Spain*, ECONOMICS OBSERVATORY (2020), https://www.economicsobservatory.com/ongoing-research/understanding-the-rise-of-domestic-violence-during-the-covid-19-pandemic-evidence-from-spain ; France to put domestic violence victims in hotels as numbers soar under coronavirus lockdown, FRANCE 24 (March 30, 2020), https://www.france24.com/en/20200330-france-to-put-domestic-violence-victims-in-hotels-as-numbers-soar-under-coronavirus-lockdown ; Anya Prusa, Beatriz García Nice & Olivia Soledad*, Pandemic of Violence: Protecting Women during COVID-19*, WILSON CENTER (May 15, 2020), July 18, 2021https://www.wilsoncenter.org/blog-post/pandemic-violence-protecting-women-during-covid-19 and Brad Boserup, Mark McKenney and Adel Elkbuli, *Alarming trends in US domestic violence during the COVID-19 pandemic*, 38 (12) AM J EMERG MED. 2753–2755 (2020).

domestic violence between July and October 2020. In second round of survey, conducted between March and April 2021, the number dropped at few places but remained high at other places ranging from 24% to 60%. It skyrocketed in Jordan from 29 per cent to 55 per cent and in Lebanon from 23 per cent to 43 per cent.[12] According to Human Rights Watch report 2020, cases of domestic violence increased by 200 per cent in Pakistan.[13]

The Special Rapporteur on violence against women, *Dubravka Šimonović*, have reported similar patterns in her report issued in July 2020.[14] Further, the current estimates by UNFPA indicate that for every three months of lockdown, an additional 15 million women are expected to be subjected to violence.[15] (Refer the Image below).



Source: UNFPA[16] (UN Population Fund) DV is an under-reported crime all over the

12 Aseel Alayli, *COVID-19 Magnifies Pre-Existing Gender Inequalities in MENA*, A RAB BAROMETER (December 1, 2020), July 18, 2021; https://www.arabbarometer.org/2020/12/covid-19-magnifies-pre-existing-gender-inequalities-in-mena/ See also, Deutsche Welle, *More violence, less income: Arab women bear the brunt of COVID-19*, study finds, FRONTLINE (August 3, 2021),https://frontline.thehindu.com/dispatches/more-violence-less-income-arab-women-bear-the-brunt-of-covid-19-study-finds/article35690720.ece

13 Saira Asad, *Domestic Violence - An insidious problem*, THE NEWS (August 01, 2021), Domestic Violence - An insidious problem (thenews.com.pk)

14 Dubravka Šimonović (Special Rapporteur on violence against women, its causes and consequences), *Intersection between the coronavirus disease (COVID-19) pandemic and the pandemic of gender-based violence against women, with a focus on domestic violence and the "peace in the home" initiative*, UN Doc. A/75/144 (July 24, 2020).

15 Patsilí Toledo Vasquez (International Consultant), *The impact of COVID-19 on criminal justice system responses to gender-based violence against women: a global review of emerging evidence,* UN Doc. E/CN.15/2021/CRP.2 (April 28, 2021).

16 Ibid. Patsilí Toledo.

world.[17] The global data indicates that less than 40 per cent of the women who experience violence seek help of any sort and less than 10 per cent of those seeking help turned to the police.[18] Hence the actual figures could be higher than the present reports suggest.

IV. Situation in India

The situation in India is no different from other countries. The National Commission for Women (NCW), which is the government body which receives complaints of domestic violence from all parts of the country has recorded more than twofold rise in gender-based violence during lockdown. In 2020, the commission received total 23,722 complaints[19] of crimes against women under 23 categories, marking a sharp rise from the 19,730 complaints[20] registered in 2019, which showed an alarming increase of around 20% in the complaints. Out of these reported incidents, 5297 cases were registered under the category of "Protection of Women against Domestic Violence" in 2020 whereas 2960 cases were registered in 2019. This NCW data shows that there is an increase of around 80% of cases of domestic violence in India. (Refer the chart below).

Nature of Crime/Number of Reported Cases	2019	2020
All Crimes against Women	19730	23722
Protection of Women against Domestic Violence	2960	5297

The number of complaints registered under domestic violence category has started to increase from the first lockdown in India i.e., March 25 to May 31. This can be seen in the following chart that the cases have only increased thereafter. (Refer the chart below).

Months	**No. of Complaints**	**Months**	**No. of Complaints**
January	271	July	660
February	302	August	539
March	298	September	492

17 Payal Seth, *As COVID-19 Raged, the Shadow Pandemic of Domestic Violence Swept Across the Globe*, THE WIRE (January 23, 2021), https://thewire.in/women/covid-19-domestic-violence-hdr-2020

18 United Nations Department of Economic and Social Affairs, *The World's Women 2015: Trends and Statistics,* UN Doc. ST/ESA/STAT/SER.K/20 (2015).

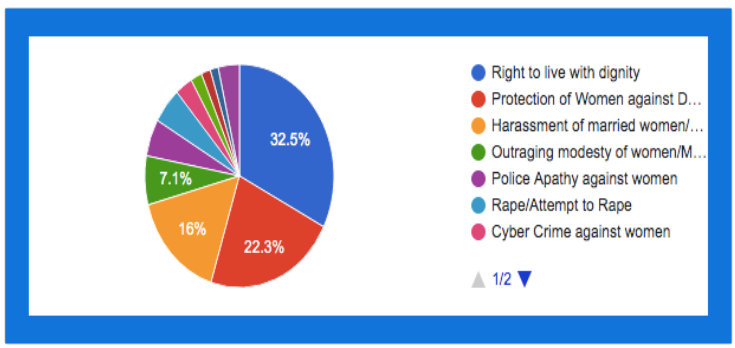
19 National Commission for Women, Nature-Wise Report of the Complaints Received by NCW in the Year: 2020, http://ncwapps.nic.in/frmReportNature.aspx?Year=2020

20 National Commission for Women, Nature-Wise Report of the Complaints Received by NCW in the Year : 2019, http://ncwapps.nic.in/frmReportNature.aspx?Year=2019

April	315	October	495
May	393	November	485
June	461	December	586
Total Number of Complaints		**5297**	

Domestic Violence Complaints received by NCW in the Year 2020[21]

The maximum number of complaints received by the NCW was registered as a violation of the "right to live with dignity" in both 2019 as well as 2020 which is followed by complaints against domestic violence.[22] The image below is depicting number of cases in 2020.



Source: National Commission for Women

The National Commission for Women (NCW) received 13,410 complaints of crimes against women between March – September 2020, of which 4,350 were domestic violence.[23] In 2020, between March-May, 1,477 complaints of domestic violence were made by women. This 68-day period recorded more complaints than those received between March and May in the previous 10 years.[24] Similar increase has been witnessed in the beginning of 2021 also. Around 2,383 complaints of domestic violence have already been filed with

21 Supra note 20. NCW report of 2020.

22 National Commission for Women, Statistical Overview of Complaints of 2020, http://ncwapps.nic.in/frmComp_stat_Overview.aspx , See also, Sumi Sukanya Dutta, *25 per cent rise in plaints from women during Covid pandemic*: NCW latest report, THE NEW INDIAN EXPRESS (July 06, 2021), https://www.newindianexpress.com/nation/2021/jul/06/25-per-cent-rise-in-plaints-from-women-during-covid-pandemic-ncw-latest-report-2326127.html

23 Mitali Nikore, *With Covid-19, comes the "Shadow Pandemic": How the surge of domestic violence gripped India's women in 2020*, THE TIMES OF INDIA (November 24, 2020), https://timesofindia.indiatimes.com/blogs/irrational-economics/with-covid-19-comes-the-shadow-pandemic-how-the-surge-of-domestic-violence-gripped-indias-women-in-2020/

24 Vignesh Radhakrishnan, Sumant Sen and Naresh Singaravelu, *Domestic violence complaints at a 10-year high during COVID-19 lockdown*, THE HINDU (June 22, 2020), https://www.thehindu.com/data/data-domestic-violence-complaints-at-a-10-year-high-during-covid-19-lockdown/article31885001.ece

the National Commission for Women between January-May which is the highest since 2000 (last 21 years).[25] In comparison to year 2020, 1,579 cases were reported during January-May which means there is an increase of around 51% already. Most complaints were received from U.P., followed by Delhi, Haryana, Maharashtra, Bihar, Rajasthan and others.[26]

During 2018-19, the National Commission for Women registered 19,279 complaints/cases in all 23 categories of crimes against women. Out of these, only 462 complaints were lodged under the category "Protection of Women against Domestic Violence".[27] However, one of the limitations of this data is this that "Protection of Women against Domestic Violence" category was included from January 2019 only. It has also been reported that only 14% of women who have ever experienced violence seek help, thus making it clear that figures of reported violence are only the tip of the iceberg.[28] However, this data can be used to understand the underlying trends and issues related to domestic violence.

VI. Policy Initiatives

In the wake of COVID-19, United Nations came up with *COVID-19 Global Gender Response Tracker* with the help of UNDP and UN Women. This *UN Gender Tracker* investigates the policy responses taken by governments worldwide to tackle the pandemic, and highlights those that have integrated a gender lens. It also analyses policy measures taken by the governments to address the issue of violence against women (VAW) among other gender issues. The Tracker provides guidance for policymakers and evidence for advocates to ensure a gender-sensitive COVID-19 policy response. According to the recent data of Tracker, there are 832 measures all over the world to address the issue of VAW in COVID-19 context. The tracker suggests that Europe is leading the response on addressing VAWG with 242 measures in place, followed by America (223 measures), Asia (184), Africa (117) and Oceania (66).[29] (look at the image below).

25 Sumant Sen and Jasmin Nihalani, *Domestic violence complaints received in past five months reach a 21-year high, THE* HINDU (June 21, 2021), https://www.thehindu.com/data/data-domestic-violence-complaints-received-in-past-five-months-reach-a-21-year-high/article34877182.ece .

26 Supra note 23. NCW stats.

27 National Commission for Women, Annual Report 2018-19.

28 Supra note 24. Mitali Nikore.

29 UNDP-UNW COVID-19 Global Gender Response Tracker Policy Measures Dataset. Living database, version 2 (March 22, 2021) https://data.undp.org/gendertracker/ .

Number of measures by region

Region	All Measures	Gender Sensitive	Unpaid care	Violence against women	Women's economic security
Oceania	143	85	12	66	7
Europe	908	361	91	242	28
Asia	770	281	25	184	72
Americas	752	360	42	223	95
Africa	539	212	10	117	85
Total	**3,112**	**1,299**	**180**	**832**	**287**

Source: COVID-19 Global Gender Response Tracker[30]

The new data shows that governments have primarily focused their gender-related COVID-19 efforts on preventing and/or responding to violence against women and girls (VAWG) – these measures account for 71% percent of all actions identified, or 704 measures across 135 countries. Out of this, 63% focus on strengthening essential services, such as shelters, helplines and other reporting mechanisms. However, only 48 countries out of 206 countries (including India) treated VAWG-related services as an integral part of their COVID-19 response plans, with very few adequately funding these measures.[31] The Tracker signal that 42 countries (20%) have no gender-sensitive measures in response to COVID-19 at all.[32] Countries like Spain, Singapore, South Africa declared services to protect and assist victims of gender-based violence and their children an essential service.

The tracker has divided policy measures in 5 parts – a) Strengthening of Services; b) Awareness Raising Campaign; c) Integration of VAW in COVID-19 response plans; d) Collection and use of data; e) Other measures. The policy measure "Strengthening of Services" has further been sub-divided in the following parts – i) Hotlines and Reporting Mechanisms ii) Police and Justice Responses to address impunity iii) Continued functioning and expansion of shelters iv) Coordinated accessible services v) Continued provision of psychological support vi) Continuity of health sector response to VAW. These measures have been implemented in pieces all around the world. Authorities all around the world have deployed social media platforms, online support groups and web-based hotlines across countries to tackle domestic violence, with some countries standing out for their best practices.[33] For instance, Vodafone Foundation launched an app called "Bright Sky" which provides support and information to

30 Ibid.

31 Sangita Khadka and Maria Sanchez, UNDP and UN Women launch COVID-19 Global Gender Response Tracker, UNDP (September 28, 2020), https://www.undp.org/press-releases/undp-and-un-women-launch-covid-19-global-gender-response-tracker

32 Ibid.

33 Supra note 24. Mitali Nikore.

victims of domestic violence. This app has been launched at UK, Ireland, Czech Republic, Romania, Italy, Portugal, Albania, South Africa, Hungary, New Zealand, and Luxembourg. Through this app thousands of couriers and mail delivery staff have been trained to spot the signs of domestic violence, and how to react, referring victims to the app when possible.[34]

Similarly, France and Spain started an innovative system, where women could report domestic violence at pharmacies using the codeword "mask19". The pharmacists were trained to offer instant help to the women who asked for "mask19". Italy adopted hotel room initiative to create safe spaces for domestic violence victims in which specific hotel rooms were used as temporary shelters for women who were at risk of domestic violence. This initiative upheld the safety precautions within COVID-19 rules and domestic violence safety.

VII. Initiatives at India

In India, similar efforts have been made to ensure that existing government scheme such as "One Stop Centres" (OSC) remain operational. OSCs were established in 2015 and are intended to support women affected by violence, in private and public spaces. Currently, there are 703 OSCs in India which were fully operational even during lockdowns and provided medical as well as legal aid to the distressed women.[35] Recently, the Ministry of Health and Family Welfare released guidelines for OSCs to ensure continuity of essential services like shelter and to meet the needs of survivors of domestic violence like counselling facilities. The Government also shared National Legal Aid Services Authority's (NALSA) directory of Legal Service Institutions with NALSA Legal Aid Helpline and online portal with all the OSCs and Women Helplines to facilitate legal aid and counselling to women facing violence. The Government of India strengthened existing helplines for women, and extended emergency response mechanisms to address issues of domestic violence and intimate partner violence. Key helplines, including the ones established by the Chief Ministers' offices in their respective states, are operational both at the National and Sub-National levels.

34 *Domestic violence and abuse: providing support during COVID-19*, VODAFONE FOUNDATION NEWS (April 22, 2020), https://www.vodafone.com/news/vodafone-foundation/domestic-violence-abuse-providing-support-during-isolation

35 Press Trust of India, *COVID-19 lockdown: One-stop centres providing aid to distressed women are functional, says Irani*, BUSINESS STANDARD (April 09, 2020), https://www.business-standard.com/article/pti-stories/covid-19-lockdown-one-stop-centres-providing-aid-to-distressed-women-are-functional-says-irani-120040900001_1.html See also, Ministry of Women and Child Development, *Over 3 Lakh Women Provided Assistance Through 701 One Stop Centres in 35 States/UTs*, PIB DELHI (May 22, 2021), https://pib.gov.in/PressReleasePage.aspx?PRID=1720843

Additionally, National Commission for Women launched WhatsApp based helpline number in April 2020 through which around 33% of reports were received successfully.[36] This discreet method was brought in place to increase the reporting of maximum number of cases. The National Commission for Women has extended its base of counsellors available to address psychosocial needs of women survivors of violence. The national and subnational governments have been popularising Central and State-specific domestic violence helpline numbers through social media campaigns, webinars and twitter chats on addressing intimate partner violence and domestic violence. Various State governments also launched initiatives to prevent domestic violence cases. For instance, the State Legal Services Authority of Delhi have set up a phone number (+91 96679 92802), which can be reached through messages on WhatsApp and SMS. The Delhi State Legal Services Authority (DSLSA) also announced collaboration with Mother Dairy booths (Milk Booths), pharmacists and chemists for information on survivors of violence and also launched an app to deliver legal aid to these individuals. DSLSA has also tied up with anganwadi and ASHA workers who might come across domestic violence cases in their areas. Uttar Pradesh Police's "Suppress corona, not your voice" campaign through which UP Police launched new helpline numbers.[37] Similarly, Odisha Police's launched "Phone-Up programme" through which policemen contacted women who had earlier reported domestic violence to enquire about their condition.[38] Maharashtra government recently launched an app called "Stand Up Against Violence". The app lists contact details of State and non-State agencies, service providers, and activists who can assist women victims of domestic abuse.[39]

Various citizen-led imitative also came on surface and one such initiative is the "Red Dot Initiative" which was launched on 30 March 2020 by Women Entrepreneur Foundation (WEFT) which asks women to use a *red bindi* as a distress signal.[40]

VIII. Legal Framework

Violence against women is the one of the most widespread, persistent and devastating human

36 The NCW launched a WhatsApp number 7217735372 for registration of cases of Domestic Violence.

37 Aanchal Nigam, *'Supress Corona, Not Your Voice': UP Police Lauded For Ad Against Domestic Violence*, REPUBLIC WORLD (March 20, 2020), https://www.republicworld.com/india-news/general-news/brilliant-up-police-lauded-for-ad-against-domestic-violence.html

38 Press Trust of India*, Odisha police takes initiative to address domestic violence during lockdown*, INDIA TODAY (April 18, 2020),https://www.indiatoday.in/india/story/odisha-police-takes-initiative-to-address-domestic-violence-during-lockdown-1668302-2020-04-18

39 Supra note 24. Mitali Nikore.

40 UN Economic and Social Commission for Asia and the Pacific, The Covid-19 Pandemic and Violence Against Women in Asia and the Pacific, Policy Brief (June 28, 2021).

rights abuses. There are various legal instruments at international level which recognise violence against women as a violation of basic human right. These instruments include **"**Universal Declaration of Human Rights, 1948", "the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979", "the Vienna Declaration and Programme of Action, 1993" recognises elimination of violence against women as a human right obligation, "the Declaration on the Elimination of Violence Against Women, 1993", "Special Rapporteur on violence against women, its causes and consequences",[41] Committee in its General Recommendation No. 19, asserted that violence against women is a form of discrimination.[42]

The "1995 Beijing Declaration and Platform for Action" highlighted that, "Violence against women both violates and impairs or nullifies the enjoyment by women of their human rights and fundamental freedoms." Additionally, Violence against women is a human rights violation that hinders development and the achievement of the Sustainable Developmental Goals. The fifth goal (target 5.2) of the 2030 Sustainable Development Goals (SDGs) is to achieve gender equality and women's empowerment.

India, being a party to these international conventions and treaties, have similar obligations to protect the basic human rights of women. To fulfil its obligations at the international platform, India developed an extensive legal machinery against domestic violence. There are three pieces of legislations in India that deal directly with domestic violence: The Protection of Women from Domestic Violence Act, 2005, The Dowry Prohibition Act, 1961 and the Indian Penal Code. These laws are there in place to protect and promote the human rights of women. The Protection of Women from Domestic Violence Act, 2005 is a civil law that provides protection to women in a household against domestic violence. The act provides for an expansive definition of domestic violence which includes not just physical but also verbal, emotional, sexual and economic violence and provide the scope for urgent, protective injunctions, along with economic rights including maintenance and compensation. The scope of DV Act is much wider in comparison to IPC. The DV Act promotes the rights of women guaranteed under Articles 14, 15 and 21 of the Constitution.

The second law is the Dowry Prohibition Act, 1961. This is a criminal law that punishes the taking and giving of dowry. The third law that exists to help women who are facing

41 The United Nations Commission on Human Rights appointed a Special Rapporteur on violence against women on March 04, 1994 through resolution 1994/45.

42 Nilakshi Srivastava, *Surge in Domestic Violence Cases during Covid-19 Lockdown in India*, HUMAN RIGHTS CONSORTIUM (August 03, 2020), https://humanrights.blogs.sas.ac.uk/2020/08/03/surge-in-domestic-violence-cases-during-covid-19-lockdown-in-india/

violence at home is Section 498A of the Indian Penal Code (Husband or relative of husband of a woman subjecting her to cruelty). This is a criminal law, which applies to husbands or relatives of husbands for "Cruelty" which refers to any kind of conduct that drives a woman to suicide or causes grave injury to her life or health – including mental health – and also includes harassment in the name of dowry.

IX. Judicial Activism

The Judiciary has also played an important role in prevention of domestic violence during pandemic. The court, regardless of its limitations, imposed due to lockdown, continued to protect and promote human rights of women through their constructive interpretations of the DV Act. The Higher Courts also supervised the functioning of other organs of the state i.e., legislature and executive. To fulfil their responsibility, the courts heard countless petitions on the issue of domestic violence during lockdown and dictated guidelines on the same through virtual hearings. The most common relief sought in various petitions were to appoint more protection officers on duty to ensure safety of the victims and to establish measures to curb DV.[43]

The division bench of the Delhi High Court in *All India Council of Human Rights Liberties* v. *Union of India*[44], directed the Central government and the Government of Delhi to convene a high-level meeting to take expeditious steps to protect the victims of domestic violence and suggested the appointment of temporary protection officers. Similarly, the High Court of Jammu & Kashmir took suo-moto cognisance in *In Re: Court on Its Own Motion* v. *Union Territories of Jammu & Kashmir and Ladakh through Secretaries, Social Welfare Department*[45] and issued notices to the authorities and asked them to submit a report highlighting the steps taken regarding domestic or any other kind of violence being faced by women

In various other petitions, higher judiciary revisited the DV act and pronounced constructive interpretations and remedies. In *S. Vanitha* v. *Deputy Commissioner, Bengaluru Urban District*,[46] the Supreme Court held that "the Maintenance and Welfare of Parents and Senior

43 *Effective steps taken to curb domestic violence during lockdown,* TN tells Madras HC, THE NEW INDIAN EXPRESS (April 25, 2020), https://www.newindianexpress.com/states/tamil-nadu/2020/apr/25/effective-steps-taken-to-curb-domestic-violence-during-lockdown-tn-tells-madras-hc-2135296.html

44 All India Council of Human Rights Liberties v. Union of India, 2020 SCC OnLine Del 537.

45 In Re: Court on Its Own Motion v. Union Territories of Jammu & Kashmir and Ladakh through Secretaries, Social Welfare Department, WP(C) PIL No. 1/2020.

46 S. Vanitha v. Deputy Commissioner, Bengaluru Urban District, Civil Appeal No. 3822 of 2020.

Citizens Act has no overriding effect over the right of residence of a woman in a 'shared household' within the meaning of the DV Act". In *Satish Chander Ahuja* v. *Sneha Ahuja*,[47] the Supreme Court analysed the definition of "shared household" under section 2(s) of the DV Act, 2005 and the statutory right of the wife to reside in the matrimonial house. In this landmark judgment, the Apex Court held that, "a wife is also entitled to claim a right to residence in a shared household belonging to relatives of the husband" while overruling the 2006 judgment in *S.R. Batra* v. *Taruna Batra*.

In light of the given circumstances, various High Courts also actively interpreted the nature of proceedings under DV Act. For instance, in *Muthulakshmi and others* v. *Vijitha*[48], the single bench of Madras High Court held that "regardless of whether DV Act proceeding is civil or criminal in nature, powers under Article 227 of the Constitution are available against it". The bench also observed that Article 227 is "forum-neutral". Similarly, the division bench of Bombay High Court in *Dr. Sandip Mrinmoy Chakrabarty* v. *Reshita Sandip Chakrabarty*,[49] held that "the rights created and remedies provided for in the DV Act are basically of civil nature and civil appeal can be filed against the order passed under the DV Act." In *Sirisha Dinavahi Bansal* v. *Rajiv Bansal*,[50] a single bench of the Delhi High Court, held that in case "there is a clear remedy of Appeal under Section 29 of the DV Act is available, the High Court cannot entertain the petition in its extraordinary power under Section 482 Cr.PC."

In *Mahin Kutty* v. *Anshida,*[51] the Kerala High Court considered the application of the principles of res judicata in light of the scheme of legislation of the DV Act and held that "recovery proceedings instituted under Section 20 of the DV Act would not operate as a bar on a Family Court adjudication of the matter". Similarly, the High Court of Meghalaya in *Masood Khan* v. *Smt. Millie Hazarika*,[52] analysed the dimension of any criminal law involved in proceedings under the DV Act, 2005 and held that "petition under section 482 of the CrPC challenging the proceedings of the DV Act is maintainable". Whereas in *Ramachandra Warrior* v. *Jayasree*,[53] the Kerala High Court held that "a divorced wife is not entitled to the right of residence conferred under section 17 of the DV Act". In various other judgments, the high courts interpreted the meaning and scope of the terms defined in

47 Satish Chander Ahuja v. Sneha Ahuja, (2021) 1 SCC 414.

48 Muthulakshmi and others v. Vijitha, C.R.P (MD).No. SR16753 of 2021.

49 Dr. Sandip Mrinmoy Chakrabarty v. Reshita Sandip Chakrabarty, Family Court Appeal No. 31 of 2020.

50 Sirisha Dinavahi Bansal v. Rajiv Bansal, CRL. M.C. 1554/2020 and Crl. M.A. 8821/2020.

51 Mahin Kutty v. Anshida, Mat.Appeal.No. 739 of 2014.

52 Masood Khan v. Smt. Millie Hazarika, Crl. Petn. No. 1 of 2021.

53 Ramachandra Warrior v. Jayasree, Crl.Rev.Pet.No. 3079 OF 2009.

the DV Act. For instance, in *Smt. Harini H.* v. *Smt. Kavya H. @ Sangeetha and others*[54], single bench of Karnataka High Court interpreted the meaning and scope of "respondent" under section 2(q) of the DV Act and held that "only those persons who have been in the 'domestic relationship' can be made respondent". Similarly, the Tripura High Court in *Ramendra Kishore Bhattacharjee* v. *Smt. Madhurima Bhattacharjee,*[55] analysed the scope of the definition of the term 'domestic violence' and held that "denial of maintenance allowance by a husband to his wife causes economic abuse which falls within the meaning of section 3 of the DV Act, 2005". It can be seen that there are enough laws in place and even the judiciary is very active in performing its role and duties. However, it is not easy for the judicial system to break into the stranglehold of the patriarchal family. There are still many challenges.[56]

X. What Can Be Done?

The consequences of the COVID-19 pandemic are far-reaching and we still have much to learn about how this pandemic has impacted and will continue to impact survivors of domestic violence. The pandemic has not only exposed pre-existing gaps and shortcomings in the system dealing with the prevention of violence against women that had not been sufficiently addressed by many States. It has also identified challenges that victims as well as victim service agencies faced during pandemic situation like available funding and resources, homelessness and financial insecurity of survivors, health and wellness of both staff and clients, limitations in services available within the community, and continued isolation and safety of survivors.

In light of the given circumstances, the governments all around the world urgently need to first recognise 'DV as a silent pandemic'. Secondly, the governments also need to recognise the services to respond to and prevent DV as essential services and must make them an integral part of national and local COVID-19 response plans. These services should be funded on a regular basis. In India, there was no mention of the allocation of funds for the policy initiatives for DV like the economic stimulus packages were announced to tide over the crisis created by the pandemic. Similarly, financial packages can be devised for the survivors of domestic violence who have nowhere to go. The pandemic also highlighted the need for recognising 24/7 instant counselling, rehabilitation and access

54 Smt. Harini H. v. Smt. Kavya H. @ Sangeetha and others, Criminal Petition No. 2148 of 2021.

55 Ramendra Kishore Bhattacharjee v. Smt. Madhurima Bhattacharjee, Crl. Rev. P. No. 36 of 2020.

56 EPW Engage, *COVID-19, Domestic Abuse and Violence: Where Do Indian Women Stand?,* EPW (April 17, 2020), https://www.epw.in/engage/article/covid-19-domestic-abuse-and-violence-where-do

to mental health services in the shelter homes as essential services. Akin to the national campaigns on COVID-19, the government can utilise several mass communication platforms to enhance awareness about the resources accessible to the victims of DV and to emphasise upon the consequences of DV on the perpetrator. Further, there is a need to identify creative ways to make services accessible in the context of physical distancing measures as it has been reported that 57% of the women in India still do not have access to phones. Due to this, women are not able to register complaints. For facilitating the access, government can train health facilities and providers in matters related to domestic violence as has been done in France and Spain. They can provide "first-line support"[57] and medical treatment to those who disclose by any means that they have been abused. They can help in connecting victims to the aiding agencies and shelters in case of severe abuse issues. Health providers and facilities can also disseminate information about DV services available locally for victims. For e.g. hotlines, shelters, rape crisis centers, counselling including opening hours, contact details, and whether services can be offered remotely, and establish referral linkages. Humanitarian response organizations need to include services for women subjected to violence and their children in their COVID-19 response plans and gather data on reported cases of violence against women. Community members and neighbours can also be made aware of the increased risk of violence against women and the need to keep in touch and support women subjected to violence, and to have information about where help for survivors is available. Other support services also need an expansion in both traditional and non-traditional way. Traditional methods include the creation of new helplines to offer a greater level of telephone and Internet support, special training of police officers on VAW, or expanding funds available to shelters and counselling services. Some non-traditional measures taken in the region thus far include repurposing an empty hotel in Moscow to provide extra rooms to shelters and police performing check-ups on women who had reported domestic violence prior to the pandemic.

57 First-line support includes: listening empathetically and without judgment, inquiring about needs and concerns, validating survivors' experiences and feelings, enhancing safety, and connecting survivors to support services.

From Rio to Paris: What Have Developing Countries Really Achieved?

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Abstract

One of the main tensions within the debate of climate change is concerned with how the developing countries have been victims of the damage caused by the developed nations, resulting in violation of environmental justice in the global context. This became the main point of contention that influenced their claims and proposals during the course of negotiation of agreements to combat the issue. The role and participation of developing countries in global agreements on environmental issues, primarily revolving around climate change, has witnessed a significant transition over the years as their position has evolved from that of mere spectators to main actors. It is important to trace this progression to assess the current status and analyse their futuristic roles, so as to measure the extent to which the essence of intergenerational equity, distributive justice, democracy and accountability have found a place within the principles governing international environmental governance. This paper has attempted to provide an overview of the incentives available to the developing countries towards commitment, magnitude of implementation of the obligations and prescribed practices, measures taken towards accountability and the challenges in relation to these. Through this means, the following research has also identified the precise, present day needs of the developing nations and priorities that have emerged, with specific reference to capacity building, financial support, technology transfer, power sharing and burden sharing. The research

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concludes by asserting that the members of the UNFCCC have a long road ahead to reap the benefits of their negotiations on mitigation from climate crisis and adaptation to ecological responses.

***Key words**: Environmental Justice, Climate Change, Burden sharing, Negotiation, Developing nations*

I. Introduction

Environmental justice acts as a 'guiding philosophy' in combating the present disruption of environmental harmony.[1] While it is understood as a concept in correlation with problems of pollution and environmental sustainability, many believe that environmental injustice in a much wider connotation has varied political and moral symptoms.[2] The politics associated with environment and sustainable development is complex, leading to inadequacy in efforts towards conservation of natural resources and protection of the environment. In recent times, there have been discourses about environmental hazards due to 'anthropological consequences,' that result in violation of environmental justice.[3] Climate change is one such consequence affecting the quality of people's lives and the environment.

The concept of environmental justice can be linked to social and economic justice.[4] There is a need to contemplate this on the lines of 'redistributive justice' insofar as justice is served to future generations also. As far as climate justice is concerned, the Paris agreement must be analysed in depth so as to have a sound understanding and enhancement of the method of working of the agreement. The progressive states talk about climate more than they act on it. It is critical to see that their excuse about scarcity of funds is a self-fulfilling prophecy.[5] But little do they realize that longer duration of inaction leads to increase in cost of action. So, prevention and treatment are the two main facets of climate justice where the former focuses on mitigation of climate change by reducing emissions and treatment is nothing

1 Asghar Ali, *A conceptual framework for environmental justice based on shared but differentiated responsibilities,* CSERGE Working Paper EDM, No. 01-02, University of East Anglia, The Centre for Social and Economic Research on the Global Environment (CSERGE).

2 UNFCCC, REPORT OF THE CONFERENCE OF THE PARTIES ON ITS TWENTY-FIRST SESSION, DECISIONS ADOPTED BY THE CONFERENCE OF THE PARTIES, (December, 2015)

3 Peter Singer, *A fair deal on climate change*, PROJECT SYNDICATE, (June 2007) May 15, 2021, 3:19 P.M https://www.projectsyndicate.org/commentary/a-fair-deal-on-climate-change?barrier=true.

4 Marine de Oliveira Finger & Felipe Bortoncello Zorzi, *Environmental Justice,* UFRGS MODEL UNITED NATIONS JOURNAL 222 (2013)

5 Alice Kaswan, *The Paris Agreement and Theories of Justice,* THE CENTRE FOR PROGRESSIVE REFORM, (December 2015), http://progressivereform.org/cprblog/the-paris-agreement-and-theories-of-justice/ (Last visited May 16, 2021, 12:30 A.M).

but the adaptation to inevitable effects of climate change like coastal flooding etc. In this way, there can be a realization of the relational aspect of access to justice; in this case the between the human-environment conflict.[6]

The focus of this research article is to analyze the attributes in relation to climate justice, across the globe in light of the Paris Agreement of 2015 and its impact on climate change mitigation. The paper will briefly discuss the historical perspectives of climate change concerns and the multilateral treaties that were formulated to bring in a uniform climate governance regime across the globe. International covenants starting from the Rio Declaration in 1992 to the Paris Agreement paved the way to solve these issues, and the discussions in the following sections attempt to trace the extent to which these instruments have succeeded.[7]

II. The Journey from Kyoto to Paris

Climate change not only affects the natural environment, but also takes a toll on livelihood because of its impacts on food security, health, availability of freshwater, housing, and the other basic resources. However, the consequences of this phenomenon are not borne by the population in an equitable manner, resulting in environmental and climatic injustice. The economically weaker section, children, women, residents of island nations, indigenous people and such other categories of the global population confront disproportionate risks as compared to the others. Moreover, they are often marked by lack of capacity to adapt to such risks or develop resilience. The Kyoto Protocol came about as an extension of the United Nations' Framework Convention on Climate Change (UNFCCC), to address this issue.[8]

1. An endeavour to foster environmental justice:

The Kyoto Protocol recognized and put forth on paper, binding targets on greenhouse emissions for the first time, and came into effect in 2005. It was considered a 'game changer' as far as long-term consequences were concerned. The Protocol was a result of a marathon of negotiations in order to fight against climate change and its effect on

6 Barbara Adams & Gretchen Luchsinger, *Climate Justice For A Changing Planet: A Primer For Policy Makers And Ngos* (UN Non-Governmental Liaison Service, 2009)

7 The Rio Declaration on Environment and Development, *Facing Finance,* May 13, 2021, 4:55 P.M., https://www.facing-finance.org/en/database/norms-and-standards/the-rio-declaration-on-environment-and-development/

8 Jeremy Baskin, *The Impossible Necessity of Climate Justice*, 10 MELBOURNE JOURNAL OF INTERNATIONAL LAW 424 (2009)

humanity.[9] It was after 8 years that the Kyoto Protocol was finally tabled to the signatories; being the first binding treaty in the field of international law that was formulated to reduce emissions, it was considered as a milestone in the field of international climate change law. With UNFCCC underlining the beginning of responsibility for greenhouse emissions, the Kyoto Protocol laid down a concrete idea as to how emitters should be highly precautious against global climate change.[10] There were 140 parties to the protocol in the year 2005 and the treaty committed thirty-eight countries that are industrially sound by reducing their emission levels by around 5% by 2012; including the EU and US. This was considered the first-ever international law facet that was binding to an extent that set commitments to states.[11] During the Earth Summit, 1992, India supported the notion that developed countries were responsible for "carbon colonialism." However, a shift in this stance was visible in 2002, when it ratified the Kyoto Protocol, wherein it seemed to have a more realistic outlook towards the benefits and tradeoffs in its place, in the global climate change policy. The Indian government encouraged entrepreneurs to adopt CDM stipulations. Developing countries have to consider that climate discourse is accompanied by co-benefits such as alleviation of poverty, economic welfare and social development, in furtherance of environmental justice, which is often not adhered to, due to improper implementation of the stipulated CBDRs.[12]

2. Lack of execution and other limitations:

The challenges in the implementation of the Kyoto Protocol primarily came in the form of private sector bottlenecks and domestic politics along with the lack of wholesome agreements regarding certain aspects of the Protocol. Many nations failed to genuinely domesticate the contents of the Protocol through appropriate legislation. It was also recorded that the companies present in the Annex I countries conveyed their dissent with respect to emissions cuts. These private sector bottlenecks happened by way of lobbying lawmakers and their venalities. On account of such hindrances, many nation states failed

9 Marcelo Santos, *Global justice and environmental governance: An Analysis of the Paris Agreement,* 60(1) REVISTA BRASILEIRA DE POLÍTICA INTERNACIONAL (2017)

10 UNFCCC, *What is the Kyoto Protocol?,* https://unfccc.int/kyoto_protocol#:~:text=In%20short%2C%20the%20Kyoto%20Protocol,accordance%20with%20agreed%20individual%20targets (Last visited May 16, 2021, 12:30 A.M)

11 Dominique van der Mensbrugghe, *A (Preliminary) Analysis of the Kyoto Protocol: Using the Oecd Green Model*, OECD (1998), May 17, 2021, 6:30 P.M, https://unfccc.int/kyoto_protocol#:~:text=In%20short%2C%20the%20Kyoto%20Protocol,accordance%20with%20agreed%20individual%20targets.

12 Aniruddh Mohan, *From Rio to Paris: India in global climate politics*, ORF OCCASIONAL PAPER (December, 2017) https://www.orfonline.org/research/rio-to-paris-india-global-climate-politics/ (Last visited May 18, 2021, 4:30 P.M.)

to abide by the Compliance Mechanisms specified under Articles 4 and 12 of the protocol, according to which every party had to present its yearly GHG inventory. This was subject to examination. However, this was not backed by any penalties. In addition to this, multiple propositions did not match all the parties' interests in 2005, when it came into force.[13] There are varying notions about the extent of success of the Protocol. On one hand it has been viewed as an institutional failure that failed to achieve its targets, as it came out as a wrong solution at a crucial time. Paradoxically, statistics indicate that the instrument has played a noteworthy role in reducing the ill effects of emissions in the nations that ratified it. Nonetheless such reductions are insignificant on a global scale.[14] Hence, despite the shortfalls of the Protocol, it acted as an estrade for further negotiations and formulation of instruments, such as the Paris Agreement. A major drawback of the Kyoto Protocol was that the developing countries showed less interest in fulfilling the targets. While there was steep economic growth during this time in countries like India and Indonesia, the emission rates also rose rapidly. Hence, is it crucial to note that half of these emissions come only from developing nations where the economics incline steadily. According to the principles of the protocol, developed nations were also obliged to keep a track of their emission rates, but the Paris Agreement 2015 surpassed the same. This showcases how the Protocol was undermined. According to the Paris Agreement, all nations across the globe had agreed upon the core norm of reducing the global average temperature below 2 degrees Celsius, eventually tackling the rise in global temperature leading to climate change.[15]

Theorists of public international law opine that a norm will not have the effect of force unless there are incentives to upkeep the same by way of reciprocity, so as to ensure peaceful coexistence. A sense of mutual responsibility is the ideal yardstick to achieve an illustrative standard of behaviour. The jolting presence of this element in the Paris Agreement as compared to the Kyoto Protocol is the reason behind the fact that the former was welcomed with open hands by more nation states.[16]

III. The Paris Agreement - Projections and Actions

The concept of climate justice has been recognized in the preamble of the Paris Agreement under Art.2, which reiterated the principle of 'equity and cooperation' along with the

13 KHENG-LIAN KOH, et al., CRUCIAL ISSUES IN CLIMATE CHANGE AND THE KYOTO PROTOCOL (World Scientific Publishing Co., 2009)

14 Jorge E. Viñuales, *Balancing Effectiveness and Fairness in the Redesign of the Climate Change Regime,* 24 LEIDEN JOURNAL OF INTERNATIONAL LAW 223 (2011)

15 *Supra* note 5.

16 *Supra* note 14.

responsibilities of all states in their respective capabilities; however, they are differentiated and in accordance with national circumstances. Although the principle was subject to many interpretations by state parties as a result of normative debates and negotiations, through the Paris Agreement of 2015, the United Nations Framework Convention on Climate Change (UNFCCC) featured the sentence "in the light of different national circumstances" in the agreement in order to emphasize on and recognize the changing circumstances of the member states for successful operation of the principles.[17] The COP 21 of the UNFCCC was adopted on December 12, 2015, which was seen as a turning point in the history of climate action. With around 195 nations across the globe coming to a consensus, it was aimed to combat climate change effects, mitigate the perils of climate disasters and adapt to the impacts of the disasters.

In 1997, the concept of 'common by differentiated responsibilities' was contented mainly because of the proposal that Brazil submitted to the Berlin Mandate's Ad Hoc committee, (UNFCCC, 1997).[18] The 'Polluter Pays Principle' was the basis of the proposal, which stipulates that the burden of environmental responsibility is to be distributed amongst all the nations as specified under Annexure I of the proposal i.e. the industrialized countries in accordance to their impact on climate change.[19] The UNFCCC has placed the opinion that "it is the developed countries that have the largest share in the current emission standards globally." The responsibility approach was also envisaged upon during COP 16, held in Cancun in the year 2010 and was observed that the global emission rates of greenhouse gases are seen to be contributed by most developing countries and hence they must come forward in taking the lead to combat the adverse effects of global climate change (UNFCCC, 2010).[20] Through this, it was interpreted that the normative application of these observations and principles acted as the grassroots of division of developed and developing countries as far as proportional compensation mechanism was concerned; it was recommended by developing countries, but was later rejected by the developed countries.

17 Tian Wang & Xiang Gao, *Reflection and operationalization of the common but differentiated responsibilities and respective capabilities principle in the transparency framework under the international climate change regime*, 9(4) ADVANCES IN CLIMATE CHANGE RESEARCH 253 (2018)

18 Mathias Friman, *Historical Responsibility: The Concept's History in Climate Change Negotiations and its Problem-solving Potential*, Master thesis in Environmental History, Linköping University, Faculty of Arts and Sciences, Tema V (2006)

19 Idovu Ajibade, *Distributive justice and human rights in climate policy: the long road to Paris*, JOURNAL OF SUSTAINABLE DEVELOPMENT LAW AND POLICY (2016)

20 *Cancún Climate Change Conference - November 2010,* UNFCCC, May 19, 2021, 7:10 P.M, https://unfccc.int/process-and-meetings/conferences/past-conferences/cancun-climate-change-conference-november-2010/cancun-climate-change-conference-november-2010-0

The Final document of the Paris Agreement that was signed in New York City reinstated the long-run objective, which was introduced in Copenhagen and confirmed during the assembly at Cancun; reducing the average global temperature to 2 degrees Celsius and stimulating the member countries to restrict the rise in temperature to 1.5 degree Celsius. While this was the important necessity of most developing countries, following the European Union, most of about 106 other states agreed to join hands in achieving the goal.[21] Looking through a normative standpoint perspective, the reiteration by various states turned the attention of the world to mitigating the problem by sharing the responsibility through fairness and equity. The 2014 assessment report by Intergovernmental Panel on Climate Change (Assessment Report No.5),[22] acted as a complex and comprehensive evidence in showing the scientific grounds on which the global temperature is increasing at an alarming rate and the goal of 2 degree Celsius can be achieved only if the carbon emission rates are kept below 'one trillion of tons' i.e. 1.000 Gt. of Carbon-dioxide.[23] The document acted as a clear-cut carbon budget of the planet earth.

IV. The Paris Agreement - A Paper Tiger?

The Paris Agreement came into force as a landmark instrument that attempted to transform the views on roles of nations in mitigating climate change. It stipulated that, parties had the responsibilities to prepare and enhance separate plans in the form of Nationally Determined Contributions (NDCs) every five years, wherein such parties had to be accountable for the implementation of the NDCs.[24] The manner in which the commitments specified under the UNFCCC shall be discharged by the countries, laid the groundwork for the Paris Agreement. COP 19, that took place in 2013. It happened to be a spur for the parties to convey their potential NDCs (i.e., self defined goals for mitigation of climate change) under the Agreement, much before COP 21. In this respect, the developed nations have submitted targets relating to emission control, covering all economic activities. An array of approaches was adopted by the developing nations, such as economy-wide objectives, cutbacks in the magnitude of emissions and commutations in the per capita emissions. However, there is no legally binding compulsion upon the parties to achieve these NDCs.[25]

21 *Supra* note 19.

22 Climate Change 2014 Synthesis Report, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (2014)

23 Paris Agreement, United Nations Framework Convention on Climate Change 2015, art. 2.

24 Paris Agreement, United Nations Framework Convention on Climate Change 2015, art. 4.

25 Lavanya Rajamani and Jutta Brunnee, *The Legality of Downgrading Nationally Determined Contributions under the Paris Agreement: Lessons from the US Disengagement*, 29 JOURNAL OF ENVIRONMENTAL LAW 537, 542 (2017)

1. The Dark Realities in implementation:

Unlike the transparency system followed by the UNFCCC that placed different mandates for the developing and developed nations, the framework under the Paris Agreement provided a system of "built in flexibility" so as to establish a sense of inclusivity amongst the parties that had different competencies. The mechanism adopted by it to promote compliance, is in the form of a "non-adversarial" committee, that shall endeavour to aid nations that face difficulties living up to their commitments. Nevertheless, there are no specifications regarding penalties in the instance of non-compliance.[26] At the COPs 24 and 25, no agreements were reached amongst the nation states, regarding the manner in which Article 6 was to be implemented, which discusses the idea of carbon markets.[27] Moreover developing nations that are marked by copious vulnerability, put forth their concerns about the lack of adequate availability of resources for building resilience in the event of a climate catastrophe. On account of the Covid-19 pandemic of 2020, many parties had fallen behind on their deeds in keeping up the existing NDCs and formulating new ones. However, the invitation in COP 26 for presenting climate friendly recovery plans in the context of the pandemic showcases the veracity of the Paris Agreement.[28]

The question, to what extent the Agreement actually pushes the developed nations to provide financial assistance and technology transfer to the developing countries and risk-prone island nations for initiating adaptation plans, remains unanswered. To gain such assistance, developing nations must pin down priority sectors that are highly in need of integration with strategies and plans for addressing the distress concerned with climate change in these sectors. During the course of offering and receiving such aid, various kinds of disputes may arise amongst the parties. Hence the WTO has to table a proper mechanism to settle any such disputes, that primarily involve an intersection of climate change and trade.[29]

'The Common but Differentiated Responsibility and Respective Capacities' (CBDRRC) as enshrined through UNFCCC, and its Kyoto Protocol, was taken forward in the Paris Agreement. This is considered as a sound 'action plan' mechanism to realize 'distributive

26 *Paris Agreement Q&A*, CENTRE FOR CLIMATE AND ENERGY SOLUTIONS, May 15, 2021, 9:30 A.M https://www.c2es.org/content/paris-climate-agreement-qa/.

27 *COP25: Key outcomes agreed at the UN climate talks in Madrid,* CARBON BRIEF, (May 15, 2021, 9:30 A.M) https://www.carbonbrief. org/cop25-key-outcomes-agreed-at-the-un-climate-talks-in-madrid

28 *Supra* note 25.

29 Pradeep S. Mehta & Rashid Kaukab, *Paris Agreement: A pact of solidarity for developing countries?,* 5(3) GREAT INSIGHTS MAGAZINE, ECDPM (2016) https://ecdpm.org/great-insights/from-climatecommitments-to-action/paris-agreement-pact-solidarity-developing-countries/ (Last visited May 16, 2021, 12:30 A.M)

justice.'[30] This principle was applied to developed and developing nations in different methods through Annex 1 and Annex 2, respectively. The Paris Agreement, replaced the Kyoto Protocol in 2015, and the Kyoto Protocol, expires in 2020, but it does not expressly mention the differential treatment. Instead, it softens the principle of equity laid down in Kyoto Protocol. The Paris Agreement puts forth the idea of equity and CBDRRC in terms of 'differentiable national circumstances', which totally disregards the injustice, caused by climate change effects and faintly heavier mitigation responsibilities on developed nations. Hence there is a disproportionate burden of the mitigation mechanism, e.g. on countries in the African subcontinent that have least resources that will be least responsible, but more likely to be the victims of the climate crisis.[31]

No matter how mitigation works, adaptation as a part post disaster recovery process is a need that cannot be ignored. Initially, the UNFCCC through the Kyoto Protocol envisaged the fact that the developed nations are obligated to assist and help the developing countries for the purpose of adaptation through financial needs, capacity building related programmes and transfer of technology.[32] An Adaptation fund was also set up in the year 2001 in order to financially assist committed projects relating to adaptation in the developing countries that are party to the protocol, especially to those countries that are more vulnerable to climate disasters. Thereafter, adaptation at national level is perceived as the ability to get accustomed to the climate change consequences. This requires sound governance strategies at domestic and provincial level amongst different communities belonging to different social and economic living conditions wherein the distribution mechanism must be reactive and responsive to the challenges faced due to climate change. The states should also take into consideration the prevailing issues such as economic globalization, social, political, and environmental barriers, institutional capacities, and historical disadvantages while applying their responsiveness.[33]

Next, the financial arrangement to be set up under the Paris Agreement appears to be unclear. Article 6(6) of the Agreement states the share of proceeds procured from a new mitigation mechanism used for combating greenhouse emissions and achieving sustainable

30 Rosemary Lyster, *Justice, Adaptation and the Paris Agreement: A Recipe for Disasters?*, Legal Studies Research Paper No. 16/104, Sydney Law School, The University of Sydney, 20 May, 2021, 8:58 A.M. http://ssrn.com/abstract=2883910

31 Anika Molesworth, *Climate Justice and its Role in the Paris Agreement,* THE CONVERSATION (April 2016), https://theconversation.com/climate-justice-and-its-role-inthe-paris-agreement-57798 (Last visited May 20, 2021, 9:45 A.M)

32 *Supra* note 9.

33 DANIEL KLEIN et al., *THE PARIS AGREEMENT ON CLIMATE CHANGE: ANALYSIS AND COMMENTARY* 70 (Oxford University Press 2017)

development can be used to help the countries that are at jeopardy and vulnerable to disasters; to assist them and cover their adaptation costs.[34] On the other hand, Article 6(1) of the Agreement promotes contributions into the new funds on a voluntary basis, without specifying any targets, which is seen to be succeeding the CDM (Clean Development Mechanism).[35] However CDM has been criticized for contributing to development of hydroelectric projects, which led to human rights violations through displacement of indigenous communities, lack of transparency, non-disclosure of adverse effects and poor public consultation processes. Hence, it can be argued that there is no clarity on whether the future generations would hold good in the hands of such as environmental rights regime, and if those would act as co-relative duty on the present generations to achieve environmental justice.[36] The signatories of the Paris Agreement are committed to the targets of national climate and 'carbon dioxide reduction mechanism' that they came up with, out of their own accord. However, no country has lived up to these obligations. Since 1990, the greenhouse emission rate across the globe has risen by 41% and is still continuing. Upon continuation of such a rise, global warming would increase by 3 degree Celsius by the end of the 21st century. Scholars believe that the consensus that was meant to help in handling the climate crisis has failed and is failing as years pass by quoting examples of non-compliance of any real action by fossil fuel rich states like Saudi Arabia, USA, Australia, and Russia.[37] Hence, the new agreement of 2015 that was believed to serve the purpose that was earlier aimed for in the earlier instruments, turned out to be futile.

2. Recommendations

The measures taken against climate change must be marked by economic efficiency, in pursuance of which every nation must fix their efforts towards emission reduction on the basis of the marginal gains of circumventing damages arising from global warming. This is known as the "social cost of carbon." The determination of the manner in which adaptability can be fostered and quantified is an important need, along with identification of potent approaches in order to ensure such adaptability. Reinforced assessment and observation will aid in accountability of these systems.[38]

34 Paris Agreement, United Nations Framework Convention on Climate Change 2015, art. 6(6).

35 Paris Agreement, United Nations Framework Convention on Climate Change 2015, art. 6(1).

36 Daniel Bodansky, *The Paris Climate Change Agreement: A New Hope?*, 110(2) AMERICAN JOURNAL OF INTERNATIONAL LAW 288 (2016)

37 Tarun Gopalakrishnan, *Climate Targets: The Paris Agreement legally requires better targets this year*, DOWN TO EARTH (February 2020), https://www.downtoearth.org.in/blog/climate-change/2020-climate-targets-the-paris-agreement-legally-requires-better-targets-this-year-69332

38 NICHOLAS STERN, THE ECONOMICS OF CLIMATE CHANGE: THE STERN REVIEW (London School of Economics and Political Science, 2006)

As nations are connected with one another through international trade, the policies adopted by each country towards climate change affect the other nations. As a result, concerns about possible "carbon leakages" arise, paving the way for realisation of the need for harmonization of action taken against climate change. The CDM is a good example of this. On this note, it is also vital to be guided by the fact that wholesome efforts for intercepting climate change are compatible with economic welfare and growth. Appropriate policy execution and an environment to nurture investment are cardinal to ensure that the financing regimes are in consonance with emission reduction and development that is climate resilient.[39]

V. Intergenerational Equity and Distributive Justice

The 'intergenerational equity' principle envisages the fact that every generation on this planet, in common, holds the resources available with the members of the present generation as well as the past and future generations. This principle specifically puts forth the notion of utilization of environmental and natural resources in a fair and equitable manner so that the generations to come also have the accessibility and availability to the same quantity of resources that's being used at present; applied predominantly in the context of sustainable development is often coupled with social and economic problems associated with people at large. The failure of the prevailing international instruments to combat climate change results in the violation of intergenerational equity.[40]

In the context of climate change and environmental law, the application of distributive justice revolves around equitable distribution of the risks arising as a result of climate change and its impacts. It also emphasizes on appropriate sharing of the technology designed to tackle the issue and the beneficial measures taken to repair environmental damage, degradation and the harm occurring due to global warming. This rationale behind this emphasis lies in the fact that the encumbrances endured due to climate change are disproportionately borne by some specific groups of the population, developing countries and vulnerable nations.[41]The Preamble of the Paris Agreement states that the parties of the agreement should respect, contemplate and promote their corresponding obligations in terms of human rights, right to environment, human health and rights of indigenous and local communities along with the

39 *Id.*

40 James M. Nguyen, *Intergenerational Justice and the Paris Agreement,* E-INTERNATIONAL RELATIONS (May 2020), https://www.e-ir.info/2020/05/11/intergenerational-justice-and-the-paris-agreement/ (Last visited May 20, 2021, 9:45 A.M)

41 Alice Kaswan, *Distributive Justice and the Environment*, 81(3) NORTH CAROLINA LAW REVIEW 1031 (2003)

rights of migrants and children, while addressing the issue of Climate change.[42] Moreover, the obligations should also recognise the "protection of people with disabilities, people who are in vulnerable conditions, gender equality, women empowerment and inter-generational equity."

For the purpose of realizing redistributive justice, the principle of 'intergenerational equity' proposes an exclusive perspective on how to regulate International Environmental Law in order to fetch an equitable outcome for the developing nations. Although there is a need for comprehensive operative and executional techniques for the same, the international community at large has developed an understanding of the emission level contributions in both developed and developing nations, eventually pushing the states to address the socio-economic problems resulting out of "disproportional-retroactive" pollution trends.[43] In this respect, the Paris agreement through COP 21, has enshrined upon 'ethical and legal duties' that ought to be flowed by states; this is inferred from Para 52 of Article 8 of the agreement (COP-21 decision) which says that the provisions pertaining to loss or damage under Art. 8 do not act as a basis for any liability or compensatory mechanism.[44] As described above, the Paris Agreement is not bereft of shortcomings. However, through its emphasis on international cooperation and integrated efforts with the motive of achieving climate justice, its attempts to secure the essence of intergenerational equity are commendable.[45] Peer pressure on a global level and incentives for future governments to take steps that are positively aligned with that of the previous governments' must be induced by way of explicit recommendations to meet the objectives of attaining distributive justice.[46]

VI. Conclusion

In spite of the attempts made by the Paris Agreement to address the vicious effects of climate change, the setbacks in the arrangement of the Paris Agreement result in violation of the principle of environmental justice. The theory on redistribution of justice, and the deadlocks that were tried to be resolved through the Paris Agreement clearly shows that

42 *The Paris Agreement: Process and Meetings,* United Nations Climate Change, UNFCCC, https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement (Last visited May 21, 2021, 9:30 A.M)

43 Jason F. Moeller, *Distributive Justice And Climate Change: The What, How, And Who Of Climate Change Policy,* Graduate Student Theses, Dissertations, & Professional Papers 10699 (2016), https://scholarworks.umt.edu/etd/10699

44 *Supra* note 5.

45 Cinnamon P. Carlarne. JD Colavecchio, *Balancing Equity And Effectiveness: The Paris Agreement & The Future Of International Climate Change Law,* 27 NYU ENVIRONMENTAL LAW JOURNAL (2019)

46 Keshab Chandra Ratha, *Paris Climate Deal: A Bumpy Road Ahead*, 32 INDIAN JOURNAL OF ASIAN AFFAIRS 67 (2019)

there has been an attempt in balancing the provisions of the Agreement, and a striking responsibility on the ability to realize the needs and bearing the costs in order to procure the needs. Moreover, the developed countries also assure to keep up to the reduction of emission standards more firmly than the developing countries, which will then in turn undertake responsibilities in those particular areas, especially the countries that have high emissions. There is need for strict adherence towards this positive trend. Finally, the under-developed countries and other small island countries must be treated on priority basis amongst the set of developing countries. Flexibility is the attribute inducing equity and cooperation amongst different nations. However, responsibilities rendered based on their capabilities and other intergovernmental decisions prove to be insufficient without lack of sanctions. On the other hand, it also acts as a restriction in the agreement's scope on 'equity and justice' because of the non-binding factor of most of the complex dimensions of the agreement. It is hence important to address the increase in emission standards through strong mechanisms of financing, adaptation, transfer of climate technology, capacity building in developing countries, making environmental governance easier with regard to justice and equity.[47] All the stakeholders of a society must be engaged to involve them in the implementation of the Agreement at local, state and national levels, for improvement in execution. Non-governmental organisations must take efforts to create sensitisation about the importance of the participation of the general public in the action for implementation, taken by the government. The efforts of the developed countries must be channelized in such a manner that the impact of their actions directly benefit the underdeveloped and developing countries, rather than placing emphasis on the wide-scale objective of their actions, such as reduction of global average temperature.

47 Adams H, Adger WN, *Changing places: migration and adaptation to climate change* in SYGNA L, O'BRIEN K, WOLF J, THE CHANGING ENVIRONMENT FOR HUMAN SECURITY: TRANSFORMATIVE APPROACHES TO RESEARCH, POLICY, AND ACTION (Routledge-Earthscan, 2013)

INTELLECTUAL PROPERTY RIGHTS; THE ASSET OF NEW INDIA

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Abstract

It is no less than a fact that there is no limit to the human intelligence and skills! From the early times of forming circular wheels and discovering the means to light up fire to the development of Artificial intelligence, there is not even a single instance wherein humans haven't seen an opportunity to discover new things. In the similar manner, since the past few decades there has been a lot of discussions on giving legal protection to the "Human Intellect", which in other words is called as Intellectual Property Rights.

In the era of technology and gadgets, the definition of properties is not only restricted to land, house or furniture but it is now extended to the novel intellectual ideas in terms of Industrial designs, Development of new procedure, Creation of designs and so on. Thus, Intellectual Property (IP) pertains to any original creation of the human intellect such as artistic, literary, technical, or scientific creation. "Intellectual Property Rights (IPR) refer to the legal rights given to the inventor or creator to protect his invention or creation for a certain period of time."[1]

Examples of Intellectual Property include an author's copyright on a book or article, design of a product, logo of a brand, method of production and the list goes on. However, question of the hour is why has IPR acquired so much popularity in recent times? What gave birth to the concept of IPR and how has it evolved the economy at a global level

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1 Chandra Nath Saha and Sanjib Bhattacharya, *Intellectual property rights: An Overview and Implications in Pharmaceutical Industry,* Journal of Advanced Pharmaceutical Technology & Research., (2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3217699/#ref1.

especially in a developing country like India. Thus, the paper revolves around the nuances of Intellectual Property Rights, Predominant areas of Intellectual Property Rights and the role of Intellectual Property Rights in India.

***Keywords**: Intellectual Property Rights, Innovation, Economy, Competition.*

I. Introduction

Due to development of science and technology, the world around us is evolving at a faster pace and so are the perceptions and the reach of human beings. Today the existence of the term "impossible" can be seen nowhere as common people with the support of science and intellect can explore to any extent and invent things which can solve big world problems, and the most recent example to support the argument is the production of vaccines for the deadly disease called Co-vid 19 at a very short span of time. But the discussion does not stop at development or implementation of ideas but to give a legal recognition to it so as to protect the creator from duplication and to a certain extent commercialization of the same. Thus, this concept of giving a legal backing to the useful innovations is called as Intellectual Property Rights.

In India, the term Property *per se* has been defined nowhere, however it is used in its widest and the most generic sense. Property is the most extensive of all concepts since it is suggestive and prescriptive of every imaginable interest that somebody can have. As a result, it encompasses not only physical items, but also rights and interests that exist in or are derived from them.

Thus, properties can be divided into two forms, tangible and intangible. Tangible property means one which is physically present. For example, land, houses, money, these can be physically seen and felt. On the contrary, there is a type of valuable property that cannot be sensed since it does not exist in the physical world form. Intellectual property is a type of intangible property that has a monetary value.

Prior to the General Agreement on Tariffs and Trade (GATT), the Intellectual Property and its related rights were not a subject, to any international trade negotiations. The history of Intellectual Property Rights can be traced all the way to 500 BCE, when Sybaris, a Greek State made it possible for the citizens of their state, to obtain a patent for one year, for "any

new refinement in luxury[2]" or according to British intellectual property expert Robin Jacob, a patent was documented for "some kind of new-fangled loaf" of bread in the 600 BC.[3]

However, the only truth that we can strongly affirm is IPRs have become much wider and complex in today's era, wherein a person can acquire legal protection for an invention of a tiny pin to a massive construction.

II. History of Intellectual Property Rights

If we look at it from a global perspective, the Rights of discovery was in the form of dominance which was seen in the 1300 at the Alp Mountains wherein the people who identified the mines for the first time used to dictate the terms on the resources available in the surroundings, Example - water, wood etc.

In 1409 at Germany, special privilege used to be given for the people who constructed modern mill for storage of grains. However, French structured the recognition of IPR well by adopting the concept of registration and examination of invention before granting exclusive Rights.[4]

Some historians credit Filippo Brunelleschi, a Florence architect who invented a crane system for exporting and transporting marble from the Carrara highlands, with the first industrial patent application in 1421.[5]

In an exhibition conducted at Paris in 1867, Germany got its first serious recognition as an industrial country. The Americans declined to participate in the Vienna Exhibition (1873) in order to protect the German Nations' Intellectual Property Rights Inventions. As a result, the Paris Convention for the Protection of Intellectual Property was born. The nations that are members of the convention have the ability to claim precedence under this treaty.[6]

2 Palak Sinha, *History and Evolution of IPR*, Legal Desire, https:// legaldesire.com/history-and-evolution-of-ipr/ (Last visited August 8, 2020, 12:20 PM)

3 Matt Kwong, *Six Significant Moments in Patent History*, Thomson Reuters, https://www.reuters.com/article/us-moments-patent-idUSKBN0IN1Y120141104 (Last visited November 5, 2014, 2:17 AM)

4 2 BAYYA SUBBA RAO AND P. V. APPAJI, INTELLECTUAL PROPERTY RIGHTS IN PHARMACEUTICAL INDUSTRY: THEORY AND PRACTICE Chapter no. 1, 1 (B. S. Publications 2018) http://www.bspublications.net/downloads/05afc26c1e9088_Ch-1_IPR%202nd%20Ed._Subba%20Rao.pdf.

5 Matt, *supra* note 3, at 2.

6 Bayya, *supra* note 4, at 3.

> *"In India, IPR existed since the time of Harappa Civilization, special marks were identified on the pottery indicating as trademarks."*[7]

The first official legislation for IPR in India was Act VI of 1856 on the Protection of Innovations, which was modelled on the British Patent Law of 1852 and offered specific exclusive advantages to inventors of new manufactures for a period of 14 years.

However, as the Act was passed without the authority of the British Crown, it was revoked by Act IX of 1857. Under Act XIII of 1872, it was called "The Patterns and Designs Protection Act." The Act of 1872 was revised again in 1883 (XVI of 1883) to include a provision to protect the uniqueness of inventions that were disclosed in the Indian Exhibition prior to filing an application for protection.

All prior Acts were repealed by the Indian Patents and Designs Act, 1911 (Act II of 1911). For the first time, this Act placed patent administration under the control of the Controller of Patents. In 1920, the Act was changed again to enter into reciprocal agreements with the United Kingdom and other countries in order to secure primacy. After Independence, it was felt that the Indian Patents & Designs Act, 1911 was not fulfilling its objective. It was found desirable to enact comprehensive patent law owing to substantial changes in political and economic conditions in the country. As a result, the Government of India established a committee in 1949, chaired by Justice (Dr.) Bakshi Tek Chand, a retired Judge of the Lahore High Court, to study Indian patent law in order to ensure that the patent system is in the national interest.[8]

Due to the insertion of Article 372(1) in the Indian Constitution which authorizes the legislature or any competent body to repeal, alter or amend the pre-constitutional laws, it became possible for the pre-constitutional laws to be in force in India. For example, the repealing of 1911 Patent Act and the passage of new Patent Act, 1970. Furthermore, Article 253 of the Indian Constitution, which mandates the recognition of the international aspect of laws, legislations, and agreements and empowers the Indian parliament to enforce international treaties through the law-making process, plays a significant role in recognising Indian IPR with other international IPRs.

Today, India is a signatory and member of various international organizations and agreements for the protection and recognition of IPR rights of its own country at a global stage as well as of its member countries; starting from being the member of World Trade Organization,

7 *Ibid.*

8 INTELLECTUAL PROPERTY INDIA, https://ipindia.gov.in/history-of-indian-patent-system.htm, (Last visited Mar. 16, 2022).

Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, Marrakesh Treaty to facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities to the recent MOU between US and India in the year 2020 which dealt with knowledge sharing pact and Sector agnostic pact.[9]

III. Intellectual Property Rights in India

Indian Constitution is the Grundnorm of all the existing laws in India till date! The Constitution of India is enshrined with Fundamental Rights, Duties and Constitutional Rights which are to be abided by the people residing in India or the citizens of India.

In India, the provision of Right to Property had been one of the controversial issues in the early 1980s. Prior to the 44th Amendment of 1978, the Right to Property was considered as the Fundamental Right; wherein Article 31 protected individuals from the government's or state's arbitrary seizure of private property for both public and private purposes. That means that if this right is violated, a person has the right to move to the Supreme Court and Article 19(1)(f) "provided for the freedom to citizens to acquire, hold, and dispose of the property within the territory of India."

However, by the 44th Amendment of 1978, the above two mentioned Articles were deleted and a new Chapter IV was added in Part XII, containing only one article 300A, making the Right to Property a Constitutional Right thus the remedy available to an aggrieved person is to approach the Supreme Court under Article 32 of the Constitution is no more available, he can only approach the High Court under Article 226 of the Constitution.

Unlike the U.S Constitution, Indian Constitution does not mention Intellectual Property *per se* under the Articles relating to the Property to constitute IPR as a Constitutional Right. However, Entry 13 and 14 of List I of Schedule II gives a superficial hint on IPR and Entry 49 of List I of Schedule II clearly mentions about Intellectual Property Rights, but it restricts only to patent, inventions, designs, copyright, trademarks and merchandize marks; but it is also important to note that as the legislature have the exclusive power under Article 248 to make laws with respect to any matter not enumerated in the concurrent List or State List; thus it is safe to assume that all the other Intellectual Property Rights may come under the ambit of Constitutional Rights under List I of Schedule II.

9 ET Bureau, India, *US ink pact on intellectual property rights,* The Economic Times, (Feb. 20, 2022. 08:03AM), https://economictimes.indiatimes.com/news/international/business/india-us-ink-pact-on-intellectual-property-rights/articleshow/74218241.cms?from=mdr.

Therefore, to conclude, an Intellectual Property Right is a Constitutional Right and not a Fundamental Right in India.

IP is divided into two categories:

a. Industrial Property

b. Copyright

Industrial property, which includes inventions (patents), trademarks, industrial designs, and geographic indications of source; and

Copyright, which includes literary and artistic works such as novels, poems and plays, films, musical works, artistic works such as drawings, paintings, photographs and sculptures, and architectural designs. Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and those of broadcasters in their radio and television programs.

The different types of Intellectual Property Rights in India are:

1. The Indian Patents Act, 1970

Patent rights are issued for new and inventive processes, products, or articles of manufacture that can meet the patent eligibility standards of novelty, inventive steps, and potential for industrial application.

To strengthen the patent rights in India, Government of India has come up with an initiative called as Patent Analysis and Management System (PAMS), wherein services are offered with the intention of raising awareness of intellectual property (IP), promoting and safeguarding innovations, and offering a wide range of value-added IP-related services. Adding to this, there is a one-of-a-kind chance to work with us directly to establish a culture of IP identification, protection, and monetization for your cutting-edge R&D inventions and results.

2. The Copyright Act, 1957

This act prevents unlawful uses of original works of literature, drama, music, and art, as well as films on film and sound recordings. In contrast to patents, copyright safeguards expressions rather than ideas.

3. The Trademark Act, 1999

The Trademark law was replaced with the Trademark and Merchandise Act, 1958. It offers improved trademark protection and stops unauthorised or dishonest use of marks on goods. The Act allows for trademark registration, giving the owner of the mark a legal right to its sole use. Trademark in India is governed by Trademark Act, 1999 and Trademark Rules, 2017 framed under this Act.

4. The Designs Act, 2000

The Design Act of 2000 is an Act to consolidate and amend the law relating to the protection of designs. Its main objective is to protect new or original designs from getting copied which causes loss to the proprietor. As per Section 44, priority can be claimed from a convention application if the design application in India is filed within six months of the priority date. Since India is a party to the Paris Convention, priority may be claimed for applications made in any nation, group of nations, or organisation of nations to whom the Paris Convention applies. However, India is not currently a signatory to The Hague Convention.

5. The Geographical Indications of Goods (Registration and Protection) Act, 1999

A geographical indication (GI) is a label placed on a product to identify its place of origin. The product must exhibit the reputation and characteristics of its country of origin. One of the famous cases in India relating to Geographical Indication is the “Darjeeling Tea.” The Tea Board of India made its first attempt to safeguard the “Darjeeling” trademark far back in 1983, when the “Darjeeling” emblem was developed. The Indian Trade and Merchandise Marks Act of 1958 allowed The Tea Board to gain domestic protection for the Darjeeling emblem as a certification trade mark (now the Trade Marks Act, 1999). In 1986, the Tea Board was given permission to register in class 30. The logo was also registered as a trademark in a number of other nations in the same year including the United Kingdom, the United States, Canada, Japan, Egypt, and under the Madrid Agreement, which covers Germany, Austria, Spain, France, Portugal, Italy, Switzerland, and the former Yugoslavia.

6. The Biological Diversity Act, 2002

This act was passed by the parliament of India to protect biodiversity and facilitate

the sustainable management of biological resources with the local communities.

7. Protection of Plant varieties and Farmers rights, 2001

This act was enacted to acknowledge and protect the farmers' rights with regard to their ongoing efforts to preserve, enhance, and make available plant genetic resources for the creation of new plant kinds.

V. Recent Initiatives for Intellectual Property Rights in India

Since few years, India has become a fertile land for innovation and investment, and one of the reasons of such growth is recognition of Intellectual Property Rights especially in priority sectors like Pharmacy and MSME. India has achieved significant success not only in fulfilling its responsibilities under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, but also in building its own IP framework and balancing the trade-off between monopoly rights and unfettered access to information.[10]

1. Establishment of Anti-Piracy Coordination Cell: The cell was established with the approval of the Ministry for Human Resource Development on 15th October 2015 which will serve as a centralised agency to coordinate government and industry efforts to combat piracy, as well as a platform to showcase the impact of anti-piracy activities in India to the rest of the globe. It will contribute to ensure "zero tolerance" for piracy by boosting the battle against it.

2. International Searching Authority and International Preliminary Examining Authority: The international preliminary report on patentability gives the applicant the opportunity to evaluate the chances of obtaining patents in elected Offices before incurring the expense and trouble of entering the national phase. Under the Patent Cooperation Treaty, the Indian Patent Office was designated as an International Searching Authority and an International Preliminary Examining Authority, and it began operations on October 15, 2013.

3. Initiative by FICCI: FICCI has conducted many awareness programs with respect to Intellectual Property Rights in India. It also holds continuous interaction between the industry and the Government with a view to provide an interface for businesses to resolve their issues pertaining to IPRs.

10 Dr. S Md. Ghouse and B R Aswini, *Current trends of intellectual property law in India*, 3, Issue. 2, International Journal of Conceptions on Management and Social Sciences, 32, 33-34, (2015)

The FICCI IPR Division has established an Intellectual Property Education Centre (IPEC) with the goal of providing specialised training in the field of intellectual property. The objective is to raise awareness about intellectual property rights and to create a pool of IPR specialists whose expertise and services will benefit the entire industry.

4. DRDO grants free patent access to boost indigenous production in 2019

5. Government brings key changes in Manual of Patent Office Practice and Procedure: This New Manual seeks to adapt different improvement like automating and digitalizing the process and also tries to make the functioning of Patent Office efficient.

6. Extending the intellectual property right (IPR) defence to abuse of dominance Section 4(a) of Competition Act 2020: In addition to the pre-existing exemption from the scope of anti-competitive agreements, IPR holders' rights to prevent infringement or set reasonable restrictions to safeguard their IPR rights are intended to be excluded from provisions of the Act that prohibit the abuse of dominance.

7. Centre of Excellence in Intellectual Property (CoE-IP): This is one such project, with the goal of assisting inventors, start-ups, and SMEs in understanding the value of Intellectual Property (IP), providing value-added services, and ensuring effective IPR protection. CoE-IP is being implemented over a five-year period with a budget of Rs.323.77 lakhs. The project's goal is to promote the expansion of IP in ICT by establishing a suitable environment for identifying, protecting, and monetising IPRs.

8. IPR Facilitation for MeitY R&D Societies and Grantee Institutions

9. Support for International Patent Protection in E&IT (SIP-EIT) – II for Micro, Small and Medium Enterprises and Technology Start-up Units: MeitY created this initiative to assist MSMEs and start-ups in securing Intellectual Property Rights on a worldwide scale. The SIP-EIT plan provides financial assistance to MSMEs and tech start-ups in order to foster innovation and recognise the value and potential of global IP in order to gain a competitive edge. The initiative was designed to support 200 worldwide ICT patent applications over a five-year period

10. Patent Analysis and Management System (PAMS): This helps in providing wide range of services related to IPR protection, and also conducts activities to create awareness about IPR and its importance.

11. IP Panorama: The IP Panorama's major goal and aim is to raise IPR awareness among targeted stakeholders in the ICT sphere, such as tech start-ups, MSMEs, and academics.

VI. Impact of IPR in the various sectors of Indian economy

Since the recognition of importance of IPR in India, a significant development can be seen in the major sectors of the Indian economy with respect to the contribution of the said rights. As per the reports of WIPO, today IPR filings contribute around 8,443.36 US Dollars in the Indian Economy (2020).[11] Thus, some of the major areas where IPR has its presence in the market share are as follows:

1. IPR and Start-up

> *"The term start-up refers to a company in the first stages of operations. Start-ups are founded by one or more entrepreneurs who want to develop a product or service for which they believe there is demand.[12]"*

Since the past few years, India has seen an upward graph in the establishment of start-ups by young entrepreneurs. Therefore, looking at the zeal and zest of the innovators, Indian government came up with several Central and State government schemes and incentives to support the entrepreneurs for example, SAMRIDH scheme, Start-Ups Intellectual Property Protection (SIPP), Start-up India Seed Fund and many more.

One of the noteworthy moves of the government in improving the status of start-ups is recognition of importance of IPR in Start-up companies! The Start-up Action plan 2016 provided with legal support and IPR facilitation benefits by fast-tracking start-up patent applications so that they can realise the value of their IPRs as soon as possible, provided with a panel of facilitators to assist in filing IP applications and free legal support and fast-tracking patent examination, the start-ups have to only bear the cost of statutory fees payable. As a result of these initiatives, it is reported (Evolution of Start-up India –

11 World Intellectual Property Organization, https://www.wipo.int/ipstats/en/statistics/country_profile/profile.jsp?code=IN (last visited Mar. 17, 2022).

12 Investopedia https://www.investopedia.com/terms/s/startup.asp#:~:text=The%20term%20startup%20refers%20to,they%20believe%20there%20is%20demand (last visited on March 17, 2022).

Capturing the 5-year Story) that 5,020 patent applications have been filed as of November 2020, 1,170 patent applications have been filed for expedited examination by start-ups; of these, 884 applications have been examined and 459 patents have been granted, and 12,264 trademark applications have been filed. 510 patents and designs facilitators and 392 trademark facilitators are enrolled under the scheme.[13]

Thus, through IPRs, Start-up companies would get an edge over its competitors by being able differentiate itself in terms of Brand, Designs and Quality which would lead to establishment of name and goodwill in the market without any problem relating to protection of their intellectual asset.

According to the Economic Survey 2021-22, which was submitted in Parliament on January 31, the number of new recognised start-ups has surged from 733 in 2016-17 to over 14,000 in 2021-22. Following the United States and China, which added 487 and 301 unicorns, respectively, in 2021, India surpassed the United Kingdom to become the country with the third-highest number of unicorns.[14]

2. IPR and Artificial Intelligence

> *"Artificial intelligence (AI) is the ability of a computer or a robot controlled by a computer to do tasks that are usually done by humans because they require human intelligence and discernment."*[15]

In the era of technology and innovation, Artificial Intelligence has become the talk of the town in almost all the sectors of the economy. Its ability to replace the human's brain work with the help of algorithms and quick and efficient retrieval of data and information has made AI one of the greatest inventions of human kind. Some of the sectors where AI is predominant is Hospitality, Customer care and call centres, Software Development etc. According to the reports, the global artificial intelligence market size was valued at USD 62.35 billion in 2020 and is expected to expand at a compound annual growth rate (CAGR) of 40.2% from 2021 to 2028.[16]

13 Prof. (Dr) Vijay Kumar Singh, *INDIA'S STORY OF IP AND SMES: TAKING IDEAS TO THE MARKET,* The Daily Guardian, (May 3, 2021, 03:14AM) https://thedailyguardian.com/indias-story-of-ip-and-smes-taking-ideas-to-the-market/

14 Financial Express, https://www.financialexpress.com/opinion/need-to-fast-track-ipr-recognition/2427972/, (Last visited on Mar. 17, 2022).

15 Britannica, https://www.britannica.com/technology/artificial-intelligence, (Last visited on March 17, 2022).

16 Legal Services India.com http://www.legalservicesindia.com/article/1734/Judicial-Review-in-India-AndUSA.html (Last visited November 5, 2014, 2:17 AM)

> *"The Indian Artificial Intelligence market is valued at $7.8 Bn as of July – August 2021. This represents a 22% increase in size of market over 2020.The AI market share and size in relation to the Types of Companies is the highest across the broad MNC IT / Technology / Electronic category, which includes High-end Software and Hardware technology, IT Services, Semi-conductor, and Electronics firms.[17]".*

IPR is a critical instrument for protecting innovation and ensuring a financial return on intellectual capital, and AI has added a new dimension. Expert Systems, which solve problems in specific fields of knowledge such as medical conditions, Perception Systems, which allow technology to perceive the world with senses of hearing and sight, and Natural language Systems, which require a dictionary database to learn the meaning of words, are the three types of AI recognised by the WIPO.

With advent of AI in the global market, India has also taken this opportunity to give impetus to AI with mission of Digital India by increasing the budget allocation to $477 in 2020. India seeks to increase the presence of AI through cybersecurity, machine learning and robotics. Some of the recent initiatives taken in India for AI are; MCA 3.0, AI portal developed by MeitY and NASSCOM in June 2020 and many more.

The last five years have witnessed significant uptake of artificial intelligence (AI)-focused innovation in India, with over 4,000 AI patents being filed during the period, six times higher than the figure for 2011-2015. On a worldwide scale, AI patent families rated India seventh among the top ten countries.[18]

3. IPR and MSME

Medium and Small-Scale Industries play a vital role in the India economy in terms of GDP as well for providing employment opportunities to people thus bridging the gaps of national income and wealth and promoting regional equality. MSMEs employ over 120 million

17 Kashyap Raibagi, *State Of Artificial Intelligence In India 2021- By AIM & TAPMI,* Analytics India Magazine, (Oct. 18, 2021) https://analyticsindiamag.com/study-state-of-artificial-intelligence-in-india-2021-by-aim-researchtapmi/#:~:text=There%20are%20close%20to%20109000,personnel%20is%20INR%2014.3%20Lakhs,

18 Shivani Shinde, *India Now an Artificial Intelligence Innovation Hub, Reveals a Study*, Business Standard (October 12, 2021 14:38 IST) https://www.business-standard.com/article/technology/india-now-an-artificial-intelligence-innovation-hub-reveals-a-study-121071100854_1.html.

people, making them the second-largest source of employment after agriculture.[19]

In accordance with the Micro, Small and Medium Enterprises Development (MSMED) Act of 2006, the Indian government has launched MSME, or Micro, Small and Medium Enterprises. These businesses specialise in the manufacture, manufacturing, processing, or storage of products and commodities. MSMEs in India account for around 8% of the country's GDP, 45 percent of manufacturing output, and over 40% of exports.[20]

Thus, it is safe to say that developing countries like India should facilitate legal as well as financial framework for the growth of MSMEs and one of the contemporary ways of doing it is protection and promotion of IPR in this sector. A good IPR may assist a small business protect their inventions (patents), grow their brand (trademarks), and secure their designs and creative works (copyright and design laws). According to one of articles of Economic Times, it was said that "MSMEs should look at IPRs as legal monopolies-investments in which it will allow them to be ahead of their competition as IPRs, being negative rights, outrightly stop others from practising, using or selling any product or service that infringes on any of their IPRs."[21] Thus, MSME can acquire Intellectual Property Rights in the following ways to establish its goodwill in the market:

Distinctive name or logo of the organization- Trademark

Asset pertaining to designs or shape pertaining to a product- Industrial design

Creation of artistic work- Copyright

Handicraft or speciality of that particular region like *Banarasi* Silk, Darjeeling Tea- Geographical Indication

4. IPR and Pharmaceuticals

The Indian pharmaceutical business has seen an upward graph in the past few years and one of the reasons of growth is low cost of production and R&D in India. India is the world's largest supplier of generic medications, accounting for 20% of worldwide supply

19 LENDINGKART, https://www.lendingkart.com/msme-loan/what-is-msme/#:~:text=In%20India%2C%20MSMEs%20contribute%20nearly,40%25%20of%20the%20country's%20exports.&text=MSMEs%20are%20an%20important%20sector,the%20country's%20socio%2Deconomic%20development, (last visited Mar. 17, 2022).

20 *Ibid.*

21 Economic Times, https://economictimes.indiatimes.com/small-biz/sme-sector/why-msmes-should-treat-intellectual-property-rights-as-assets/articleshow/69304077.cms (May 13, 2019, 12:59 PM IST).

by volume, as well as supplying 62% of global vaccination demand.[22] India's domestic pharmaceutical market is estimated at USD 41 billion in 2021 and is likely to reach USD 65 billion by 2024 and further expand to USD 120-130 billion by 2030.[23] Recognition of Intellectual Property Rights is very crucial to provide a safe environment for the growth of Pharma in the global level.

Innovation, R&D and of course Science play an integral part in the development of a drug! Crores of rupees are invested in the formulation of a drug which starts from the very basic activity of identification, planning, producing to commercialization of the drug.

Therefore, if the IPR laws of a country are strong in the manufacturing as well as distributing countries, it would ensure healthy competition with adequate protection from the Trademark and Patent infringers.

India has provided protection to drugs and medicines under, Trademarks Act 1999, and Patent Act, 1970. The true milestone was reached by the Indian Pharmacy business during the period of Covid. India emerged out of its effects by ramping up the pharma manufacturing sector and maintaining a resilient supply chain of essential drugs despite of 2 deadly waves of Covid-19.

With the export of Covid vaccines from India surpassing the 65 million mark to more than 100 nations, the worldwide faith in the Indian healthcare industry has been reaffirmed once again, reaffirming India's place as the world's pharmacy. During the early stages of the pandemic, India supplied life-saving medications and medical equipment to over 150 nations, as well as more than 65 million doses of Covid vaccines to over 100 countries this year.[24] The pharmaceutical industry is currently valued at $41.7 bn and is expected to reach $65bn by 2024 and $120 bn by 2030.[25]

However, it is important to highlight at this stage of development that, though there has been an upshoot of the pharma sector yet there is a lack of proper utilization of such growth in this sector in terms of IPR as, out of 16,134 patents filed during the last 5 years,

22 Invest India, https://www.investindia.gov.in/sector/pharmaceuticals#:~:text=The%20pharmaceutical%20industry%20in%20India%20is%20currently%20valued%20at%20%2441.7,%2Dpatent%20during%202017%2D2019, (Last visited Mar. 17, 2022).

23 Bhawna Sharma and Sana Singh, *Pharmaceutical Industry and Intellectual Property Rights – An Indian Perspective,* Singhania & Partners (Jun. 21, 2021) https://singhania.in/blog/pharmaceutical-industry-and-intellectual-property-rights-an-indian-perspective.

24 Outlook India, https://www.outlookindia.com/website/story/pharmacy-of-the-world-india-delivers-over-65-million-doses-of-covid-vaccines-to-100-countries-this-year/401489, (Last visited Mar. 17, 2022).

25 FDI in India, https://www.fdi.finance/sectors/pharmaceuticals, (Last visited Mar. 17, 2022).

only 4,345 were granted patents (Report 2021).[26] Thus, the Department for Promotion of Industry and Internal Trade should fill in the gaps so that such administrative lacunas do not hinder the scale of progress.

5. Agriculture and IPR

There was no legal provision for the protection of plant varieties in India until 2005 as a result of TRIPS-WTO agreement which sought to protect the plant varieties and genetic modification either through Patent or Sui-Generis system.

Adding to this, there were many laws made for the purpose of protection of Intellectual Property Rights of the agricultural produce, some of them being passing of the Geographical Indications of Goods (Registration and Protection) Act, 1999, and the Protection of Plant Varieties and Farmers' Rights Act, 2001, as well as the revision of the Patents Act, 1970 in 1999 and 2002, also the requirement to offer protection is also being realised in the areas specifically related to the farm animal business.

IPR in agriculture helps to produce high quality seeds planting materials to the farmers. In India Krishi Vikas Kendra plays an important role in spreading awareness about IPR in Agriculture among the also it works as Knowledge and Resource Centre of agricultural technologies for supporting initiatives of public, private and voluntary sectors in improving the agricultural economy of the district.

V. Ranking of India in Intellectual Property Right

India is a hub of innovators and entrepreneurs! Adding to this with the trend of "Aatmanirbhar Bharat" which was coined by the Hon'ble Prime Minister Narendra Modi in 2020, India has become a fertile land for invention and investment.

As of January 10, 2022, more than 61,400 start-ups have been recognised in India. In 2021, 555 districts, compared to 121 districts in 2016-17, had at least one new start-up.[27]

India has ranked 46th by the World Intellectual Property Organization in the Global Innovation Index 2021 rankings and has seen a huge rise in the Global Innovation Index

26 Rajya Sabha, *Review of Intellectual Property Rights Regime in India*, 10, 92, (2021), https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/13/141/161_2021_7_15.pdf.

27 Srinath, Sridharan, *Need to Fast-Track IPR Recognition*, Financial Express (feb. 8 2022) https://www.financialexpress.com/opinion/need-to-fast-track-ipr-recognition/2427972/.

(GII), from a **rank** of **81** in **2015** to **46** in **2021**.[28]

According to the report by NITI Aayog, "The consistent improvement in the GII ranking is owing to the immense knowledge capital, the vibrant start-up ecosystem, and the amazing work done by the public and the private research organizations. The Scientific Departments like the Department of Atomic Energy; the Department of Science and Technology; the Department of Biotechnology and the Department of Space have played a pivotal role in enriching the National Innovation Ecosystem.[29]"

As per the reports, the number of patents filed in India has gone up to 58,502 in 2020-21 from 39,400 in 2010-11 and the patents granted in India has gone up to 28,391 from 7,509 during the same period".[30]

However, there is a dip in the registrations of Trademarks from 2813609 (2019) to 293295 (2020) and a similar trend is seen in the registration of Industrial Designs where the registration has fallen down from 16422 (2019) to 11987 (2020).[31]

Also adding to this IPR registrations are dominated by the foreigners who are staying in India for commercial purposes with Indian filing of patents in the year 2019-20 accounted for 36 per cent of the total patent filings while a major share of patents of remaining 64 per cent had been filed by foreign entities.[32]

VI. Reasons For Slow Growth of IPR In India

There is no doubt that India has seen an upward graph in terms of activities surrounding Intellectual Property Rights, India climbed 35 ranks since 2015 on the Global Innovation Index to place 46th in 2021. Adding to this according to the Union Economic Survey for

28 Press Information Bureau, https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1756465#:~:text=India%20has%20climbed%202%20spots,81%20in%202015%20to46in%202021, (Last visited on 17th March, 2022, 6:36 PM).

29 *Ibid*.

30 Down To Earth, https://www.downtoearth.org.in/news/economy/more-indian-residents-filing-patents-than-mncs-despite-challenges-economic-survey-81344#:~:text=Overall%2C%20the%20number%20of%20patents,and%207%2C509%20in%202010%2D11, (Last visited on 17th March, 2022, 6:28 PM).

31 WIPO, https://www.wipo.int/ipstats/en/statistics/country_profile/profile.jsp?code=IN, (Last visited on 17th March, 2022, 6:40 PM).

32 Rajya Sabha, Review of Intellectual Property Rights Regime in India, 10, 25, (2021), https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/13/141/161_2021_7_15.pdf.

2021-22, more Indians filed for patents than multinational companies.[33]

However, if we look at the performance of India at a global platform, India is still lagging behind China, the United States, Japan and South Korea by a huge margin.

Thus, below are the reasons for the low performance of India:

1. **Low expenditure on Research and Development activities:** Research and Development plays a crucial role in the IPR sector as it helps the innovators to understand the existing registrations and compare the same with their ideas. Thus, as Novelty is the essence of Intellectual Property Rights, it becomes necessary to have an updated data on the same in terms of domestic Intellectual Property Right holders as well as cross boarder Intellectual Property Rights. The R&D spends in India were a mere 0.7% of the country's GDP in 2020.[34] According to the opinion pf various organizations, **"**absence of study undertaken by India to analyse the economic impact of IPRs on its GDP, growth of industries, generation of employment, trade and commerce, etc was one the primary reasons for slow growth of IPR in India also it was stated that such a study needs to be undertaken in wake of immense contribution of creative sectors and innovations and its impact on the economy.[35]**"**

2. **Lack of Awareness of IPR:** Another important reason of slow growth of IPR is lack of awareness amongst the people about the various rights of IPR and its importance. Many innovators who are own a MSME or a small business fail to commercialize their products or services due to illiteracy in terms of IPR. According to the reports, 35% of people are unaware of intellectual property rights (IPR), and the majority of respondents, including students, scholars, teachers, and managers, are unaware of the financial benefits of obtaining an IP right, the commercialization of acquired IP rights, or the legal ramifications of using a pirated product.[36]

33 Down To Earth, https://www.downtoearth.org.in/news/economy/more-indian-residents-filing-patents-than-mncs-despite-challenges-economic-survey-81344#:~:text=Overall%2C%20the%20number%20of%20patents,and%207%2C509%20in%202010%2D11, (Last visited on 17th March, 2022, 6:28 PM).

34 Financial Express, https://www.financialexpress.com/opinion/need-to-fast-track-ipr-recognition/2427972/, (Last visited on 17th March, 2022, 6:23 PM).

35 Rajya Sabha, Review of Intellectual Property Rights Regime in India, 10, 18, (2021), https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/13/141/161_2021_7_15.pdf.

36 Heena Lamba, *India: Reforming University Research Ecosystem Can Help Uplift India's IPR Index,* Modaq, (17th March, 2022, 6:20 PM), https://www.mondaq.com/india/patent/758100/reforming-university-research-ecosystem-can-help-uplift-india39s-ipr-index.

3. **Administrative issues:** According to the survey, the average time taken in India in 2020 to make a decision to award patents was 42 months, compared to 52 months in 2019 and 64 months in 2016. (2017). This is far slower than the US's 20.8 months, China's 20 months, South Korea's 15.8 months, and Japan's 15 months (Japan). According to the survey, the low number of patent examiners in India, which now stands at 615, compared to 13,704 in China, 8,132 in the United States, and 1,666 in Japan, is to blame for the delay in India's patent application.[37] India is home to some of the world's largest technology companies' R&D centres. Many of them, however, file their patent submissions outside of India to expedite the process. Only 24936 patents were issued in India in 2019, which is a low number when compared to the 354430 granted in the United States and the 452804 given in China.[38]

VII. Budget 2022

The budget 2022 focuses on over-all growth of the India by especially pumping the niche sectors such as Start-ups, Digital markets and Infrastructure.

To make the vision of *"Aatmanirbhar Bharat"* successful, Budget 2022 plays an important role to carve a pathway for the growth of local manufactures and to be self-reliant.

As this paper focuses on the aspect of Intellectual Property Rights, I have highlighted the impact of Budget 2022 on the Intellectual Property Rights in India.

1. **Aatmanirbhar Bharat:** The goal of achieving "Self-reliance" has brought in fresh wave of invention and investment in India. Since the announcement of Special economic and comprehensive package of INR 20 lakh crores – equivalent to 10% of India's GDP – to fight COVID-19 pandemic in India, there has been a significant impact on the domestic manufacturers, traders, and innovators. As this campaign focuses on pumping MSMEs, Agriculture sectors and Infrastructure, IPR plays an important role in protecting the innovation and commercializing the same at a global market. If we fail to recognize IPR at this point of time India would end up losing all its innovations to the developed countries and continue depending upon the foreign countries in terms of technology and infrastructure.

2. **Tax rates:** Budget 2022 seeks to provide tax relief to the Start-up companies to motivate the innovators to establish their business in India. Thus, this would

37 Financial Express, https://www.financialexpress.com/opinion/need-to-fast-track-ipr-recognition/2427972/, (Last visited on 17th March, 2022, 6:23 PM).

38 WIPO, World Intellectual Property Indicators, 2020, 7, 31, 2020, https://www.wipo.int/edocs/pubdocs/en/wipo_pub_941_2020.pdf.

move towards growth in innovation and the recognition of Intellectual Property Rights be it to protect their innovation of products or services or to safeguard the domain name of their websites. Adding to this the changes made in custom duties and provision of certain exemptions to MSMEs clearly portrays a positive impact to for the manufacturers and innovators in India.

VIII. Conclusion

To conclude, to encourage innovation and business at a global level, it becomes crucial to understand the importance of IPR, which could be possible with strong awareness of IPR and a proper framework of laws and its implementation at the ground level.

India being a hub for business and talented manpower, Intellectual Property Rights would help the Indian economy to become one of the leading economies in the world. Thus, following are the suggestions which I believe must be implemented for the betterment of the current situation:

1. Increase in the allocation of funds for Research and Development on IPR.
2. Spreading of awareness about IPR and its importance in primary as well as secondary schools and also at a public level.
3. Provide incentives to MSMEs and Small Businesses and Start-ups in India which have the capabilities of innovation and commercialization.
4. India is known for its traditional and indigenous knowledge; therefore, the government should give impetus to safeguard such rights at a global level.
5. Improvement in the procedural aspect of IPR registrations.
6. Utility Model: It's also known as a 'petty patent,' a 'short-term patent,' or an 'incremental patent.' Utility Models are especially valuable for discoveries that are only marginally creative and for which patents are either unavailable or difficult to obtain. It does not require official registration and may be easily registered for a period of 10 to 15 years. This was also recommended to the Standing Committee on Commerce in Rajya Sabha (2021) saying that "introduction of a Utility Model rights regime may be explored in India to encourage the role of small-scale innovators, inventors and artisans for protecting their innovations as IP.

The Concept of Judicial Review as A Process – An Analytical Study

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Abstract

The power of the judiciary to scrutinize any act of the legislative or executive bodies is called judicial review. This feature forms part of the basic structure of the constitution and without a doubt gives life to the organic document. It is appropriate to refer to this feature as a check and balance mechanism thought of by the makers of the constitution. This article discusses the evolution and significance of the concept, also the understanding of judicial review in a system of parliamentary and constitutional supremacy respectively.

Keywords: *Judicial review, Parliamentary Supremacy, Constitutional Supremacy, Judiciary*

I. Introduction

Judicial Review can be understood as the power of the courts to review the legislative acts or executive action so as to check whether there has been any breach in the constitutional principles in such act or action. The judiciary itself is subject to review of its own decisions by the same court or higher court. The power of judicial review vests with the High Courts and the Supreme Court in India. It is that feature of the judiciary with which it performs the balancing exercise with respect to the other two branches of a legal system, namely the legislature and the executive. The importance of this feature could be understood if you think of a legal system where in its different branches keep doing their respective tasks and there is no authority to ensure that their functioning is not in abeyance of the constitutional principles. So, there is a need for a strict check and balance mechanism and this is where the relevance of judicial review comes in and in India the feature forms

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part of the basic structure of the constitution as well. The concept is perceived differently in civil legal systems and in common law systems. It was not even recognised till 1600s where in UK Lord Edward Coke, in the famous Bonham case[1], discussed the concept but this was not a formal recognition given to it. The British Empire always seemed to have embraced the system of Parliamentary supremacy but judicial review often came to light and gained significance in their legal thought and discussions. Therefore, it was from the UK that the US later formally upheld the process of judicial review in Marbury v Madison.[2] The decision in the Madison case is known as one of the master strokes by Chief Justice Marshall, who is one of America's greatest Chief Justices of all times. The significance of the process of judicial review in any legal system can be understood by looking into its origins particularly. This research paper aims to deal with the evolution of the concept through the different legal systems and it deals with the importance of judicial review as an essential tool for a democratic government to regulate the functions of the legislature and the executive. It goes on to explain the process as conceived by a system of Parliamentary supremacy (case of UK) and by a system of constitutional supremacy (as is the case of India). Also explains the process as perceived by the US as the concept is said to have originated there. In short, the paper discusses the scenario in UK, US and India.

II. Understanding the Concept

1. Evolution of Judicial Review

The seed of the concept is found to have grown in the British soil first. It was part of the British Legal system even in the times where they followed a monarchical form of government. India was then a British colony and our country has been upholding this principle since then. In ancient times, the king was the supreme authority and the powers of Legislative, Executive and Judiciary was exercised by him on the advice of a group of Nobles. The king and the Nobles together constituted the Royal Council (also known as Curia Regis). This system of Royal Council then splitted to operate as three separate branches – Legislative, Executive and Judiciary and these organs were to be functioning under the supervision of the King. The Royal Courts in this system practised the system of 'review'. This system gave way to the Courts of Common Law and the feature of judicial review was carried forward. In England, later, the system of Parliamentary supremacy prevailed over that of constitutional supremacy. The English judges were guided by the Blackstonian principle 'that the power of parliament is absolute and without control'.

1 Dr. Bonham v. Cambridge University, 638 Eng. Rep. 638, 646, (1610)

2 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

Nonetheless, the concept of judicial review has its origin strongly rooted in the British land. It was from the English legal system, America, Canada, and various African countries borrowed this concept. India, which was primarily a British colony, never gave up on the idea of 'review' by the judiciary.[3]

England and America having embraced the concept as part of their legal systems got this idea from Lord Edward Coke's famous decision in Dr. Bonham's case in the year 1610. Lord Coke explained the concept by reporting the Calvin's case whish was decided few years earlier. In the Calvin's case it was stated that the Moral law or the Law of Nature is the supreme law and no Parliament has the right to go beyond this Law of Nature. Sir Frederick Pollock, the eminent English legal historian, says, "The omnipotence of Parliament was not the orthodox theory of English law, if orthodox at all, even in Holt's time."[4] To this, Chief Justice Holt replied in 1694 in a case before him concerning jurisdiction of courts that the judges "adjudge things of as high a nature every day; for they construe and expound Acts of Parliament, and adjudge them to be void."[5] Despite these comments by legal luminaries, there is no good evidence to infer that the British courts have ever held any Parliament Act as void for not being at par with the 'Law of Nature'. Even then we can understand that it was Lord Coke that brought to light the concept of judicial review to mean that manmade laws should always be subject to a Higher Law and there has to be a proper check and balance mechanism to ensure the same.[6]

The Americans were greatly moved by Lord Coke's decision in the Bonham case. Article VI, Clause 2 of the US Constitution is called the 'supremacy clause' that upholds the supremacy of national law. This means that all acts or administrative action should be at par with the national law and the constitution. It was during the tenure of Chief Justice Marshall of the US Supreme Court, who served the Judiciary from 1801 to 1835, that the independence of judiciary and supremacy of national law was formally acknowledged. Although the concept of judicial review originated in UK, it was Justice Marshall who, in his famous decision Marbury v Madison[7], founded the practice of Judicial Review.[8]

3 Shyam Prakash Pandey, *Evolution and Development of the Concept of Judicial Review in India: An Evaluation*, 4(4) Asian Journal of Advances and Research, 25-38, 25, 2020.

4 Pollock, A Plea for Historical Interpretation (1923) 39 L. Q. REv. 165.

5 King v. Earl of Banbury, Skinner, 517, 526-7 (K. B. 1694).

6 Dudley OdelL Mcgovney, *The British Origin of Judicial Review of Legislation*, 93, University of Pennsylvania Law Review, 1-49, 1944

7 *Supra* 2

8 Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less*, 56, Washington & Lee Law Review 787 (1999), https://scholarlycommons.law.wlu.edu/wlulr/vol56/iss3/3

Alexander Bickel, a constitutional scholar believed that Marshall had done it all. "If any social process can be said to have been 'done' at a given time and by a given act; the time was 1803; the act was the decision in the case of Marbury v. Madison".[9]

Justice Marshall's Marbury vs. Madison was inspired by Hamilton's essay in the federal papers No. 78 in 'the Federalist' (1788).[10] He wrote: "whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution. The judiciary has no influence over either the sword or purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither Force nor Will but merely judgment".

The 'Due Process Clause', the 5th and 14th Amendments in the US Constitution, provided the scope to exercise the power of Judicial Review by the Supreme Court; however, the practice became an integral part of the US system post Justice Marshall's decision in Madison case.

In India, the practice of judicial review evolved gradually. The powers of the judges in the Supreme Court of Calcutta (est. by Charter of 1774) were similar to that of the Kings Bench in England. The principle is first said to have established in the case of Emperor v. Burrah.[11] Later it was not formally notified even in the Government of India Act of 1935 but in 1950 when the Constitution was framed; judicial review doctrine became a part of its various articles.[12]

2. Significance of Judicial Review

Countries like USA and India have adopted federal system of governments, i.e., there are two levels of Gov. - at the centre and state. The power of judicial review is one way of ensuring that the federal system is run effectively within the framework of the constitution. This power bestows upon the courts a right to watch over the legislature and executive. Although efficiently followed by America and India, England, France and Russia have not yet adopted the principle. It is pertinent to note that the adoption of a federal system

9 ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 1 (1962).

10 RACOLB LEGAL, http://racolblegal.com/judicial-review-in-indian-context-a-critical-analysis/, (last visited Nov. 02, 2021)

11 Emperor v. Burrah, 1877 (3) ILR 63 Cal.

12 *Supra* 3

of government by a country indicates that it has decided on overlooking the system of Parliamentary supremacy. It becomes essential that a powerful judiciary is put in place to run such a federal system in line with the Constitution and not a supreme Parliamentary body. Countries like Australia, Canada and India have embraced this feature of judicial review. "The power of judicial review is based on the idea that the constitution created a government of limited powers." This holds true for the American and Indian Constitutions.

It is imperative for any democracy to establish that its people would be protected. It is their trust in the legal system of their county that forms the foundation of any democratic rule. One can always argue that in a democracy, the people elect their government and the government is expected to serve its people and this setup is in itself sufficient for the smooth functioning of any legal system. This idea largely relies on the concept of majority rule. But can such rule be devoid of tyranny just because it was the choice of the majority. Well, the answer would be no. "With all my admiration and love for democracy, I am not prepared to accept the statement that the largest number of people is always right", says Pandit Jawaharlal Nehru, who is known for his constitutional experience. Hence there is a need for a sound judicial system with the power of judicial review so that the courts can act as the supreme arbiter of the constitution.[13]

Before looking into the importance of judicial review in the Indian legal system, it can be understood that the feature is essential for maintaining constitutional supremacy and for keeping a check on any misuse of power by the other two branches of the legal system. Independence of judiciary is protected through judicial review. It ensures that tyranny is eliminated when majority rule is in place.[14]

In India, the constitution is the law of the land and if any law passed goes against the basic structure of the constitution, the judiciary is vested with the power to hold that law as void. The term 'judicial review' finds no place in Indian Constitution but there are articles which support the process of judicial review like Art 13, 32, 336, 251,254,246 etc. In India, judicial review can be exercised at three levels, that is, to examine the actions of legislature, executive and the previous decisions of the judiciary itself. Legitimizing the actions of the government and protecting the constitution if the government tries to encroach it are two important functions of the judicial review. We can see that India is more in support of the

13 *Supra* 3

14 DRISHTI IAS, https://www.drishtiias.com/daily-updates/daily-news-analysis/judicial-review-1, (last visited Nov. 02,2021).

American understanding of judicial review than that of Britain.[15]

In the Indian Constitution, Article 13 states that any law that breaches any of the fundamental rights would be held void and unconstitutional. Art. 13(1) and (2) deals with pre-constitutional and post constitutional law respectively. This power of Judicial Review with respect to fundamental rights found formal expression in Art. 8 (2) and Art. 25 (1) & (2) in the draft Constitution, which later became the new Arts. 13 (2) and 32 (1) & (2), respectively. Dr B R Ambedkar had said that if he had to mention any one article as most important, it would be Art. 32. "It is the very soul of the Constitution and the very heart of it".[16]

III. Judicial Review: Parliamentary supremacy

To understand the concept of judicial of review in a legal system where the Parliament is supreme, let us take the case of UK. In the British legal system, no Act made by the Parliament can be reviewed by the courts. It is true that the origin of the concept can be traced from the Bonham case but later Chief Justice Holt in another renowned case made a remark that "An Act of Parliament can do no wrong, though it may do several things that look odd". However, with the formation of the European Court of Human Rights and the Human Rights Act, the scope of judicial review has widened and that it's available for secondary legislations. Primary legislations generally can't be subjected to review by the courts but in certain cases that too is allowed. An Act made by the Parliament is called as primary legislation and the rules, regulations etc. made by the executive is called as secondary legislation. It can be said that there are three pillars of the British legal system, namely, rule of law, parliamentary supremacy and separation of powers. According to this, judicial review of secondary or subordinate legislation is permitted and justified.[17]

According to Diceyan expression of Parliamentary sovereignty, the parliament can pass whatever law it chooses without seeing if that enactment goes against rule of law. Now, it is questionable whether the Parliament's enactment could be contrary to the rule of law. For this we should also see if at all the parliament should pass any such legislation, how is the judiciary to respond to the situation. The current understanding of the concept in the

15 LEGAL PEDIA, https://www.legalpedia.co.in/articlecontent/judicial-review-a-brief-analysis.html, (last visited Nov. 02, 2021)

16 Legal Services India.com http://www.legalservicesindia.com/article/1734/Judicial-Review-in-India-AndUSA.html (Last visited November 5, 2014, 2:17 AM)

17 Sargam Jain, *Judicial Review: A Comparative Analysis of India, USA & UK*, Vol 1 Issue 2 International Journal of Law Management and Humanities, 2018.

UK is a bit more flexible. The judiciary has seen to be availing their powers of statutory interpretation to disobey the Parliament's intention while holding that they are abiding by it.[18] It is mostly yet secondary legislations that are being judicially reviewed and given the case of primary legislations the same holds true only in some exceptional cases.

IV. Judicial Review: Constitutional Supremacy

To understand judicial review in a legal system that believes in Constitutional supremacy; let us take the case of US and India.

In simple terms, America takes their constitution as the supreme law of the land. And the feature of judicial review is implicit in Article III and IV though not expressly mentioned. So, the Judiciary has the power to review any Act passed by the Congress or action by the President. In 1803, it was in the historic Madison case that the principle was first laid down.

The idea behind the principle of judicial review may seem to be judicial supremacy but not purely so for separation of powers is an organic feature of the Constitution. No branch of government is supreme over the other. The concept of judicial review also stems from the popular notion that the judiciary is better equipped to watch over the executive and the legislature. The court is not just a counter majoritarian institution to support but also a mechanism to uphold the democratic impulse the country purports to uphold. Judicial review is not the sine qua non for any democracy. But In America the popular acceptance of the doctrine could be due to the nation's historical experience and the nature of their Constitution.[19]

"The decision on the question of constitutionality of a legislative Act is the essence of the judicial power under the Constitution of America" says Bernard Schwartz. There are three possible outcomes when a judicial review is done on any act. The Act is held unconstitutional in part or in full or is held to be constitutional. The purpose of judicial review in the US can be summarised as follows- to declare the laws unconstitutional or constitutional, to uphold constitutional supremacy, to save the legislative functions of the Congress, to prevent delegation essential legislative functions.[20]

18 Amy Street, *Judicial Review and the Rule of Law*, The Constitution Society, 2013.

19 Alvin B. Rubin, *Judicial Review in the United States*, Vol. 40 Louisiana Law Review, 1979, https://digitalcommons.law.lsu.edu/lalrev/vol40/iss1/6

20 *Supra* 17

In India, the constitution is similar to the American one than the British. For in Britain the system of parliamentary supremacy still finds place whereas in India the parliament is not supreme. "The doctrine of judicial review is thus firmly rooted in India, and has the explicit sanction of the constitution". says Dr. M.P.Jain. Art. 13, 32, 131-136, 143, 226, 145, 246, and 372. are specific provisions that support judicial review of legislations. The doctrine of judicial review is thus an integral feature of the Indian Constitution and has the explicit sanction of it. Article 13(2) says that "The state shall not make any law which takes away or abridges the rights conferred by this Part (Part III containing Fundamental Rights) and any law made in contravention of this clause shall, to the extent of the contravention, be void." Therefore, it could be said that the courts act as sentinel on the qui vive with regard to the Constitution. [21]

Under our Constitution, judicial review can be classified into three[22] :

1. Judicial review of Constitutional amendments -This has been under a series of cases including Shankari Prasad case[23], Sajjan Singh case[24], Golak Nath case[25], Kesavananda Bharati case[26], Minerva Mills case[27], Sanjeev Coke case[28] and Indira Gandhi case[29]. Any constitutional amendment should be at par with the basic structure of the constitution.

2. Judicial review of legislation of Parliament, State Legislatures and subordinate legislation -Judicial review with respect to legislative competence and violation of fundamental rights or any other Constitutional or legislative limitations;

3. Judicial review of administrative action of the Central or State Governments and authorities falling within the purview of State.

21 Judicial Review – India by Thaheera Fathima

22 Justice Syed Shah Mohammed Quadri, *Judicial Review of Administrative Action*, EBC India.com (Mar. 03, 2001), https://www.ebc-india.com/lawyer/articles/2001v6a1.htm

23 Shankari Prasad v. Union of India, AIR 1951 SC 458

24 Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845.

25 Golak Nath v. State of Punjab, AIR 1967 SC 1643.

26 Kesavananda Bharati v. Union of India, AIR 1973 SC 1461

27 Minerva Mills v. Union of India, AIR 1980 SC 1789

28 Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd., (1983) 1 SCC 147.

29 Indira Nehru Gandhi v. Raj Narain, 1975 Supp SCC 1.

V. Conclusion

The concept of judicial review as a process have been explained above on lines of two kinds of legal systems. One where the Parliament is supreme taking the case of UK and the other where the Constitution is supreme as in the case of USA and India. It can be understood that the main aim of the judiciary is to protect the rights of its people. In an efficient legal system, it is expected that its branches should function effectively and independently. And there is a need to watch over all the branches. The judiciary is to ensure that the legal system works smoothly and people's rights are always put on a higher pedestal than any other right. It could be said that the judiciary ensures that both individual as well as collective rights are protected and harmony is maintained in the state. A country that has strengthened its judiciary is one that has embraced the goal of ensuring freedom and liberty to its people. In UK, it was seen that the concept first took shape but later gave way to supremacy of the Parliament over the other two organs of the government. So, the judicial review subsists only in very limited sense. In US and India, the Constitution prescribes judicial review and is practised more widely than in the UK. Therefore, that one organ which acts as Guardian of the law of the land is the judiciary and judicial review becomes an essential component of a legal system that upholds federalist and democratic values.

THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION: THE NEED FOR INDIA TO STEP IT UP?

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Abstract

There is no denial that third-party funding is a huge risk investment. Yet, the funding companies have the opportunity to double, triple or even quadruple their invested money if the claim is won. That is the reason by which a third-party who has no interest in the dispute or is not related to the matter in any way, comes forward to invest by way of financial assistance in the conflict in exchange for having certain share in it. This third-party funder can be an investment company, or a bank, or a firm, or any individual or any other entity that comes forward with a view to provide monetary support. This kind of arrangement between a funder and a claimant is what is known as third-party funding. It has gained huge momentum in the international arbitration forum and specifically in international commercial transactions and their arbitration. As this phenomenon grows, India should also step forward in this arena by making legal norms in this regard. Since the international arbitration hasn't been in India's favour in recent years and the burden of monetary compensation falls directly on the government, it is essential for India to allow for third-party funding in international arbitration by bringing legal framework to deal with the same.

Keywords: *International arbitration, Third party funding, Investments, Arbitrators*

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I. Introduction

Engaging in litigation and alternative dispute settlements have become an expensive sport these days. Gone are the days when the dominating reason was the prevailing dispute and conflict, which still remains, though the added element is the monetary efficacy to engage in such matters. Now what remains is the good cause hindered with the fog of position to fight the issue. There comes the concept of third-party funding to the rescue. Third-party funding, though is a unique concept, yet it is not a new one. It has existed for some time in different forms. International arbitration, which is constantly becoming expensive with the passing days, it has become important for any nation to ensure security in case of befalling cost and expenses.

II. THIRD- PARTY FUNDING (TPF)

1. Meaning

Third-party funding is where a party, who is not involved in the dispute or is not a party to the dispute, helps fund the matter in return for some claim in it. It is an arrangement whereby an outsider aids in funding the issue. The purpose of funding the cost is to get in return certain monetary reward if and when the dispute is won or is successful.[1] The third-party funder becomes privy to the contours of the disputes and that is where the significant discussion arises. The funder usually has agreements set in place to provide funds in relation to in general legal fees, expenses and in other cases, going beyond to pay the cost of the opponents if an order comes through court or arbitration.[2]

As the significant feature of the third-party funding is that the funder has share in the dispute in exchange for providing fund, which can be larger than what is initially invested, benefitting the funder and the claimant as well. Along with that, a funder can be any investing company, a lawyer (though not applicable in India at present[3]), a company, a firm, a financial corporation, a bank or any other third-party[4] that is interested to lend to

1 Cyril Amarchand Mangaldas, Advocates & Solicitors, *Third-party Funding in India*, https://www.cyrilshroff.com/wp-content/uploads/2019/06/Third-Party-Funding-in-India.pdf (last visited Feb. 20, 2019).

2 Ashurst.com, *Third-party Funding in International Arbitration,* https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/, (last visited Jun. 15, 2022).

3 Bar Council of India, Appendix G, Part IV, Ch. II.

4 Mr Arnaud Bourgeois, *Third-party Funding*, Jus Mundi (Jun. 21, 2022), https://jusmundi.com/en/document/wiki/en-third-party-funding

the claimant in regard to that dispute.

But what becomes important to look at is that no third-party funder will go on investing their time and money in the claim on only looking at the parties. The third-party funder will carefully access the situation before making any kind of decision whether they want to fund the party or not. Therefore, it is clear that the third-party funder will invest in the matter only by looking at it through individualistic claim to form a decision. The decision by the third-party funder is made through series of discussions, analysis, examination, careful scrutinizing and other important elements attached to it. This is done by going through the documents, the private information to which only the parties are privy to like the agreement itself and essential other documents.

2. Significance

In the present times, the need for third-party funding has increased multi-fold. Before dealing the current pandemic situation (as it had put a crunch on economic and financial needs of individuals, companies, businesses and even nations), the need for the third-party funding in general has grown a great deal. The third-party funding has gained momentum in different areas of law like in litigation, in arbitration, in international arbitration, in mediation, in investment law, in maritime law, etc. This shows its diversity and adaptability to different areas of law. One of the major advantages that come in favour of third-party funding is that both arbitration and litigation has become expensive these days, that is the reason the need is felt for access to justice to the ones who are not able to get it.[5] The cost of approaching the international arbitration in the present scenario has become a very farfetched phenomenon since such a huge claim at an international level becomes very much impossible at the time when there is lack of investing in the same. In that scenario, the third-party funding in international arbitration comes to the rescue by providing and investing in the dispute.

As one looks at specifically to the forum of arbitration and more particularly international arbitration, it is a completely private affair and out of the court or alternative dispute resolution (ADR) mechanism which does not bind one to the strictness of the court or litigation matters.[6] That is the reason that a lighter view can be accessed in relation to third-

5 Portfolio Media Inc., *The Rise Of 3rd-Party Litigation Funding,* Law 360.com https://jenner.com/system/assets/publications/130/original/The_Rise_Of_3rd-Party_Litigation_ Funding.pdf?1312815913 (last visited on June 9th, 2021)

6 Lisa Bench Nieuwveld, Conway & Partners, *Third-party Funding – Maintenance and Champerty – Where is it Thriving?,* Kluwer Arbitration Blog http://arbitrationblog.kluwerarbitration. com/2011/11/07/third-party-funding-maintenance-and-champerty-where-is-it-thriving/ (Last visited Nov. 7, 2011)

party funding in international arbitration. Since one understands the concept of international arbitration itself, there is definitely a dire requirement for the possibility of pursuing the claim[7] which seems a vague possibility for certain business due to monetary and financial issues. Furthermore, the major point of access to justice is to ensure that there is fairness maintained[8] in the adjudication of disputes, if the parties do not get the support to represent their matters, it leads to unfairness. Thus, access to arbitration with equal opportunity to everyone is an essential ingredient of the mechanism.

III. International Presence

1. Singapore

Singapore is considered as the international arbitration hub; thus, it comes as no surprise that third-party funding will have its market and share over there. Third-party funding in international arbitration was given wings in July 2017 where international funders saw a huge presence in Singapore.[9]

The major legal reform was in the form of amendment in the Civil Law Act of the Singapore and the Civil Law (Third-Party Funding) Regulations, 2017[10] that has aided in the third-party funding making it enforceable for certain funding agreements which are now permitted as per the law. Under the law which is Section 5A of the Civil Law Act whereby the third-party funding is now available to the parties to the dispute in regard to the prescribed dispute resolution proceedings which are international proceedings.[11]

Furthermore, the amendment is brought in the Legal Professional Act and Legal Profession (Professional Conduct) Rules, 2015 in which there is a requirement to disclose third-party funding along with the prohibition of lawyers and law firms to have interest in the funders or to receive funds or proceeds from funders.[12] These amendments are of significance and huge importance as it helps in identifying the actual working of the regulatory mechanism

7 Dr. Geoges Affaki, *A financing is a financing is a financing*, https://www.affaki.fr/wp-content/uploads/2021/11/pdf-A-Financing-is-a-financing-Dossier-Institut-ICC-Georges-Affaki.pdf

8 Rogers and Catherine A., *Gamblers, Loan Sharks & Third-Party Funders - Ethics in International Arbitration*, Penn State Law Legal Studies Research Paper Series (2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345962

9 KC. Vijayan, *First third-party funding in S'pore arbitration case*, The Straits Times (Jul. 1, 2017)

10 Olivia De Patoul, *The Third-party Litigation Funding Law Review: Singapore*, The Law Reviews (Jan. 10, 2021), https://thelawreviews.co.uk/title/the-third-party-litigation-funding-law-review/singapore

11 The International Arbitration Act, 1994, S. 5.

12 Legal Profession (Professional Conduct) Rules 2015, Rule 49B.

and machinery in relation to the third-party funding in the international arbitration. This cannot be denied that there is, in fact, many issues revolving around the interest of the lawyers as the funders.

2. Hong-Kong

In Hong Kong, it is necessary to start with Hong Kong Code of Practice for Third-party Funding in Arbitration which is effective from 1st February, 2019. This Code of Practice for Third-party Funding came in force from February, 2019 in Hong Kong. When a third-party is a part of the dispute which it has no interest in, a conflict might arise. Thus, in that case, these codes clearly set out that a written agreement needs to be there between the party and the funder.

Since the doctrines of champerty and maintenance are no longer applicable in cases of arbitration proceedings[13], it gives a wider scope of third-party funding in that area of international arbitration. The passing of the Arbitration and Mediation Legislation (Third-party Funding) (Amendment) Ordinance in 2017 is of importance, where some parts will come in force by June 23rd, 2017 while others will come by February 1st, 2019.[14] The Part 10 A of the Ordinance deals specifically with third-party funding in arbitration proceedings. The rules are clearly prescribed so that no deviation and ill-will occurs from either side, for example that the funding agreement should be in writing and clearly stating the third-party funding who has no interest in the matter except to fund the dispute[15] and other essential requirements.

3. ICC Rules, 2021

The International Chamber of Commerce came up with new rules 2021 which brought significant changes in the third-party funding arrangement in the international arbitration. Through its Rule 11 of the ICC Rules, it seeks to ensure transparency by requiring that the party must disclose if there is a third-party funding in the dispute and the identity of the third-party funder as well. This will ensure transparency and will avoid any kind of conflict of interests that are bound to arise at different stages of the arbitration. The new

13 Sapna Jhangiani and Rupert Coldwell, *Third-Party Funding for International Arbitration in Singapore and Hong Kong – A Race to the Top*, Kluwer Arbitration Blog (Nov. 30, 201), http://kluwerarbitrationblog.com/2016/11/30/third-party-funding-for-internationalarbitration-in-singapore-and-hong-kong-a-race-to-the-top/

14 Jun, Jung Won., *Third-Party Funding of Arbitration: Focusing on Recent Legislations in Hong Kong and Singapore,* 30 (3) Journal of Arbitration Studies, 137-167, (2020), https://www.koreascience.or.kr/article/JAKO202027265524042.pdf

15 Arbitration and Mediation Legislation (Third-party Funding) (Amendment) Ordinance, 2017, S. 98 J.

Rules of the ICC talks about the outcome of the arbitration whereby any non-party that has an economic interest in the dispute or the claims has to disclose the identity if they have entered into such an arrangement of funding the claims and defences.

4. IBA Guidelines – Changes Brought

The IBA Guidelines on the Conflict of Interest in International Arbitration were released in 2014 which mentions and regulates the third-party funding through its provisions. It ensures that there does not arise any conflict of interest by employing the Standard or Guideline 6 along with the Explanation to General Standard 6 of the IBA Guidelines.[16] This is a necessary amend in the already established guidelines which were operative as it brought within its new purviews. The repeat arbitrators have to be disclosed because what cannot be denied is that there is definitely regulation by the third-party funding, though not through formal sense but as a part of being interested in the dispute. The disclosure by the arbitrators needs to be made in connection to the third-party funder, if it exists, so as to remove any doubt that might arise as to the impartiality of the arbitrator along with to conduct smooth functioning of the arbitration proceedings.

Portion 2[17] and 3[18] of the guidelines discusses specifically the conflict of interest and disclosure requirements respectively. It talks about the fact that the arbitrator should decline if there is a conflict with or a doubt that whether impartiality and independence will be maintained or he can even refuse to act as an arbitrator if discovered at a later stage. It is further clarified that these doubts can be related to the third-party who has knowledge of the facts and circumstances of the matter and has the power to influence in the factors of the case and the merits of the dispute as well.[19] Thus, such a step should be taken by the arbitrator himself if such a situation presents itself.

5. ICSID Proposed Amendments

The first Working Paper came in 2018 by the ICSID that contained the proposed amendments

16 IBA Guidelines on Conflicts of Interests in International Arbitration, Part I (General Standards Regarding Impartiality, Independence and Disclosure), Explanation to General Standard 6 (a) and (b).

17 IBA Guidelines on Conflicts of Interests in International Arbitration, Part I (General Standards Regarding Impartiality, Independence and Disclosure), Guideline 2 (Conflicts of Interest) and Explanation to General Standard 2.

18 IBA Guidelines on Conflicts of Interests in International Arbitration, Part I (General Standards Regarding Impartiality, Independence and Disclosure), Guideline 3 (Disclosures) and Explanation to General Standard 3.

19 IBA Guidelines on Conflicts of Interests in International Arbitration, Part I (General Standards Regarding Impartiality, Independence and Disclosure), Guideline 2 (c).

related to the third-party funding and the requirement to disclose if there is any kind of engagement of the third-party as well the name of the third-party who is funding such an arrangement. Furthermore, the next Working Paper on the Proposed Amendments emerged in 2019 that highlighted the similar concept of disclosure but with a concise and more elaborative meaning and definition contained in it.

In 2020, the major working paper came of the proposed amendments in the form of Working Paper 4.[20] Under its Chapter II, through its Rule 14 of the Arbitration Rules of the Working Paper 4, it deems to talk about the 'notice of third-party funding'. The disclosure is to be made by a written notice with the name and address of the non-party from which the party has directly or indirectly received funds, or in the pursuit of receiving funds or if a defence is to get the expenses through a donation, grant or "in return for remuneration" which is dependent on the outcome of the proceedings which is also called as the third-party funding.[21] Thus, what is significant is that the disclosure is to be made in regard to the involvement of the third-party funding and it has become a mandatory requirement by giving notice of the same under these rules.

6. Certain International Decisions and Pronouncements

Decisions and pronouncements by different bodies are important to analyse the position taken by them in relation to such a third-party funding arrangement in the international arena as well as in the arbitration arena. Firstly, in the important pronouncement of made in the dispute of *Oxus Gold PLC V. Republic of Uzbekistan*[22], decided on 17th December, 2015 where there was involvement of UNCITRAL Rules of Arbitration applicable between UK and Uzbekistan BIT. In the present case, the complainant was assisted by a third-party funder in the arbitration proceedings. The court relied on the fact that the voluntary disclosures by the parties regarding the funding agreements between the third parties[23] and themselves should become a norm so that complexities does not arise at a later stage when dealing internationally like in present case through BITs. Thus, even at the stage of proceeding in regard to the bilateral investment treaties, the favour still goes in the part of disclosing that there exists third-party funding the arrangement.

20 International Centre for Settlement of Investment Disputes (ICSID) World Bank Group, *Proposals for Amendment of the ICSID Rules*, Volume 1 International Centre for Settlement of Investments Disputes (Feb. 2020), https://icsid.worldbank.org/sites/default/files/documents/WP_4_Vol_1_En.pdf

21 International Centre for Settlement of Investment Disputes (ICSID), World Bank Group, *Proposals for Amendment of the ICSID Rules*, Volume 1 International Centre for Settlement of Investments Disputes (Feb. 2020).

22 Oxus Gold PLC v. Uzbekistan, IIC 779 (2015).

23 *Ibid*.

In another significant case of South *American Silver Ltd. (Bermuda) v. The Plurinational State of Bolivia*[24], the issue involved was related to international investment. There was British investor whose identity was to be disclosed compulsorily by the parties as said by the Tribunal.[25] Furthermore, the award which was rendered involved sunk cost to the funder or the investor. Thus, the Arbitral Tribunal can also order for the disclosure of the involvement of the third-party funder at any stage in the proceedings.

In another case of *RSM Production Corp. v. Saint Lucia*[26], the ICSID looked at the fact of the security of the cost and the third-party funding whereby it said that the third-party funding alone was not the basis for its decision. Rather, the tribunal was also convinced to order security because of the fact that the claimant's proven history of non-payments in prior ICSD cases and it's simultaneously admitted lack of any other financial resources also proved as an essential factor for allocation of the cost. So, in this particular case as well, the identity of the third-party funding was disclosed.

IV. Steps Taken for Third-Party Funding in India

India has made developments over the years paving way for many crucial decisions and policy reforms and changes which has helped in shaping the country's legal system and defining it as a progressive and developing system. More than that the positive development in the field of arbitration is commendable of India whereby India is stepping in the arena of becoming the international arbitration hub in regard to commercial and trans-national disputes. As a result, it is necessary that India takes necessary and crucial steps in recognizing the need of the third-party funding and its growing demand in the international arbitration sector with providing for a regulatory framework as well as mechanism for the claimants as well as the funders to approach this new sector and market at an international level.

1. Legal Position

Before moving ahead, it is necessary to examine the position of India with respect to the third-party funding and its application, principles and approach that is adopted in the present times along with different judicial opinions or pronouncements on the matter. Firstly, the Code of Civil Procedure, 1908 (CPC) though does not regulate or provide for

24 South American Silver Ltd. (Bermuda) v. The Plurinational State of Bolivia, UNCITRAL PCA Case No. 2013-15, Procedural Order No. 10, https://perma.cc/G97S-HV6L

25 *Ibid.*

26 RSM Production Corp. v. Saint Lucia, ICSID Case No ARB/12/10, https://perma.cc/K8QB-LWDB.

third-party funding but there have been state amendments in the states of Maharashtra, Madhya Pradesh, Karnataka, and Gujarat whereby they have expressly made amendments in regard to the funder or a financier giving the litigation cost to the plaintiff and where the funder can act as a party to the proceedings through Order XXV. In addition, a report of High-Level Committee to review the Institutionalisation of Arbitration Mechanism in India[27] has come up which had recommendations for changes and inclusions in arbitration as well in this regard.

2. Views of the Court through various Pronouncements

A very important judgement came from the Supreme Court of India in 2015 in the case of *Bar Council of India v. AK Balaji*.[28] In this case the court held that the concept of third-party funding in India is permissible in legal terms and there appears no apparent restriction in regard to the conduction of such practice in the litigation where the amount is dependent on the outcome of the litigation. But the court clarified that the third-party funder needs to be a non-lawyer. Thus, this is an important information and judgement in regard to the third-party funding and its growing importance in India.

Going back in the case of *Ram Coondoo v. Chunder Cando Mookerjee*[29], it was said that the principle of champerty in India is not prohibited completely and can be used in restricted sense and circumstances. Furthermore, in a very important case of In *Re Mr. G, A Senior Advocate*[30], the court held that where there is no involvement of lawyers in such transactions, then it does not go against the public policy.

Thus, these judgements are significant in highlighting that the third-party funding was never exclusively, absolutely or completely barred in India and its position and aid can be taken for the same. The development of the same in domestic litigation in India is less only because there is in place a legal aid mechanism, a concept which is enshrined in the Constitution itself, and also the pro bono cases and matters taken up by different lawyers, companies, firms, etc. But it cannot be ignored that in international arbitration no such mechanism exists and thus, it can definitely be employed and worked in that arena. Furthermore, the cost arbitration is at a very high increase which the apex court has itself

27 Department of Legal Affairs, Report of The High-Level Committee to Review the Institutionalisation of Arbitration Mechanism In India (Jul. 30, 2017), http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf.

28 Bar Council of India v. AK Balaji, (2015) 5 SCC 379.

29 Ram Coondoo v. Chunder Cando Mookerjee, 1876 SCC Online PC 19.

30 In Re Mr. G, A Senior Advocate, (1958) 1 SCR 490.

observed in a case[31] and to make sure that such a mechanism prevails, the engagement of a third-party funder ensuring the cost in international arbitration is of paramount significance.

In another very important case A Division Bench of the Kerala High Court in *Damodar Kilikar and ors. v. Oosman Abdul Gani*[32], the issue was related to the champerty agreements in the country. The court highlighted that the agreements are not illegal only if no advocates are involved. This judgement is significant and clearly shows the preference towards the third-party funding in India as well as what it shows is that even the concepts of maintenance and champerty are not prohibited in India but only in regard to the portion that the advocates and law firms cannot be involved.

So, what is analysed in this regard is that the third-party funding does creates the issues in regard to the public policy of a particular state as well. Moreover, in India the lawyers or advocates cannot ask for fees which are contingent on the outcome of the dispute since that goes against the basic principle of the duty of an advocate which is clearly mentioned is towards the court, the client and the society. But more than that, it is prohibited in the stricter sense that there cannot be any kind of financial aim on the dispute to the advocate is himself interested in.

V. Conclusion

The discussion is a bit more segregated and particular in its approach by looking at different elements, international instruments, amendments, changes, implications, explicit and implicit matter, decisions, holdings, etc. taken in regard to specifically third-party funding in the international arbitration to understand how much has it been developed, changed, is accepted, and succeeded in the international arbitration arena. The third-party funding is international arbitration is clearly developing at a faster pace.

In regard to India, what is clearly established is that there is bar on the advocates or attorneys funding the claim of the dispute because the basic intrinsic purpose of the third-party funding is that there is an investment which is risky in nature and depends on the result of the dispute. But the advocate cannot charge as such. So, the concept of third-party funding is as has been said allowed in India with many states having made specific amendments in regard to it in the statutes.

It is true that the concept of third-party funding will grow in India since the cost of

31 Union of India v. M/s. Singh Builders Syndicate (2009) 4 SCC 523.

32 Damodar Kilikar and ors v. Oosman Abdul Gani, Appeal Suits No 171 of 1956, 176.

international arbitration is very much increasing and to fund the essential claims, it is necessary to take help from third-party funding in the international arbitration. To formulate a legal enactment, amendment or provision to tackle with third-party funding in international arbitration in India is crucial with the first step being its acceptance in direct and legal terms; secondly, defining third-party funding; thirdly, putting the disclosure requirement for arbitrators and parties; fourthly, allowing for arbitration agreements or clauses with third-party funding clauses; and lastly, ensuring independence and impartiality of arbitrators. Thus, in the end, it can be concluded that third-party funding will lead to better access to justice in India with specific regard to international arbitration and thereby, rules and regulations should be adequately brought to deal with the changing legal scenario.

EXPLICATION ON THE CONCEPT OF CROWDFUNDING IN THE INDIAN LEGAL SYSTEM

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Abstract

For new businesses, raising the capital has always been a herculean task. They mostly rely on venture capital, loans, self-financing etc. for initial funding. Crowdfunding is the other mechanism apart from these; although less discussed in India. The article delves deep regarding the concept of crowdfunding. In this research we will discuss crowdfunding, its various forms particularly the reward-based, donation-based, equity-based and debt-based crowdfunding. Moreover, the process of crowdfunding has also been explained in this work. In India, as such there are not sufficient laws to regulate crowdfunding and therefore the author is primarily relying on the consultation papers of Securities and Exchange Board of India ['SEBI'] and Reserve Bank of India ['RBI']. Further, a reading of these consultation papers would indicate that there is no clarity as to who has the authority to issue directions in case of crowdfunding, as there is an overlapping of jurisdictions between the RBI and the SEBI. In this research, the various obligations that SEBI has imposed on the issuers of the securities as well as on the platform owners have also been discussed. This specifically consists of the disclosure requirement on the part of entrepreneurs. The qualifications for an investor to take part in the crowdfunding process have also been elaborated upon. This is followed by the analysis of the recommendations made by SEBI. The paper follows a multi-disciplinary approach referring to the relationship of crowdfunding with elections, Intellectual Property regime. The section of analysis is followed by the suggestion where the author has suggested for the introduction

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of Sharia Crowdfunding in India with a suitable reason for such a suggestion. To sum up the discussion, a suitable conclusion has been provided by the author at the end.

Keywords: *Crowdfunding, Securities and Exchange Board of India, Islamic Finance, Reserve Bank of India, Shariah Crowdfunding.*

I. Introduction

Business is the art of extracting money from another man's pocket without resorting to viole –

Max Amsterdam

India is becoming one of the major destinations of upcoming startups.[1] It has joined the league of countries like the United States, China etc. who have a plethora of successful startups.[2] This is evident from the number of entrepreneurs along with the diversity of ideas they are pitching on platforms like 'Shark Tank'.[3] The success of the business depends upon its ability to get money from others. But before that, to even start a business, money as capital is indispensable. How well a businessman can convince the investors to invest their money in his project is really crucial. However, with the increasing competition, it is getting really difficult to raise money to set up a business. The situation of entrepreneurs from humble backgrounds is even more precarious. Nonetheless, the rapid advancement in technology and raising awareness on microfinance has brought a sigh of relief for these people. Today, crowdfunding has become one of the most familiar ways of raising finance with the entrepreneurs having limited sources of raising capital. The concept of crowdfunding assumed significance after the 2008 economic depression,[4] thereby leading to the implementation of Basel norms resulting in restraints on the banks giving loans.[5] Due

1 Surendra Singh, *India has 50k-plus startups providing 2L jobs, country emerging as world's preferred startup destination: Minister*, The Times Of India, Feb 20, 2022, 08:11AM, https://timesofindia.indiatimes.com/india/india-has-50k-plus-startups-providing-2l-jobs-country-emerging-as-worlds-preferred-startup-destination-minister/articleshow/89695900.cms

2 John Sarkar, *India becomes third largest startup ecosystem in the world*, Sep 3, 2021, 10:31AM, https://timesofindia.indiatimes.com/business/india-business/india-becomes-third-largest-startup-ecosystem-in-the-world/articleshow/85871428.cms

3 *EMPOWERING INDIA'S STARTUP CULTURE: MEET THE SHARKS*, ENSPIRE, https://www.bloomboxkjsc e.com/media/pdfs/enspire-march-22.pdf.

4 The World Bank, *Crowdfunding's Potential for the Developing World*, 2013/01/01 AM, https://documents1.worldbank.org/curated/en/409841468327411701/pdf/840000WP0Box380crowdfunding0study00.pdf.

5 James J Williamson, *the jobs act and middle-income investors: why it doesn't go far enough,* Vol. 122 No. 7, The Yale Law Journal

to this the businesses, especially the new startups started facing difficulty in getting finance because they had very limited resources to back the loans they required. This led to the emergence of crowdfunding as an alternative source of funding across the world.

II. Crowdfunding

Crowdfunding is the collection of funds from multiple investors through a web-based platform or a social networking site for a specific project, business venture or a social cause.[6] In the process of crowdfunding, generally there are three parties involved i.e., the investor, the entrepreneur and the platform owner.[7] The entrepreneur comes up with the business idea for which he requires the funding. He collaborates with the platform owner which does the screening of the idea and makes all the arrangements. The campaigning is done for the idea in order to make the people aware of the business venture. The people invest their money in the project and the platform owner collects the money on behalf of the entrepreneur. After deducting his fees, the platform owner transfers the funds to the entrepreneurs. The profits made by the entrepreneur by using those funds are then divided among the general public which had initially invested.[8]

III. Types of Crowdfunding

In normal parlance, there are four types of crowdfunding which exist i.e., the reward-based crowdfunding, donation-based crowdfunding, equity-based crowdfunding and debt-based crowdfunding.[9] Donation based and reward-based crowdfunding are not very complex in nature, hence allowed in most of the countries. But the problem arises in the case of equity and debt-based crowdfunding which are convoluted and lie within the ambit of more than one regulatory authority.

1. Reward based Crowdfunding-

In reward-based crowdfunding, a tangible reward is given in return of the investment made by the investors. The reward can be some present or future tangible consideration.

6 Mario D' Ambrosio, *Crowdfunding and Venture Capital: Substitutes and Complements?* Vol. 20 No.1. The Journal of Private Equity,

7 Eric R. Smith, *Keeping current: crowdfunding: the real thing is almost here*, Vol. 1, No. 1, Business Law Today

8 SEBI, *Consultation paper on crowdfunding in India, Jan 7, 2014, https://www.sebi.gov.in/sebi_data/attachdocs/1389083605384.pdf*

9 *Id.*

2. Donation based Crowdfunding-

The donation-based crowdfunding is the sort of charity where the public or the donor donates the money without expecting anything in return.[10] Section 80-G of Income Tax Act governs the donation-based crowdfunding, where the donor gets exemptions from tax deductions. The only catch here is that it does not provide any exemption, if the amount of ₹ 2000 or more is donated in cash.[11] Apart from this, Section 66-A of Information Technology Act used to regulate this crowdfunding model, where the parties involved in the transaction were barred from making any kind of misrepresentation or fraudulent commitments.[12] But now this provision has no applicability, as it has been struck down by the judiciary.[13]

3. Debt based Crowdfunding-

The debt-based crowdfunding is about raising unsecured loans through an online platform where the lenders meet the buyers. The debt-based crowdfunding as of now is not regulated by any law in India. Recently, RBI has launched a consultation paper which is the only authority providing directions on it.[14] RBI has assumed the role of regulatory authority for peer-to-peer lending due to the fact that Section 45S of RBI Act[15] prohibits any acceptance of deposits by a firm or a firm or an unincorporated association of individuals, if the business they are doing falls within the functions of a financial institution under Section 45-I.[16] The function of accepting the deposits from the lenders and providing it to the borrowers indicates towards the activities of a financial institution.[17] RBI is in favor of bringing the platforms under the definition of NBFCs under Section 45 I(f)(iii), thereby making regulations under Section 45JA and 45L.

4. Equity based Crowdfunding-

10 Karina Sigar, *Fret no more: inapplicability of crowdfunding concerns in the internet age and the jobs act's safeguards,* Vol. 64, No. 2. Administrative Law Review,

11 Income Tax Act, 1961, No. 43 of 1961, Acts of Parliament, §80-G (India).

12 The Information Technology Act, 2000, No. 21 of 2000, Acts of Parliament, §66-A (India).

13 Shreya Singh v. Union of India, (2015) 5 SCC 1 (India).

14 RBI,*Consultation paper on peer to peer lending*, April 2016, https://rbidocs.rbi.org.in/rdocs/content/pdfs/CPERR280416.pdf

15 RBI Act, 1934, No. 2 of 1934, Acts of Parliament, §45 (India).

16 *supra* note 8.

17 *Id.*

In equity-based crowdfunding, equity shares of the company are issued in return of the amount invested by the investors.[18] With regards to the equity-based crowdfunding, there is no law in place in India to regulate it apart from a consultation paper of SEBI. This form of crowdfunding is technical because of the fact that it incidentally falls under the purview of Companies Act, 2013, SEBI (Securities Contract Regulations Act), 1956.

IV. Relevant Rules of Consultation Paper of Sebi

The private companies raise their funds through private placement.[19] The rules maintain that private placement of securities cannot be made more than to 200 persons in a financial year excluding the qualified institutional buyers and employees of the company, offered the securities under the scheme of employees stock option.[20] At the same time, the law is clear that if any condition of the private placement is violated the same shall be deemed to be a public offer.[21] But the companies under the garb of raising funds through crowdfunding were actually exceeding this numerical threshold of 200. Therefore, SEBI came up with the proposal to put a limit of 200 on this. Further, SEBI realized that in absence of Initial Public Offer (IPO), there is a need to protect the retail investors who have limited access to the information pertaining to the company. Therefore, SEBI has proposed that only the Accredited Investors should be allowed to participate in crowdfunding. For this purpose, SEBI has provided certain qualifications of an accredited investor including qualified institutional buyers (QIBs) as defined in relevant SEBI regulations,[22] companies incorporated under the Companies Act with a minimum net worth of ₹ 20 Crore, high net worth individuals (HNIs) with a minimum net worth ₹ 2 Crores or more, Eligible Retail Investors (ERIs) who receive investment advice from an Investment Adviser, or who avail services of a Portfolio manager etc.[23] The SEBI has also proposed that a QIB shall hold a minimum of 5% securities issued, whereas a company is required to purchase at least 4 times of the minimum of the offer value per person, HNI is required to purchase at least 3 times the minimum offer value per person, ERI is required to purchase at least the minimum offer value per person where the maximum investment by an ERI in an issue shall

18 G. Usha, *Crowd funding for startups in India*, IOSR Journal of Business and Management.

19 Companies Act, 2013, No. 18 of 2013, Acts of Parliament, §23 (India) [hereinafter Companies Act, 2013]

20 Securities and Exchange Board of India Share Capital and Debenture Companies (Prospectus and Allotment of Securities) Rules, 2014, Gazette of India, pt. II sec. 3, (April 1, 2014).

21 Companies Act, 2013, *supra* note 14, §42.

22 Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009, Gazette of India, pt. III sec. 4, §2(zd), (August 26, 2009).

23 *supra* note 8.

not exceed ₹ 60,000.[24] At the same time, the SEBI has also suggested that only companies with certain specifications should be allowed to go for crowdfunding. These specifications include a company intending to raise a capital not exceeding ₹ 10 Crores in a period of 12 months, a company not sponsored by any company having the turnover more than ₹ 25 crores, a company which is not listed on any stock exchange and is not more than 48 months old etc.[25]

V. Disclosure Requirements on Issuer

The SEBI has advocated for the disclosure by the issuers in order to maintain the transparency. For this, the issuers are expected to submit a private placement offer letter to the crowdfunding portal which will contain the particulars like name of the company with the registered office address, description of the valuation of the securities offered, the specified target offering amount and the intended usage of the funds, past history of funding, ownership details and capital structure, rights and liabilities attaching to the securities etc. At the same time, SEBI has also stressed upon the fact that the crowdfunding platforms also play a vital role in the whole process and therefore, there is a need for prescribing the essentialities of a crowdfunding platform as well. For this, SEBI has suggested that an entity has to be recognized as a crowdfunding platform before making any online offering. It is for this purpose that the SEBI has allowed the recognized stock exchanges with a nationwide terminal presence or through SEBI registered depositories to function as a crowdfunding platform. While the other class of entities which SEBI has recommended consists of those having relevant experience and domain knowledge. The technology business incubators promoted by the central or state government having a minimum experience of 5 years with a minimum net worth of ₹ 10 crore etc. are the requirements of an entity falling under this category. SEBI has also imposed certain obligations on the platforms to prevent any kind of fraudulent and deception in the whole process of crowdfunding. This includes conducting due diligence of the startup, checking the background to ensure whole time directors, promoters, shareholders holding more than 20% of equity shares in the company, completing the KYC formalities, keeping a record of all the issues by the companies and the disclosure at a later stage etc.[26] SEBI has also proposed a 'screening committee' which will be a filtering mechanism in the platforms. These screening committees are required to have a minimum strength of 10 persons, with a minimum 40% comprising of the professionals having expertise in startups, at least 30% composing of banking experts and the remaining

24 *Id.*

25 *Id.*

26 *supra* note 8.

can be persons of huge caliber which are the nominees of the owner of the crowdfunding portal.[27]

VI. Procedure of Raising Funds Through Crowdfunding

An entrepreneur interested in raising funds has to fulfil the disclosure requirements as mentioned above. He is also required to submit the relevant documents to get them displayed on the platform. Meanwhile, the crowdfunding platforms do the necessary KYC formalities and other ancillary documentation like signing of risk acknowledgment, net worth etc. The accredited investors are offered a login id and password to access the platform; which is followed by the screening committee doing screening of companies before calling for investments. The segment of open discussion between the accredited investor and the issuer in a boardroom plays an important role in taking an informed decision by prospective investors. At the end, it is upon the investors to invest in the company or not.

In the next stage, the private placement offer letter is provided to the investors in compliance with Section 42.[28] If the investors decide to invest the amount, the collected amount is kept in a separate account. The issue shall be kept open for a period of 15 days, where the minimum subscription has to be met. This minimum subscription is required to be mentioned in the offer letter. It is pertinent to point out here that this subscription can never be less than 50%. The securities are required to be allotted to the investors within 15 days, if subscription is more than this aforementioned limit. In case of failure, money is to be returned by the company within the next 15 days, otherwise an interest at the rate of 12% per annum is charged on the same.

SEBI has also deliberated upon the fact whether these platforms can act as a secondary trading market. As per the consultation paper, there cannot be any secondary market in case of crowdfunding platforms otherwise it would be treated as a stock exchange. But still the investors can transfer the securities to the issuers of the securities or to other accredited investors, or to a family member of an accredited investor. At the same time, an investor may also get an exit when there is a sale of the company or a management buyout or issuance of IPO or the company gets listed on a recognized stock exchange.

27 *Id.*

28 Companies Act, 2013, *supra* note 14, §42.

VII. Analysis

1. Crowdfunding Platform: A Stock Exchange?

Stock Exchange is referred as[29]-

a) *a body of individuals, whether incorporated or not, constituted before corporatization and demutualization under sections 4A and 4B, or*

b) *a body corporate incorporated under the Companies Act, 1956 whether under a scheme of corporatization and demutualization or otherwise,*

for the purpose of assisting, regulating or controlling the business of buying, selling or dealing in the securities. In its consultation paper, SEBI was in favor of regulating the crowdfunding platforms, specifically in case of equity-based crowdfunding as there is actual exchange of securities of taking place.[30] However, when SEBI pondered upon the question of considering platforms as a secondary exchange market, it dropped the idea as it was not a stock exchange.

SEBI has the power to administer in the case of listed public companies and in the case of those public companies which intend to get their securities listed on a recognized stock exchange in India.[31] In the present case, the question arises as to how SEBI can regulate the affairs of crowdfunding platforms, if they are not stock exchanges in the humble opinion of SEBI. This is a moot question which still requires an answer.

2. Is Consultation Paper Binding?

The entire discussion in this research is based upon the consultation paper of SEBI. SEBI has proposed a variety of guidelines in its consultation paper. But now the question arises as to whether that consultation paper is binding? A consultation paper as the name suggests is a mere document put in the public domain for academic discussions.[32] Therefore, these guidelines proposed are merely some discussion points which are not even final. Also, this consultation paper was introduced by SEBI in 2014 but till now there are no proper laws and guidelines introduced by the Parliament or SEBI. This has created a puzzling situation as there is confusion among the players of the crowdfunding market whether to follow it

29 Securities Contracts (Regulation) Act, 1956

30 *supra* note 8.

31 Sahara India Real Estate Corporation Limited & Ors. v. SEBI, (Civil Appeal No. 9813 and 9833 of 2011).

32 Law Commission of India, *Consultation paper on Sedition*, 30 Aug 2018, https://lawcommissionofindia.nic.in/reports/CP-on-Sedition.pdf

or not.

3. 'Politics in Crowdfunding' And 'Crowdfunding in Politics'

There was a time, when the political parties and the candidates contesting the elections used to approach the corporate houses for the donations to contest the elections. The easy access you have to these companies, the more there will be chances for your success. But now, it appears that the situations have changed. With the advancement in technology, candidates are looking for alternative sources of funding for the elections which are cheap and easy to access. Crowdfunding seems to suit this requirement of the candidates. It is cheap as not much cost is involved and because there is an involvement of people at large, the funds can be raised comfortably. In the Karnataka assembly elections, the candidates resorted to crowdfunding, specifically donation-based crowdfunding for raising the amounts.[33] But what if the debt-based crowdfunding and equity-based crowdfunding takes the place of donation-based crowdfunding. As discussed above, SEBI and RBI have imposed certain disclosure obligations on the entrepreneurs and the platform owners in case of debt and equity-based crowdfunding. However, by virtue of the Representation of People Act, the political parties are exempted from disclosing the details of the amount they have received.[34] As such this problem has not arisen so far, but anticipating the popularity crowdfunding is enjoying, the solutions to these relevant questions are required to be looked for.

4. Disclosure Norms Threaten the IP Of Crowdfunding

As discussed above, the crowdfunding requires disclosure pertaining to the scheme of crowdfunding along with the other details. In today's world of advanced technology, new technologies are coming up which requires further funding and financial assistance for further research. For this, they often rely upon the various models of crowdfunding. However, the disclosure norms may raise issues with respect to the intellectual property such as in trademarks, patents etc. Taking the case of patent, section 3 of the Patent Act[35] requires certain qualifications to be fulfilled before granting a patent on any application. This includes novelty, inventive steps and commercial utilization. Novelty here requires that the idea on which the patent is requested should be new in nature. It means that it should not have existed beforehand. For this, the patent office considers every piece of information associated with that patent application in the public domain. If the information

33 K.C. Deepika, *Citizens lend me your note and money,* https://www.thehindu.com/news/national/karnatak a/citizens-lend-me-your-vote-and-money/article23732472.ece. (Last visited May 21, 2021 10.30 AM)

34 The Representation of People Act, 1951, §29C,

35 The Patents Act, 1970, §3,

on that application is already available in the public domain, it loses its novelty. Hence, resulting in the rejection of the patent application. Further, such disclosure may also lead to some competitor coming up and copying that idea. The solution to this problem is present in the Patent Act itself i.e. the concept of '***provisional specification***' and '***priority date***'.[36]

A. Priority Date-

The date of first filing of a patent application is called the priority date. In the patent system of first to file, this date becomes important and if there are two patents/ patent applications with same/substantially similar subject matter, the earlier priority date patent application/patent survives the other.

B. Provisional Specification-

The Patent Act allows for two kinds of specifications/disclosures i.e. provisional specification and complete specification. When the invention is conceived but not fully developed, providing a complete specification is not practically possible and hence they introduced the option of a provisional specification. A provisional specification is required to give only the key novelty and inventive aspect of the invention in an abridged form and may not have claims provided.

Therefore, before going for raising funds through crowdfunding a provisional specification can be filed on a priority date and after complete development of the idea complete specification can be filed. So, even if any third person files an application for the patent of the same subject matter, he will not get the patent. Moreover, filing a provisional specification will also prevent the novelty of your project getting killed.

VIII. Conclusion

The unique value of crowdfunding is not money, it's community[37]

- Ethan Mollick

The basic essence of Crowdfunding is the involvement of the community. It has received the popularity which it enjoys today; because the entrepreneurs who do not have any contact with the influential people can raise the money for their ventures. It is a settled principle that a thing which becomes stagnant soon loses its value. Consumable water, if it remains

36 The Patent Act, 1970, §11,

37 Ethan Mollick, *The Uniques Value of Crowdfunding is not Money-It's Community*, https://hbr. org/2016/04/the-unique-value-of-crowdfunding-is-not-money-its-community (Last visited April 21,2016)

stagnant for a period, loses its utility. Similarly, a broad vision with regards to the law is required. Law is dynamic in nature in which changes take place frequently. A sincere attempt should be made to accommodate those changes in the existing framework of laws. Further, an interdisciplinary study is required to be made on crowdfunding along with various other laws including the IP laws as discussed in this paper.

In India, there is an inherent problem in the administrative and legal framework. To be specific, this problem is to control everything. India's *100^{h} ranking out of 190 countries* in the **index of ease of doing business** is a paramount example of this.[38] The suggestions that SEBI has provided are so repressive that it will take away the basic essence of the concept and it is a mere red-tapism. SEBI expects the issuers of the securities to prepare a private placement offer letter along with a research conducted by a third party, showing the future prospects of the company's growth. An entrepreneur who does not have any financial resources, isn't it unreasonable to expect him to do these burdensome tasks? Not only this SEBI and the RBI are having parallel jurisdiction in crowdfunding. Can't there be a single regulatory body for crowdfunding matters? In the concluding remarks, the author would like to suggest that there is a serious requirement of Minimum government and maximum governance.

IX. Suggestion

The Introduction of Shariah Crowdfunding in India. India consists of a large number of people from Muslim community, who lead their lives as per the principles of sharia law. Sharia law provides its directions in a number of areas of a person including the way of doing business. It prohibits any kind of returns on gambling *(Maysir)*.[39] It also prohibits charging on interests (*Riba*) on debts as it is considered as exploitative and unjust gain.[40] Further, the purpose for which the funds are being raised should be 'halal' i.e. allowed by sharia. Therefore, things such as wine, pork etc. cannot be funded. As discussed in the aforementioned paragraphs, the debt-based crowdfunding which is the most commonly used form of crowdfunding; is totally based upon charging of interest. Due to this, many

38 Nisha Ranjan, *View: structural reforms are needed to scale up World Bank's ease of doing business ranking*, https://economictimes.indiatimes.com/news/economy/policy/view-structural-reforms-are-needed-to-scaleup-world-banks-ease-of-doing-business-ranking/articleshow/64034653.cms. (Last visited May 21, 2021 10.30 AM)

39 Alfred Kammer, *Islamic Finance: Opportunities, Challenges and Policy Options*, International Monetary Fund staff discussion note, April 2015, https://www.imf.org/external/pubs/ft/sdn/2015/sdn1505.pdf.

40 Abayomi A. Alawode, *Islamic Finance*, The World Bank, March 31, 2015, https://www.worldbank.org/en/topic/financialsector/brief/islamic-finance

entrepreneurs from Muslim community hesitate in using crowdfunding to raise the funds for their venture as it is deemed against Islam. This also results in their exclusion from the mainstream business.

Sachar Committee Report of 2006 on Social, Economic and Educational Status of Muslims

Bank Credit (Amount Outstanding) (%)

	Muslims	**Other Minorities**	**Others**
Pvt. Sector Banks	6.6	7.9	85.5
PSU Banks	4.6	6.3	89.1

The solution to this problem lies in the sharia crowdfunding. A Sharia-compliant crowdfunding is a form which takes place on an online portal, where people finance other businesses on a sharia compliant basis for the purpose of gaining a financial return over a pre-determined period of time.[41] In this form of crowdfunding, the returns on the amount invested are in the form of profits and not in any form of interest.[42] Thus, it is not against the principles of Islam.

Therefore, it has become indispensable to introduce sharia crowdfunding in order to ensure their financial inclusion in the society. Sharia crowdfunding has become a very popular concept in Arab countries and measures should be taken to promote it in India as well. However, the problem is RBI is not in favor of introducing Islamic banking in India as it feels that "*wider and equal opportunities*" are available to all citizens to access banking facilities.

41 *Consultation Paper*, Kingdom of Bahrain, https://www.cbb.gov.bh/assets/Consultations/Consultation-Shariah-compliant%20Financing%20based%20Crowdfunding.pdf.

42 *Leveraging Islamic Finance for SMEs*, Joint WB-IsDB G20 Islamic Finance Policy Paper, http://g20.org.tr/wp-content/uploads/2015/09/Leveraging-Islamic-Finance-for-SMEs.pdf.

NEED FOR FORMALISATION OF GIG WORKERS: TOWARDS A PARADIGM SHIFT IN WORKING MODEL

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Abstract

In recent years, what is known as "gig economy", a term applicable to digitally intermediated labour services, characterized by unique or sporadic tasks (gigs), has expanded enormously owing to technological advancement. India currently houses the world's third-largest start-up ecosystem and due to pandemic-induced massive technological advancement and work-from-home business model, the future is likely to be dominated by the gig- workers.

This rapid expansion of the gig-economy would necessarily demand to measure these non-traditional employment formats. These jobs belong to a "Grey area" in which they share characteristics of dependent and independent employment at the same time i.e. they are hybrid. Identifying the category of these workers correctly is vital, as this type of employment has had a series of repercussions on different aspects of the labour market. The paper tends to propose solutions to the problems that arise due to misclassification with the help of a comparative analysis made concerning the status of gig workers employment in different nations. Lastly, The Social Security Code, 2020 is analysed to study the ambiguities the code has concerning gig workers and solutions for the same have also been proposed.

***Keywords**: Gig Economy, Gig Workers, Employment Relationship, Social Security.*

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I. Introduction

Technological advancement has aided the world into entering the fourth industrial revolution where computer systems equipped with AI and Machine Learning are swiftly changing the nature of the work with new ways of organizing and carrying out productive activities.[1] During the health crisis caused by COVID-19, remote- work has made it possible to continue carrying out productive work in various areas, saving hundreds of thousands of jobs that would otherwise have been destroyed. On the other hand, advances such as robotics and artificial intelligence are replacing routine human work and all those activities that can be systematized through algorithms and codifiable rules, while complementing work based on non-routine skills, creativity and social skills, among others. Technological change has led to the proliferation of new work formats that are not traditional and allow a better fit with the heterogeneous priorities of the workers.

Many have called them gig jobs, as they are based on the completion of individual tasks. These tasks are performed with the aid of digital platforms that mediate between the worker and the consumer and are characterized by a high degree of autonomy and flexibility that is highly valued by those who carry them out. However, detractors have also emerged who view these new work formats with suspicion, as they fear that they are being used to evade labour regulations and that they promote precariousness.

With the rapid expansion of the gig economy, the need to measure these non-traditional employment formats has become important, as it has an impact on the analysis of the labour market. These new gig jobs, however, belong to a "grey area" in which they share characteristics of dependent and independent employment, which complicates their classification in one or the other traditional occupational category.[2]

II. Defining Gig Economy

The expression "gig economy" is borrowed from the music world, where the term "gig" indicates a performance linked to a single engagement and therefore – unique and

1 Bernard Marr, What Everyone Must Know About Industry 4.0, Forbes https://www.forbes. com/sites/bernardmarr/2016/06/20/what-everyone-must-know-about-industry-4-0/?sh=66faa9fa795f. (last visited Jun. 16. 2016)

2 Seth D. Harris and Alan B. Krueger, A Proposal for Modernizing Labor Laws for 21st Century Work: The "Independent Worker", Brookings http://www.brookings.edu/research/papers/2015/12/09- modernizing-labor-laws-for-the-independent-worker-krueger-harris. (Last visited Dec. 8, 2015)

occasional.[3] Labour in the gig economy, is purely occasional in nature, attributable to the single daily service or a few hours, minutes.[4] Cambridge Dictionary defines gig-economy as "a way of working that is based on people having temporary jobs or doing separate pieces of work, each paid separately, rather than working for an employer".[5] Gig economy is a free-market system where organizations contract with independent workers for a short-term project or service engagement.[6] Crowdworking, platform work, freelancing, on-demand work, sharing economy are some other names for this economy.[7] The gig economy is characterized by the execution of unique projects or tasks for which a worker is hired, often through a digital market, to work under commission. Apart from these definitions, The Social Security Code, 2020 defines workers in this economy. Section 2(35) defines a "gig-worker" as an individual performing or participating in any work that is outside traditional employment and earns from the same work.[8] Section 2(61) defines a "platform worker" as a person working outside the traditional employee-employer relationship and the person uses an online platform to access other organizations or individuals to solve specific problems or to provide specific services in exchange for remuneration.[9] Further, in section 2(86), "unorganized worker" is defined as a worker who is self-employed, home-based or a wage worker in an unorganised sector.[10]

Scholars have identified 2 major branches of gig-economy: Crowdwork and Work-On-Demand. The first branch corresponds to crowdwork, consisting of a job which is performed through digital platforms that puts an indefinite number of geographically dispersed organizations and people in contact.[11] Examples of these platforms are UpWork, Fiverr, Freelancer etc. The second branch corresponds to work-on-demand via mobile

3 Leslie Heck, Year in a Word: Gig Economy, Financial Times https://www.ft.com/content/b5a2b122-a41b-11e5-8218-6b8ff73aae15 (Last visited Dec. 15, 2015)

4 J. Healy, D. Nicholson, and A. Pekarek, Should We Take the Gig Economy Seriously?, 27 Issue 3 Labour & Industry: A Journal of the Social and Economic Relations of Work 232, 232-248 (2017).

5 Cambridge Dictionary, Gig Economy https://Dictionary.Cambridge.Org/Dictionary/English/Gig-Economy (Last visited Sep. 21, 2021).

6 TechTarget 2020, Gig Economy, https://whatis.techtarget.com/definition/gigeconomy (Last visited Sep. 20, 2021).

7 Brendan Churchill and Craig Lyn, "Gender in the gig economy: Men and Women Using Digital Platforms to Secure Work in Australia" 55 Journal of Sociology 741-761 (2019) http://dx.doi.org/10.1177/1440783319894060.

8 Code on Social Security 2020, § 2(35), No. 36, 2020 (India).

9 Code on Social Security 2020, § 2(61), No. 36, 2020 (India).

10 Code on Social Security 2020, § 2(86), No. 36, 2020 (India).

11 Cristiano Codagnone, Fabienne Abadie, and Federico Biagi. The Future Of Work in the 'Sharing Economy'. Market Efficiency and Equitable Opportunities or Unfair Precarisation?, Publications Office of the European Union (2016), https://publications.jrc.ec.europa.eu/repository/handle/JRC101280.

applications, where services are physically provided and the assignment of tasks within a geographic area is channeled through digital applications managed by companies.[12] Examples of these platforms are Uber, Ola, Zomato, UrbanClap etc.

Owing to technological advancements, demographic advantage, expansion of digitization and the fact that India houses the third-largest start-up ecosystem, the very definition of the term "labour" and the nature of services provided by them are evolving. As per Ernst & Young and FICCI's Report on "Future of Jobs in India: A 2022 Perspective", the Indian Economy is emerging as third-best market for online labour.[13] This report states the reasons for the rise of the gig economy in India are urbanization, a significant proportion of young population and a rise in the middle-income class of people.[14] Apart from these reasons, there are several other reasons for its growth such as low entry barriers,[15] response to employment problems created by economic shocks,[16] discrimination in traditional employments,[17] etc. It is the benefits of this working model that has led to its rise. Thus, it becomes necessary to discuss the same.

1. Effects on Labour Underutilization:

There are low entry barriers to working in the gig economy, allowing flexible work arrangements and making it easier for workers to participate in contingent employment when they need it or require it. The low barriers to entry have their origin in the fact that gig workers tend to have low costs to develop the activity and usually use tools that they already have, thus avoiding incurring the cost of starting a business from scratch.

Valendue and Vendramin (2016) point out that, due to their high degree of autonomy, this type of work allows the existence of more inclusive labor markets and facilitates access

12 Ibid.

13 Ernst & Young and Federation of Indian Chambers of Commerce and Industry, Future of jobs in India: A 2022 Perspective, https://ficci.in/spdocument/22951/FICCI-NASSCOM-EY-Report_Future-of-Jobs.pdf (last visited Sep. 22, 2021).

14 Id.

15 Gérard Valenduc and Patricia Vendramin, Digitalisation, Between Disruption and Evolution, 23(2) European Review of Labour and Research, 121 121–134 (2017).

16 Emilie Jackson, Availability of the Gig Economy and Long Run Labour Supply Effects for the Unemployed, National Bureau of Economic Research, (2020).

17 Hyperwallet "The Future of Gig Work is Female – A Study on the Behaviours and Career Aspirations of Women in the Gig Economy" https://www.hyperwallet.com/app/uploads/HW_The_Future_of_Gig_Work_is_Female.pdf?mkt_tok=eyJpIjoiTVRjMU9UQmlOakk1TW1WaSIsInQiOiJYaVQrNEtTTzUzNWliUzZOSTQ3R2wxTnlwY00xZG9MZmErTnVXUkJVdGhMRm9EUW9GWTFcL1huaXZPbnBmdGN1RnBaWjAwa2tjTW5PXC82NnR5Z0o1VFcrOFhWbEZMbVd3UGcramZvdTg0Y1Y0Q3orMjlcL1wvVUpJaFBROVhMeXRyU1QifQ%3D%3D (last visited Sep. 25, 2021).

to employment for people who, otherwise, could not perform a traditional job in a certain place for reasons of health, mobility or availability.[18] In addition to flexibility, it also facilitates the possibility of supplementing income for individuals whose main occupation is a traditional dependent job.[19] Thus, the existence of these gig jobs makes it possible to avoid a labor underutilization that would otherwise be greater, either due to unemployment or inactivity.

2. Countercyclical behavior of gig employment

An economic shock generates unemployment in the labor market. In economic recessions, companies are lay off workers and the resulting unemployed face difficulties finding new jobs in a depressed labor-market.[20] Formerly, in a typical economic recession, workers increased their local job search efforts or migrated to places less affected by the crisis in search of new opportunities. However, with the advent of digital platforms, workers have new alternatives.

Studies indicate that work through digital platforms is positively correlated with the unemployment rate in the face of adverse economic shocks.[21] In other words, the existence of digital platforms with low entry barriers and a high degree of flexibility has become a buffer against adverse economic shocks. This was the case in the past with informal or self-employed employment which, like gig employment, often behaves in a contrary way.

3. Effects on discrimination and labour gaps

Another potential benefit is that gig economy employees could contribute to reducing inequalities in access to work. Since the algorithmic management of the platforms in assigning tasks, discrimination that takes place in traditional employment due to human.[22] These inequalities are also reduced or eliminated by not being subject to distorting regulations present in traditional dependent employment legislation, for example, those that legally make hiring women more expensive, causing gender gaps. Of course, not

18 Gerard, supra note 15, at 4.

19 Jonathan V. Hall and alan B. Krueger, An Analysis of the Labor Market for Uber's Driver-Partners in the United States, 71(3) Industrial and Labour Relations Review, 705–732 (2018).

20 Carmen M. Reinhart and Kenneth S. Rogoff, This Time is Different: A Panoramic View Of Eight Centuries of Financial Crises, National Bureau of Economic Research (2008) https://scholar.harvard.edu/files/this_time_is_different_short.pdf.

21 Emilie Jackson, Availability of the Gig Economy and Long Run Labor Supply Effects for the Unemployed, Industrial Relations Section Princeton University, (Apr. 26, 2021, 1:20-2:35 PM) https://irs.princeton.edu/events/2021/emilie-jackson.

22 Hyperwallet, supra note 17, at 4.

all biases are eliminated, since clients can still act under their diligence, affecting the job opportunities of those who provide the services.

III. Classification dilemma: problems, international status and solutions

1. Problems with Current Classification

The nature of this work creates a narrative of flexibility and independence among the workers.[23] The presumed advantages of flexibility provided by the gig works shall not be estimated immediately. In spite of numerous benefits, there are numerous legal risks in this model that are faced by the workers. While it is certainly true that most jobs in the sharing economy involve flexible working hours, we must not forget the competition between employees because of which they feel compelled to work as many hours as possible to achieve higher wages, thereby actually giving up the advantage of the flexibility provided.

The most prominent issue is that of legal classification for this category. Today there is a heated debate around how similar new gig jobs are to traditional dependent employment. This arises mainly because these jobs belong to a "grey area" where they share characteristics with dependent employment and employment. independent at the same time. That is, they are hybrid. Platforms like Uber, Ola, Swiggy, etc. considers these workers as contractual and part-time workers thereby classifying them as "Independent Worker". The root of the problem stems from the fact that the legal relationship of gig workers is governed under the category of "independent worker", which lacks measures to protect these workers as a result of which the status of these workers falls under the vulnerable category.

As per the qualification mark used in the Indian Judicial practices, the elements referring to the employment relationship can be understood with the help of the ruling given in the *Dharangadhara Chemical Works versus State of Saurashtra Case*[24] wherein the Supreme Court held that the primary test that determines the relationship between an employee and the employer is the test of supervision.[25] A similar test was proposed in *D. Hussainbhai, Calicut versus The Alath Factory*.[26] In the context of Uber and Ola Drivers, the activity of their work task appear to be continuous and repeated. There is an obligation on the drivers

23 Leticia M. Saucedo, The Legacy of the Immigrant Workplace: Lessons for the 21st Century Economy, 40 T. Jefferson L. Rev. 1, 10 (2017).

24 Dharangadhara Chemical Works v. State of Saurashtra, AIR 1957 SC 264.

25 Ibid.

26 D. Hussainbhai, Calicut v. The Alath Factory, (1978) 4 SCC 257.

to work in person. Furthermore, Uber has the option to select drivers through a rating system, giving the company essentially control over drivers. The fact that there is a direct link between the person using the application and the person providing the service and that the instructions specifying the tasks do not come from the employer but through the passenger does not necessarily change the nature of the dependent work, the relationship can easily be considered as an employment relationship.

However, several considerations suggest that this is a form of self-employment. The company has no employment obligations. If the driver is available, they don't need to accept the ride request and if they don't respond within a certain time limit, the request is passed to another driver without any sanction. Uber does not specify a work schedule; the driver is free to decide when he wants to work. Uber rewards drivers weekly for tasks performed.

Apart from issues related to classification dilemmas, the recent pandemic and its socio-economic ramifications have provided contextual clarity on the loopholes in the current framework relating to the social security available to gig workers. Lack of benefits such as health insurance cover, unemployment allowance, minimum wage and paid leaves to the workers resulted in most of them being rendered without any financial support during the period when work was not available.

The lack of an adequate system of collective bargaining meant that the workers had no forum through which they could have put forward their grievances and collectively negotiated with the platform companies. This exposes another issue of collective bargaining on this platform is another problem. The first obstacle arises from geographic dispersion which affects the ability to establish a community and identify their shared interest.[27] The second obstacle is the variability in dependence on income the workers generate from the platform- for some this payment is his sole-earning while for others, it might be part-time income. The latter category is less likely to participate in solidarity with other workers.[28] The third obstacle is the algorithmic management and the ranking system. This system reinforces disciplining in the workforce. Platforms can easily block workers, leaving them without their source of income. The fear of getting punished or getting lower ratings make

27 Hannah Johnston and Christopher Land-Kazlauskas, Organizing On-Demand Representation, Voice, and Collective Bargaining in the Gig Economy CONDITIONS OF WORK AND EMPLOYMENT SERIES No. 94, International Labour Organization (2018) https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_624286.pdf.

28 Niels van Doorn, On the Conditions Of Possibility For Worker Organizing in Platform-based Gig Economies, Notes From Below, https://notesfrombelow.org/ article/conditions-possibilityworker-organizing -platform. (last visited Jun. 8, 2019)

the workers reluctant to exercise their collective rights.[29]

Overall, it is safe to state that there exist lacunas in the current legislation concerning this working model and reconciling the interests of the stakeholders i.e., the State, the Company and the workers is of paramount importance. The role of the State shall be to ensure the safeguards for the gig workers and exercise control over the company's behaviour towards these workers. It is also essential for the companies to be able to accommodate themselves with the changing needs and expectations. For workers, the guarantees for their protection must be laid down so that they cannot be exploited.

Thus, current legislation can no longer cater to the interests of the stakeholders in this economy. Existing legislation cannot cope with this working model as it requires more flexibility than traditional employment. To devise solutions for the problem of classification, an analysis of the steps taken by different nations has been made. With the help of this analysis, solutions have been proposed.

IV. International Approach in Responding to Gig-Economy

Despite uniformity in resistance shown by the leadership of various service platforms in the gig industry, the need for a dedicated regulatory mechanism has been observed in multiple jurisdictions. Judicial pronouncements have been pathbreaking in terms of initiating reforms for safeguarding the rights of the labours engaged in the gig economy.

1. Spanish Approach

The Government of Spain has enacted a law extending the rights availed by a salaried employee to the workers engaged in the gig economy.[30] The essence of this enactment can be traced back to the Spanish Supreme Court's ruling in the Golvo Case[31] which involved an individual lawsuit on behalf of a deliveryman who contended that he shall be accorded the status of an employee. The Hon'ble Court made certain important observations in this case. Firstly, it held that the food delivery rider was expressly operating for the brand-name of the company and got his orders solely based on the Golvo food delivery application which is essential to contract of employment. In this regard, reliance was placed upon the

29 Valerio De Stefano, The Rise of the Justin-Time Workforce: On-Demand Work, Crowdwork, and Labor Protection in the Gig-Economy, 37(3) Comp. Lab. L. & Pol'y J., 471-504 (2016).

30 Royal Legislative Decree 2/2015, Ministry of Employment and Social Security "BOE" no. 225, October 24 2015.

31 Judgement N. (805/2020) STS 2924/2020 - ECLI:ES:TS:2020:2924.

ruling of the Elite Taxi Professional Association[32] wherein similar findings were observed concerning the status of employment of uber drivers. Secondly, the Court emphasized that the digital application of the company serves as an actual mode of production in this business model and absence of this, the rider cannot possibly procure, locate and deliver the food order. Thirdly, it stated that digital ratings work to establish a system of surveillance and control over the rider as allocation of all future delivery orders is dependent upon the ratings that a rider gets thereby meaning that the company holds discretionary powers over the riders and its interests are of paramount importance. On these bases, the court held that a delivery rider qualifies as an employee of the food delivery platform and therefore he is liable to receive all the benefits that an employee is guaranteed.

Subsequently, the Spanish Govt. formulated legislation known as "Rider's Law" derived from a tripartite agreement between the Government, Trade Unions (such as CC.OO and UGT) and Employer's Organization (such as CEOE and CEPYME) reached on 10 March 2021.[33] It reflects a social agreement that recognizes the rights of gig workers emerging out of an employee-employer contract and mandates that the works' council ('Comité de empresa') must be informed of the "parameters, rules and instructions" that determine the work of the algorithm and the gig workers for getting benefits including holidays and unemployment benefits.[34]

2. American Approach

In the backdrop of the judgment delivered by the Supreme Court of California in *Dynamex Operations West Case,*[35] California's state legislature enacted a law which is known as the AB5 law for preventing the misclassification of gig workers as independent contractors.[36] The legislation states that every individual providing labor or services in exchange of certain monetary consideration shall be classified as an employee thereby making him eligible for social security benefits such as workers compensation, disability insurance etc unless they explicitly meet the qualifications set forth under the category of independent contractor in the Act.[37] This enactment means that the concept of 'employee' has been

32 Asociación Profesional Élite Taxi v. Uber Systems Spain SL, Case C-434/15, (Dec. 20, 2017).

33 Natasha Lomas, Spain Agrees On Labor Reform That Will Recognize Delivery Platform Riders As Employees, Techcrunch, (Mar. 11, 2021) https://techcrunch.com/2021/03/11/spain-agrees-on-labor-reform-that-will-recognize-delivery-platform-riders-as-employees/.

34 Rider Law 2021, art 64.4 d.

35 Dynamex Operations v. Superior Court, (2018) 4 Cal. 5th 903.

36 Assembly Bill No. 5, Chapter 296 (Added Section 2750.3 to the Labor Code, amended Sections 606.5 and 621 of the Unemployment Insurance Code, relating to employment.)

37 Labor Code of California, s. 2, § 2750.

redefined and its scope has been widened to include the gig workers and now they can further avail unemployment allowance, minimum wages, paid leave, sick leave and paid family leave.[38]

3. French Approach

In 2016, the French government enacted a law providing self-employed gig workers with rights like work insurance coverage, professional training, right to be provided with a validation of their working experience upon request, right to establish and join a trade union and take collective action to defend their interests. Furthermore, in 2019 the delivery workers were granted certain additional rights through the Mobility Orientation Law they were provided with the right to disconnect from the service app without penalty.

4. Dutch Approach

The Netherlands has observed a significant rise in the growth of the gig industry and its participation in the national economy, however, this rise has coincided with a drastic increase in bogus self-employment directly impacting the workers engaged in this industry, who are generally hired as self-employed persons and are in a weak position to bargain for decent compensation for their work. In its attempt to formalize this sector, the Dutch Government announced its plan to introduce a minimum wage rate of €16 per hour for self-employed persons 2021.[39]

V. Proposed Solutions

After outlining the problems, the question rightly arises as to how this unidentifiable legal relationship could fit into the current labour law system. The authors have proposed solution alternatives that are discussed below: -

1. Collective Bargaining Agreement: Self Employed Plus Status

This system facilitates the development of workers who operate in conditions of dependence on their principles comparable to those of employees while in theory, it restricts their classification as self-employed. The platform company signs a contract with a particular union of workers for collective bargaining which entitles the workers to avail certain

38 Assembly Bill No. 5 Chapter 296, Page 2 & 3.

39 Information Note Protection of labour rights of “gig workers” in selected places, Research Office Legislative Council Secretariat, IN10/19-20.

benefits such as minimum pay, holiday pay, pension contributions and health care plans.[40] It focuses upon granting social security benefits without touching upon the issue of whether the workers engaged in the gig industry should be treated as independent contractors or employees.[41] Companies are increasingly finding this approach reliable and significant collective bargaining agreements have been signed in recent times such as the Uber – GMB Union (UK) agreement providing social security to around 70,000 Uber Drivers.[42] This is also in consonance with the declaration of the Council of Europe's Committee of Social Rights which emphasizes the right of self-employed workers to collectively bargain.[43]

2. Creating a new criterion of classification

An effective method to counter the legal uncertainty surrounding the classification of gig workers could be the introduction of a third category separate from that of employees and independent contractors.[44] Such a classification will aim to grant those rights to gig workers which are not accessible in the capacity of an independent contractor. An example of the implementation of such an approach could be found in certain European Nations such as the United Kingdom where a separate "worker category" was introduced to incorporate gig workers within the structure of social security benefits in consonance with the ruling given in the landmark case of Uber BV v. Aslam.[45]

3. 'Functional Conceptualisation' of Employee

This alternative approach means drifting away from the traditional inelastic definition of the employee-employer relationship.[46] A "functional" conceptualization of the employer, instead, is one "in which the contractual identification of the employer is replaced by an emphasis on the exercise of each function—be it by a single entity or in situations where

40 Danish Confederation of Trade Unions 'Collective agreement Between Hilfr ApS. CBR.no.: 37297267 and 3F Private Service, Hotel and Restaurant'(2018) <http://static.ow.ly/docs/Hilfr%20collective%20agreement%202018_83Wv.pdf> (Last visited October 3, 2021).

41 Jakob Widner, *Gig Economy Un-Gigged: Collective Bargaining Agreement For Bike Couriers,* Lexology (Dec. 18,, 2019) < https://www.lexology.com/Commentary/employment-immigration/austria/graf-isola-rechtsanwlte-gmbh/gig-economy-un-gigged-collective-bargaining-agreement-for-bike-couriers

42 GMB Union, '*Uber And GMB Strike Historic Union Deal For 70,000 UK Drivers*' (May 26, 2021) <https://www.gmb.org.uk/news/uber-and-gmb-strike-historic-union-deal-70000-uk-drivers (Last visited Oct. 4, 2021).

43 European Social Charter (Revised), 03.V.1996, Article 6, ETS 163.

44 Jeremias Prassl, Martin Risak, *The Legal Protection of Crowdworkers: Four Avenues for Workers' Rights in the Virtual Realm*, In PAMEILA MEIL AND VASSIL KIROV, *POLICY IMPLICATIONS OF VIRTUAL WORK*, 273–295 (Palgrave Macmillan 2017).

45 Uber BV v. Aslam, [2021] UKSC 5.

46 Jeremias, *supra* note 44, at 11.

different functions may be exercised from more than one locus of control".[47] (As per this concept , the latter can be a single entity or combination of entities (for example, a combination of the person availing the service, the platform, and the gig workers). What matters is who plays a decisive role in the exercise of a particular employing function, and who can then be regulated as such according to prevailing employment law. Hence, a functional approach could be a way to deal with the complexities arising from trilateral work relationships inherent to gig work mediated by platforms.

VI. Gig Economy and Social Security: Indian Perspective

The Indian legislature has shown a proactive approach in including the gig workers and platforms workers within the ambit of the Code on Social Security, 2020. CHAPTER IX of the Code specifically deals with the unorganized workers, gig workers and platform workers. Section 112 provides a provision for setting up a facilitation center for improved decimation of information regarding the social security schemes for gig workers.[48] Section 114 lays down the criteria for schemes which include life disability cover, accident insurance, old age protection, health or maternity benefits and other benefits that the Central Government may determine to be fit.[49]

However, even after the inclusion of gig-workers in the code, there exist several ambiguities that act as a barrier in availing social security benefits.

1. Ambiguities in the Code on Social Security which make implementation impractical

The Code contains certain ambiguities that complexify its implementation. The First Schedule of the Code prescribes a threshold regarding the size of the establishment which continues to be mandatory in the case of pension and medical schemes with a minimum number of employees prescribed as not less than 20 and 10 respectively. This can potentially lead to the exclusion of gig workers and the people in the informal sector from gaining the benefit of pension or medical allowances who are employed in smaller establishments. The Code has also prescribed a rigid mechanism of registration, which states that the gig worker has to be mandatorily registered with the platform company where he is working for availing the social security benefits.[50] However, there is no clarity about the workers

47 *Ibid.*

48 The Code on Social Security 2020, § 112, No. 36, 2020 (India).

49 The Code on Social Security 2020, § 114, No. 36, 2020 (India).

50 The Code on Social Security 2020, § 113, No. 36, 2020 (India).

who work for multiple gig platforms. This leaves workers who work for several platforms to avoid economic uncertainty in a dilemma about their position in code.

Furthermore, there exists an overlapping usage of certain terms in the Code, specifically under Sections 2(35), 2(61) & 2(85) regarding the definitions of gig workers, platform workers and unorganized sector workers. Because of such overlap, employers may use the legal loopholes and ambiguity in definitions to shrug off their social security entitlements due to the lack of clarity concerning the nature of their employment. Apart from this, Section 103 of the Code, states that the employer is allowed to determine the cess amount himself without having to consult any authority for confirmation of the same.[51] The section specifically uses the term 'Self-assessment' which allows the employer to get away with any kind of manipulation in the determination of the cess amount payable by him, thereby leaving the employee's rights subject to the discretion or even the arbitrariness of the employers.

The Code states that to receive the social security benefits, every unorganized worker, gig worker and platform worker must be registered through an application including the Aadhar number.[52] This mandatory requirement to avail social security benefits does not align with the SC verdict wherein it was held that an Aadhaar Card is not mandatory for accruing rights-based benefits of any kind.[53] In addition to this, the Code postulates two different sets of social security instruments, one of which is to be provided by the Central Govt. and the other is to be provided by the State Govt. under Section 109(1) and 109(2).[54] This could result in clumsy implementation and can consequentially hamper the benefits to be accrued by the unorganized sector and may give rise to a conflict of powers of the state and the Centre. Furthermore, the funding mechanism is also prone to confusion as the code fails to mention any exact proportion of allocation of funds by the State or Central Government.

2. Proposed Solutions for Structural Reforms in the Code & Interim Relief Measures

To tackle the problems in providing adequate social security benefits to gig workers, a two-fold approach has been recommended. First approach is to deal with the problem of delay in implementation of the Code on Social Security and second is to reform and eliminate the loopholes from the Code.

51 The Code on Social Security 2020, § 103, No. 36, 2020 (India).

52 Code, *supra* note 50, at 12.

53 Justice Puttaswamy (Retd.) and Anr. V. Union of India and Ors., AIR 2017 SC 4161.

54 Code on Social Security 2020, § 109, No. 36, 2020 (India).

a) Measure for granting interim relief to the gig workers

For granting interim relief to gig workers in the short-term minimum health insurance, fixed working hours, grievance redressal, a minimum payment of fares, and recognition as a frontline worker shall be ensured. In addition to this, a minimum cash transfer can be fixed till the Code on Social Security comes into action and benefits under the PM Garib Kalyan Ann Yojana should be extended to app-based workers irrespective of whether they hold ration cards.[55]

b) Structural Reforms in the Code on Social Security

To provide clarity regarding the definition of "gig workers", "platform workers" and "unorganized sector", the gig workers should be directly treated as unorganized workers and the specific schemes formulated for them such as health insurance, disability allowance, housing allowance should use this term to avoid confusion. This shall also be included within Chapter I of the Unorganised Workers' Social Security Act, 2008.

Further, directions should be issued regarding the registration of Gig Workers on the E-SHRAM platform, therein there shall be a feature for the 'Aggregators' to directly pay the cess from their turnover for operating the schemes made for the Gig Workers.[56] Apart from this, the compulsory requirement of attaching "Aadhar card" for registration of unorganized workers should be amended and it could be replaced with "or any other identification proof".[57] Furthermore, there shall be an expansion of the definition of unorganized workers under Section 2(86) to include gig workers and platforms workers as it would help in avoiding duplication and would be beneficial in ensuring access to the various social security benefits to every unorganized worker covered under the Code. In addition to this, an amendment should be made to the definition of "Establishment" under Section 2(29) of the Code for including "exchange of services" as per Section 2(29)(a), to cover establishments with less than 10 employees. This will prove highly effective in increasing the coverage of the Code on Social Security Code. To increase the financial accountability and transparency regarding the 'self-assessment' done by employer, Section 103 can be amended to include an audit mechanism to be conducted by auditors who specialize in matters of the relevant industries by specifying the procedure in the said provision.[58]

55 The Pradhan Mantri Garib Kalyan Yojana, *Package Is A Comprehensive Relief Package Of Rs 1.70 Lakh Crore Yojana For The Poor To Help Them Fight The Battle Against Corona Virus* https://www.india.gov.in/spotlight/pradhan-mantri-garib-kalyan-package-pmgkp (last visited Oct. 4, 2021)

56 Ministry of Labour & Employment Government of India, https://eshram.gov.in/home (last visited Sep. 27, 2021).

57 Code, *supra* note 50, at 12.

58 Code, *supra* note 51, at 12.

There shall be an attempt to incorporate a mechanism for the portability of the funds among the States so that the due funds reach the beneficiaries irrespective of the State in which they were collected. Furthermore, in this regard, there can also be an amendment to Sections 109(2) & 109(3) to make the States solely responsible for providing social security benefits to the unorganized sector workers for clarity in terms of accountability. The provision can also allow for the States to share a certain portion of the total cost of providing such security benefits with the Central government.

VII. Concluding Remarks

The gig economy is a rapidly growing phenomenon in India as well as other major industrialized countries. The rise of this economy has contributed to complex projections due to the "blurring of boundaries" between dependent and independent workers. The traditional paradigms of dependent and independent workers are gradually ceasing to be the norm. Current framework that provides for binary classification of workers i. needs to be revised to accommodate the needs and rights of gig workers.

In the first part, the paper has analyzed the reasons for the growth of the economy and its impact on labour market. Flexibility of working hours combined with other reasons like low entry barriers, response to employment problems created by economic shocks, lack of discrimination as seen in traditional employments attracted the workers towards this economy.

In the second part, problems faced by these workers face due to misclassification has been analyzed. The binary classification system leaves these workers in a "grey area" as they share characteristics of both- an employee or an independent worker. To recommend solutions, a study has been made concerning the status of these workers on the international front. International evidence has highlighted a rather heterogeneous picture, but with one point was common to all – Absence of regulation to accommodate needs of these workers.

Finally, in the last part, Social Security Code of 2020 has been analyzed. Structural ambiguities in The Code have been pointed out. To deal with these ambiguities, recommendations have also been proposed.

If we observe the root causes of the industrial revolutions of the last centuries in parallel with the events of today, we can conclude that social and institutional changes play a significant role in the need to change legal regulations. Just as problem-solving innovations did not emerge overnight in the 19th century, the same cannot be achieved in a short period for the gig workers. The legal problems with this economy need to be patiently and thoughtfully evaluated and framed.

THE COMPETITION COMMISSION OF INDIA'S ATTITUDE TOWARDS CROSS BORDER MERGERS

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Abstract

Mergers and acquisitions are an unavoidable component of corporate restructuring and consolidation. As globalization continues, mergers have become more cross-border and multi-jurisdictional transactions. Mergers are widely recognized to provide substantial strategic benefits to commercial enterprises. Nonetheless, mergers may affect existing firms in the market, making competition analysis of company combinations necessary and essential. The Competition Commission of India has been regulating mergers, including cross-border mergers, that are combinations that satisfy established threshold limitations with the intent of examining their possible competition impacts in the relevant market. Except for those that qualify for authorized exclusions, such mergers must be disclosed to the Competition Commission of India.

After discussing the fundamentals of merger control, the paper discusses the substantive position of India's cross border merger control under the Competition Act, 2002 in terms of jurisdictional thresholds set in monetary terms concerning the value of assets or turnover, as well as possible exemptions for certain mergers from notification requirements. Following that, the procedural framework for India's cross-border merger control is discussed, including the notice procedure and penalty proceedings, followed by an examination of critical features of the Competition Commission of India merger approvals and a conclusion.

Keywords: *Competition Commission, Cross border mergers, Trade practices, Combinations*

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I. Introduction

Although the merger control regime in India began with the erstwhile Monopolies and Restrictive Trade Practices Act, 1969 (hereinafter "MRTP Act"), mergers were controlled primarily to prevent economic power concentration to the public harm in the private sector. Chapter III of the MRTP Act's merger requirements specifically did not apply to public sector players. With the 1991 amendments to the MRTP Act following India's globalisation policy, critical merger regulatory provisions in Chapter III stood omitted, and after that, merger transactions remained unregulated.[1] It was then that the *newly enacted* Competition Act, 2002 (hereinafter "CA") provided for merger control provisions. At the time, the recently established CA had rules governing merger control. The CA, passed to encourage and defend competition in the Indian market, was immediately unable to become a reality owing to a legal challenge filed in the Supreme Court in October 2003 in the form of a writ petition.[2] Subsequently, in 2007, the Act was amended. Pursuant to Section 1(3), the CA was effectively implemented on 20th May 2009, except for the combination provisions, which took effect on 1st June 2011.[3]

In June 2011, India implemented a new merger control system. Section 5 of the CA defines combination and establishes jurisdictional thresholds based on asset worth or turnover. However, the term 'merger' is used broadly in this article to refer to a variety of merger combinations, including the purchase of shares, voting rights, assets, or control over another firm, as well as the amalgamation or merger itself. Combination can be defined as when two or more previously separate entities combine their operations, when an entity's control changes (resulting in sole or joint control), or when a full-function joint venture is formed. Mergers affect the market in a more permanent and long-lasting way.[4] Mergers, especially horizontal ones, may pose serious competition issues since they result in companies acquiring or maintaining market dominance.[5] Therefore, competition authorities in various nations

1 MRTP (Amendment) Act, 1991; J. C. Sandesara, *Restrictive Trade Practices in India, 1969-91: Experience of Control and Agenda for Further Work*, 29 Economic and Political Weekly 2081–2094 (1994).

2 Brahm Dutt v. Union of India, (2005) 2 SCC 431.

3 Ministry of Corporate Affairs (hereinafter "MCA"), F.No.5/4/2003-IGC/CS (Notified on 4th March 2011); MCA, F. No.5/4/2003-IGC/CS (Notified on 30th May 2011); The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011.

4 ALISON SUFRIN, EU COMPETITION LAW: TEXT, CASES, AND MATERIALS. 855 (Oxford University Press 2019).

5 *Merger Control in* Competition Law Today: Concepts, Issues, and the Law in Practice 99; Prateek Bhattacharya, *Competition commission of India's "control" conundrum – practice, precedent, and proposals*, European Competition Journal 1–33 (2021); Avirup Bose, *Lessons to Be Learned from India's Latest High Profile Merger Review: The Jet-Etihad Deal*, 35 European Competition Law Review (2014).

take mergers seriously and work to prevent anticompetitive mergers. The fundamental goal of merger control is to enable competition authorities to manage changes in the market's competitive environment. Thus, competition law is focused on policing anticompetitive merger transactions based on an *ex-ante* evaluation of the merged entity's post-merger market dominance. However, mergers are believed to provide substantial financial benefits to merger companies since they result in corporate consolidation, in addition to providing synergies in the form of increased cost-efficiency.

There has been a rise in cross-border mergers in recent years.[6] Cross-border mergers in which one of the partners is a foreign corporation are seen as critical for achieving global competitiveness in obtaining modern technology, processes, marketing, and distribution networks and is viewed as the remedy for the local market's suffocating competition.[7] The Companies Act, 2013, as the principal statute enabling cross border mergers, now permits outward (cross border) mergers,[8] in contrast to the preceding Companies Act, 1956, which permitted only incoming (cross border) mergers. Cross border mergers, including outbound mergers, like domestic mergers, must be mandatorily pre-notified to CCI for permission in line with section 6(2) of the CA. Cross border mergers, thus, always result in several notifications across the countries in which the firms operate.

6 Varghese Thekkel, *Cross-Border Mergers: Is India Ready? Lessons from the United States and European Union*, 28 Indiana Journal of Global Legal Studies 231–291 (2021); Avin Tiwari, *Emerging Trends in Cross Border Mergers and their Tax Implications in India: A Critical Appraisal*, 8 BRICS Law Journal (2021); Centre for Development Studies & Beena Saraswathy, Cross-Border Mergers and Acquisitions in India: Extent, Nature and Structure (2010); Ashoka Mody & Shoko Negishi, *Cross-Border Mergers and Acquisitions in East Asia: Trends and Implications*, 38 Finance & Development (2001); Michael A. Hitt & Vincenzo Pisano, *The Cross-Border Merger and Acquisition Strategy: A Research Perspective*, 1 Management Research: Journal of the Iberoamerican Academy of Management 133–144 (2003).

7 Geeta Rani Duppati & Narendar V. Rao, *Cross-border mergers and acquisitions: Mature markets vs. emerging markets - with special reference to the USA and India*, 2 Cogent Business & Management(2015); Surendranath R. Jory & Thanh N. Ngo, *The wealth effects of acquiring foreign government-owned corporations: evidence from US-listed acquirers in cross-border mergers and acquisitions*, 21 Applied Financial Economics 1859–1872 (2011); Puspita Rani et al., *Motives, governance, and long-term performance of mergers and acquisitions in Asia*, 7 Cogent Business & Management (2020); Sumati Varma et al., *Drivers of emerging market cross border mergers and acquisitions: evidence from the Indian IT industry*, 9 Transnational Corporations Review 360–374 (2017); Samta Jain et al., *Impact of Organizational Learning and Absorptive Capacity on the Abnormal Returns of Acquirers: Evidence from Cross-Border Acquisitions by Indian Companies*, 19 Global Journal of Flexible Systems Management 289–303 (2018); Evren Arık & Ali M. Kutan, *Do Mergers and Acquisitions Create Wealth Effects? Evidence from Twenty Emerging Markets*, 53 Eastern European Economics 529–550 (2015); PengCheng Zhu & Vijay Jog, *Impact on Target Firm Risk-Return Characteristics of Domestic and Cross-Border Mergers and Acquisitions in Emerging Markets*, 48 Emerging Markets Finance and Trade79–101 (2012).

8 MCA, F. No. 1/37/2013-CL.V, (Notified on 13th April 2017).

II. Merger Thresholds Crossing Borders

In the case of mergers, competition law is primarily concerned with determining whether the merged business would compete in the market after the merger.[9] To invoke CCI's merger control examination, the deal must be a combination that satisfies the conditions of section 5 of the CA. Combination is defined in section 5 as the 'acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises.' Subject to jurisdictional (financial) thresholds for No-Group (Individual) and Group transactions, the said definition under section 5 lists three types of combinations in clauses (a), (b), and (c) for 'acquisition of control, shares, voting rights or assets of an enterprise,' or 'acquiring of control by an enterprise when such acquirer has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service' or 'merger or amalgamation' respectively. Not all merger transactions are a combination under section 5 of the CA; only merger transactions involving businesses that exceed certain threshold limitations (subject to specific exclusions) are considered a combination and a mandatory notifiable transaction under section 6. (2).[10] Section 5 prescribes threshold limitations in financial terms by referring to the combined entity's assets or revenue; in other words, the combined entity's assets or revenue triggers the threshold limits jointly with the assets or revenue of both or all of the parties as the case may be. Additionally, the Central Government reviews them every two years in conjunction with the CCI per section 20(3) of the CA. Section 5 establishes jurisdictional criteria for cross-border mergers based on the value of assets or revenue 'in India or beyond India in aggregate', as well as enforceable 'India nexus' financial requirements.[11]

CCI has the authority to examine cross-border mergers under section 6(1) of the CA, which prohibits any person or enterprise from entering into a combination that 'causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India',[12] and declares such a combination void. Thus, not all mergers are illegal; only those with an adverse effect on competition in the relevant market are prohibited. As required by section 6(2), mergers triggering the threshold limitations must be pre-notified to CCI and are subject to scrutiny by CCI in line with the CA's Sections 29, 30, and 31. Following such notice, the merger transaction is suspended and cannot take effect until two hundred and

9 T RAMAPPA, COMPETITION LAW IN INDIA: POLICY, ISSUES, AND DEVELOPMENT 183 (Oxford University Press, 2014).

10 Competition (Amendment) Act, 2007, S. 6(2).

11 MCA, F. No. 5/7/2013-CS (Notified on 4th March 2016).

12 D P MITTAL, TAXMANN'S COMPETITION LAW & PRACTICE 294 (Taxman Publications 2011).

ten days have elapsed from the date of notification to CCI or unless the latter approves it under section 31 of the CA, whichever occurs first.[13]

Section 32 of the CA is an important clause that strengthens the Competition Commission's examination of cross-border mergers. It expressly applies to mergers that occur outside India. Specifically, sections 32(d), (e), and (f) allow for the Act's extraterritorial application to mergers that occur outside of Indian boundaries. While section 32(e) relates to mergers that occur outside India and include at least one foreign entity (and, conversely, at least one Indian company), section 32(d) pertains to mergers that occur outside India and involve both foreign organizations. It becomes clear that section 32(d) authorizes the CCI to examine entirely foreign to foreign merger transactions that 'meet' financial threshold requirements, irrespective of the Act's scope of application under section 1(2) if they would have or are likely to have a material adverse effect on competition in the relevant market in India;[14] while section 32(e) requires CCI to examine significant cross-border mergers. In other words, regardless of whether a merger is contemplated or completed outside India, it must be pre-notified if it fulfils the jurisdictional standards outlined in section 5 and is capable of (significantly) impairing competition in the relevant market in India. Similarly, since many foreign companies operate in India through their subsidiaries, although the entities' primary place of business is outside India, their wholly foreign to foreign mergers are required to be pre-notified to CCI if they trigger section 5 of the CA.

In a transaction entirely outside India involving the acquisition of *Pfizer Inc.'s global nutrition business by Nestlé SA, a Swiss public company*,[15] CCI determined that because both parties to the proposed transaction were present in India through their subsidiaries and their assets value and turnover in India exceeded the threshold limits under section 5(a), the transaction qualified as a combination under the said provision. In a cross-border merger of *Wyoming 1 (Mauritius) Private Limited (Wyoming 1) and Tata Chemicals Limited (TCL)*,[16] CCI determined that, despite Wyoming 1 being a wholly-owned subsidiary of TCL, incorporated under the Mauritius Companies Act solely for the purpose of holding TCL's off-shore business interest, and having no assets or revenue in India, the proposed

13 Ajay Sharma, *Cross Border Merger Control by the Competition Commission of India: Law and Practice*, Freiburg Law Students Journal (2015).

14 The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011, Regulation 4.

15 CCI Order under Section 31(1) of the CA, 2002 with regard to *Nestlé/ Pfizer*, Combination Registration No. C-2012/05/57, order dated 1-8-2012 (CCI).

16 CCI Order under Section 31(1) of the CA, 2002 with regard to *Wyoming 1/Tata Chemicals Ltd.*, Combination Registration No. C-2011/12/12, order dated 28-12-2011 (CCI).

transaction qualified as a combination under section 5(c), as it met the required thresholds under Similarly, in a proposed transaction involving the acquisition by *Intel Corporation of certain Motorola Mobility LLC assets*,[17] including non-Indian intellectual property rights, Motorola's tangible assets located in the United States, and the right to hire certain Motorola employees in the United States to develop technologies used in the components of cellular baseband processors, the CCI determined that because the transaction occurred outside India, it had no direct impact on competition in the Indian' market for cellular baseband processors.' CCI found that since Motorola's assets being bought by Intel did not produce income in India at the time of the transaction, the deal was unlikely to pose any negative competition concerns in India. Even if the parties to the transaction are foreign corporations without Indian subsidiaries, Section 5 may draw an indirect acquisition outcome in India. In a wholly foreign to foreign (consummated) transaction involving *Titan International's acquisition of Titan Europe's entire share capital*,[18] where both parties (acquirer and target) were based in the United States of America and the United Kingdom, respectively, and had no presence or operations in India, except for Titan Europe (the target) holding 35.91 per cent equity share capital in Wheels India, CCI determined that the transaction was a combination under section 5, as it resulted in Titan International becoming Titan Europe.

CCI conducts merger investigations under section 5 in two circumstances: first, upon receipt of a notification according to section 6(2); and second, *suo motu* or upon receipt of information on any sort of combination pursuant to section 20(1) of the CA.[19] In either of these circumstances, if the CCI forms a *prima facie* opinion about the instant merger transaction that it is likely to cause or has already caused a material adverse effect on competition in the relevant market in India, it is required to issue a notice to the parties to the transaction requiring them to respond within thirty days of receipt of the notice as to why an investigation into the transaction should not be conducted. Thus, cross-border mergers are subject to CCI examination and any resulting ruling under the CA's sections 29, 30, and 31. Meanwhile, section 20(4) of the CA requires CCI to consider all or any considerations listed in that section when evaluating whether the merger will have

17 CCI Order under Section 31(1) of the CA, 2002 with regard to *Intel/ Motorola Mobility*, Combination Registration No. C-2013/01/104, order dated 22-1-2013 (CCI).

18 CCI Order under Section 31(1) of the CA, 2002 with regard to *Titan International/Titan Europe*, Combination Registration No. C-2013/02/109, order dated 2-4- 2013 (CCI).

19 CCI Order under Section 43-A of the CA, 2002 with regard to *Avago/Broadcom*, Combination Registration No. C-2015/09/312, order dated 7-6-2017 (CCI); CCI Order under Section 31(1) of the CA, 2002 with regard to *Future Consumer Enterprise Ltd./Grasim Industries Ltd.*, Combination Registration No. C-2016/03/384, order dated 11-5-2016 (CCI).

a considerable detrimental impact on competition in the relevant market.[20] This part, which is crucial in 'pre-deciding' the harmful effect of cross-border mergers on competition in the 'relevant market,' also allows CCI to perform an *ex-ante* evaluation of the combined entity's relevant market dominance based on 'post-merger' dominance.

III. Exemptions From Notification for Certain Mergers

Certain mergers are generally not subject to CCI examination under section 6(2) of the CA. Regulation 4 of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (hereinafter "Combination Regulations") clarifies that since the combinations described in Schedule I are 'ordinarily not likely to cause an appreciable adverse effect on competition in India and notice under section 6(2) need not normally be filed.' As mentioned above, Schedule I of the Regulations outlines ten types (items) of combinations for which the parties are excluded from the need to notify CCI in advance. The latter does not typically conduct an examination. A common feature of Schedule I notification exemptions is that they apply to transactions that do not result in the acquirer (or its group) acquiring sole or joint control of the entity,[21] and that no acquisition should result in the acquirer (or its group) acquiring sole or joint control of the entity, and that no merger or amalgamation (even within the same group) should result in the transfer of joint control to sole control. For example, in a proposed merger of two subsidiaries, *Glenmark Access Limited and Glenmark Generics Limited, with (their parent) Glenmark Pharmaceuticals Limited*,[22] where the parent entity held a 100% and 98.14 per cent shareholding in the subsidiaries, respectively, CCI determined that the proposed combination fell under item 9 of Schedule I of the Combination Regulations, while noting that there was 'no change in the ultimate control' as a result of the transaction, and thus that section 6(2) applied.[23]

However, in *acquiring 20.28 per cent and 12.11 per cent of equity shares in Multi Screen*

20 Prateek Bhattacharya, *supra* note 5; Merger Remedies in India: Having an Upper Hand Kluwer Competition Law Blog, http://competitionlawblog.kluwercompetitionlaw.com/2019/04/01/merger-remedies-in-india-having-an-upper-hand/ (last visited Jan 22, 2022).

21 Jenisha Kirti Parikh, Vinay Shukla and Simone Reis, *India: Merger Control Exemptions Expanded- Better Late Than Never!,* MONDAQ, (April 27, 2017), https://www.mondaq.com/india/maprivate-equity/589256/merger-control-exemptions-expanded-better-late-than-never

22 CCI Order under Section 31(1) of the CA, 2002 regard to *Glenmark Generics Ltd./Glenmark Access Ltd./ Glenmark Pharmaceuticals Ltd.*, Combination Registration No. C-2014/02/156, order dated 5-3-2014 (CCI).

23 Cyril Shroff & Nisha Kaur Uberoi, *A Look Back at The Enforcement of Merger Control in India*, US-India Business Council 2014.

Media Private Limited (MSM India) by Acquires, SPE Mauritius Holdings Limited, and SPE Mauritius Investments Limited, respectively, from Grandway Global Holdings Limited and Atlas Equifin Private Limited,[24] CCI determined that 'joint control over an entity inferred control over strategic commercial operations of the entity by two or more persons, and which control in turn would be sufficient to veto/block the strategic commercial decisions of the entity by each such person.' Additionally, CCI concluded that *controlling* 'right over strategic commercial decisions cannot be considered as mere minority investor protection rights' as the acquirers argued. While the acquirers controlled 62% of equity shares and had the right to appoint three directors before the acquisition, the sellers (*Grandway and Atlas*) had 32.39 per cent of equity shares and the right to nominate two directors in the acquired before the acquisition. Consequently, CCI determined that the acquisition resulted in the acquirers' transfer from joint control to sole control of the acquirers over MSM India,' and hence that an exemption from the Section 6(2) notice requirement could not be obtained.

Concerning item 1 of the Schedule I exemption, CCI concluded in a *proposed acquisition of 22% of New Moon BV by Abbott Laboratories* pursuant to an amendment agreement that even if the acquisition of shares or voting rights between the acquirer and the target engaged in horizontal or vertical business relationships was less than 25%, it could raise competition concerns. Such acquisition need not necessarily be considered an acquisition made solely as an investment or in the ordinary course of trade and required notification under section 6(2) of the Competition Act.[25] In another instance, *Cairnhill CIPEF Limited and Cairnhill CGPE Limited (the investors) acquired 11% of the equity shares of Mankind Pharma Limited (the target), i.e., 10.77% from Monet Limited and 0.231% from Ms. Dinaz Kaul (sellers)*,[26] CCI observed that if the acquirer has no intention of participating in the formulation and determination of the target's business decisions, the transaction could be considered to have been made solely as an investment. In contrast, while CCI denied item 1 to schedule I exemption in the instant case, CCI determined that the Shareholders Agreement entered into between the investors, the target, and the target's promoters empowered the investors to appoint one director to the target's board of directors and conferred upon them certain affirmative rights, including the right to commence a new business. Additionally,

24 CCI Order under Section 31(1) of the CA, 2002 with regard to *MSM India/SPE Holdings/SPE Investments/ Grandway/Atlas*, Combination Registration No. C-2012/06/63, order dated 9-8-2012 (CCI).

25 CCI Order under Section 31(1) of the CA, 2002 with regard to *New Moon BV, In re*, 2014 SCC OnLine CCI 147.

26 CCI Order under Section 31(1) of the CA, 2002 with regard to *Cairnhill CIPEF Ltd./Cairnhill CGPE Ltd.*, Combination Registration No. C-2015/05/276, order dated 25-6-2015 (CCI); CCI Order under Section 43-A of the CA, 2002 with regard to *Cairnhill CIPEF Ltd./Cairnhill CGPE Ltd.*, Combination Registration No. C-2015/05/276, order dated 13-4-2017 (CCI).

CCI noted in another instance[27] that, in denying an exemption from section 6(2) notification pursuant to explanation to item 1, Schedule I of the Combination Regulations, an investor (acquirer) who anticipates influencing management decisions is an 'active' investor, and such acquisition will not be accepted as 'solely as an investment.'

Another notable exemption is the *de minimis* exemption for some mergers from the restrictions of Section 5 of the CA, which exempts such transactions from the Act's merger filing obligation under Section 6(2).[28] The current *de-minimis* exemption Notification [dated 27th March 2017 (SO 988(E))] published on 29th March 2017 by the Ministry of Corporate Affairs (hereinafter "MCA") exempts enterprises involved in (i) any acquisition referred to in section 5(a), (ii) any acquiring of control referred to in section 5(b), and (iii) any merger or amalgamation referred to in section 5(c) of the CA, where the value of assets being acquired, taken control of, merged or amalgamated does not exceed Rs. 350 crores in India or turnover of the acquired does not exceed Rs. 1000 crores from the provisions of section 5 of the Act for five years.[29] Regardless of the acquirer's financial criteria, if the acquisition does not exceed the defined financial *de minimis* restrictions, the advantage of this exemption is available and does not need pre-notification. On 29th March 2017, another Notification [dated 27th March 2017 (SO 989(E))] entered into effect, rescinding the Notification of 4th March 2016, save for acts done or omitted to be done prior to the date of the said rescission Notification's entrance into force.[30] It is worth noting that the 2017 *de-minimis* exemption Notification [SO 988(E)] preserved the acquired entity's higher value of assets or turnover as a result of the 2016 Notification (SO 674 (E)).

Additionally, the 2017 Notification exemption included mergers and acquisitions, in contrast to the earlier Notifications (from 2011 and 2016), which only allowed for a partial *de minimis* exemption for acquisitions. Prior to the 2017 *de-minimis* exemption Notification, however, CCI's practice was to consider the entire acquired entity when calculating financial thresholds, such as asset value or revenue, as opposed to the claim previously advanced by acquirers that only the business division/unit of the acquired enterprise must qualify as an enterprise. Along the same lines, in *Eli Lilly's acquisition of Novartis AG's*

27 CCI Order under Section 43-A of the Competition Act, 2002 with regard to *Piramal Enterprises Ltd., In re*, 2016 SCC OnLine CCI 95.

28 MCA, F. No. 5/4/2003-IGC/CS, (Notified on 4th March 2011); MCA, F. No. 5/33/2007-CS (Part), (Notified on 4th March 2016); Vikas Kathuria, *Vertical restraints under Indian Competition Law: whither law and economics*, Journal of Antitrust Enforcement 1–22 (2021).

29 MCA, F. No. 5/33/2007-CS, (Notified on 29th March 2017).

30 *Ibid*.

global veterinary pharmaceutical business (Novartis Animal Health),[31] CCI observed that the *de minimis* exemption would apply to either Novartis or Novartis India, but not to Novartis Animal Health, because the exemption applied only to the 'enterprise' 'whose control, shares, assets, or voting rights were acquired, but not to a business division or the assets acquired'. However, in the immediate transaction, it was determined that Novartis AG's assets and revenue (including Novartis India) exceeded the de-minimis levels, so disqualifying the transaction from the exemption mentioned above. CCI's practice indicates that it previously relied on a literal reading of the exemption discussed above. However, the most recent 2017 Notification (SO 988(E)) included two more exemptions: I it distinguishes the division/unit of an enterprise (the target) that is being acquired from the enterprise (the target) itself for purposes of the said exemption; and (ii) it requires the calculation of assets value or turnover derived solely from the given division/unit for purposes of calculating *de minimis* thresholds under Section 5 of the CA.[32]

Section 5 of the CA is also subject to the 'Group' exemption, which was renewed and extended in March 2016 by MCA Notification of 4th March 2016. In the public interest, the Central Government, according to section 54(a) of the CA, exempted the 'Group' exercising voting rights of less than fifty per cent in other enterprises from the provisions of section 5 of the said Act for a five-year term (ending 3rd March 2021).[33] Section 6(4) of the CA provides an exemption (a non-application) from section 6(2) merger filing requirements for a share subscription, financing facility, or acquisition made by a public financial institution, foreign institutional investor, bank, or venture capital fund in compliance with a loan or investment agreement's covenants. However, under section 6(5) of the CA and regulation 6(1) of the Combination Regulations 2011, these four exempted institutions are required to file a 'post-completion' Form-III detailing the acquisition, including the details and circumstances surrounding the exercise of control and the consequences of default arising from such loan or investment agreement, within seven days of the acquisition. This exemption has been granted to encourage foreign institutional investment in India. It is widely accepted that such transactions would have no discernible detrimental impact on competition in the relevant Indian market. If the investment is not made as part of a loan or

31 CCI Order under Section 43-A of the CA, 2002 with regard to *Eli Lilly/ Novartis*, Combination Registration No. C-2015/07/289, order dated 14-7-2016 (CCI).

32 *Excel Crop Care Ltd. v. Competition Commission of India*, (2017) 8 SCC 47; CCI in Section 43-A order in relation to Section 20(1) inquiry of 2016 in *acquisition of consumer products division (CPD) business of Grasim Industries Ltd. by Future Consumer Enterprise Ltd.*, Combination Registration No. C-2016/03/384, order dated 9-6-2017 (CCI); MCA, F. No. 5/33/2007-CS, (Notified on 27th March 2017).

33 MCA, F. No. 5/33/2007-CS (Part), (Notified on 28th November 2017); MCA, F. No. 5/4/2003-IGC/CS, (Notified on 28th November 2017).

investment arrangement, it is not subject to the section 6(4) exemption.[34]

IV. Filing Of Notices and Penalty Proceedings

According to Section 6(2) of the CA, the acquirer in the case of acquisition or both (or all) of the parties in the case of merger (or amalgamation) must file a pre-merger notice in the form specified and with the fees specified in the CCI Combination Regulations, 2011, as amended from time to time. Section 6(2) notices are typically submitted with CCI in Form I, as stated in Schedule II of these Regulations, accompanied with proof of payment of the appropriate charge, in line with rule 5(2) of the said Regulations. However, regulation 6(3) gives parties to mergers the option of filing the said notice in Form II, as (also) specified in said Schedule II, preferably in the case of horizontal or vertical mergers, as the case may be, where the parties' combined market share in the relevant market exceeds 15% or 25%, respectively. According to rule 5(5) of the Regulations mentioned above, if CCI is unable to prove *prima facie* that the merger is likely to create or has had a material adverse impact on competition in the Indian relevant market via Form I, it requires the parties to submit a comprehensive Form II notice. The parties must submit a comprehensive and accurate notification in line with the Combination Regulations; otherwise, CCI has the authority to nullify the notice and accompanying grounds, albeit the parties may be given a chance to be heard.[35] If the notification contains insufficient information, CCI may request that the parties correct the errors and provide the relevant information, and the parties are obligated to do so.[36] Following 'international best practices,' CCI has established an 'informal and verbal' pre-notification consultation procedure with its employees to help merger parties identify necessary information for completing a full and accurate Form.[37]

Until recently, merger notices under Section 6(2) were required to be filed within 30 calendar days of the 'trigger event,' which was defined as the date on which either (a) the board of directors of the entities concerned approved the merger or amalgamation proposal, or (b) the parties to the acquisition executed any agreement or 'other document'.[38] Consequently, any merger deal that was not pre-notified within the specified time after the trigger event was liable to a penalty of up to 1% of the parties' combined revenue or assets, whichever was greater, under section 43A of the CA. CCI's practice demonstrates

34 *GS Mace Holdings/Max*, Combination Form III Registration No. C-L/2011/12/03, order dated 20-3-2012 (CCI).

35 Combination Regulations, 2011, Regulation 1, 2A.

36 *Ibid.*, Regulation 3, 5.

37 CA, 2002, Section 6(2).

38 *Ibid.*; Combination Regulations, 2011, Regulation 5(8).

that CCI was lenient during the first year of the Combination Regulations 2011 and did not impose penalties on parties that filed belated section 6(2) submissions. While taking serious note of the acquirer's late notice filed after the transaction was completed and emphasizing that any entity proposing to enter into a combination must give a section 6(2) notice before doing so,[39] CCI decided not to initiate section 43A penalty proceedings, as that was the first year of implementation of the statutory combination provisions. Similarly, in a belated section 6(2) notification involving the combination of Siemens Power Engineering Private Limited and Siemens Limited,[40] CCI ruled that no penalty should be imposed on the parties to the amalgamation, despite initiating section 43A proceedings. However, in the third year of enforcement of the combination provisions, the CCI did not impose a penalty on the parties in an instance of section 43A proceedings for an overdue notice filed under section 6(2) about the *amalgamation of Shree Uttam Steel and Power Limited with Uttam Galva Steels Limited*,[41] as it believed that the notice filing delay was less than a week and was inadvertent.

After the first year of implementing the combination rules, CCI has enforced penalties ranging from the maximum to the minimum in practically all instances of belated notification in line with section 43A. For example, CCI said in *Baxalta's acquisition of Baxter's bioscience company and associated assets*,[42] that it previously regarded it permissible to apply a penalty only where the delay was considerable, defined as at least seventy days with or without the merger having been completed by the parties. Even in cases where mergers were determined to have occurred, CCI took a liberal position and levied a modest penalty due to the parties' cooperation in disclosing essential data and cooperating with merger investigation. However, in one of its previous decisions, in an entirely foreign to foreign transaction involving the formation of a greenfield joint venture (JV) between Johnson and Johnson Innovation, Inc., Ethicon Endo-surgery, Inc., and Google Inc.,[43] CCI imposed a nominal penalty of Rs. Five lakhs on the parties for a 43-day delay in filing a section 6(2)

39 CCI Order under Section 31(1) of the CA with regard to *Tetra Laval BV/ Alfa Laval AB*, Combination Registration No. C-2012/02/40, order dated 12-4-2012 (CCI).

40 CCI Order under Section 43-A of the CA with regard to *Siemens Power Engg. (P) Ltd./ Siemens Ltd.*, Combination Registration No. C-2012/03/43, order dated 19-4- 2012 (CCI).

41 CCI Order under Section 43-A of the CA with regard to *Shree Uttam Steel and Power Ltd./Uttam Galva Steels Ltd.*, Combination Registration No. C-2013/11/140, order dated 31-12-2013 (CCI).

42 CCI Order under Section 43-A of the CA with regard to *Baxter/Baxalta*, Combination Registration No. C-2015/07/297, order dated 8-3-2016 (CCI). In the instant global transaction CCI imposed on the acquirer a penalty of Rs one crore.

43 CCI Order under Section 43-A of the CA with regard to *Johnson and Johnson Innovation Inc./Ethicon Endo-surgery Inc./Google Inc.*, Combination Registration No. C-2015/06/283, order dated 30-12-2015 (CCI).

notice for the unconsummated transaction.

Interestingly, in a previous uncompleted and 'abandoned' foreign to foreign transaction involving the acquisition of 439 million new ordinary shares in DBS Group Holdings by the acquirers, namely Zulia Investments Pte. Ltd. and Kinder Investments Pte. Ltd.,[44] both of which were indirect wholly-owned subsidiaries of Temasek Holdings (Private) Ltd., the CCI imposed a penalty of Rs. Fifty lakhs on the acquire in the instant case, acquirers argued that they received incomplete and incorrect legal advice from their first Indian counsel regarding Indian competition law requirements and that upon receiving confirmation of the requirement to file a section 6(2) notice from a second set of Indian counsel, they immediately took steps to prepare and file the necessary information. Further, they informed CCI that they wished to withdraw the section 6(2) notice, as the Share Purchase Agencies had withdrawn it. On the other hand, CCI rejected acquirers' argument, stating that timely filing and the eventual destiny of the transaction were two distinct concerns.[45] However, in accordance with *Uttam Galva*, in one of the recent foreign-to-foreign transactions involving the acquisition of (remaining) 55.50 per cent of the outstanding shares of Guardian Industries Corporation by KGIC Merger Corporation, a wholly-owned subsidiary of Koch Industries Inc.,[46] CCI decided not to initiate section 43A proceedings after receiving a section 6(2) notice.

In a significant move, the Central Government, in the public interest, exempted all parties to a merger falling under section 5 from filing notice within the thirty calendar days required by section 6(2), subject to the requirements of section 6(2A) and section 43A of the said Act, for five years via MCA Notification dated 29th June 2017.[47] Due to this 'trigger event' exemption, merger parties are now immune from the section 43A penalty provision for derogating from the trigger event-related pre-notification obligation. While pre-notification under section 6(2) remains necessary, the current relaxation will assist parties in providing notice under the abovementioned provision with final documentation reflecting a firm decision on the transaction before its execution. This exemption will provide significant relief to entities engaged in cross-border merger transactions, including foreign-to-foreign merger transactions, particularly those involving multi-jurisdictional

44 CCI Order under Section 43-A of the CA with regard to *Zulia Investments Pte. Ltd./Kinder Investments Pte. Ltd.*, Combination Registration No. C-2013/06/124, order dated 1-8-2013 (CCI).

45 CCI Order under Section 43-A of the CA with regard to *First Blue Home Finance Ltd./DHFL Holdings (P) Ltd./ Dewan Housing Finance Corpn. Ltd.,* Combination Registration No. C-2012/11/92, order dated 3-1-2013 (CCI).

46 CCI Order under Section 43-A of the CA with regard to *Guardian Industries Corpn./KGIC Merger Corpn.*, Combination Registration No. C-2016/11/461, order dated 4-1-2017 (CCI).

47 MCA, F. No. 5/9/2017-CS, (Notified on 12th December 2017).

merger filings, as it will avoid 'imminent' belated filing penalty actions and will instead contribute to 'ease of doing business. This puts India's merger control system in line with most mature competition law regimes, which do not impose a deadline for filing a merger notification with the competition authority.

However, the 'trigger event' exemption does not exclude the prospect of a transaction being partially consummated. Section 6(2) read with section 6(2A) of the CA requires merger parties to wait for CCI clearance in the event of notifiable transactions. As a result, any portion of consummation during the pre-approval stage is susceptible to section 43A penalty procedures. For example, in *Acquisition by Baxalta of the bioscience businessand related assets of Baxter,*[48] according to a Global Separation and Distribution Agreement (GSDA) entered into between the parent (Baxter) and its wholly own subsidiary (Baxalta), CCI, on receipt of section 6(2) notice, observed the global implementation of the transaction, except in certain 'deferred' jurisdictions, including India, upon target business was effectively transferred to Baxalta. It was believed that it would be moved to India after completing the India leg of the deal ('India Separation'). CCI noted that in the case of a global transaction, if the parties notify it only after the execution of the local agreement but not before the (prior) execution of the GSDA, there is a risk that the transaction will be consummated at the global level even before it (CCI) examines it, defeating the very purpose of the suspensory regime of Indian merger control provided under Section 6(2A) of the CA.

V. CCI Approval for the Merger

Once a Section 6(2) notice is received from merger parties, either in Form I or Form II, as the case may be, the CCI is required to reach a *prima facie* opinion under section 29(1) of the CA within thirty working days as to whether the proposed transaction is likely to cause or has already caused an appreciable adverse effect on competition in the relevant market in India.[49] This step marks the start of CCI's phase I inquiry. Additionally, during the phase I examination to form a *prima facie* conclusion, CCI may compel the parties to provide additional material and may even accept the parties' suggested modification(s) (remedies).[50] The phase I inquiry is subject to 'clock stops,' which means that the time necessary by CCI for the parties to provide any material requested by CCI after the filing of a section 6(2) notice will not be considered for thirty working days. Additionally, CCI may request an

48 CCI Order under Section 43-A of the CA with regard to *Baxter/Baxalta*, Combination Registration No. C-2015/07/297, order dated 8-3-2016 (CCI).

49 Combination Regulations, 2011, Regulation 19(1).

50 Ibid., Regulation 19(2).

extra time period of up to fifteen days for evaluating the parties' proposed modification;[51] this additional time period is not included in the *prima facie* opinion timeframe. CCI may accept a proposed transaction during phase I if it determines that the transaction would not have a material detrimental impact on competition or is unlikely to have such an effect. Otherwise, the inquiry progresses to a comprehensive phase II investigation,[52] during which, following receipt of a response to a show-cause notice sent on the parties according to section 29(1), CCI may request a report from CCI's Director-General addressing the transaction's competition concerns. This whole phase II inquiry period is limited to 210 days from the date of receipt of the section 6(2) notification, subject to 'clock stops' and authorized (time) exclusions.[53]

After concluding that the transaction has no present or potential appreciable adverse effect on competition,[54] CCI may approve it,[55] or if CCI determines that the transaction has caused or is likely to cause an adverse effect on competition, the transaction will not take effect,[56] unless CCI is satisfied that the adverse impact can be eliminated through appropriate modification (remedy) and proposes appropriate modification.[57] If the parties do not agree to the change within thirty working days after CCI's recommendation, they may revise the modification.[58] If CCI accepts the submitted revisions, the transaction is approved;[59] if not, the parties will have additional thirty working days to accept the proposed alteration.[60] However, even after that, if the parties do not agree to the adjustment, the merger is judged to have a significant detrimental impact on competition in the relevant market in India and will not be implemented by CCI.[61]

A possible source of significant unfavorable impact on competition in mergers is the inclusion of non-compete provisions in the acquisition agreement. Non-compete agreements

51 Ibid.

52 *Sun Pharmaceutical Industries Ltd./Ranbaxy Laboratories Ltd.*, 2014 SCC OnLine CCI 148; *Holcim Ltd./ Lafarge SA*, 2015 SCC OnLine CCI 51; *PVR Ltd./ DLF Utilities Ltd*., 2016 SCC OnLine CCI 97; *Dow/ DuPont*, 2017 SCC OnLine CCI 66; *Agrium/PotashCorpn*., Combination Registration No. C-2016/10/443, order dated 27-10-2017 (CCI); Allen & Glendhill et al., Merger Regulation in Asia and the EU (2017).

53 CA, 2002, Section 31(11).

54 *Ibid.*, Section 20(4).

55 *Ibid.*, Section 31(1).

56 *Ibid.*, Section 31(2).

57 *Ibid.*, Section 31(3).

58 *Ibid.*, Section 31(6).

59 *Ibid.*, Section 31(7).

60 *Ibid.*, Section 31(8).

61 *Ibid.*, Section 31(9).

are restrictive covenants that CCI may encounter during its review of a potential deal placed by the acquirer on the seller from whom the buyer acquires the firm (acquirer). Non-compete covenants or provisions are often included in corporate company transfers to aid in the first stages of settling into the new firm. However, suppose the acquirer's conditions are too restrictive, preventing the seller (transferor) of the firm from participating in the market for an extended length of time or with an infinite geographical scope. In that case, they are deemed to create serious competition issues. In corporate commercial transactions, such limiting duties might take various forms. When approving mergers, CCI has been cautious about such clauses; and has offered suitable adjustments in such circumstances.[62]

Concerning the compatibility of such restrictive covenants with merger control provisions, CCI determined in a proposed transaction involving the *acquisition of the transferred business by Hospira Healthcare India Private Limited from Orchid Chemicals and Pharmaceuticals Limited*,[63] that such covenants must be reasonable, particularly in terms of the duration of the restraint and the business activities, geography, and geology. In addition, in one of the recent transactions involving *HP Inc.'s acquisition of Samsung Electronics Co. Ltd.'s global printer business*,[64] CCI required the acquirer (HP) to justify non-compete obligations imposed on the seller (Samsung) for five years concerning the target business (Samsung's global printer business) and seven years with respect to printer-related consumables. In this respect, according to Regulation 19(2) of the Combination Regulations, the acquirer voluntarily suggested and accepted a change that would limit the length of both the seller's non-compete duties, notably in reference to India, to three years. Furthermore, as indicated in CCI's recently issued 'guidance notes on non-compete restrictions' for purposes of approving mergers under section 31 of the CA, non-compete restrictions must be 'deemed to be directly related and necessary to the implementation of the transaction'; they cannot be 'ancillary' to the transaction's execution.[65]

VI. Conclusion

While India's *new* merger control system is still in its infancy, it looks to be rapidly

62 Merger Control Comparative Guide - Anti-trust/Competition Law-India www.mondaq.com, https://www.mondaq.com/india/anti-trustcompetition-law/843858/merger-control-comparative-guide (last visited Jan 22, 2022).

63 CCI Order under Section 31(1) of the CA with regard to *Orchid Chemicals and Pharmaceuticals Ltd./ Hospira Healthcare India (P) Ltd.*, 2012 SCC OnLine CCI 67.

64 CCI Order under Section 31(1) of the CA with regard to *HP Inc./ Samsung Electronics Co. Ltd.*, Combination Registration No. C-2016/10/444, order dated 27- 4-2017 (CCI).

65 CCI, Guidance on Non-compete Restrictions, (Issued on 16th December 2017).

strengthening its implementation mechanism. Due to the fact that the contemporary Indian market is inextricably linked to the global market, cross-border merger control, in addition to domestic, is becoming more necessary. Except for a few section 43A penalty appellate cases, India's merger control system seems to 'predominantly' rely on CCI. Interestingly, CCI does not seem to have rejected any merger transactions so far, with just a handful of transactions proceeding to phase II review. If the parties determine that remedies are required to address competition concerns in the transaction, CCI has approved such notified transactions without undue delay by accepting or providing revisions. In general, it is worth noting that CCI resolves merger notifications as quickly as possible while adhering to the time restriction.

CCI penalty processes have been determined to be thorough and relentless in their approach, and penalty imposition was virtually immediate and inescapable for late files. CCI may have avoided imposing a penalty on the parties in one of the almost 'abandoned' transactions, Zulia and Kinder Investments, since the penalty cannot be imposed for the sake of punishment in bona fide conditions. Apart from the text, execution of the law's spirit becomes magnanimous in such instances. While the maximum penalty under section 43A proceedings is one per cent of the total value of worldwide assets or turnover, whichever is greater, in the case of cross-border and entirely foreign-to-foreign mergers that meet financial thresholds and include a mandatory India leg, there appeared to be no clarity regarding the quantum of the penalty to be imposed on the parties. CCI does, however, rely on mitigating circumstances such as inadvertence and inaccurate legal counsel, trustworthy information, complete cooperation and openness, and so forth. They cannot, however, be used in place of explicit guidelines. At the moment, owing to the recent 'trigger event' exemption, section 43A penalty procedures would be significantly reduced. This exemption will allow a substantial number of cross-border and totally foreign-to-foreign mergers to proceed without delay and in a logical manner.

Additionally, it will benefit transactions involving multi-jurisdictional filings; transacting parties will be able to adapt their filings across the countries in which they do business in terms of time and cost-efficiency. However, the 'trigger event' exemption may sometimes persuade merger parties to avoid providing notice before the transaction's completion. Nonetheless, section 43A penalty procedures for 'gun leaping' may be launched correctly. CCI's discretion must be utilized consistently and prudently in determining the size of the punishment in this respect.

Another significant development favoring cross-border and entirely foreign-to-foreign

transactions is the most recent 'target exemption,' which requires a 'suitable' understanding of an entity's division/unit and related assets value and turnover when determining the *de minimis* thresholds for the exemption. Furthermore, CCI's recent publication of 'guidance on non-compete restrictions will significantly assist merger parties in deciding whether restrictions are 'directly related and necessary' to the transaction's execution. Additionally, the CCI must continue to cooperate and interact with different national competition authorities to ensure the effective execution of cross-border merger control.

Rising Religious Majoritarianism in India: The Impediment to Minority Rights and Representation

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Abstract

Today, India is witnessing a wave of polarization and majoritarian politics. The root of this polarization lies in the conflict between Secular nationalists and Hindu nationalists. Independent India witnessed a constant growth in the majoritarian and communal politics. The period between 1947 and 1964, was a period of tolerance and diluted polarization under the leadership of Pt. Nehru. In 1948, the assassination of Gandhi cost the popularity of majoritarian right-wing organizations. Till the 1980s, congress fostered secularism and had a broadly inclusive vision for India. Surprisingly, the subsequent periods witnessed a changed political approach, which was based on pseudo-secularism and manipulation of religion as a vote bank. Post-2014, a new wave of communalism and true Majoritarianism got injected into the Indian society which involved the appeasement of the majority especially the religious majority for the success in the elections.

The purpose of the paper is to scrutinize the status of minorities' constitutional rights and representation in the parliament in such a majoritarian environment. The question of law for this research is whether the decision of constitution framers of abolishing reservations for minorities in the legislature and granting a charter of rights under fundamental rights to the minorities was a feasible decision considering current India's political scenario? The approach of research is purely doctrinal research which involved the usage of legislation, reports, journal articles, and case laws for research purposes. The paper

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analyses various themes and subthemes associated with this topic and provides solutions for the prevailing problems.

Keywords: *Majoritarianism, communalism, minority, representation, rights, reservation*

I. Introduction

The Indian subcontinent has always been a culturally and religiously diversified region which constituted 100 different languages, more than 700 tribes and home to all the prominent religions of the world.[1] Before its colonization by the Britishers, the region composed of various kingdoms and principalities who were involved in constant conflict among each other. Subsequently, with the conquest of this region by the British East India Company, it led to the rise in the spirit of nationhood among all the Indians irrespective of their caste, color, gender and religion. This rise in the nationalism leads to the Indian freedom struggle against the British occupation of this territory.[2] But unfortunately, this unity among Indians did not last long and soon religious polarization entered for political purposes. Although India gained independence from British rule, due to the ill effects of religious polarizations, Indian subcontinent was partitioned and a new country was carved out of it that is Pakistan. Today, the post partitioned India is still witnessing the ill effects of religious polarizations with the rising demand of some groups for converting India from a secular country to a Hindu Rashtra.[3] The very root of the Indian politics revolves around the question of whether India shall be a Hindu state or a secular state.[4]

In the era of 1970s, the country witnessed a rise in the prominent Hindu Nationalist organizations which leads to a sharp divide among the diversified communities especially Hindus and Muslims.[5] The main goals of these organizations were to appease the majority community, inject hatred, and incite the majority community to commit crimes like lynching the minorities. In the year 1992, a dark incident took place, when a large group of religious bigots calling themselves 'Kar Sevaks' demolished the Babri Masjid and as a result the gap

1 Greater Pacific, https://www.greaterpacificcapital.com/thought-leadership/indias-diversity-is-a-strategic-asset (last visited Nov. 7, 2021).

2 MyGOV, https://blog.mygov.in/freedom-fighters-who-fought-valiantly-in-indias-independence-movement/ (last visited Nov. 7, 2021).

3 Niranjan Sahu, *Mounting Majoritarianism and Political Polarization in India*, Carnegie Endowment For International Peace https://carnegieendowment.org/2020/08/18/mounting-majoritarianism-and-political-polarization-in-india-pub-82434 (last visited Nov 8, 2021, 8:34 P.M.)

4 Mani Shankar Aiyar, *Politics and Religion in India*, 34 India Int'l Centr Qtly 42, 43 (2007).

5 Sahu, *supra* note 3, at 2.

between majority community and minority Muslims widened.[6] Since then, the country has witnessed a steady rise in religious violence, lynching, and mob attacks. Unfortunately, the ruling party is pretending to be oblivious to these incidents[7]. These sorts of events have led to an extreme rise in the magnitude of Majoritarianism within the country.

In simple terms, Majoritarianism arises when the views which express the will of the majority community are legitimately accepted by the political authority without concerning the interest of the minority community. Therefore, the main research questions that have been scrutinized by this paper are as *firstly*, whether India is shifting from a representative form of democracy to a majoritarian form of democracy? And *secondly*, what would be the status of Minority rights and political representation in the majoritarian democracy?

II. The Concept of Majoritarianism

The concept of Majoritarianism is used interchangeably with majoritarian democracy and majority rule. Under this concept, a majority of the population in terms of religion, language or any social class attains certain degree of primacy in society and decisions in the society are taken as per their will.[8] It is axiomatic that the last few years saw a dramatic rise in communalism and the political sentiments have consolidated around the symbol of one religious' identity. In majoritarian democracy, the political narratives are framed in the form of perception, wherein the religion of majority community is perceived to be weak and under threat.

The majoritarian politics has the most accentuated influence in the region of South Asia. In the last decade, the region has witnessed a meteoric rise in the magnitude of majoritarian politics. The instance of India, the BJP ruled government which is considered a Hindu supremacist has consolidated its majoritarian base by appeasing Hindus and establishing the narratives of Hindu Rashtra, Ram Rajya etc.[9] The instance of Pakistan on the other hand,

6 The Freepress Journal, https://www.freepressjournal.in/india/babri-masjid-demolition-anniversary-timeline-of-events-from-construction-of-mosque-in-1528-to-cbi-court-judgement-in-2020 (Last visited Nov 8, 2021).

7 Manoj Joshi, *Rise of Majoritarianism – needs the check*, Times of India, (Oct. 21, 2020, 15:51 IST) https://timesofindia.indiatimes.com/readersblog/mythoughtsviews/rise-of-majoritarianism-needs-the-check-27376/

8 Ranjan Ray, *The Necessity for Delinking Democracy from Majoritarianism*, The Wire, (Feb. 25, 2021) https://thewire.in/rights/democracy-majoritarianism-india.

9 Radhika Govindrajan, Bhoomika Joshi and Mubbashir Rizvi, *Majoritarian Politics in South Asia: Introduction,* Society for Cultural Anthropology, (Mar. 16, 2021) https://culanth.org/fieldsights/majoritarian-politics-in-south-asia-introduction.

reflects a military-state nexus under the leadership of PTI which establishes a narrative of Riyasat-e-Madina for moulding a glorious medieval Muslim empire.[10] The instance of Sri Lanka can be considered as the best example of Majoritarianism; it is a fact that Sri Lanka gone through a civil war between 2 communities that is the Sinhala and Sri Lankan Tamils. In the civil war, Sinhala community which is also a majority in Sri Lankan population, succeeded and established its government without giving any representation to Sri Lankan Tamils.[11]

It is pertinent to note that judiciary does play an important role in countering Majoritarianism. The landmark case of *Naz Foundation* is known for decriminalising homosexuality but, actually the court went much beyond by reinterpreting Article 15 of the Indian Constitution and dealt with the issue of minorities. The court observed that, religion is an immutable status and fundamental choice of an individual; thereby it is the foundation for personal autonomy under Article 15.[12] Ultimately, court while granting an unprecedented constitutional protection under Article 15 represented a new deal for minorities. In today's India, it would not be wrong to use the term 'minorities and 'vulnerable groups' interchangeably. Apart from numerical strength, other dimension of minority includes political vulnerability, social vulnerability and economic vulnerability.[13]

The further sections of this paper would be discussing the current outlook of Indian democracy. The paper would be discussing contentious issues like firstly whether India is shifting towards majoritarian democracy? Secondly, what is the impact of majoritarian politics in India? And thirdly how the majoritarian politics is impacting minority rights?

III. Indian Democracy: A Shift Toward Majoritarianism

The Indian democracy was moulded on the secular and representative framework. As it has been expressly declared by Nehru in his speech in the Constituent Assembly that the country like India that has got a huge diversity would never function satisfactorily until a secular and representative framework to run the country is adopted. Therefore, it is axiomatic that the idea of Indian democracy is moulded upon the idea of secularism and

10 *Ibid.*

11 Ben Davis, *What Is An Example Of Majoritarian Politics?*, MV Organization, (Oct. 8, 2019) https://www.mvorganizing.org/what-is-an-example-of-majoritarian-politics/.

12 Naz Foundation v. Govt. of NCT of Delhi, (2009) 111 DRJ 1(SC).

13 Tarunabh Khaitan, *Reading Swaraj into Article 15: A New Deal for All Minorities*, 2 NUJS L Rev 419, 421 (2009).

non-communalism.[14]

During the initial period just after independence, under the leadership of Indian National Congress, there was a clear ideological schism between advocates of secularism and communalism. However, with end of Indira Gandhi era, the country witnessed a breakdown of secular structure that was constructed by Nehru and initial congress leaders. There were certain events and steps of the government that lead to more communal divides. For an instance, the assertion of Islamic code in Pakistan and Bangladesh had its impact in India. Moreover, In India there two landmark decisions - Firstly, decision on Muslim women and Protection or rights on Divorce Bill, 1986 and secondly, the decision of Babri Masjid 1986 in favour of Hindus marked the turning point in the relation between Hindus and Muslims.[15] These events were the reason for escalation of polarization between the two communities.

1. Emergence of majoritarianism

In a study conducted by anthropologist, it was observed that everywhere the community of people tends to differentiate themselves from the other communities living in the same state. This tendency of human beings gives birth to the Majoritarian politics, wherein majority represents "the people" and considers minority as its "natural enemy".[16] In politics, there can be two ways through which politics and religion can overlap. The First, is when the minorities in order to protect their self-respect demands self-respect and second, is when the majority community makes a false perception about religious minorities by considering them to be internal threat or anti nationals.[17]

As far as minority inspired religious politics is concerned, it is merely limited to the province of Kashmir. On the other hand, Hindu Majoritarianism had a telling impact when it comes to religious politics. In politics, Majoritarianism is impactful and stimulates best results for the political leaders but, it is exercised at the nation-state arena rather then, being limited to just one or two provinces. There is a best example of Shiva Sena which is a pure Hindu Nationalist political party. The Shiva Sena had its influence merely limited to the province of Maharashtra which made it difficult to promote its narrative about south Indians (Communists) and Muslims at national level as no national party aligned with it, in fear of losing seats in other states. In contrast, BJP which is currently ruling the nation

14 Zoya Hasan, *Changing Orientation of the State and the Emergence of Majoritarianism in the 1980s,*18 Social Scientist, 27, 28 (1990).

15 *Ibid*.

16 Dipankar Gupta, *Citizens versus People: The Politics of Majoritarianism and Marginalization in Democratic India*, 68 Sociology of Religion, 27, 32 (2007).

17 *Ibid*.

promoted its Hindu Majoritarian narratives like Ram Mandir, Love Jihad and Hindutva and Hindu Rashtra at nation-state arena and ultimately succeeded in elections.

2. Majoritarian politics and election manifesto

India has adopted Universal Adult Franchise which grants every single individual in the country who is above the age of 18, a right to vote. As already noted, that India has got a huge diversity in terms of religion, caste and languages, this opens up the way for mainly two forms of politics named, caste politics and communal politics.[18] The more election dates come closer, the more marginalisation takes place in terms of castes and religion. During elections, far right-wing parties exploit religion of majority communities in order to attain success. While majority of Hindu got appeased by majoritarian politics but, the huge percentage of largest minority that is Muslims voted for Congress and other leftist party rather than voting Muslim parties.[19]

A study conducted by Pew found that about 49% of Hindus voted for BJP which is quite higher in comparison with the percentage of people belonging to minority groups. The study further stated that Congress which is the largest opposition against the ruling BJP government is popular among Muslims and other minority groups. It is about 30% Muslims out of the total population that voted in favour of Congress and other left parties because of their secular framework and promises for reforms.[20]

It is an unfortunate situation that the country does not have any specific and separate legislation for the proper governance of political parties. There is no law that regulates the conduct of the political parties rather it is the election commission who has been granted with a large delegated power to make rules regarding the code of conduct of the political parties.[21] Since, there is an absence of any specific law for the political; this raises a question that whether Majoritarian politics is legitimate or illegitimate in India?

As aforementioned that Election commission has the jurisdiction to deal with political parties, it can even act as tribunal, in case of dispute between parties. It is pertinent to note that under Part VIII, it has been specified that election manifesto published by a political

18 Jayshree Bajoria, *India's Electoral politics*, Council on Foreign Relation, (Apr. 14, 2009 2:29PM (EST)) https://www.cfr.org/backgrounder/indias-electoral-politics

19 *Ibid*.

20 Adit Phadnis, *20% Muslims Voted For BJP In 2019 General Elections, Says Pew Survey*, Business Standard, (June 30, 2021 00:51 IST) https://www.business-standard.com/article/politics/20-muslims-voted-for-bjp-in-2019-general-elections-says-pew-survey-121063000059_1.html.

21 Mumtaj Ahmed Khan v. ECI, Writ Petition No.8359/2019

party shall be in consonance with the principles of the Constitution and spirit of the other provisions of the model code of conduct.[22] Further, Clause 1(1) and (3) has been inserted in order to prevent religious and communal politics. These two provisions of the model code of conduct explicitly bars the political parties from spreading hate among communities and usage of any religious place in order to fulfil their agendas.[23] Furthermore, the Election Commission has also been authorized any action in case of any violation of the provisions of model code of conduct to ensure its compliance.

In India, there is no specific law that deals with the prohibition of majoritarian politics. Nevertheless, it has been barred under Part 1(1) and (2) (i.e., general conduct) of the model code of conduct laid by election commission of India.[24] However, India is still witnessing divisive, communal and majoritarian politics. For an Instance, BJP, the ruling party, In April 2019 releases its election manifesto wherein they iterate their stand on the controversial religious matter of *Ram Janm Bhoomi case* and promises to construct the temple in the disputed land.[25] Surprisingly, in the month of April, the dispute was pending in the Supreme Court and there was no clarity regarding the construction of temple or mosque. Therefore, the mentions of *Ram Mandir* in the election manifesto, in itself a practice of majoritarian politics. It was nothing but a tactic to appease the Hindu voters in order to succeed in 2019 general elections. Surprisingly, Election Commission was silent and refrained from taking any action against such election manifesto.[26] Further, the Election Commission's response to hate speeches during 2020 Delhi Assembly election were also weak and ineffective.[27] It can be inferred from this discussion that the laws and regulation that has been framed in order to prohibit the majoritarian politics are almost toothless and ineffective because independence of Election Commission has also been doubtful and contentious issue for discourses. Furthermore, there is no legislation of parliament that directly regulates the behaviour of political parties during elections. On this regard, the observation of Supreme Court in the case of *S. Subramaniam Balaji vs. State of Tamil Nadu* stands reasonable, when the court declared that there is no enactment that directly governs

22 Election Commission of India, https://eci.gov.in/mcc/ (Last visited Nov. 10, 2021)

23 *Ibid.*

24 *Id.*

25 Press Trust of India, *BJP Releases Election Manifesto; Promises Ram Temple, Firm Hand In Dealing With Terror And A $5 Trillion Economy,* The Hindu, (Apr. 08, 2019 17:06 IST) https://www.thehindu.com/elections/lok-sabha-2019/bjp-releases-sankalp-patra-election-manifesto-makes-75-pledges/article26769193.ece)

26 Arjen Boin, ET. AL. *Guardians of Public Value,* 54 (Palgrave Macmillan 2020).

27 The Wire Staff, *ECI's Conduct of 2019 Elections Raises 'Grave Doubts' About Its Fairness: Citizens' Report,* The Wire (Mar. 15, 2021*)* https://thewire.in/rights/election-commission-bjp-polls-fairness-citizens-commission-on-elections-report.

the contents of election manifesto.[28] Representation of people act which governs the electoral aspects in the country is only applicable to candidates and not to political parties.[29] Section 123(3A) of Representation of Peoples' Act which bars "the practice of promoting enmity between different classes of citizens" is only applicable only to candidates and not to political parties or election manifestoes. Further, the Supreme Court also considered the fact that political parties intentionally release election manifestoes before the announcement of election dates in order to escape the actions by election commission.[30] Thereby, in this particular judgment Supreme Court recorded the need for "separate legislation for governing political parties in the democratic society" and "directed the election commission to make exception regarding election manifesto in order to take action even if it is released before the announcement of election dates".[31]

This particular judgment by the Supreme Court was pronounced in the year 2013 but unfortunately there is no measure taken by either legislature or election commission till date. Neither there is strict implementation of model code of conduct nor there any legislation for governing the behaviour of political parties during elections. Further, the Supreme Court in the case of *Jagdev Singh Sidhanti vs. Pratap Singh Daulata* laid down the test for determining the corrupt practice under Section 123(3) of the Representation of People Act. The Court iterated that "in order to decide the corrupt practice under Section 123(3) of the act, the impugned speech shall be considered under the light of the relevant political controversy". By applying this particular test on the hate speeches made by the candidates of the ruling government during 2019 Lok Sabha election, it can be observed that such speeches were corrupt practice by the virtue of Section 123(3) of the Representation of People Act. However, Election Commission never took the cognizance of such speeches and those candidates were elected seamlessly.

IV. Status of minority rights and representation in Indian democracy

In a representative participative form of democracy, the representation of minorities is important as it strengthens representational links, allows political participation of minority community and maintains positive attitude of the country's population toward the government[32]. The representation of minorities in the decision making of the country

28 S. Subramaniam Balaji v. State of T.N., (2013) 9 SCC 659.

29 *Ibid*.

30 *Ibid*.

31 *Ibid*.

32 Susan A. Banducci, ET. AL., *Minority Representation, Empowerment, and Participation*, 66 The Journal of Politics 534, 538 (2004)

is important for their empowerment.[33] As per the empowerment theory, the descriptive representation and visible political leadership by the members from minority community ensures the trust in the government, participation and pride of minorities.[34] The political empowerment of the minority sends a contextual cue to minority citizens that participation in voting is better than not voting.[35]

The concept of political empowerment involves the power sharing with the people from disadvantageous group. It implies that access of various political offices, position in the government and decision making shall be opened for the people belonging to the vulnerable groups.[36] As discussed earlier in this paper that in the situation of majoritarian politics, the minority community can also be considered under the category of vulnerable groups.[37] In common parlance, the minority is group of people who are distinct from the dominant political group and seeks to maintain their separated identity.[38] Under Section 2(c) of National Commission for Minority Act 1992, there are five religious communities that are Sikhs, Muslims, Parsis, Buddhists and Christians who have been termed as minority.[39]

The principal issue that the minorities globally face is the 'discrimination'. The minority do not have the same rights as to the majority community. The United Nation Commission on Human Rights viewed these minorities' issues as a great global problem. Thereby, in the 1st session only, the UNHRC established a sub commission on Prevention of Discrimination against Minorities.[40] This commission sets up some human rights standards in the form of Universal Declaration on Human rights and two covenants that are International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.[41] The protection of minority rights has been dealt under Article 27 of International Covenants on Civil and Political Rights. This provision states that "no rights shall be denied to the people belonging to minority communities, they shall have the right to protect, profess, practice and propagate their religion and culture".

33 Lawrence Bobo, ET. AL., *Race, Sociopolitical Participation, and Black Empowerment*, 84 American Political Science Review 377, 382 (1990)

34 *Ibid.*

35 *Ibid.*

36 Alex C. Michalos, *Encyclopedia of Quality of Life and Well-Being Research,* 4876-4879 (Springer 2014)

37 Joshi, *supra* note 7, at 3.

38 Abdul Kalam Biswas, *Empowerment of Muslim Minorities Through Reservation in India*, Shodhganga https://shodhganga.inflibnet.ac.in/handle/10603/186512 (Last visited Nov. 15, 2021, 8:00 PM)

39 National Commission for Minorities Act, 1992, §2, No. 19, Acts of Parliament, 1992 (India).

40 Refworld, https://www.refworld.org/publisher/UNSUBCOM.html (Last visited Nov. 15, 2021)

41 Abdul, *supra* note 38 at 10.

1. Evolution of minorities rights and political representation in India

During the Constituent Assembly debates on the aspect of minority rights, a subcommittee on minorities was set up represented by people belonging to schedule caste, Muslims, Parsis, Christians, Schedule tribes, Anglo Indians, Sikhs and Hindu. The aim of this subcommittee was to discuss the minority rights and recommend relevant amendments for securing the rights of minorities.[42] There were four major issues relating to minorities were dealt by this subcommittee[43] that are *first,* whether the representation shall be given to minorities through separate electorates or joint electorate? S*econd,* whether seats in the cabinet should be reserved for minorities? *Thirdly,* whether seats shall be reserved for minority representation in public service? *Fourthly*, whether there shall be an administrative body for ensuring minority rights?

While dealing with the 1st issue, the committee gone through a serious discussion and final outcome of this discussion was that "adopting separate electorates for minority representation would be suicidal for minority, as they would enter into separate isolation".[44] Thereby, the idea of joint electorate was adopted along with some reservation of seats in legislature for minority communities for the period of ten year.[45] For the purpose of this reservation, there was three categories were made of all the "recognized minorities", wherein Anglo Indians, Parsis, Tribesmen were considered minorities with the population of 0.5% of the total population.[46] Second category included Sikhs and Indian Christians were treated as minorities having population less than 1.5% and third category included Muslims and Schedule caste having population exceeding 1.5%.[47]

On the aspect of reservation for minorities in cabinet and public service, members of the subcommittee reached to an agreement that there shall be no statutory provisions regarding the same. However, they supported the adoption of paragraph VIII of *instrument of instruction* and incorporated it under *directive principles of state policy*. This instrument suggests that the government shall be obligated to frame policies regarding the appreciation of representation of minorities in public service and cabinet.[48]

42 Constitution of India. https://www.constitutionofindia.net/blogs/desk_brief__the_minority_report (Last visited Nov 16, 2021)

43 Joshi*, supra* note 7, at 3.

44 3 B. Shiva Rao, *The Framing of India's Constitution* 757-58 (Universal 2015).

45 *Ibid*.

46 *Ibid*.

47 *Ibid*.

48 *Ibid*

In one interesting attempt to propose the idea of separate electorate voting, on 24th July 1947 K.T.M Ibrahim moved an amendment before the constituent assembly, specifying that the reservation shall be made on community basis and a candidate from a particular community must poll at least 35% votes in order to secure that reserved seat for the same community. However, the proposal was rejected by the majority of members in the constituent assembly.

Further, after India's partition, the framer of the constitution decided to abolish the reservation of seats in the legislature. However, in the constitution itself, a charter of rights for minorities were inserted under Part III to make sure that the minorities do not feel like the second-class citizens and their culture and religion stay protected.[49] Moreover, Article 15, Article 25-30 and Preamble were enacted within the constitution for protecting the rights of minorities and maintain unity and integrity of the nation by eradicating discrimination against minorities.[50] The Article 15 in the Constitution was incorporated in the Constitution with an intention of giving a blanket protection from discrimination to every citizen of the country whether he/she belongs to majority community or minority community.[51] It is pertinent to note that during the initial discussion in the Constituent Assembly several demands for reservation in legislature were put forth by the representatives of minority community but, framers did not accepted their demands. However, the framers incorporated several minority friendly provisions in the constitution for their welfare and protection. Accordingly, representatives from minority community dropped their demands for reservations in the legislature as they positively believed that such provisions would protect them from any kind of suppression and discrimination.[52]

It can be understood from the above discussion that the minorities rights enshrined in the Constitution were incorporated with an optimistic intention of protecting the minority from discrimination and securing their culture and religion. Here emerges a question that whether these constitutional rights without any reservation in the legislatures are actually sufficient for protection of minorities in today's India?

2. Fading constitutional rights and absent political representation

In this era of majoritarian religion-based politics, the policies of Indian government have put the minorities of the country especially religious minorities into the state of marginalisation

49 Ibid, 769

50 Bal Patil v. Union of India, (2005) 6 SCC 690.

51 State of Bombay v. Bombay Education Society, (1955) 1 SCR 568.

52 Ahmedabad St. Xavier's College Society v. State of Gujarat, (1974) 1 SCC 717.

and extreme pressure.[53] Today, the country is witnessing an increment in the hate crimes against minorities. This can be understood from the fact that in the year 2009, the total religiously motivated hate crimes were 3, whereas, in 2018 this number increased to 63.[54] Between June 2014 and the year 2018, a sum of 195 hate crimes were committed against minorities out of which 83.08% were against Muslims, 14.87% were against Christians and 2.05% were against Sikhs.[55] As per Sachar Committee Report, it is not only about hate crimes but, as far as access to social benefits like health, education, employment, housing and shelters are concerned, the minorities particularly Muslims are the most deprived community. A report of National Commission for Religious and Linguistic Minorities highlights social and economic problems for different minority groups.[56] In Muslim community, the major concern is relating to high degree of illiteracy.[57] Muslim community has the lowest percentage of educated people as compare to other minority groups.[58] Furthermore, Muslim community also face highest number of hate crimes in the country.[59] For Christian community, the major concern is high unemployment and poverty. As per periodic labour force survey, 6.9% Christian rural males and 8.9% Christian urban males are suffering due to joblessness.[60] Christians has the highest rate of unemployment as compare other minorities.[61] The Sikh community of the country has to face physical insecurities for life and properties because of anti-Sikh sentiments originated in the 1980s.[62] For Zoroastrian community of the country the major issue is with respect to low fertility which is causing their population to reduce.[63] The fertility rate of the Zoroastrian community is below 1 which means many spouses in the community are not having child. The infertility among Zoroastrians has caused their population to reduce from 69,000 in

53 Human Rights Watch, https://www.hrw.org/news/2021/02/19/india-government-policies-actions-target-minorities (Last Visited Nov. 16, 2021).

54 Deepankar Basu, *Majoritarian Politics and Hate Crimes Against Religious Minorities in India 2009-2018, 146(C*) World Development, Elsevier (2021) https://www.sciencedirect.com/science/article/abs/pii/S0305750X21001522.

55 *Ibid*.

56 Ranganath Misra Committee, *Report of National Commission on Religious And Linguistic Minorities*, National Commission Religious And Linguistic Minorities (Sept. 12, 2010), https://www.minorityaffairs.gov.in/sites/default/files/volume-2.pdf

57 *Ibid*.

58 *Ibid*.

59 *Ibid*.

60 Onmanorama, https://www.onmanorama.com/news/india/2019/06/27/unemployment-christians-india-religion.html (Last visited Nov. 20, 2021)

61 *Ibid*.

62 Basu, *supra* note 54, at 14.

63 *Ibid*.

2001 to 57,000 in 2011.[64]

As far as, representations of religious minorities in the Indian parliament are concerned, the facts are more surprising. In 2019 Lok Sabha, it is 90.4% of the total MPs who belong to Hindu majority community.[65] On the other hand, total numbers of MPs representing different minority communities is only 10 %(approx.), although 19.96% (approx.) of the Indian population is composed of different religious minorities.

Therefore, it would not be wrong to infer that amidst of this majoritarian politics; the minority community are being deprived in every aspect. Be it political representation, access to human development or security to profess their religion, the minorities are being deprived in every aspect. This raises a serious concern upon the decision of the constitution framers of abolishing the reservation of seats for minority community. India's anti-terror laws like UAPA with just 2% conviction rate are being used more as political weapons to terrorize the minorities and critiques of the ruling government.[66] As already discussed, in India political parties are more concerned about Hindu appeasement and vote bank politics rather than social welfare. Considering, the hardship suffered by minorities amidst the majoritarian politics, there is a grave violation of fundamental rights be it right to equality (Article 14 – 18), right to life (Article 21), right to religion (Article 25-28) and Cultural and educational rights of minorities (Article 29 and 30), the minorities are being deprived of almost every fundamental rights. In current scenario, right of minorities are merely available in paper and not in real sense.

Therefore, the enough representation of minorities is very crucial to strengthen the Indian democracy. The reservation of seats for the minority communities in the parliament would encourage the participation of minority communities in the Indian politics. Such participation would be beneficial to everyone in the country. It will improve the quality of political life, facilitate social integration and prevent conflict in the societies.[67] The issues of the minorities would be raised by their respective representative in the parliament

64 Manoj Nair, *As Their Population Declines, Parsi-Zoroastrians Struggle To Manage Religious Properties,* Hindustan Times (Jan. 20, 2019 10:44PM IST) https://www.hindustantimes.com/mumbai-news/as-their-population-declines-parsi-zoroastrians-struggle-to-manage-religious-properties/story-9ldRw9KNefTO5c7CSn65OL.html.

65 Priyamvada Trivedi, *From Faith to Gender and Profession to Caste: A Profile of the 17th Lok Sabha*, Hindustan Times (May 25, 2020 07:39AM IST) https://www.hindustantimes.com/lok-sabha-elections/from-faith-to-gender-and-profession-to-caste-a-profile-of-the-17th-lok-sabha/story-Mnp5M4pRX3aUji1UFFVy2N.html.

66 Bilal Kuchay, *With 2% Conviction, India's Terror Law More a Political Weapon*, Aljazeera (Jul. 2, 2021) https://www.aljazeera.com/news/2021/7/2/india-terror-law-uapa-muslims-activists

67 Dr. Oleh Protsyk, *The Representation of Minorities and Indigenous Peoples in Parliament*, Inter Parliamentary Union (Jan. 1, 2010) http://archive.ipu.org/splz-e/chiapas10/overview.pdf

and ultimately the policy makers would be compelled to work for the welfare of citizens including minorities.

3. Protection for religious minorities in existing constitutional framework: analysis

India is a country that has been gifted with a huge diversity in terms of cultures, ethnicities and languages. The first Prime Minister of India, Pt. Nehru used the phrase "unity in diversity" to describe India in his book named "Discovery of India" published in the year 1946.[68] It is worth to note that during Constituent Assembly debates, the secular state model was adopted for India in order to maintain the multi-culturalism of the country.[69] The Charter of Rights was introduced under Part III of the Constitution to preserve the secularity of the state. Article 14 which is one of the key provisions in the charter of rights declares "Equality before the law and equal protection of the law". However, Equality does not mean universal application of law to every citizen rather; it is based upon the premise of "like must be treated alike and unlike must be treated unlike".[70] The idea behind this particular concept is to implement protective discrimination for any group who is weak and vulnerable or disadvantaged.[71]

In light of the previous discussions with respect to minorities' pathetic social status, it would not be wrong to consider religious minorities as the vulnerable groups. Special rights to the religious and linguistic minorities were granted under Article 29 and 30 of the Indian Constitution. In this context the Supreme Courts observation in the case of *Ahmedabad ST. Xavier College Society v. State of Gujarat* gets pertinent, wherein the court stated that the special rights for minorities were not granted to give them any special privilege rather, to ensure protection to the minorities and give sense of security.[72]

Under Article 15(1) and (2), the Constitution imposes negative obligation upon the state to refrain from discriminating among citizens on the ground of religion, race, caste, sex and place of birth.[73] In 1951, Clause (4) was inserted in the Constitution which allowed

68 NCERT, SOCIAL AND POLITICAL LIFE, Ch. 1 (NCERT 2022) https://ncert.nic.in/textbook/pdf/fess301.pdf

69 Suhrith Parathasarthy, *Constitution Building in Culturally Diverse States: The Case of India,* Melbourne Forum on Constitution Building (2018) https://law.unimelb.edu.au/__data/assets/pdf_file/0009/2925801/MF-2018-India-Paper-FINAL-clean-formatted.pdf.

70 B.K. SHARMA, INTRODUCTION TO THE CONSTITUTION OF INDIA 67 (Prentice Hall of India Pvt. Ltd 2004)

71 Abdul, *supra* note 38 at 10.

72 Ahmedabad ST. Xavier College Society v. State of Gujarat, (1974) 1 SCC 717

73 INDIA CONST. art. 15

state to make special provision for socially or educationally backward classes of citizens or for the schedule castes or for the schedule tribes.[74] Here arises a question whether religious minorities can be placed under socially backward classes mentioned under Clause (4) of Article 15? It is pertinent to note that in a matter before the Supreme Court wherein 'affirmative action of treating Muslims as special class was challenged', National Commission through its affidavit asserted that "Minorities have to be treated as a weaker section".[75] The Sachar Committee and Ranganath Misra committee reports discussed previously clearly highlights the poor social status and serious problems of minorities in India. Moreover, in a survey recently conducted by Common Cause, it is found that minorities face religious discrimination even in a professional department like police.[76] Therefore, it is inferable that minorities can be treated as socially backward within the meaning of clause (4) of Article 15. However, it is an upsetting fact that despite of social backwardness and atrocities the minorities face in India, there is hardly any concrete special provision and prevention from the state till date like for.

The Constitution framers provided every possible protection to religious identities of minorities by incorporating Article 25 and 26 in the charter of Fundamental rights. Declared under Article 25 of the Constitution, all persons are equally entitled to freedom of conscience and right to freely practice, profess and propagate religion.[77] Further, Article 26 allows every religious denomination to maintain religious institutions, manage its religious affairs, and acquisition and administration of moveable and immoveable property for religious purpose.[78] The right to religion enshrined under Article 25 and 26 affirms the positive secularism of India which means that every person has right to practice, profess and propagate his religion but, state will have no religion of its own.[79] Justice Ahmadi, in the landmark case of *S.R. Boomai vs. Union of India* laid an interesting observation regarding secularism of India. Ahmadi J. states that "the concept of secularism is based upon the principle of accommodation and tolerance".[80] Moreover, Justice Kuldeep laid *in*

74 *Ibid*

75 Press Trust of India, *Minorities Have To Be Treated As 'Weaker Sections': NCM*, The Hindu (Aug. 29, 2021, 4:15 P.M.) https://www.thehindu.com/news/national/minorities-have-to-be-treated-as-weaker-sections-ncm-to-supreme-court/article35691794.ece.

76 Common Cause, *Status of Policing in India 2019,* Common Cause and Lokniti – Centre For The Study Developing Society(CSDS), https://www.commoncause.in/uploadimage/page/Status_of_Policing_in_India_Report_2019_by_Common_Cause_and_CSDS.pdf

77 INDIA CONST. art. 25

78 INDIA CONST. art. 26

79 Shefali Jha. Secularism in the Constituent Assembly Debates, 1946-1950, 37 Economic and Political Weekly 3175–80 (2002).

80 S.R. Boomai v. Union of India, (1994) 2 SCR 644.

S.R. Boomai case that "whatever the attitude of the state toward religion but in secular state religion shall not be mixed with secular activities of the state".[81] Further it is pertinent to mention here that in the landmark case of *Kesavananda Bharati vs. State of Kerala*[82], the Supreme Court declared Secularism to be the part of the basic structure of the constitution which means any law passed by the parliament can never contravene the secular spirit of the Constitution. The Hon'ble Supreme Court has been time and again interpreted the term 'secularism' in Indian context, the most recent example of such interpretation can be found in *M. Siddiq vs. Mahant Suresh Das* popularly known as *Ram Janmbhoomi case*, wherein court interpreted secularism by using the quote *Sarwa Dharma Sambhava* from *Yajur Veda, Atharva Veda* and *Rig Veda* which means tolerance of all religion.[83] In spite of such a secular framework of the constitution, the Minorities especially Muslims places of worships are under threat in today's India because of Majoritarianism.

After safeguarding religious identity, the Constitution framers while attempting to preserve the cultural and linguistic identity inserted Article 29 and 30 in the Constitution. The purpose of these two provisions was to provide the protection to the culture and language of the minority groups. Moreover, Article 30 allowed the religious and linguistic minorities to set up and administer their own educational institution.[84] Further clause (3) of Article 30 imposes another negative obligation upon the state to refrain from discriminating while providing financial aid to any such institution. Justice Ray's observation in the case of *Ahmedabad St. Xaviers College* case is pertinent because his observation provides the reason for inclusion of Article 30 in the constitution. Ray J. states that "minorities have the choice to establish their own educational institution so that their children can get general secular education and become good citizens of the country".[85]

On the basis of the above evaluation of existing constitutional protection for minorities, it can be inferred that even after dropping the idea of reservation for the minorities in parliament; the Constituent Assembly ensured some constitutional safeguards to minorities. However, in the era of majoritarianism and communal politics the status of minorities is degrading because of social problems they are facing. The representation percentage of minorities in parliament is below their population that is causing them lack of voices in the parliament. Thereby, the social issues of minorities are prevailing with no signs of resolution and the charter of rights that they got from constitution framers only exists on paper.

81 Ibid

82 Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

83 M. Siddiq v. Mahant Suresh Das, (2020) 1 SCC 1.

84 INDIA CONST. art. 30

85 Ahmedabad ST. Xavier College Society v. State of Gujarat, (1974) 1 SCC 717.

V. Conclusion

Due majoritarian politics, it is a saddened reality that status of Indian democracy is constantly backsliding. Recently, UK based 'Economists Intelligence Unit' in its democracy index 2021 placed India in the category of 'Flawed democracies'.[86] Moreover, in the democracy report 2022 released by a renowned global platform, Sweden based V-Dem institute, India has been declared as an elected autocracy.[87] The unrepresented minority groups in the parliament are facing constant fundamental rights violations. The minority rights provided under constitution are exists for name's sake. Minorities without proper representation don't have much say in the Indian parliament.

Therefore, reservation for minority community in the parliament is the need of an hour. As already mentioned, the idea of reservation of minority was dropped because of the sole reason of partition. Since, today India has much stronghold and fear of partition has somewhat vanished, it would be a positive step to grant reservation for the minority communities as per their population percentage at the national level for parliament and at the state level for the reservation in the state legislature. The Part XVI of the initial draft constitution that provided "special provisions for minority citizen" can be restored in the constitution.

The reservation of seat would allow the minority to grasp enough representation and say in the parliament. Accordingly, the laws and policies would be framed for whole of India with common consensus with every community rather than just majority community. With enough representation of minorities in the parliament, the ramification of majoritarianism will reduce. Further, in order to completely end the practice of majoritarianism, a special law should be introduced to govern the behaviour of political parties during elections and there shall be strict implementation of model code of conduct by the Election Commission.

The time has come to introspect into the political system of the country because it is not the reservation that would give oxygen to the fears of partition rather, it is the majoritarian politics that can have worst effect on the population and geography of the country.

86 Economist Intelligence Unit, https://www.eiu.com/n/democracy-index-2021-less-than-half-the-world-lives-in-a-democracy/ (Last visited Apr. 2, 2022).

87 Vanessa A. Boese, *Autocratization Changing Nature*, V-Dem Institute (Mar. 3, 2022) https://v-dem.net/media/publications/dr_2022.pdf.

RACIAL DISCRIMINATION IN SPORTS ACTIVITIES

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Abstract

People from all walks of life coexist in modern society, yet they nevertheless have to contend with racism from time to time. People of many colours, ethnicities, and socioeconomic statuses coexist peacefully in the modern world as we go about our daily lives, studying, working, and having fun. It's unfortunate that some people's lives are negatively impacted by various sorts of prejudice. Even in the world of sports, racism still exists, and black players in particular face barriers to entering the professional ranks of their chosen sports. Most football racism instances are tied to race, accounting for more than half of the overall number of occurrences, according to the study. Faith-based discrimination is the third most common kind of racism, followed by discrimination based on sexual orientation, gender, or a person's physical or mental impairment.

Keywords: *Racism, Sports, Combating Racism, Football, Gender.*

I. Introduction

People from all walks of life coexist in modern society, yet they nevertheless have to contend with racism from time to time. People of many colours, ethnicities, and socioeconomic statuses coexist peacefully in the modern world as we go about our daily lives, studying, working, and having fun. Racism manifests itself in various forms and has an adverse effect on certain people's life. Now, the term "racism" encompasses a wide range of concepts relating to racial tensions. With its ability to bring people from different backgrounds together through shared passions and experiences, sports serve as a powerful social and

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cultural bridge-builder. Racism can be reduced in sports organisations by emphasising inclusivity, teamwork, and the improvement of both individual and team abilities. In sports, racism can have a significant impact. Unchecked, it can lead to unwarranted, even violent, outbursts of motivation, excitement, and participation.

Speaking of racism and discrimination in Romania, we are not referring to large-scale campaigns or a concerted effort by the entire country. Rather, we are referring to a small number of isolated incidents that have been thoroughly investigated and documented. In other cases, the public is made aware of discriminatory behaviour, such as when the government punishes institutions, organisations, or individuals for racist, xenophobic, or violent incidents. It is therefore appropriate to explore this touchy topic, which can have a significant impact on how we view racism. One of the most common forms of ideology based on racial behaviours is the belief that people can be labelled as either inferior or superior because of their social behaviour or natural abilities. The Holocaust, apartheid regimes in South Africa, slavery, and racial segregation in the United States are all historical examples of institutional racism. Racism was also a feature of the social organisation of many colonial regimes and empires.

Race and ethnicity have a long history of equivalence, both in common use and in older social science literature, despite their current separation in contemporary social research. To use the term "ethnicity" in a way that resembles the conventional meaning of the word "race," i.e., the categorization of people into groups based on characteristics that are thought to be inherent or necessary to each group (for example, a parent or common behaviour). Since racism and racial discrimination are commonly used to express ethnic or cultural distinctions, rather than racial ones, the terms are sometimes interchangeable. There is no distinction between "racial discrimination" and "ethnic discrimination," according to a United Nations treaty on racial discrimination. There is no basis for racial discrimination everywhere, theoretically or in fact, according to the UN Convention on the Elimination of All Forms of Racial Discrimination and the Promotion of Racial Equality.

II. What is Racism?

According to Oxford Dictionary, Racism is: "the belief that all members of each race possess characteristics, abilities, or qualities specific to that race, especially so as to distinguish it as inferior or superior to another race or races prejudice, discrimination, or antagonism directed against someone of a different race based on the belief that one's own race is superior". "Racism is a complicated problem, and a complete solution requires careful

consideration of all its complexities". Governments are responsible for combating racism and other types of prejudice, yet their policies (if in place) take a long time to implement. Many countries have residents from various ethnic groupings, and bigotry and racism are sometimes deeply rooted in society, with resentments based exclusively on ethnicity. and racism are much impregnated in the society with resentments based solely on ethnicity. "The categorization of ethnic groups, especially by officialdom, is not just a matter of social classification practices: it has consequences" that divide people and countries and can escalate to interethnic conflicts.

Linguists generally believe that it originated in English, although there is no consensus on how it entered Latin. According to a new theory, the word "area" is derived from the Arabic word "head, beginning, origin." According to theorists, it was perfectly acceptable to treat races differently because some breeds were regarded to be inferior to others. Linguists generally believe that it originated in English, although there is no consensus on how it entered Latin. A new theory is that it is derived from the Arabic area, which meaning "head, beginning, origin" in the Arabic language.[1] As a general rule, theorists held that some races were superior to others, and therefore they justified the practise of treating them differently[2]. Scientific racism is a term commonly used to describe collaborative efforts to define and accurately describe racial distinctions, despite the fact that there is no true evidence to support these claims.

Biologists and anthropologists are increasingly rejecting a taxonomy of races in favour of more precise and verifiable criteria, such as geography, ethnicity, or endogamy in their definition of races. According to current human genome research, there is minimal evidence that a specific human breed can be used to classify people genetically. In sociology and economics, racial and racial relations are important areas of research. White racism is the subject of much sociological research. Du Bois, the first African American to receive a Ph.D. from Harvard, wrote some of the earliest sociological articles on racism. Racism that is more deeply ingrained in societal systems and practises - and hence harder to see and oppose - is more difficult to investigate and confront. Implicit racism, also known as averse racism, may persist even among those who profess equality, despite the fact that it has grown increasingly forbidden in many nations. As a part of implicit knowledge, social psychologists have examined implicit associations and implicit attitudes. Assumptions are made without the subject or themselves being aware of them. These evaluations are generally positive or negative. Individuals' experiences have varied influences on their perceptions

1 Online Etymology Dictionary, 2016

2 (Garner, 2009; The Canadian Encyclopedia, 2013)

of the world. Assumed attitudes don't realise that they're acting on feelings, thoughts, and actions influenced by previous experiences that are favourable or unfavourable to social objects. Regardless of whether or not the individual is aware of it, their thoughts, feelings, and actions have an impact on their behaviour.

As a result, when confronted with beautiful faces of other races and ethnicities, our minds can be influenced by our own ingrained racism. "Blackness is so connected with crime that you are eager to choose these criminal objects,".[3] As a result of such experiences, we may develop a racial bias against other people or even inanimate objects. There is a possibility that racist attitudes and acts can develop from prejudices and concerns that we are unaware of.

III. Racism in Sport

Even in the world of sports, racism still exists, and black players in particular face barriers to entering the professional ranks of their chosen sports. Sports are an integral element of what we refer to as "entertainment," since they are a mainstay of our daily lives. More and more individuals 'consume' sports as viewers or followers of various teams or sports since they are aware of the health benefits of participating in such activities. More and more sportsmen are moving around the world in order to improve their chances of winning trophies because of a growing interest in sports as well as the entertainment value they provide.

Many also believe that the sports world is a model of race relations for the rest of society. Through television and other media coverage, fans see that on the playing field it does not matter whether you are black or white, what matters is your ability". Racism, prejudice, and other racial barriers do not exist in sports. Racism and prejudice are pervasive in society, not just in sports, despite the popular belief that "sports are frequently utilised as paradigms for how an integrated society should look." In USA black players were excluded from professional sports until 1940's and it took them a long time to be accepted as equal employees in sports clubs. It can be said that everything happening in sport mirrors the society and as in the larger society, patterns of race discrimination in sport are rampant. These patterns, including evidence of institutional racism, receive far more attention than any other topic in the area of race relations and sport. The system is a sort of vicious cycle, as black student-athletes are encouraged to focus on athletic success from all sides and are not given proper aid to succeed academically and after the end of their athletic career their

3 Stanford University social scientist Jennifer L. Eberhardt (2004)

chances to be employed as coaches or in management are very slim but the "success of black coaches disputes any notion that they cannot be successful, and the overwhelming number of players who are black shows that there are many candidates.

Athletes are socially isolated because of the enormous effort they put in to train and compete to be the best in the world, and they "do not feel racist attitudes in professional sports," but they believe that "whites generally received preferential treatment in their sport" and "that blacks were far less likely than whites to be allowed into team management after their playing years." Racism has been documented in a variety of sports, including tennis, athletics, basketball, boxing, handball, basketball, volleyball, and football, both in collective and individual sports.

IV. What do we mean when we speak of discrimination in sport?

Differing from one another is a grammatical definition of discrimination. In order to be considered discriminatory, a distinction cannot simply be made between one group and another. Differences become "discriminatory" when they are based on illegal or invalid criteria. Discrimination occurs when people who are in similar situations are treated differently on the basis of at least one characteristic that is illegal. Discrimination, according to sociologists, can be both subjective and internally felt. Feelings of discrimination are more common than the actual practise of discrimination, as a researcher, you need to be aware of both the objectivist and subjectivist aspects of discrimination, no matter where it occurs.

V. Race, sex, class and power

Sports events such as the Olympics and Paralympics, where athletes from all over the world compete, seem to foster an inclusive environment where everyone has an equal chance to shine. Of course, this is not so because of the unequal investment in individuals, resources and facilities for personal and professional growth in all countries. As a result, people of all races and ethnicities around the world face unequal opportunities to participate in sports. Despite the wealth of options accessible in most nations, social status remains a significant barrier to participation. Racism and prejudice exacerbate socioeconomic disadvantages, making them even more difficult to overcome. Discrimination against multiple groups has resulted in disadvantage and exclusion for many others, including disabled persons and women and girls. This can lead to a very negative outcome if all of the above qualities are present.

Power plays based on race, class, and sex are prevalent in the decision-making process of leaders, managers, and administrators. People who share these qualities are more likely to face discriminatory consequences and impacts, whether those outcomes and impacts were intended or not. Discrimination, disadvantage, inequity, and exclusion can be eliminated only by addressing the issue of power and who has it when it is exercised. All those in charge of making decisions need to have a firm grasp on racism's definition and repercussions if they are to be able to combat racist stereotypes and labels.[4] The fatal underpinnings of power in the hands of people who possess prejudices, intolerance, and hatred toward people of different racial groups seem to be increasingly difficult to understand at the moment. To avoid biased effects, power can be used more constructively if people are prepared to question their prejudices and biases People of different races, sexes, and socioeconomic backgrounds can nevertheless suffer as a result of their behaviours, which aren't subjected to institutional reform to eliminate discrimination. Organizational structures and practises that lead to systematic institutional discrimination must be the primary focus of attention. People from certain groups are further marginalised and excluded because of the dominant culture and status quo that is reflected in and reinforced by these organisations.

Sport's governing bodies are no different from other organisations. Sporting organisations in the United Kingdom are almost non-existent in terms of the number of people of colour in leadership roles. The absence of women and persons from the lowest socioeconomic strata of our society from positions of power does not entail that there is overt racial discrimination, nor does it mean that only blatant sexism and exclusion are to blame. Moreover, it does not imply that only white people are capable of racism, that only men are capable of sexism, or that only the wealthy are capable of oppressing the poor. Decisions made by people in power, despite their stated pledges to equality and fair treatment, maintain traditions, cultures, policies and practises that are insufficiently radical or resilient to remove or ameliorate the negative impacts of race and sex discrimination.

1. Suarez-Evra case

This is the most publicised and hotly debated case of racial discrimination involving two players in the past decade. On October 15, 2011, during Manchester United's Premier League match against Liverpool, Luis Suarez was accused of making racial slurs directed at Manchester United left back Patrice Evra. Evra allegedly heard Suarez call him "Negro." The English Football Association announced their judgement on December 20: Suarez

4 Jonathan Long and Karl Spracklen, *Challenging Racism in and through Sport: Masculinity, Power and Supremacy, Sport and Challenges to Racism*, https://link.springer.com/content/pdf/bfm%3A978-0-230-30589-2%2F1.pdf/

would be fined £40,000 and suspended for eight games. The full 115-page report was released by the English FA Regulatory Commission on December 31. Its main finding was that the Liverpool player had "hurt the reputation of English football around the world." Although it considered Evra to be a trustworthy witness, it implied that Suarez's testimony was unreliable and contradictory. Suarez's claim that the term "black" was intended to be kind and conciliatory was deemed to be "unsustainable and simply impossible given that the players were involved in an intense disagreement," the report said[5].

2. Dani Alves Case

During a 2013–14 La Liga match, a Villarreal supporter threw a banana towards FC Barcelona right back Dani Alves. The look on Dani's face was priceless. Then, before taking a corner for his team, he ate the banana. Villarreal was fined 12,000 Euros by the Disciplinary Committee of the Spanish Football Association as punishment.

3. Kalidou Koulibaly Case

On the 26th of December, 2018, during a series A match between Napoli and Inter, Inter fans chanted racist slurs at Napoli centre back Kalidou Koulibaly. Consequently, the Disciplinary Tribunal of Serie A ordered Inter to play its next two home games without fans present as a form of punishment.

4. Moise Kean Case

However, a case was regarded a scandal, and it included a player for Juventus named Moise Kean during a 2018–19 SERIE A match against Cagliari. The youthful forward was the focus of racist taunts from the crowd. Cagliari, however, was spared punishment by the Serie A Disciplinary Tribunal because it was determined that such shouts occurred infrequently. As a result, many groups that aim to end racial prejudice were outraged by this decision.

These cases illustrate the wide range of fines imposed across Europe, which vary according to national laws and levels of tolerance for racism[6].

5 Mahmood Hussain Law Firm, *Discrimination In Football: Its Most Famous Cases, The Evolution Of Its Regulations, And Its Remedies*, February 6, 2020, https://www.legal500.com/developments/thought-leadership/discrimination-in-football-its-most-famous-casesthe-evolution-of-its-regulationsand-its-remedies/

6 *Discrimination in Football: Its Most Famous Cases, The Evolution of Its Regulations, And Its Remedies, Legal* 500, August 20, 2022. https://www.legal500.com/developments/thought-leadership/discrimination-in-football-its-most-famous-casesthe-evolution-of-its-regulationsand-its-remedies/,

5. FIFA

In Article 4 of the FIFA statutes, it is stated that "discrimination against a country, private person, or group of people on the basis of race, skin colour, ethnic, national, or social origin, gender, disability, language, religion, political opinion, or any other opinion, wealth, birth, or any other status, sexual orientation, or any other reason is strictly prohibited and punishable by suspension or expulsion."

This Code applies to all FIFA-organized matches and competitions," states Article 2 of the 2017 FIFA Disciplinary Code. Any player who "offends the dignity of a person or group of persons through contemptuous, discriminatory, or denigratory words or actions regarding race, colour, language, religion, or origin shall be suspended for at least five matches," as stated in Article 58.1.a) of the 2017 FIFA Disciplinary Code. Additionally, a punishment of at least CHF 20,000 and a ban from all stadium appearances will be imposed. A minimum fine of CHF 30,000 shall be imposed if the offender is a public servant.

The 2017 FIFA Disciplinary Code states, "Where fans of a side infringe par. 1 a) at a match, a punishment of at least CHF 30,000 shall be levied on the association or club concerned, regardless of the question of culpable conduct or culpable supervision."

When France played Russia in a friendly in March 2018, Russia played host and the French players Ousmane Dembele, and Paul Pogba were the targets of racist chants and comments from the Russian crowd. In accordance with Articles 2, 58.1.a), and 58.2.a) of the 2017 Edition of the FIFA Disciplinary Code, the FIFA Disciplinary Committee has decided to punish the Russian Football Federation CHF 30,000.

VI. The World of Sport: Between Inclusion and Exclusion

A contradiction exists in sports. It is widely practised and is open to everyone, regardless of their cultural background or gender identity. Because of this, it might be considered a place where there is no discrimination. Competition in sports can also be seen as a means of differentiating participants by classifying them according to their degree of skill. It may appear that discrimination is taking place by excluding people because of their "less excellent" athletic abilities, but this exclusion is not based on any of these social factors. As if discrimination weren't enough of an issue, all age groupings, weight divisions, and rankings are constructed with the goal of ensuring "the greatest individual wins, regardless of skin colour." Due to the fact that distinct competitions for men and women are "natural," differences between the sexes are recognised and differentiation is permitted.

When it comes to democratic cultures that believe that individuals are fundamentally equal, performance is a legitimate benchmark to use. For participants of all cultures and national origins, sport provides a level playing field that is "in essence" level (fair) and the best possible opportunity for integration on the field. According to Pierre de Coubertin, the contemporary Olympics' humanist sporting tradition's founder, athletes from all over the world participate under the same laws and ethical guidelines in a single "sporting community" while adhering to the same set of rules and regulations. As a result, all players leave their personal identities and associations in the changing room and emerge on the sports field or in the gym in a neutral role.

Reality checks reveal that these ethical rules are routinely violated. Sport's paradox is highlighted when some groups of competitors and spectators are subjected to injustice, racism, and prejudice, either because they are members of those groups or because they are thought to be. In addition, because competitive sport is dependent on physical performance, it also distinguishes athletes with disabilities from the rest of the population. The International Paralympic Committee (rather than the International Olympic Committee) organises the Paralympics, which bring together athletes with disabilities from all around the world. The athletes in question have a wide range of disabilities, including physical and visual limitations (amputees, people without sight, cerebral palsy sufferers, wheelchair athletes and athletes with other disabilities). This demonstrates that society's principles and intentions are not always followed. There are many examples in everyday practise and in the conduct of sports institutions that show sport is still affected by identity affirmations and specific discrimination (sexual, ethnic, and/or based on physical appearance or sexual orientation) in spite of a certain political concept of sport's universality.

VII. Combating Racism and Racial Discrimination in the Field of Sport

Enact and enforce anti-discrimination legislation that ensures equal access to sport for all people and punishes discriminatory behaviour -:

Consider implementing suitable and effective legal and regulatory measures, such as enacting adequate anti-discrimination laws to prevent discrimination in sport and implementing integration programmes to increase access to sport for children from minority backgrounds.

Hold sports federations and clubs responsible for discriminatory behaviour on the field of play.

Build coalitions against racism in sport -:

1. Consider adopting a national framework agreement that lays out the roles and obligations of each participant.
2. Invite local authorities to organise sports-related outreach programmes that will bring people from diverse backgrounds together to interact.
3. Invite sports federations and sports clubs to take steps to recruit fans from different minority backgrounds to sports events.
4. It is imperative that athletes and coaches are reminded to refrain from any form of racist behaviour at all times.
5. Promote the adoption of anti-racism charters by supporters' organisations.
6. Sponsors and the advertising industry should be urged to avoid portraying minority athletes in a stereotypical manner.
7. Create a good practise award for eliminating racism and racial prejudice in sports so that best practises can be shared.

Train the police to identify and deal with racist incidents in sport -:

1. Make a formal request to your local government that they equip your police department with the necessary training to deal with occurrences of racism both inside and outside of sporting venues.
2. Request that the police and the security staff of athletic event organisers work together to combat racism.

Raise awareness of racism and racial discrimination in sport -:

1. Build massive anti-racism initiatives in sports that include all relevant players and are supported by major charitable foundations.
2. To combat racism and racial prejudice in sport, provide funds for social, educational, and informational initiatives by non-profit organisations.
3. Encouraging the media to cover occurrences of racism at sporting events and to publicise the punishments meted out to those involved.

VIII. Case studies

"India is full of racial and communal issues," says former football captain Baichung Bhutia. He concedes his teammates and he have been racially abused on and off the field multiple times, but that did not have an impact on them because footballers are mentally strong. "A lot of them are not even aware that a racial slur is being hurled at them. Most of these players come from humble backgrounds and have struggled their way to the top. The challenges that these guys have gone through since their childhood are more than just the abuse that is directed towards them or their folks. However, that does not mean this should happen. Strict action must be taken against players and spectators who do this," says the Arjuna Awardee and Padma Shri, who became the first Indian footballer to play over 100 games for the country.

A bronze-winner at the 2011 World Championships, shuttler Jwala Gutta remembers derisive comments being made about her appearance and skin tone, but she wasn't aware why she was targeted. "Racism exists in general. When I was young, I was name-called, but I never took it seriously… I never understood that it was racism. I want to believe it was not meant to hurt me. I always drew attention because I was tall, and South India, where I grew up, is obsessed with fair skin," she says. When she was called 'chinki' (of Chinese inheritance), she thought it was "factual", she adds, because she probably looked like that or it was said in jest. "I didn't pay attention because I was busy playing. I didn't get the purpose [of these jibes]. We are Indians after all." It was only in her late-20s that the Arjuna Awardee realised there was more to it than meets the eye.

I. Former South Sydney National Rugby League captain Bryan Fletcher allegedly went on a racist rant against Parramatta player Dean Widders, an Indigenous Australian, at a 2005 game.

II. Also, in 2005, Australian Rugby Union player Justin Harrison was accused of verbally abusing his opposition teams' player with racist remarks.

III. Fans of Chelsea Football club were accused of racism after a video[7] emerged of Chelsea fans singing racist chants and refusing to let a black man on a train ahead of the Champions League clash against Paris St. Germain in March 2015.

IV. In January 2013, Kevin Prince Boateng, a player from Ghana for AC Milan, walked off the pitch with teammates after alleged racist chants and 'monkey'

7 Guardian Wires, *Chelsea fans prevent black man boarding Paris metro train*|, August 20, 2022 https://www.youtube.com/watch?v=zBeeZVd6urI,

gestures by supporters of the opposing team.

V. French footballer Nicolas Anelka of West Bromwich Albion made a hand gesture, called the quenelle, while celebrating a goal in 2013. The gesture is perceived by some to be anti-Semitic. He has since said it was meant as anti-establishment, not anti-Semitic.

VI. Australian Rules Football star Adam Goodes, an indigenous Australian, who is alleged[8] to have ended up taking time off from competition to consider retirement following being booed whenever he got the ball. Goodes returned to practice on Aug. 4, alleviating some fans' fears that he may have quit over the booing.

VII. The NBA recently found itself at the centre stage of the racism in sports controversy. Then-Clippers owner Donald Sterling was recorded on tape making racist remarks against African Americans to his mistress, V. Stiviano. According to a tape released by TMZ, Sterling is heard scolding Stiviano for bringing African Americans to the game and posting photographs with her posing with them. In his latest lawsuit, Sterling has accused ex-girlfriend Sriviano and TMZ of violating his privacy and causing damage on a "scale of unparalleled and unprecedented magnitude," according to a report published by Associated Press.

VIII. An ad published featuring the Spanish Basketball team during the Beijing Olympics featured the Spanish team members in their Olympic gear making slit-eye gestures. The ad, which had photographs of both the men's and women's teams, took up a full page in Marca, the country's daily sports newspaper.

IX. Conclusion

Racism is unavoidable; it occurs on a daily basis and in all places. The prevalence of this problem is one of the most important challenges in several industries. Racism in sports is on the rise, and it's a serious problem. Sports and fitness Many sports leagues claim they are imposing policies that will make their leagues and games free of racism. The Barclay's Premiership, the Major League Baseball, cricket, and the NBA are all examples of this (National Basketball Association). Some players believe the leagues, sports organisations, and associations are exacerbating the problem by going overboard in their efforts to handle it. It's evident that sports leagues and organisations feel obligated to act because the image

8 AFL racism row*: Goodes backed by #IstandwithAdam campaign, BBC News, 1 Aug 2015, https://www.bbc.com/news/world-australia-33745663*

of role models and powerful individuals they want to project to a young population is not one they want to project to the public. Some episodes of rising have gone unnoticed because to a lack of interest, but others have had a long-term impact on a sport's future actions/ competitions and regulation. Racism in football is all too widespread because it is the world's most popular and widely watched sport. The anti-racism movement Kick It Out in England is one of the first of its sort in the world. The Football Association (FA), the Association of Professional Football Players (PFA), the Premier League, and the Football League together fund a non-profit that seeks to promote equity and inclusion in all aspects of education and the community (EFL). At the international level, we have strong relationships to FIFA, UEFA, and the European Racism Network (FARE). According to "Kick It Out," the number of racial events reported in the 2014/2015, 2015/2016, and 2016/2017 seasons has risen season after season as a result of the documented incidents. The 2015/2016 season saw an increase of 15 incidents, while the 2016/2017 season saw an increase of 61, both of which were higher than previous seasons. In total, 1270 incidents have been registered in English football during the last three seasons. It's also worth noting that, as technology has advanced, problems may now be reported swiftly and easily. To report a case of "Kick It Out," you can call the free phone number "Kick It Out," which is available in England on iPhone and Android cell phones, as well as online at the organization's website. Because of the lack of information accessible at the time, a lack of technology in the past may have contributed to a failure to act against racist perpetrators (clubs, officials, players or supporters).

Evolving Interpretations of Legal Provisions of 'Intestate Succession' In Light of Judicial Precedents

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Abstract

It is seminal to note that Section 30 talks about 'Testamentary Succession' via Indian Succession Act and once the 'Karta' dies or the person is deceased intestate (without any testamentary instrument), then devolution of interest of Coparcenary happens as per extant provisions of the enactment Hindu Succession Act, 1956 where the property is devolved by succession to next 'Legitimate Claimant'. It is vital to look at Section 6 of the original Act which talked about two modes of devolution, that is, firstly, Survivorship and secondly, by accordance of the provisions of the Act. Section 8 to 13 of the aforesaid Act specifies about succession of property Intestate of 'Male Hindu dying'. The law of succession has been subject matter which has been of utmost interest for legal scholars from ancient times. The School of Hindu Law, in the form of Dayabhaga School of Hindu Law and Mitakshara School of Hindu Law has been predominant in India. The ancient text and the scholarly debates have been the food for thought for many scholars and for legal fraternity when delving on the vital facets of succession and devolution of property. The growing acceptance of jurisprudence evolving from the commentaries of scholars Jimutavahana and Vijnaneshwara has been seminal in carrying forward the philosophy that is innate in the realm of property succession.

Keyword: *Property Succession; Dayabhaga School of Hindu Law; Mitakshara School of Hindu Law; Conversion; Escheat; Live-in*

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Relationship; Jimutavahana; Vijnaneshwara; Remarriage of Widows; Smritikars; Animus possidendim; Agnates; Cognates; Child in womb.

I. Introduction

The devolution of the property in Succession as per the Hindu Law is the subject matter of the instant paper. Pertinently, the heirs are categorised in the Hindu Succession Act, 1956 as enunciated in Section 8 of the Act as per the statutory provisions, firstly, Class I heirs – Class I heirs are 'Preferential heirs' and inherit simultaneously and hence are also called as 'simultaneous heirs' and hence one does not exclude the other, secondly, Class II heirs, thirdly, Agnates and fourthly, Cognates. It is vital to note that Class I legitimate claimants before amendment had 8 (female) and 4 (males), in total 12 person and after amendment, has 11 (female) and 5 males, making it a total of 16 entries in Class I Schedule of Hindu Succession Act 1956. It is vital to observe that in respect to analysis of Hindu Law of Succession, the devolution of the property as per the aforesaid Act happens in a specific order (Section 8), first the Class I heirs success to the property, then if there is no Class I heir, then only Class II heirs are considered where the entries in the Class II in that order takes it all and if there are no Class I or Class II heirs then the Agnates are considered and lastly if there are no Class I or Class II or Agnates, then only the 'Cognates' are considered. It is vital to note that if there is a Hindu male who has no heirs in the aforesaid four heads, then the Government takes the property as 'Escheat' (Section 29 of Hindu Succession Act 1956).

II. Agnates and Cognates

The scenario of Agnates comes into play, when the person traces his relationship in 'ascent' or 'descent' with another wholly through males. The scenario of Cognates involves relationship of a person with another in the 'ascent' or 'descent' where a 'female' intervenes anywhere in line, then only the person is cognate to another. In this perspective, a cognate may be of various types and may acquire the form of either descendant or may be an ascendant or simply, other form of collateral. In 'Half-blood', the persons have the same male ancestor but are from different ancestress (mother), while in 'full blood' father and mother of two persons are the same. In 'Uterine blood' the persons are having the same mother (ancestress) but different fathers. Section 18 specifies that the 'full blood' is preferred over the 'half-blood'. Legitimate and Illegitimate relationships are when a person born within a lawful wedlock is considered as legitimate. However, if a person born outside the lawful wedlock, then is considered as 'illegitimate'.

III. Children in Live-in Relationship

In *D. Velusamy v D. Patchaiammal*[1], the factum of the cases involved, after the death of his wife, the husband started having a live-in relationship with another lady and they resided in the locality as husband and wife, till the husband died in the year 1979. The valid status of the Respondent was the moot issue as the case surfaced before the Hon'ble Court of law and four other daughters born out of the relationship which brought forth questions about 'legitimacy'. The Hon'ble Supreme Court of India held that, "the law presumes in favour of marriage and against concubinage…" The Hon'ble Court further observed that, "there is a presumption under Sec. 114 of Indian Evidence Act that they lived as husband and wife and any child borne out of that relationship is 'legitimate', and such presumption can be rebutted via unimpeachable evidence…"

IV. Daughter's position vis-a-vis that of Son

The position of the daughter is the same as the son which is vital to note that the distinction between married, unmarried and widowed daughter are not there and all of them inherit equally. It is pertinent to note that 'Unchastity' and 'Divorce' are no bar to inheritance.

1. Scenario with Legitimate Son

Legitimate Son brings forth the following scenarios:

a. Natural son born son out of a 'valid marriage'

b. Adopted son

c. Posthumous Son, that is the child in the 'womb of the mother' at the time of intestate or who is born alive later (**Section 20**)

d. Son born after the partition and the son who was separated inherit with other son, in the ambit and scope of the Hindu Succession Act 1956.

2. Scenarios of more than one Wife of a Hindu husband

a. In *Vidyadhari & Ors vs Sukhrana Bai & Ors*[2], the case which surfaced before the Hon'ble Supreme Court of India, had the question of deciding the rights of two wives - Sukhrana Bai and Vidhyadhari of one Sheetaldeen. Vidhyadhari, the plaintiff was the second wife of Sheetaldeen and Sukhrana

1 D. Velusamy v. D. Patchaiammal, (2010) 10 SCC 469.;

2 Vidyadhari & Ors. v. Sukhrana Bai & Ors., AIR 2008 SC 1420.

Bai as being the first wife, where the Apex Court went with the decision of the Hon'ble High Court as it held that, "Sukhrana Bai was the only legitimate wife yet, and the Court chose to grant the certificate in favour of Vidhyadhari who was his nominee and the mother of his four children…"

V. Vital Features of the Hindu Succession (Amendment) Act, 2005

1. Abolition of Doctrine of Survivorship with retention of National Partition
2. Deletion of provisions for exempting application of the Hindu Succession Act 1956 to 'Agricultural Holdings'
3. Daughters as 'Coparceners' irrespective of the Marital Status
4. Female Coparceners could devolve property being 'absolute owner' as per Section 14 of the Act.
5. Abolition 'pious nature' of obligation for the son to pay off the debts of the father as such it is now a personal responsibility and debts which occurred prior to the enforcement of the aforesaid amendment was to dwelt into as per the classical Hindu law.
6. Partition to be registered and doing away with any form of 'Oral Partition'.
7. Introduction of four new heirs (three female and one male heirs') in Class I category mentioned in 'Schedule' of the Act.
8. Amendment with respect to 'Dwelling Houses' aspect, which is deemed to be 'Impartible property'.

Disease, Deformity and Defect are no longer a disqualification as per Section 28 under Hindu Succession Act 1956, as such mental and physical abnormality and diseases such as AIDS, TB, cancer would not have any effect on succession rights of a person. Unchastity is no longer a disqualification as well, in contrast to the old Hindu law, before 1956.

Section 20 specifies the 'Right of the child in womb' which is satisfied with two conditions, firstly, the persons who are having the interest in property are aware of the child being in womb of the mother, secondly, the child in womb is presumed to be eligible for inheritance, though the child is in womb and may have been born and see the light of the day after the death of the intestate. The complexity increases in case of 'Surrogate child in womb' as

technology makes a higher degree of certainty because of technological advancement of the birth of the child and require further explanation and proper jurisprudence evolving with the passage of time as it is also 'predetermined'.

Section 21 specifies the 'presumption in case of simultaneous death', which is based on 'Statutory presumption', where the younger is presumed to be survived the elder in case of uncertain circumstances who have died. So, here it is pertinent to note that younger means 'younger by relationship' and not by age. In sequitur, reliance can be placed on the case Madambath Rohini v Devi[3], where the Hon'ble Court delved into the aspect of Section 21 of aforesaid Act, pertaining to 'presumption in case of simultaneous death'; however, in the instant case, it was inapplicable as date of the death of one brother was unknown.

Section 22 of the Act specifies the legal facet of 'Preferential Rights', which is applicable to Class I heirs and where there is preferential right to family members and has two vital aspects associated, firstly, this Section to safeguard from the introduction of 'stranger' in the family, secondly, it safeguards from the disturbance caused to the family members by 'total stranger' in the family setup, where enjoyment of the family property by another family member is being ensured and prevent the potential cause of harm or trauma to previous 'tenants in common'. This Section can be also construed from the perspective of 'Doctrine of rights of Pre-emption' which raises clogs and fetters on full sale, which was the subject matter if the issue in the case *Bhola Nath v Santosh Prakash*[4], where the scope of applicability of the Section was restricted to cases of Inheritance only.

Section 23 which has being omitted by amendment in the Act vide Hindu Succession (Amendment) Act, 2005 pertains to 'Dwelling Houses' such as those property which has been permanent abode of the family for many years, acquire the character of 'Impartible property'. In *S. Narayanan v Meenakshi*[5], where taking into consideration in ambit and scope of interpretation of this omission of the Section has to be seen in light of 'preservation' of a dwelling house as for long period it is wholly occupied by some or all the members of the intestate's family members including male or males. Further, the Court held that the inclusion of 'stranger' in the family setup with respect to 'dwelling house' where it was understood that the male has lost his animus possidendi (that is, his right to control the object as 'intent to possess'). It is also pertinent to mention that even *'Smritikars'* also did not ordinarily entertain partition of 'dwelling house' property.

3 Madambath Rohini v. Devi, AIR 2002 Ker 192.

4 Bhola Nath v. Santosh Prakash, AIR 1975 Pat 336.

5 S. Narayanan v. Meenakshi, AIR 2006 Ker. 143.

Pertinently, it is seminal to note that another complexity which is enunciated in the Act is that of Section 24 where 'remarriage of widows' before succession opens, disentitles them from inheritance as they cease to be members of the intestate's family. Reliance can be placed on the case *Montorabai v Parentanbai*[6], where it was held that, "the mother of the intestate does not succeed as widow of the father but in her own right…"

VI. Conversion

As per Section 26 of the aforesaid Act, a Hindu converting to other religion, whereby the covert's descendants are 'disqualified' from inheriting property - Two conditions have to be satisfied for that, *firstly,* they should be born after the conversion, secondly, they should not be Hindu at the time of opening of the succession, that is at the time of death of the intestate. Two seminal cases in this context, is that of *K Sivanandam v Maragathammal*[7], a Hindu widow converting to Christianity after the death of the husband was entitled and would not create a bar against inheritance of the deceased spouse's property. In *Suresh Darwade v Arjun Pandey*[8], the Hon'ble High Court of Punjab and Haryana held that, disinheritance was a result of conversion for convert's descendants, which disqualified them from inheritance.

VII. Murderer

As per Section 25 of the Act, a 'murderer' is not entitled to succession as it is rule of public policy, which is based in equity, justice and good conscience as per the old Hindu law also. It is based on the maxim which encapsulates the guiding principle of 'Nemo ex suo delicto meliorem suam conditionem facere potest' (no one can perfect his condition by crime), pertinently the section applies where the 'murderer' is disqualified person who is treated to be 'non-existent' and with 'no title' to right to succeed. As has been well established in *Vallikannu v. R Singaperumal*[9], if the heir is entitled to succession on his own right and at the same time, does not trace his right through the murderer, then the section would have no application. A conjoint reading with Section 27, further substantiates that any person is disqualified, it shall devolve as if the person has 'non-existent' before the intestate. As could be seen, in varied catena of cases that the Hon'ble Apex Court held that as per Section 25 and Section 27 of the aforesaid Act, the person cannot inherit the property based

6 Montorabai v. Parentanbai, AIR 1972 MP 145.

7 K Sivanandam v. Maragathammal, AIR 2013 (Mad) 30.

8 Suresh Darwade v. Arjun Pandey AIR 2010 Chh 40.

9 Vallikannu v. R Singaperumal, AIR 2005 SC 2587.

on the principle of justice, equity and good conscience.

From Comparative Law perspective, *Riggs v. Palmer*[10], where a criminal law existed to punish the convicted murderer, but the person claims in the estate based on his action resulted in disqualification from inheritance of the estate.

VIII. Property devolving to Government (Escheat)

This provision is embodied in Section 29 of the aforesaid Act, if the intestate has no heirs qualified to succeed, then the Government has taken the property, which has been also substantiated and pronounced in the judgment in the case of *Kothawale v State of Maharashtra*[11].

IX. Conclusion

To conclude, a synergetic and a harmonious construction of interpretation from judicial precedents and statutory provisions tested with the touchstone of the provisions enshrined in the Constitution of India would have to be considered in entirety. The broader principles of 'equity, fairness and good conscience' would have a paramount importance in the light of cases on succession where attempts to bring finality to the judgment should be the constant endeavour of legal fraternity for meeting the ends of justice for the parties seeking delivery of justice in a timely and expeditious manner in the august portals of Hon'ble Courts. In a recent judgment in the year 2021, *R. Janakiammal and Ors. vs. S.K. Kumarasamy (Deceased) through Legal Representatives and Ors.*[12], held that in the year 1979 when residential property of Tatabad was obtained in the name of one of the defendants, all three branches were part of the joint Hindu family and the house property purchased in the name of one member of joint Hindu family was for the benefit of all and during the purchase of property amount was not paid by the defendant from his separate account or in cash. So, it becomes vital to note whether the individual coparceners have done investment from their bank account personally or via a third party which becomes essential factor to be looked into in subject matter of 'partition' in civil cases. The catena of cases surfacing before the Hon'ble Court of law with varied concepts *inter alia* of 'Live-in relationship', 'child borne out of illegitimate marriages', 'surrogate child rights' and 'daughter rights on matrimonial

10 Riggs v. Palmer, 115 N.Y. 506.

11 Kothawale v. State of Maharashtra AIR 1970 Bom.

12 R. Janakiammal and Ors. v. S.K. Kumarasamy (Deceased) through Legal Representatives and Ors., (2021) 9 SCC 114.

property acquired by her' are some of the questions which has been the moot questions where the judicial interpretation by precedents have a significant value seen in light of hitherto 'customary practices' in the context. The cross fertilisation of ideas in the stream of legal know-how with social and cultural dynamics have been the bedrock of the changes that have an anticipatory effect on the legal future and the way forward in this pertinent area of Succession in Hindu Family Law.

MARRIED WOMEN – LESS THAN HUMANS?

Case Comment - RIT Foundation V. Union of India*

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Abstract

Section 375 defines the offence of rape and under what circumstances can the sexual act be termed as rape. Exception 2 to Section 375 states that sexual intercourse by a man with his own wife, not under the age of 15 does not amount to rape. Thereby, creating the issue of marital rape. The issue revolving marital rape is that when a wife does not give her consent to have sexual intercourse with her husband, and the husband still has sexual intercourse with her, it does not amount to rape. Neither can the wife initiate a criminal proceeding against the husband for the same. This paper highlights the submissions and arguments given for and against the criminalization of marital rape. It emphasizes on the Hon'ble judges' point of view while adjudicating the case and criminalization of marital rape in other jurisdictions. This paper also analyses the effect of the exception of marital rape on women and the plight of women who are not able to defend themselves against this statutory protection given to husbands. The observations and recommendations of the J.S. Verma committee regarding the legality of marital rape is also discussed. The rights of women and the discrimination towards married women is the controversy revolving around this exception. In the case of RIT Foundation v. Union of India, petitions have prayed for striking down of this exception and criminalizing marital rape.

Keywords: *Marital rape, discrimination, women, legality of marital rape.*

* W.P.(C) 284/2015 & CM Nos.54525-26/2018

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> *"A woman is human. She is not better, wiser, stronger, more intelligent, more creative, or more responsible than a man. Likewise, she is never less. Equality is a given. A woman is human."*
>
> *— Vera Nazarian, The Perpetual Calendar of Inspiration*

The Constitution of India, often called the mother of all laws, has the word "equality" embedded in its Preamble. Equality is one of the core values of the nation which in no case can be compromised. Numerous enactments and statutes have been constructed and amended to do justice to the word "equality" in our constitution. Among others acts to promote gender equality, acts like The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, Protection of Women from Domestic violence Act, 2005, The Indecent Representation of Women (Prohibition) Act, 1986 and Dowry Prohibition Act, 1961 are doing remarkably well. But when the question comes as to where we as a nation are lacking to protect our women, the answer that first comes to one's mind is criminalization of marital rape.

Delhi High Court passed a split verdict on criminalizing marital rape. PILs challenging the exception 2 of Section 375 IPC were filed.[1] The exception states that sexual intercourse or sexual acts performed by a man on his own wife will not amount to rape is the wife is over 15 years of age.

This exception arises out of an archaic perception of the institution of marriage which regards that marriage is a contract and that the wife gives up herself to the husband with an irrevocable consent for such sexual acts. Marital rape is not a novel point of issue, it is a long-standing concern which roots from the outdated belief that men are expected to initiate sex and therefore, they are the ones in command of the woman's body.

Since India was a British Colony for about 200 years and the laws in India were heavily colored by the English laws. The Doctrine of Coverture is a concept which was applied in common law. The exception was drafted under the influence of this doctrine which regarded man and a woman in a marriage as one entity and the legal existence of the women ceases to exist. The concept of the wife giving her consent in perpetuity is not ideal and the irrevocability of it is a grave violation of her rights.

Criminal Jurisprudence of India has undergone massive changes and certain landmark judgments have given it an entirely new shape. In the case *Tukaram v. State of Maharashtra*,

1 Indian Penal Code, 1860 S. 375.

the judgment acquitted the rapists and received a lot of criticism[2]. The court had observed that since no signs of resistance or injury were present on the body of the victim, her consent was voluntary in nature. After this judgment, in 1983, the Criminal Law (Amendment) Act was passed.[3] One of the most significant changes brought by this amendment was the insertion of section 114-A in the Indian Evidence Act, 1872.[4] Under Section 114-A, the burden of proof shifts to the accused to prove that the prosecutrix did voluntarily consent to the sexual acts. Given that the prosecutrix must depose that she did not give him the consent for sexual intercourse. This revolutionary presumption is in support of the prosecutrix but married women get no such aid. The concept of implied consent when it comes to sexual intercourse and sexual acts in the institution of marriage disintegrates the liberty of a woman. There is a distressing violation of the fundamental rights of married women.

The High Court of Delhi recently in the case of *RIT Foundation v. Union of India*[5], observed that it is exclusively the role of the legislature to pronounce whether non-consensual sex within marriage ought to be punished or not. The Court further expressed that it is only concerned with the constitutional validity of the impugned Exception 2 to Section 375 IPC. The Hon'ble Court clarifies that if the said act of marital rape is criminal in nature and should be punishable, there is still no ground to strike down the statutory provision which makes it not punishable. It is of the view that striking down of said provision would entirely obliterate the distinction that exists between the legislature and the judiciary.

The question was put before the Hon'ble High Court of Delhi, whether the effect of the exception would nullify or compromise the right of the wife to refuse to consent to sexual intercourse with her husband? It was submitted by the Counsel for the Petitioner that the Exception itself disregards the wife's right to consent to having sexual relations. It was further submitted that the Exception grants an immunity to the husband when he disregards the consent of his wife. The argument put forward by the Counsel for the petitioner focused on the inability of the wife to prosecute her husband for rape compromises the wife's right to refuse to her husband's request for sex. The Hon'ble High Court of Delhi observed that on a plain reading of the exception there is no such obligation on the wife to consent to having sex with her husband.

However, what seems to be a pertinent issue is the course of sexual relations when the wife does not give her consent. The issue is whether the said exception restrains the wife

2 Tukaram v. State of Maharashtra, 1979 AIR SC 185.

3 The *Criminal Law* (*Amendment*) *Act*, *2013*. No. 13 of 2013.

4 The Indian Evidence Act, 1872. No. 1 of 1872, S. 114-A

5 RIT Foundation v. Union of India, 2022 SCC Online Del 1404.

from prosecuting her husband for rape when her refusal is disregarded by the husband. The Hon'ble Court observed that the Counsel for the petitioner tried to imply that the Exception encourages the husband to force himself upon his wife on the purport that he is exercising his conjugal right. It is view of the Court that the exception does not encourage husbands to force sex on their wives and if some husbands choose to do so, it is *"their own perverse predilections and is certainly not the direct and inevitable effect of operation of the impugned Exception"*.

The arguments advanced against the striking down of the exception heavily focused on the separation of powers. It was argued that if the court were to go ahead and strike down the exception, it would in effect be carrying out a legislative act and therefore not letting the legislature exercise its right to examine the issue at hand. It was further argued that if the legislature if giving the protection to its citizens through the exception, the judiciary cannot take away the same by striking down the exception and creating a new offence.

The arguments advanced for striking down the exception was that the object of Section 376 IPC is to criminalize rape, and the defense that is out forward in support of the exception is to protect conjugal rights in the institution of marriage. However, the exception itself is destroying the object and purpose of the main provision.

It is the view of the Court that the impugned exception does not violate Article 14 and is based on an intelligible differentia having rational nexus with both the Exception and Section 375. It does not violate Article 21 as well and the exception cannot be struck down as unconstitutional.

The justification behind the legalization of marital rape was given by the Central Government by way of an affidavit in 2016. The Central Government stated that criminalizing "marital rape" would "destabilize the institution of marriage and become a tool for harassment of husbands."[6]

Recommendations were given by the committee headed by former Chief Justice of India, J S Verma which was constituted as an aftermath of the Nirbhaya rape case.[7] Its role was to review the criminal law related to sexual assault against women and give recommendations on strengthening those laws. The report highlighted the fact that the immunity given to husbands was widely withdrawn in many jurisdictions. It was withdrawn in England and

6 Bhadra Sinha, In 2017, *govt said criminalizing marital rape would harm marriage, Now it's reviewing stance,* The Print https://theprint.in/judiciary/in-2017-govt-saidcriminalising-marital-rape-would-harm-marriage-now-its-reviewing-stance/819853/ (last visited Feb. 3, 2022, 12:00pm)

7 Mukesh & Anr. V. State for NCT of Delhi & Ors. (2017) 6 SCC 1.

Wales in 1991. It referred to the judgment of the European Commission of Human Rights which ratified that a rapist is a rapist regardless of his relationship with the victim.[8] It has been withdrawn in several other nations such as Canada, Sweden, Denmark, Norway, Poland, South Africa, Australia and many more. In 1991, The High Court of Australia held that: 'if it was ever the common law that by marriage a wife gave irrevocable consent to sexual intercourse by her husband, it is no longer the common law'.[9] The Justice Verma committee recommended complete criminalization of marital rape. The recommendation stated that the wife is a woman and most importantly a human being who deserves the right to live a dignified life. It recommended for the exception to be removed and for the law to specify that a marital or any other relationship is not a valid defence against the charge of rape. Moreover, the marital relationship should not be seen as a factor to lower the sentence for the crime of rape.

In South Africa, marital rape was criminalized in 1993. The common law that the husband could not be found guilty of raping his wife was reversed by Section 5 of the Prevention of Family Violence Act of 1993. However, this section was repealed by combined reading of Sections 3 and 56(1) of The Criminal Law (Sexual Offences and Related Matters) Amendment Act (SORMA). Under these sections, with regard to a rape charge, the fact of an existing marriage or relationship between the accused and the complainant cannot be used as a defense.[10]

The argument against criminalizing marital rape is that women would have an unfair advantage, that it would be a biased law and could lead to multiple false charges. The concern of no lasting evidence in case of sexual intercourse between a husband and a wife also arises. There would be a complication to differentiate between the consensual and the non-consensual acts that took place between them.[11] But just to bring down the enormous number of litigations, legalization of marital rape is not justified. The rights of married men cannot be given superiority over the rights of married women. The fact that married women are being denied basic rights promised to women under the Constitution of India cannot be ignored.

The counsel for the respondents argued that whether or not the sexual act was an offence

8 C.R. v UK, Application number 00020190/92 November 22, 1995

9 R v L (1991) 174 CLR 379 at 390

10 Oyebanke Yebisi, Victoria Balogun, *Marital Rape: A tale of two legal systems*, Sabinet African Journals

11 Lachmi Deb Roy, *Why doesn't India have a law against marital rape*, Outlook https://www.outlookindia.com/national/why-doesn-t-india-have-a-law-against-marital-rape- -news-52044 (last visited Feb. 8, 2022, 9:50am)

is determined through the circumstances/context. It was further argued that consent is not the sole deciding factor whether there was a commission of offence or not. There are circumstances laid out in Section 375 IPC which help determine the illegality of the act. The counsel stated that it is impossible to establish the absence of consent due to the intimate nature of the act and the obvious absence of witnesses to it.

The High Court of Delhi, shed light on the perspective that the word "rapist" has a stigma attached to it. When the man is the husband of the woman and there is a marital relationship subsisting between the two, the exemption given to the husband from possibly being labelled as a "rapist" is the intention of the statute. The Court highlights that in fact equating the husband and a stranger who commits such an act would be violative of Article 14.

This exception is violative of the core value of "equality" and numerous provisions in our Constitution which strive to protect the same. It is depriving women who are married of their right to equality, right of personal liberty, right to life with dignity. Thus, the status being given to married women is altogether different from the status being given to women.

The Court while analyzing the premise of the counsel for the petitioner, stated that if as per its definition, non-consensual sex by a man with a woman is rape, it would be saying that every incident of taking of life of another is murder. The Court laid down that just as every such incident is not murder, "every incident of non-consensual sex of a man with a woman is not rape".

If we go by this statement of the Hon'ble Court, a lot of offences and offenders would get off scot free. However, the emphasis of the court was to focus on the circumstances under which the act happens.

The Court's verdict stressed on its inability to create offences or pass any such judgments which would result in conversion of an act which is not an offence to be rendered as an offence. It laid down that by striking down the exception, the Court would be pronouncing that the act of non-consensual sex between a husband and a wife would amount to rape; which tantamount is creation of an offence.

Authors opinion is that when it comes to the issue of recourse, women can take action under Protection of Women from Domestic Violence Act or Section 498-A of IPC and file for divorce. The exemption of husband under Exception 2 of Section 375 is regressive and encourages male privilege in a world where equality as a value is promised and idealized.

While the Hon'ble High Court of Delhi was very clear about the seriousness of this case

and the impact of the verdict, there still was no relief for married women who are still being exploited and having their consent constantly disregarded. This dependence on other provisions and statutes to grant relief to these women is inadequate as a relief. In today's world where the concept of marriage is modernizing each day, it is not acceptable to have the same archaic laws to preserve an obsolete notion of what the institution of marriage is. As the times are changing, we need our laws to be changed in accordance with the new circumstances in which we live. The argument on separation of powers between the legislature and the judiciary is well founded but women are now at the mercy of the legislature to recognize their need for criminalization of marital rape and till then they are without relief. Lastly, striking down of the exception will not lead to any inequalities or injustices towards men, it will only uplift women and allow them to have a say over their own bodies.

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