ISSN 2582-0311 (Print)
ISSN 2582-0303 (Online)

Volume 5
Issue I

August 2023

VIPS STUDENT LAW REVIEW

VIVEKANANDA INSTITUTE OF PROFESSIONAL STUDIES - TECHNICAL CAMPUS

Affiliated to GGSIP University, Delhi
Grade A++ Accredited Institution by NAAC & Recognized by Bar Council of India and AICTE,
Recognized under section 2 (f) by UGC, NBA Accredited for MCA Programme
An ISO 9001:2015 Certified Institution

ISSN 2582-0311 (Print)
ISSN 2582-0303 (Online)

Volume 5
Issue I

August, 2023

VIPS STUDENT LAW REVIEW

VIVEKANANDA INSTITUTE OF PROFESSIONAL STUDIES - TECHNICAL CAMPUS

Affiliated to GGSIP University, Delhi

Grade A++ Accredited Institution by NAAC & Recognized by Bar Council of India and AICTE,

Recognized under section 2 (f) by UGC, NBA Accredited for MCA Programme

An ISO 9001:2015 Certified Institution

August 2023 Volume 5, Issue I

VIPS STUDENT LAW REVIEW

Editorial Board

Volume 5, Issue I August, 2023 ISSN 2582-0311 (Print)
ISSN 2582-0303 (Online)

Publisher and Printer's Detail

Published and printed by Registrar (Academics & HR) **on behalf** of Vivekananda Institute of Professional Studies. **Printed at** M/s Star Forms, Plot no.37-38, Gali no.4, Libaspur Extension, Industrial area, Village Libaspur, Delhi. **Published from** AU Block - Outer Ring Road, Pitampura, Delhi-110034. **Editor** Prof. Dr. Rashmi Salpekar

Student Core Team Assisting The Editorial Board

Arsheya Chaudhry
Fifth year, BA LLB, 35717703819

Anubhuti Sharma
Fifth year, BA LLB, 36317703819

Sudarshana Jha
Fourth year, BA LLB, 23017703820

Siya Jindal
Fourth year, BBA LLB, 13517703520

Khushi Garg
Third year, BA LLB, 08317703821

Tulika Joshi
Third year, BA LLB, 06517703821

EDITORIAL NOTE

VIPS Student Law Review Volume 5 is the 5th issue of the annual law journal of Vivekananda School of Law and Legal Studies, Vivekananda Institute of Professional Studies-TC. It is a double-blind peer-reviewed journal which provides an opportunity to the legal fraternity to interchange contemporary thoughts on law and justice.

The year 2023 has been a progressive year at both national and international level. The G20 Summit served as a diplomatic exercise to reinforce international relations and enhance the nation's image at global stage. It also provided India with the opportunity to promote and represent its culture and tradition at a worldwide level. By organising various meetings in diverse parts of the country, showcasing India's culture and heritage sites by promoting these venues through communication outreach is helping the world learn about India's attractions. India's step to include Africa Union as a member of G20 has pitched India as a leader of the developing countries, thereby enhancing its international relations.

Another progressive step in the year 2023 was when a historic legislation of Nari Shakti Vandan Adhiniyam was passed by the Parliament on September 21, 2023 to provide 33 per cent reservation for women in Lok Sabha and legislative assemblies. Since last 27 years the bill had been waiting to get approved by the Parliament and we had a commitment to pass this bill till 2026, but the wait is now over. This shows that the country is gradually moving from protection to empowerment of women, not only legally but politically as well.

The year of 2023 also witnessed a historical moment when, after the unfortunate failure of Chandrayan-2 in 2019, India's Moon mission of Chandrayaan-3 successfully landed on the lunar surface. With the Lander accomplishing a 'soft landing' on the Moon's south pole, India becomes the only country to have ever done so. The successful landing of Chandrayan-3 has evolved space law in India as we continue to explore and utilize the space environment, space law will continue to play a crucial role in regulating these activities.

This year our Issue is also progressing in the field of law. The Journal has received over 100 contributions this year, and we are truly overwhelmed. The selected papers address a wide range of contemporary subjects with unrivalled judgement that goes beyond the confines of just law. We want to congratulate the volume's authors on their remarkable dedication to academia and their high-quality work. As a result, we are pleased to present the VIPS Student Law Review Volume 5.

Ms. Amita in her article titled *"Emerging Role of Just Energy Transition vis a vis Sustainable Development Goal 7"* focuses on achieving the goal of energy sustainability through the synchronization of social, economic, environmental, gender, governance, etc. she has also discussed about the rationale behind just energy transition in light of contemporary policies and regulations governing renewable energy as well as the role of Just Energy Transition in achieving the targets of SDG 7.

Ms. Richa Srivastava in her article titled *"Critical Analysis of Social Security Schemes for Women in India"* delves into continued interest in designing welfare measures in the form of labour legislation for the women's workforce, however, lot many of them falter in the actual implementation. The effective implementation of these women-centric welfare measures has been an arduous challenge. These challenges in the work arena are seen in the form of gender biases, unequal pay, and allowances for similar types of work, and unsuitable working environment conditions for women.

Mr. Mostafijur Rahmani in his article titled *"Mass Atrocities and Reparation to Rohingyas in Myanmar"* examines the Myanmar government's mass atrocities against Rohingya Muslims in the Rakhine State of Myanmar in 2017 and related reparations, taking into account pertinent principles of international law in this regard. He has tried to assess whether the actions taken by the Myanmar government constitute mass atrocities and the extent to which Myanmar is required by international law to pay reparations to the Rohingya Muslims for their actions.

Ms. Mansi Singh Tomar & Mr. Kumar Mukul Choudhary in their article titled *"Discourse on Homosexual Rights in Nepal, India and Singapore"* focus on laws relating to the recognition of the rights and dignity of homosexual relationships with respect to three three countries i.e., India, Nepal, and Singapore, and their constitutional courts.

Ms. Ritika Kanwar in her article titled "Open Prisons: Reserialising Prisoner's rights with Freedom" aims at a structural study of open prisons while looking at a series of live illustrations in India. She has delved into the upcoming challenges and loopholes in the administration aspects of such correctional reforms, thereby, listing succinct model suggestions over the same.

Ms. Neha Singh in her article titled *"Victim Participation in the Criminal Justice Process: A Therapeutic Approach"* examines the jurisprudential development of the concept of victim and analyse their evolving role in the criminal justice process in the wake of the recent Supreme Court Judgement and its implications in the field of victimology. She

further stresses on the need for a therapeutic criminal justice delivery mechanism that provides for accountability and contributes to victim healing.

Mr. Lalit Anjana in his article titled *"Reassessing Section 498A: Exploring Judicial Interpretations and Statistical Data"* provides an in-depth analysis of section 498A of the Indian Penal Code (IPC), which deals with cases of cruelty against married women. The article examines the contentious issues surrounding the utilisation of this provision by critically analysing the definition, Supreme Court (S.C.) judgments and statistical data.

Mr. Vedant Lathi in his article titled *"Current Regulatory Framework on Cryptos and Crypto Exchanges in India*" examines the current regulatory framework for cryptocurrencies and crypto exchanges in India and also traces the evolution of the same. He further discusses the impact of the Reserve Bank of India's circular prohibiting banks from dealing with cryptocurrency exchanges, the Supreme Court's decision to strike down the circular, and proposed the Cryptocurrency and Regulation of Official Digital Currency Bill, 2021.

Ms. Meher Sachdeva in her article titled *"Taxation of Cryptocurrency in India: The Future Finance"* investigates the taxation of cryptocurrencies in India and proposes a regulatory framework for their use. India's current policy is mainly observational, with no clear regulations for regulating cryptocurrencies.

Ms. Neha Samji in her article titled *"Rule of Law Implementation in India: A Critical Review"* critically analyses the principle of Rule of Law given by A.V. Dicey. She stresses on the importance of Rule of Law without which a political and legal system cannot function.

Mr. Satyam Sah and Ms. Krati Gupta in their article titled *"Beyond Borders- The Use of Comparative Law in Constitutional Interpretation"* has delved into the application of comparative law in the interpretation of constitutions, with a particular focus on the legal system of India. They have further highlighted various examples of how Indian courts have utilized international law, including the use of international conventions and norms in the interpretation of the Constitution of India.

Ms. Anushka Singhal and Mr. Ashmit Raj in their article titled *"Implementation of Section 12(1)(c) of the Right to Education Act: An Overview"* have presented doctrinal research wherein government-authenticated data has been used to shed light on the implementation of this section. They have also mentioned about the history of the Right to

Education along with questioning its constitutionality.

Mr. Chaitanya Thakur in his article titled *"Critical Analysis of the Last Seen Theory"* examines its literal interpretation and how judges have construed it. He analyses whether the doctrine requires the continuous presence of the accused with the deceased. He has also mentioned about the criteria for admitting the testimony of witnesses and scrutinizes issues involving husbands and wives and the requirement of a homicidal death in such cases.

Ms. Raghvi Kanwal in her article titled *"Juvenile Justice Care and Protection Act: Framework on Adoption in India"* aims to explore the Juvenile Justice Act, 2015 with special focus on adoption of children and the intricacies regarding the same. She mentions a brief about the laws relating to juveniles and then focuses upon adoption rules in different religions in India. She analyses the lacuna that is present in the existing law along with a few suggestions that might help in alleviating the situation.

Ms. Snigdha Rohilla, through her article titled *"Abortion and Natural Law,"* aims to establish a link between the theory of Natural Law and the contentious issue of abortion. She mentions about the natural law theory and links it with a woman's right to choose for herself.

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

TABLE OF CONTENTS

STUDENTS SECTION

EMERGING ROLE OF JUST ENERGY TRANSITION VIS A VIS SUSTAINABLE DEVELOMENT GOAL 7

Ms. Amita*

VIPS Student Law Review
August 2023, Vol. 5, Issue 1, 1-17
ISSN 2582-0311 (Print)
ISSN 2582-0303 (Online)

https://vslls.vips.edu/vslr/

ABSTRACT

The Concept of Just Transition is widely acknowledged as it opens the door for debatable perspectives. There are diversified national and international regulations and standards that are used to achieve the aim of Just Transition. This has led to the birth of the principle of "Just Energy Transition" through the diverse efforts towards clean energy transition and the application of sustainable technologies which are targeted towards the larger goal or achieving Sustainable Development Goal 7 (SDG 7). Even though the nations together had made a collaborative effort to achieve the targets, they are facing certain setbacks in the process. The study focusses on achieving the goal of energy sustainability through the synchronization of social, economic, environmental, labor, governance etc. and how the concept of just energy transition has gained the international recognition to be adopted all over the globe. Further, the author tries to identify the rationale behind just energy transition in the light of contemporary policies and regulations governing renewable energy. The author also examines the role of Just Energy Transition in achieving the targets of SDG 7.

Keywords: *India; Renewable Energy; Sustainable Development; Just Transition; Just Energy Transition*

* Assistant Professor, Vivekananda School of Law and Legal Studies, Vivekananda Institute of Professional Studies - TC, New Delhi, India; Ph.D. Scholar, Rajiv Gandhi National University of Law, Patiala, India.

I. INTRODUCTION

Presently, global energy sector is in a state of transition which requires equity and fairness which term it as just transition. COP 27 stresses on the point that the world is facing a critical point for global climate action. The experts were of the view that if the world wants to achieve the promises of Paris agreement SDG 7, then, there is a need of co-operation and collaboration by all the stakeholders laid down by the Marrakech partnership. Over the past decades, expert body of research on climate change has made it very apparent that there is a need to shift away from non-renewable sources gradually which has become in evitable in the present times. Providing justice for millions of people in the transition away from non-renewable resources is clearly going to be a major challenge. There are various socio economic, political, cultural issues which cannot be ignored.

The term "Just transition" aims to provide a sustainable and decent livelihood for the people who are dependent on the fossil fuel industry. It is only possible through proper planning and investments. It also aims to build resilient communities and also eradicate poverty in these regions. It focusses on the idea that there should be synchronization between clean energy and clean environment which ultimately trickle down to a healthy economy. There are many factors involved in the low carbon energy transitions such as economic, health, infrastructural, gender etc. at the same time it is driven and accelerated by the various targets and goals such as SDG 7, policies and regulations relating to climate change. The Paris Agreement on Climate Change includes an important principle and explains the same not only as a fixed set of rules but considers it as a vision and a process. It is implemented with a set of guiding principles, such as the International Labour Organization's guidelines for a just transition.[1]

It is high time to address the increasing risk of catastrophic climate change all over the world and at the same time provide sustainable energy to people who currently lack access to electricity, and also achieve sustainable development goals. Hence, there is an urgent need to transition to renewable energy by adopting the process of 'Just Transition'.

II. THE CONCEPT OF JUST TRANSITION, JUST ENERGY TRANSITION AND ITS DISCOURSE

The origin of the concept of just transition dates back to 1970s, in United States when labour unions argued for economic and social intervention for workers to secure jobs and

1 Indian Institute for Sustainable Development, *Just Transition*, Available at: https://www.iisd.org/topics/just-transition (Last visited June 11, 2023)

livelihood which were threatened by environmental regulations. It is widely accepted that the term 'just transition' has been coined by the US labour and environmental activist, Tony Mazzocchi, who had given reference of an existing federal program to clean up environmental toxic waste and had made efforts for the establishment of a similar "Superfund for Workers". It was aligned with the aim to support these workers with minimum income and education benefits so they are in the position to transition away from the jobs having hazardous consequences. The experts believed the term "Superfund for Workers" had too many negative connotations and thus, it was changed to "just transition" (Eisenberg 2019).

This concept draws a wide range of perspectives but few of the predominates given by Eisenberg are - *Firstly*, it strictly interprets on the idea that because of an intentional shift away from fossil fuel-related activities, the workers and communities involved might lose their livelihoods, therefore, it is the responsibility of the state to support them.[2] Secondly, it interprets justice in more general terms which is not restricted to workers only. The emphasis is on the sustainability i.e. to not sacrifice the wellbeing of the vulnerable class just for the sake of advantaging others which was general norm practiced in the fossil driven economy. It implies that notion of justice and equity must form an integral part of the transition towards a low-carbon world. At present, it calls for a wider interpretation to include ambitious social and economic restructuring that addresses the roots of inequality.[3]

There are diverse opinions and interpretations of the concept of 'Just Transition", but we will only focus on the concept of Just Transition within climate justice and environmental justice. Thus, 'Just energy transition' stands on the fundamental idea that a healthy economy and clean environment should co-exist.[4]

At international level, the concept of just transition integrates a number of equity issues such as: if the cutting of the greenhouse emissions is done in a rapid manner, then it is difficult to address the uneven distribution of burdens and costs associated with the impacts of climate change. It encourages a gradual low -carbon transition to protect countries which are fragile, poor as well as most vulnerable to the impacts of the climate change. The delaying or slowing the transition away from the extraction and use of fossil fuels is fundamentally unjust. It is most probable too that some countries will be adversely affected

2 Directorate Energy and Climate Change Directorate, *Just Transitions: a comparative perspective* (25 August 2020) Available at: https://www.gov.scot/publications/transitions-comparative-perspective/pages/3/ (last visited June 10, 2023)

3 *Ibid*.

4 *Ibid*.

compared to other countries during this global effort to decarbonize globally.[5]

There are various transformative ideas evolved over the years through growing synchronization of various stakeholder groups in this constructive and inclusive vision. According to Climate Justice Alliance, "just transition is a vision-led, unifying and place-based set of principles, processes, and practices that build economic and political power to shift from an extractive economy to a regenerative economy.

This philosophy is also reflected in the 2030 Agenda for Sustainable Development adopted by the United Nations (UN) General Assembly in October 2015. Three Sustainable Development Goals (SDG) provide the impetus for a fair transition from fossil fuels, balancing the needs of secure and affordable energy, full and productive employment, and sustainable use and management of resources. These includes:

- SDG 7: Ensure access to affordable, reliable, sustainable, and modern energy for all,
- SDG 8: Promote sustained, inclusive, and sustainable economic growth, full and productive employment and decent work for all, and;
- SDG 15: Protect, restore, and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss.

III. RATIONALE BEHIND JUST ENERGY TRANSITION

Competitiveness of Renewables

The strong rationale behind using renewable energy is its availability, derives high energy and the cost. It is comparatively more profitable and cost effective compared to renewable resources. It has its additional advantage of easy storage and job creation at a large scale. However, with the decline in the cost, availability of technology and subsidies from the government has led to the decline in the use of renewable energy for the production of electricity. Thus, the advantages of renewable energy are gradually eroding. The main drawback of fossil fuel is that is depleting whereas renewable sources such as solar, wind. hydro, biofuels etc, are replenished from time to time. Even investors are of the opinion

5 Aaron Atteridge and Claudia Strambo, *Seven principles to realize a just transition to a low-carbon economy,* Stockholm Environment Institute (2020) Available at: https://www.jstor.org/stable/resrep25078.5 (Last Visited June 11, 2023).

that now it's not economically viable investing in non-renewable resources.

Rising Pollution Control Costs

Coal-fired power plants produce a range of externalities such as PM4, SO2, NOx and Hg. The rationale behind air pollution is the high concentrations of harmful particles. This could be only determined by continuous emissions monitoring systems. In 2018, the Ministry even amended the standards, however, there was no material change in air pollution norms (Central Pollution Control Board, 2018). If the emission trends of thermal power plants remain unchanged, projections estimate that these pollutants will cause an estimated 1.3 million deaths in India per year by 2050 (Health Effects Institute, 2018).[6] Ministry of Environment Forest and Climate Change had provided that a budget of Rs.8915 Crore have been provided from 2019-20 to 2022-23 for taking air quality improvement measures in 131 cities for achieving the prescribed annual air pollution reduction targets. 24 States/ Union Territories and 131 Cities/Urban Local Bodies under NCAP have been requested to incorporate relevant actions of Mission Life in State and City Action Plans for improvement of air quality.[7]

Displacement of the indigenous people and their rehabilitation

The social risks such as physical displacement, restoration and resettlement exists which the indigenous people and mining affected communities faces. This leads to the deprivation of their livelihoods which is recognized as the fundamental rights by most of the countries. The world is moving at very fast pace towards economic development and industrialization but we all are suffering from a complex problem of "resources curse". The socio-economic conditions of the area involve in mining of the non-renewable sources are really untenable and hence, it is the alarming state to take measures to provide them with livelihood, health and safety and basic necessities of life.

Urgent action towards Climate Change

Various initiatives taken at the national and international level reflects the need to urgent action to overcome the consequences of climate change. The notable achievements of Paris

6 Maureen L. Cropper,Sarath Guttikunda, Puja Jawahar, Zachary Lazri, Kabir Malik, Xiao-Peng Song, and Xinlu Yao, *Applying Benefit-Cost Analysis to Air Pollution Control in the Indian Power Sector* (2019) 10(Suppl 1)185–205., National Library of Medicine, Available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7473063/ (Last Visited June 13, 2023).

7 Ministry of Environment, *Forest and Climate Change, Shri Bhupender Yadav calls for coordinated actions by all the stakeholders for effective implementation of National Clean Air Programme (NCAP*), Available at https://www.pib.gov.in/PressReleseDetail.aspx?PRID=1907272 (Last visited June 15, 2023).

Agreement and recently COP 27 showcases the achievements and gaps of our journey to achieve the targets. It also considers suggestions and recommendation given by the experts which will facilitate the other stakeholders too.

Restoration of the site of mining

During the earlier time, there was a universal target of production of coal which will provides us with electricity. There was so much pressure on the coal sector to meet the demand of the energy through fossil fuel. This led to the rise of so many issues such as impact on environment, displacement, rehabilitation as well as restoration of the mining site. The stakeholders were very reluctant to deal with these issues. At present, we are substantially dependent on the fossil fuel but these issues can be tackled through the process of Just Transition by following the rules and regulations to protect the vulnerable communities as well as environment.

IV. REGULATORY AND POLICY FRAMEWORK RELATING TO JUST ENERGY TRANSITION AND SDG 7: INDIAN PERSPECTIVE

Current Status of Renewable Energy in India

India has overtaken China and becomes the world's most populous country with total population of 1,425,775,850 and expected to increase to 142.86 crore. According to the U.N population estimates, this event has been considered as most significant shift in the global demographics till date. India's demographic dividend will certainly contribute to the economic growth and expected to become 47 trillion-dollar economy by 2047.[8] Therefore, economic growth is dependent upon the just energy transition within the economy which drives the economy towards synchronization between renewable energy and environment protection.

The world in its commitment to achieve sustainable development goal 7 and has aimed to expand infrastructure and advanced technology for providing efficient and sustainable energy services for all the developing countries including India. India has taken the center stage to deal with the most debatable issue of just energy transition. India stands fourth in renewable energy installed Capacity globally. As per the report "Year- End Review 2022" given by Public Information Bureau, it includes fourth in wind power and solar

8 Ministry of Commerce & Industry, *India will continue to be the world's fastest growing large economy for many decades to come: Union Minister Piyush Goyal at Asia Economic Dialogue, Pune* (February, 2023) Available at: https://pib.gov.in/PressReleasePage.aspx?PRID=1902288 (Last visited June 15, 2023).

power capacity.[9]Generation from non-fossil sources is 42.26% of total installed generation capacity in India.

As per the infographic stated in figure 1, India's Energy mix has been seeing a shift from more conventional resources of energy to renewable sources. The financial year 2021-22 has witnessed a growth of 16.4% over last year in the installed capacity of RES (Renewable Energy Sources, other than Hydro) under utility; while that of thermal sources grew only at 0.06%.[10]

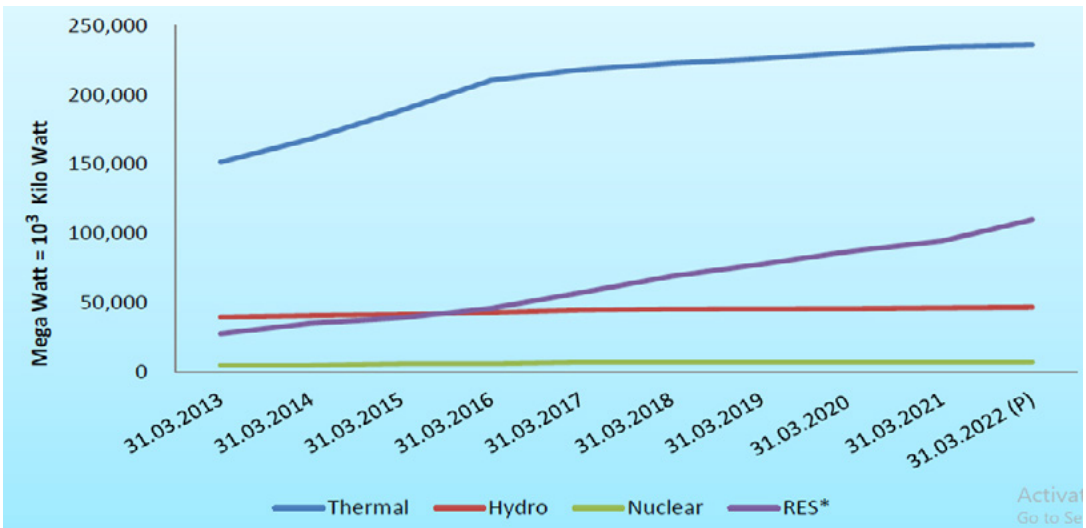

Fig 1: Trends in Installed Electricity Generation Capacity from utilities (MW) in India – Source wise during the period 2012-13 to 2021-22 (P)[11]

9 Ministry of New and Renewable Energy, Year- End Review 2022- Ministry of New and Renewable Energy Posted (20 DEC 2022) Available at: https://pib.gov.in/PressReleasePage.aspx?PRID=1885147 (Last visited on June 19, 2023).

10 *Ibid*

11 Government of India, Ministry of Statistics and Programme Implementation, Energy Statistics India 2023, Available at: https://www.mospi.gov.in/sites/default/files/publication_reports/Energy_Statistics_2023/Chapter%202-Installed%20Capacity%20and%20Capacity%20Utilization.pdf (Last visited June 19, 2023).

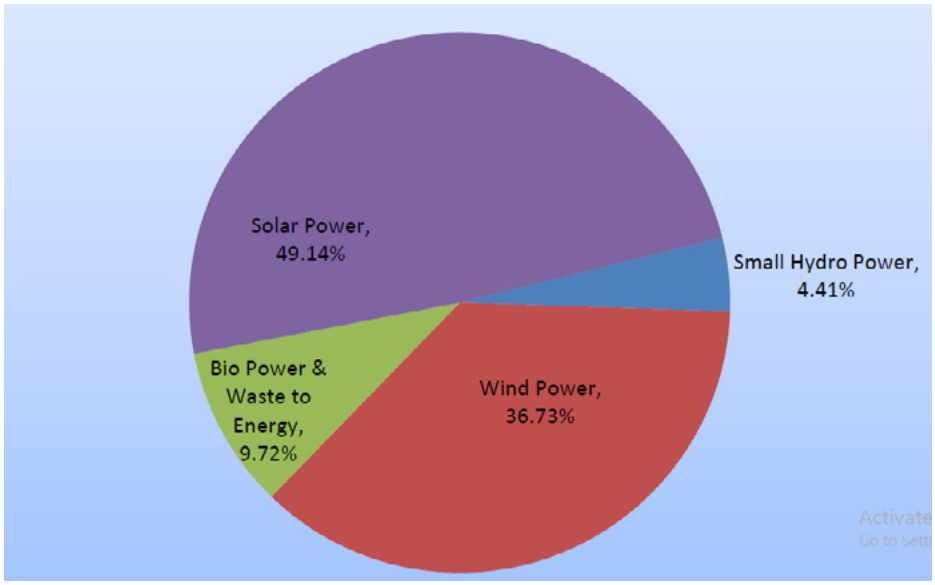

Fig 2: Sector wise percentage distribution of Installed Grid-Interactive Renewable Power Capacity during 2021-22(P)

As per the infographic stated above, it explains the total installed generation capacity of renewable sources of power in 2022 in which installed capacity of Solar power including roof tops accounted for about 49.14%, followed by Wind power (36.73%) and Bio Power & Waste to Energy (9.72%). However, in terms of growth rates year on year, Solar power installed capacity has a growth rate of 30.95% from FY: 2020-21 to FY: 2021-22.[12]Considering this parameter, Rajasthan has contributed as the highest installed capacity of grid connected renewable power (17,040.62 MW) in 2022 which is followed by Gujarat (16,587.90 MW) mainly on account of wind and solar power. Analyzing the state wise cumulative Installed Capacity of Grid Interactive Renewable Power during 2020-22 as on 31.03.2023 reveals that Goa (155.8%) has the highest growth rate, followed by Assam (5.7%), then followed by Rajasthan (63.8%).[13] Moreover, Rajasthan had contributed as the highest installed capacity of grid connected renewable power (17,040.62 MW) in 2022 followed closely by Gujarat (16,587.90 MW) mainly on account of wind and solar power.

12 *Ibid*

13 Government of India, Ministry of Statistics and Programme Implementation, *Energy Statistics India 2023, Chapter-2, p 23 Table 2.5: State-wise cumulative Installed Capacity of Grid Interactive Renewable Power as on 31.03.2022*, Available at: https://www.mospi.gov.in/sites/default/files/publication_reports/Energy_Statistics_2023/Chapter%202-Installed%20Capacity%20and%20Capacity%20Utilization.pdf (Last visited June 19, 2023).

Indian Regulatory Framework towards just energy transition and SDG7

Roadmap for Just Energy Transition by the Ministry of New and Renewable Energy (MNRE)

The Ministry of New and Renewable Energy (MNRE) as part of the third Energy Transition Working Group (ETWG) meeting of India's G20 Presidency together with the Indian Renewable Energy Development Agency (IREDA), and International Renewable Energy Agency (IRENA) deliberated on Low-cost Finance for New & Emerging Energy Technologies towards just energy transition. The Ministry of New and Renewable Energy (MNRE), India through the Presidency of the G20, is committed towards an accelerated, responsible and just energy transition through international cooperation and collaboration.[14]

Report by Niti Aayog on Just Energy Transition

At present, India's primary energy sources constitutes more than 80% fossil-based energy sources. Coal as a fuel still plays a crucial role in meeting India's energy requirements and it will continue for the next few decades too. The report of the inter-ministerial Committee on Just Transition evaluated and addressed the key issues and pre- requisites required to enable a just transition framework. They also gave recommendations for the action plan and implementation framework adopted for the just energy transition. The ministry of Coal in collaboration with the World Bank is working on the principle of just energy transition.[15]

India's vision to promote clean energy transition and climate change

India's vision is to achieve ambitious long-term goal of Net Zero Emissions by 2070 shows its commitment towards Net zero target. The other short term targets are: increasing renewables capacity to 500 GW by 2030, Meeting 50% of energy requirements from renewables, reducing cumulative emissions by one billion tons by 2030, and reducing emissions intensity of India's gross domestic product (GDP) by 45% by 2030.[16]Also, India aspires for the commitment to clean energy with ambitious targets like 500GW of non-fossil, including 450 GW Renewable Energy (RE) capacity addition and 43% RE

14 Ministry of New and Renewable Energy, *India, through the Presidency of the G20, is committed to an accelerated, responsible and just energy transition through international cooperation and collaboration – Shri Bhupinder Singh Bhalla, Secretary, MNRE (*15 MAY 2023) Available at : https://pib.gov.in/PressReleasePage.aspx?PRID=1924283 (Last visited June 17, 2023).

15 Niti Aayog, *Report of the inter- ministerial Committee on Just Transition from coal, 202*2, Available at: https://www.niti.gov.in/sites/default/files/2022-11/Report_Just-Transition-Committee_compressed.pdf (Last visited on June 17, 2023).

16 Government of India, Press Information Bureau, *Ministry of New and Renewable Energy Renewable Energy in India* (09 SEP 2022) Available at: https://pib.gov.in/FeaturesDeatils.aspx?NoteId=151141&ModuleId%20=%202 (Last visited June 18, 2023).

purchase obligation by 2030.Several policies and legislative instruments such as Energy Conservation (Amendment) Act), missions (National Green Hydrogen Mission), fiscal incentives (production-linked incentives) and market mechanisms (upcoming national carbon market supports these targets.[17]

The Energy Conservation Amendment Act, 2022[18]

Recently, the Energy Conservation Act, 2001, was amended with the Energy Conservation (Amendment) Act, 2022.It came into force on January 1, 2023.[19] The Energy Conservation Act, 2001[20], was enacted to provide for efficient use of energy, its conservation and additional issues related to it. The amendment comprehensively explains the regulation of energy consumption through different sources. It has special focus is in consonance with the principle of "Panchamrit" and focusses on the promotion of new and renewable energy and the National Hydrogen Mission. The amendment aims to facilitate the achievement of "Panchamrit" which is the five nectar elements presented by India in COP-26 in 2021.

India committed to (a) reach 500GW non-fossil energy capacity by 2030; (b) meet 50 per cent of its energy requirements from renewable energy by 2030; (c) reduce total projected carbon emissions by one billion tons from the date of COP-26 to 2030 (d) Reduce carbon intensity of the economy by 45 per cent by 2030, over 2005 levels and (e) achieve net zero emissions by 2070.[21] Thus, the amended act aims to promote just energy transition although the term is not specifically stated in the Act and also provides a roadmap towards achievement of sustainable development goals in line with the Paris Agreement.

The Electricity (Amendment) Bill, 2022

The Electricity (Amendment) Bill, 2022 proposes important changes required in the distribution of power and its related businesses and mainly aims towards the clean energy transition and achievement of India's Intended Nationally Determined Contribution (INDC). It also empowers State Regulatory Commission to specify Renewable Purchase

17 *Ibid.*

18 The Energy Conservation Amendment Act, 2022(Act No. 19 0f 2022).

19 Government of India, The Gazette of India, The Energy Conservation (Amendment) Act, 2022, Available at: https://beeindia.gov.in/sites/default/files/2023-05/EC%20Act%2C%202022.pdf (Last visited June 15, 2023).

20 The Energy Conservation Act, 2001(Act No.52 0f 2001).

21 Government of India, Press Information Bureau, *National Statement by Prime Minister Shri Narendra Modi at COP26 Summit in Glasgow (*01 NOV 2021) Available at: https://pib.gov.in/PressReleseDetail.aspx?PRID=1768712 (Last visited on June 18, 2023).

Obligation (RPOs)[22] which has to be not less than prescribed by the Central Government. It also empowers SERCs to specify renewable purchase obligations (RPO) for discoms. The Failure to meet RPO will attract penalty between 25 paise and 50 paise per kilowatt of the shortfall.[23] Therefore, the amendment certainly helps us towards the clean energy transition in a gradual manner.

Implementation of Energy efficiency measures and Government Schemes facilitating Just Energy Transition

The Government of India through the Ministry of Power and Ministry of New and Renewable Energy is implementing various measures and schemes to conserve energy and meet the consumption through renewable energy with an objective to reduce CO2 emission levels in the environment from industries, establishments and by using equipment/ appliances etc. The Ministry of Power, through the Bureau of Energy Efficiency (BEE), plays an active role in implementing various policies and schemes viz Perform Achieve Trade (PAT) Scheme, Standard and Labelling, Energy Conservation Building Codes and Demand Side Management.[24] These programs facilitate towards significant energy conservation, energy efficiency and use of renewable sources for the production of energy.

International Solar Alliance

The ISA is structured as an international resource hub with in-house technical expertise which is action-oriented, member-driven, collaborative platform for increased deployment of solar energy technologies for ensuring energy security, energy access, affordable and efficient ensuring energy, transition towards renewable energy. The Solar Alliance was conceptualized on the side-lines of the 21st Conference of Parties (COP21) to the United Nations Framework Convention on Climate Change (UNFCCC) held in Paris in 2015.[25] Its Framework Agreement undergone an amendment which allows all the member states of the United Nations to join the ISA. At present, 101 countries are signatories to the ISA Framework Agreement, of which 80 countries have submitted the necessary instruments of

22 RPO refers to the mandate to procure a certain percentage of electricity from renewable sources.

23 Ministry of Power, The Electricity (Amendment) Bill, 2022, Available at: https://prsindia.org/billtrack/the-electricity-amendment-bill-2022#:~:text=The%20Electricity%20Act%2C%202003%20permits,The%20Bill%20removes%20this%20requirement. (Last visited on June 18, 2023).

24 Government of India, Ministry of Power, Bureau of Energy Efficiency, Programmes Available at : https://beeindia.gov.in/en/programmes (Last visited on June 9, 2023).

25 Press Information Bureau, Government of India, Ministry of New and Renewable Energy, *International Solar Alliance will be the First International and Inter-Governmental Organisation of 121 Countries to have Headquarters in India with United Nations as Strategic Partner* (2016) Available at: https://pib.gov.in/newsite/printrelease.aspx?relid=135794 (Last visited June 9, 2023).

ratification to become full members of the ISA.

It helps in transfer of solar energy technologies to other member nations and also guides other countries in project implementation. Its vision is to provide access to energy on priority basis otherwise just energy transition would be meaningless. It collaborates with governments globally to improve energy access and security worldwide and promote solar power as a sustainable transition to a carbon-neutral future.[26]

'One Sun, One World, One Grid' is an initiative discussed at the Fourth General Assembly and this thought was first outlined in late 2018 at the First Assembly of the ISA.OSOWOG aims to decarbonize energy production, which is today the largest source of global greenhouse gas emissions. 'One Sun, One World, One Grid' is a solution to the demand of clean and sustainable energy.[27] Moreover, economically developed countries can manage their fund for just energy transition but economically weaker countries have to be helped by financing them through the green funds. Therefore, International Solar Alliance has to facilitate them to achieve these targets.

V. REGULATORY AND POLICY FRAMEWORK RELATING TO JUST ENERGY TRANSITION: INTERNATIONAL PERSPECTIVE

Current Status of Renewable Energy at the Global Level

The International Trade Union Confederation (ITUC) for the first time included the proposition of "Just transition" in its statement to the Kyoto Conference. Again in 2009, a statement on just transition was submitted to the COP15 held in Copenhagen. Finally, the concept of just transition was included in the preamble of the Paris agreement, COP21. The preamble notes that the parties to the agreement shall respond to the urgent threat of climate change *"Taking into account the imperatives of a just transition of the workforce and the creation of decent work and quality jobs in accordance with nationally defined development priorities"* [Para 10].[28] 2018: The 'Solidarity and Just Transition Silesia Declaration' adopted during the Katowice Conference, COP24, signed by the Polish presidency of the

26 Ministry of New and Renewable Energy, *International Solar Alliance and West African Power Pool hosts 13 African countries in New Delhi to share best practices in solar deployment* (14 FEB 2023) Available at: https://www.pib.gov.in/PressReleasePage.aspx?PRID=1899198 (Last visited June 12, 2023).

27 Ministry of New and Renewable Energy, *Fourth Assembly of the International Solar Alliance closes with a promise to achieve $1 trillion global in solar investments by 2030*, (22 OCT 2021) Available at: https://pib.gov.in/PressReleasePage.aspx?PRID=1765671 (Last visited June 13, 2023).

28 United Nations Framework on Climate Change, Paris Agreement, Available at: https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf (Last visited June 19, 2023).

Katowice COP, along with 52 Head of States and Governments from across the world. The Declaration underscored that just transition of the workforce and the creation of decent work and quality jobs are crucial to ensure an effective and inclusive transition to low greenhouse gas emission and climate resilient development. Moreover, COP26 signed the Glasgow Just Transition Declaration, reemphasizing the need to ensure that no worker or community is left behind. Therefore, it is a process that structures the plans, policies, regulations and economic investments for a future with net zero emissions, green and clean energy, resilient community and achieving SDG 7.

International Regulatory Framework towards Global just energy transition and SDG 7

COP 27 and the Just Energy Transition

For the first time in the history, The United Nations Framework on Climate Change at COP 27 adopted the agenda of creating a specific fund for loss and damage to achieve the goal of Just Energy Transition and to achieve SDG7. There was remarkable contribution by European Union and International Labour Organization hosted the first ever Just Transition Pavilion at COP27. It had different sessions to brainstorm on the diversified themes of inequalities, global transition, energy crisis, policy making and ensuring just sustainability.[29] It witnessed significant progress on adaptation which will conclude at COP28.Undoubtedly, these pledges will help vulnerable communities adapt to climate change through concrete adaptation solutions. The investments of more than USD 230 million were made to the Adaptation Fund at COP27. There was launch of mitigation work program which has a greater significance focused towards mitigation ambition and implementation. It also led to launch of a new five-year work program at COP27 to promote climate technology solutions in developing countries.[30]

The Intergovernmental Panel on Climate Change (IPCC)

The Intergovernmental Panel on Climate Change (IPCC) in March, 2023 has just launched its latest report "The AR6 Synthesis Report: Climate Change 2023" summarizing five years of reports on global temperature rises, fossil fuel emissions, energy crisis and climate impacts. The report analyses and explains that despite progress in policies and legislation around climate mitigation, the warming is likely to exceed 1.5°C during the 21st century.

29 United Nations Climate Change, *COP27 Reaches Breakthrough Agreement on New "Loss and Damage" Fund for Vulnerable Countries*, Available at: https://unfccc.int/news/cop27-reaches-breakthrough-agreement-on-new-loss-and-damage-fund-for-vulnerable-countries (Last visited June 23, 2023).

30 *Ibid*.

The target of Paris agreement to achieve the target of below 2 degrees Celsius is hard to achieve but yet not impossible. Human-caused climate change is already affecting many weather and climate extremes in every region across the globe – with widespread loss and damage to both nature and people. The key findings of the AR6 report[31] include prioritization to equity, social justice, inclusion and just transition processes as it would enable ambitious climate mitigation actions and climate-resilient development. Moreover, this is a decisive decade as the IPCC has "very high confidence" to achieve the goals, agendas, targets through greater integration across the energy systems globally.[32]

International Energy Agency and Just Clean Energy Transition

The reports of IEA stresses on the urgent action for all the governments to achieve the targets of Paris Agreement as well as SDG 7, it's the time to dedicate ourselves towards people-centered and inclusive policies towards clean energy transitions. Vulnerable communities have to be at the heart to achieve just energy transitions. The 'Global Commission on People-Centered Clean Energy Transitions' convened by Dr Fatih Birol, Executive Director of the IEA in 2021 was proved to be extremely valuable in bringing this major issue to the forefront in front of the world. It was a platform that enabled to identify a set of 12 actionable recommendations involved in the transformation of our energy system with equitable distribution which doesn't leaves any country behind.[33]

IEA's '2022 edition of Tracking SDG 7: The Energy Progress Report' tries to explore and assess achievements in the global quest for universal access to affordable, reliable, sustainable, and modern energy by 2030.This edition is influenced by the broad social and economic disruptions due to COVID-19 pandemic and Russian-Ukraine war which might leads to energy crisis.

31 World Economic Forum, Nathan Cooper Lead, Partnerships and Engagement Strategy, Climate Action Platform, *The IPCC just published its summary of 5 years of reports – here's what you need to know,* Available at: https://climatechampions.unfccc.int/the-ipcc-just-published-its-summary-of-5-years-of-reports-heres-what-you-need-to-know/ (Last visited June 20, 2023).

32 The Intergovernmental Panel on Climate Change, *Urgent climate action can secure a liveable future for all, 20 March 2023*, Available at: https://www.ipcc.ch/site/assets/uploads/2023/03/IPCC_AR6_SYR_PressRelease_en.pdf (Last visited June 20, 2023).

33 International Energy Agency, *Global Commission of government leaders and prominent figures announces key recommendations for putting people at the centre of clean energy transitions* (26 October 2021) Available at: ea.org/news/global-commission-of-government-leaders-and-prominent-figures-announces-key-recommendations-for-putting-people-at-the-centre-of-clean-energy-transitions (last visited June 21, 2023).

The Energy Progress Report-Tracking SDG 7

The Energy Progress Report is an outcome of close collaboration among the five SDG 7 custodian agencies including International Energy Agency (IEA), International Renewable Energy Agency (IRENA), United Nations Statistics Division (UNSD), World Bank and World Health Organization (WHO) responsible for tracking global progress toward Sustainable Development Goal 7 (SDG 7), which is to "ensure access to affordable, reliable, sustainable, and modern energy for all. As per the Energy Progress Report 2023[34] Tracking SDG 7, the primary indicators of global progress of SDG 7 and latest data is provided in figure 3. The figure 3 rightly explains the growth towards SDG 7. Indicator 7.1.1 explains the number of people without electricity has been almost halved during the period. Indicator 7.1.2 states that the goal of universal access by 2030 remains still elusive to achieve the targets specified. With respect to 7.2.1, the share of renewable energy in total final energy consumption (TFEC) will remain negligible. With respect to indicator 7.3.1, it focusses on doubling the global rate of improvement in energy intensity over the average rate during 1990–2010 with a target of improving by 2.6 percent per year between 2010 and 2030. The indicator 7.a.1 shows a decline trend in international public financial flows in support of clean energy. The reasons for the decline are assumed to be Covid-19 crisis as well as Russia-Ukraine war.[35]

34 International Energy Agency, *Energy Progress Report 2023 - Tracking SDG 2023*, Available at: https://trackingsdg7.esmap.org/data/files/download-documents/sdg7-report2023-full_report.pdf (last visited June 22, 2023).

35 *Ibid*.

Fig 3: Primary indicators of global progress toward the SDG 7 targets

The above-mentioned figure rightly explains the growth towards SDG 7. Indicator 7.1.1 explains the number of people without electricity has been almost halved during the period. Indicator 7.1.2 states that the goal of universal access by 2030 remains still elusive to achieve the targets specified. With respect to 7.2.1, the share of renewable energy in total final energy consumption (TFEC) remained negligible. With respect to indicator 7.3.1, it focusses on doubling the global rate of improvement in energy intensity over the average rate during 1990–2010 with a target of improving by 2.6 percent per year between 2010 and 2030. The indicator 7.a.1 shows a decline trend in international public financial flows in support of clean energy. The reasons for the decline are assumed to be Covid-19 crisis as well as Russia-Ukraine war.

The author truly examines the growth and conveys their views that with this rate of progress, it is difficult to achieve the SDG 7 goals by 2030.No doubt, the investment flows have been directed towards developing and least developed countries to have access to affordable, sustainable and modern renewable energy technologies.

International Renewable Energy Agency

IRENA acknowledges the increasing recognition of just and inclusive energy transitions as countries across the globe. It is essential to accelerate their energy transitions to meet their development and climate objectives. It establishes the Collaborative Framework on 'Just and Inclusive Energy Transitions' and convenes its first meeting on 20 May 2021 which discussed the different issues and possible plan for the same.[36] The Funding remains at the core, so to fill the funding gap for renewable energy projects in developing countries, IRENA launched the Energy Transition Accelerator Financing Platform (ETAF) in 2021 at COP26. This platform provides a multistakeholder climate finance solution dedicated solely to advance the global energy transition by mobilizing and directing close to USD 1 billion into renewable energy projects in developing markets.[37]

VI. THE WAY FORWARD

The year 2023 marks as the mid-point of the implementation of the United Nations 2030 Agenda for Sustainable Development. The author is of the view that aspiring for energy security is very important but it has a missing link. Therefore, the concept of Just Transition has to be incorporated in the whole process and this step will certainly drive us towards Just Energy Transition. Moreover, it will facilitate us to achieve SDG 7.

Globally, the countries are driving towards energy security but faces challenges due to catastrophic events such a Covid 19 pandemic, Russia- Ukraine war. There should Judicial Interventions in all the countries to drive the world towards a Just and Regenerative Renewable Energy transition. Various perspectives such as social, economic, cultural has to adhered but yet, the importance of gender equity cannot be undermined in transition towards renewable energy.

36 International Renewable Energy Agency, *Just & Inclusive Energy Transition Back-Collaborative Framework on Just & Inclusive Energy Transition,* Available at: https://www.irena.org/How-we-work/Collaborative-frameworks/Just-and-Inclusive-Energy-Transition (last visited June 21, 2023).

37 International Renewable Energy Agency, *IRENA's ETAF Recognised as Key Accelerator for Just Transition, 19 January 2023* , Available at: https://www.irena.org/News/articles/2023/Jan/IRENA-ETAF-Recognised-as-Key-Accelerator-for-Just-Transition (Last visited June 21, 2023).

India has taken a Centre stage towards clean Energy Transition and Net zero by 2070 but there are significant structural changes required in the production and consumption through fossil fuels. There is an urgent need to align the regulations and policies with the implementation and operationalization of the renewable energy sector. By incorporating the concept of Just Energy Transition in the National domain, India can send a strong signal that it is willing to play a leadership role by tackling the issue of inequality and climate change.

CRITICAL ANALYSIS OF SOCIAL SECURITY SCHEMES FOR WOMEN IN INDIA

Ms. Richa Srivastava*

VIPS Student Law Review
August 2023, Vol. 5, Issue 1, 19-27
ISSN 2582-0311 (Print)
ISSN 2582-0303 (Online)

https://vslls.vips.edu/vslr/

ABSTRACT

The effective implementation of women-centric welfare measures has been an arduous challenge. These challenges in the work arena are seen in the form of gender biases, unequal pay, and allowances for similar types of work, and unsuitable working environment conditions for women. Many establishments prefer a male workforce over a female workforce to reduce financial overheads due to different regulatory measures. In this study, an attempt is made to identify the factors that prevent women workers and employees from aspiring for higher posts along with the different challenges faced by them. This study tries to reflect the real condition of Indian working women and the difficulties faced by them in balancing domestic and professional work, issues related to gender inequality, lack of implementation of legal measures such as equal remuneration for equal work, etc., and some remedies to address these issues.

Keywords: *Challenges, Women Workers, inequalities, gender bias, equal remuneration, crèche, sexual harassment, etc.*

I. INTRODUCTION

There has been an inherent urge in human beings to have stability and security in their lives. Security in society has become a necessity and reality of millions of lives throughout the world. The hardship and turbulence in life get a relief of stability and protection with these social security measures and provide a sense of being cared about. In contemporary

* Assistant Professor, Vivekananda School of Law and Legal Studies, Vivekananda Institute of Professional Studies - TC, New Delhi, India; Ph.D. Scholar, Maharashtra National Law University Nagpur.

times, the prevalence and coverage of social security status in any country have become a yardstick to measure its progress towards being a welfare state.[1]

The concept of human dignity and social justice are inherent constituents in the concept of social security. Social security is based on the idea that citizens contribute and are likely to play a constructive role in the development and advancement of the country and thereby should be protected against certain hazards. Initially, workers looked for the protection in form of small savings, employer's liability, or public insurance against any contingency[2]. Later, the onus to provide this protective environment was put on the employers, as the employer was responsible for creating the factory/work units and the environment that could cause harm or injury to the workers. Thereby, making the employer responsible for any loss sustained by the victim, and the protective legislation revolved around making the employer liable to protect against such consequences.

Further, in this process of evolution, many different measures have been adopted by different states to protect people in need. [3] There was a lot of emphasis on the individual efforts to provide some form of protection through the acts of charity and philanthropy followed by the development of a mechanism to provide mutual benefits during times of hardship. These were further evolved including state sponsorship & state participation and finally making its space in the major plans of Government policies in many countries.[4]

Working women face problems at the workplace just by virtue of being women. Social attitude to the role of women lacks much behind the law. The women who are equally qualified at par with men are not taken into consideration for the job. Gender bias creates an obstacle at the recruitment stage itself. The problem of gender bias dissuades women in the industrial setup when technological advancements result in the retrenchment of employees. The discriminating situation is prevalent in the unorganized sector. [5] There are issues of unequal and lower wages for female as compared to males even when the nature & duration of work is the same for men and women. There have been efforts to address these inequalities by enacting some laws like the Unorganized Worker Social Security Act 2008, and the Domestic Worker Welfare and Social Security Act 2010, etc. These acts do address the problem of inequality to some extent but lack in their proper and effective

1 Government of India, "Report on National Commission on Labour" (Ministry of Labour,1969) p.162.

2 Government of India, "Report on National Commission on Labour" (Ministry of Labour,1969) p.163.

3 *Ibid.*

4 *Ibid.*

5 "Unorganized Sector" means an enterprise owned by individuals or self-employed workers and engaged in the production or sale of goods or providing service of any kind whatsoever, and where the enterprise employs workers, the number of such workers is less than ten.

implementation. This has resulted in miserable living conditions and work environments for women, particularly in the unorganized sector. The following Acts which have been legislated for the welfare of women are discussed below.

II. ANALYSIS OF THE MATERNITY BENEFIT ACT, 1961

The Maternity Benefit Act 1961[6] provides for employment security to women during their maternity. It provides for full paid leave for a period of 6 months to take care of them and their child[7]. The maternity benefits under this act are applicable to all establishment which has 10 or more employees. These establishments can be factories, mines, plantations, Government establishments, shops, and establishments under the relevant applicable legislation or any other establishment as notified by the central government.

Increased Paid Maternity Leave

The Principal Maternity Benefit Act of 1961 provided for 12 weeks of paid maternity leave, which was further increased to 26 weeks by an amendment (The Maternity Benefit Amendment Act 2017)[8]. This amendment also offered flexibility to the women to avail of these leaves extending up to a maximum of 8 weeks before the expected delivery date and remaining leaves can be availed after the birth of the child. This act also has provision for the maternity benefit with respect to women who are expecting after having 2 children. For these cases, this act provides for 12 weeks of total paid maternity leave, out of which 6 weeks of leave each can be availed before and 6 weeks of leave after the date of delivery.

Work from Home option

The amended Maternity Benefit Act of 2017 also introduced an enabling provision that allows for a "work from home" facility for women after availing of their 26 weeks of paid leave. However, this is just an enabling provision and actual terms and benefits on which a work-from-home option can be provided to the women post giving birth to the child are to be mutually agreed upon with the employer. This provision became redundant during the COVID-19 pandemic which saw mandatory work-from-home provisions for all workers irrespective of gender and maternity status. Now, after normalcy has begun to set in probably this provision will gain some traction and may be invoked by women to gain some benefits post-pregnancy.

6 Maternity Benefit Amendment Act, 2017 (Act 6 of 2017).

7 *Ibid*.

8 *Supra* note 6 at 3.

Creche facility

The Maternity Benefit Amendment Act 2017 also introduced the provision to provide for a creche facility mandatorily within a prescribed distance for every establishment employing 50 or more people. Women employees would be permitted to visit the crèche 4 times during the day (including rest intervals) The Maternity Benefit Amendment Act makes it mandatory for employers to educate women about the maternity benefits available to them at the time of their appointment. The provision for crèche[9] is also available in Factories Act, 1948 though the implementation of the same is lacking in most organizations.

Although these were welcome steps with respect to maternity benefits, the status of on-ground implementation requires research. There have not been many studies that document the impact of changes brought by the amendments made in 2017 to the principle Maternity Benefit Act of 1961. Only few studies like VV Giri National Labor Institute in 2019 can be referred. This study highlighted various lacunas mainly unawareness about mandatory requirement of providing information regarding maternity leaves in the appointment letter and creche facility.

In this context, the case, namely *Smt. Popi Paul @ Popi Das Paul vs. The State of West Bengal & Ors*[10] is appropriate to refer. In this case the petitioner delivered a child in September 2016 and, in March 2017 applied to the Principal of the Respondent/College in issue to rejoin her duties since, the College had appointed her until the 29th of June, 2017. The petitioner was not however allowed to rejoin her duties and, therefore claims through writ petition, both her right to avail of the maternity leave and to rejoin her duties in the absence of any formal communication from the Respondent/College in issue rescinding her engagement. The Court gave decision in favor of the petitioner and allowed to rejoin her duties upon completion of the maternity leave.

III. ANALYSIS OF THE FACTORIES ACT, 1948

The Factories Act has provisions that offer extra benefits to women, such as not allowing them to work near cotton openers[11] and providing creches within the factory premises. According to section 48[12] of the Factories Act 1948, any factory that employs more than thirty women workers must have a suitable room or room for children under six years of

9 The Factories Act, 1948, s. 48.

10 *Smt. Popi Paul @ Popi Das Paul vs State of West Bengal*, 2017 SCC OnLine Cal 7924.

11 Factories Act 1948 as amended by the Factories (Amendment) Act, 1987 (Act 20 of 1987) s. 27.

12 *Supra* note 10 at 5.

age. These rooms must be well-lit, ventilated, clean, and under the supervision of trained women who can take care of children and infants. The State Government can make rules regarding the location, construction, furniture, and equipment of these rooms. Additionally, factories must provide additional facilities for the care of children, including washing and changing facilities, free milk, or refreshments, and allowing mothers to feed their children at necessary intervals.

IV. ANALYSIS OF THE UNORGANISED WORKERS SOCIAL SECURITY ACT, 2008

The Unorganized Workers Social Security Act 2008 is legislation that aims to offer social security and welfare measures to workers who are employed in the unorganized sector[13]. This includes self-employed workers, small business employees, casual workers, and daily wage earners who do not have access to formal social security benefits. The Act requires the creation of a National Social Security Board to supervise the implementation of social security schemes for unorganized workers[14]. It also mandates the establishment of various social security schemes, such as life and disability cover, health and maternity benefits, old age protection, and skill up-gradation of workers. The Act intends to enhance the living conditions and social status of unorganized workers and their families.

The scheme formulated by the Central Government shall provide welfare benefits to unorganized workers. These benefits include maternity leave, insurance, retirement benefits, gratuity payments, provident funds, disability benefits, housing schemes, family pensions, bonus payments, and equal remuneration. The unorganized sector employs over 93 percent[15] of the labor force, which has limited social protection and low earnings. Small enterprises employ two-thirds of the workforce, and almost half of the national income comes from this sector[16]. Casual wage workers and self-employed individuals make up a significant portion of the unorganized sector. However, there is limited data available on employment numbers and quality in this sector, which makes it difficult to analyze informal employment[17].

13 The Unorganized Workers Social Security Act, 2008, s. 2l.

14 The Unorganized Workers Social Security Act, 2008, s. 2m.

15 Ministry of Labor and Employment, "Unorganized Worker" *available at* https://labour.gov.in/unorganized-workers (last visited on May 01, 2023)

16 Report on Conditions of Work and Promotion of Livelihoods in the Unorganised Sector, *available at* https://www.prsindia.org (last visited on May 01, 2023)

17 International Labor Organization, *available at* www.ilo.org (last visited on May 01, 2023)

V. ANALYSIS OF THE SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION AND REDRESSAL) ACT, 2013

This legislative act came into effect to provide protection to women from sexual harassment at their place of work. This law was enacted to provide legislative cover to the already framed guidelines by the judiciary (Supreme Court of India) in the form of the Vishakha Guidelines[18] for the prevention of sexual harassment. This act mandates any workplace with more than 10 employees must implement this law, however, this act is not implemented by most employers. In a 2015 report of FICCI-EY, it is claimed that 36% of Indian companies and 25% of MNCs are not compliant with the Sexual Harassment Act, of 2013. The government has been trying to enforce it and has also warned employers to comply with this act or face stern action[19].

VI. ANALYSIS OF THE EQUAL REMUNERATION ACT, 1976

The Equal Remuneration Act of 1976 was enacted to implement the constitutional goal of equal pay for equal work, as stated in Article 39(d)[20]. This act ensures that men and women workers receive equal remuneration and prohibits discrimination based on sex in employment matters. According to Section 2(h) of the Act, "same work or work of a similar nature" refers to tasks where the required skill, effort, and responsibility are the same for both genders under similar working conditions. Any minor differences in these aspects between men and women should not have practical significance in terms of employment terms and conditions. Overall, the Act aims to promote gender equality and eliminate wage disparities in the workforce.

The principle of Equal Pay for Equal Work was first[21] considered in the year 1962 when the Supreme Court declared that it cannot be decided in a court of law. But later on, it received recognition in 1987[22]. Here the issue of concern was a claim for equal remuneration of male and female Stenographers. This was ruled in favor of lady stenographers as the Court was in favor of equal pay.

18 *Vishakha and others* v. *State of Rajasthan,* AIR 1997 SC 3011.

19 The Economic Times, a*vailable at* https://economictimes.indiatimes.com (last visited on May 02, 2023)

20 The Constitution of India, art. 39(d).

21 *Kishori Mohanlal Bakshi* v. *Union of India,* AIR 1962 SC 1139.

22 *Mackinnon Mackenzie's,* [1987] 2 SCC 469.

In a leading case[23], the Supreme Court has held that although the principle of equal pay for equal work is not expressly declared by our Constitution as a fundamental right it is certainly a constitutional goal under Articles 14[24], 16,[25] and 39(c)[26] of the Constitution. This right can, therefore, be enforced in cases of unequal scales of pay based on irrational classification.

VIII. FALLOUTS OF THE WOMEN-CENTRIC SOCIAL WELFARE ACTS IN INDIA

Gender discrimination against women

Policy formulation holds significance, but when social security becomes an obligation for employers, as observed in India, it may lead to discrimination against women. Furthermore, implementing additional provisions such as providing childcare facilities demands increased financial investments and operational expenses. Consequently, certain companies in India may hesitate to hire women, and if they do, these women might experience reduced compensation to offset the anticipated higher long-term costs. This was very much visible in the recent findings by the World Economic Forum (WEF) which ranked India at 135 out of 146 countries in the Global Gender Gap Index in the report's 2022 edition[27].

Types of the burden on the employer

Employers are responsible for covering the complete expenses related to providing leave to their employees particularly paid maternity leaves to the women employees. This includes continued payment while on leave and the additional costs of hiring replacement workers to complete the absent employee's tasks. Additionally, this policy leads to increased expenditures for temporary training provided to the replacement employee working on behalf of the absent employee. This becomes an overhead for the employee and also is seen in terms of the Gender Pay gap. The gender pay gap was 28% in 2018-19 as per the labor force survey data of the National Sample Survey Office (NSSO). The situation has further deteriorated due to covid pandemic by increasing this gender gap. As per the World Inequality Report 2022 men in India capture 82% of labor income and women just about 18% which is an alarming situation with respect to the gender pay gap.

23 *Randhir Singh* v. *Union of India*, [1982] 1 SCC 618.

24 The Constitution of India, art. 14.

25 The Constitution of India, art. 16.

26 The Constitution of India, art. 39(c).

27 World Economic Forum, "Global Gender Gap Report 2022" (July 2022).

Women lose their jobs

There have been a few studies estimating the number of women losing their jobs due to the impact of social security scheme implementation concerning women due to lack of data. Therefore, direct attributable data of women losing jobs in relation to these social security schemes is very difficult. However, the different inferential situation presents a case of attributing the lower female participation rate to the overall cost associated with the social security benefits.

Financial burden only on the employer

In many developed countries, the financial burden of maternity leave is distributed among various entities, including the government, employers, insurance agencies, and social security programs. For instance, in Singapore, the employer covers the cost for 8 weeks, while public funds support the remaining 8 weeks. In Australia and Canada, the entire cost is covered by public funds. France operates on a social insurance scheme to cover the expenses, and in Brazil, the cost is shared among the employer, employee, and the government. However, in the Indian scenario, the entire financial burden of the social security benefits lies with the employer which makes him reluctant towards effective implementation of social security schemes for women one hand and also discourages employment of women in their organizations.

Gender inequalities

Gender bias is one of the major challenges of the women working force. There are various welfare provisions for women but the implementation of the same has become a major task. To overcome from these challenges, strict implementation of various welfare provisions is required.

IX. CONCLUSION AND SUGGESTIONS

The analysis made above of various Acts showed that effective implementation is still not achieved. Various challenges faced by women can be resolved by improving the conditions for women workers with the help of trade unions for example maternity leaves can be made available to women and it could also support women in achieving higher posts and promotions.

Women have time and again proved their capability in all fields of life. The present COVID crisis is an example of it where women are equally participating and working as corona

warriors. Based on the above study, the suggestions are given below.

Gender-Inclusive Policy Development: Policymakers should ensure that social security policies take into account women's unique needs and circumstances, such as the gender pay gap, caregiving responsibilities, and the vulnerabilities faced by elderly women. To resolve the multiplicity of applicable laws, policies, and schemes the government introduced labor codes. The strict implementation of the code on Social Security 2019[28] will address these issues and would be beneficial for working women in the unorganized sector. A body working as a watchdog is required to ensure the effective implementation of social security schemes. This body shall have mandatory participation of women and they should constitute half of the members of the body.

Improving Widow and Survivor Benefits: Enhance survivor benefits for widows and dependents of deceased workers to offer greater financial security to women who have lost their spouses or partners.

Promoting Financial Literacy and Inclusion: Encourage financial literacy among women, particularly in rural areas, and facilitate their participation in formal financial systems. This may involve initiatives for women's banking, access to credit, and microfinance programs. Empowerment through Employment Opportunities and Training need to be achieved.

Addressing Workplace Violence and Harassment: Strengthen measures to combat violence and harassment against women in the workplace, as these issues significantly impact their social and economic security.

Public-Private Partnerships: Foster collaborations with private organizations and NGOs to design and implement effective social security programs for women. Providing social security could be made part of corporate social responsibility.

28 Ministry of Labor and Employment, "The draft code on social security, 2019" (2019) and "Recommendations by 2nd National Commission on Labour 2002".

MASS ATROCITIES AND REPARATION TO ROHINGYAS IN MYANMAR

Mr. Mostafijur Rahmani*

VIPS Student Law Review
August 2023, Vol. 5, Issue 1, 28-41
ISSN 2582-0311 (Print)
ISSN 2582-0303 (Online)

https://vslls.vips.edu/vslr/

ABSTRACT

This article examines the Myanmar government's mass atrocities against Rohingya Muslims in the Rakhine State of Myanmar in 2017 and related reparations, taking into account pertinent principles of international law in this regard. The article offers five types of restitution that are in accordance with the United Nations' Basic Principles on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005). It tries to assess whether the actions taken by the Myanmar government constitute mass atrocities and the extent to which Myanmar is required by international law to pay reparations to the Rohingya Muslims for their actions. This paper draws its data and material from a variety of secondary sources, including websites, newspaper articles, book chapters, thesis papers, and research journals. To better understand the data gathered and develop an analytical technique, the relevant literature that has already been published on the subject of the research was reviewed.

Keywords: *Mass Atrocity, Rohingya, Myanmar, Reparation, International Law.*

I. INTRODUCTION

Given their lengthy history of severe discrimination, persecution, brutality, denial of citizenship, and other restrictions, the Rohingya Muslims of Rakhine State in Myanmar are considered the most oppressed ethnic minority in the modern world. In Myanmar, the Rohingya are being forcibly kept out of society, barred from using public amenities, and

* Assistant Professor, Prime University, Bangladesh; Ph.D. Scholar.

the subject of hate speech from insiders and outsiders[1]. The Rohingya population has most recently been the target of horrific atrocities committed by the Myanmar military. These atrocities include genocide, ethnic cleansing, and crimes against humanity. The United Nations has also identified them as the world's most vulnerable minorities. Recently, more than 700,000 Rohingyas have fled to neighbouring Bangladesh due to brutal violence and persecution carried out by Myanmar's government and military power in Rakhine State since August 2017. Many of those escaping and entering Bangladesh from across the border have reported mass murders, rape, and village burnings. The Myanmar administration has established commissions before 2021 to look into the violence and encourage amity between the Rohingya and those who targeted them. These inquiries, however, lacked objectivity and were ineffectual. The perpetrators of the Rohingya genocide were put in power by the military coup that Myanmar conducted in February 2021. The Rohingya's future has since grown even more precarious. The leaders of Myanmar have not done anything to improve the situation of the Rohingya, either before or after the coup. Instead, they have implemented laws and regulations that make life for them intolerable. The Rohingya who fled Myanmar are still unable to return home safely due to the perilous conditions there. Both the Rohingya who would return to Burma and those who are staying there are still in danger of being wiped out[2]. As per the relevant provisions of international law, the Myanmar military and government are strictly liable for their acts against Rohingyas. In light of the aforementioned background, this paper examines the Myanmar government's mass atrocities against the Rohingya Muslims in Rakhine State, analyzing the principles of reparations as stated in international law.

Definition of Key Concepts

Mass Atrocities: The 1949 Geneva Conventions and their 1977 Additional Protocols, the 1998 Rome Statute of the International Criminal Court, and other treaties provide definitions of the crimes, despite the fact that the term "mass atrocity" has not been formally or legally defined in international law. Genocide, crimes against humanity, and war crimes are three internationally recognized crimes that are together referred to as "atrocity crimes" by law. Genocide, war crimes, ethnic cleansing, and crimes against humanity were identified as four elements of atrocities in the 2005 World Summit Outcome Document's paragraphs 138 and 139 on the "Responsibility to Protect" (UN General Assembly, 2005 World Summit

1 Human Rights Watch, "Burma: End Ethnic Cleansing of Rohingya Muslims," April 22, 2013, *available at:* <https://www.hrw.org/news/2013/04/22/burma-end-ethnic-cleansing-rohingya-muslims>

2 United States Holocaust Memorial Museum, "Atrocities against Burma's Rohingya Population," *available at*: <https://encyclopedia.ushmm.org/content/en/article/atrocities-against-burmas-rohingya-population>.

Outcome: Resolution). The term "atrocity crimes" has been used in this context to refer to ethnic cleansing, which encompasses acts that are grave breaches of international human rights law, humanitarian law, and major crimes against humanity.

Crime Against Humanity: According to Article 7 of the Rome Statute, crimes against humanity means any act of murder, extermination, enslavement, deportation, imprisonment, torture, rape, or any other inhuman treatment carried out against any civilian population or any ethnic group, or persecution on political, racial, or religious grounds, or other inhumane acts of a similar character intentionally causing great suffering, or serious injury to the body or to mental or physical health. Straus (2011) identifies crime against humanity as a broader concept than genocide because "crime against humanity is widespread, systematic violence against civilians, implying a degree of large scale, but not necessarily group-selective violence or group-destructive violence".

Genocide: As per Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted in 1948, genocide means acts of killing members or causing serious bodily or mental harm to members of the group or imposing measures intended to destroy, in whole or in part, a national, ethnic, racial, or religious group (Convention on the Prevention and Punishment of the Crime of Genocide, 1948).

Ethnic cleansing: Literally, ethnic cleansing means the forced removal, expulsion, or killing of an ethnic minority or racial group by a powerful ethnic group or by a dominant majority. Gareth Evans defines ethnic cleansing as "outright killing, expulsion, acts of terror designed to encourage flight, and rape when perpetrated either as another form of terrorism or as a deliberate attempt to change the ethnic composition of the group as a whole" (Evans 2008: 13, cited by Straus, 2011).

War Crimes: Article 8 of the Rome Statute defines war crimes as "wilful killing, torture, or inhuman treatment, wilfully causing great suffering or serious injury to body or health; extensive destruction and appropriation of property; compelling a prisoner of war or other protected person to serve in the forces of a hostile power; willfully depriving a prisoner of war rights; unlawful deportation or transfer or unlawful confinement; taking of hostages; destroying shelter; and generally attacking civilians deliberately in war" (Rome Statute of the International Criminal Court, 1998).

Analytical Framework

The most terrible crimes against humanity, according to experts, are atrocity crimes. Mass atrocities were defined as episodes of widespread violence against defenceless populations

by Anderton and Brauer (2019). Mass atrocities are described as a serious international crime that undermines the basis of human dignity in the United Nations Office on Genocide Prevention's "Framework of Analysis for Atrocity Crimes" (2014). In accordance with the 1948 Universal Declaration of Human Rights, victims of state abuses of fundamental rights must have access to an appropriate remedy in both peacetime and armed conflict. Reparations are one of a number of strategies that societies take to address historical acts of mass atrocity. Reparation aims to eradicate, to the extent possible, the effects of the unlawful act and to return the situation to the way it would have been had the act not been committed (Gillard, 2003). When 23 Jewish organizations established the Conference on Jewish Material Claims against Germany in 1952 to seek compensation for Holocaust victims and their families, the first significant reparations program got underway. Governments started putting reparations plans into place in the 1980s and 1990s. Right-wing military dictatorships that ruled the region during the Cold War were compensated for by nations in Latin America like Argentina and Chile. Those who lost property during the Communist era, Central and Eastern European nations like Romania and Poland started reparations schemes in the 1990s.[3] Restitution, payment, or satisfaction are some examples of different types of reparation. In response to a specific infraction, these remedies may be used separately or in combination (Gillard, 2003). The direct payment of money is compensation. Returning rights and property is known as restitution. Restitution seeks to put things back to how they were before the wrongdoing occurred. Rehabilitation includes providing victims with emotional and physical health care, among other things. A non-material injury that amounts to an insult to the wounded state or person is covered by satisfaction. Additionally, there are "symbolic reparations," which include public memorials, celebrations, and commemorations[4].

Myanmar and the Ethnic Rohingyas

Myanmar was formerly known as Burma (in 1989), and the government, led by the army, altered the name to Myanmar (Ullah, 2011). The Republic of the Union of Myanmar is one of the East Asian countries bordered to its west by India and Bangladesh, to its east by Thailand and Laos, and to its north and northeast by China. The total size of the country is 676,578 sq. km. The country is one of the poorest in the region, with a GDP of $66.5 million and a population of 54 million people. The country was once under the British regime and was freed from British rule in 1948. A military junta ruled Myanmar for nearly 50 years

3 The Conversation, "Why reparations are always about more than money," *available at*: <https://theconversation.com/why-reparations-are-always-about-more-than-money-162807>.

4 *Ibid*.

(from 1962 to 2011), during her protracted political transition. Although the army junta was dissolved in 2011 and a civilian government was installed following a free general election, in 2015, in the country's politics, the military prevailed in a powerful position, and the government stood accused of suppression and serious human rights misuse. Consequently, criticism of the government's actions against minorities continued. For instance, a military operation in Rakhine State since August 2017 against alleged terrorists has compelled many Muslim Rohingyas to take shelter in neighbouring countries, especially in Bangladesh. No doubt this scenario is a great sign of human rights abuses in today's world, and, for this very reason, the United Nations indicated it as a "textbook example of ethnic cleansing.

II. HISTORICAL BACKGROUND

Myanmar is a country of a Buddhist majority, and she has 135 distinct religious minorities and ethnic groups divided as Bamar (about 68%), Kachin, Chin, Kayin, Mon, Kayah, Shan, and Rakhine. Interestingly, the ethnic Muslim Rohingya of Rakhine state are not included in the country's census or in ethnic classifications, though the total population of Rohingyas is 1.5 million (Mahmood, Wroe, Fuller, and Leaning (2016). Many historians say the Rohingyas are descendants of Muslims from Afghanistan and Persian and Arab traders who have lived in Myanmar since the 12th century. Ahmed (n.d.) indicates that the Rohingyas are descendants of Moorish, Arab, and Persian traders, including Moghul, Turk, Pathan, and Bengali soldiers and migrants, who arrived between the 9th and 15th centuries, married local women, and settled in the region. Rohingyas are therefore a mixed group of people with many ethnic and racial connections. According to Frontiers-Holland (2002:9), "the Arakanese had their first contact with Islam in the 9th century when Arab merchants docked at an Arakan port on their way to According to Frontiers-Holland (2002:9), "the Arakanese had their first contact with Islam in the 9th century when Arab merchants docked at an Arakan port on their way to China". He further says that the Rohingyas are racially mixed descendants of Muslims from Afghanistan, Persia, Turkey, Arabia, and Bengal who constitute an ethnically distinct group with its own dialect.

Ahmed (2009) further mentions that "the Muslim population of the Rakhine State is mostly Bengali migrants from Bangladesh, with some Indians coming during the British period. This theory is further premised on the fact that, since most of them speak Bengali with a strong 'Chittagong dialect,' they cannot but be illegal immigrants from pre-1971 Bangladesh". In this sense, Myanmar calls the Rohingyas "Bengalis", which implies that they are illegal immigrants from Bangladesh. According to Ahmed (2009:3), the people of Arakan possess two identities: Rakhines (for many long years) and Rohingyas (for the

local dialect). In other words, the Arakanese Buddhists call themselves 'Rakhines' and the Arakanese Muslims call themselves 'Rohingyas'.

III. MASS ATROCITIES AND HUMANITARIAN CRISIS IN MYANMAR

It is estimated that of the total 1.5 million Rohingya living in Myanmar (Mahmood, Wroe, Fuller, and Leaning, 2016), they have developed their own unique culture, habits, and language over the generations. Despite this, they have not been considered citizens of Myanmar except as foreigners, Bengalis, or migrants. The Muslims of Rakhine were subject to the same regulations as the rest of the population in terms of citizenship and voting rights when Myanmar gained independence in 1948 and published its first constitution. A coup in 1962 halted the idea of granting Rakhine sovereignty, but it reappeared in 1973 when the regime called for talks on a new constitution. They have been denied their nationalist identity by Myanmar's authorities since the country's independence in 1948. For example, under a law passed in 1962, the Rohingyas were given foreign identity cards, denying their citizenship. This statelessness encourages both the government and individual actors to persecute and abuse the world's largest ethnic groups. As a result, they cannot enjoy the right to access a job, health care, or education; the right to travel; the right to marry; the right to practice religion; the right to vote; or even the right to freedom of movement. In the end, it resulted in Rakhine being a distinct state but without any kind of autonomous region for the Muslims who live along the Mayu frontier. The pressure on the Muslims of Rakhine thereafter increased in many ways. (Fair, 2019). Around 200,000 Rakhine Muslims were forced to flee to Bangladesh as a result of the violent "Dragon King" operation, which targeted illegal immigration in Rakhine.

In addition to another military coup in 1988, the junta in Myanmar passed a new citizenship law in 1982 that further harmed Muslims' legal rights in Rakhine and elsewhere. The junta sent soldiers into northern Rakhine in 1991 and seized Muslim agricultural property to build camps and feed its troops. The government imposed arbitrary taxes and forced labor. Nearly a quarter of a million Muslims once again migrated to packed camps in Bangladesh under these terrible circumstances.

With notable exceptions, such as the anti-Muslim violence in 2001, a tumultuous peace persisted in Rakhine. But in 2010, circumstances changed. The Union Solidarity and Development Party of the junta promised to offer citizenship to Rakhine Muslims in advance of multiparty elections in which they would be permitted to vote, infuriating Buddhists.

Violence against Rohingya civilians resulted from tensions between the Rohingya and Rakhine communities in June and October 2012. More than 140,000 people were forced to flee their homes as a result of this violence. These people were overwhelmingly Rohingya. Buddhist monks and local Rakhine politicians allegedly incited and led many of the attacks, according to witnesses from both the Rakhine and Rohingya communities. State security forces frequently failed to put an end to the violence, refused to do so, or even took part in it. The Rohingya were forced to flee several of their communities as a result of the violence. The government subsequently took or destroyed their houses, companies, and property. The internally displaced Rohingya continue to live in appalling conditions in both official and illegal IDP camps. Burmese officials virtually imprisoned the majority of the Rohingya population under the pretext of maintaining security. They deployed barbed wire and barricades to separate thousands of Rohingya from the camps as well as from areas where Rohingya people were residing.

The Myanmar military reacted violently in October 2016 to deadly attacks on police posts in northern Rakhine State. The general Rohingya population was the focus of these attacks. About 65,000 people were forced to flee into Bangladesh's border after being attacked by the military.

The current episodes of violence occurred when the Arakan Rohingya Salvation Army (ARSA) attacked Myanmar police posts in 2017. In response to the assault by ARSA, Myanmar initiated political and military actions to thwart terrorism, which resulted in deaths, rape, murder, beheading, internal displacements, demolition of villages, and finally migrations to other countries facing perilous conditions, and so forth (Simon-Skjodt Center for the Prevention of Genocide, 2017). Not only that, Myanmar adopted the four "Race and Religion Protection Laws" in August 2015 as the objects of blatant discrimination. For example, the Buddhist Women's Special Marriage Bill, which threatens the religious freedom of Rohingyas, Under the law, if a non-Buddhist, i.e., a Rohingya Muslim, wants to marry, she must submit an application to the local township's registrar (The Myanmar Buddhist Women's Special Marriage Law, 2014). In August 2017, following another attack on police posts, the Burmese military launched genocidal attacks on the Rohingya. These attacks included mass killing, rape, torture, arson, arbitrary arrest and detention, and the forced displacement of more than 700,000 people. Those Rohingya still in Myanmar remain vulnerable to further attack by the military. They face ongoing persecution, restrictions on basic freedoms, and hate speech. The persecution of the Rohingya has forced many to seek

refuge in neighboring countries, often by means of risky journeys[5] to Thailand, Malaysia, and Indonesia. Many seeking asylum have been vulnerable to violence, human trafficking, and other abuses[6]. The Religious Conversion Bill requires prior permission from local registration bodies in the case of changing religion. Religious practice is a personal right and is therefore protected by the UDHR. From this point of view, the religious conversion bill in Myanmar is clearly a violation of international law. According to White (2015), "the laws may lead to increased violence and prejudice against ethnic and religious minorities.

According to data from the UN, 128,000 Rohingya were residing in 24 camps across Rakhine as of December 31, 2018, largely in the vicinity of Sittwe. This is in addition to the Aung Mingalar ghetto, where 4,000 Muslims reside inside of Sittwe. They are entirely dependent on the foreign community, to which Myanmar occasionally provides access, at its discretion, because they are unable to leave to find work, food, or medication (Fair, 2019).

The fourth anniversary of the genocidal assaults on the Rohingya population by the Burmese military on August 25, 2021. The Simon- Skjodt Center for the Prevention of Genocide at the United States Holocaust Memorial Museum marked the occasion solemnly by holding a virtual debate about the ongoing difficulties the Rohingya population is still enduring. Rohingya Remain at Risk of Genocide on the Fourth Anniversary of Military Attacks. The Tatmadaw military force, which now controls the nation, poses serious risks to the Rohingya and other vulnerable populations due to the fact that the genocide's perpetrators are still at large and enjoying impunity[7].

IV. EXAMINING WHETHER MYANMAR IS RESPONSIBLE FOR MASS ATROCITIES

Fortify Rights and the Simon-Skjodt Center mention two relevant factors to consider whether an attack is widespread or systematic, which has been established in the famous case Prosecutor v. Kunarac et al. Determining the factors, the Simon-Skjodt Center shows that the attacks by the military force of Myanmar against the Rohingya in Rakhine were widespread in the sense that the attacks were large-scale in nature against many people and were "massive, frequent, and carried out collectively." Moreover, "the prohibited acts

5 United States Holocaust Memorial Museum, "Atrocities against Burma's Rohingya Population," *available at*: <https://encyclopedia.ushmm.org/content/en/article/atrocities-against-burmas-rohingya-population>.

6 *Ibid*.

7 *Ibid*.

were perpetrated as part of an attack in line with a state policy that was in place at the time of the attacks." For example: Fortify Rights and the Simon-Skjodt Center indicated that, since 2012, from October to December 2016, and lastly since August 2017, the Myanmar authority has carried out arson, rape, sexual violence, enforced disappearances, persecution, mass killing, deportation, looting, burning, destroying, and targeted attacks against the Rohingya Muslims in the name of an ethnic cleansing campaign when the ARSA attacked police outposts. When the attacks extended over a vast area of Rakhine State, thousands of Rohingya civilians gradually began to flee to nearby countries. The Simon-Skjodt Center further shows that the attacks against the Rohingyas were also systematic in the sense that they were organized. Considering the large deployment of armies, the widespread use of weapons, including RPGs, and the allocation of arms and financial resources during the operations in response to ARSA's attacks, they bear a symbol of systematic attacks on the Rohingyas (Simon-Skjodt Center for the Prevention of Genocide, (2017). So it is evident that under international law, Myanmar is criminally responsible for the atrocities against the Rohingyas, since they are entitled to be protected as a distinct ethnic and religious group under international law (Abdelkader, 2018).

V. REPARATION

For Violations of International Humanitarian Law

According to the general rules of public international law, anybody who violates an international commitment is obligated to provide restitution[8]. This was specifically stated in the Hague Convention (IV) respecting the Laws and Customs of War on Land in 1907, which states in Article 3 that "[a] belligerent Party which violates the provisions of the (…) Regulations [respecting the Laws and Customs of War on Land] shall, if the case demands, be liable to pay compensation[9]..." In Article 91 of Additional Protocol I, the need to compensate victims of violations of international humanitarian law is explicitly reaffirmed. Even though only compensation is discussed in The Hague Convention and Additional Protocol I, there are many different ways to make up for violations of international humanitarian law. The most important are restitution, such as the return of illegally taken property, as provided for in Article 3 of the Protocol to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, and, more frequently,

8 Permanent Court of International Justice, Factory at Chorzow (Claim for Indemnity) case, (Germany v. Poland), (Merits), PCIJ (ser. A) No. 17, 1928, p. 29.

9 International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, *available at*: <https://www.refworld.org/docid/4374cae64.html> (last visit on August 06, 2023).

compensation, including situations where restitution is impractical or inappropriate. There is no need to make a finding of a violation even though many of the damages and claims may, in reality, result from transgressions of international humanitarian law. The December 2000 peace treaty between Ethiopia and Eritrea[10] is a recent and noteworthy exception in this regard. Not just violations of the grave breaches provisions for which there is individual criminal culpability, but violations of all IHL regulations give rise to the requirement to provide reparations (Gillard, 2003).

For Addressing Mass Atrocities

There have been three different initiatives to define victims' rights since 1985. The 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power is the first of the three. Unfortunately, the Declaration that was ultimately enacted, in contrast to the original text, was constrained in scope to domestic processes and lacked comprehensive provisions for state responsibility, particularly for civilian superiors. The international community revisited this question in 1998 as part of the International Criminal Court Statute and its 2002 Rules of Procedure and Evidence ("RPE"), which clearly rejected head of state and other immunity and acknowledged individual criminal culpability. Last but not least, in contrast to the ICC Statute and RPE, the 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("2005 Basic Principles") gave victims broad rights to participate in the process and receive reparations.

VI. EXAMINING WHETHER THE ROHINGYAS DESERVE REPARATION

Literature proves that mass atrocities affect "the core dignity of human beings." Considering the gravity of the crime, Kan (2017) reiterates that, "after mass atrocities, reparation should be at the forefront of peacebuilding." Since reparation serves to compensate the victims for their past human rights violations, it is paid considering the gravity or seriousness of the violations. As per the general provisions stated in principles 19–23 of the United Nations' Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005), reparations are of five forms: (i) restitution, (ii) compensation, (iii) rehabilitation, (iv) satisfaction, and (v) guarantees of non-repetition. The following

10 Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, 12 December 2000, Article 5, International Legal Materials, Vol. 40, 2001, p. 260.

discussion asks whether the Rohingya victims have a right to claim reparation for atrocities committed against them.

Restitution: According to Principle 19 of the Basic Principles, restitution refers to restoring the victim to its original situation before the gross violations of human rights, which includes: restoration of liberty, enjoyment of human rights, identity, family life, and citizenship; return to one's place of residence; restoration of employment; and return of property. Hence, the Rohingyas are entitled to restitution to their original situation through the restoration of their liberty or freedoms, human, civil, and political rights, and return to their properties, homes, and lands from which they have been forced to abandon.

Compensation: Principle 20 of the Basic Principles provides compensation for any economic damage in the case of physical or mental harm: lost opportunities in employment, education, and social benefits; material damages and loss of earnings, moral damage; costs required for legal or expert assistance; medicine and medical services; and psychological and social services. As per Principle 20, thousands of Rohingyas are victims of physical harm and mental trauma. They have lost opportunities in their employment, education, social benefits, earnings, other basic conveniences, medical care, and social services as a result of the violence and ethnic cleansing carried out by the Myanmar security forces and deserve appropriate monetary compensation.

Rehabilitation: As per Principle 21 of the basic Principle, rehabilitation should be given to the sufferer of gross human rights violations by providing medical and psychological care as well as legal and social services. Hence, the Rohingyas are entitled to get rehabilitative services through medical and psychological care, as well as legal and social services. If these are given to them, they will be able to overcome their long-term suffering as a result of atrocities against them, and, in the end, they will also get judicial remedies.

Satisfaction: Principle 22 provides satisfaction, which includes: measures for cessation of violations; verification of the facts and truth; the search for the whereabouts of the disappeared or abducted; restoration of the dignity, reputation, and rights of the victim; acknowledgement of the facts and acceptance of responsibility; judicial and administrative sanctions against those responsible for the violations; and inclusion of an accurate account of the violations in educational material at all levels. This principle states that Myanmar will acknowledge the atrocities against Rohingyas and accept responsibility; will verify and disclose the facts and truth about what happened to the Rohingyas, will identify the perpetrators and punish accordingly; will restore the dignity of the victims; and finally, will include an accurate account of the violation during atrocities and in educational materials at

all levels for future generations. So, the victims of the Rakhine have the right to be satisfied in one or all of the aforementioned ways.

Guarantees of Non-repetition: Principle 23 provides guarantees of non-repetition of violations and some measures in this respect that will contribute to prevention. According to this principle, the state for non-repetition of gross violations of human rights and humanitarian laws will ensure effective control of military and security forces, strengthen the independence of the judiciary, protect persons in any other related professions, provide human rights education and training to all, promote mechanisms for preventing and monitoring social conflicts; and lastly, review and reform laws allowing gross violations of human rights law. So, as per Principle 23, Myanmar will take measures with a view to ensuring guarantees of non-repetition of violations against Rohingyas over the years. Myanmar must not repeat persecution against ethnic minorities in the name of a cleansing campaign. Moreover, the Principle tells Myanmar to restore the Rohingyas to streaming Buddhist society; to promote mechanisms for preventing and monitoring social conflicts, to provide human rights education to the citizenry by which they will learn not to violate others rights; to establish some effective and necessary measures at all government levels to stop repetition of any violations; and finally, to reform and review such laws that lead to the commission of genocide or massacre. For example, when in 1982 a new citizenship law was passed, it deprived the Rohingya of citizenship in Myanmar and effectively rendered them stateless, which is why there have been several occurrences of violence in Rakhine[11].

VII. CONCLUSION

Under international law, states are obliged to ensure the right to reparation so that victims can obtain reparation for injuries caused in the past. Various international and regional mechanisms, i.e., International Human Rights Law, the United Nations Human Rights Committee, the Universal Declaration of Human Rights, various conventions against torture and inhuman treatment, and, in the latest, the United Nations Basic Principles and Guidelines, have stipulated state responsibility to pay reparation for violations or injuries caused against civilians. It is abundantly obvious from the explanation above that over time, the individuals who were directly harmed by violations of international law have expanded their claim to compensation. The right to complete and efficient reparation is especially important for victims of genocide, crimes against humanity, war crimes, and torture. Depending on the type and severity of the human rights and international humanitarian law

11 Office of the United Nations High Commissioner for Human Rights, "Remedy and Reparation," *available at*: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>.

violations, reparation may be provided in one or all of the aforementioned ways (restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition). The victims of the atrocities in Rakhine are said to be deserving of all five types of restitution.

First, according to Basic Principle 19 of the Basic Principles, the Rohingyas are entitled to compensation through the restoration of their freedoms, civil and political rights, the ability to return to their homes, and the return of their lands and properties that they were forced to leave behind. Many Rohingya farmers were also compelled to abandon their fields of crops, which the Myanmar authorities afterwards harvested. As a result, these Rohingya farmers have a right to the money made from the sales of the commodities they grow.

Second, in accordance with Principle 20, the Rohingyas who were harmed physically, psychologically, lost opportunities for employment and education, lost their earnings, and spent money fleeing the violence to get basic necessities and medical care are entitled to adequate and prompt monetary compensation.

Thirdly, in accordance with Principle 21, the Rohingyas must be given the necessary legal assistance so that they can seek appropriate judicial remedies in the future. These services must include medical, psychological, legal, and social support so that the Rohingyas can recover from the ordeal they were made to endure and receive assistance in dealing with its long-term effects.

Fourth, in accordance with Principle 22, the Rohingyas must be satisfied through Myanmar's admission of the wrongs and atrocities committed against them, admission of guilt, issuance of a public apology, punishment of the perpetrators, verification and public disclosure of the true facts regarding the atrocities committed, search for missing persons, identification and reburial of the dead, and restoration of the victims' and their families' dignity.

Last but not least, Myanmar must take action in accordance with Principle 23 to ensure that crimes like this won't happen again. For want of a better phrase, it must ensure that a similar campaign of ethnic cleansing won't ever occur again. This is crucial since Rohingyas were previously exposed to similar mistreatment in 1978 and 1990, which led them to abandon Myanmar. Many of them were later repatriated, but they were forced to escape once more in 2017. Rakhine can never experience true peace if this cycle of cruelty and bloodshed is not broken.

In order to achieve this, Myanmar must successfully reintegrate the Rohingya into Burmese society, set up efficient monitoring and preventive mechanisms in the government, military, and judicial systems, and finally, reform and review laws (like the citizenship law) that

contribute to the mistreatment and commission of such atrocities.

Where can the right to reparations be implemented, is the question. Victims' rights to restitution may be upheld on a national or international level. Individuals may file a claim for compensation with a national court of the state that violated their rights, an international or regional court, or in some circumstances, a court of a third state. States are free to create their own reparations plans. For instance, Argentina established such programs following the military dictatorship in the 1980s, allowing many people to recover damages without having to meet the same strict standards for proof as in a court. Reparations schemes, like the one between Germany and Israel for atrocities committed by the Nazi dictatorship during the Second World War, can also result from agreements between states. The International Court of Justice (ICJ) in The Hague can hear disputes between two states. The Court may also issue an advisory ruling in which it may urge the offending state to pay compensation. Following an individual's conviction, the International Criminal Court (ICC) has the authority to mandate reparations and request compensation for victims of crimes through its Trust Fund for Victims. Reparations may also result from a UN Security Council resolution that outlines a required reparations process. For instance, a UN Compensation Committee (UNCC) was established following the Iraqi invasion of Kuwait, and via it, Iraq made payments to several businesses, nations, and private victims who had incurred losses in Kuwait. Truth commissions can help reunite a divided nation and issue satisfaction-based reparations in nations with a history of egregious human rights and international humanitarian law breaches. For instance, truth commissions were established in South Africa following the Apartheid system, in Sierra Leone following the civil war, and in numerous South American nations following the fall of dictatorships. However, the neighbouring countries, the international communities, and the United Nations should come forward with a realization of reparative justice for the Rohingyas so that the community can be afforded reparations and can establish peace by developing their lives. All states, but especially those that seek to play an active role in the world, must now come to view developing national strategies for reparation as a primary means of upholding their domestic and international contributions to this urgent global and shared challenge if it is indeed agreed that all states must share in the burden of helping to pay reparation for mass atrocities.

CONSTITUTIONAL DISCOURSE ON HOMOSEXUAL RIGHTS IN NEPAL, INDIA, AND SINGAPORE

Mansi Singh Tomar*
Kumar Mukul Choudhary**

VIPS Student Law Review
August 2023, Vol. 5, Issue 1, 42-53
ISSN 2582-0311 (Print)
ISSN 2582-0303 (Online)

https://vslls.vips.edu/vslr/

ABSTRACT

Just half a decade back the Indian Supreme Court recognized the agency and dignity of homosexual couples in the celebrated judgment of Navtej Singh Johar. Here the Apex Court developed the concept of progressive realization of rights. This concept is not new and can be found in Western ideas of rights. Therefore, it is necessary to understand how foreign judgments and ideas influence a constitutional court. Furthermore, how a court accepts the judgment of a particular court and negates the judgments of others. This paper has taken up the case study of three countries i.e., India, Nepal, and Singapore, and their constitutional courts. The focus is on laws relating to the recognition of the rights and dignity of homosexual relationships. An attempt has been made to see how courts choose to accept and reject equality in homosexual relationships and the materials and methods that influence their relationship. This paper essentially argues that it is not merely Western principles or traditions that influence the judgments of the courts. Rather it is the ideology and social morality that has a significant responsibility of influencing the judgements of the courts. It is ultimately upon the court to choose its influence and give its opinion on the issues put before it.

***Keywords**: Homosexuality, Gender, LGBTQIA+, Constitution, Sodomy, Sexual Orientation.*

* Assistant Project Manager at Consilio India Pvt. Ltd.
** Ph.D. Scholar, University of Delhi, Delhi.

I. INTRODUCTION

The terms 'sex' and 'gender' have different meanings, sex means the biological organs with which a child is born at birth, it can be either male or female. Gender, on the other hand, is generally construed as a man- having male organs and exhibiting masculine characters and a woman- having female organs and exhibiting feminine characters, but a mix of these characters is also seen very widely throughout the globe, where people may exhibit different gender orientations not in line with the traditional set norms or may associate themselves with a different gender identity from the one which was assigned to them at birth, or may not associate with any gender identity, these people form part of the LGBTQIA+ community. The world population has a mix of these genders, still historically all the constitutions that exist are made by men or are a man-dominated assembly.[1] The impact of this man-dominated creation is reflected in most of the constitutions around the world, some of which have expressed provisions favouring men over women and entirely ignoring other genders on the spectrum. This is the reason why today questions related to the constitutional rights of LGBT+ groups are so widely discussed across the globe.

One of the most recently debated issues worldwide related to Sexual Orientation and Gender Identity (SOGI) rights is about same-sex partnerships and how far rights associated with them are acknowledged by the state. These rights raise substantive questions as to the right to choose their identity or their right to choose a partner, these questions become questions of constitutional importance as they relate to the basic human rights of an individual which are recognized by almost all the constitutions globally and because they relate to constitutional values of equality and dignity.[2]

Lately, as an influence of cosmopolitan constitutionalism, many countries have abolished anti-gay or sodomy laws and have upheld the SOGI rights of the LGBTQIA+ community in their country.[3] This paper will talk about the importance of comparative constitutionalism in the recognition of SOGI rights of individuals and then discuss their rights in the jurisdictions of India, Nepal, and Singapore; with Nepal being the first nation in South Asia to grant

1 Catharine A. Mackinnon, "Gender in Constitutions' in Michel Rosenfeld and András Sajó (eds.)" *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, Oxford, 2012).

2 Nicholas Bamforth, "Legal protection of same-sex partnerships and comparative constitutional law" in *Tom* Ginsburg and Rosalind Dixon (eds.), *Comparative Constitutional Law* (Edward Elgar Publishing Limited, 2011).

3 Sujit Choudhry, "Postcolonial Proportionality in Johar, Transformative Constitutionalism, and Same-Sex Rights in India" in Philipp Dann, Michael Riegner, and Maxim Bönnemann (eds.) *Postcolonial Proportionality In: The Global South and Comparative Constitutional Law* (Oxford University Press, Oxford, 2020)

these rights to its citizens, India being a more recent country which partially acknowledged these rights in 2018 and is still deliberating on the legal status of same-sex marriage, and Singapore being one of the South Asian countries who have not yet recognized these rights and still has sodomy laws in place. This paper centers its focus on the constitutional aspects concerning the recognition of rights and the preservation of dignity within homosexual relationships. It aims to investigate how courts decide to either grant or deny equality to homosexual relationships, taking into account the various sources and methods that impact these decisions. The central argument put forth revolves around the notion that the determinants of court judgments in this matter extend beyond Western principles or historical practices.

It is contended that the primary drivers of these judgments are ideological perspectives and prevailing social moralities. Courts bear a substantial responsibility in selecting the influences that shape their decisions in formulating their viewpoints on the matters brought before them. In essence, the paper underscores that the decisions made by courts in recognizing rights and dignity in homosexual relationships are not solely constrained by established legal principles, but are significantly moulded by the broader context of ideological and societal norms.

II. COMPARATIVE CONSTITUTIONALISM IN GENDER RIGHTS

As described by Kelson, the Constitution is the Grundnorm of every country from which all the other laws and rights follow. There can be no discussion of the rights of any individual without first substantiation of those rights through the Constitution.[4] Thus, to substantiate gender rights in legal form four questions on the constitutional front need to be answered, first on equality, second on freedom, third on privacy, and fourth on political discourse.[5] The issue of equality is prima facie evident from texts of the constitutions itself, where most constitutions use masculine terminology to cover all humans, thereby giving a higher position in gender hierarchy to men and making all other genders secondary.[6] One such, instance can also be found in Article 15(3) of the Constitution of India where women and children are kept on the same pedestal, reducing the position of a gender itself to that of a child. The issue of freedom of expression and the right to privacy of persons belonging to the LGBTQ+ community is compromised by either criminalizing their conduct or by putting them on a moral pedestal. Similarly, most of their day-to-day activities are scrutinized

4 Hans Kelsen, *Pure Theory of Law* 5 (Lawbook Exchange, 2009).

5 *Supra* note 1.

6 *Ibid.*

and policed by way of moral and social pressure reflected in the political discourse which constantly challenges their equality, autonomy, and dignity.[7]

To address these basic human and constitutional rights, there arises a need to do a comparative constitutional study to grant such rights to all persons. As most of the constitutions historically have been made by men or men-dominated assemblies, excluding the opinion of other genders in general, there arises a need to look at the global culture to recognize and acknowledge the developing needs of the time regarding gender minorities. This comparative study need not be understood as a way to impose Westernised culture on traditional South Asia, instead, it can be easily seen from the lens of binding and non-binding sources of law, where these judgments of foreign courts can merely hold a persuasive value for the judiciary in question.[8] The reading of which according to Sujit Choudhary can be done either in a particularistic, universalist, or dialogic manner.[9]

Particularistic approach is where the courts give more weightage to the nationalistic and cultural values of the country and disregard foreign judgments or consider them as legal imperialism.[10] This is reflected in the decisions of Singapore Courts, where they have outrightly rejected foreign judgments and have given supremacy to their cultural notions. Universalistic approach is where the courts consider all democratic constitutions as protectors of "common liberal political morality and ideology of human rights"[11] therefore considering comparative study to be more relevant. Dialogic approach is what appears to be the best approach, which was also applied by the Indian Supreme Court in the case of NAZ Foundation v. UOI, where the courts did a comparative study to better understand their own legal system and to confer better rights to the people of its country.[12]

A popular trend to do this comparative study has been to follow the judgments of the West but, now a globalized approach is visible in the comparative constitutional studies. Sujit Choudhary classified this globalized approach in the context of India into two ambits, one is the cosmopolitan approach and the other being the anti-colonial approach. The

7 Robert Wintemute, "Lesbian, Gay, Bisexual and Transgender Human Rights in India: From Naz Foundation to Navtej Singh Johar and Beyond" *12 NUJS L. Rev. 3-4 (2019)*.

8 Madhav Khosla, "Inclusive Constitutional Comparison: Reflections on India's Sodomy Decision" 59(4) *The American Journal of Comparative Law*, 909 (2011) 934.

9 Bret Boyce, "Sexuality and Gender Identity under the Constitution of India" 18 *J Gender Race & Just* 1 (2015)

10 *Ibid*.

11 *Ibid*.

12 Sujit Choudhry, "How to Do Comparative Constitutional Law in India: Naz Foundation, Same Sex Rights, and Dialogical Interpretation" in S. Khilnani, V. Raghavan, A. Thiruvengadam, (eds.), *Comparative Constitutionalism in South Asia*, (Oxford University Press, New Delhi, 2010).

cosmopolitan way is where the courts take into consideration judicial pronouncements of all jurisdictions and apply a dialogical approach to understand the domestic legal system in a better way to incorporate the changing dimensions of rights. The anti-colonial way is where the courts recognize the law to be antiquated and colonial in origin, not in line with a transitional democracy, and therefore find the law to be unconstitutional.[13]

A reflection of these approaches can be seen in the jurisdictional LGBTQ+ rights discourse of many countries which has impacted the decisions of such countries, three of such jurisdictions are discussed in the following part, highlighting how these approaches have affected the decisions of the courts.

III. DEVELOPING RIGHTS IN INDIA

The story of India's struggle to secure SOGI rights starts from the year 1994 when NGO AIDS Bhedbhav Virodi Andolan[14] first challenged Section 377 in the Supreme Court of India, but this petition was neither decided nor disposed of due to technical administrative reasons. Then the first positive step in this direction was seen in the case of *Naz Foundation v. Government of India (2009)*[15], wherein the Delhi High Court struck down Section 377 of IPC and upheld the SOGI rights under the constitution of India, but unfortunately, the decision was set aside in the case of *Suresh Kumar Koushal v. Naz foundation*.[16] Though, soon enough the rights of transgender as a third gender were recognized through the case of *National Legal Services Authority v. Union of India*[17], wherein the court held that the term 'sex' under Article 15 of the Constitution of India also includes sexual orientation within its ambit and thus any discrimination on the ground of sexual orientation shall also amount to a violation of the constitution.[18] This was further broadened through the privacy judgment wherein the right to choose gender identity; sexual orientation and right to choose a partner were covered under the right to privacy of an individual under Article 21 of the constitution.[19] Finally, through the case of *Navtej Singh Johar v. Union of India*, the Supreme Court of India struck down the colonial anti-sodomy provision which existed in

13 Sujit Choudhry, "Postcolonial Proportionality in Johar, Transformative Constitutionalism, and Same-Sex Rights in India" in Philipp Dann, Michael Riegner, and Maxim Bönnemann (eds.) *Postcolonial Proportionality In: The Global South and Comparative Constitutional Law* (Oxford University Press, Oxford, 2020)

14 *ABVA v. Union of India and Others*, Civil Writ Petition No. 1784 (1994)

15 (2009) 111 DRJ 1

16 (2014) 1 SCC 1

17 (2014) 5 SCC 438

18 *Ibid*.

19 *K. S. Puttaswamy v. Union of India* (2017) 10 SCC 1

the criminal law of India and upheld the rights of the LGBT+ community, drawing a clear distinction between societal morality and constitutional morality.[20]

In the case of Naz Foundation, the Delhi High Court based its decision on the ground that fear of prosecution under Section 377 is actually increasing the possibility of getting HIV infection and thus there is a need to remove the stigma attached with homosexuality.[21] In reaching its decision the court heavily relied on the historical background of India, the difference between popular morality and constitutional morality, on a range of foreign cases, and international principles and authorities, in its reliance on foreign cases the court looked at cases from all over the globe including Nepal, South Africa, and Fiji; and did not restrict itself to only western cases.[22] In this way, the court adopted the dialogic method of comparative study wherein, they were not concentrated to any particular jurisdiction and did a holistic study to better understand their own legal system and culture. The court equated discrimination based on sexual orientation to that of historical discrimination based on untouchability and condemned it.[23] By doing so they adopted a sound reasoning which presented the Constitution of India as "a reflection of the modern Indian political identity".[24]

Later Supreme Court of India set aside this decision of the Delhi High Court in the case of Suresh Kumar Koushal, basically on the grounds of popular morality, giving no regard to constitutional morality, or the rights of LGBT+ persons, classifying them as a miniscule group for whose sake societal morality need not be compromised.[25] Here, Indian courts displayed a particularistic approach and gave immense weightage to national and cultural values having utter disregard to the sentiments and rights of the LGBTQ+ community.

Subsequently, in the case of *Navtej Johar v. Union of India*, this debate of constitutional morality and popular or social morality was again taken up, wherein Justice Deepak Mishra described the Indian Constitution as a transformative constitution, the one which evolves with time, to transform into a modern, egalitarian democracy and said that at this point much weightage cannot be given to the popular morality of the country when such morality can actually lead to violation of inherent human rights of the citizens of the state.[26] He explains constitutional morality to mean that a person should be allowed to follow his/her pattern in life as long as it is legal and constitutional. A person's right to choose gender

20 (2018) 10 SCC 1

21 *Naz Foundation v. Government of India* (2009) 111 DRJ 1

22 *Supra* note 8 at 4.

23 *Supra* note 12 at 4.

24 *Ibid*.

25 *Suresh Kumar Koushal v. Naz foundation* (2014) 1 SCC 1

26 *Supra* note 20 at 6.

identity and to choose a sexual partner falls under his right to life and dignity under Article 21 of the constitution of India and is also a person's right to privacy; thus a person has a right to exercise these rights (which are constitutionally moral) as long as they are not in violation of any law.[27] The court also invoked the principle of proportionality which has been adopted by it in the case of K.S. Puttaswamy (Privacy decision) by holding that Section 377 does not comply with the proportionality principle and thus is violative to the rights enshrined in the constitution. To substantiate the argument that homosexuality should be legalized the court referred to various foreign cases and international conventions. Here the court adopted a universalistic and dialogic approach, where the court referred to other democracies holding equal human rights to better understand its own legal system and applied them to end an archaic law. Sujit Choudhary also classifies this approach as a cosmopolitan approach, where the court has placed little reliance on traditions, cultures, and popular morality of the country and has placed more reliance on the development of rights globally.[28]

Further, the court highlighted the history of Section 377 to hold that it was a colonial provision, specifically added to suppress the people belonging to the transgender community as Justice DY Chandrachud stated in his judgement that,

> *"India gained her liberation from a colonial past. But. . . Gays and lesbians, transgenders, and bisexuals continue to be denied a truly equal citizenship seven decades after Independence. The law has imposed upon them a morality which is an anachronism. . . The shadows of a receding past confront their quest for fulfillment."*[29]

This view of the court reflects the transformative Constitution of India, which is constantly developing according to developing rights. Classification of Section 377 as colonial era legislation, made to specifically suppress the rights of transgender people, showcases the anti-colonial approach of the Indian Courts.[30]

Currently, a hearing for same-sex marriage is going on in the Supreme Court of India.[31] If the court in this proceeding decides to follow its cosmopolitan approach and refers to

27 *Ibid.*

28 *Supra* note 3 at 4.

29 *Supra* note 20 at 6.

30 *Supra* note 3.

31 Supreme Court Observer, "Plea for Marriage Equality" *available at* https://www.scobserver.in/cases/plea-for-marriage-equality/#: ~ :text = On%20November%2014th%2C%202022%2C%20two,Supriyo%20Chakraborty%20and%20Abhay%20Dang. (Last visited on May 10th, 2023).

jurisdictions providing legal status to SOGI of LGBTQ+ persons following the dialogic method as adopted in the Naz Foundation case and Navtej Johar case, we might see a judgement rich in gender rights.

IV. COSMOPOLITANISM IN NEPAL

The formal steps for recognizing the rights of sexual minorities in Nepal began in 2001 with the registration of a civil society group by the name of Blue Diamond Society which worked for the rights of these minorities. This society was founded by Sunil Babu Pant who eventually became the first openly gay legislative member of the Nepal parliament. The success of this group began reflecting positively in 2007 when the Supreme Court of Nepal gave the most progressive decision as to SOGI rights in South Asia in the case of *Sunil Babu Pant v. Government of Nepal*[32]. Though Nepal had no anti sodomy laws or any anti SOGI statutes, the petition was filed due to increasing discrimination and violence against the LGBTQ+ group.[33] The court relying on the equality and non-discriminatory clause of its interim constitution and on various international principles held that gendered minorities are also citizens of Nepal and any sort of discrimination or violence against them amounts to a breach of the constitutional principles of Nepal. Through this decision, the court upheld all the constitutional rights including the right to marriage of the LGBT community, and directed the government to specifically include protections for gender identity and sexual orientation in its new constitution.[34]

The Nepal Court in giving its decision relied heavily on foreign cases and international principles such as the Yogyakarta Principles, International Covenant on Civil and Political Rights, Universal Declaration of Human Rights, etc. and the court expressly stated that "It seems to us that the traditional norms and values in regards to the sex, sexuality, sexual orientation and gender identity are changing gradually."[35] This shows that the approach of Nepal court was not guided by societal morality instead by international and right-based morality. The court adopted a universalistic approach in referring to the international covenants and foreign democratic jurisdictions to better understand the Human Rights of the LGBTQ+ community.

32 *Pant v. Nepal*, Writ No. 917 (2064 BS/ 2007 AD), *translated* in *National Judicial Academy Law Journal* (Nepal), 2008, at 262

33 Sean Dickson and Steve Sanders, "India, Nepal, and Pakistan: A Unique South Asian Constitutional Discourse on Sexual Orientation and Gender Identity" in Susan H. Williams (eds.), S*ocial Difference and Constitutionalism in Pan-Asia* (Cambridge University Press, Cambridge, 2014).

34 *Ibid*.

35 *Supra* note 32 at 7.

The approach of Nepalese Courts appears to be similar with that of the Indian Court in *Navtej Johar v. Union of India*. The principle of transformative constitutionalism as has been discussed by Justice Deepak Mishra in the Indian case is also evident in the Nepalese jurisprudence, wherein the constant effort of the Nepalese court was to adopt principles in consonance with the developing concepts of rights all around the globe, this is what I believe will also be classified by Sujit Choudhary as an impact of cosmopolitan constitutionalism.

V. THE CONSERVATIVE VIEW IN SINGAPORE

Section 377A of the Singapore Penal Code provides for an anti-sodomy provision, punishable with 2 years imprisonment, this section was challenged in 2014 in the case of Lim Meng Suang[36] to be violative of Article 9 (liberty clause) and Article 12 (equal protection clause) of the Constitution of Singapore, where the Supreme Court of Singapore upheld this provision to be constitutionally valid on the ground of narrow interpretation of Article 9 and reasonable classification test under Article 12 of the Singapore Constitution.[37] In the interpretation of the term 'life and liberty' under Article 9, the Supreme Court took a very narrow view to hold that the term does not include the right to privacy in it, referring to the foreign cases which have given this interpretation, they held that 'foreign cases should be approached with circumspection as they are decided in the context of their unique social, political and legal circumstances'.[38]

Further relying on the reasonable classification test for justification of the equal protection clause, the court explained the two limbs of the test: (a) the basis of classification must be intelligible differentia and (b) there must be a rational nexus between the classification and the object of the law, only when limb (a) is satisfied the court will look at limb (b). For the purpose of limb (a) for a classification to have intelligible differentia it must be logical and coherent, and only when any classification is extremely illogical and incoherent in a manner that no reasonable person would contemplate it to be reasonable then it becomes violative, so court here held that the differentia of applying Section 377A to only homosexual and bisexual males is intelligible.[39] Then applying limb (b), it stated that the nexus needs to be rational and not perfect or complete, and thus held that there is a reasonable nexus between classification and the object of law which is to prohibit unnatural intercourse.[40]

36 *Lim Meng Suang v. Attorney General* [2014] SGCA 53.
37 *Ibid.*
38 *Ibid.*
39 *Ibid.*
40 *Ibid.*

The approach of the Singapore court with respect to anti-sodomy laws and SOGI rights is very different from that of Nepal and India in four ways. Firstly, in its application of the reasonable classification test the court time and again stated that it is a mere threshold test and there is a need for a better test but still, it did not widen its scope or adopt a better test, whereas, in India, a broader test of proportionality was adopted by the court through its privacy judgement as a step away from the reasonable classification test.[41] Singapore has in the making of its constitution been inspired by the constitution of India, but it does not appear to be so inspired by the judicial decisions. The issue of Section 377A was again challenged in 2020 in Singapore but even then, the court refused to entertain the petition and did not widen the scope of this test.[42]

Secondly, the court was constantly conscious to not take up the role of the legislature and reminded itself that it should not in such cases become a mini legislature, whereas the courts in Nepal and India were more concerned with the constitutional and human rights of its citizens instead of being concerned about the role of the legislature. The approach of the Singapore court was similar to one taken by Justice Scalia and Justice Thomas in their dissent in the case of *Lawrence v. Texas*, wherein they held that the decision to legitimize same-sex partnerships is a policy decision and not a matter to be decided by the courts.[43] Though, it can be argued that there is more to the question of same-sex partnerships than merely being a policy-related question, as it involves substantive questions as to the basic human rights of an individual. Thus, even if the Singapore court wanted to be cautious of maintaining the separation of power and respecting the role of the legislature, it could have adopted the approach taken by the South African court wherein Justice Sachs while emphasizing on the importance of separation of powers, postponed the right to marriage of LGBT persons for a period of one year and gave legislature time to frame the law in accordance with the constitutional rights of the citizens.[44]

Thirdly, the Singapore court in its reasoning was guided by the concept of societal majority and nowhere discussed about constitutional majority which has been widely discussed in the Indian case of Johar, wherein the court struck down Section 377 of the Indian Penal Code on the ground that mere social morality is not sufficient to restrict the fundamental rights of any citizen. The Indian court drew a clear distinction between social and constitutional

41 *K. S. Puttaswamy v. Union of India* (2017) 10 SCC 1.

42 *Ong Ming Johnson v. Attorney General* [2020] SGHC 63.

43 Nicholas Bamforth, "Legal protection of same-sex partnerships and comparative constitutional law" in Tom Ginsburg and Rosalind Dixon (eds.), *Comparative Constitutional Law* (Edward Elgar Publishing Limited, 2011).

44 *Ibid*.

morality and held that a transformative constitution must look at constitutional morality and not at social morality.[45]

Lastly, the Singapore court took a back seat in referring to foreign judgements or to international principles or authorities and relied on its traditional values, stating that the traditions and values of Singapore are different from other countries, and it cannot just follow the principles of the West. Here it adopted a particularistic approach, different from the approaches taken by the courts of Nepal and India where they adopted a universalistic and dialogic approach to grant SOGI rights to the LGBTQ+ community. Nepalese and Indian courts are influenced by cosmopolitan constitutionalism which is absent in the approach of Singapore court.

VI. CONCLUSION

This paper has perused two jurisdictions which have legalized homosexual conduct and have upheld the SOGI rights of the LGBTQ+ community and one jurisdiction which has taken a rigid stance to not grant these rights. The reason why Singapore has taken such a different course when compared with India and Nepal is because it is an authoritative or illiberal polity, whereas India and Nepal can be classified as liberal or semi-liberal polities.[46] By virtue of being an illiberal polity, Singapore is not one of those countries which will welcome global influence and change readily, and thus in its approach, the rejection of foreign cases and international authorities was clearly seen, keeping the cosmopolitan influence out, which is visible in the decisions of Nepal and Indian courts. Even out of Nepal and India, Nepal has adopted a broader interpretation of the rights of LGBTQ+ persons and has given them wider rights including express rights to marry and to have identity cards with their gender specifications, whereas India is still deliberating on the right to marriage of such persons and was very late in giving them identity as a third gender when compared to Nepal. One of the reasons behind this could be that the Constitution of India is comparatively old and deeply rooted, whereas when the case of Pant v. Nepal came, Nepal only had an interim constitution and was in the process of framing a final constitution for its nation, due to which the Nepalese court might have wanted to acknowledge broader rights for its citizens. But in spite of being an old and deep-rooted constitution, Indian courts classified the Indian constitution as transformative and adopted cosmopolitan and anti-colonial approaches to recognize and acknowledge the much-needed

45 *Supra* note 20 at 6.

46 Li Ann Thio, "Constitutionalism in Illiberal Polities" in Michel Rosenfeld and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, Oxford, 2012).

rights of the LGBTQ+ community. In furtherance of these principles, the Indian courts are now deliberating upon the question of same-sex marriage as well. Contrastingly, the Singapore Courts are persistent with their particularistic approach and unwilling to take a cosmopolitan view in spite of the fact that the Singapore Constitution was guided by the Indian Constitution. This approach also highlights how Singapore still remains an illiberal patriarchal institution with little tolerance towards widening the scope of gender rights.

The comprehensive discussion on LGBTQ+ rights and approaches of the various constitutional courts tells us that it is not merely a comparative constitution which develops and enhances the concept of rights in the state, it is also the ideology of the state and how much the state feels connected to liberal western political thoughts that determine the approach of the constitutional court of that particular state.

Addressing the complex issue of legal recognition and dignity for homosexual relationships requires a comprehensive approach that balances legal principles, social perspectives, and human rights. Firstly, legal systems should strive to harmonize with evolving societal attitudes. Updating laws and regulations to reflect current social norms can pave the way for greater acceptance and inclusivity. This involves decriminalizing homosexuality, providing legal avenues for same-sex partnerships, and ensuring non-discrimination in various spheres. Moreover, fostering dialogue and education is crucial. Efforts should be directed towards raising awareness about LGBTQ+ issues, dispelling myths, and promoting understanding. This can be achieved through educational curricula, public campaigns, and awareness programs. Courts should continue interpreting laws in a manner that upholds human dignity and equality. Legal precedents from other jurisdictions can offer valuable insights in this regard thus, the Judicial decisions should consider not only legal principles but also the broader ethical considerations and the evolving understanding of human rights. Legislation and policies should be designed to protect LGBTQ+ individuals from discrimination in various aspects of life, including employment, healthcare, housing, and adoption rights. This requires collaboration between lawmakers, civil society organizations, and LGBTQ+ advocates.

Ultimately, societal change often drives legal change. Encouraging open conversations, challenging stereotypes, and celebrating diversity can help shift attitudes and create a more inclusive environment. The media and entertainment industry also play a role by portraying diverse relationships and promoting positive narratives. In conclusion, addressing the legal recognition and dignity of homosexual relationships requires a multi-faceted approach that involves legal reforms, education, judicial interpretation, policy changes, and societal transformation. By actively engaging with these aspects, societies can move towards a more just and inclusive future for all individuals, regardless of their sexual orientation.

OPEN PRISONS: RESERIALISING PRISONERS' RIGHTS WITH FREEDOM

Ms. Ritika Kanwar*

VIPS Student Law Review
August 2023, Vol. 5, Issue 1, 54-69
ISSN 2582-0311 (Print)
ISSN 2582-0303 (Online)

https://vslls.vips.edu/vslr/

ABSTRACT

Modern Criminology seeks prison as an institution which tilts the balances slightly more towards correctional angle against penal approach. Such practices have made ideological differences in perception of justice delivery system being reformative and rehabilitative instead of being retributive and deterrent. Nevertheless, the conventional penitentiary edifice, being gripped with abusive, archaic and impervious sense of justice, demands removal of ill-suited decadence among prisoners. Among all laudable prison reforms for safeguarding human rights and constitutional right of dignity of the prisoners, open prisons have emerged as the most quintessential imperative ensuring dual objectives of socio-penal sentencing and efficacious reintegration of prisoners in the society. The administration of open prison postulates an alternative for social adjustment of convicts strongly provoking a sense of responsibility and improved behavioural conduct towards society. Resocialisation of prisoners through open prisons has proved to be an antidote to prisonisation of convicts. The present article aims at a structural study of open prisons while looking at a series of live illustrations in India. It delves into the upcoming challenges and loopholes in the administration aspects of such correctional reforms, thereby, listing succinct model suggestions over the same. With respect to research methodology, doctrinal study has been employed and secondary data has been used that is available on the topic. The thoughtful literature review of this paper is inclusive of various books, commentaries, research papers and articles relating to the relevant research area. The scope of the study is analytical, critical, explanatory and comparative in nature. No on-field empirical study has been conducted for this research.

* Advocate High Court of Rajasthan.

Keywords: *Open Prisons, Reformative Justice, Rehabilitation and Reintegration, Resocialisation of prisoners, Socio-penal sentencing.*

I. INTRODUCTION: SEEDS OF 'OPEN PRISONS'

The custodial notion of prisons continuing since ages has immensely witnessed recent influences from transformative socio-legal factors and pragmatic eco-cultural conditions of the society. The variable solution for resocialisation of prisoners and their rights commences from reforming the structure of prisons from being deterrent and retributive institutions to such promoting reintegration of prisoners.[1] Earlier the imprisonment of the offender was considered as the ultimate punishment, i.e., the end. However, the trend has shifted to punishment inflexed with concept of reformation as means to the end. The philosophy of rehabilitation was to strike down repressive penal agency of convicted offenders along with underlying torment-punitive regime in the prison administration.

Initially. the western idea of punishment was to confine the offenders till administration of corporal punishment. The practices of beating, whipping and execution while imprisoning the wrong doer were seen as the only methods of punishment. However, with introduction of prison reforms, the emphasis shifted from coercive to correctional. [2]In present scenario, respect for liberty, dignity and inherent human rights of inmates in prisons are being constantly monitored by the courts of law and associated authorities to ensure arrangement of safe custody along with transforming detainees into law abiding citizens on their way back to society. As opposed to humanity, the controlling ambience of prisons results in inmate socialisation, deprivation, corruption and over-punishment.

Later in the 1940s, a bold and tangible vision of open prisons developed with the philosophy of minimum security. The underlying idea of such open-air prisons, prevalently known as "prison farms" in the US, was that the imposition of confines of prison is a punishment in itself and, therefore, inmates are to be trained in the light of freedom as trustworthy and law-abiding citizens of the society.[3] It was believed that punishment in itself is incompetent for the reformation of offenders and their readjustment in society, therefore, community contact

1 R.G. Singh, "Reformation and Rehabilitation of Surrendered Dacoits - A Case Study of Open Prisons of Madhya Pradesh," 40(1) Indian Journal of Social Work 41 (1979).
Bindu Bansal, "Concept of Open Prisons, their main characteristics and Indian Scenario: A Review," 5 Universal Research Reports 1 (2018).

2 Ilango Ponnuswami & Beulah Emmanuel, The Status and Scope of Professional Social Work in Indian Correctional Setting, 14 International Journal of Criminal Justice Sciences 55 (2019).

3 Gary Hill, "Value of Open Prisons in India," 33(3) Corrections Compendium 29, 34 (2008).

while completing sentence paves the way for effective resocialisation of wrongdoers.[4] The process of moulding is bound to be coupled with sensitisation of inmates and motivating them to inculcate humane virtues and kind behavioural faculties.

Furthermore, ancient Indian jurisprudence covers much literature on prison administration. Kautilya, while highlighting the punitive treatment of detainees in his writings, calls for separate accommodation for male and female inmates. In the medieval era, undertrials were incarcerated in fortresses where quazis visit to assess the behaviour of detainees and prison conditions and release them, or else on special events. During British colonialism, Lord Macaulay, through the Prison Discipline Committee, balanced imprisonment between petrifying the offender and not terrifying to conscience of humanity. Although, 6 committees were constituted for recommending prison reforms between 1835-1919, but many of the freedom fighters, who were frequently sent to jails, were critical and resentful about the perilous sufferings of the inmates and barbaric prison conditions during the colonial period.[5]

Legal Framework

International legal instruments at various instances have indirectly been reflective of rehabilitation of detainees while discussing about norms of prison justice and humanitarian prison administration. Consecutively, an organic human rights document of 1948, i.e., *UDHR*[6] has explicitly inculcated respect for life, freedom and security of a person and, therefore, prohibited any kind of torture, inhumane treatment or arbitrary arrest/detention of any person. Similar provisions have been explicated in the *Torture Convention*[7],

4 Mitali Agarwal, "Beyond the Prison Bars: Contemplating Community Sentencing in India," 12 NUJS L. Rev. 119 (2019).
B.S. Shree, "Open Prisons and its Potential for Rehabilitation," 3(1) National Journal of Criminal Law 91 (2020).

5 Paridhi Poddar & Winnu Das, "Establishing Linkages Between Imprisonment and Impoverishment: Reinstilling Punitive Sensibilities in the Carceral State," 7 GJLDP 85 (2017).
Nrupthanga Patel and Dr. G.S. Venumadhava, "Resocialisation of Prisoners- A Concept of Open Prison," 6 Indian Journal of Applied Research 576 (2016).

6 "Universal Declaration of Human Rights," 1948, art. 1, 3, 9, 11, *available at*: https://www.un.org/en/about-us/universal-declaration-of-human-rights.

7 "The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment," 1984, art. 2, 3, 4, 11, 14, *available at*: https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading.

Torture Declaration[8] and *ECHR*[9]. Moreover, *Article 10(3)* of *ICCPR*[10] stresses on the social readaptation of prisoners as 'essential aim' of the penitentiary system in order to ensure recognition of inherent human dignity while treating prisoners. Furthermore, the 1995 *United Nation Congress on the Prevention of Crime and the Treatment of Offenders in Geneva*[11] extensively promoted and recognised the significance of open correctional establishments.

Other authoritative obligations fleshing out of fundamental liberties of individuals are inclusive of comprehensive guidelines evaluating prisoners' rights and prison conditions, namely, *UN Standard Minimum Rules for Treatment of Prisoners, 1955*[12] by Amnesty International, *Basic Principles for Treatment of Prisoners, 1990*[13], *UN Standard Minimum Rules for Administration of Juvenile Justice, 1985*[14] and *Body of Principles for protection of all persons under any form of Detention or Imprisonment, 1988*[15]. These instruments reaffirm dignity and liberty of individuals as fundamental and universally applicable rule, thereby, casting positive obligations on State Parties to protect rights of deprived and vulnerable persons.

Furthermore, the post-independence national framework on prison administration respecting fundamental freedoms and liberal rights of prisoners has been drafted in Constitutional provisions, namely, Article 14, 20, 21 and 22 along with related rules and legislations. For instance, *Prison Act of 1894*[16] regulated shelter, sanitation, safe custody, accommodation, quality medical examination and mental health of prisoners with special emphasis on women

8 "The Declaration on Protection from Torture," 1975, art. 2, 3, *available at*: https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-protection-all-persons-being-subjected-torture-and#:~:text=Any%20act%20of%20torture%20or,Universal%20Declaration%20of%20Human%20Rights.

9 The European Convention on Human Rights, 1950, art. 2, 3,4,5 *available at:* https://www.echr.coe.int/european-convention-on-human-rights.

10 The International Covenant on Civil and Political Rights, 1966, art. 10, cl.3 *available at:* https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights.

11 *Ibid*.

12 "Standard Minimum Rules for the Treatment of Prisoners," A/RES/70/175 (1955), *available at:* https://www.un.org/en/events/mandeladay/mandela_rules.shtml.

13 "Basic Principles for Treatment of Prisoners," A/RES/45/111 (1990), *available at*: https://digitallibrary.un.org/record/105348?ln=en.

14 "UN Standard Minimum Rules for Administration of Juvenile Justice," A/RES/40/33 (1985), *available at*: https://www.ohchr.org/en/instruments-mechanisms/instruments/united-nations-standard-minimum-rules-administration-juvenile.

15 "Body of Principles for Protection of All Persons under Any Form of Detention or Imprisonment," A/RES/43/173 (1988), *available at:* https://digitallibrary.un.org/record/53865?ln=en.

16 The Prisons Act, 1894, No. 9, Acts of Parliament, 1950 (India), §. 4, 7, 14, 24(2), 27, 31, 35.

detainees and undertrials. Moreover, other such statutes such as *Transfer of Prisoners Act, 1950*[17] and *Prisoners (Attendance in Courts) Act, 1955*[18] addresses the issue of overcrowding and vocational training among prisoners.

Beside substantive legislations, the policy framework include National Expert Committee on Women Prisoners in 1986 headed by Justice Krishna Iyer dealt with restoration, rehabilitation, employment training and related correctional modalities of women prisoners.[19] Similarly, *All India Committee on Jail Reforms* in 1951 under the chairmanship of Justice AN Mulla, popularly known as *Mulla Committee Report* (1980-83) along with *Indian Prisons Bill, 1955* drafted as a consequence of consensus on drafting prison law at the *National Conference on Human Rights of Prisoners, 1995*. Other such committees constituted for recommending prison reforms were LCI Report 78[20] and 152[21], *Justice Leila Seth Commission of Inquiry* in 1997, *Duggal Committee Report on Classification of Prisoners* in 1998, *Kapoor Committee on Jail Reforms* in 1986, *Central Bureau of Correction Services* in 1961 and *Conference of Chief Secretaries* in 1979.

Available Instances in India

The peno-correctional institutions in India have transformed the deterrent and custodial notion of confinement to concrete training on social behaviour, skill development, pragmatic education and aftercare facilities[22], thereby, shifting from retributive to rehabilitative approach. The first independent India open camps were established in 1949 in collaboration with Lucknow Model Prison and in 1963 in Sanganer, Rajasthan, predominantly known as "*Sampurnanand Open-Air Camps*".[23] These initial instances of reformative confinements offered vocational training of the offenders with respect to the promotion of cottage industries, forestry, fishery, agriculture or as paid labourers in public utility developments.

17 Transfer of Prisoners Act, 1950, No 29, Acts of Parliament, 1950 (India).

18 Prisoners (Attendance in Courts) Act, 1955, No 32, Acts of Parliament, 1955 (India).

19 Suryansh Tiwari, "Concept of Open Prison System as a Correctional System: A Study in Light of Present Context," 3(4) International Journal of Legal Science and Innovation 1025 (2021).
Narender Kumar, "Role of Open Prison in India: A Socio-Legal Study," 9 Mukt Shabd Journal 1821 (2020).

20 Law Commission of India, Congestion of undertrial Prisoners in Jails, Report no. 18 (1979).

21 Law Commission of India, Custodial Crimes, Report no. 152 (1994).

22 R. Deb, "Aftercare Organisation," 13 JILI 517 (1971).
Hollis Moore, "The Mata Escura Penal Compound: An Analysis of the Prison-Neighbourhood Nexus in Northeast Brazil," in Sacha Darke, Chris Garces, Luis Duno-Gottberg and Andrés Antillano (eds.), "Carceral Communities in Latin America" (Cham: Springer Nature 2021).

23 Anupma Kaushik & Neetu Sharma, Human Rights of Prisoners: A Case Study of Sampurnanad Open Prison, Sanganer, Rajasthan, 3:1 The International Journal of Political Science (2017).

The legacy of the correctional mode of treating the wrongdoers further extended to other parts of India. At present open prison establishments are spread over 17 states, chiefly, in Rajasthan, Kerala, Maharashtra, Tamil Nadu, West Bengal and Gujarat. However, the prisons without fences or supervisory towers have not been stretched to Union Territories yet.

Name of the Open Jail	Place	Structure and Functioning
Atpadi Open Jail[24]	Pune	Unique technique to restore the dignity of inmates and rehabilitee them was employed in jails unfolded over 61 acres of land. The community contact allowed detainees to live with their families and avenues for earning and availing basic facilities. Adoption of such practices enabled inmates to become more determined, responsible, accountable and trustworthy, thereby, providing new meaning and angle to their lives.
Anantapur Open Prison[25]	Andhra Pradesh	Diffused over 1427 acres of land on the outskirts of the city without chains and fences. The prisoners fulfilling the eligibility criteria of showcasing good behavioral conduct and completing 2/3rd of the sentence are admitted to open prisons. They are equipped with hands-on vocational training and experience in agriculture for being fit for earning basic livelihood in the outer society once released. For instance, as a part of corporate social responsibility, a Himalayan Pharmaceutical Corporation initiated growth, packaging and transportation of dried perennial herb. This medicinal herb is being supplied in exchange of adequate prices that enable the inmates to earn sufficient livelihood.

24 Priya Rao, Indian Prison System: Structure, Problem and Reforms, 10:1 Res. J. Humanities and Social Sciences 189 (2019).

25 Adv. Sanjay Sarraf, Beyond the Walls: A Comprehensive Look at the History and Future of Open Prisons (2023).

Sampurnanand Khula Bandi Shivir[26]	Sanganer, Rajasthan	Clothed over 4 hectares of land area and situated approximately 25 kms away from capital city Jaipur. It is noteworthy that this peno-correctional institution does not use the word 'prison' or 'jail.' Surrounded by low boundary walls, the camp holds strength of 150 convicts which are inclusive of 10 women and all of them being supervised by merely 2 guards without guns. The inmates are permitted to live with their families, children are allowed to attend schools, construct their separate houses, use paid facilities of electricity, water, and other recreational avenues along with working as daily wage labourers. It is pertinent to note that they are conceded to earn outside within the radius of 10kms from camp between 6am-7pm, for instance, in nearby schools. However, rigid screening restricts the eligibility of inmates to those completing 1/3rd of their sentences with remission in regular prisons, thereby, excluding habitual offenders, drug peddlers, human trafficking and smuggling, convicts of serious offences such as crimes against state and those involved in heinous and acute offences.
Nettukaltheri Open-Air Prison[27]	Kerala	Spread over 300 acres of land in the valleys of Western Ghats having relaxed and peaceful ambience without guns and bars. Follows similar eligibility criteria of inmates reflecting good behaviour before transferring to open jails. In order to generate revenues over expenditure and submitting the balance amount to respective state government, the inmates work on 200 acres of associated rubber plantation and paddy fields on daily wages. For ensuring continuous engagement with society and encouraging community contact, they are authorized to spend 1 out of 6 months with their families along with exclusive 5 day leave on relevant occasions. This also helps in healing wounds of offence committed by them and subsequent trial procedures.

Table 1: Relevant Instances of Open Prisons in India[28]

It is imperative to ensure to develop relevant structures, engage trained personnel and process implementation of vital laws to facilitate feasible and smooth functioning of open

26 Id at 23.

27 Saraswathy Nagarajan, 'Harvest of Hope at Open Jail, Nettukaltheri' *The Hindu* (14 April 2018) *available at:* <https://www.thehindu.com/society/harvest-of-hope-and-optimism-at-nettukaltheri-open-jail/article23536344.ece> (last visit on September 13, 2023).

28 Reference from Smita Chakraburtty, The Open Prisons of Rajasthan, Rajasthan State Legal Services Authority (2017).

prisons. The nature of accommodation varies from prefabricated constructions, perpetual barracks, and dormitories with asbestos ceiling. The conditions for eligibility revolve around ability, fitness (both physical and mental) and willingness of prisoners to work and abide by certain (even so lenient) regulations imposed, awarded up to one year or more sentence, completion of at least 1/4th of the term of such sentence, between 21 to 50 years of age, good behavioural conduct, reformatory potential, not undertrials or convicted or serious offences and, most importantly, not being habitual and class one offenders.[29] Hence, open air institutions contrast with regular prisons in various aspects such as administrative functioning, structural construction, interactive roles, degree of community contact, availment of vocational training and social experiences, opportunity to work and earn, normative restrictions and expected behaviour, consensus among inmates, guiding values and family orientations.

II. OPEN AND CENTRAL JAILS: IMPACT OF COVID-19 AND OTHERS

Open Prisons are tacit penal institutions which envisage an ideology of minimal supervision and effective security manageable within perimeters of jail where restraints are considerably relaxed. According to various surveys and studies, there has been no escape in open-air jails which work on the virtues of trust, self-discipline and human reformation.[30] However, as opposed to captive prisons, prisoners in open prisons are not acquainted with routine transfers. The Covid-19 outbreak has invited hovering challenges throughout the globe. The black clouds of pandemic have also soared over poverty trodden, unemployed, vulnerable, marginalised and neglected section of society.[31] This has particularly poisoned the societal stigma engrossing undertrials and convicted prisoners. The fear of infection was exacerbated by scarcity of resources and absence of effective support system.

The lack of beneficial legislation mandating rehabilitation and subsequent implementation has worsened the situation, leaving detainees to suffer in silence. The prisoners are devoid of any efficient relief by the government or any kind of employment avenues post release

29 Trishna Senapaty, The Closed and the Open Prison: Contested Imaginaries and the Limits of Openness, Legal Pluralism and Critical Social Analysis (2023) DOI: 10.1080/27706869.2022.2163603.; M. Martí, Prisoners in the community: the open prison model in Catalonia 106(2) Nordisk Tidsskrift for Kriminalvidenskab 211 (2021).

30 Mohanty et. al., A Comparative Study on the Attitudes of Prisoners Towards Special Jail and Open-Air Jail Systems, 27 Social Science International 27 (2011).

31 Stern et. al., Willingness to Receive a COVID-19 Vaccination Among Incarcerated or Detained Persons in Correctional and Detention Facilities — Four States, 70:13 US Department of Health and Human Services/ Centers for Disease Control and Prevention 473 (2020).

owing to their criminal history, thereby, neglecting certain basic needs and fundamental requirements of such individuals.[32] The socio-economic disadvantaged section of society, including prisons, are more prone to malnutrition and communicable infections. Moreover, the ethical conundrum of the target group amidst the constant chaos of increase in death rate due to spread of infection on account of overcrowding of jails has left indelible mark on their future prospects.

With Covid-19 declared as global pandemic by WHO, the focus of health concern instantaneously diverted towards detainees and prison authorities. The concern was mainly relating to extreme immediacy among inmates in overcrowded arena of prisons which has been exaggerated many folds by existing deteriorated health issues affecting masses in custody along with degrading infrastructure and administration in most prisons, thereby, posing severe threat of dispersing infection in prison community.[33] In such an alarming state, various social reformists, peno-correctional activists, human rights institutions and NGOs worldwide were called in to put in place deliberate measures addressing the problem of overcrowding and spread of infection.

In the wake of Covid-19 outbreak, various countries, including India, have implemented stringent measures to manage population in prisons by increasing release rate from custody through various schemes and absolutions and reducing entry into custody at the stage of remand, pre-trial, sentencing or violating terms of release. Such population management measures coupled with other factors have resulted in augmented waning in quantum of prisoners.[34] Alongside, such trend has complexed the prison policy as the state of lockdown has drastically condensed numbers/cycles of offences and prosecutions. On the lines of infection controlling measures, the executive policies have suspended prison visits by family members, advocates, inspection authorities, staff providing services in prisons on contract basis or others such as NGOs. Likewise, restrictions were also imposed on temporary visits of prisoners for work or home.

32 Sarthaka Kumar Rath & Abhinab Kumar Swain, Liberalization and Privatization of Prisons in India, 4 Int'l J.L. Mgmt. & Human 1554 (2021).; K. Borah, Privatisation of Prisons in India: Possibilities and Challenges, 69(1) Indian Journal of Public Administration 221 (2023).

33 Fair et. al., Keeping COVID out of prisons: approaches in ten countries, Project Report ICPR London (2021).
Praveen Kumar & Shubhendu Shekhar, Working with silenced undertrial prisoners in India during the COVID-19 pandemic, 44:2 Social Work with Groups 174 (2021).

34 M. Balasubramanian and S. Balakrishnan, Reflections on COVID-19 in India: A Survey, 12(4) International Journal of Pharmaceutical Research 137 (2020).; M.Z.M. Nomani and Zafar Hussain, Health Care in Prisons and Detention Homes During COVID-19 Pandemic in India, 8(1) European Journal of Molecular and Clinical Medicine (2021).

The menace of epidemic in prisons have also been underestimated owing to inadequate statistics on figures of infections and deaths caused by Covid-19 virus in prisons. [35]However, plausible measures of managing overcrowded prisons and controlling spread of infection have saved the prisons from facing the most feared devastating impact of pandemic. The most evident apprehension conceived by the thinkers is accelerated condition of overcrowding on urgency of pandemic threats being retroceded. Even though difficult but devising and implementing effective public health measures to shield prison settings from Covid-19 pandemic have contributed to proportionate safeguarding of well-being and human rights of inmates.

III. HUMAN DIGNITY: FREEDOM BEHIND BARS OR BEYOND BARS

Apart from overcrowding and consequent understaffing, the prison system, as notified in several inspection reports, has constantly encountered the challenges of obsolete and scattered regulations, outdated rules, organisational lacunas, procedural loopholes, dilapidated infrastructure, inadequate resources, vaguely remunerated prison staff, lack of proper security and medical treatment, cruel and degrading conditions of physical and mental torture[36], unchecked exercise of discretionary powers by prion officers, dearth of aftercare facilities and post release programme, increased incarceration of UTPs, delayed and affluent judicial process, forced labour for lengthy hours, rampant prison violence[37] and sexual/drug abuse, absence of self-discipline and professionalism, amplified corruption, constrained opportunities of employment or legal-aid, restricted access to basic amenities, miniscule hygiene and food facilities, full-fledged ignorance of deaths, suicides and custodial crimes, blotted public standing and minimal awareness about societal opinions, fundamental freedoms and intrinsic human rights of prisoners.

35 Sivakumar, Prison Research: Challenges in Securing Permission and Data Collection, 50 Sociological Methods & Research 348 (2021).; M. Bandyopadhyay, *Prison Escapes, Everyday Life and the State: Narratives of Contiguity and Disruption* in Martin, Tomas Max, and Gilles Chantraine, (eds.) Prison Breaks: Towards a Sociology of Escape (2018 Cham: Springer International Publishing).

36 Paras Diwan, Torture and the Right of Human Dignity, 4 SCC J-31 (1981).; Mullick et. al., The Hollowness of Torture Prevention Law Lacking Institutional Transparency, Special Issue IJLIA 25 (2019).; Roma Chatterji and Deepak Mehta, *Living with Violence: An Anthropology of Events and Everyday Life* Critical Asian Studies (2007 New Delhi: Routledge).

37 Khatri v. State of Bihar, [1981] 1 SCC 627.; Sunil Batra v. Delhi Administration, [1978] AIR 1548.; Sheela Barse v. Union of India, [1983] AIR 378.

All these factors have cumulatively affected psychological health of prisoners[38] and resulted in enhanced contamination of young and destitute offenders owing to frequent interactions with hardened offenders, thereby, affecting delinquent circumstances among prisoners and extended families. [39]This inexorable cycle of stigmatization has propelled social haplessness beyond bars and extensive human right exploitations behind bars. In order to preserve human dignity and fundamental liberties of prisoners, open prisons, being rehabilitative and reformational centres, are adequately designed to pursue social life enabling community participation and well-equipped with recreational activities (including sports, yoga and meditation), educational resources and employment facilities along with efficient legal-aid clinics which the help of government and various NGOs.

Focussing of dignified public life of prisoners, open prisons have positively constructed psyche of prisoners towards societal integration and resocialisation.[40] Despite of recognising freedom and dignity of inmates, the only problem with open-air prisons is stringent and subjective eligibility criteria resulting in underutilisation and less occupancy as compared to inbuilt capacity of open jails. The filters comprising of security risk, sentencing period, nature of crime, behavioural conduct and reformative potential of convict has many a times excluded women in unreasonable and arbitrary manner. [41]The trend has been observed as contradicting reformative tenets of open-air institutions for authorities being disinclined towards admission of inmates based on their suitability instead of judging on the basis of aforesaid filters.

The non-availment of progressive benefits of such institutions to the fullest possible extent can be seen as another probable consequence of undermining transfer of inmates to open jails. Even after several recommendatory reforms through numerous committees and regulations, lack of political will and strict legislative backing along with bureaucratic corruption has limited such reforms to see the light of the day. Furthermore, the constructive infrastructure and structural management of such correctional institutions has blatantly suffered from societal indifference to predicament of offenders and non-uniformity among

38 Tripathy et. al., Burden of depression and its predictors among prisoners in a central jail of Odisha, India, 64 Indian J. Psychiatry 295 (2022).

39 Bayer et. al., Building criminal capital behind bars: Peer effects in juvenile corrections, 124:1 The Quarterly Journal of Economics 105 (2009).

40 K.I. Vibhute, Right to Human Dignity of Convict under Shadow of Death and Freedoms Behind the Bars in India: A Reflective Perception, 58 JILI 15 (2016).; Edwards AR, Inmate Adaptations and Socialization in the Prison, 4:2 Sociology 213 (1970).

41 Muktikanta Mohanty, Behavioural Syndrome of Women Prisoners in India, 74:4 The Indian Journal of Political Science 639 (2013).; Reena Patel, Woman prisoners - custody or malady?, 1 Student Adv. 25 (1989).

states to establish and administer such institutions. The incapability of union government to legislate and initiate uniformity can reasonable be attributed to domain of prisons being state subject under the Constitution of India. Moreover, the much-believed social stigma attached to convicts disable their likelihoods of sincere reformation and convincing rehabilitation in society.[42]

Critics of open correctional institutions, primarily opposing reformative approach being devoid of harsh aspects of punishment, contend that staying with families, financial independence, free shelter and other socio-economic conveniences have made inmates habitual to such places and, therefore, in later stages or on completion of their sentence they are reluctant to move out. This has been coupled with increased land scarcity. Notwithstanding the aforesaid voids, the positives of open jails surpass and possibly, in long run, rectify the inherent loopholes. The journey of the correctional prison system instils confidence and self-reliance among inmates, thereby successfully morally reforming and reserialising prisoners.

Model Suggestions for Peno-Correctional Institutions in India

Model open prisons are desired to be well equipped with recreational, medical, employment and educational facilities along with professional and vocational training for inmates. [43]There must be separate constructions for undertrials, juvenile and female inmates. Despite of land scarcity, external encroachment on land where open prisons are situated is strictly non-negotiable. The inmates must be adequately informed about their rights and have awareness about prison rules and suggestion box. The reintegrative approach of criminal justice system has recognised and duly protected the intrinsic worth of human dignity and justice for not only the offenders but also for the society as a whole.

Improved attention to liberalised and advanced approach towards inclusion of prisoners, especially considering female convicts and undertrials, through flexible eligibility conditions is quintessential to achieve the goal of social reintegration and reformation of offenders best possible manner. Along with relaxation in eligibility criteria, the old outdated management

42 Gnaneshwar Rajan & Hema Varsshini, Prison Law in India - Need for Reformation with a View towards Rehabilitation, 13 Supremo Amicus 91 (2019).; Anupma Kaushik & Kavita Sharma, Human Rights of Women Prisoners in India: A Case Study of Jaipur Central Prison for Women, 16(2) Indian Journal of Gender Studies 253 (2009).

43 C. Paramasivan, A Study on the Performance of Vocational Training to Prisoners in Prisons in India, 3 International Journal of Advanced Scientific Research & Development 57 (2016).; Sohail Nazim and Kulsoom Haider, Historical Analysis of the Development of Prisons in India: Human Rights in Retrospect, 17(2) History and Sociology of South Asia 190 (2023).

procedures and regulations must be amended in consonance with transformative society.[44] Besides, the scope of open prisons must be expanded to Union Territories and the peril of corruption need to be curtailed. Concurrently, engagement in productive functions, vocational training and activities involving societal intercourse have immensely contributed towards bridging the trust between inmates and state authorities.

The standard model of open-air institutions constitutes open colonies, open work camps, semi-open and open training institutions which are arranged in descending order of freedom offered to inmates in demarcated perimeters along with reserialising potential.[45] Semi-open institutions are equipped with high surveillance and enhanced security measures in enclosed boundaries. Open institutions focus on vocational training and encourage employment on daily wages in prison factories, afforestation organisations, environment conservation, cultivated lands and government construction projects. Open colonies have minimum security standards where inmates live with their respective families and earn livelihood to maintain themselves.

The issue of non-uniformity among state laws can be resolved by the powers of central government to frame laws in accordance with ratified international conventions under Article 253 of the Constitution. However, it is strongly recommended to shift prison security and administration as a subject matter from state to concurrent list in the seventh schedule of the Constitution along with incorporating prison management and treatment of inmates as DPSP in Part IV of the Constitution. In terms of promoting trust between offenders and society, model open prisons ensure desirable confidence and instil self-respect among inmates. Beside gainful employment of available manpower and continuous monitoring of accelerated success of projects, open prisons have comprehensively reduced recidivism while encouraging rehabilitation and resocialisation of prisoners.[46]

It is hereby suggested to include at least two open prisons in every district so as to accommodate less violent and low risk inmates, including undertrials and women prisoners in the process of social reintegration. Moreover, easily adjusted and well-qualified prison staff extensively trained in correctional services, human behaviour, understanding inmates

44 Krishnan et. al., Grappling at the Grassroots: Access to Justice in India's Lower Tier 27 Harvard Human Rights Journal 166 (2014).; Tanmay Sharma, Open Air Prison: A Blessing to Prisoners? 2 Indian JL & Legal Rsch 1 (2021).

45 Ministry of Home Affairs, Model Prison Manual for the Superintendence and Management of Prisons in India, Bureau of Police research and Development (2003).

46 Drago, et. al., Prison conditions and recidivism, 13:1 American Law and Economics Review 103 (2011). M. Keith Chen & Jesse M. Shapiro, Do harsher prison conditions reduce recidivism? A discontinuity-based approach, American Law and Economics Review (2007).

on personal level and having quality of leadership and integrity must be employed in open-air institutions. The uniformity is also envisaged in terms of equitable wages across states through a central legislative mandate.[47] Judiciary must be empowered to direct administration effectively classify prisoners and sentence juvenile offenders in open prisons for their betterment in long run. Major focus must be on mentally ill prisoners and relaxing the selection criteria for transferring inmates to open jails.[48]

IV. PRISONERS' RIGHTS: JUXTAPOSING RECIDIVISM WITH REHABILITATION

With development of socio-legislative thinking about human rights, the concept of prisoners' rights slightly transformed as concrete and valuable norm in prison security and administration. Initially, in ancient, medieval or British era, the prisoners were heavily chained and kept in dark dungeons. The horrible condition of prisoners could be attributed to the so-called credible belief across the community about forfeiture of rights and liberty by those who have committed crimes. Later, with the awakening of human rights as an essential goal worldwide, the society learnt and followed socio-moral obligations towards prisoners on the pretext of improved values of rehabilitation and resocialisation of prisoners.[49] They were not to be physically injured, tortured psychologically or deprived of their basic human rights and fundamental liberties. Rather, they must be reserialised with freedom and reformed to be law abiding and informed citizen in the society.

Such entitlement of fundamental freedoms and prisoners' rights has been largely contributed by various UN conventions and legislative revolution in several countries across the globe. They outline respect for prisoners' right and dignity by drafting and ensuring subsequent implementation of the provisions of non-discrimination, humane treatment, not awarding corporal punishment, healthy reformation, hygienic ambience, educational and recreational facilities, employment opportunities and environment devoid of torture and cruel or degrading treatment. India, being signatory to such human rights instruments, have also incorporated provisions in its constitution and legislations in consonance with protecting and respecting prisoners' fundamental rights and freedom.

Moreover, Indian judiciary, through plethora of precedents, has affirmatively interpreted

47 K.I. Vibhute, Compulsory Hard Prison Labour and the Prisoners' Right to Receive Wages: Constitutional Vires and Judicial Voices, 42 JILI 1 (2000).

48 Jakar & Jain, Distressful life events between prisoners of open jail and central jail, 7:6 International Journal of Social Sciences, 1795, 1799 (2019).

49 Rakesh Chandra, Human Rights of the Prisoners: An Indian Scenario, 3 Supremo Amicus 457 (2018).

prisoners' rights in the light of right to life and personal liberty, safeguarded from sexual abuse or arbitrary exercise of discretion by authorities, appropriate lodging and clothing, clean potable water and sanitation, healthy living conditions[50], timely medical examinations, hygienic and sufficient food, protection against exploitation (in the form of handcuffs etc.) or forced labour, legal aid, remission and parole, defined calculative sentences, speedy bail, proper security and safety, expedite trial process, effective grievance redressal and most importantly right to be properly classified for scheme of rehabilitative programme.[51] Additionally, their right to information about trial procedures and prison laws, carrying any trade, profession or employment for wages, give interview and talks and remedy against human rights violations must also be protected.[52]

The contours of rights entitled to prisoners as widely elaborated by the apex court can be succinctly defined as considering their human rights within confines of sentence awarded and not justifying aggravated sufferings beyond what are innate in incarceration process.[53] The concept of open prisons as a tool for individualised penalties and social reintegration has been successfully recognized as quintessential to prison administration in the case of *Ramamurthy v. State of Karnataka*[54]. The apex court emphasised the shared and cooperative living of inmates with the community paving path for inculcating respectable personalities, moral values, just virtues, responsive attitudes, self-esteem, human dignity and social

50 Kundu et. al., Health status of inmates in an open prison: A cross-sectional study in Eastern India, 13 J. Datta Meghe Inst Med. Sci. Univ. 150 (2018).

51 K.M. Ashok, 'SC Asks States, UTs To Seriously Consider Feasibility Of Establishing Open Prisons In As Many Locations As Possible [Read Order]' (*Live Law*, 10 May 2018), *available at:* https://www.livelaw.in/sc-asks-states-uts-to-seriously-consider-feasibility-of-establishing-open-prisons-in-as-many-locations-as-possible/ (last visit on August 05, 2023); 'SC Tells States to Consider Setting up an Open Prison in Each District' (*Hindustan Times*, 12 December 2017) *available at:* <https://www.hindustantimes.com/india-news/sc-tells-states-to-consider-setting-up-an-open-prison-in-each-district/story-tnLIiuOT6tAKlso8wKamUJ.html> (last visit on August 05, 2023).

52 'Open Prisons: SC Asks Centre To Hold Meeting With All States To Study Rajasthan Model And Adopt Uniform Guidelines [Read Order]' (*Live Law*, 12 December 2017), *available at:* https://www.livelaw.in/open-prisons-sc-asks-centre-hold-meeting-states-study-rajasthan-model-adopt-uniform-guidelines/ (last visit on August 05, 2023).

53 Arvind Tiwari, Human Rights, Ethics & Prison Administration in India: A Critical Overview, 2 RMLNLUJ 43 (2010).

54 Ramamurthy v. State of Karnataka, [1997] SCC (Cri) 386.; *See also* Krushna Prasad Sahoo v. State of Odisha and others (High Court of Orissa, 23 December 2021).; Surendra Singh Sandhu v. State of Uttarakhand and others (High Court of Uttaranchal, 10 January 2017).; Rajasthan State Legal Services v. Chief Secretary (High Court of Rajasthan, 15 October 2019).

confidence among them. Further, in *Dharambir v. State of UP*[55], the apex court supported the idea of open-air institutions for the protection of young offenders from vicious evils and forced exploitation suffered in ordinary jails. The court relaxed eligibility criteria substantially and obligated prison authorities to the imperatives of constitutional provisions.

V. CONCLUSION AND PATH AHEAD

It can be concluded that the open-air institutions and work camps have authoritatively reduced recidivism, custodial crimes and decadence in offenders, thereby achieving the real essence of freedom. Reforms of community sentencing and social contact in the recent penitentiary structure have holistically responded to wrongs inflicted on inmates in ordinary prisons and allowed them to start afresh. Being superior and more effective than other conventional modes of incarceration, Peno-correctional institutions restore humane behaviour through reformative healing of hidden frustrations towards social injustice repressed deep inside the psyche of the offender. Such fatigue created by an unjust order of society and slow administrative procedures is vicariously liable for the criminal guilt of innocent wrongdoers. Therefore, open prisons have emerged as a socio-legal reform to respond to societal taboos with humanism.

The criminal justice system and prison jurisprudence have cumulatively postulated reformative structures, rehabilitative administration and reintegrative management for protecting the inherent human rights and fundamental liberties of prisoners. For serialising prisoners' rights with freedom, the pillar organs, namely, legislative, executive and judiciary must take a constructive approach towards existing administrative mandates and actively carry out amendments in prison regulations and respective jail manuals. The harmonious and justiciable efforts for social readjustment of prisoners must involve not only the prison authorities but also the coherence of cultural, economic, social and educational institutions along with integrating values and socio-moral perspectives of society at large. The firm root of model peno-correctional institutions is dependent on the time and resources invested by the state to make it successful.

55 Dharambir v. State of UP, [1979] 3 SCC 645.; *See also* Sardar s/o Shahvali Khan (C-6608) v. State of Maharashtra (High Court of Bombay, 11 April 2023).; Pooran Singh s/o Shri Ramsingh v. State of Rajasthan (High Court of Rajasthan, 11 March 2022).; Deepak s/o Dattatraya Jawale v. State of Maharashtra (High Court of Bombay, 20 August 2021).

VICTIM PARTICIPATION IN THE CRIMINAL JUSTICE PROCESS: A THERAPEUTIC APPROACH

Ms. Neha Singh*

VIPS Student Law Review
August 2023, Vol. 5, Issue 1, 70-89
ISSN 2582-0311 (Print)
ISSN 2582-0303 (Online)

https://vslls.vips.edu/vslr/

ABSTRACT

A crime is a menace to society at large and victims of crime represent the most suffering lot. Our Criminal Justice System conflates the presence of the State with the presence of victims wherein the trial becomes a significant contest between the state and the accused and victims are merely envisaged as mute spectators with passive role to play in their quest for justice. The victim's predicament is often forgotten in the battle for supremacy between the state and the accused. The recent Apex Court verdict in Jagjeet Singh versus Asish Mishra is historic in the arena of victim rights since it has for the first time recognized the unbridled participatory rights of the victim at all stages of trial. However, it is encountering many hurdles in its implementation, which reflects the urgent need for suitable amendments in the Criminal Procedure Code and the creation of a victim-friendly statutory framework so as to facilitate the recognition of victim rights. This Research paper seeks to examine the jurisprudential development of the concept of victim and analyse their evolving role in the criminal justice process in the wake of the recent Supreme Court Judgement and its implications in the field of victimology. The paper further stresses on the need for a therapeutic criminal justice delivery mechanism that provides for accountability and contributes to victim healing. The paper is finally concluded by suggesting ways and means of making criminal justice dispensation more victim-friendly which will not only provide relief to the victims but will also give teeth to criminal justice in India.

Keywords: *Victim, Criminal Justice System, Statutory framework, Therapeutic, Accountability.*

* Ph.D. Scholar, University Department of Law, Patna University.

I. INTRODUCTION

Background of the Study

Indian criminal justice system is centered around the accused and victims of crime who represent the most affected lot and are merely envisaged as mute spectators with either no or very limited role to play in the criminal justice process. The accused enjoys manifold rights and is accorded protection at every stage of the criminal proceeding whereas the victim's predicament is often forgotten in the battle for justice whose participation is merely restricted to being a prosecution witness in a criminal trial. Though the Indian judiciary has time and again, recognized the evolving role of victims by assuring them several rights through various judicial pronouncements, howsoever its enforcement in strict terms requires suitable amendments in the criminal procedure code and enactment of a victim friendly statutory framework for ensuring meaningful realization of the same. Relief to victims by way of judicial decisions is merely restricted to financial aid and the other aspects of victim assistance such as reparation and rehabilitation have often been ignored, thereby leaving the victim to cope with the aftermath of suffering.

Objectives of the Study

The present study is intended to achieve the following objectives:

a) To analyze the various definitions of the victim and to examine the possibility of expanding the scope of the definition.

b) To identify various types of victims under the Indian Criminal Justice system.

c) To discuss the role of the victim in the process of criminal justice administration in India.

d) To examine the participatory right of the victim and its extent of development.

e) To discuss the existing mechanism for protecting victims' rights and to point out the flaws in the present legal framework.

f) To suggest some efficacious measures ensuring the effective participation of victims at every stage of criminal justice administration.

Significance of the Study

The right to fair and speedy criminal justice is an essential attribute of fundamental Right to life and personal liberty and so the victim assumes importance in this regard, being an

integral component of the criminal justice system. To ensure meaningful realization of the aforesaid right, effective participation of victim at every stage of the criminal justice process is necessary. The previous researches in this regard appear to be limited in their scope which prompted the present study to cover the unexplored areas.

Scheme of the Study

In this background, the present study has been divided into six parts, which may be briefly summarized as the Introduction being the first part, Meaning & Concept of victim: Scope & Jurisprudential development being the second part, third part dealing with the Role of the victim in the criminal justice process, fourth part comprising Participatory Rights of victim: Evolution & Development, Fifth part dealing with Safeguarding victim rights: Therapeutic Approach and finally summing up with the sixth part pointing out conclusive findings and some workable solutions.

II. MEANING AND CONCEPT OF VICTIM: SCOPE AND JURISPRUDENTIAL DEVELOPMENT

Victims are individuals who suffer loss or injury in body, mind, reputation or property which may be direct or indirect due to any reason. They play a critical role in any criminal justice system. The concept of victim existed since time immemorial which gradually declined but further gained momentum with the sincere efforts of many classic writers of criminology as well as international organizations and further led to the advent of a new branch of criminology dealing with victim-offender relationships known as victimology.[1]

Meaning & Concept

The definition of victim lacks accurate precision. 'Victim' in common parlance refers to all those who suffer injury, loss, trauma, or hardship due to any reason and crime may be one of such reasons. Such loss or traumatic experience may be physical, psychological, emotional, or financial.[2]

The Code of Criminal Procedure provides a very narrow definition of victim which is not sufficient to cover all kinds of injury.

1 N.V. Paranjape, Criminology & Penology including Victimology 765 (Central Law Publication, Prayagraj, 18th ed. 2021).

2 S.S. Srivastava, Criminology & Penology including Victimology 566 (Central Law Agency, Prayagraj, 6th ed. 2021).

'Victim' as defined by the Cr.P.C. means a person who has suffered any loss or injury caused because of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir."[3]

'Victims' as defined by the United Nations includes persons who individually or collectively, have suffered harm including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that violate criminal laws operative within member states including those prescribing criminal abuse of power.

According to the Declaration of Basic Principles of Justice for Victims (1985), a person may be considered as a victim irrespective of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and victim. The term 'victim' also comprises the immediate family or dependents of the victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.[4]

Historical Background

Victims played a crucial role in the criminal legal system during ancient times. Their position remained the same even during the Mughal empire where they enjoyed substantial rights and were imparted justice. Howsoever, their power and position declined later with the advent of the Industrial Revolution in Europe. Their plight further worsened with the onset of the Adversarial system where they were merely envisaged as mute spectators with passive role to play in the criminal justice system. Thus, the victim-centric criminal justice system became more accused-oriented where the punitive role of the state outweighed the reparation aspect and became a dominating factor in the administration of criminal justice. They became the most neglected lot and were left to their own fate with nothing to gain except suffering and harassment. Their significant role was realized in the later part of the 18th and 19th centuries especially in the U.K. and U.S.A. where concern regarding victims caught the attention of many classic writers of criminology and hence, mass movements took place for reforming the Criminal Justice System. Victim rights further gained momentum with the efforts of the United Nations which has contributed in this regard by calling many conventions and declarations.[5]

3 The Code of Criminal Procedure, 1973, § 2, cl. wa, No. 2, Act of Parliament, 1974 (India).

4 The United Nations Convention on Justice & Support for Victims of Crime and Abuse of Power, 2006, art. 1.

5 Gurratan Wander & Harsimrat Kaur, "Victimology and Emerging trends of Compensation," Academike, (July 20, 2022, 9:25 PM), <https://www.lawctopus.com/academike/victimology-emerging-trends-compensation>.

Victim Typology

Different ideologists have proposed different kinds of victims time and again according to the nature of the offence or harm. However, the U.N. Declaration of 1985[6] categorizes victims under two broad heads.

Victims of Crime

It includes those who individually or collectively have suffered any harm whether physical or mental, emotional suffering or economic loss through acts or omissions that are in violation of criminal laws operative within member states. They may be either victim of crime relating to injury caused to a person or property such as Murder, Dowry death, Rape, Grievous Hurt, Dacoity, Robbery Assault or victims of environmental offences such as Gas leakage, River pollution etc.

Victims of abuse of power

It comprises all persons who individually or collectively, have suffered harm including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights due to abuse of power by authorities such as third-degree methods, custodial torture or death, custodial rape, groundless arrest etc.

Victims may also be broadly divided into three levels based on the hierarchy of the level of suffering experienced as a result of a crime.

a) Primary Victims are the immediate victims of crime and suffer physical, mental, and economic damage due to victimization.

b) Secondary Victims are mostly victims of social surroundings and suffer from social stigma, social ostracism, and social isolation. They suffer as a result of harm or injury to the primary victim.

c) Tertiary Victims are those who are other persons besides immediate victims who experience harm or injury due to the criminal act of the offender.[7]

Scope & Jurisprudential Development

Though India does not have any separate legislation for victims of crime, victim justice has been rendered through the affirmative action and orders of the Apex Court and victim rights acquired significance due to the efforts of various national-level commissions and

6 Declaration of Basic Principles of Justice of Victims of Crime & Abuse of Power, 1985.

7 S.S. Srivastava, Criminology, Penology & Victimology 569 (Central Law Agency, Prayagraj, 6th ed. 2021).

committees.[8] During the late 1970s, studies on crime victims by researchers in India was seen for the first time which was mostly conducted on victims of dacoit gangs in the Chambal valley, victims of homicide and victims of motor vehicle accident.[9]

The deplorable state of crime victims in India in contrast to global developments caught the attention of the Law Commission of India which made suggestions and recommended for introduction of provisions ensuring compensatory relief to crime victims under the Indian criminal law and procedure.[10] The 154th Report of the Law Commission of India[11] on the code of Criminal Procedure provided for a separate chapter on victimology which extensively dealt with victim's rights in criminal cases and its growing significance. It further mandated the incorporation of Section 357-A providing for victim compensation which was initially recommended by the 152nd Law Commission Report[12]. The Justice Malimath Committee[13] in its report provided for the extended right of the victim in matters of appeal which is not merely confined to appeal against orders passed by the trial court but also includes the right to appeal against acquittal to the High Court. The recommendations made by the Malimath Committee paved the way for suitable amendments in Cr. P.C. The definition of victim for the first time was incorporated in the code. The amended Section 372 of Cr. P.C.[14] dispensed with the requirement for the victim to approach the prosecution for its consent to file an appeal against the acquittal of the accused. The amended Section 357-A[15] was inserted in the Cr. P.C. which safeguarded victim rights by way of providing compensation to victims of crime. The Apex Court has referred to many International Conventions, Covenants and Declarations while interpreting the provision of fundamental rights.

The National Commission to Review the Working of the Constitution recommended for a victim-oriented criminal justice administration and urged the union and state governments to legislate on this subject with an effective scheme of compensation for victims of crime

8 Ashpreet Kaur, "Judiciary's Contribution towards Evolving Victimology," iPleaders, (July 22, 2022, 10:03 PM), <https://blog.ipleaders.in/victimology>.

9 Akash Shah, "Victims, Victimization & Victimology," Legal Service India, (July 23, 2022, 10:45 AM), <http://www.legalservicesindia.com/article/1349/Victims,-victimization-and-victimology.html>.

10 Mihir Inamdar, "Criminal Victimization: Jurisprudential Perspective with Reference to India," Jus Dicere, (July 22, 2022, 2:10 PM), <https://www.jusdicere.in/criminal-victimization-jurisprudential-perspective-with-reference-to-india>.

11 Law Commission of India, "154th Report on the Code of Criminal Procedure, 1973" (1996).

12 Law Commission of India, "152nd Report on the Code of Criminal Procedure, 1973" (1994).

13 Government of India, "Report of the Committee on Reforms of Criminal Justice System" (Ministry of Home Affairs, 2003).

14 Inserted by Act 5 of 2009, (w.e.f. 31-12-2009).

15 Id.

without any further delay.[16] The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[17], The Rights to Reparation for Victims of Human Rights Violation, April 1997, UN Convention on Justice & Support for Victims of Crime & Abuse of Power, 14th Nov 2006 are the major international instruments advocating victim rights and therefore must be respected by the state since customary rules of international law which are not inconsistent with municipal law shall be deemed to be incorporated in the domestic law.[18]

But unfortunately, these have not yet been interpreted by our Apex Court into fundamental rights which is very much implicit under the following Articles of the Constitution such as Article 14, 21, 39-A, 41, 46 and 51(c)[19].

Thus, it can be concluded that though India has recognized the importance of victim rights and has made progress in this regard, yet it is still far behind and has a long way to go.

III. ROLE OF VICTIM IN CRIMINAL JUSTICE PROCESS

The victim has a pivotal role to play at every stage of the criminal justice process. Several provisions of our procedural criminal law emphatically deal with the role of the victim during the trial in different capacities (witness/complainant) beginning from reporting stage to the sentencing stage.

Pre-trial Stage:

At the time of Reporting: The victim as an informant sets criminal law in motion by providing every information regarding the commission of a cognizable offence to an officer in charge of the police station.[20] On refusal to record an FIR by the officer in charge, the victim may send the substance of such information in writing to the Superintendent of Police who may either investigate the case himself or depute any subordinate for the same provided such information discloses the commission of a cognizable offence.[21] The victim as a complainant may file a complaint before a competent magistrate empowered to take cognizance.[22]

16 Government of India, "Report of the National Commission to Review the working of the Constitution", (2002).

17 Adopted by the United Nations General Assembly on Nov. 11 (1985).

18 People's Union for Civil liberties v. Union of India, AIR 1997 SC 568.

19 The Constitution of India, 1950.

20 The Code of Criminal Procedure, 1973, § 154, NO. 2, Acts of Parliament, 1974 (India).

21 Id. § 154(3).

22 Id. §190(1)(a).

At the time of Investigation: Where a complaint has been filed by a crime victim disclosing the commission of a cognizable offence, the magistrate in such a case directs police to register and conduct a proper investigation and also keeps track of the same.[23] The victim as a witness who seems to be apprised of the facts and circumstances of the case may be required to appear before the investigating officer for the recording of their statements and may also be examined orally by the police.[24] The victim as witness may also be produced before a magistrate by a police officer for the recording of statements.[25] The victim against whom rape is alleged or attempted to have been committed is required to undergo a medical examination conducted by a registered medical practitioner.[26] The victim enjoys the role of being informed and heard before the acceptance of the closure report of police by the magistrate leading to the discharge of the accused.

At the time of granting Bail: The victim has a role to participate in hearings related to bail and may also apply for cancellation of bail of the accused person who has been granted bail by the subordinate court.[27]

Plea–Bargaining: The victim also has a role to play in case of sentence or charge bargain by way of participation in the meeting along with the public prosecutor, investigating officer and the accused for obtaining a satisfactory disposition of the case.[28]

Inquiry and Trial Stage

The victim as a complainant or witness is examined upon oath by a magistrate.[29] The victim may file protest petition in case of unsatisfactory police report filed before the magistrate which is treated as a complaint. [30]The victim in a criminal trial is represented by a public prosecutor. The victim is entitled to engage an advocate of his choice to assist the prosecution.[31] If the victim of a crime instructs any pleader to prosecute in court, the prosecution shall be conducted by the public prosecutor and the pleader shall assist him by following his directions and may submit written arguments after the closure of evidence with the permission of the court.[32] The victim is also entitled to conduct prosecution

23 Id. §156(3).
24 Id. § 160, 161.
25 Id. § 164.
26 Id. § 164.
27 Id. § 439(2).
28 Id. § 265-C
29 Id. § 200.
30 Id. § 190.
31 Id. Proviso to § 24(8). Inserted by Act 5 of 2009.
32 Id. § 301(1) & (2).

himself.[33] The evidence of the victim shall be taken in the presence of the accused except when expressly barred.[34] The victim as a witness may also be examined by way of issuing commissions.[35] The victim summoned as a witness or in any other capacity shall be examined or re-examined at any stage of trial for a just decision of the case.[36] The victim as complainant or informant may be directed by the magistrate to pay compensation to the accused for accusing them without reasonable cause. [37]The victim as the complainant may withdraw his complaint against the accused before the passing of the final order with the consent of the magistrate on proving sufficient grounds for withdrawal. [38]The victim can also apply for a transfer of the case from one criminal court to another in sessions division or to the High Court or Supreme Court for achieving the ends of justice.[39]

Post-trial Stage:

At the time of Filing the Appeal: The victim is entitled to prefer an appeal to the superior court against any order passed by the subordinate Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation.[40] The victim as the complainant is also entitled to file special leave to appeal before High Court from the order of acquittal if such order has been passed in any case instituted upon complaint of the victim and the High Court has granted permission to the victim on an application made by him/her in this regard.[41]

At the time of Revision: The victim as an aggrieved party may also file revision before the Session Court or High Court where there is no provision for appeal to rectify any improper exercise of judicial power by the subordinate court.[42]

At the time of Sentencing: At the time of pronouncing of judgement, the victim's role can be seen in the case of grant of compensation for any loss or injury suffered by the victim even in cases where a fine was not imposed on the accused.[43]

33 Id. § 301(2).
34 Id. § 273.
35 Id. § 287.
36 Id. § 311.
37 Id. § 250.
38 Id. § 257.
39 Id. § 406, 407, 408.
40 Id. § 372 proviso. Inserted by Act 5 of 2009.
41 Id. § 378(4).
42 Id. § 399, 401.
43 Id. § 357, 357-A.

IV. PARTICIPATORY RIGHTS OF VICTIM: EVOLUTION & DEVELOPMENT

The criminal justice system in India is accused-centric where the victim's position stands marginalized. Initially, the criminal justice system in India laid much emphasis on punishment as a part of crime rather than paying heed to the sufferings of victims of crime. Therefore, the victim's role in a criminal trial was merely limited to that of being a witness for the prosecution. Howsoever, in situations where victims of crime and witnesses of the case were the same, the victim played dual role of being a victim of crime as well as the witness of the crime.[44]

The concern towards victim rights grew later with the efforts of social activists who played an active role in drawing the attention of the court towards the loopholes in the existing criminal justice system by way of public interest litigation as well as by contributions of Law Commission and Committees such as 154th Law Commission's report[45], Justice Malimath Committee Report[46], Madhav Menon Committee Report [47]etc.

The Declaration of Basic Principles of Justice of Victims of Crime and Abuse of Power (1985) recognized four basic rights of victims of crime which are Access to justice and fair treatment, Restitution, Compensation, and Personal Assistance & Support Services. Amongst these rights, Indian law has always shown utmost priority towards awarding of compensation to victims and their rehabilitation by providing some financial assistance to them. The status of crime victims regarding access to justice and fair treatment may be attributed to four different stages of criminal justice system which are Right to bring criminal law into motion by lodging an FIR or Complaint, the right of the victim during the investigation, right of victim during trial and right after judgement in criminal case.[48] Victim assistance by way of counselling and support services which was also one of the key components of the declaration has hardly received any attention.[49]

44 Surja Kant Baladhikari, "Victim: A Forgotten Story in the Indian Criminal Justice System," 9 Vivekanand Journal of Research 38 (2020).

45 Law Commission of India, "154th Report on the Code of Criminal Procedure, 1973" (1996).

46 Government of India, "Report of the Committee on Reforms of Criminal Justice System" (Ministry of Home Affairs, 2003).

47 Government of India, "Report of the Committee on Draft National Policy on Criminal Justice" (Ministry of Home Affairs, 2007).

48 R.N. Mangoli & Nandini G. Devarmani, "Role of victims in Criminal Justice System: A Critical Analysis from Indian Perspective" *SSRN*, (27th July, 2022, 8:12 PM) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2814578 .

49 Ahmad Siddique, Criminology, Penology & Victimology (EBC, Lucknow, 7th ed. 2021).

Participatory rights

At present, the victim enjoys the following participatory rights during a criminal trial:[50]

a. Right to obtain a copy of FIR free of cost from the officer in charge.[51]

b. Right to attend proceedings during the bail application, investigation, inquiry, trial and thereafter at the stage of sentencing and parole.[52]

c. Right to be notified that the case shall not be investigated by the police in the absence of any sufficient ground.[53]

d. Right to Legal aid and fair trial.[54]

e. Right to file the complaint and be examined and heard before the magistrate.[55]

f. Right to apply for cancellation of bail.[56]

g. Right to be consulted in case of withdrawal from prosecution.[57]

h. Right to protection from intimidation and harassment.[58]

i. Right to engage an advocate of his choice to assist the public prosecutor.[59]

j. Right to appoint any private pleader as a prosecutor which includes the victim himself.[60]

k. Right to prefer an appeal against any order of acquittal passed by the court or against conviction for a lesser offence or inadequate sentence.[61]

l. Right to be heard before acceptance of the final report of police by the magistrate discharging the accused.[62]

m. Right to apply for shifting the venue of trial in the interest of justice.[63]

50 S.S. Srivastava, Criminology, Penology & Victimology, 594-597 (Central Law Agency, Prayagraj, 6th ed. 2021).

51 The Code of Criminal Procedure, 1973, § 154(2), NO. 2, Acts of Parliament, 1974 (India).

52 *Mallikarjun Kodagali v. State of Karnataka & Ors.* (2019) 2 SCC 752.

53 *Bhagwant Singh v. Commissioner of Police and Anr.* AIR 1985 SC 1285.

54 Legal Services Authorities Act, 1987, s. 12(1).

55 The Code of Criminal Procedure, 1974, s. 200.

56 Id. § 439(2).

57 Id. §§ 257, 321,

58 The Indian Penal Code, 1860 (Act 45 1860), s. 228A.

59 Id. § 301(2).

60 Id.

61 Id.§§ 377, 378.

62 *K.P. Ramasamy & Ors. v. R. Dharmalingam & Ors.* 2020 SC 168.

63 Id. § 406.

n. Right of the rape victims to participate in camera trial proceedings.[64]

o. Right to compensation and restitution.[65]

p. Right of an accused victim to object arrest or detention by the police in the absence of proper compliance of safeguards necessary for arresting a person.[66]

The realm of victim rights is an evolving jurisprudence and the judiciary has time and again, recognized the emerging role of victims and accorded crucial protection to them. Though there is a lack of any comprehensive legislation imparting justice to victims in India, the Apex Court has played an insightful role and adopted affirmative action to secure the rights of victims.[67]

In *Rudal Shah v. State of Bihar*[68], the Apex Court for the first time laid down the foundation of the principle of compensatory justice by categorically stating that it has the power to award compensation to undertrial prisoners who have become victims of inordinate delay in the trial process for infringement of their fundamental right to speedy justice by way of writ jurisdiction. In *D.K. Basu v. State of West Bengal*[69], the Apex Court laid down guidelines to protect victims of custodial violence including custodial rape. In *Hussainara Khatoon & Ors v. Home Secretary*[70], the Apex Court recognized victimization due to abuse of state power. In *Bodhisatttwa Gautam v. Subhra Chakraborty*[71], the Apex Court recognized the right of awarding interim compensation to victims of rape and also laid down guidelines to support impoverished rape victims who are deprived of legal, medical and psychological services due to financial constraints. In *S.A. Karim v. State of Karnataka*[72], the Supreme Court recognized the right of the victim to be consulted in case of withdrawal from prosecution by relying on the plea of the deceased victim's father and dismissed the order of the trial judge that had allowed the prayer of the state for withdrawal. In *G.X. Francis v. Banke Bihari Singh*[73], the Apex Court in view of ensuring a fair trial shifted the venue of a criminal defamation case filed in the High Court of Madhya Pradesh where the situation

64 Id. § 327(2).

65 Id. §§§ 357, 357-A, 357-B.

66 *Joginder Kumar v. State of U.P.* 1994 SCC (4).

67 Kishita Gupta, Victim assistance in the Indian criminal justice system, *ipleaders,,* (25th July, 2022, 7:14 PM) https://blog.ipleaders.in/victim-assistance-indian-criminal-justice-system .

68 AIR 1983 SC 1086.

69 (1997) 1 SCC 416

70 (1980) 1 SCC 98.

71 AIR 1996 SC 922.

72 (2000) 8 SCC 710.

73 AIR 1958 SC 309.

was hostile, to the one in the neighboring state. *In P.S.R Sadhanantham v. Arunachalam*[74], the Apex Court recognized the right of victims near relatives to file SLP under Article 136 of the Constitution challenging an order of acquittal by the High Court. In *Karan v. State N.C.T. of Delhi*[75], the Delhi High Court recognized the right to restitution of victims of crime based on victim impact reports to determine the quantum of compensation by assessing the impact of crime on the victim. In *Nirmal Singh Kahilon v. State of Punjab*[76], The Hon'ble Apex Court recognized the victim's right to fair trial and investigation and such right flows from Article 21 of the Constitution of India. In *K.P. Ramasamy v. R. Dharmalingam*[77], the Supreme Court laid down that victim has the right to file a protest petition if deprived of the right to notice before acceptance of the final report of the police. In *Mallikarjun Kodagali v. State of Karnataka & Ors*.[78], the Apex Court emphasized the need for the establishment of Victim Impact Statements assuring adequate participation of victims in criminal proceedings and also confirmed the victim's right to file an appeal against an order of acquittal.

In the recent case of *Jagjeet Singh v Ashish Mishra*[79], the Apex Court has acknowledged the unrestrained participatory rights of the victim at every stage of the criminal proceeding i.e., from the time of the commission of offence till the conclusion of trial.

The recent judgement of the Apex Court in the Lakhimpur Kheri case[80] is historic in the realm of victim rights since it affords greater participation for victims in the criminal justice process.

Observations of the Court

The Court made the following remarks regarding the victim's role in the criminal justice process:

a) Victim enjoys uncontrolled participatory rights at every stage right from the inception till the conclusion of trial which also extends to appeal and revision proceedings. Hence, they can assert their right to participate at every stage post-occurrence of an offence.

74 (1980) 3 SCC 141.
75 (2020) DLT 352.
76 (2009) 1 SCC 441.
77 Appeal (Crl.) No (s). 354/2020.
78 (2019) 2 SCC 752.
79 2022 Live Law (SC) 376.
80 Jagjeet Singh v. Ashish Mishra, (Crl.) Appeal No. 632 of 2022.

b) Where victims willingly come forward and participate, they must be granted an opportunity for fair and effective hearing and cannot be expected to observe the proceedings as a mute spectator especially where they may have genuine grievances.

c) The victim's right to file an appeal against acquittal if not supplemented with the right to be heard at the time of deciding bail application would result in a travesty of justice.

d) The right of the victim to be heard is an indispensable right which is independent of that of the state under Cr.P.C.

e) A 'victim' need not always be construed as complainant/informant since even a person unknown to the act of crime may be an informant.[81]

Way Forward

Though the progressive observations made by the court, in this case, are likely to have a profound impact on the way we visualize our criminal justice processes, its implementation in letter and spirit may be challenging on various fronts in the wake of several provisions and judicial precedents[82] which may act as stumbling block to the comprehensive guarantee of such rights to the victims. The most effective way to address these challenges is to provide legislative affirmation to the principles of participation by incorporating suitable amendments in the existing criminal procedural law and enacting a victim-friendly statutory framework to facilitate the recognition of victim rights.[83]

V. SAFEGUARDING VICTIM RIGHTS: THERAPEUTIC APPROACH

Ever since the acceptance of the Declaration of Basic Principles of Justice, for Victims of Power Abuse and Crime (1985), India has made considerable progress in providing safety and assistance to victims of crime through various legal reforms.

81 Sohini Chowdhury, Victim has right to be heard from every stage from investigation to culmination of trial in Appeal/Revision, Live Law, (29th July, 2022, 10:20 PM.) https://www.livelaw.in/top-stories/victim-has-right-to-be-heard-at-every-stage-from-investigation-to-culmination-of-trial-in-appealrevision-supreme-court-196856.

82 *Rekha Murare v. State of West Bengal*, (Crl.) No. 7848 of 2019.

83 G.S. Bajpai & Ankit Kaushik, "A victory for crime victims", The Hindu, May 11, 2022.

Protection Measures & Safeguards: Existing Framework & Mechanism

Under the Constitution of India: There are several provisions in our Constitution which provide for the protection of victims' rights. The preamble itself deals with the noble principle of brotherhood which impliedly incorporates the idea of protecting victim rights. Article 14[84] of the Constitution dealing with the equality principle envisages the idea of equal care and protection to both victims and offenders. Article 21[85] of the Constitution conceives the idea of fair trial and investigation and hence guarantees safety and security to victims. Further, the Constitution acknowledges the responsibility of the state to secure public assistance to vulnerable groups in case of undeserved want[86] and the fundamental duty of every citizen to have compassion for living creatures which includes victims[87]. Hence, the constitutional scheme for compensatory victims is reflected in various rulings of the Supreme Court while interpreting Fundamental Rights or Directive Principles of State Policy or by way of exercising writ jurisdiction[88], SLP[89] and invoking extraordinary powers to do complete justice[90].

Under Indian Criminal Laws: The Code of Criminal Procedure, 1973 outlines several provisions dealing with different aspects of victim protection such as protection against torture and intimidation by the police[91], recording of statements of victims as witnesses by audio-video electronic means[92], conduct of in camera inquiry and trial proceedings of victims of rape at the place of residence or any other place of choice possibly by a women judge or Magistrate[93], medical examination of victim of rape[94], payment of reasonable expenses incurred by the victim as complainant or witness for the purpose of attending the court[95], provision for open court trial[96], recording of statement of a temporarily or permanently mentally or physically disabled person with the help of an interpreter or special educator[97],

84 The Constitution of India, 1950.
85 Ibid.
86 Id. art. 41.
87 Id. art. 51A cl. G.
88 Id. arts. 32, 226.
89 Id. art. 136.
90 Id. art. 142.
91 The Code of Criminal Procedure, 1973, s. 163, 171.
92 Id, § 160 proviso. Inserted by Act 5 of 2009.
93 Id, § 157 proviso. Inserted by Act 5 of 2009.
94 Id, § 164-A.
95 The Code of Criminal Procedure, 1973, s. 312.
96 Id, § 327.
97 Id, § 164(5) proviso. Inserted by Act 13 of 2013.

completion of investigation of rape offences within two months from the date of filing of FIR[98], completion of inquiry or trial in case of rape offences within two months from the date of filing of chargesheet[99], Free of cost medical treatment to victims of rape and acid attack by the government hospitals[100], protection to victims of custodial offences for e.g. issuance of prior notice to person against whom reasonable complaint has been made to appear before the police officer, Preparation of memorandum of arrest and informing the person arrested to notify about his arrest to his near ones, enabling the accused person to meet an advocate of his choice during interrogation[101], arrest of women only after sunrise and before sunset except under exceptional circumstances[102], payment of compensation to victim for any loss or injury caused by the offence[103] etc. There is a separate provision for a Victim compensation scheme [104]with the object of providing compensation to the victim or his dependents who have suffered loss or injury and require immediate aid and assistance even in those cases where the offender has not been traced or identified and trial has not been conducted[105]. The District or State Legal Service Authority is the body deciding the quantum of compensation to be awarded under the scheme on the recommendation of the court.[106] The trial court may even make recommendations for awarding compensation in cases where sufficient compensation for rehabilitation of the victim has not been awarded under section 357. The compensation paid under the scheme shall be additional i.e., apart from payment of fine to victims of rape or acid attack.[107] The Indian Penal Code, of 1860 also guarantees protection to victims by providing that whoever threatens to cause any injury to another person including damage to his reputation or property or injury to anyone in whom that person is interested with the intent to cause that person to give false evidence shall be penalized for a term which may extend to seven years or fine or both.[108] Disclosure of the identity of victims of rape or offences related to rape is a punishable offence under I.P.C. which will attract punishment with imprisonment which may extend to two years including a fine.[109]

98 Id, § 173(1A). Inserted by Act 5 of 2009.
99 Id, § 309 proviso. Inserted by Act 13 of 2013.
100 Id, § 357-C. Inserted by Act 5 of 2009.
101 Id, § 41-A, 41-B, 41-D. Inserted by Act 5 of 2009.
102 Id, § 46 proviso. Inserted by Act 5 of 2009.
103 Id, § 357.
104 Id, § 357-A. Inserted by Act 5 of 2009.
105 Id. § 357-A cl. 4.
106 Id. § 357-A cl. 2.
107 Id. § 357-B.
108 The Indian Penal Code, 1860 s. 195-A.
109 Id. § 228-A.

The Indian Evidence Act, of 1872 also offers protection to victims and witnesses by prohibiting indecent, scandalous or offensive questions being asked to them having the tendency of making them feel annoyed or humiliated[110]. The victim or witness is also afforded a defence of not being subject to arrest or prosecution if he is compelled to give any answer, except a prosecution for giving false evidence.[111] Victims are also guaranteed protection against irrelevant questions which have no connection to concerning the matter in issue.[112] Unnecessary questions to the victim of rape regarding her past character bearing no relevance to the issues of the case is prohibited.[113]

Under Special Laws: Anonymity protection to victims and witnesses has also been provided by some special legislations such as The Unlawful Activities (Prevention) Amendment Act, 2004[114], Juvenile (Care and Protection of Children) Act, 2000[115], The Protection of Children from Sexual Offences Act, 2012[116]. Compensatory relief to victims has also been guaranteed under various statutes such as the Probation of Offenders Act, 1958[117], Motor Vehicles Act, 1988[118] as well as SC and ST (Prevention of Atrocities Act), 1989[119]. Legal Services Authority Act, 1987 recognizes the victim's right to legal aid provided such a victim has a prima facie case to prosecute or defend.[120]

Major Pitfalls:

a. Despite the existence of several provisions in various legislations safeguarding victims' rights, there is no specific law in India for victims of crime.

b. The criminal justice system in India is accused-centric where victims are merely envisaged as mute spectators with limited roles to perform.

c. The problem of rampant corruption by public officials cripples the entire system which results in the victimization of people from every stratum of the population.[121]

110 The Indian Evidence Act, 1872, § 151, 152, NO .1, Acts Of Parliament, 1872 (India).

111 Id. § 132 proviso.

112 Id. § 148.

113 Id. § 155.

114 § 40.

115 § 21.

116 § 23.

117 § 5(1).

118 § 5.

119 V 4.

120 § 12, 13.

121 Mendelson B., "Role of victims in Indian Criminal justice system and Legislative measures taken", *Racolb Legal,* http://racolblegal.com/role-of-victims-in-indian-criminal-justice-system-and-legislative-measures-taken (Last visited on 28th July, 2022).

d. Heavy backlog of cases pending in courts leads to denial of victims' right to speedy justice.

e. Lack of awareness in people especially poor women and children, who remain uninformed about their rights exposes them to vulnerability which makes them easy victims of exploitation.[122]

f. Unsympathetic and insensitive attitude of law enforcement agencies towards victims and witnesses affects their willingness to participate freely in the criminal justice process and makes them reluctant in seeking redressal of their grievances.

g. Lack of transparency and accountability is another ill plaguing the system thereby impeding the implementation process which is one of the prime hurdles.

h. Assistance is provided to victims mostly by way of compensation or by repayment of medical treatment expenses or litigation costs whereas minimal attention is given towards providing adequate support services for victims of crime including counselling measures.

i. The Code of Criminal Procedure, 1973 prescribes a very narrow definition of the victim by merely prescribing suffering or loss to the victim as a result of an act or omission of the accused person and ignores the other reasons behind the same such as unnecessary harassment, inordinate delay, misuse or abuse of power or criminal process by the authorities under the code or any private person.

j. Victimization by abuse of criminal process which has been glaringly reflected in many earlier cases including the recent ones of Nupur Sharma[123] as well as Muhammad Zubair[124] do not find its mention anywhere.

k. The victim's right of representation by a private pleader is merely confined to the submission of written arguments after the closure of evidence and with the prior permission of the court.

Therapeutic Approach:

A crime has a lifelong impact on the victim and the victim is often left isolated with no idea to cope with the tragic aftermath especially societal trauma which makes them feel alienated. Hence, they get trapped in the vicious cycle of vindictive battle with no hope of

122 Pavithra V. & Rikhta Muralidhar, "Victim Rights in India: Is the Focus of the Criminal Justice System Shifting from the accused to the victim?", 4 *International Journal of Law Management & Humanities* 778 (2021).

123 *Nupur Sharma v. Union of India,* WP(Crl.) 239/2022.

124 *Mohammad Zubair v. State of U.P.*, Civil Appeal No. 8643 of 2009.

recovery.[125] The victim-oriented approach in the criminal justice system envisages the idea of restorative justice which focuses on therapeutic dealing thereby, healing the wounds of the society to restoring the confidence of the victims in the system. This approach endeavors to heal the society internally through a process of reconciliation by way of participation of victim, accused and community.[126]

VI. CONCLUSION & SUGGESTIONS

The Indian Criminal justice system is accused-centric and fails to provide an environment conducive for the efficacious participation of victims in the investigatory, prosecution and sentencing process. However, positive trends in the realm of victim rights have been observed in recent times both at the national and international level with the passing of the United Nations Declaration recognizing key components of victim rights and the efforts of the law commission and committees in making suitable recommendations with a view to incorporate the same in Indian criminal laws. The Indian judiciary has shown greater receptivity towards victims by recognizing their evolving role and hence, providing them a gamut of rights which has been reflected in various earlier pronouncements including the recent one of *Jagjeet Singh v. Ashish Mishra*. Restorative justice which calls for therapeutic dealing is the only amicable solution which will not merely alleviate the sufferings of the victim but also reinstate peace and harmony in society.

The following measures are suggested in this regard:

a. A separate robust legislation exclusively dealing with victims should be enacted.

b. Victims should be accorded a well-defined status under the criminal law so as to ensure an equitable balance between the rights of the accused and that of the victims.

c. There is an urgent need for the incorporation of suitable amendments in the Indian Criminal Procedure Code which not only provides for a comprehensive definition of victim but also addresses the needs of victims on various fronts.

d. Adequate training should be provided to the agencies of the criminal justice system so that they become more sensitive to the needs of the victims and handle their issues with utmost sincerity and empathy.

125 *Suresh & Ors. v. State of Haryana.*, Criminal Appeal No. 420 of 2012.
126 *Karan v. NCT.,* Criminal Appeal No. 352 of 2020.

e. Efforts should be made to provide assistance to victims by way of reparation and rehabilitation which requires the active participation of various stakeholders including civil society and can be ensured by sensitizing the victims about their rights and by offering them support services including counselling measures through training programs and awareness campaigns.

f. Need for the establishment of a centralized authority where victims can have direct access for seeking remedies.

REASSESSING SECTION 498A: EXPLORING JUDICIAL INTERPRETATIONS AND STATISTICAL DATA

Mr. Lalit Anjana*

VIPS Student Law Review
August 2023, Vol. 5, Issue 1, 90-108
ISSN 2582-0311 (Print)
ISSN 2582-0303 (Online)

https://vslls.vips.edu/vslr/

ABSTRACT

This article provides an in-depth analysis of section 498A of the Indian Penal Code (IPC), which deals with cases of cruelty against married women. The article examines the contentious issues surrounding the utilisation of this provision by critically analysing the definition, Supreme Court (S.C.) judgments and statistical data. The data highlights the increase in cases filed under section 498A over the years, but the low conviction rate remains a cause for concern. By examining landmark cases related to section 498A, this article seeks to identify the views of the Supreme Court. The article also argues that the use of mediation in cases related to section 498A is detrimental to the effectiveness of this provision. This is because mediation fails to address the underlying issues of power dynamics and patriarchal attitudes that contribute to cruelty in domestic relationships. The article highlights the need for a more comprehensive approach to address the issue of misuse of this provision rather than diluting its deterrent effect and efficacy. It concludes by highlighting the importance of adopting a more nuanced approach to dealing with cases under this provision, which should take into account the specific circumstances of each case rather than just relying on the numerical data provided by the NCRB. Overall, the article provides a critical analysis of Section 498A and emphasises the need to preserve the deterrence effect and efficacy of the law rather than diluting its efficacy.

Keywords: *women, cruelty, statistical analysis, judicial interpretation, mediation, sustainable development goal, battered woman syndrome.*

* Ph.D. Scholar, 3rd year, Faculty of Law, University of Delhi, Delhi, India.

I. INTRODUCTION

Globally, the problem of domestic abuse has been identified as a major threat to public health because of its catastrophic effects on the physical, reproductive, sexual, and mental well-being of women.[1] Traditionally, domestic violence against women has been considered a private matter solely concerning the family.[2] Women were often expected to endure such abuse to preserve the reputation and sanctity of the household and family.[3] However, the introduction of section 498A of IPC in 1983 is a significant and noteworthy attempt to criminalise domestic violence against married women by their husbands or family members.[4] The provision is non-bailable, non-compoundable, and cognisable, aimed at ensuring timely and effective redressal for victims.[5] However, within a decade of its introduction, there was growing resistance to section 498A of IPC, with complaints about its alleged misuse by women.[6]

In India, it is customary for women to relocate to their husbands homes and live with their husbands and their families. Therefore, section 498A of IPC was enacted to safeguard women against violence perpetrated by their spouses and family members. The provision recognises the vulnerability of women when they move out of their natal homes to a new family. Section 498A of IPC is a significant deterrent to those contemplating violence against married women, and its efficacy should not be undermined through case laws or legislation. It plays a crucial role in ensuring the safety and security of married women, especially when they are in a new environment with a completely different set of people. Therefore, upholding the efficacy and deterrent effect of section 498A of IPC is imperative.

In India, the situation regarding violence against women is alarming. A total of 4,28,278 cases of "crime against women" were reported in 2021, compared to 371,503 in 2020, showing an increase of 15.3% as per the report of 2021. [7]

1 Meghna Bhat and Sarah E. Ullman, "Examining Marital Violence in India" 15 (1) *Trauma, Violence & Abuse* 57 (2014).

2 Editorials, "Victimised Twice Over" 44 (46) *Economic and Political Weekly* 6 (2009).

3 *Ibid*.

4 Meena Rao, "Ramifications of harassment of women" 43 (3) *Journal of the Indian Law Institute* 315 (2001).

5 The code of Criminal procedure, 1973, Schedule- I.

6 Malini Bhattacharya, "Can Law Help Women to Survive?" 42 *Social Scientist* 11 (2014).

7 National crime records Bureau (NCRB), "Crime in India 2021 Statistical volume-1" page no. xii (Ministry of Home Affairs, 2022).

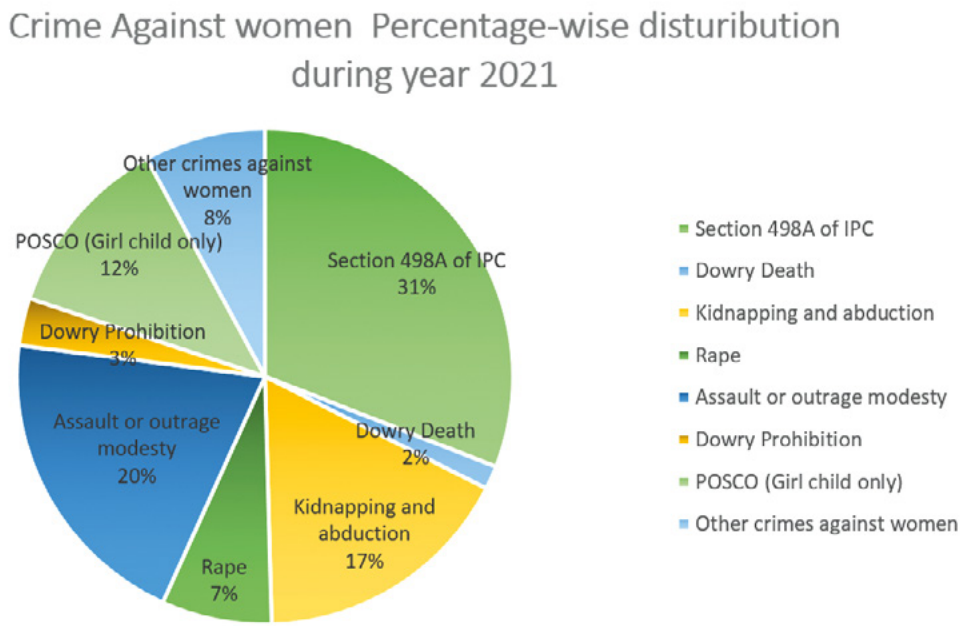

Fig 1. Source: National Crime Records Bureau (NCRB).

The largest number of cases filed under the "crime against women" category as per the IPC were related to "Cruelty by Husband or His Relatives" under section 498A of IPC.[8] Given the persistently high percentage of violence against women being inflicted by husbands or husbands' relatives, despite the implementation of women-centric civil and criminal laws, it is crucial to analyse the current situation comprehensively.

II. THE NECESSITY OF ADDRESSING SECTION 498A DILUTION

In India, section 498A of IPC has empowered women and prompted them to come out and lodge complaints. Women initially resisted speaking out against harassment out of concern that they wouldn't be heard. Women are now speaking out against their husbands or in-laws rather than remaining silent. There exist multiple justifications for maintaining the integrity of section 498A of IPC, and the most significant among them in the contemporary era are:

Suicide: The Indian legal system acknowledges that women may be compelled to commit suicide due to dowry harassment or cruelty inflicted by their husbands or their husband's relatives. In response, section 304B of IPC, as well as sections 113A and 113B under the Indian Evidence Act, were enacted. These provisions take into account the social realities

8 *Id.,* at 211-228.

of the situation and establish a presumption of abetment of suicide or dowry death against the husband or his relatives. However, it is important to consider the circumstances that drive a woman to commit suicide. It is essential to avoid diluting section 498A of IPC, which serves as a crucial measure in preventing suicides and providing immediate relief to victims of domestic violence. The timely and effective action taken under this section can potentially save the lives of women who may feel driven to take their own lives. Therefore, it is important to maintain a strong and effective implementation of this section to protect the rights and safety of victims of domestic abuse.

Battered woman syndrome: "Battered Woman Syndrome" (BWS) is a notion that describes psychological and behavioural responses displayed by battered women in response to domestic violence.[9] BWS explains why some women cannot leave abusive relationships and may resort to extreme measures, such as killing their abuser, in certain circumstances.[10] The cycle of violence theory used to describe BWS includes three phases: the "tension-building phase," where minor forms of abuse occur, leading to the "acute battering phase," where the abuse becomes more severe, followed by the "contrition phase," in which the abuser apologises and promises to change, but the cycle often repeats itself.[11] Battered women trapped in the cycle of violence often develop "learned helplessness," causing them to become passive and believe that there is no escape from abuse.[12] In some cases, this can lead them to perceive that ending their abuser's life is the only way out of the situation.[13]

The BWS is not legally recognised in India, but some high courts have acknowledged and considered this concept in certain cases.[14] This is a positive step towards acknowledging the harmful effects of domestic violence on women. The BWS has been acknowledged and recognised in numerous nations worldwide, and criminal laws in various countries have been amended to accommodate the unique situation of the BWS.[15] This syndrome illustrates how prolonged and continuous violence can have detrimental effects on women, leading to them becoming passive and, in some cases, even killing their abusive partners. Diluting

9 Regina A. Schuller and Neil Vidmar, "Battered Woman Syndrome Evidence in the Courtroom: A Review of the Literature" 16 (3) Law and Human Behavior 274 (1992).

10 *Ibid.*

11 *Ibid.*

12 *Id.,* at 275.

13 *Ibid.*

14 Keerthana Medrarametla, "Battered women: The gendered notion of defences available" 13 *Socio-Legal Review* 110 (2017).

15 Penal Reform International and Linklaters LLP, "Women who kill in response to domestic violence: How do criminal justice systems respond? A multi-jurisdictional study by Linklaters LLP for Penal Reform International" (2009).

the effectiveness of section 498A of IPC and focusing on family preservation through mediation and reconciliation may make women more vulnerable to repeated abuse. Women who experience prolonged violence may also develop trauma and mental health issues that can impact their ability to leave an abusive relationship and lead to the development of BWS. It is crucial to recognise the effects of domestic violence on women and provide them with the necessary support and resources to break the cycle of violence and appropriately punish the abusers.

Sustainable Development Goal (SGD): SDG-5 aims to promote gender equality, with targets 5.1 and 5.2 specifically focusing on ending all forms of discrimination and violence against women in both the private and public spheres.[16] However, in India, the SDG-5 index score for 2020-21 was only 48, categorising it as an aspirant or underperformer.[17] Achieving a score of 100 will require the effective implementation of laws and a change in societal attitudes towards women. It is essential that section 498A of IPC, a crucial provision that acts as a deterrent and provides immediate relief to prevent further violence against women, is not diluted to achieve the desired results. By effectively enforcing laws that protect women and provide immediate relief, we can work towards achieving the SDG 5 targets and ensuring that all women have a safe environment free from discrimination and violence.

III. COMPREHENSIVE ANALYSIS OF THE EVOLUTION AND DEFINITION

In India, domestic violence is not an unknown phenomenon.[18] In response to the issue of domestic violence, significant amendments were made to our criminal laws in the 1980s, and prior to 1983, there were no specific laws addressing violence or abuse within marriage.[19] However, husbands or relatives of the husband could be tried and punished for their actions under provisions of IPC that dealt with abetment to suicide, murder, hurt, grievous hurt and unlawful detention.[20] In 1983, section 498A was added to the IPC to punish the husband

16 NITI Aayog, "SDG India index & dashboard 2020-21 partnerships in the decade of action" 101 (March, 2021).

17 *Id.,* at 104.

18 Indira Jaisingh, "Domestic violence and law", 1 *Journal of National Human Rights Commission* 73 (2002).

19 Sawmya Ray, "Legal Constructions of Domestic Violence" 55 (3) *Sociological Bulletin* 430 (2006).

20 Madhu Kishwar, "Law against Domestic Violence: Underused or Abused?" 15(2) NWSA Journal 113 (2003); Agnes, "Protecting Women against Violence? Review of a Decade of Legislation 1980-89", 27 (17) Economic and Political Weekly 25 (1992).

or his relatives for cruelty to wives.[21] In this particular section, the act of matrimonial cruelty has been designated as a cognisable and non-bailable offence, which may lead to imprisonment of up to three years and a monetary fine.[22]

The current definition of "cruelty" under section 498A of IPC only refers to violence experienced by married women at the hands of their husbands or their husband's relatives.[23] However, this fails to acknowledge the common violence that unmarried women, children, and married women experience from other male relatives within their households.[24] Further, women encounter different types of violence, such as sexual, physical, psychological or economic. The term "cruelty" under section 498A of IPC encompasses only mental and physical harm, as well as any form of harassment that is linked to a request for dowry; therefore, the definition of "cruelty" is limited and vague, posing a significant concern as it fails to encompass other forms of violence women encounter in domestic settings.[25] It is necessary to broaden the explanation of the term "cruelty", which should include the diverse range of violent acts that women may face in the domestic setting.[26] The "Protection of Women from Domestic Violence Act" of 2005 (PWDVA) addresses significant gaps previously present, primarily through providing civil remedies such as protection orders,[27] residence orders[28] and monetary relief,[29] to name a few. The PWDVA aims to safeguard women and children subjected to violence by their family members.

21 The Indian penal code, 1860, s. 498A, "Husband or relative of husband of a woman subjecting her to cruelty. Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. Explanation. For the purpose of this section, "cruelty" mean-

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand."

22 *Supra* note 5.

23 Jayna Kothari, "Criminal Law on Domestic Violence: Promises and Limits" 40 (46) *Economic and Political Weekly* 4844 (2005).

24 *Ibid.*

25 Indira Jaising, "Bringing Rights Home: Review of the Campaign for a Law on Domestic Violence" 44 (44) *Economic and Political Weekly* 51 (2009).

26 A comprehensive and all-encompassing definition would prevent subjective evaluations by police officers and courts in determining whether violent acts constitute cruelty. The definition of cruelty needs to be aligned and updated with the definition of domestic violence as outlined in PWDA. *See*, The protection of women from domestic violence Act, 2005, s. 3.

27 *Id.,* at s. 18.

28 *Id.,* at s. 19.

29 *Id.,* at s. 20.

A comprehensive civil law that offers extensive protection and redressal measures and a criminal law that provides remedies in the form of imprisonment and fines are essential for ensuring the complete safety and protection of women subjected to domestic violence. Implementing these laws should be accompanied by effective enforcement mechanisms and awareness campaigns to ensure women are safe and live without fear of violence.

IV. STATISTICAL ANALYSIS: THE BIGGER PICTURE

The potential to raise public awareness and show domestic violence's true scope and prevalence depends on a detailed statistical investigation.[30] The National Crime Records Bureau maintains records on "Crimes against Women."[31]

Table 1: Year-wise data of individuals dealt under section 498A of IPC.[32]

Year	Charge-sheeted	Arrested	Convicted	Discharged	Acquitted
2014	1,96,893	2,25,648	16,360	5,428	94,765
2015	1,71,605	1,87,067	16,857	2,064	88,203
2016	1,68,053	1,98,851	13,511	2,198	82,075
2017	1,82,285	1,35,340	13,929	3,994	84,679
2018	1,69,604	1,10,789	12,665	2,974	70,171
2019	2,07,715	1,42,808	11,689	5,716	74,192
2020	1,98,807	1,20,306	6,487	2,396	35,998
2021	2,53,432	1,43,266	8,537	1,927	48,889

Source: NCRB

30 Renuka Viswanathan, "Development, Empowerment and Domestic Violence: Karnataka Experience" 36 (24) *Economic and Political Weekly* 2177 (2001).

31 Srimati Basu, "Organising Strategies of the Indian Men's Rights Movement" 50 (44) *Economic and Political Weekly* 69 (2015).

32 National crime Record Bureau (NCRB), "Crime in India 2014" Table 5.7 and 5.8, at page 168-172 (Ministry of Home Affair, 2015); NCRB, "Crime in India 2015" table 5.7, 5.8, at page 170-173 (Ministry of Home Affair, 2016); NCRB, "Crime in India 2016 statistics" Table 3A.9. at page no. 156-157 (Ministry of Home Affair, 2017); NCRB, "Crime in India 2017 statistics volume-I" Table 3A.9. at page no. 238-239 (Minsitry of Home Affairs, October, 2019); NCRB, "Crime in India 2018 statistics volume -1" Table 3A.9. at page no. 238-239 (Minsitry of Home Affairs, December, 2019); NCRB, "Crime in India 2019 statistics volume -I" Table 3A.9. at page no. 238-239 (Minsitry of Home Affairs, 2020); NCRB, "Crime in India 2020 statistics volume-I" Table 3A.9. at page no. 242-243 (Minsitry of Home Affairs, 2021); NCRB, "Crime in India 2021 statistics volume-I" Table 3A.9. at page no. 254-256 (Ministry of Home Affairs, 2022).

The data provided shows the number of persons charge-sheeted, arrested, convicted, discharged, and acquitted under section 498A of IPC over 2014-2021. The data shows a fluctuation in the number of persons charge-sheeted and arrested over the years. The highest number of persons charge-sheeted were in 2021, followed by 2019. The highest number of arrests was made in 2014, followed by 2016. However, the number of arrests has steadily decreased over the years, whereas the person charge-sheeted increased over the period. The number of convictions has been consistently low compared to the number of persons charge-sheeted and arrests made. The number of persons charge-sheeted has been increasing over the years, and the number of persons discharged and acquitted has shown a notable reduction. Based on the data, it appears that while a large number of cases are being filed and arrests are being made under section 498A of IPC, the number of convictions is relatively low. This discrepancy points to a severe issue that requires urgent attention and resolution. There can be several factors possibly contributing to this trend, such as compromise, pressure from relatives, and false charges. Therefore, to understand the underlying issue, it is essential to conduct comprehensive research rather than relying solely on numerical data, which may only highlight the area of concern without providing a complete picture. [33] In the *Social Action Forum for Manav Adhikar & Another v. Union of India,*[34] it was contended that no concrete data is available to support the claim that section 498A is being misused. Therefore, reducing the stringency only on the basis of unproven data and claims is not the correct approach.

The 2019-21, National Family Health Survey (NFHS-V) indicates that attitudes towards wife beating have shifted since NFHS-IV.[35] For women, there has been a significant decrease in agreeing with justifications for wife beating, dropping by seven percentage points from 52% in NFHS-IV to 45% in NFHS-V. However, there has been a two percentage point

33 According to a report, only 2% of the accused are convicted among 100 cases investigated under Section 498A. Convictions have been reported when Section 498A is invoked in conjunction with Sections 304B and 302 after the victim's death. However, no convictions have been reported in cases filed solely under Section 498A. In five cases, the parties resolved the matter through mutual agreement. In instances where the defendants were acquitted, the complainants had suffered physical and psychological abuse, but evidence was insufficient to prove the alleged abuse. In many cases, the victims endured abuse for three or more years before invoking Section 498A. Victims of domestic violence seeking assistance from various agencies are often advised to reconcile with their abuser or tolerate the situation before filing a formal complaint. Individuals who have experienced violence consider Section 498A as primary criminal provision to safeguard them from abusers mainly in private sphere. *For more detailed information See*, Centre for Social Research, A Research study on the use and misuse of Section 498A of the Indian Penal Code (2005), available at: https://awomaninindia.files.wordpress.com/2010/07/csr-report-summary.pdf (last visited on Jan. 15, 2022).

34 (2018) 10 SCC 443.

35 International Institute for Population Sciences (IIPS) and ICF, "National Family Health Survey (NFHS-5), 2019-21" (Ministry of Health and Family Welfare, 2022).

increase in men agreeing with justifications for wife battering, rising from 42% in NFHS-4 to 44% in NFHS-V.[36]The survey also reveals that out of the 14,410 married women surveyed, a significant majority of 88.7% never sought help from anyone in cases of violence committed by their husbands. Only 11.3% of women sought help from any source. The sources of help sought by women who experienced violence were primarily from their own families, friends, husbands' families, or neighbours. In contrast, help from the police constituted only 6.3%.[37] It should be acknowledged that numerous women are hesitant to seek assistance from law enforcement or the judicial system to ensure their protection.[38] This is because they are aware that once their husbands are incarcerated, they will have to endure an arduous battle, and many women are mostly unprepared to handle such a situation.[39] Instead, they often seek support from their families, who can act as mediators and assist them in achieving a more favourable resolution.[40]

The increase in the percentage of men justifying wife beating is a major concern in a patriarchal country like India, which needs to be addressed through targeted interventions and education programs. It is essential to identify the underlying concerns depicted by NCRB and NFHS data and develop effective measures to address them, such as strengthening legal provisions, improving law enforcement, conducting more research and enhancing awareness and education about women's rights and gender-based violence.

V. SUPREME COURT JUDGEMENTS: INSIGHTS

The Supreme Court's ruling, along with the recommendations of the Justice Malimath Committee and the Law Commission of India, indicates that section 498A of IPC is often misused as a tool for revenge rather than being used for its intended purpose of protection.[41] The Justice Malimath Committee suggested that, in order to address this issue, section 498A of IPC should be made both compoundable and bailable.[42] Similarly, the Law Commission of India recommended that it should be made compoundable, which would allow the parties involved to reach a settlement and avoid prolonged legal battles.[43]

36 *Id.,* at. 579, 586.

37 *Id.,* at 674-675; *see generally,* Flavia Agnes, "Section 498A, Marital Rape and Adverse Propaganda," 50 (23) *Economic and Political Weekly* 14 (2015). In this article it is explained why less women are motivated to file police complaints.

38 *Supra note* 20, at 120.

39 *Ibid.*

40 *Id.,* at 121.

41 Prashant k Trivedi and Smriti Singh, "Fallacies of a Supreme Court Judgment: Section 498A and the Dynamics of Acquittals" 49 (52) *Economic and Political Weekly* 90 (2014).

42 *Ibid.*

43 *Ibid.*

In *Sushil Kumar Sharma v. Union Of India And Ors*,[44] S.C. upheld the constitutional validity of section 498A of IPC and emphasised that the provision was introduced to combat the menace of dowry deaths and cruelty to married women. The court also acknowledges the possibility of the provision being misused for personal vendettas and harassment. The court suggests that the legislature may need to resolve the issue of alleged misuse of this section.

The fundamental goal should be to find the truth, punish the wrongdoers, and protect those who are not guilty. The truth must be sought, and the innocent must be protected. The court, in this case cautioned against making false accusations frequently, as it may result in a lack of aid and protection when a genuine case arises ('cry wolf' metaphor). The provision was designed to serve as a protective measure rather than a tool for misuse. Overall, the court believes that while the prohibition of harassment and cruelty is essential, it should be used carefully to avoid potential misuse.

In *Arnesh Kumar v. state of Bihar,*[45] the court referred to statistical data and noted that the percentage of charge-sheeting in cases related to section 498A of IPC is notably high at 93.6%, whereas the rate of conviction is significantly low at only 15%. This observation implies that a noteworthy portion of the cases initiated by females may lack sufficient evidence or justification. The court stated that enforcing mandatory arrests in such cases is extremely capricious. The court delivered a resolute verdict in regard to section 498A, stating that:

> *"The fact that Section 498-A is a cognisable and non-bailable offence has lent it a dubious place of pride amongst the provisions that are used as weapons rather than shield by disgruntled wives. The simplest way to harass is to get the husband and his relatives arrested under this provision. In a quite number of cases, bed-ridden grand-fathers and grand-mothers of the husbands, their sisters living abroad for decades are arrested."*[46]

44 (2014) 8 SCC 273. In this case, the court while referring to Mafatlal Industries Ltd. and Ors. v. Union of India and Ors., [1997] 5 SCC 536, and Collector of Customs v. Nathella Sampathu Chetty, [1962] 3 SCR 786, observed that the mere possibility of abuse of a statute, which is otherwise deemed valid, does not render it invalid. It is not justifiable to consider a provision as procedurally or substantively unreasonable solely based on the potential for abuse by those responsible for its administration.

45 (2014) 8 SCC 273.

46 *Ibid.*

In this case, S.C. laid down a certain guideline to be followed and, as per guidelines, an arrest under section 498A IPC to be made after proper investigation and satisfaction regarding the geniuses of the complaint and further held that magistrates should not order detention in a mechanical and causal manner. To reduce automatic and arbitrary arrests under section 498A of IPC, State Governments were instructed to provide police officers with a checklist of parameters to consider before making an arrest. When presenting the accused to the Magistrate for extended custody, the officer must provide a completed checklist and evidence for the arrest. The Magistrate must carefully review the report and authorise detention only after being satisfied with its contents. The accused must be served a Notice of Appearance within two weeks of case initiation, which the Superintendent of Police can extend with written reasons. Non-compliance with the instructions may result in judicial and police officers being held accountable for their actions and facing serious repercussions.

In *Rajesh Sharma v. State of U.P,*[47] S.C was faced with the question of whether guidelines were necessary to prevent the abuse of section 498A of IPC. The court, in this case, upheld the conviction of those found guilty under section 498A of IPC. The court also made references to NCRB reports and law commission reports.

The following guidelines were then laid out.[48]

a) To form a "family welfare committee" in every district, consisting of at least three members, to review complaints under section 498A of IPC. The committee will be made up of volunteers, social workers, retirees, and citizens who are willing to serve. The committee report must be submitted to the appropriate authority within one month of receiving the complaint. Until the committee submits its report, no arrests should be made.

b) Designate an Investigating Officer to investigate complaints under section 498A, and such an officer must undergo training for at least one week.

c) Bail applications must be decided as soon as possible.

d) Impounding of passports or issuing of Red Corner Notices should not be done routinely for individuals residing outside India.

e) All related cases arising from matrimonial disputes may be combined and reviewed appropriately.

47 2017 SCC OnLine SC 821.

48 *Id.,* at Para 19.

f) Personal appearances of family members, particularly out-of-state members, may be exempted or allowed via video conferencing.

g) These directions are not to be applied in cases involving physical injuries or death.

This ruling by S.C. is one of several rulings to limit the scope of section 498A of IPC.[49] There are several concerns regarding the validity of the directions provided in this ruling. The composition of Family Welfare Committees is characterised by a notable lack of seriousness, as evidenced by the composition of said committees. The guidelines also come with a caveat that makes them ineffective in cases where the victim has suffered from mental abuse, raising serious doubts about their practical utility. Despite the enactment of section 498A, instances of matrimonial cruelty resulting in severe mental trauma or suicide due to such mental trauma are still prevalent. It is, therefore, unacceptable to trivialise the impact of mental cruelty and suggest that it can be resolved through ordinary civil procedures by Family Welfare Committees, given that psychological violence can have devastating effects on victims.[50]

In *Kahkashan Kausar @ Sonam v. The State Of Bihar*,[51] The supreme court held that legal professionals must uphold noble traditions and approach section 498A of IPC cases as fundamental human issues, assisting parties in reaching a mutually agreeable resolution.[52] It is important to fulfil responsibilities to preserve the social fabric and promote peace within the community, and multiple cases should not arise from a single complaint.[53] The goal of the justice system is to ascertain the truth, hold the guilty accountable, and protect the innocent.[54] In matrimonial cases, courts must exercise caution and consider practical realities when addressing complaints, especially when accusations of harassment involve acquaintances residing in different cities or infrequent visitors, and scrutiny of allegations must be meticulous and cautious.[55]

The Supreme Court's efforts to address the perceived misuse of section 498A of IPC may have been well-intentioned. Still, the unintended consequences of their actions have created

49 Suman Dash Bhattamishra, "Courts, police and criminal justice in cases of section 498-a: an assessment", available at: http://www.dehradunlawreview.com/wp-content/uploads/2023/02/Paper-5-Courts-Police-and-Criminal-Justice-in-Cases-of-Section-498-A-An-Assessment.pdf (last visited on Jan. 12, 2023).

50 *Rupali Devi Vs. State of Uttar Pradesh and Ors.,* (2019) 5 SCC 384, at para 14.

51 2022 SCC OnLine SC 162.

52 *Id.,* at para 6.

53 *Ibid.*

54 *Id.,* at para 35.

55 *Ibid.*

an additional barrier for women seeking legal recourse. However, it is important to note that the challenges faced in delivering justice to female victims of violence are not limited to inadequacies in legal frameworks but rather stem from deeper issues within the criminal justice system and patriarchy.

VI. MEDIATION: OVERLOOKING THE REALITIES

The efficacy of mediation in achieving mutual agreement appears problematic from the complainant's standpoint.[56] Although section 498A of IPC is a non-compoundable provision, legal strategies have developed to circumvent it.[57] Prioritising the preservation of family structures over dispensing justice for the victims may prove detrimental to survivors of violence.[58] It may result in delaying the case, dissuading survivors from pursuing legal action, and minimising the gravity of the violence perpetrated against them. Additionally, it may promote the idea of forgiving the offender and reconciling with them, putting the survivor at risk of future harm. Requiring mediation in cases where a victim of domestic violence has sought court intervention could expose the victim to further psychological abuse due to potential interactions with the abuse. Additionally, this requirement may send a message that the victim's traumatic experiences are not being taken seriously, potentially leading to feelings of further isolation and disempowerment.

In *Jitendra Raghuvanshi & Ors v. Babita Raghuvanshi & Anr,*[59] it was held that courts have a legal responsibility to ensure that marital conflicts are resolved fairly and justly, especially considering their growing prevalence. In instances where the offences are non-compoundable and relate to matrimonial disputes, the possibility of quashing the FIR, complaint, or any ongoing criminal proceedings is not precluded by section 320 of the Code of Criminal Procedure, provided that the parties have voluntarily and without coercion resolved the matter amicably to the satisfaction of the court.[60]

56 Prashant K Trivedi and Smriti Singh, "Fallacies of a Supreme Court Judgment: Section 498A and the Dynamics of Acquittals" 49 (52) *Economic and Political Weekly* 95 (2014).

57 *Ibid.*; In case of Section 498A of IPC, parties can be referred to mediation by the Magistrate or any other court trying the offense. *See generally* guidelines issued by the Delhi Mediation Centre, available at: https://delhicourts.nic.in/dmc/guidelines.htm (last visited on Jan. 12, 2023); *also see* K. Srinivas Rao v. D.A. Deepa, civil appeal no. 1794 of 2013; However, only the High Court can quash a FIR or proceedings under Section 482 of CrPC, provided that the complainant files an affidavit affirming that the dispute with the accused has been resolved amicably. *See,* B.S. Joshi & Ors. v. State of Haryana & Anr, Appeal (Crl.) 383 of 2003, *also see*, Ajay Kumar And Others v. State of Punjab And Others, CRM M-8705 of 2012.

58 *Id.,* at 97.

59 (2013) 4 SCC 58.

60 *Id.,* at para 12; *also see,* Gurudath K v. State of Karnataka, criminal petition no. 7258/2014, at para 11; Gian Singh v. State of Punjab & Anr, special leave petition (Crl.) no. 8989 of 2012, at para 5.

In *K. Srinivas Rao v. D.A Deepa,*[61] It was held that the offence under section 498A of IPC is non-compoundable. Nonetheless, the criminal court may recommend mediation as a resolution in certain circumstances, provided that the parties are agreeable and the court deems that grounds for settlement exist. This approach does not undermine the strictness, effectiveness, or intention of this section but rather seeks to identify opportunities for marital conflicts to be resolved fairly and expediently. It is incumbent upon judges, who possess specialised knowledge of the matter, to take measures to prevent the offending party from exploiting the mediation process to evade legal consequences. If a settlement cannot be reached, the person may proceed with lodging a formal complaint without prejudice to either party. Settlement of criminal cases may save the parties involved from the burdensome legal process and associated difficulties and could also alleviate the burden on the court system, thereby serving the greater good of the public.[62]

The court's decision to permit mediation in cases under section 498A of the IPC may be perceived as a deviation from legislative intent, as the statute limits the use of mediation mechanisms mainly in civil cases.[63] It could be argued that the court exceeded its judicial mandate by sanctioning mediation in criminal cases, which is not explicitly authorised by the statute.[64] Nevertheless, the court's decision may have been prompted by the goal of promoting efficient and equitable dispute resolution, easing the burden on the court system, and the directives as to mediation be considered in cases where there is a possibility of resolving the dispute without causing further harm or injustice to the victim has demonstrated a balanced approach in judgments by the supreme court, ensuring that the victim's and accused's rights and interests are protected through this neutral approach and directives. However, it can contend that allowing mediation in section 498A cases diminishes the section's deterrent effect and could contribute to the normalisation of domestic violence and patriarchy, as women may be dissuaded from reporting violence for fear of retaliation or other negative repercussions.

61 AIR 2013 SC 2176.

62 *Id.,* at para 35; *also see* para 36, the court, has issued a directive to criminal courts handling complaints under Section 498-A of IPC, stating that they should refer the parties to a mediation center if potential grounds for settlement exist, and both parties are agreeable. This referral may occur at any stage, particularly before the complaint is taken up for hearing, but it is essential to ensure that the rigor, purpose, and effectiveness of Section 498-A of IPC are not compromised during this process.

63 Kritika Vohra, "Matrimonial Disputes in India: Trends from the Bangalore Mediation Centre" 52 (45) *Economic and Political Weekly* 62 (2017).

64 *Ibid.*

VII. MEDIATION AND COMPOUNDING: AN ANALYSIS OF DATA

In the context of mediation, it is important to highlight that a significant number of legal disputes are resolved through court-annexed mediation facilities. Compared to a court trial, the mediation process is characterised by its shorter duration, reduced burden, and avoidance of unnecessary delays.[65] In the case of *K. Srinivas Rao*, the Apex court determined that its experience indicates that approximately 10 to 15% of matrimonial disputes are resolved within the court by utilising the services of various mediation centres. In this case, the apex court also stated that the disputes should be promptly directed to mediation centres at the earliest stage.[66] There is a dearth of comprehensive data and research pertaining to the cases referred to and the success rates observed in mediation centres under section 498A of IPC. Despite this constraint, accessible data is used to gain an overview of the cases referred to and the success rate of mediation in section 498A of IPC proceedings.

The total number of cases referred to mediation in Delhi as per the report from 2005 to 2023 were 399,254, and the total number of cases settled were 199,551, with a success rate of 49.99%.[67] A comprehensive study was conducted to perform an in-depth analysis of cases from 2005 to 2008 at various mediation centres in Delhi. In particular, the 'Karkardooma' mediation centre received a total of eight cases pertaining to section 498A/406 of IPC. Out of these cases, five were successfully settled, showcasing an impressive success rate of 71.43%.[68] At the 'Tis Hazari' mediation centre, there were 1164 cases referred, primarily concerning matrimonial disputes without specifying section 498A/406 of IPC. Among these cases, 426 were settled, leading to a success rate of 49.80%.[69] In a study conducted at the Bangalore mediation centre, it was found that during the period from 2011 to 2016, there were 1,875 matrimonial cases (domestic violence cases) referred for mediation. Out of these, 1,046 cases were successfully settled, resulting in a settlement rate of 44.21%.[70] During the conference proceedings held at the National Judicial Academy in Bhopal, Justice Sudhir Kumar Jain provided statistical data demonstrating that a total of 11,439

65 Neelam Tyagi, *Women, Matrimonial Litigation and Alternative Dispute Resolution (ADR)* 159 (Springer, 2021).

66 *Supra* note 61, at Para 32.

67 Delhi Mediations Center, statistical report, available at: https://delhicourts.nic.in/dmc/statistical.htm (last visited Aug. 5, 2023).

68 K. N. Chandrasekharan Pillai, Jaya V. S and Vishnu Konoorayar. K, "ADR: status/ Effectiveness study" 87 (2014), available at: https://www.ssoar.info/ssoar/handle/document/41034 (last visited on Aug. 5, 2023).

69 *Id.*, at 86.

70 Kritika Vohra, "Mediating Matrimonial Disputes in India: Trends from the Bangalore Mediation Centre" 52 (45) *Economic and Political Weekly* 62 (2017).

cases were referred for mediation under section 498A/406 of IPC. Out of the cases, 4,328 were effectively resolved, yielding a success rate of 37.77%.[71] The data analysis reveals an approximate 50% success rate in cases referred to mediation centres, encompassing section 498A/406 of IPC and other matrimonial disputes. This underscores the effectiveness of mediation. However, it is essential to carefully consider the mediation's effectiveness while ensuring that only suitable cases are referred to avoid injustice, particularly to women facing grave danger due to violence.

The Law Commission of India, in its 154th report (1996) and its 24th report on section 498A of IPC, recommended making the offence under section 498A of IPC compoundable with the court's permission.[72] When examining the data provided by NCRB, it becomes evident that in cases under section 498A of IPC, instances of compounding or compromise of the offence by the court were present. Therefore, it is essential to analyse the data to understand the number of cases that went to trial and how many cases were resolved through compounding or compromise.

71 Justice Sudhir Kumar Jain, *Optimal approaches for adjudicating family disputes' encouraging mediation in family disputes: role of referral judges,* Conference for district judiciary on matrimonial laws (P-1317), Held on (National Judicial Academy, Bhopal, 20th November, 2022), available at: https://nja.gov.in/Concluded_Programmes/2022-23/P-1317_PPTs/3.Matrimonial%20mediation.pdf (last visited on Aug. 06, 2023).

72 Law Commission of India, "243rd Report on Section 498A of IPC", Report No. 243, 17-18 (2012).

Table 2: Year-wise data of cases compounded or compromised by the court under section 498A of IPC.[73]

Year	Cases sent for trial	Cases compounded or compromised	Percentage of cases compounded or compromised
2014	97081	8922	9.19
2015	90971	10318	11.34
2016	91810	8437	9.19
2017	91048	9925	10.91
2018	82837	9693	11.68
2019	96512	8397	8.70
2020	96513	5640	5.84
2021	114304	9126	7.98

Source: NCRB

The data indicates that a significant number of cases are not resolved through compounding or compromise compared to cases sent for trial. In light of the fact that approximately 9% of total cases are compounded or compromised, it is evident that such actions are not taken recklessly. Compounding offences with the court's permission seems to be a viable option in appropriate and selected cases. However, a thorough examination of the cases and the reasons for compounding is crucial for gaining a comprehensive understanding. Conducting further analysis can offer valuable insights into the effectiveness and suitability of compounding in these situations.

An argument can be made that the gravity of the offence should not be diminished by allowing it to be compoundable. The potential for compounding the situation, even with the court's permission, could potentially place additional pressure on the woman to reach a compromise. The non-bailable nature of the offence should be maintained, but it may be

73 National crime Record Bureau (NCRB), "Crime in India 2014" Table 4.5, at page 128 (Ministry of Home Affair, 2015); NCRB, "Crime in India 2015" table 4.5, at page 129 (Ministry of Home Affair, 2016); NCRB, "Crime in India 2016 statistics" Table 3A.7. at page no. 152 (Ministry of Home Affair, 2017); NCRB, "Crime in India 2017 statistics volume-I" Table 3A.7. at page no. 226-227 (Minsitry of Home Affairs, October, 2019); NCRB, "Crime in India 2018 statistics volume -1" Table 3A.7. at page no. 226-227 (Minsitry of Home Affairs, December, 2019); NCRB, "Crime in India 2019 statistics volume -I" Table 3A.7. at page no. 230-231 (Minsitry of Home Affairs, 2020); NCRB, "Crime in India 2020 statistics volume-I" Table 3A.7. at page no. 242-243 (Minsitry of Home Affairs, 2021); NCRB, "Crime in India 2021 statistics volume-I" Table 3A.9. at page no. 254-256 (Ministry of Home Affairs, 2022).

allowed to be compounded with the court's permission in suitable instances. Furthermore, immediate arrest should only be executed if the offence is severe and directly impacts the victim's life.

VIII. CONCLUSION AND SUGGESTIONS

The proverb, "Prevention is always better than cure", underscores the need to proactively address concerns to prevent escalation into more significant problems. Likewise, marriage relationships entail the union of distinct individuals possessing unique personalities, thereby occasionally giving rise to disagreements and conflicts as the relationship progresses. If left unresolved, these conflicts can escalate into acts of violence or lead to legal consequences, such as the filing of criminal cases or divorce proceedings. In such circumstances, the utilisation of expert assistance in the form of marriage counselling can prove advantageous. Marriage counselling offers a secure environment wherein couples can resolve their issues and gain insight into the underlying factors contributing to their disagreements, disputes, or inclinations towards aggression. Through marriage counselling, couples can proactively address conflicts at an early stage, which enhances their ability to effectively settle their disputes and diminishes the probability of divorce or instances of domestic violence.

In legal proceedings, mediation offers a highly beneficial approach to resolving disputes. In cases falling under section 498A of IPC, both spouses, along with their families and children, often endure a challenging journey. Unfortunately, even a short term of imprisonment can significantly hinder the possibility of reaching a compromise, despite the potential for mediation to resolve the matter amicably. Therefore, seeking amicable resolutions through mediation becomes crucial in appropriate cases, as it can create a more conducive environment for the overall welfare of the parties involved.

To ensure a fair and effective mediation process, it is critical to establish a well-structured procedure and ensure that all officials involved are adequately qualified and trained. The victim should not face harassment or threats during the process, and measures must be in place to prevent the accused from tampering with evidence or misusing the process. However, it is also essential to acknowledge that mediation may not be safe or suitable for women facing severe violence. In such cases of severe violence, even if mediation is recommended, it must be accompanied by appropriate protection orders to ensure the safety and well-being of the women involved.

To strike a balance between safeguarding the interests of all parties and upholding the efficacy of section 498A of IPC, alternative options may also be considered, such as the

court imposing stringent penalties on individuals making false claims under this provision. This alternative option may prevent misuse and encourage the filing of only genuine cases. By imposing stringent penalties on those who make baseless assertions, it will deter attempts to exploit the provision for personal gain or harm others unjustly.

In conclusion, although there are civil and criminal laws to safeguard and provide relief to women, still a significant number of them continue to suffer from humiliation, physical abuse, and even death. Additionally, there is a growing belief that some law enforcement officials and legal practitioners use these laws to help unscrupulous daughters-in-law extort and harass their husbands and in-laws. The discourse concerning the alleged "misuse" of section 498A is a subject of considerable controversy. Some even contend that the prevalence of fabricated accusations is a substantial concern, whereas others maintain that such assertions are an endeavour to diminish the law's importance. The focus should be on improving the implementation of section 498A of IPC, ensuring that genuine cases are dealt with expeditiously and abusers are punished. The efficacy of this section mustn't be diluted by relying solely on numerical data that presents only numbers instead of real situations or facts. Similarly, the fact that certain individuals may misuse the law shouldn't be a reason for diluting its efficacy since unscrupulous people can misuse every law, and it's unjust to shift the burden of their actions onto others. Instead of relying on personal perceptions and a few instances of misuse, factual data and studies are needed to establish whether section 498A of IPC is being misused, which is currently lacking.

The imprisonment serves as a means to communicate to husbands or relatives of husbands that wives will not tolerate violence passively. The deterrent effect of this punishment may dissuade individuals from committing acts of violence. The mediation process can potentially diminish the efficacy and deterrent impact of this particular provision; however, it is also essential to acknowledge that, in appropriate cases, mediation can effectively resolve disputes in a fair and amicable manner. Reclaiming the effectiveness of section 498A of IPC and dispelling any negative perceptions of its misuse is crucial. This provision serves as a vital safeguard for victims of domestic violence and needs to be implemented efficiently.

CURRENT REGULATORY FRAMEWORK ON CRYPTOS AND CRYPTO EXCHANGES IN INDIA

Mr. Vedant Lathi*

VIPS Student Law Review
August 2023, Vol. 5, Issue 1, 109-117
ISSN 2582-0311 (Print)
ISSN 2582-0303 (Online)

https://vslls.vips.edu/vslr/

ABSTRACT

This research paper examines the current regulatory framework for cryptocurrencies and crypto exchanges in India and also traces the evolution of the same. The paper discusses the impact of the Reserve Bank of India's circular prohibiting banks from dealing with cryptocurrency exchanges, the Supreme Court's decision to strike down the circular, and proposed the Cryptocurrency and Regulation of Official Digital Currency Bill, 2021. The paper also examines the regulatory oversight of the Securities and Exchange Board of India and the recommendations of the committee formed by the Ministry of Finance. The paper concludes that the current regulatory framework for cryptocurrencies and crypto exchanges in India is complex and rapidly evolving, with a lack of clear guidelines for the industry. The proposed bill, if passed, would ban private cryptocurrencies, and introduce an official digital currency issued by the RBI. The paper highlights the need for a clear and comprehensive regulatory framework to promote the growth of the cryptocurrency industry in India.

Keywords- *Cryptocurrency, Blockchain, Digital Assets, Virtual Currency, Digital Ledger.*

I. INTRODUCTION

Virtual Currency (**VC**) is a type of currency that is stored on a digital ledger called the blockchain. Transactions involving cryptocurrencies take place privately, which eliminates the need for traditional financial institutions such as banks. However, these decentralized

* Student, 4th year BA LLB, ILS Law College, Pune, India.

characteristics also create challenges for governments to trace any illegal transactions.[1]

Cryptocurrencies are digital representations of value created by means of cryptography and are intended to secure financial transactions or transfer of assets.[2] Currently, India does not have any specific laws to govern the VCs; however, it has modified its Income Tax Act to define the concept of Virtual Digital Assets (**VDA**), which encompasses VCs among other things.

The term 'virtual digital asset' is defined under Section 2(47A) of the Income Tax Act, 1961 to include the following:

> *(a) "Any information or code or number or token (not being Indian currency or foreign currency), generated through cryptographic means or otherwise, by whatever name called, providing a digital representation of value exchanged with or without consideration, with the promise or representation of having inherent value, or functions as a store of value or a unit of account including its use in any financial transaction or investment, but not limited to investment scheme; and can be transferred, stored or traded electronically;*
>
> *(b) Non-fungible token (NFT) or any other token of similar nature, by whatever name called;*
>
> *(c) Any other digital asset, as the government may specify by notification."*

A cryptocurrency exchange is a digital marketplace where people can buy, sell, and trade cryptocurrencies. The exchange typically acts as an intermediary, matching buyers and sellers and charging a fee for each transaction. As per a recent circular[3] issued by the Central Board of Direct Taxes (**CBDT**) the term 'exchange' is now defined as any person that operates an application or platform for transferring of VDAs, which matches buy and sell trades and executes the same on its application or platform.

1 Vikram Jeet Singh and Kalindhi Bhatia, "*Cryptocurrency In India: State Of Play*", *available at* https://www.mondaq.com/india/fin-tech/1196300/cryptocurrency-in-india-state-of-play_

2 AZB & Partners, "*Regulation of Cryptocurrencies in India*", *available at* https://www.azbpartners.com/bank/regulation-of-cryptocurrencies-in-india/

3 Circular F. No. 370142/29/2022-TPL dated 22 June 2022 by Ministry of Finance Department of Revenue Central Board of Direct Taxes, Government of India.

The Government's position on VDAs will be clearer once the Proposed Bill titled 'The Cryptocurrency and Regulation of Official Digital Currency Bill 2021' is released to the general public.

During a G20 seminar[4], India called for a collaborative global endeavor to tackle the challenges presented by cryptocurrencies like Bitcoin and to establish a unified framework, demonstrating India's dedication and proactive stance towards addressing this issue.

II. A BRIEF TIMELINE OF THE EVOLUTION OF CRYPTO REGULATIONS IN INDIA

When	Event
24 December 2013	The Reserve Bank of India (**RBI**) issued a press release cautioning users of cryptocurrencies of the potential risk associated with the same.
2017	RBI again cautioned users of cryptocurrencies and explicitly stated that no licenses had been granted to operators trading in cryptocurrencies in India.
6 April 2018	RBI, through a notification, prohibited all entities regulated by the RBI from dealing in virtual currencies or providing services to facilitate any transaction involving virtual currencies.
July 2019	Indian exchanges and blockchain advocates filed multiple petitions and went to court in a bid to overturn the ban on crypto. Government of India (**GoI**) released a draft bill 'The Banning of Cryptocurrency and Regulation of Official Digital Currency Bill 2019' which sought to ban any person from 'mining, generating, holding, selling, dealing in, issuing, transferring, disposing of or using cryptocurrency in the territory of India'.
4 March 2020	The Supreme Court of India struck down RBI's order in the case of *Internet and Mobile Association of India v. Reserve Bank of India*, where the Supreme Court declared the RBI circular unconstitutional.
25 May 2020	RBI clarified that presently there is no prohibition applicable to banks to provide bank accounts to crypto exchanges or crypto traders.

4 Reuters, "India's push to regulate crypto gains IMF, U.S. support at G20", *available at* https://www.reuters.com/business/finance/indias-push-regulate-crypto-gains-imf-us-support-g20-2023-02-25/

2021	On 24 March 2021, the Ministry of Corporate Affairs (**MCA**) issued a notification to make it mandatory for companies to disclose any dealings in cryptocurrency or virtual currency in their balance sheets. In January 2021, the government introduced the Cryptocurrency and Regulation of Official Digital Currency Bill 2021 (**the Bill**).
2022	With Crypto laws still under discussion, the budget bill that was passed in the Union Budget 2022 specified crypto tax regulations.
7 March 2023	The Finance Ministry announced that all VDAs will fall under the scope of the Prevention of Money Laundering Act 2002 (**PMLA**).

III. CURRENT REGULATORY FRAMEWORK IN INDIA

The Bill

According to the Lok Sabha bulletin dated November 23, 2021, the Bill seeks '*to create a facilitative framework for the creation of the official digital currency to be issued by the Reserve Bank of India. The Bill also seeks to prohibit all private cryptocurrencies in India; however, it allows for certain exceptions to promote the underlying technology of cryptocurrency and its uses*.[5]

Publicly available information also indicates that in May 2021, the government was looking to set up a new panel to decide the fate of cryptocurrency regulation in India. However, details of whether this panel has been set up or any developments in cryptocurrency regulations continue to be unavailable. The government of India was scheduled to introduce new cryptocurrency regulations during the Winter Session of Parliament. This was the second time that the Cryptocurrency bill was listed but got delayed. The first time it happened was during the Budget Session of Parliament in 2021.

The Minister of State Finance, Shri Pankaj Chaudhary, on behalf of the Ministry of Finance answered the questions by saying, 'Crypto assets are by definition borderless and require international collaboration to prevent regulatory arbitrage. Therefore, any legislation on the subject can be effective only with significant international collaboration on evaluation of the risks and benefits and evolution of common taxonomy and standards.'

5 Neil Hildreth, "*Cryptocurrency Bill 2021: The Road Ahead*", *available at* https://www.mondaq.com/india/fin-tech/1145012/cryptocurrency-bill-2021-the-road-ahead

Prevention of Money Laundering Act

The notification published in the gazette[6] by the Ministry has expanded the scope of the Prevention of Money Laundering Act, 2002 to include cryptocurrency transactions.

As a result, Indian cryptocurrency exchanges will be required to notify the Financial Intelligence Unit - India (**FIU-IND**) of any suspicious buying or selling activities related to cryptocurrency. The FIU-IND is a central agency responsible for receiving, processing, analyzing, and distributing information regarding suspicious financial transactions to both law enforcement agencies and foreign FIUs. If the FIU-IND detects any misconduct during its investigation, it will inform the Enforcement Directorate (ED).

Taxation

In the 2022 Budget, Finance Minister Mrs. Nirmala Sitharaman made revolutionary changes to the virtual asset class by the introduction of a wide definition of VDAs and thereby including cryptocurrencies and non-fungible tokens (NFTs) within its ambit. It was for the first time, the government officially classified digital assets, including crypto assets, as "Virtual Digital Assets." This category encompasses all cryptocurrencies such as Bitcoin and Ethereum, as well as other digital assets.

The Finance Act of 2022 has introduced a regime for the taxation of VDAs by amending the Income Tax Act, of 1961. The 2022 Budget Session laid down the following rules:

a) Income from the transfer of virtual digital assets such as crypto and NFTs will be taxed at 30% at the end of each financial year.

b) No deduction, except the cost of acquisition, will be allowed while reporting income from the transfer of digital assets.

c) Loss from digital assets cannot be set off against any other income.

d) The gifting of digital assets will attract tax in the hands of the receiver. Losses incurred from one virtual digital currency cannot be set off against income from another digital currency.

Ministry of Corporate Affairs

The latest amendment to Schedule III of the Companies Act, 2013 issued on 24 March 2021 states that from the new financial year, all companies will be required to disclose their

6 Notification S.O. 1072(E). dated 7th March, 2023 by Ministry of Finance, Government of India, *available at* https://egazette.nic.in/WriteReadData/2023/244184.pdf

investments in cryptocurrencies and also state any profit or loss involved in the transaction. The holder of any virtual currencies will also have to declare the number of holdings, details of deposits and advances from any person for trading or investing in cryptocurrency.

CERT-In Directions to Crypto Exchanges

The Indian Computer Emergency Response Team (the CERT-In), set up under the Information Technology Act, 2000 (IT Act), had, on 28 April 2022, issued directions under the IT Act with respect to information security practices, procedures, prevention, response, and the reporting of cyber incidents for a safe and trusted internet.

These directions require, *inter alia,* the 'virtual asset service providers,' 'virtual asset exchange providers' and 'custodian wallet providers' to mandatorily maintain:

a) information obtained as part of KYC; and

b) records of financial transactions, for five years.

The directions also prescribe a list of 'officially valid documents' for the customer identification procedure in line with the RBI Directions 2016/ SEBI circular dated 24 April 2020/Department of Telecom notice 21 September 2021 for the purpose of KYC. It may also be noted that the terms 'virtual asset service provider,' 'virtual asset exchange provider' and 'custodian wallet provider' are presently not defined under these directions; however, the frequently asked questions issued in relation to these directions indicate that such providers may include crypto asset businesses as well.[7]

ASCI Guidelines

On 23 February 2022, the Advertising Standards Council of India (ASCI) framed guidelines for the advertising and promotion of VDAs. The salient features of these guidelines are as follows:

a) Advertisements pertaining to VDAs must carry the prescribed disclaimer.

b) Words like "currency," "securities," "custodian" and "depositories" must not be used.

c) Depiction of minors is prohibited.

d) Risks should not be downplayed. VDAs should not be compared to any other regulated assets.

7 AZB & Partners, Cryptoassets & Blockchain 2023, *available at* https://www.azbpartners.com/bank/cryptoassets-blockchain-2023/

e) Celebrities and influencers are required to carry out proper due diligence before taking part in such promotions.

IV. COMPARISON WITH OTHER JURISDICTIONS

According to PwC's Global Crypto Regulations Report 2023[8], a large proportion of countries are at various stages of drafting regulations around crypto. Most countries have already brought digital assets under anti-money laundering laws. Singapore, Japan, Switzerland, and Malaysia have legislations on regulatory framework. The U.S., U.K., Australia, and Canada have initiated plans on regulating. So far, China, Qatar, and Saudi Arabia have issued a blanket ban on cryptocurrency. The EU is also preparing a cross-jurisdictional regulatory and supervisory framework for crypto-assets. The framework seeks to provide legal clarity, consumer and investor protection, and market integrity while promoting innovation in digital assets.

USA

The United States operates under a dual governance system, which means that there can be different laws and regulations for cryptocurrencies in different states. For instance, New York has been a proponent of cryptocurrencies since 2016 when it introduced a licensing framework for crypto and business exchanges known as "BitLicense." However, there are many states in the US that have yet to take a definitive stance on cryptocurrencies. While different states have varying regulations for cryptocurrencies, the overall approach in the US towards the trading community is positive, and cryptocurrency is legal in the country.

The Financial Crimes Enforcement Network (FinCEN) does not consider cryptocurrencies to be legal tender but considers cryptocurrency exchanges to be money transmitters on the basis that cryptocurrency tokens are "other value that substitutes for currency." The Internal Revenue Service (IRS) does not consider cryptocurrency to be legal tender but defines it as "a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value" and has issued tax guidance accordingly.

Cryptocurrency exchanges are legal in the United States and fall under the regulatory scope of the Bank Secrecy Act (BSA). In practice, this means that cryptocurrency exchange service providers must register with FinCEN, implement an AML/CFT program, maintain appropriate records, and submit reports to the authorities. Meanwhile, the US Securities

8 PwC Global Crypto Regulation Report 2023, *available at* https://www.pwc.com/gx/en/new-ventures/cryptocurrency-assets/pwc-global-crypto-regulation-report-2023.pdf

and Exchange Commission (SEC) has indicated that it considers cryptocurrencies to be securities, and applies securities laws comprehensively to digital wallets and exchanges. By contrast, The Commodities Futures Trading Commission (CFTC) has adopted a friendlier, "do no harm" approach, describing Bitcoin as a commodity and allowing cryptocurrency derivatives to trade publicly.

In response to guidelines published by FATF in June 2019, FINCEN made clear that it expects crypto exchanges to comply with the "Travel Rule" and gather and share information about the originators and beneficiaries of cryptocurrency transactions. It places virtual currency exchanges in the same regulatory category as traditional money transmitters and applies all the same regulations, including those set out in the Bank Secrecy Act – which has established its own version of the Travel Rule. In October 2020, FINCEN released a Notice of Proposed Rulemaking (NPRM) on adjustments to the Travel Rule, signaling the introduction of new compliance responsibilities for cryptocurrency exchanges.

The Justice Department continues to coordinate with the SEC and CFTC over future cryptocurrency regulations to ensure effective consumer protection and more streamlined regulatory oversight.

Singapore

Singapore has taken a friendlier position towards cryptocurrency exchanges and trading than many of its neighboring countries. While cryptocurrencies are not considered legal tender, they are treated as goods and subjected to the Goods and Services Tax. The Monetary Authority of Singapore (MAS) has generally been accommodating towards crypto regulation, and in 2020 and 2022, issued warnings to the public on the risks of investing in cryptocurrency products. The Payment Services Act 2019 brought exchanges and other crypto businesses under MAS regulatory authority and imposed a requirement for them to obtain a MAS operating license.

Since then, MAS has issued licenses to a number of high-profile crypto service providers. MAS is likely to follow up with additional regulations to further align its position. Singapore's recent regulatory efforts have attracted international interest in its crypto industry, especially after China's crackdown on cryptocurrencies prompted many high-profile Chinese service providers to migrate to Singapore.

V. CONCLUSION AND RECOMMENDATIONS

India does not currently have a comprehensive regulatory framework specifically designed for virtual currencies. Cryptocurrencies cannot be used as legal tender or a medium of exchange in the country, they are not regulated by any central authority. There are no rules and regulations or any guidelines laid down for settling disputes while dealing with cryptocurrency. So, trading in cryptocurrency is done at investors' risk.

Additionally, there is no specific framework for registering or licensing cryptocurrency platforms. Presently, crypto asset businesses primarily operate under self-regulatory codes, which include complying with KYC, Anti-Money Laundering (AML), and Countering the Financing of Terrorism (CFT) obligations.

As of March 2023, the regulatory framework on cryptocurrencies and crypto exchanges in India is still evolving, with no clear consensus on the legal status of cryptocurrencies. In conclusion, the regulatory framework on cryptocurrencies and crypto exchanges in India is still in flux, with various proposals and bills being debated at different levels, hence there is an urgent need to bring a law to regulate this space.

As the landscape of cryptocurrency continues to evolve with unprecedented dynamism, this research paper culminates with a series of visionary recommendations aimed at shaping a robust framework for governing cryptocurrencies and exchanges in India. The increasing prominence of digital assets necessitates the establishment of an intricate yet adaptable regulatory paradigm, stratifying cryptocurrencies for nuanced treatment while embracing innovation. In this pursuit, the implementation of licensing protocols for exchanges and wallet providers emerges as a pivotal step to ensure a secure and legitimate ecosystem. To thwart illicit activities, the stringent enforcement of anti-money laundering (AML) and know-your-customer (KYC) protocols is vital, instilling transparency and accountability. Amidst these imperatives, reinforcing consumer safeguards, fortifying market integrity against manipulation, and fortifying data privacy measures within exchanges stand as paramount features. This blueprint further accentuates the importance of cross-border transaction guidelines synchronised with international standards, transparent frameworks for cryptocurrency taxation, and incentives fostering innovation and entrepreneurship. Simultaneously, collaborative synergies between regulatory bodies, industry pioneers, and academia, along with public awareness campaigns, ought to be diligently cultivated. Lastly, a regulatory review mechanism, responsive to the relentless cadence of technological progress and sectoral trends, will engender an adaptive, secure, and forward-looking environment for cryptocurrencies and exchanges across India.

TAXATION OF CRYPTOCURRENCY IN INDIA: THE FUTURE FINANCE

Ms. Meher Sachdeva*

VIPS Student Law Review
August 2023, Vol. 5, Issue 1, 118-132
ISSN 2582-0311 (Print)
ISSN 2582-0303 (Online)

https://vslls.vips.edu/vslr/

ABSTRACT

As the global economy becomes increasingly digitized, cryptocurrencies have emerged as a new and innovative form of financial transaction. However, the Indian government has been hesitant to implement this technology, taking a wait-and-see approach. This article investigates the taxation of cryptocurrencies in India and proposes a regulatory framework for their use. India's current policy is mainly observational, with no clear regulations for regulating cryptocurrencies. This has resulted in confusion among consumers and investors, those who don't know how their investments will be taxed. Nevertheless, a regulatory framework must be established to ensure that these transactions are appropriately monitored and taxed, given the exponential growth in cryptocurrency usage. Depending on how long they are held, cryptocurrencies would be subject to taxation under our proposed framework. If the virtual currency is held for a brief period of time, it will be taxed as a speculative asset. Alternatively, if the cryptocurrency is held for an extended period of time, it will be considered a long-term investment and subject to capital gains tax. Moreover, we recommend that cryptocurrency exchanges and trading platforms be subject to the same regulatory requirements as conventional financial institutions. This would include Know Your Customer (KYC) and Anti-Money Laundering (AML) regulations to prevent fraudulent activity and protect investors. Finally, we propose the establishment of a new government agency to supervise cryptocurrency regulation. This organization would be responsible for issuing licenses to cryptocurrency exchanges and trading platforms and monitoring their activities to assure regulatory

* Student, 4th year, BBA LLB, Bennett University, Greater Noida.

compliance. In summation, cryptocurrency adoption in India presents both opportunities and obstacles. Cryptocurrencies have the potential to revolutionize the financial industry, but their use must be properly regulated to prevent fraud and protect investors. Our proposed framework offers the Indian government a starting point for developing a comprehensive regulatory system that encourages innovation while protecting the interests of all stakeholders.

Keywords - *Digitalization, Cryptocurrency, Regulatory framework, Finance, Bitcoin*

I. INTRODUCTION

Cryptocurrency, which is created and managed using advanced cryptographic techniques, has become a reality with the creation of Bitcoin in 2009.[1] Bitcoin is unique in that it is not subject to censorship or regulation, but this also means that there is no central authority to ensure that transactions proceed smoothly or to support its value.[2]

One important consideration when it comes to Bitcoin is tax collection.[3] Given the legal uncertainties surrounding Bitcoin, it is important to monitor how Bitcoin retailers deal with the taxation of Bitcoin transactions.[4] When we talk about "business," we are referring to an occupation, business, or business activity. According to Article 246 of the Indian Constitution, Parliament has the same authority as the individual state legislatures to impose taxes.[5] In 2016, Parliament amended Article 246-A, which gives Parliament the power to establish rules governing interstate exchange and commerce, including those related to GST.[6]

Schedule VII details the areas in which Parliament and state governments have the authority to impose fees.[7] When it comes to digital currency transactions, including those involving Bitcoin, there are two angles to consider: pay and usage, or revenue and spending. The

1 Krivtsov, Artem I. "Taxation of Digital Financial Assets." *Growth Poles of the Global Economy: Emergence, Changes and Future Perspectives* (2020): 1231-1239.

2 Prarthna Nachappa, Crypto-Regulation in India: Necessary Evil?, 2 Lexforti Legal J. 115 (2021).

3 Id.

4 Id.

5 Shukla, Varun, Manoj Kumar Misra, and Atul Chaturvedi. "Journey of cryptocurrency in India in view of Financial Budget 2022-23." *arXiv preprint arXiv:2203.12606* (2022).

6 Dhoot, Vrinda. "Cryptocurrency as a Revolution." *Supremo Amicus* 30 (2022): 531.

7 The Constitution of India, 1950, Schedule VII, List III, Concurrent List.

applicability of various legislation, including the Income Tax Act, 1961, the Central Goods and Services Tax Act, 2017, and others, depends on the nature of the exchange and the parties involved.

Therefore, the emergence of cryptocurrency like Bitcoin has raised several legal and regulatory questions, including those related to taxation.[8] As such, it is important for retailers and individuals involved in Bitcoin transactions to understand the relevant legislation and to comply with tax regulations.[9] Ultimately, the development of a clear regulatory framework for digital currency will be necessary to ensure the continued growth and legitimacy of this emerging field.

II. THE POSITION OF INDIA TOWARDS CYRPTOCURRENCY

India's position towards cryptocurrencies has been ambiguous, with no clear policy shift from the government. However, a new body of law is looming, which could potentially put an end to many cryptocurrency trading platforms in India. The Central Economic Intelligence Bureau (CEIB), a department of the Ministry of Finance, has submitted a proposal to the Central Board of Indirect Taxes and Customs (CBIC), which serves as a think tank for the Ministry of Finance. The proposal was submitted to study the effects of the Goods and Services Tax (GST) on cryptocurrency exchanges in India.

The CEIB has requested that Bitcoin be officially recognized as an asset by the Indian government, and all Bitcoin transactions within the country will now be subject to GST tax. This development is not entirely surprising, as the lack of regulation of cryptocurrencies has been a source of concern for authorities in India for some time. Bitcoin has been linked to black markets, including money laundering and illegal gambling. The Indian government's approach towards cryptocurrencies has been cautious and somewhat negative.[10] The Reserve Bank of India (RBI) had banned banks from providing services to cryptocurrency exchanges, which was subsequently overturned by the Supreme Court. However, the RBI has expressed concern over the risks associated with cryptocurrencies and their impact on financial stability.[11]

8 Singh, Arvind Kumar, and Karan Veer Singh. "Cryptocurrency in India-its effect and future on economy with special reference to bitcoin." *International Journal of Research in Economics and Social Sciences (IJRESS)* 8.3 (2018): 115-126.

9 Jani, Shailak. "The growth of cryptocurrency in India: Its challenges & potential impacts on legislation." *Research gate publication* (2018).

10 Thakur, Kumar Krishnan, and G. G. Banik. "Cryptocurrency: Its risks and gains and the way ahead." *IOSR Journal of Economics and Finance* 9.2 (2018): 38-42.

11 Pradeep Thakur, Govt weighs imposing 18% GST on bitcoin trade, The Times of India.

India's Ministry of Finance has been examining the possibility of introducing a regulatory framework for cryptocurrencies since 2017. In the absence of a clear policy, cryptocurrency exchanges have been operating in a grey area, with many facing difficulties in opening bank accounts and securing funding. The lack of regulatory clarity has also hindered investment in the sector.[12] The CEIB's proposal is a step towards bringing cryptocurrencies under the regulatory framework, which could potentially reduce the risks associated with their usage. However, there are concerns about the impact of the proposed law on the cryptocurrency sector in India. The law could potentially stifle innovation and lead to the closure of many cryptocurrency trading platforms.[13]

III. NAVIGATING THE CHALLENGES OF CRYPTOCURRENCY TRADING IN INDIA: LEGALIZATION, TAXATION, AND RECOGNITION

It is worth noting that after a two-year moratorium, the Indian Supreme Court finally allowed the Reserve Bank of India (RBI) to resume operations related to cryptocurrency trading. Since then, institutional traders such as banks and financial institutions can once again engage in cryptocurrency trading, and business has picked up significantly. This marks a change from the Indian government's extreme stance against Bitcoin and other cryptocurrencies in the past, including the possibility of outlawing all transactions.[14]

However, despite the legalization of cryptocurrency trading in India, there are still significant challenges that the industry faces. For example, some cryptocurrency exchanges, including Bitcoin exchanges, would incur additional costs if trading were taxed as GST. Additionally, the lack of clear standards from the RBI makes it difficult for cryptocurrency exchanges to secure funding from financial institutions, as noted by industry expert Praveen Kumar in a letter to the RBI.

Furthermore, there is currently no clear guidance on how internet-based income in the form of digital currency should be reported in the Income Tax Return (ITR), leaving many taxpayers unsure of what to report.[15] This confusion extends to calculating returns

12 Irfan, Syed Bilal. "Opportunities and Challenges of Cryptocurrencies in India-A Study." *International Journal of Research and Analytical Reviews* (2022).

13 Ahuja, Ms Priya. "Cryptocurrency: A New Millennium Currency (Problem and Prospects in India)."

14 Shukla, Varun, Manoj Kumar Misra, and Atul Chaturvedi. "Journey of cryptocurrency in India in view of Financial Budget 2022-23." (2022).

15 Gotety, Anirudh. "The Future of Cryptocurrency Regulation in India." *Banking LJ* 136 (2019): 481.

on investments in virtual currencies, as there are no clear guidelines for the tax treatment of gains and benefits from holding cryptocurrency. Whether cryptocurrency is treated as money or property will affect its tax treatment, with gains from digital currencies potentially taxed as business income if the purpose of acquisition was to expand capital or make a profit through trading or mining.[16]

It is also important to note that the RBI does not currently recognize digital forms of money as cash, so they are not recognized as money under India's yearly spending regulation.[17] Instead, they will be treated as property for the purposes of an individual assessment, with the suggested costs being comparable to those incurred if one owned any other type of property. This lack of recognition as cash affects the use of cryptocurrency for transactions involving the transfer of goods or the purchase of government services.[18]

IV. INDIA'S COMPLEX RELATIONSHIP WITH CRYPTOCURRENCY: FROM BAN TO HOPE

The Indian government has had a tumultuous relationship with cryptocurrency over the years. In 2018, the government expressed its desire to put an end to the use of bitcoin and other virtual monetary forms in India.[19] At the same time, Facebook announced a policy change to prevent notifications about financial things and organizations associated with deceiving or interesting limited time practices such as early coin commitments and cryptographic cash.

In April 2018, the RBI prohibited banking institutions from providing services to anyone controlling virtual or advanced financial rules, in response to a series of frauds and scams that surfaced in the wake of 2016's demonetization move. This move led to falling exchange volumes, which affected the crypto market in India.

However, in March 2020, a three-judge seat of the Supreme Court reversed the public bank boycott, giving hope to crypto currency traders. The Supreme Court stated that the RBI had not implemented any observational check that virtual or cryptographic sorts of money that have adversely affected the financial zone or other controlled substances. The

16 Malusare, Lalita Babulal. "Crypto Currency in India: A study of Concept and Legal aspect of Crypto currency in India." *Commerce & Management*: 139.

17 Babu, P. Venkaiah, et al. "Taxation Of Crypto Currency and Virtual Digital Assets In India: A Critical Analysis." *Specialusis Ugdymas* 1.43 (2022): 1713-1717.

18 Shukla, Shubhi, and Rohitkumar Raut. "Taxation on Cryptocurrency: A Global Perspective." *Legal Spectrum J.* 1 (2021): 1.

19 Keshav Batheja & Param Goel, Cryptocurrency in India, 1 Jus Corpus L.J. 98 (2021).

court further held that "RBI will need to demonstrate a connection to the harm that their controlled substances have caused. Whatever the case may be, however, there is none." This judgment was seen as a landmark victory for the crypto industry in India.[20]

Following the RBI's decision to eliminate the ban on the usage of digital currencies, India saw the advent of new, more advanced cash trading stages and exchange markets. Many international cryptocurrency exchanges have also established operations in India. Despite government efforts to control them, interest in and demand for automated financial principles have consistently grown in India.[21]

India's improving internet infrastructure is likely to contribute to a surge in the popularity of bitcoins in the country.[22] The growing use of mobile devices and increased internet penetration has the potential to make India one of the largest markets for cryptocurrency. The ease of access to digital assets coupled with the lack of clear regulations has made India an attractive destination for cryptocurrency investors.

However, the lack of regulatory clarity has also led to confusion regarding taxation policies for cryptocurrency. The Income Tax Act mandates an individual's obligation to file an Income Tax Return (ITR) revealing all profits if the individual's annual salary is more than Rs 2.5 lakh or if the individual has received any instalment on which duty was deducted at source (TD). However, there is no guidance on how internet-based income in the form of digital money should be reported in the ITR, leaving taxpayers unsure of what to report.

The treatment of cryptocurrency as money or property will affect the tax treatment of gains and benefits from holding cryptocurrency. Cryptocurrency money is typically used for transactions involving the transfer of goods or the purchase of government services. However, the Reserve Bank of India (RBI) does not currently recognize digital forms of money as cash, hence it is not recognized as money under India's yearly spending regulation. As such, it will be treated as property for the purposes of one's individual assessment, and the suggested costs will be comparable to those one would incur if they owned any other type of property. Gains from digital currencies can be taxed as business income if the equivalent was gained for the purpose of making a profit through trading or mining, or if the purpose of acquiring the equivalent was to expand one's capital. The lack of clear guidelines for taxation policies creates uncertainty for cryptocurrency traders and investors in India.

20 Id.

21 Shukla, Varun, Manoj Kumar Misra, and Atul Chaturvedi. "Journey of cryptocurrency in India in view of Financial Budget 2022-23." (2022).

22 Ahuja, Ms Priya. "Cryptocurrency: A New Millennium Currency (Problem and Prospects in India)."

V. UNPACKING INDIA'S CRYPTOCURRENCY TAXATION: GOODS OR CURRENCY?

Article 246 of India's constitution gives Parliament and State Legislatures the authority to levy taxes and pass legislation pertaining to the subjects included in Schedule VII.[23] According to Article 265, only those with the proper legal power may levy and collect taxes. Due to the lack of clarity surrounding cryptocurrency legislation, this study attempts to examine the taxation of cryptocurrencies through the lens of the two most often used approaches today: goods and currency. Bitcoin is subject to income tax in the same way that other currencies are when they are bought and sold commercially.[24] There are two options for enforcing income tax. First, a person's bitcoin trading profits can be taxed like any other business income, and second, a bitcoin trader's profits on the sale or purchase of bitcoins as goods can be taxed like any other capital gain. The Income Tax Act of 1981 governs the process of determining a person's taxable income in India. Gains in income are possible whether or not they are monetary in nature.

VI. DIRECT TAX REGIME

Under India's direct tax framework, cryptocurrency is regulated by the Income Tax Act. The current legal climate provides no clarity on how cryptocurrencies should be taxed, and the Income Tax Administration has not set a disclosure requirement for cryptocurrency earnings. Treatment under the head "capital gains"

According to Section 2(14) of the IT Act, "property of any type possessed by the assessee whether or not associated with his business or profession"[25] constitutes a capital asset. All property not specifically excluded by the Act is considered a "capital asset" under this definition.[26] For this reason, any profits made from selling cryptocurrencies should be reported as capital gains if the funds would be used for further investment.

Taxability under "Profit or Gain from a Business or Profession":

When cryptocurrency is held in furtherance of business activity, issues occurring while recognising it as capital gains do not exist, hence the tax treatment of cryptocurrencies

23 Singh, Muskaan. "Taxability of Cryptocurrency in India." *Issue 5 Int'l JL Mgmt. & Human.* 5 (2022): 1498.

24 Sharma, Pradyumn Amit. "Legality of Crypto-Assets in India." *Issue 4 Int'l JL Mgmt. & Human.* 3 (2020): 985.

25 Section 2(14), Income Tax Act.

26 Chetna Alagh & Vibhuti Sharma, Taxation of Cryptocurrency in India, 1 Jus Corpus L.J. 187 (2020).

held as'stock in trade' does not face severe obstacles. Businesses of any kind are covered by the broad definition of "trade, commerce, or manufacture or any adventure or concern of such type" found in Section 2(13) of the IT Act. In addition, Section 28 of the IT Act applies to any gains made through a "continuous business activity,"[27] such as trading cryptocurrency. Even if the gains are not paid out in cash, they are nevertheless subject to taxation if they exceed a certain threshold. The IT Act's Sections 30–43D indicate that any expense incurred for this reason—including the purchase of computing power as a capital asset—should be deductible.

VII. INDIRECT TAX IMPLICATION ON CRYPTOCURRENCY

On 1 July 2017, the Central Goods and Service Tax was implemented throughout India. Almost all other indirect taxes have been absorbed by GST, with the exception of few state taxes. Sales of goods and services between states are subject to GST. So, it becomes necessary to classify cryptocurrencies as commodities. The Supreme Court has ruled that products are broad and include a variety of flexible properties, whether tangible or immaterial. Services are defined in section 2(102) of the Central Goods and Services Tax Act as everything other than products, money, and securities, and also include actions related to the usage of money or its conversion, for consideration, from one form, currency, or denomination to another.

Bitcoin purchases will soon be subject to a goods and services tax (GST) of 18%, as proposed by the federal government. Several concerns were addressed following the introduction of GST, such as the fact that GST is applicable to the provision of both commodities and services and, drawing from the definition of services, the possibility that GST may be applied to bitcoin. Assuming all involved parties are located in India GST on the value of goods and also on fee charged would be triggered by any exchange, including the exchange of virtual currencies for cash or for which a separate commission is imposed. When an intermediary is involved, the transaction is actually two independent transactions. The first exchange takes place between the provider and the middleman, while the second takes place directly between the recipient and the provider. This method of taxation has many flaws, including the fact that it double-taxes the transaction by charging sales tax on the supply and again on the consideration. Businesses dealing in digital forms of money suffer a huge loss as their purchasing power is drastically reduced as a result of the increased frequency with which taxes are collected. If both the supply and the recipient are located outside of India, i.e., in international trade, the situation becomes more problematic.

27 Section 28, Income Tax Act.

VIII. EFFECT OF COVID-19 ON CRYPTOCURRENCIES

Indian regulators have previously shown clear signs of distress with Bitcoin, but the recent rise in Bitcoin's value thanks to the massive COVID-19 international liquidity poured by national banks has helped alleviate some of their problems. Indian regulators have previously shown clear signs of distress with Bitcoin, but the recent rise in Bitcoin's value thanks to the massive COVID-19 international liquidity poured by national banks has helped alleviate some of their problems.[28]

There is evidence to suggest that cryptographic money has emerged as a hedge against the COVID-19 threat.[29] Speculators in India reconnected their premium in virtual currency forms as a result of the shutdown, presumably in the hopes of drawing the attention of the personal duty office back to crypto financial professionals.[30]

Even though cryptocurrencies are changing at a dizzying pace, the legal standing of cryptographic currencies in India remains murky. The RBI's ban on digital currencies was overturned by the Supreme Court, yet the new regulations are still difficult to understand. Although transactions involving cryptocurrencies are legal in India, the government has made it incredibly difficult for traders to operate. Concerns about money laundering and tax evasion have dominated discussions about digital currency transactions for quite some time. The time has come to recognise the economic potential of the estimated 1.7 million Indians involved in the trading of advanced resources, as well as to enact appropriate legislation for its regulation, provision for purchaser security, and concerns about its utilisation in tax evasion and fear financing.

The Indian government has been on the fence over cryptographic currencies, debating whether or not it needs to regulate virtual currencies. The government is committed to blockchain research and development, but it has opposed widespread use of digital currency because of the impossibility of recouping taxes in the event that the unit of record for a given exchange were to switch from rupees to some cryptographic form of money. So, if the government wants to collect taxes on blockchain transactions, it needs to recognise cryptocurrency, and not just the INR, as a unit for recording transactions.

28 Ashish, Vishrut, and Sabiha Fazalbhoy. "Impact of COVID-19 on Investment Education and Behavior in Cryptocurrency and Stock Market: A Study of Indian Undergraduate Students." *Annual Research Journal of SCMS, Pune* 10 (2022): 59-79.

29 Demir, Ender, et al. "The relationship between cryptocurrencies and COVID-19 pandemic." *Eurasian Economic Review* 10 (2020): 349-360.

30 Sahoo, Pradipta Kumar. "COVID-19 pandemic and cryptocurrency markets: an empirical analysis from a linear and nonlinear causal relationship." *Studies in Economics and Finance* (2021).

IX. INCOME TAX IN INDIA VIS-A-VIS OTHER FOREIGN JURISDICTIONS

Over the past decade, Indian cryptocurrency dealers have had their fair share of denials and scepticism regarding the industry of cryptocurrency as a whole. Despite being one of the top developing nations for cryptocurrencies, India lacks a strong legal framework to oversee this $1 trillion market cap sector.[31] However, new laws and regulations on cryptocurrency tax in India were suggested and adopted in the 2022 financial budget. Until 2022, cryptocurrency and virtual assets were not subject to taxes. After the introduction of the bill, India considers cryptocurrency as an important virtual asset which is taxed. From April 1, 2022, income from trading cryptocurrencies or other virtual digital assets has been made subject to a 30% tax and 4% cess under Section 115BBH of the 2022 Budget.[32] From July 1, 2022, the 194S section imposes a 1% Tax at Source on the transfer of cryptocurrency assets if the transactions total is more than $50,000. Private investors, professional traders, and anybody else who transfers digital assets during a given fiscal year are subject to this tax rate.

Additionally, this tax rate is applicable regardless of the investor's source of income and does not distinguish between profits made in the short- or long-term. Over the past two years, the Indian government and Income Tax Department (ITD) have released a tonne of advice regarding cryptocurrencies and any potential tax repercussions of investments. Investors will have to report their earnings from cryptocurrencies and other digital assets as capital gains in 2023 if they are retained as investments or as business income if they are used for trading. ITR-3, not ITR-2, should be used by those with business income.[33] Penalties would be issued elucidated under sections 271C and 276B of the Income tax act. The Income Tax Act's Section 2(47A) defines the term "Virtual Digital Assets" and cryptocurrency is also considered a part of it.

Cryptocurrency taxation in the United States

Cryptocurrency taxation in the USA is all managed by the Internal Review Services (IRS). According to the IRS, digital assets are the representations that are kept on a distributed ledger which is encrypted. [34] Since 2014, The IRS recognises cryptocurrencies as property for federal income tax purposes in accordance with its advice, which implies that gains or

31 "Crypto Tax in India- An-In Depth Guide on crypto Tax laws" Koin%.

32 Section 115BBH, Finance Act 2022.

33 Michelle legge " Crypto Tax India: Here's how much you'll pay in 2023." Koinly Blog Publications.

34 "Internal Revenue Services" Tax Foundation.

losses from sales and exchanges are subject to tax.[35] Later as per 2021 Notice Cryptocurrency transactions trigger capital gains tax, and the character of the gain depends on the holding period. Short-term gains, for holdings of less than a year, are taxed at ordinary income tax rates, while long-term gains are subject to lower capital gains tax rates.[36] The IRS released a Chief Counsel Advice in January 2023 outlining the circumstances under which taxpayers can and cannot deduct losses from cryptocurrencies. According to the memorandum, taxpayers are not allowed to deduct their personal investments in cryptocurrencies when their value has significantly decreased but is still higher than zero and they are still traded on at least one exchange. The fundamental premise is that the taxpayer did not dispose of, sell, exchange, or abandon the cryptocurrency tokens. However, the loss is recognised as a deduction for the taxable year in which it occurred provided the decline in cryptocurrency value is revealed by a completed transaction, which establishes the amount of loss. [37] A deduction may also be claimed under Section 165 if the taxpayer offers proof that the cryptocurrency tokens are useless or abandoned. In the fast forward country like USA, The Federal Revenue Service (IRS) mandates that all cryptocurrency transactions be taxed and recorded.[38] It is mandatory that forms 1099-B are required for cryptocurrency owners to report transactions. If they accept cryptocurrencies as payment for services, they must utilise Form 1099-MISC. Similarly, NFTs must submit a Form 1099-NEC to the IRS in order to comply with their tax obligations. It is mandated by the IRS that all cryptocurrency transactions must be reported to the IRS on tax forms, and any earnings from these transactions must be taxed.[39] The specific tax repercussions of cryptocurrency operations rely on a number of factors, including the nature of the transaction, the duration of the holding period, and the cost basis of the cryptocurrency.

In the US, tax rates on cryptocurrency gains are determined by the tax bracket of the person. A unique tax rate is applied to each of the income levels in the tax brackets which increases as per the individuals earning.

Cryptocurrency taxation in the United Kingdom

Taxation on cryptocurrency depends on the capital gains. The profit made when one sells or "dispose of" an asset that has gained in value—in this case, the cryptocurrencies—is subject to capital gains tax (CGT). [40] You are only required to pay taxes on the gain you make, not

35 Internal revenue service. (2014). Notice 2014-2021

36 Internal revenue service. (2021). Virtual Currencies.

37 "Cryptocurrency and NFT Tax Considerations based on Recent IRS Strategy Guidance." STOUT.

38 "Crypto Taxes USA: The absolute Guide for 2023 (IRS Rules)." Bockpit.

39 *id.*

40 Crypto Tax UK : 2023 Guide (HMRC Rules)

the total amount you get. In the United Kingdom, the government offers an annual tax-free allowance which is also called the annual or Yearly excempt amount. Crypto-asset-related income is taxable under the income tax law.[41] All of these situations, whether payment is received in Bitcoin for the service rendered or earned BTC through mining or staking—are all taxable. The revenue declared should be equal the value of the cryptocurrency in pounds at the moment you received it if you use cryptocurrency as payment for products or services.

X. CONCLUSION AND RECOMMENDATIONS

Cryptocurrencies are becoming increasingly popular as an investment option in India. The Reserve Bank of India (RBI) has not recognised bitcoin or any other cryptocurrency as legal tender, but investors in cryptocurrencies do not avoid paying taxes on any gains they make.[42] The Economic Times reports that in order to better manage taxes on payments, investments, and aid, the Indian government plans to categorise actual cash differently depending on their use.[43]

Cryptocurrency trading site Mudrex was founded and is led by Edul Patel of San Francisco. Patel has stated that there are numerous methods to make money with cryptocurrencies, including mining, farming, farming, and ordinary buying and selling. Business revenue can include gains from trading digital assets, while other income could be classified as "revenue from other sources." Adding new regulations or changes, Patel argued, would place an undue strain on taxpayers.[44]

Bitcoin can be "mined" by computers by having them solve difficult problems for rewards in bitcoin. Staking digital currencies also uses token payments to verify compliance with protocol rules.[45] In the Ethereum ecosystem, crop farming typically comprises the lending of crypto assets in exchange for payment. The Indian government has not yet decided whether or not to establish a regulatory framework for tangible assets, although it has incorporated certain transparency rules. Financial institutions in India are now required, as of March, to report their gains or losses from cryptocurrency trading, as well as the total value of cryptocurrency held. On April 1 of this year, new provisions of the Companies Act

41 *Id* .

42 Chaudhari, Samarth. "Taxation as a form of regulating cryptocurrencies in India." (2019).

43 Muskaan Singh, Taxability of Cryptocurrency in India, 5 INT'l J.L. MGMT. & HUMAN. 1498 (2022).

44 *id*

45 Sahoo, Pradipta Kumar. "Bitcoin as digital money: Its growth and future sustainability." *Theoretical & Applied Economics* 24.4 (2017).

went into effect. "the earnings resulting from the transfer of crypto / assets are less taxed under the head of revenue, depending on the type of similar holding,"[46] the then-Finance Minister Anurag Singh Thakur explained.

Taking stock of the investments' nature is essential. Bitcoin can be viewed as either a financial asset or an income stream for a company. A digital token acquired with the intent of resale or further investment is taxed as a capital asset. These investments can generate substantial long-term or short-term gains, respectively, depending on how long they are held. Long-term financial benefits, such as those realised after holding bitcoin for 36 months or longer, are taxed at a lower rate than shorter-term capital gains. Harsh Bhuta, a partner at the Bhuta Shah & Co. accounting firm, says that while long-term capital profits are taxed at a lower rate of 20% on the index income, these profits are subject to the taxpayer's applicable slab rates. Bhuta maintains that "greater clarity" is needed about the administration of various forms of revenue and profit.[47]

After the profit margin is applied, the investor can cut the tax rate below the long-term level to account for inflation. The annual inflation rate at which these assessments are made is reported by the Central Tax Board. If a trader engages in cryptocurrency operations on a regular basis, however, such profits will be treated as business income.

Disclosure may become mandatory under India's proposed cryptocurrency law. Although bitcoin profits are taxed in many countries, investors in India face complications due to the country's icy reception of a physical currency. According to blockchain data firm Chainalysis,[48] Indians have deposited nearly $6.6 billion (Rs49,189 crore) in cryptocurrencies since May this year, compared to about $ 923 million until April 2020. A growing number of Indians are acquiring access to digital tokens by purchasing and selling on overseas platforms, which may offer superior functionality and customer service than those available in India. One of these businesses, however, may enter the domestic crypto trade if Indian authorities begin to show more enthusiasm for the crypto token market.

Reports in July suggested that to level the playing field between domestic and international cryptocurrency trade, the Indian government would implement a Property and Services (GST) levy of 18% on global cryptocurrency transactions. It has been reported that India is considering imposing a 2% tax on the trade of foreign currencies. Similar to stock

46 *id*

47 Banwari, Vijeta. "Cryptocurrency scope in India." *International Research Journal of Management Sociology & Humanities* 8.12 (2017): 82-92.

48 *id*

brokerages, the Indian cryptocurrency exchange implements a Goods and Services Tax (GST) trading cost of 18% for all users. Investors are on edge because it is possible that the first cryptocurrency law in India may be adopted during the winter session of parliament. Currently, crypto has the ability to fortify the foundation of India's digital infrastructure and guarantee the safety of all digital transactions. Taxing bitcoin transactions is a necessary and welcome development at this time, rather than a hindrance. It's a two-way street that allows governments to track cryptocurrency transactions legally and put the tax money they receive to good use. There is also widespread support for the view that taxing cryptocurrencies should be a governmental priority since it can help to foster an atmosphere where investors' funds are protected and trading risks are minimised.

Recent highs in Bitcoin's and other cryptocurrencies' volatility have made them attractive to those seeking rapid returns on their capital. Bitcoin's multiplicative value attracted investors, who drove up demand, which pushed up the price even further. Despite their apparent promise, prospective investors should proceed with caution. Several instances of counterfeit cryptocurrency have been reported over the past couple of years. If you don't understand cryptocurrencies inside and out, it's best not to invest too much in them. Long-term investments in such digital currencies can help to even out the risk/reward of an investor's portfolio, while short-term trading can yield returns of 10–40%. There will always be sceptics, but time will likely increase the number of people who put their trust in Bitcoin and other decentralised currencies. The transfer of authority from huge institutions to the general populace might begin with decentralisation. Keep in mind that the government's current resistance to cryptocurrency regulation is expected to change very soon, and the digital currency sector will be subject to heavy oversight. Gains from trading bitcoins are likely to be taxed by government revenue agencies. While some analysts see Bitcoin and other digital currencies as a bubble that could pop at any time, leaving investors with nothing, others see them as the wave of the future in terms of currency and trade.[49]

As things stand, crypto can bolster India's advanced framework and guarantee all transactions on the digital network. In light of the current situation, charging fees on exchanges that deal in digital currency should be seen as a welcoming development rather than a restriction. Following this path and using crypto exchanges legitimately to generate revenue for the government's productive use is a two-way street. Using fees on cryptocurrencies as a matter of strategy has also been widely endorsed as a means of assuring buyers and sellers of the safety of their funds and reducing the inherent risks of trading. Tax regulations should be updated to discourage far-sighted strategies. Bitcoin's success as a means of exchange

49 Chaudhari, Samarth. "Taxation as a form of regulating cryptocurrencies in India." (2019).

is progressive and encouraging, and as such, it merits serious consideration. Now more than ever, it's crucial to set in stone strict regulations and taxation policies to guarantee safety. Indian law, rather than focusing on a boycott, should ensure that sufficient levels of confirmation are ready to decide a crypto-transfer tax evasion or psychological oppression funding risk. Assuming, however, that reasonable legislation is drafted for digital money, its guidelines will mandate that businesses with the digital sharp unit monitor these transactions. Bitcoin and other digital currencies will gain more widespread acceptance in India once the associated fears could be properly understood and dispelled.

RULE OF LAW IMPLEMENTATION IN INDIA: A CRITICAL REVIEW

Ms. Neha Samji*

VIPS Student Law Review
August 2023, Vol. 5, Issue 1, 133-141
ISSN 2582-0311 (Print)
ISSN 2582-0303 (Online)

https://vslls.vips.edu/vslr/

ABSTRACT

Any legal and political system cannot function without the principle of the Rule of Law. It is based on the principles of equality, non-arbitrariness, and justice. The principle's origins may be traced to ancient Greece, where it was predominately beneficial. A.V. Dicey provided an accurate interpretation, suggesting a three-pronged description of the concept. However, his approach is not without faults. In India, the Constitution embodies the Rule of Law in principles contained in the Preamble and Part III of the Indian Constitution. Over time, the judiciary has construed the Constitution in a way that allows for a liberal application of the concept. Due process and a fair, just, and non-adversarial method have been defined as part of the Rule of Law. This is achieved by the idea of separation of powers and any intrusion by one organ significantly weakens the said principle. Thus, this paper aims to critically analyse the application of the Rule of Law in India.

Keywords: *Rule of Law, Dicey Theory, Constitutional Provisions, Judiciary, Parliament*

I. INTRODUCTION

The word 'Rule of Law' refers to the principle of legality, which alludes to a government established on legal principles rather than men's ideals. No individual, whether wealthy or destitute, or from any background, is above the law[1]; it is a shield against the

* Student, 4th year BBA.LLB (Hons.), Symbiosis Law School, Pune.

1 Justice V. Dhanapalan, "Basic Structure of the Indian Constitution – An Analysis," (2014) 8 SCC J-1."

oppressive authority of governmental agencies[2]. The Rule of Law is the pinnacle of human culture and civilization, as well as a new "*lingua franca*" for global moral discourse. The term 'Rule of Law' should not be confused with the term 'law'. It is commonly regarded as a state political morality concept that emphasizes the Rule of Law in ensuring a proper balance of rights and powers between people and between citizens and the state in any free and civil society. Law founded on freedom, justice, equality, and accountability can help to achieve such balance.[3] The Rule of Law is one of the most important components in a list of modern political concepts that also includes human rights, free-market economy, and democracy principles.[4] Thus, the Rule of Law is a dynamic notion that may be interpreted in a variety of ways to help a government operate successfully.

II. EVOLUTION

The Rule of Law dates to the dawn of society. Many interpretations of the Rule of Law refer texts from Plato and Aristotle as evidence of its beginnings in classical Greek philosophy. As a result, Greek views on the Rule of Law are best understood as illustrative models that provide inspiration and authority for succeeding times. The Romans made both positive and negative contributions to the Rule of Law history, with the negative tradition having far more consequences.[5] In the medieval period, the Germanic customary law notion that the monarch is subject to the law has been largely recognized as an independent source of the Rule of Law.[6] The Magna Carta, epitomized a third ancient root of the Rule of Law—the effort of nobles to use the law to repress kings, although it stands on its own as a past narrative with resonating consequences in the Rule of Law tradition.[7] Later, there were the approaches to Rule of Law that were Liberalist and Federalist. Locke's proposal included a limited delegation of authority from citizens to the government and he defined the division of powers between the legislative and the executive to ensure that the government functions by legally passed laws. Thus, Locke believed that law should be formed by majority vote,

2 Shailendra Kishore Singh, *Rhetoric and the Rule of Law vis-à-vis the Supreme Court of India*, CNLU LJ, 82 (2012).

3 Venkat Iyer. *Citizen's Rights and the Rule of Law problems and prospects*. Lexis Nexis, 7 (1st ed., 2008).

4 Jeremy Waldron, *The Concept and the Rule of Law*, Georgia Law Review, 134 (2008).

5 Cicero, Niall Rudd, Jonathan Powell Niall Rudd. *The Republic and the Laws*. Oxford University Press, 50 (2008).

6 Fritz Kern. *Kingship and Law in the Middle Ages*. New York: Frederick A. Praeger Publishers, 186 (1st ed., 1956).

7 William H. Dunham. *The Great charter: four essays on Magna carta and the history of our liberty*. New York: Pantheon Books, 26 (1965).

in keeping with the consensual nature of civil society.[8]

In 1885, A.V. Dicey adopted Montesquieu's methodology, examined the UK model and set down three principles originating from the Rule of Law[9]:

a) Supremacy of Law

It denotes the country's legal supremacy and absolute authority. Dicey considered that where discretion is allowed, there will be arbitrariness. As a result, it was decided that the law established in a court of law must be implemented in the land and that no one can take the law into their own hands.

b) Equality before the law

This implies that the law must be applied in a reasonable and equitable manner. In a court of justice, everyone, regardless of position or status, should be subjected to the same laws and procedures as everyone else.

c) Predominance of Legal Spirit

Dicey thought that simply establishing the above two principles would not be sufficient and that the legislation would also need to be enforced. He also advocated for an independent and impartial judiciary, which he believes is essential for the implementation of the Rule of Law.

The Rule of Law notion proposed by Dicey has both merits and demerits. The Rule of Law enforced and aided in instilling an attitude of constraint in government. The government was obligated to work within the confines of the law. Furthermore, by declaring that the law is paramount, he proclaimed that all laws passed by the legislature are superior, supporting parliamentary sovereignty. Self-conferment of power is impossible since even ordinary law is paramount. Dicey, on the other hand, utterly misread the true character of French administrative law, which was in reality admired and served as a model for various European communities.[10] However, Dicey's theory is prominently referred and laid down the foundation for framing the principle of the Rule of Law in the Indian context.[11]

8 John Locke. *Second Treatise of Government*. Prometheus Books, 47 (1986).

9 A.V. Dicey. *The Law of the Constitution*. OUP Oxford, 198 (8th ed., 2013).

10 Neville Brown, John Bell. *French Administrative Law*. OUP Oxford, 48 (1998).

11 Mark D. Walters. *A.V. Dicey and the Common Law Constitutional Tradition*. Cambridge University Press, 226-258 (1st ed., 2020).

III. APPLICATION OF THE RULE OF LAW IN INDIA

The Rule of Law was adopted by India from the common law justice system, which had its origins in British jurisprudence. The absence of arbitrary authority is the basic requirement of the Rule of Law, which underpins our whole constitutional structure.[12] Governance must be based on rules rather than being arbitrary, ambiguous, or fantastical.[13] The notion of the Rule of Law cannot be implemented in its spirit and letter unless all state instrumentalities are obligated to carry out their functions in a just and equitable way.[14]

IV. CONSTITUTIONAL PROVISIONS

The principle of the Rule of Law in India may be traced back to the Upanishads. It may also be found in classics such as the Mahabharata and Ramayana, as well as the Ten Commandments, Dharma Chakra, and other fundamental scriptures. In contemporary times, India's constitution demonstrates this desire for a nation run by the Rule of Law. It declares the constitution to be the primary law of the nation, deriving power from the government and administration. Several articles of the Constitution are understood to embody the Rule of Law as it is applied in India in the light of Dicey's theory. The Constitution is considered the country's *ground norm*, from which all other laws receive their authority, making all other laws subordinate to it and preserving the postulates of the Rule of Law envisioned in the Indian Constitution. In addition, Art.13(1) says that every law passed by the legislature must be in accordance with the Constitution, or it will be deemed unconstitutional.[15] As a result, each legislation that is enacted must comply with the requirements of the Constitution.

Our constitution's Preamble includes the words justice, liberty, and equality, which are unambiguous indicators of a just and fair society with no disparities amongst the masses, regardless of their social status. Part III of the constitution, i.e., fundamental rights, meets all of Dicey's conditions for a country to be governed by the Rule of Law. The concept of equality before the law and equal protection under the law, as stated by Dicey, is enshrined in Art.14 of India's constitution.[16] Art.21 of the constitution guarantees the fundamental right to life and personal liberty.[17] Art.19 guarantees the people of India the right to free

12 S.G. Jaisinghani v. Union of India (UOI) and Ors., AIR 1967 SC 1427; T.N. Godavarman Thirumulpad v. Ashok Khot and Ors., AIR 2006 SC 2007.

13 Re. John Wilkes, (1770) 4 Burr 2528.

14 A.K. Kraipak and Ors. v. Union of India (UOI) and Ors., AIR 1970 SC 150.

15 Constitution of India, Article 13(1).

16 Constitution of India, Article 14.

17 Constitution of India, Article 21.

speech and expression.[18] The concept that no one may be punished for any crime unless the legislation in force of the country provides the same at the time the crime was committed, is explicitly established in the constitution. The constitutional principles of double jeopardy and self-incrimination have also been effectively incorporated. Art.32[19] and Art.226[20] of the constitution provide the Supreme Court and the High Courts, respectively, the authority of judicial review to protect the independence of the judiciary. Thus, our whole constitutional structure is founded on the Rule of Law.[21]

V. JUDICIAL PRONOUNCEMENTS

Judicial decisions, in addition to constitutional provisions, have played an important role in the understanding and advancement of India's Rule of Law. The Rule of Law is considered an integral component of the Constitution's core framework.[22] According to Justice R.S. Pathak, "*It must be recalled that our constitutional structure is built on the Rule of Law, it is difficult to conceive of legal power that is arbitrary in character and travels beyond the boundaries of reason in any system thus designed.*"[23] Judicial rulings have been critical in preventing the state from acting arbitrarily. The Supreme Court of India decided in *A.K. Kraipak and Ors. v. Union of India (UOI) and Ors.*[24] that our welfare state is governed and controlled by the Rule of Law. The court in *Maneka Gandhi v. Union of India (UOI) and Ors.*[25] assured that the government's arbitrary exercise of authority would not infringe on people's rights. The Supreme Court of India interpreted Art.14 of the Indian Constitution and extended its scope in *E.P. Royappa v. State of Tamil Nadu and Ors*[26]. This article was given a new dimension, and it was seen as a safeguard against arbitrariness. In a subsequent ruling, the Apex Court concluded that the Rule of Law, as enshrined in Art.14 of the Constitution, is a "basic feature" of the Indian Constitution that cannot be abolished even by a constitutional amendment under Art.368 of the Constitution.[27]

18 Constitution of India, Article 19.

19 Constitution of India, Article 32.

20 Constitution of India, Article 226.

21 Alok Kumar Yadav, "Rule of Law," International Journal of Law and Legal Jurisprudence Studies, 205-220 (2017).

22 Kesavananda Bharati Sripadagalvaru v. State of Kerala, AIR 1973 SC 1461.

23 Suman Gupta and Ors. v. State of J and K and Ors., AIR 1983 SC 1235.

24 A.K. Kraipak and Ors. v. Union of India (UOI) and Ors., AIR 1970 SC 150.

25 Maneka Gandhi v. Union of India (UOI) and Ors., AIR 1978 SC 597.

26 E.P. Royappa v. State of Tamil Nadu and Ors., AIR 1974 SC 555.

27 Indira Nehru Gandhi v. Raj Narain and Ors., AIR 1975 SC 2299.

India has an independent judiciary that keeps a check on the other branches of government while conducting its responsibilities independently, in accordance with the third principle of the Rule of Law. In *L. Chandra Kumar v. Union of India (UOI) and Ors.*[28], the court found the judiciary's independence to be part of the fundamental structure. In a subsequent decision, the Supreme Court ruled that disagreements over the constitutionality of government activities shall be resolved by judges who are independent of the Executive.[29] As a result, the government's ultra vires or arbitrary activities are restrained. The *P. Sambamurthy v. State of Andhra Pradesh*[30] was a landmark event in the history of the Rule of Law. In this case, the Supreme Court of India upheld the paramount importance of the Rule of law within the basic structure of the Indian Constitution. The legal challenge was centered on Art.371D (5), granting the government authority to alter or annul administrative tribunal's decisions. Chief Justice Bhagwati's verdict held the same to be unconstitutional, invoking the basic structure doctrine. He ruled that it contradicted the core principle of the rule of law, an indispensable constitutional element. Chief Justice Bhagwati declared the doctrine of "judicial review," integral to the rule of law, and asserted that no power could diminish this authority, whereby any such endeavor would violate the rule of law and the basic structure of the Constitution.

In recent times, the Delhi High Court has further upheld the rule of law and stated that disregarding the same would propel the country towards inevitable ruin.[31] The Himachal Pradesh High Court has also interpreted the rule of law to decide that the settlement of disputes on the street is contrary to the rule of law.[32] The Supreme Court later decided on the rule of law violation had an adverse effect on access to justice, which is a fundamental right.[33] Thus, the Indian judiciary has played a crucial role in shaping the Rule of Law in India.

VI. COMPARATIVE ANALYSIS

For society's well-being, the rule of law is a crucial concept. There are written or unwritten constitutions that contain the rule of law in countries like India, the UK, and the US. All three nations uphold the principle of separation of powers. The approach permits some

28 L. Chandra Kumar v. Union of India (UOI) and Ors., AIR 1997 SC 1125.

29 Union of India (UOI) v. R. Gandhi and Ors., (2007) 4 SCC 341.

30 P. Sambamurthy v. State of Andhra Pradesh, MANU/SC/0736/1986.

31 Navin Soni v. Munish Soni and Ors., 2022/DHC/1480.

32 Freed and Ors. v. State of H.P., ILR 2020 III HP 112.

33 Hussain and Ors. v. Union of India (UOI) and Ors., AIR 2017 SC 1362.

flexibility, though not entirely committed herewith. The judiciary also incorporates the doctrine of the rule of law into its procedures for the advancement of society and the speedy delivery of justice.

This concept was implemented in the UK to control the king's arbitrary actions, restrain his unbridled power, and promote civilization. While it was applied in India to reinforce democratic values and foster the advancement of the nation. Additionally, the US adopted this concept to reduce the discrepancy in governance and give due regard to the welfare of the state.

However, it is challenging to implement the rule of law in the UK since it does not have a written constitution, which can expound the applicability leading to biases. Whereas, India and the US, these countries have written constitutions, though expressly stated in Article IV of the US Constitution but not in the Indian Constitution, can exemplify the rule of law reflecting though various provisions of law and judicial pronouncements.

VII. CRITICAL ANALYSIS

The Rule of Law has been enshrined in the soul of our constitution by its framers. The three branches of government work together to establish the Rule of Law through a system of checks and balances. Besides following the laws as put down by the parliament and interpreted by the court, the judiciary has worked effectively toward the creation of the Rule of Law and has had equal support from both citizens and the government. In the Constitutional Assembly Debates, Dr P. S. Deshmukh discussed about the want for the Rule of Law in the unlawful society of India.[34] Prof. K. T. Shah also stated the Rule of Law to be essential in maintaining the liberty of the nation.[35] Several others debated on the importance of the Rule of Law but did not incorporate the Rule of Law explicitly in the Constitution and implied the same through various constitutional provisions as mentioned above. The notion of the Rule of Law was jeopardized during one of the darkest episodes in democratic India, the Emergency. The 42nd Amendment was enacted in an attempt to modify the Constitution. There was an abuse of Art.356 that weakened the country's core federal framework. When Justice A.N. Ray was named Chief Justice of India in the 1970s, the other three senior judges were dismissed, and the judiciary was no longer an autonomous and untainted entity from political interference. Even back then, the judiciary preserved the

34 "Constituent Assembly Debates (Proceedings) - Vol. VII (1948)," available at: http://164.100.47.194/Loksabha/Debates/cadebatefiles/C07121948.html.

35 "Constituent Assembly Debates (Proceedings) - Vol. VII (1948)," available at: http://164.100.47.194/Loksabha/Debates/cadebatefiles/C07121948.html.

spirit of the Rule of Law, demonstrating the enormous strength that such a notion wields in defeating oppressive government. Thereby, the Rule of Law in India has taken on a new connotation as it is recognized to be an integral component of the Constitution's core framework, and as such, it cannot be repealed even by Parliament.

However, the execution in India has not been devoid of problems. Some of the issues that impede the seamless execution of the Rule of Law include obsolete legislation and an overburdened judiciary. There have been occasions where corruption has harmed the legal system as well as the administrative system. The problem of the judiciary's encroachment into other government institutions in the guise of activism is present all the time. The court's ability to restrain the activity of other organs must be considered. The idea of the Rule of Law also prohibits the court from conferring authority on itself. The court's interpretations and decisions are never sufficient to assure Rule of Law adherence. Corruption, fraudulent encounters, and unjust regulations are all threats to the Rule of Law. The concept of equality comes to mind when contemplating the notion of the Rule of Law. This, too, has been highly criticized. In India, no case may be brought against officials and diplomats, and members of parliament have special rights when it comes to legal measures against them. The government has the inherent power to act solely on its initiative and without regard for checks or balances. Moreover, there have been several instances where the public has resorted to violence in response to an act of Parliament or a judicial pronouncement or has committed acts contrary to law that are not, in their opinion, contrary to Law and Justice, resulting in situations where the Rule of Law has only become a *de jure* concept while the Rule of Men has prevailed in practice. For example, the Sabarimala case[36] decision sheds light on men's discretion in following Supreme Court orders solely to the extent that they are comparable to the beliefs they hold. The court had permitted women of menstrual age, i.e., between the ages of 10 and 50, to pray at the temple. All women of menstrual age are historically barred from entering the Lord Ayyappa temple. After the judgement, there were widespread protests, as well as instances of violence against women attempting to enter the shrine. Even after the practice was deemed unlawful by the Supreme Court, women were denied their constitutional right to worship and equality standards were breached. Apart from these examples, there a plenty of others that point to the adulteration of the indigenous concept of Rule of Law. Thus, this emphasized the need to relook at the application of the Rule of Law in India and focus on the proper implementation of the same.

Therefore, the Rule of Law was largely derived and firmly ingrained in the Indian system. The rule was recognized by the constitution's framers, who ensured that it was appropriately

36 Indian Young Lawyers Association and Ors. v. State of Kerala and Ors., (2017) 10 SCC 689.

incorporated into the country's structure. Part III of the Indian Constitution which deals with people's fundamental rights, was used to achieve the same. The judiciary has also played a role in ensuring that justice is provided to the people by reinforcing all the procedures outlined in the Constitution. However, the lack of implementation and shortcomings are observed, which need to be tackled to ensure the prevalence of the principle of 'Rule of Law.' It also necessitates taking the appropriate measures to establish a speedy justice delivery mechanism to fully implement the Rule of Law. Similarly, the parliament should ensure that no law is passed that infringes on citizens' rights or violates the Constitution. The public administration must ensure that the Rule of Law is effectively implemented by constitutional directives that carry out the law's objective criteria equally.[37] Every government official in a position of public trust is responsible for ensuring that national goals are met.[38] The government should guarantee that no such laws are enforced in the country. The Law Commission of India is trying to create a society in which there are no impediments to the Rule of Law's seamless operation. The constitution should always be regarded as the supreme law of the nation, regardless of the situation. If any government organ seeks to conduct something that is beyond its constitutional power, the act should be deemed unconstitutional and hence invalid from the outset. There will be no impediments to India's complete adoption of the Rule of Law if each government department plays a key role. Despite all its obstacles, India has achieved considerable progress in terms of the practical effectiveness of the Rule of Law throughout the years. Our forefathers aspired to a Constitutional India in which every person is treated equally before the law and his or her liberty is protected. They envisioned an India with free of arbitrary power, democracy and an effective Rule of Law. The Constitution, as well as its creator's vision, will stand the test of time and it is now up to future generations to turn the idea into a reality. Hence, the Rule of Law is widely considered to be a contemporary ideal that is a gift of democracy to all citizens and is a fundamental component of successful governance.

37 State of Punjab and Ors. v. G.S. Gill and Ors., AIR 1997 SC 2324.

38 Superintending Engineer, Public Health, U.T. Chandigarh and Ors. v. Kuldeep Singh and Ors., AIR 1997 SC 2133.

BEYOND BORDERS: THE USE OF COMPARATIVE LAW IN CONSTITUTIONAL INTERPRETATION

Mr. Satyam Shah*
Ms. Krati Gupta**

VIPS Student Law Review
August 2023, Vol. 5, Issue 1, 142-150
ISSN 2582-0311 (Print)
ISSN 2582-0303 (Online)

https://vslls.vips.edu/vslr/

ABSTRACT

This article delves into the application of comparative law in the interpretation of constitutions, with a particular focus on the legal system of India. The historical evolution of comparative law and the principles of dualism and monism in Indian law are examined. The article highlights various examples of how Indian courts have utilized international law, including the use of international conventions and norms in the interpretation of the Constitution of India. Furthermore, it discusses the recent trends in constitutional interpretation in India, such as the use of comparative law, the significance of international and regional conventions in the interpretation of the Constitution, and innovative interpretations concerning same-sex marriage and dignified death. However, it also acknowledges the potential drawbacks of the application of comparative law in constitutional interpretation, such as undermining the uniqueness of a country's legal system and generating inconsistencies in judicial decisions. As a result, it proposes that judges should exercise discretion and caution in employing comparative law, balancing the benefits with the need to preserve the integrity and sovereignty of their own legal system. The article concludes that comparative law is an essential tool in constitutional interpretation, which plays a vital role in preserving the fundamental principles and values enshrined in the Constitution, guaranteeing that justice is served equitably.

Keywords: *Constitution, Interpretation, Comparative, Conventions, International.*

* Student 4th year, BA LLB, Bharati Vidyapeeth University, Pune.
** Student 4th year, BA LLB, Bharati Vidyapeeth University, Pune.

I. INTRODUCTION

Constitutional interpretation is a crucial part of constitutional law that has a significant impact on shaping the legal system of a country. It involves "examining and analyzing" the provisions of a constitution and applying them to particular legal issues or cases. It helps Judges in ensuring that the fundamental principles and values enshrined in the Constitution are maintained and that justice is served properly. One of the essential functions of constitutional interpretation is to enable judges to gain a clear understanding of the meaning of a constitutional provision and to find out the original intent of the constitution's drafters when framing the provision. However, constitutional interpretation is a dynamic process that is constantly evolving with the changing needs of society.

There are numerous emerging trends in constitutional interpretation, one of which is the use of comparative law. Comparative law involves examining the provisions of other countries, including international and regional conventions, and using these insights to interpret the constitution. In the Indian context, judges have time and again referred to comparative law to understand the provisions of the constitution. The role of foreign law in constitutional interpretation has emerged as a contentious issue in the legal community. While some legal scholars argue that foreign law can provide valuable insights and perspectives for judges to interpret their constitutions, others contend that it undermines the sovereignty of the country's legal system.

The use of comparative law has both positive and negative effects on constitutional interpretation. On one hand, it allows judges to draw on the experiences and perspectives of other legal systems to gain a more comprehensive understanding of constitutional principles and values. On the other hand, the use of comparative law in constitutional interpretation can also have negative effects. For instance, it can be argued that it dilutes the distinctiveness of a country's legal system and can lead to an erosion of national sovereignty. Therefore, judges must use comparative law carefully and judiciously. They must consider the unique circumstances and context of their legal system while drawing on the experiences of other countries. The challenge for judges is to balance the benefits of comparative law with the need to maintain the integrity and sovereignty of their legal system.

This article aims to investigate how looking at laws from different countries can help judges better understand and apply their own country's constitution. By examining the positives and potential drawbacks of using this approach, the article intends to provide insights into how judges can balance the benefits of learning from other legal systems while preserving the integrity of their own.

II. HISTORICAL DEVELOPMENT

In the middle of the 19th century, Comparative law first appeared in Gottfried Wilhelm Leibniz's Latin-language book *"Nova Methodus Discendae Docendaeque Jurisprudential" in 1667.* While relative law was not developed or studied extensively in the 19th century, Feuerbach, Gans, and Thibaut did produce some work in Germany. A legal scholar from the US who was being persecuted in Germany introduced comparative law there. In France, a comparative law chair was founded in 1832, and due to American opposition to anything related to English law, natural law predominated there.

In India, during the early 20th century, the British Parliament passed the Government of India Acts in 1919 and 1935, which aimed to increase native participation in governance. These Acts included the creation of a high commissioner with a residence in London to represent India in the UK and a dual system of government with restricted powers for the major provinces. To discuss the grant of independence to India, the Constituent Assembly of 1948 and the Constitution of 1950 was established.

While the Indian judiciary does not have the authority to pass laws, it interprets India's obligations under international law by ruling on domestic disputes involving such matters. The Indian judiciary has been active in upholding India's obligations under international treaties, particularly in the areas of environmental law and human rights. The Supreme Court has reflected the dualist philosophy of the Indian legal system in several cases. For example, in the case of *Jolly George Verghese v. Bank of Cochin,*[1] it was held that the treaty would bind the court, not the municipal law unless the latter was changed to account for the treaty.

In the landmark case of *Vishaka v. State of Rajasthan*[2], the court made reference to various international conventions and norms when formulating guidelines on the sexual harassment of women in the workplace. These conventions and norms were crucial for ensuring gender equality, the right to work with dignity, and the observance of Articles 14, 15, 19(1)(g), and 21 of the Constitution.[3]

III. METHODS OF COMPARATIVE LAW

The Functional Method

It was made popular by Hein Kotz and Konrad Zweigert, who compared how well existing laws serve their intended purposes. According to this approach, laws can be compared

1 1980 AIR 470.

2 (1997) 6 SCC 241.

3 The Constitution of India.

despite having different structures as long as they serve the same purposes.

The Structural Method

This technique compares and contrasts the legal systems' structural similarities and differences. It is primarily concerned with the internal organization of the legal system and its fundamentals

The Analytical Method

This approach is most frequently used for comparative research. This approach focuses on interpreting the significance of various legal provisions. It examines the various ways that the same idea can be understood.

The Cultural and Legal Comparison Method

This approach compares the nations' cultural aspects. Every law and legal system, especially civil and common law, is based on cultural and traditional elements.[4]

IV. INDIAN CASE LAWS ON COMPARATIVE LAW IN CONSTITUTIONAL INTERPRETATION

The Lok Sabha recently received an important report on "India and international law" from the parliamentary committee on external affairs. The report discusses, among other things, how Indian courts have approached international law. The committee noted that India adheres to the "dualism" principle, which states that domestic legal systems do not always automatically incorporate international law. Article 253[5] of the Indian Constitution recognizes that to convert international law into local law, a parliamentary act is required. The Supreme Court's ruling that customary international law (CIL), unless it conflicts with domestic law, is a part of the Indian legal system even in the absence of enabling legislation passed by Parliament, according to the committee, has deviated from the principle of dualism and moved in the direction of monism. The term "Customary International law" (CIL) refers to standards of international law that are derived from a formal source of international law.

The Supreme Court reiterated that India adheres to the dualism doctrine in the case of *State*

4 Vishruti Chauhan, Importance of Comparative Legal Studies, Ipleaders *available at* https://blog.ipleaders.in/importance-of-comparative-legal-studies/?amp=1#Functional_method (Last visited Mar. 14, 2023)

5 The Constitution of India, art.253.

of West Bengal v. Kesoram Industries (2004)[6] and ruled that no treaty that India has signed can become a law of the land unless the parliament passes a law as required by article 253 of the Indian constitution.

In *Gramophone Co of India v. Birendra Bahadur Pandey*[7], the Hon'ble Supreme Court adopted a liberal stance and ruled that the comity of nations required that the rules of international law be accommodated in municipal law even without express legislative sanctions as long as they did not conflict with parliamentary acts. The doctrine of incorporation also acknowledges the position that the rules of international law are incorporated into it.

As in the case of *Chairman Railway Board v. Chandrima Das*[8] by extending the reach of Article 21 of the constitution to include rape victims of foreign nationals, the court in Chandrima Das (2000) applied the principles of the Universal Declaration of Human Rights.

In *Neelabati Behera v. State of Orissa*[9], the court awarded compensation to the victim for the case of custodial death by citing Article 9(5) of the Covenant on Civil and Political Rights (1966).

The Right to Health Convention i.e., "International Convention on Civil, Economic and Social Rights" states that every person has the right to access medical assistance. As seen in *Parmananda Katara v. Union of India*[10], The Supreme Court using the ICESCR has very specifically stated that life preservation is of the utmost importance. Once life is lost, the status quo ante cannot be restored, according to the Supreme Court. It was decided that all doctors, whether public or private, have a duty to extend medical care to the injured as soon as possible to preserve life, without waiting for legal requirements to be fulfilled with the police. The state is required by Article 21[11] to protect life.

V. ROLE OF INTERNATIONAL AND REGIONAL CONVENTIONS IN THE INTERPRETATION OF THE CONSTITUTION

International and regional conventions have played a significant role in the interpretation of the Constitution in India. These conventions provide a framework for understanding

6 AIR 2005 SC 1646.
7 AIR 1984 SC 667.
8 AIR 2000 SC 98.
9 1993 AIR 1960.
10 1989 AIR 2039.
11 The Constitution of India, art. 21.

and implementing fundamental rights, especially in the absence of domestic laws. The Indian judiciary has successfully integrated international standards into domestic law while upholding the Constitution's supremacy.

The landmark case of *Vishaka vs. the State of Rajasthan*[12] highlighted the importance of international conventions and norms in the interpretation of fundamental rights. The Supreme Court referred to the *Convention on the Elimination of All Forms of Discrimination against Women* and held that any international convention that is not inconsistent with the fundamental rights guaranteed in the Constitution must be read into these provisions. This enlarges the meaning and content of the fundamental rights and promotes the object of the constitutional guarantee.

In addition to the Vishaka case, many other instances have shown the importance of international and regional conventions in interpreting the Constitution. *The Vellore Citizens Welfare Forum v. Union of India & Others*[13] case saw the Supreme Court rely on environmental conventions and declarations to formulate effective measures for the protection of the environment. *The PUCL vs. Union of India*[14] case relied on the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights to interpret Article 21 of the Constitution, guaranteeing the right to life and personal liberty.

In conclusion, international and regional conventions play a crucial role in the interpretation of the Constitution in India. By relying on these conventions, the judiciary enlarges the meaning and content of fundamental rights, ensures their effective implementation, and promotes the object of the constitutional guarantee.

VI. RECENT DEVELOPMENTS IN CONSTITUTIONAL INTERPRETATION

Recently several petitions have been filed in the Supreme Court of India, calling for the legal recognition of same-sex marriage. In response, the Supreme Court directed that all the petitions related to legalizing same-sex marriage would be referred to a constitutional bench. The question that arises now is whether the court will take a progressive interpretation and allow same-sex marriage.[15]

12 *Supra* note 2. at 3.

13 *Vellore Citizen Welfare Forum v. Union of India* AIR 1996(5) SCC 647.

14 AIR 1997 SC 568.

15 Bastian Steuwer, Thulasi K. Raj, Same Sex Marriage: All that is needed in a small change in the Special Marriage Act, The Indian Express *available at* https://indianexpress.com/article/opinion/columns/same-sex-marriage-small-change-special-marriage-act-8498683/ (Last Visited March 17th 2023).

When considering the legal recognition of same-sex marriage, it is essential to understand the legal landscape around the world. The US Supreme Court, in 2015, ruled that limiting marriage to heterosexual couples violates the equal protection of the law. Similarly, the Constitutional Court of Costa Rica, in 2020, and the Constitutional Court of Slovenia, in 2022, ruled that banning same-sex marriage is unconstitutional.

In the case of India, the Supreme Court invoked Article 145(3)[16] in the petition for legal recognition of same-sex marriage, as the issue involves substantial questions and interpretation of the constitution. The court's interpretation will play a vital role in deciding whether same-sex marriage will be considered a part of the fundamental right to life and dignity under Article 21. It is up to the judges of the Supreme Court to determine how they take the help of comparative law in constitutional interpretation and which approach they follow in the interpretation of the Constitution in legalizing marriage.

The Supreme Court may take guidance from the comparative laws of other countries that have taken a liberal approach while interpreting the fundamental right to life and dignity of the LGBTQ+ community. However, in its reply to the petition, the Center argued that Western decisions cannot be applied to India's constitutional jurisprudence. The Center also added that marriage is a holy union between a man and a woman. It remains to be seen how the Supreme Court of India will interpret the Constitution in the context of legalizing same-sex marriage. Nonetheless, comparative law can play a crucial role in shaping the interpretation of constitutional provisions.

When it comes to the issue of legalizing same-sex marriage in India, judges must consider the country's complex legal, cultural, and religious factors. While comparative law can be helpful, it's important to remember that the Western approach may not be suitable for India. The country has its unique legal and cultural context that must be taken into account. Judges should approach the issue with sensitivity and understand India's history and culture, including the impact of colonialism and the country's religious traditions. They should work towards developing an interpretation of the constitution that aligns with Indian values while still upholding principles of equality and non-discrimination. This will require a nuanced approach that is mindful of the specific legal and cultural context of India.

Right To Life- *"No person shall be deprived of his life or personal liberty except by the procedure established by law*," states Article 21[17] of the Indian Constitution. The right to death is not a part of the right to life under Article 21. A fundamental human right is a right

16 The Constitution of India, art. 145, cl. 3.

17 The Constitution of India, art. 21.

to life. The Bombay High Court in the *State of Maharashtra v. Maruti Sripati Dubal*[18]. In this instance, the court ruled that Section 309 of the Indian Penal Code, 1860, which classifies suicide attempt as a crime, is unconstitutional because it violates the right to life and the right to die.

However, the Supreme Court ruled in *Gian Kaur v. State of Punjab*[19] The right to life does not include the "right to die" or the "right to be killed,". No one has the right to end their life unnaturally; the right to life is a natural right, while the right to die is not. Even though a petition for euthanasia was filed, the Supreme Court ruled in *Aruna Ramchandra Shanbaug v. Union of India*[20] that only passive euthanasia is permitted in India; in other words, only when a patient is receiving ventilation can the patient be taken off of it. Even in India, euthanasia—whether voluntary, involuntary, or non-voluntary—is not permitted and is punishable by law, except for passive euthanasia, which is permitted under Indian law.

VII. CRITICISM

The utilization of comparative law in constitutional interpretation has been a subject of contention within the legal community. While it can provide valuable insights, several criticisms must be acknowledged, including:

a) Impact on national identity and sovereignty: Comparative law can create tensions between legal systems and potentially undermine a country's national identity and sovereignty.

b) Challenges arising from religious diversity: The interplay between comparative law and religion faces unprecedented challenges in diverse societies. While it aids in understanding different religious perspectives, it may also lead to clashes of values and beliefs that are hard to reconcile.

c) Variations in politics and government: Politics and government are intricately tied to a nation's unique circumstances. Differing situations make finding comparable conditions for comparison challenging. Moreover, diverse ideologies within politics and government hinder effective comparisons.

d) Objectivity in comparison: Conducting an unbiased comparison is complex, as intellectual biases towards ideology or nation can come into play. To compare

18 1986 Mah LJ 913.

19 1996 2 SCC 648.

20 2011 4 SCC 454.

politics and government objectively, empirical research is necessary, which demands skilled labor, time, and financial resources.

e) Claims of governmental superiority: Governments often assert the superiority of their systems, resulting in disagreements among stakeholders over the criteria used for comparison.

f) Restrictions on studying government systems: Governments may restrict external study of their systems, leading to limited access to data and potential biases among researchers conducting comparisons.

g) Consistency with Indian values and customs: The Indian Constitution is rooted in unique Indian values and customs. The use of comparative law can occasionally clash with these values and customs, introducing inconsistencies in the interpretation.

VIII. CONCLUSION

In the previous two decades, the comparative method has drawn a lot of attention. Its importance is demonstrated by the analysis of the legal systems and a deeper comprehension of international private and public law. A comparative study is so important that it enables both professionals and students to examine the inner workings of any legal system. Examining the existing legal systems of other countries and cultures also enables the minds to create new laws and policies in a better way. Comparative law develops and promotes various legal aspects globally and poses inquiries about various national and international perspectives. While these tools can provide valuable insights and perspectives to judges, they must be used carefully to maintain the sovereignty and integrity of the legal system. The Indian judiciary has successfully integrated international standards into domestic law while upholding the Constitution's supremacy, ensuring that fundamental rights are interpreted and implemented in a manner that is in line with the Constitution's objectives. As the legal landscape evolves, it is imperative that constitutional interpretation also adapts to reflect changing societal needs and values, while remaining faithful to the Constitution's original intent.

IMPLEMENTATION OF SECTION 12(1)(C) OF THE RIGHT TO EDUCATION ACT: AN OVERVIEW

Ms. Anushka Singhal*
Mr. Ashmit Raj**

VIPS Student Law Review
August 2023, Vol. 5, Issue 1, 151-166
ISSN 2582-0311 (Print)
ISSN 2582-0303 (Online)

https://vslls.vips.edu/vslr/

ABSTRACT

"It is not beyond our power to create a world in which all children have access to good education" -Nelson Mandela

To strengthen the position of Education and distribute its fruits among all, the Government of India took an essential initiative by enacting the Constitution (Eighty-sixth Amendment) Act, 2002, which led to the coming of The Right to Education Act, 2009 that has played an indispensable role in getting economically weaker sections, admitted to private un-aided schools. Though, the uniform application of the Act in a vast country like India is still solicited. With the introduction of reservation for the economically weaker sections, vide the Constitution (One Hundred-third Amendment) Act, 2019, the significance of implementation of Section 12(1)(c) of the Right to Education Act has been emphasized even more. The present piece of work presents doctrinal research wherein government-authenticated data has been used to shed light on the implementation of this section. This paper takes a trajectory that begins with an assessment of: (a) the history of the Right to Education; (b) goes through the question of its constitutionality; (c) examines its implementation across India; (d) compares states in terms of their performance and; (e) conclude by findings and suggestions, if any.

Keywords: *Right to Education, Economically Weaker Sections, Fundamental rights, National Education Policy.*

* Student, BA LLB, 3rd year, Symbiosis Law School, NOIDA, India.
** Student, BA LLB, 3rd year, Symbiosis Law School, NOIDA, India.

I. INTRODUCTION

Everyone has a right to Education.[1] It is the basis for a flourishing society; thus, at least in the initial stages of life, one must be endowed with "free and compulsory education." It is essential to provide "compulsory education" to all, but before applying " compulsory education, " it is vital to understand its meaning. Among various social strata, the word "compulsory education" frequently has a variety of connotations and interpretations. The most common way mandatory Education is viewed is as a necessity for attendance or as the initial level of instruction. It is seldom understood to signify something quite similar to the right to Education. The goal of compulsory Education is to preserve children's rights to Education since, when this need is unmet due to neglect or ignorance, children lack the means to claim such rights on their own. Education that is required by law in a specific nation or State is known as compulsory Education. Regulatory provisions may include schooling up to a given standard or from a specified beginning age. The government must offer these schools, and children must attend them, according to one use of the word. Another interpretation refers to the requirements that apply to these phases from both children and the government. Due to mandatory Education, Parents "have a responsibility to send their kids to school." Failure to do so will result in state intervention. The focus turns to 'self-assertion' when compulsory schooling is seen as a matter of right. Compulsory Education was considered a right in the UNESCO Yearbook of Education (1986).[2] As a result, the right has changed from being primarily applied to the State as an active subject to the population as a passive subject, such that the term "obligatory character of education" now refers to both the State's responsibility to provide it as well as the child's obligation to receive it.

Enacted in 2009, the Right to Education Act, hereinafter RTE Act, is an essential piece of legislation that provides a framework to achieve universal Education. The Act furthers the objective of Article 21-A of the Indian Constitution. Section 12(1)(c) of the Act is an indispensable part of the Act. It further helps fulfill other provisions of the Constitution like Article 15(6), which makes the provision for 10 percent reservation of seats for economically weaker sections of the society. Section 12(1)(c) of the RTE Act makes it mandatory for private unaided schools to reserve 25 percent of seats for economically weaker sections of the society in their educational institutions". Different states are now implementing this section by adopting different procedures. Various methods are being adopted from online to offline applications to allocate seats to economically weaker sections, hereinafter EWS

1 The Universal Declaration of Human Rights, 1948, art. 26.

2 UNESCO Yearbook of Education (United Nations, 1986).

of the society. Children from economically weaker strata can quickly get admission into government schools. Still, when it comes to getting access to renowned private-unaided schools, it remains a dream for them. Thus, to provide equal opportunities to all[3] and make Education inclusive, it is essential to implement "Section 12(1)(c) of the RTE Act".

II. HISTORY

The demand to recognize the Right to Education as a fundamental right has been made since the drafting of the Constitution. During the Constituent Assembly Debates, Draft Article 36 sought to give everyone access to free and required primary Education till the age of fourteen within ten years of the Constitution's adoption. Drafters like M. Ananthasayanam Ayyangar wanted to make this "an obligation on the part of the state to provide free and compulsory education." Still, Dr. BR Ambedkar and some other drafters agreed to make this a Directive Principle of State Policy (DPSP) under Article 45. Thus, the phrase "every citizen is entitled to free and compulsory primary education" was replaced with "state shall endeavor to provide free and compulsory primary education."[4] Article 46 was also introduced, directing the State to educate people to the utmost of its financial capabilities. Following that, in 1964, the Central Advisory Board of Education stated that, while statutory requirements might be required for things like the collecting of fees, the expansion of facilities in places that are not currently covered and the use of persuasion incentives would be the most successful ways to achieve universality in Education for this age group.

Since then, the 'Right to Education' was a DPSP until the Supreme Court of India stepped ahead. In AV Chandel v. the University of Delhi[5], the Hon'ble Supreme Court of India read the 'Right to Education' in Articles 19 and 21. It said that even if we read these fundamental rights in a narrow sense, we would also find the right to Education implicit in it. The same view was taken in other judgments[6] wherein the Hon'ble Courts read this right to be implied in Articles 19, 21, 41, and 45 of the Indian Constitution. As decisions like Champakam Doarairajan[7] began to surface, it became clear that the "Right to Education" needed to be recognized as a fundamental right. The Hon'ble Court first identified the need

3 The Constitution of India, art. 14.

4 Constituent assembly debates on 23 November 1948, *available at*: https://www.constitutionofindia.net/articles/article-45-provision-for-early-childhood-care-and-education-to-children-below-the-age-of-six-years/ (last visited on May 4, 2023).

5 1998 (5) SCALE 23.

6 *Bandhua Mukti Morcha v. UOI,* (1984) 3 SCC 161, *Bapuji Education Association v. State,* AIR 1984 SC 802.

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

to acknowledge 'RTE' as a fundamental right in the benchmark judgment of Mohini Jain v. State of Karnataka[8], better recognized by 'the capitation fees' case. What was observed in this case was affirmed in Unnikrishnan[9] , but the judges in the case, also partially dismissed Mohini Jain's claim. It stated that only children under 14 are entitled to the "right to free and compulsory education." The right to Education herein was recognized as part and parcel of Article 21, i.e., the "right to life."

After that, the right again was developed in PA Inamdar v. State of Maharashtra[10] and TMA Pai Foundation v. State of Karnataka[11]. The government of India also constituted several committees, like the Saikia Committee[12] in 1997. It was suggested that making DPSP a fundamental right and imposing a "fundamental obligation" on parents to give their kids access to educational opportunities. Soon after that, the Tapas Majoomdar Committee[13] constituted in 1999 came up with the conclusion that the 'right to primary education' must be there, but that would require an extra expenditure on the part of the government. Following the recommendations of these two committees, the "Right to Education was made a fundamental right" vide "86th constitutional amendment act, 2002 and Article 21-A was inserted in the constitution". After that, two bills named The Free and Compulsory Education for Children were introduced in 2003 and 2004. The 2005 bill, called the Right to Education bill, mentioned that according to Article 45, the State has a constitutionally assigned duty to provide free Education. Even after all such recommendations, a large population of children was out of the schools. Therefore, there was an urgent need to recognize the "Right to Education in Part III of the Constitution."[14] The National Commission to Evaluate the functioning of the Constitution even recommended in 2008 that the State should provide Education for children between the ages of 6 and 14 in accordance with their economic capabilities and degree of development and that the states must provide provisions for Education beyond the age of 14 as per Article 45. It recommended the appointment of a National Commission after every five years to assess the development made in the field of Education and inform the parliament about the same.[15] Finally, the

8 1992 SCC (3) 666.

9 *Unnikrishnan case v. State of Andhra Pradesh,* 1993 SCC (1) 645.

10 (2005) 6 SCC 537.

11 1994 SCC (2) 734.

12 Department of Education, "Report of the Committee of State Education Ministers on Implications of the Proposal to Make Elementary Education a Fundamental Right" (January,1997).

13 Government of India, Tapas Majumdar committee, (1999).

14 Ayushmann, Aishwarya and Bavirisetty, Deepthi "Right to Education : Edging Closer to Realisation or Furthering Conundrum" Vol 26 Issue 1, Art. 5 *NLSI Review* 87 (2014).

15 Ministry of Law Justice and Company Affairs, "Report of the National Commission to Review the Working of the Constitution" (March, 2002).

Right to Education Act was passed in 2009 to implement the Constitution (Eighty-Sixth) Amendment and provide "free and compulsory education" to kids up to fourteen years. The Act came into effect on April 1, 2010.[16] After the amendment, India was included in the list of 135 countries recognizing the "Right to education as a fundamental right."[17]

III. TIMELINE

1950- Insertion of Article 45 and Article 46 in the Constitution.

1968- National Policy on Education: recommended that efforts should be made to implement Article 45 effectively.

2002- The Constitution (Eighty-Sixth) Amendment Act: Insertion of Article 21-A.

2003- The Free and Compulsory Education for Children Bill.

2004- The Free and Compulsory Education for Children Bill.

2005- The Right to Education Bill.

2006- States were advised to make their own education bills on the Model Right to Education Bill.

2009- The right to Education Act passed and came into force in 2010.

India's International Commitments

"The mind once enlightened cannot again become dark"; Education is the tool that enlightens a child's mind. The importance of Education is thus well known and has been recognized by various international conventions.[18] "The right to Education is recognized as a human right in Article 26 of the 1948 Universal Declaration of Human Rights; It is said that children must be provided free and compulsory elementary Education. The aim of Education must be to increase cooperation among nations and make the world a better place to live in. Article 13 of the International Convention on Economic, Social and Cultural Rights" furthermore obligates the state parties to provide free and compulsory primary Education to all and, like the UDHR, declares 'Right to Education' as a 'human right.' "The Convention on the Rights of Child, 1989" also casts a responsibility upon the signatory

16 *Supra* note 14.

17 UNESCO, *Education for all Global Monitoring Report : Reaching the Marginalised*, 2010.

18 Dr. Sheeba Pillai, "Right to Education and International Law- Defining the Right" Vol 3.Issue 1 *GNLU Law Review* 53 (2012).

states to provide the 'Right to education' to all. Article 28 of the convention, like the two-above mentioned conventions, mandates the states "to provide free and compulsory primary education to children." Article 29 of the convention describes the kind of Education that must be provided to children. Education must lead to the overall development of children. "The World Declaration on Education for all," better known as Jometian Conference, also mentions the 'Right to education for all' in one of its ten pointers.

Further, the New Delhi Summit on Education held in 1993 pledges that no child should be deprived of Education. India has signed and ratified these conventions. To honor its commitments, the Right to Education has been declared a fundamental right, and a special statute has been enacted.

The United Nations Sustainable Development Goals provide a roadmap for establishing peace and prosperity in the future.[19] Goal 4 of the 2030 agenda obliges the states to "Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all." The Sustainable Development Goals, hereinafter SDGs, are in furtherance to the Millennium Development Goals, hereinafter MDGs of the 2015 Agenda. Goal 2 of the MDGs laid down the goal of the states to achieve universal primary Education[20] , which SDG4 has now replaced. The other 16 SDGs run in consonance with SDG4, as Education is the silver bullet for almost all our problems. To honour its commitment, India has to provide free and compulsory primary Education to its children by 2030. The Right to Education Act, particularly Section 12(1)(c) of the Act, would aid in achieving this goal. No doubt, there are government schools in the country which provide free Education to children at the primary level, but that alone would not lead to the fulfilment of India's international commitments. The number of "children in the age group of 6-14 years" is significant compared to the current government primary schools. Thus, there is a need for private schools to be engaged to ensure universal and quality Education for all. The SDGs have to be attained by 2030; thus, it is high time that Section 12(1)(c) of the RTE Act is uniformly implemented.

IV. CONSTITUTIONALITY OF SECTION 12(1)(C) OF RTE ACT

It is crucial to first talk about Article 15(5), which was added to the Constitution by the 86th Constitutional Amendment, before talking about the legitimacy of Section 12(1)(c) of the

19 United Nations, https://sdgs.un.org/goals, (last visited on 14th September 2022)

20 United Nations, https://www.who.int/news-room/fact-sheets/detail/millennium-development-goals-(mdgs), (last visited on September 09, 2022).

RTE Act. Article 15(5) states that special provisions can be made for the welfare of women and children. It became compulsory for institutions to portray affirmative action towards these two classes of society. The validity of this amendment was thus challenged in the case of Ashok Kumar Thakur v. UOI[21]. The Hon'ble Court upheld the validity of this amendment by 4:1 and said that the amendment aligned with the basic structure of the Constitution. The Right to Education Act's Section 12(1)(c) mandates that non-minority private unaided schools reserve 25% of the available places at the primary level for the socially and economically disadvantaged groups in society. "Right to Education is a fundamental right" guaranteed to us by our Constitution[22] , and the rights guaranteed to us by Part III are enforceable against the State.[23] Therefore, private unaided institutions have often questioned the applicability and constitutionality of this section. The landmark judgment that ended this debate was the Society for Private Un-aided Schools of Rajasthan v. Union of India[24], better known as the RTE case. The private un-aided schools herein submitted that Article 21-A and Article 45 of the Constitution only cast an obligation upon the State. These institutions, being 'private,' cannot be forced to provide "free and compulsory education to children between 6-14 years of age". The states have a constitutional obligation, unlike the private institutions, to fulfill on their behalf. The articles guaranteeing free and compulsory Education do not provide explicit provisions for reservations, so asking "private unaided non-minority schools to reserve seats for EWS category" is not constitutionally sustainable. Freedom of trade and profession[25] was also pleaded on the part of the educational institutions.

The State replied to the petitioner's arguments in a two-fold manner. Firstly, it responded that Article 21-A being a socio-economic right, should have prevalence over Article 19(1)(g). Secondly, they replied that Article 21-A is a stand-alone provision and cannot be subjected to Article 19(1)(g). The government tried to defend the RTE Act as a whole and Section 12(1)(c). The verdict was given by Chief Justice SH Kapadia and Justice Swatanter Kumar, with Justice Radhakrishnan penning down the dissenting opinion. According to the majority, states must provide children with free and mandatory Education. The State cannot meet this duty independently; it also needs cooperation from private institutions. The Court asserted that there was a positive obligation not only to the states but also to the other stakeholders. The majority denied applying Article 19(1)(g) and said that for the socio-economic welfare of the children, Article 21-A should be upheld. Therefore, after this

21 (2004) SCC 361.

22 The Constitution of India, art. 21-A.

23 The Constitution of India, art. 12.

24 2012 (6) SCC 1.

25 The Constitution of India, art.19(1)(g).

judgment, private un-aided have to admit economically weaker sections in 25 percent of the seats available in entry-level classes. Minority and aided educational institutions have been excluded from this mandate of admitting "25 percent of children from the economically weaker sections of the society". Minority institutions have the right to admit children under Article 30(1) of the Constitution and are thus excluded from this mandate. The RTE case was further challenged in Pramati Educational and Cultural Trust v. UOI[26]. The petitioners argued that the mandate of compulsory admission in private un-aided schools led to the violation of the basic structure as it interfered with the right of the private educational institutions to run their businesses. The validity of Article 15(5), saying that it violated Article 14, was also challenged. The Hon'ble Court, while denying the petitioners' contentions, upheld the constitutional validity of Article 21-A and Article 15(5) of the Constitution.

Analysis of the performance of the states

Passed in 2009 and enacted in 2010, RTE Act has completed almost 12 years. Since the year of its inception. The states and union territories are attempting to admit children under this statute. Section 12(1)(c) of the RTE Act has been implemented effectively by certain states, while some still struggle to use this provision to the fullest. During a question-answer session in the Rajya Sabha, a question[27] was raised on the status of implementation of Section 12(1)(c) of the RTE Act. The answer to that question has been used to compile the data on the implementation of Section 12(1)(c) of the RTE Act from 2015-2020. The data collected shows that some states, like Uttar Pradesh, Bihar, Assam, etc., are doing reasonably well admitting economically weaker sections in private-unaided schools.

In contrast, some, like Andhra Pradesh and West Bengal, have not admitted children under this provision. The Constitution (One Hundred and Third Amendment) Act of 2019 established a 10% reserve for the economically disadvantaged parts of society, making it a constitutional need to develop policies for their uplift. Upholding "Section 12(1)(c) of the RTE Act" is a step in that direction. Lakshadweep lacks private unaided schools and cannot execute Section 12(1)(c) of the RTE Act, although other states can. This lack of implementation is not encouraging. The table below gives an overview of how "Section 12(1)(c) of the RTE" Act is being applied in different states all around the country

26 (2014) 8 SCC 1.

27 Government of India, "Answer Session for Rajya Sabha Session 225" *available at* https://data.gov.in/resource/stateuts-wise-children-below-poverty-line-admittedstudying-private-schools-under-section (last visited on14 September 2022).

Implementation of Section 12(1)(c) of RTE

S.No.	States and Union Territories	2015-16	2016-17	2017-18	2020-21
1.	Andaman and Nicobar Islands	540	725	1017	No Data
2.	Andhra Pradesh	0	0	0	No Data
3.	Arunachal Pradesh	0	0	0	No Data
4.	Assam	3242	15062	20731	3006
5.	Bihar	97717	139418	167039	295807
6.	Chandigarh	2825	3487	3915	5358
7.	Chhattisgarh	128639	167044	196146	276961
8.	Dadar and Nagar Haveli				No Data
9.	Daman and Diu	0	0	0	No Data
10.	Delhi	49043	51254	25178	127220
11.	Goa	0	0	0	No Data
12.	Gujarat	41586	83734	141365	385164
13.	Haryana	0	0	0	No Data
14.	Himachal	0	0	0	No Data
15.	Jammu and Kashmir	No RTE	---------	----------	----------
16.	Jharkhand	10489	13244	10539	19137
17.	Karnataka	316115	414106	523139	475083
18.	Kerala	0	0	0	No Data
19.	Lakshadweep	No private unaided school	----------	---------	----------
20.	Madhya Pradesh	795225	851538	936255	1039259
21.	Maharashtra	104945	142112	197044	386854
22.	Meghalaya	0	0	0	No Data
23.	Mizoram	0	0	0	No Data
24.	Nagaland	0	0	0	No Data
25.	Odisha	31994	38820	44519	23599
26.	Puducherry	0	0	0	No Data
27.	Rajasthan	555966	600666	622271	776271
28.	Sikkim	0	0	0	No Data
29.	Tamil Nadu	197369	287068	346510	No Data
30.	Telangana	0	0	0	No Data
31.	Tripura	0	0	0	10
32.	Uttar Pradesh	3278	21598	46188	198072
33.	Uttarakhand	83450	95427	102736	92994
34.	West Bengal	0	0	0	No Data

Figure 1

Now let us analyze the performance of four states – Uttar Pradesh, Madhya Pradesh, Gujarat, and Andhra Pradesh in detail to understand how these states are trying to implement this section and how much more has to be done to achieve free and compulsory Education for all.

Uttar Pradesh

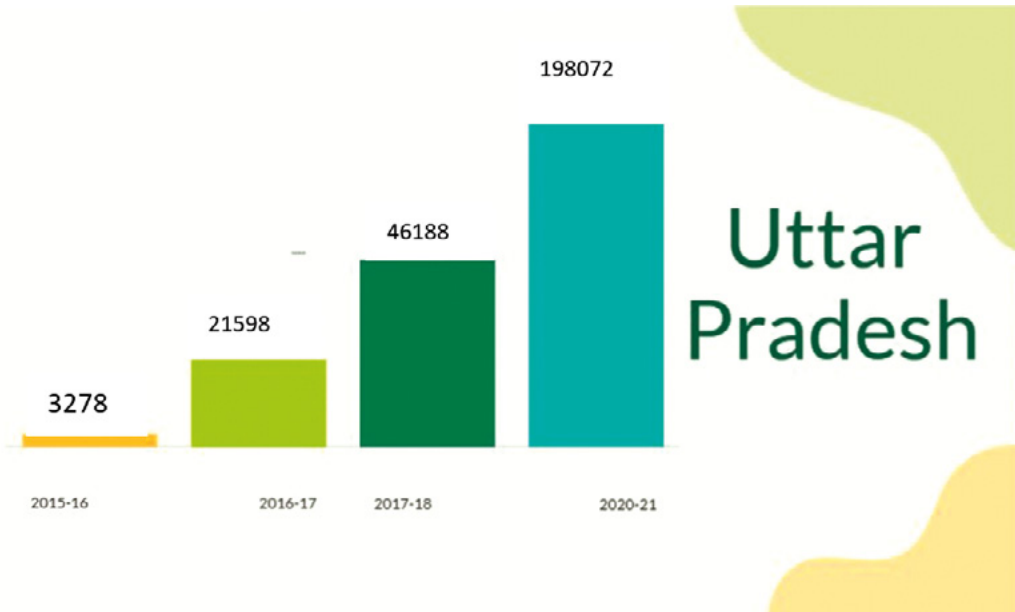

Figure 2

The State of Uttar Pradesh has admitted 198072 children in the EWS category to unaided private schools. Uttar Pradesh government has started its own RTE portal for the intake of children under Section 12(1)(c) of the RTE act. Each district's private schools are mapped to determine how many seats are available for students from economically disadvantaged sections. After completing the mapping, admissions are made through the lottery system. The applicants who want to get admission must apply through the website, and then the admissions are made according to the lottery system. The latest data shows that 124,648 seats have been allotted across the districts through the lottery system upon which the admissions will be made. In the year 2022, the applications were invited in three rounds between March 2, 2022- June 10, 2022. For each round, a cutoff date was prescribed until the Basic Education Officers of each district made the admissions. The Uttar Pradesh government accepts only online applications but has made provisions for offline applications

for those unable to access the online forms. Uttar Pradesh has even received the CSI SIG eGovernance Awards 2021 for implementing Section 12(1)(c) in the State.[28]

Madhya Pradesh

Figure 3

The State of Madhya Pradesh has also taken certain steps to "Implement Section 12(1)(c) of the RTE act". Like Uttar Pradesh, admissions herein are also made through the lottery system. The Madhya Pradesh RTE portal and the RTE Madhya Pradesh app are used to make admissions under the RTE Act in the State.[29] As per the available data, the number of private schools is 26,718 in Madhya Pradesh with 2,78,587 seats available. Till now, 2,01,304 applications have been made in 24,981 schools out of which just 17,342 have been verified. Madhya Pradesh also has a lottery system for admission. Applicants must apply through the website or the app, and then the admissions will be made through the lottery system. Several nodal officials are responsible for mapping the private unaided schools and providing a list of the institutions with seats open for the EWS category. The admission process has been made easier by providing a list of the frequently asked questions in the local language, i.e., Hindi, so that the applicants can easily apply for admission under Section 12(1)(c) of the RTE Act.

28 UP Government, *available at* http://rte25.upsdc.gov.in/UP RTE Website (last visited on July 25, 2022).
29 MP Government, *available at* https://rteportal.mp.gov.in/ (last visited on July 18, 2022).

Gujarat

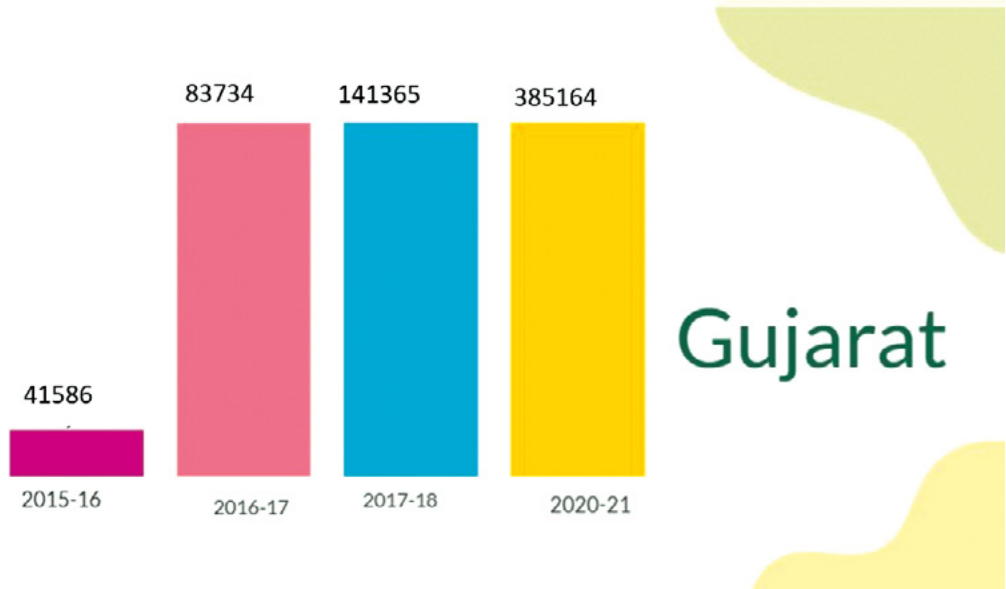

Figure 4

Gujarat is also implementing "Section 12(1)(c) of the RTE act" in a productive way. Applicants can apply through the RTE website[30] of Gujarat. They can select the preference of the schools, and they are then allotted schools through a lottery system. The applicants can refer to the FAQs given on the website and understand the whole admission process. The RTE admissions in the year 2022-23 are happening in four phases. The application process is entirely online to make it accessible and transparent. RTE help centres are also made wherein one can call and seek assistance in case of any difficulty. The schools are mapped for this session, and application forms have been closed for the academic year 2022-23.

30 Government of Gujarat, *available at* https://rte.orpgujarat.com/ (last visited on July 22, 2022).

Andhra Pradesh

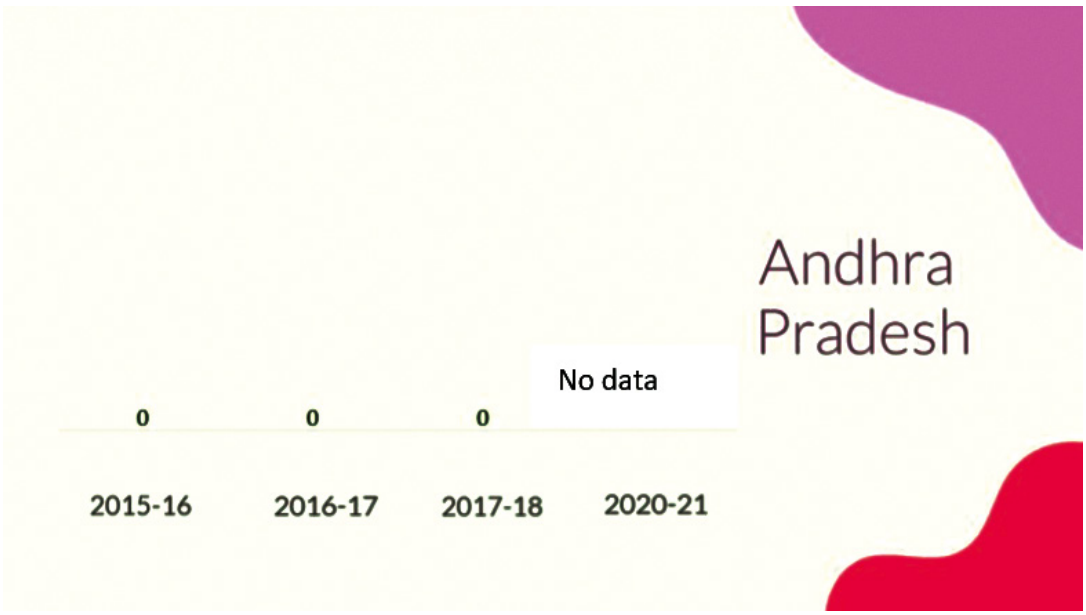

Figure 5

Andhra Pradesh is one of the states wherein Section 12(1)(c) of the RTE Act is not being implemented. The above data clearly demonstrates the same, wherein it is clearly visible that zero admissions were made between 2015-2018. In an article published in a renowned daily[31], the School Education Department of the State said it would start implementing the RTE Act from 2023 onwards. The Education Department responded to a Public Interest Litigation in the Andhra Pradesh High Court alleging the non-implementation of Section 12(1)(c). The Andhra Pradesh State Commission for the Protection of Child Rights (APSCPCR) has taken note of the issue[32] and said it would take Suo-moto actions against the private-unaided institutions that are not admitting EWS children under the 25 percent quota.

31 P. Sujatha Varma, "A.P. in list of States not implementing RTE Act" *available at:* https://www.thehindu.com/news/national/andhra-pradesh/ap-in-list-of-states-not-implementing-rte-act/article38083812.ece (last visited on January 01, 2022)

32 P. Sujatha Varma, 'Andhra Pradesh : School Education Department racing against time to implement RTE Act', *available at* :https://www.thehindu.com/news/national/andhra-pradesh/andhra-pradesh-school-education-department-racing-against-time-to-implement-rte-act/article65561243.ece , (last visited on April 25, 2023).

Findings

The states mentioned above present the bright side of the situation. The three states mentioned above are implementing the Right to Education Act well. They actively accept applications through functional websites. Economically Weaker Sections are being admitted to private un-aided schools. Schools are being mapped, and the process is going on smoothly.

On the other hand, several states still have room for progress. Certain states do not have working websites for RTE implementation; thus, there is no concrete proof of whether EWS is getting admitted under Section 12(1)(c) of the RTE act. Even a campaign known as the #HaqBantaHai campaign was started in the national capital, and a report published showed that Delhi still has a lot to do to implement Section 12(1)(c) of the RTE Act. Published in 2015, the report recommended that the implementation should be completed in three years. More than three years have passed, and much development has been made, but the uniform application is still solicited.

V. ISSUES

Improper admission procedure

The admission procedure to private unaided schools under Section 12(1)(c) of the RTE act is not uniform across the states.[33] Some states, like Madhya Pradesh, have a completely online admission procedure, while others, like Uttar Pradesh, also accept offline applications from those who cannot apply through the online portals. Admission through online mediums is indeed transparent, but one should not forget that we are talking about the admission of economically weaker sections of society who might not have access to computers and laptops. They have to go to cybercafes to fill up the admission form, which might not be feasible for them.

Lack of Awareness

Most parents are unaware of Section 12(1)(c) of the RTE Act. They are mindful that their children would get admission into government schools free of cost and be entitled to free uniforms, books, and midday meals. However, most of them are unaware that they can enroll their children in private-unaided schools.

33 Ambrish Dongre, Ankur Sarin, Shrikant Wadh, "State of Nation: RTE Section 12(1)(c)" *Centre for Policy Research, IIM, Central Square Foundation, Vidhi Centre for Legal Policy* (2015)

The approach of the government and private schools

The reluctance of private unaided institutions and the government's approach has always been a hurdle in admitting children from economically weaker sections of society. Though the Courts have ruled against private schools in many cases, they are also not actively reserving 25 percent of the seats in the EWS quota.

Violation of the Right to Information Act, 2005

Under Section 4 of the Right to Information Act, 2005, the education departments of all the states and private unaided schools have to publish the admission status under Section 12(1)(c) of the RTE on their website, notice board, etc. Most education departments and schools do not practice the same, so parents cannot get the requisite admissions information.

VI. SUGGESTIONS

Easier admission procedure

Both online, as well as offline admission applications, should be accepted. Dependency on mobile phones and the internet should be reduced, and a comprehensive offline admission procedure must start. A place should be designated where the parents or even the children's guardians can get the admission forms and submit them. The forms should be made available in the vernacular language of the region as well as in English so that the forms can be filled up quickly. The required documents should be made available in the form itself, or if the admission is taking place online, the portals should provide a detailed list of the documents required for admission.

Creating Awareness

Awareness campaigns should take place wherein parents should be informed about Section 12(1)(c) of the RTE Act. The education departments of the concerned states should conduct such awareness campaigns twice a month or even more, in which pamphlets should be distributed to create awareness. Parents should be aware of the private unaided schools in their locality where they can apply for admission. NGOs, Aganwadi workers, education officers, and municipality people should help people fill out admission forms and get their children admitted to private unaided schools.

Effective Mapping of Schools

All private unaided schools of a locality should be mapped, and comprehensive data containing their name, address, number of seats available, etc., should be made available on the State's website. No private unaided school should be left out, and at the start of each academic session, the mapping must be done so that new schools getting affiliation are not left out. Once made, the list must also be forwarded to NGOs, municipalities, Anganwadi workers, etc., so they can inform the same parents.

Establishment of Help centres

RTE-dedicated help centres can be made in each district so the Act is implemented correctly. These help centres should be essential in solving grievances and running the admission procedure. They should have a facility wherein forms can be filled online through their computers as well as they should provide physical forms to the parents intending to apply through offline mode

Progress reports

Each year a progress report should be made in each block and district to analyse whether the implementation is effectively happening. This would help the government in moulding and formulating its policy in such a manner as to match the contemporary situation.

VII. CONCLUSION

Section 12(1)(c) was enacted for fulfilling a constitutional mandate i.e., Article 21-A of the Constitution. It plays an essential role in bringing children from different social and economic backgrounds under one roof and teaches them social values like empathy and social responsibility. The lack of implementation across states needs to be addressed on a priority basis. Though both the centre and State can formulate laws on Education, it would be better if the central government frames a policy so that Section 12 (1)(c) of the RTE Act so that it can be uniformly implemented across the country. The non-uniform rules have been the biggest impediment in the implementation of this section, depriving several economically weaker children, admission in private-unaided schools. It is to be not forgotten that Sustainable Goal 4 of the United Nations i.e., quality education has to be achieved by 2030. Continuous monitoring, evaluation, and required adjustments to Section 12(1)(c) will be critical in the following years to ensure its effectiveness and impact. India can develop an inclusive educational ecosystem, empower future generations, and build a more equal and successful society by resolutely supporting this provision and working together. The suggestions incorporated in the earlier part of the paper would help solve a significant part of the issues in implementing Section 12(1)(c) of the RTE Act.

CRITICAL ANALYSIS OF THE LAST SEEN TOGETHER THEORY

Mr. Chaitanya Thakur*

VIPS Student Law Review
August 2023, Vol. 5, Issue 1, 167-180
ISSN 2582-0311 (Print)
ISSN 2582-0303 (Online)

https://vslls.vips.edu/vslr/

ABSTRACT

The last seen theory is a fairly recent principle under the Indian Evidence Act,1872. It is a vital component of circumstantial evidence in many criminal trials. It aids the judges in determining who is guilty of offenses such as murder, kidnapping, and rape in the Indian Penal Code. However, the Act does not specify the meaning of the expression "Last Seen Together." Further, the phrase is not defined in any statute, and the interpretation of this theory is based primarily on judicial decisions. This raises the crucial issue of a lack of clarification about the application, scope, and ambit of this theory. This research paper primarily focuses on identifying the scope and ambit of this theory. In pursuit of this, the paper examines its literal interpretation and how judges have construed it. It analyses whether the doctrine requires the continuous presence of the accused with the deceased. In addition, it examines the criteria for admitting the testimony of witnesses and scrutinizes issues involving husbands and wives and the requirement of a homicidal death in such cases. Moreover, it evaluates if there exists consistency and uniformity in the implementation of this evidence. Lastly, it examines if there are there is a fixed standard for determining the time gap for applying this doctrine.

Keywords: *Last Seen Together, Evidence, Time-Gap, IPC, Probative Value*

* Student, BA LLB, 4th year, The West Bengal National University of Juridical Sciences, Kolkata, West Bengal, India.

I. INTRODUCTION

In the plethora of criminal trials, it is extremely challenging to obtain direct evidence; therefore, the entire case relies upon circumstantial evidence. Under the Indian Evidence Act, 1872 ('the Act'), the term "circumstantial evidence" has not been employed explicitly; nonetheless, the meaning of the term "*Proved*" in Section 3 specifies that "*if the existence of any fact is so probable that the prudent man will believe it to exist then that fact is considered to be proved*", thereby indicating the applicability of circumstantial evidence.[1] The last seen theory is also predicated on similar grounds as in numerous cases wherein there are no eyewitnesses; the final decision for resolving the matter is this doctrine centered on the distinctive facts of the case.[2] This is among the new concepts embraced by the judiciary to prove the guilt of the accused.

Significantly, on July 6, 2022, the Tripura High Court ruled that the prosecution needs to show beyond any reasonable doubt the "last seen theory" tying the defendant to the execution of the crime.[3]

In this context, it is critical to analyse the repercussions of the last seen together principle. This doctrine stipulates that an individual last seen with another must clarify the reasons behind their departure if the other person is subsequently discovered dead or missing.[4] As no event occurs in a vacuum, the notion of last seen together is founded on the concepts of probability, causation, and connection and is thereby derived from Section 7 of the IEA.[5] The Aarushi murder case remains among the very contentious instances wherein this theory was employed to establish a chain of circumstantial evidence.[6] Nevertheless, there are numerous obstacles to this doctrine. Assume that on October 9, 2021, X and Y were last seen together in the same hotel room. On October 10, 2022, the corpse of Y was discovered in this

1 The Indian Evidence Act, 1872 (Act No. 1 of 1872), s.3.

2 M. Govindarajan, "Last Seen Together Theory", Tax Management India, July 8, 2016, *available at* https://www.taxmanagementindia.com/visitor/detail_article.asp?ArticleID=6890 (last visited on March 22, 2023).

3 "Prosecution Must Prove 'Last Seen Theory' Connecting Accused with Commission of Offence Beyond All Reasonable Doubt", Live Law, July 25, 2022, *available at* https://www.livelaw.in/news-updates/tripura-high-court-last-seen-theory-section-302-ipc-eye-witness-204665 (last visited on March 22, 2023).

4 Koyel Roy & Prarthana Sarmah, "A Socio-Legal Study on 'Last Seen Together Rule' Theory – Is It Followed In India?" Vol 1 Issue 6 *Lex Forti Legal Journal* 7 (2020).

5 *Ramesh Harijan v. State of U. P.,* (2012) 5 SCC 777*; Kiriti Pal v. State of W.B.*, 2015 CrLJ 3152 (SC).

6 Asthavyas, "Circumstantial Evidence and The Doctrine of Last Seen*", Legal Service India*, August 12, 2022, *available at* https://www.legalserviceindia.com/legal/article-3523-circumstantial-evidence-and-the-doctrine-of-last-seen.html (last visited on March 22, 2023).

room. Could X be immediately convicted on the basis that he had been seen with the Y? Also, if X is unable to recount and elucidate what occurred in that room, would the courts instantaneously convict him? Will additional circumstances have a bearing on the court's decision? The objective of this paper is to provide answers to each of these issues.

II. THE AMBIT OF THE DOCTRINE OF LAST SEEN THEORY

Generally, when the accused and the victim were last seen alive together and the subsequent inability of the accused to provide a satisfactory explanation for the sudden disappearance of the latter are deemed to be circumstances of an inculpatory nature. [7] Nonetheless, neither the Act nor any other legislation or regulation explains this doctrine. This theory's implementation is largely based on judicial decisions and interpretation.[8] In the lack of positive, precise evidence establishing the accused and the victim were last seen together, it could be perilous to reach for the court to deliver a guilty verdict.[9]

Lack of Clarity Regarding the Scope of "Last Seen Together"

In this context, it is imperative to scrutinise the literal connotation of the phrase "last seen together." The "Last seen theory" stipulates that two individuals were "*seen together alive*" and, following a period of time, it is discovered that one of the two is "*dead*" while the other is "*alive*".[10] However, it is unclear if "*seen together alive*" refers to a single instance of the accused's presence with the victim or the accused's continued presence with the victim. The latter situation applies to cases wherein the victim was discovered dead in a bedroom where the accused was seen with him the preceding day. Consequently, it is highly probable that he spent the entire evening with the victim. In *State of Rajasthan v. Kashi Ram*, [11] for example, the court held that the last seen theory applied when the defendant was last seen with the spouse in residence in the evening; however, after 3 days and the forcible entering into the residence, the corpses of the spouse and the kids were discovered inside.

7 *Pohalya v. State of Maharashtra*, AIR 1979 SC 1949; *State of Uttar Pradesh v. Satish*, (2005) 3 SCC 114.

8 Pathlegal, "The Theory of "Last Seen" In Cases Based On Circumstantial Evidence*", Path Legal,* May 18, 2021, *available at* https://www.pathlegal.in/The-Theory-Of--Last-Seen--In-Cases-Based-On-Circumstantial-E-blog-2389151 (last visited on March 22, 2023).

9 Rishabh Sachdeva, "Doctrine of Last Seen Theory*"*, *Soo Legal*, January 24, 2020, *available at* https://www.soolegal.com/roar/doctrine-of-last-seen-theory. (last visited on March 22, 2023).

10 R. Rajshekhar Rao, *"*Last seen' theory has to be established to convict the accused*", New Indian Express,* September 30, 2019, *available at* https://www.newindianexpress.com/states/telangana/2019/sep/30/last-seen-theory-has-to-be-established-to-convict-the-accused-2040960.html (last visited on March 22, 2023).

11 (2006) 12 SCC 254.

Nevertheless, when the accused was merely seen sitting with the victim, and there was no continuous presence, the problem emerges as to whether this qualifies for applying this theory. In the case of *Amit Kumar Das vs. the State of Jharkhand*, [12] the appellant's counsel contended that no eyewitness saw the accused and the victim "*walking together*," so the last seen theory is not applicable in the matter. The court outright rejected this contention, which held that this theory did not necessitate the accused and the victim to walk together. It was concluded that merely sitting together or being seen together is sufficient to apply this principle. Furthermore, in the case *Makhan Singh v. the State of Punjab*, [13] the judges emphasised that if it is asserted that the victim was last seen with the accused on a given day, it must also be shown that the victim was not seen by anyone acquainted with him following that particular date. Henceforth, a mere one-time presence at a particular point of time is sufficient for applying this doctrine.

Whether A Threshold Exists for Accepting Testimony of Witness for Proving Last Seen Theory?

Pertinently, another concern that emerges is what must constitute a valid testification for proving the last seen theory in courts. Interestingly, in the case of *State of Karnataka v. Chand Pasha*, [14] both the bartender and the bar owner claimed that the defendant and another individual entered their bar. The judges ruled that the prosecution barely demonstrated that the defendant walked to the bar with one another, and the identity of this other individual has not been conclusively proven; therefore, the last seen theory cannot be applied. In conjunction, the court has determined in the case of *Harishchandra Ladakku Thange v. State of Maharashtra* that this theory will not apply if the witness merely stated that the accused had been present at a distance close to the area where the victim was present and did not see them together. [15] Similarly, in *Dalpat Singh v. the State of Rajasthan*, [16] the court decided that doctrine does not apply as the witness acknowledged in his testimony that he wasn't able to see the victim's face because he was at a distance of ½ kilometre, and the demeanour of this witness generated reasonable doubt as he had not discussed the situation with those individuals who interacted with him immediately following the incident. Henceforth, it can be said that the witness has to see both the accused and deceased together before the crime and clearly recognise their faces and identity to apply this theory.

12 2017 (4) AJR 622.
13 AIR 1988 SC 1705.
14 (2016) 1 SCC 501.
15 AIR 2007 SC 2957.
16 2005 CrLJ 749 (Raj); See also Gopal *Singh v. State of Uttaranchal*, 2007 CrLJ 1972.

In addition to this, in another notable case of *Venakatesan v. State of Tamil Nadu*, the eyewitness who last saw the victim with the accused testified merely that he had seen both on a Tuesday evening, without mentioning a specific date. The witness was unaware of which of the accused accompanied the victim. The court ruled that his testimony was insufficient to hold the accused guilty. [17] Likewise, in the case of *Tulsi Ram vs. State*, the judges determined that the testimonies of witnesses were not entirely credible since they were delivered quite informally and said they saw the accused and the victim together the day before the occurrence. In light of the appellant's frequent visits to the victim, as well as the presence of other frequent visitors to the victim besides the appellant, this testimony is insufficient to substantiate the last seen theory. [18] However, the judges have acknowledged that last seen together evidence cannot be rejected solely based on a disparity in the witness's account regarding the date and time of the event in the FIR.[19] In the case of *Golakonda Venkateswara Rao v. the State of A.P*, the court held that the witness, a rustic village lady, could not be expected to have recalled the crime after 4 years. Yet, the fact that she reiterated that she last saw both the victim and the offender conversing while seated at the location makes her testimony valid for applying this doctrine. [20] Consequently, it can be inferred that the witnesses must testify that they had seen both the victim and accused together at a particular time.[21]

Scrutinizing Cases Relating to Husband and Wife and The Requirement of Homicidal Death: Can the Last Seen Theory Apply in Suicidal Cases?

In matters of dowry death wherein a crime is perpetrated in secret within a residence, the initial duty of the prosecution to prove the accusation would be relatively lower. Specifically, in light of Section 106 of the Act and the application of the last seen theory, the residence's occupants would be required to provide a reasonable justification regarding how the incident occurred. [22] Nevertheless, the occurrence of homicidal death should be proven before transferring the burden upon them.[23] In cases wherein the prosecution's evidence is insufficient to prove the

17 AIR 2008 SC 2369.

18 LQ/RajHC/2019/102.

19 Krishnadas Rajagopal, "Murder convictions can't be based solely on last seen theory", *The Hindu,* March 28, 2016, *available at* https://www.thehindu.com/news/national/murder-convictions-cant-be-based-solely-on-last-seen-theory-sc/article7620281.ece/amp/ (last visited on March 22, 2023).

20 AIR 2003 SC 2846; *State of Karnataka v. Marulasiddaiah,* 2006 CrLJ 1825, 1833.

21 The Desk, "Justice Sinha's Impact on Criminal Law", *SC Observer,* September 15, 2021, *available at* https://www.scobserver.in/journal/justice-sinhas-impact-on-criminal-law/ (last visited on March 22, 2023).

22 Trimukh Maroti Kirkan v. State of Maharashtra, (2006) 1 SCC 681; State of Rajasthan v. Jaggu Ram, AIR 2008 SC 982.

23 *Krishna Mahadev Chavan v. State of Maharashtra,* 2021 SCC OnLine Bom 191.

victim's homicidal death, and the probability of suicide cannot be completely excluded, the accused cannot be held guilty solely based on the last seen theory.[24] As a matter of fact, to convict an offender under Section 302 of the Indian Penal Code, the prosecution must establish the fact of homicide.[25] Fascinatingly, in the case *of Sharad Birdichand Sarda v. the State of Maharashtra,* [26] it was ascertained that except if the prosecution precludes the prospect that the spouse committed suicide, no adverse inference of guilt could be derived against the plaintiff based on the circumstance that he was last seen with his wife on the particular evening.[27] It was stated that the fact that the room was not locked from the inside doesn't imply that the victim didn't commit suicide.

On the other hand, whenever courts eliminate the possibility of suicide and the pair were discovered together in the same bedroom, the onus is on the alleged perpetrator to provide any justification as to how his spouse was discovered dead.[28] In circumstances when the accused attempts to depict the homicide as a suicide, the last seen theory would be applicable. In the case of *Manoj Kumar vs. The State of Uttarakhand*,[29] the accused strangulated the victim and then arranged the suicide. During this incident, though, 2 eyewitnesses went to the plaintiff's residence, where they saw the accused, who told them that no one was inside. The court determined that circumstances such as the closeness of the deceased's home to the accused's, the accused's demeanour, and the accused's refusal to explain how he sustained the facial injuries reinforced the testimony of witnesses. In addition, the post-mortem reveals that the victim was hung after falling unconscious rather than committing suicide. All the aforesaid circumstances further substantiated the last seen theory to convict the accused.

III. THE EVIDENTIARY VALUE OF LAST SEEN TOGETHER

Is there a Set Standard and Uniform Probative Value of the Last Seen Theory?

The probative value of "*last seen together*" evidence depends on the circumstances of each

24 *Chandrapal v. State of Chhattisgarh,* 2022 SCC OnLine SC 705.

25 *Madho Singh v. state of Rajasthan,* 2003 (1) ACR 317 (SC).

26 AIR 1984 SC 1622.

27 Prachi Bhardwaj, "In the absence of corroborative evidence, last seen theory cannot be made the basis of conviction", *SCC Online,* May 26, 2017, *available at* https://www.scconline.com/blog/post/2017/05/26/in-the-absence-of-corroborative-evidence-last-seen-theory-cannot-be-made-the-basis-of-conviction/__(last visited on March 22, 2023).

28 *Ravirala Laxmaiah v. State of A.P.*, (2013) 9 SCC 283.

29 107 (2019) ACC 683.

individual case. [30] In these situations, the judges must assess the aggregate impact of all the relevant facts and evaluate those in totality. [31] The inference of guilt can be sustained only if all the implicating circumstances are inconsistent with the accused's innocence. [32] In pursuance of this, the court has ruled that every circumstance must be complete, and there must be no missing links in the chain of evidence. [33] Moreover, in *Hanumant Govind Nargundkar v. State of M.P*,[34] the court declared that the circumstances based on which a determination of guilt is to be made must be "*fully established"* and compatible solely with the "*hypothesis of guilt*" of the suspect. In addition, it was established that the circumstances must be "*of a conclusive character and tendency*" and "*exclude any alternative hypothesis*" than the one sought to be proven. Fundamentally, there needs to be a "*chain of evidence*" that does not support a result consonant with the suspect's innocence.[35]

In the context of "*last seen together*," the circumstances are not always indicative of the fact that the individual is the perpetrator of the offense. [36] A guilty verdict cannot be predicated merely on the evidence that the accused and victim were last seen together.[37] In the case of *Anjan Kumar Sharma v. the State of Assam*, the court determined that there must be a connection and corroboration of facts to convict the appellant. [38] Additionally, the judges in *Dharani Pator v. the State of Assam* found evidence indicating the victim was last seen with the accused in *"proximity to time, space, and location"*, and the accused then absconded, which would be sufficient to establish guilt on the part of the accused. [39]

Alternatively, the court has also held that mitigating circumstances weaken the probative value of last seen evidence in the case of *Lakhan Pal v. the State of MP*. [40] Whenever the links in the series of events cannot be deemed to have led to an unavoidable inference that the accused was the victim's aggressor, he is released due to the benefit of the doubt. [41]

30 Amrit Singh v. State of Punjab, AIR 2007 SC 132; Mohd. Azad v. State of WB., AIR 2009 SC 1307, 1312.

31 *Arjun Marik v. State of Bihar,* (1994) 2 SCJ 604.

32 *Aftab Ahmad v. State of Uttaranchal,* (2010) 2 SCC 583.

33 *C. Chenga Reddy v. State of' A. P.,* (1996) 10 SCC 193.

34 AIR 1952 SC 343.

35 Kritika Mundra., *Last Seen Together Rules,* Penacclaims 5 (2020).

36 *Mohibur Rahman and Anr. v. State of Assam* (2002) 6 SCC 715**;** *Amit v. State of Maharashtra,* (2003) 8 SCC 93.

37 *Virendra Kumar Yadav v. State,* 1996 Cri LJ 231 (Del); *Raju v. State, by Inspector of Police,* AIR 2009 SC 2171.

38 AIR 2017 SC 2617.

39 2004 CrLJ NOC 15 (Gau).

40 1979 Cri LJ 1217.

41 *Reena Hazarika v. State of Assam*, AIR 2018 SC 5361; *Jagta v. State of Haryana,* AIR 1974 SC 1545.

For the last seen argument to hold, it must be shown that between the period they were last seen together and the victim's death, there were no circumstances that were congruous with the accused's innocence. [42] As a result, it could be inferred that this theory does not have universal applicability and is not enough to hold a conviction if other factors are also not present. [43]

Can Remaining Silent or Giving a False Explanation Under Section 106 Result in A Conviction Where Last Seen Theory Is Established?

Whenever it is proven that the victim was last seen in the company of the accused, the latter is required under Section 106 of the Act to offer an explanation for what occurred. [44] Invoking the last seen theory alone will not transfer the burden of proof to the offender except if the prosecution builds a *prima facie* case. [45] In this scenario, the accused's failure to explain this critical circumstance contributes to the chain of events. [46] In fact, it was held in the *Satpal Singh* case that an adverse inference could be formed against the accused if he is unable to provide a satisfactory justification. [47] Notably, the courts have started mandating that the accused thoroughly explain every intervening fact if medical or other evidence corroborates the last seen theory. [48] It was ruled in *Ram Gulam Chaudhary v. State of Bihar* that the abductors' concealment of the evidence provided a sufficient basis for inferring that they had killed the youngster. [49] Similarly, in *Lakshmana Naya v. Nanjungud Rural Police*, the accused was unable to provide any reason other than denial under Section 313 of the Code of Criminal Procedure ('CrPC'). The court ruled that an adverse inference could be formed owing to additional evidence that corroborated the facts presented by the prosecution about the victim's death and the last seen theory. [50]

42 *G. Gabriel v. State of Kerala,* 1983 Cri LJ 94; *Vithal Eknath Adlinge v. State of Maharashtra,* AIR 2009 SC 2067.

43 *Godabarish Mishra v. Kuntala Mishra and Another*, (1996) 11 SCC 264.

44 *supra* note 11.

45 Saeed Khan, "Conviction cannot be solely based on 'last seen together' story: Gujarat HC," *Times of India*, July 9, 2022, *available at* https://timesofindia.indiatimes.com/city/ahmedabad/conviction-can-not-be-solely-based-on-last-seen-together-story-gujarat-hc/articleshow/92765897.cms (last visited on March 22, 2023).

46 *Liyakat v. State of Uttaranchal, AIR 2008* SC 1537.

47 *Satpal v. State of Haryana* JT 2018 (4) SC 622.

48 *Shyamal Ghosh v. State of West Bengal,* (2012) 7 SCC 646.

49 (2001) 8 SCC 311.

50 2008 Cri. L. J. 4451. (Kant).

Besides drawing adverse inferences, courts have also found the accused guilty if he refused to provide a rational justification or remained quiet.[51] In *Joseph v. State of Kerala*, [52] the deceased's jewellery was recovered based on the details provided by the suspect during the investigations. Yet, when asked under section 313 of the CrPC, the suspect entirely denied any involvement in the offense and made no effort to explain away the evidence linking him to it. The chain of circumstantial evidence demonstrates conclusively that the offender was last seen with the victim, after which the corpse was found; consequently, this led to his conviction because it was impossible for a third party to have committed the crime within that time span.[53] In the case *Shanmughan v. the State of Kerala*,[54] the deceased was poisoned alone in her bedroom with the appellant. The appellant was also inquired about the wounds during his statement under Section 313, but he remained silent. Accordingly, the Apex court reaffirmed the accused's conviction.

Intriguingly, when the accused provided a fraudulent justification, which implied that it was plainly intended to hide the real circumstances, this evidence could also be utilized to prove his guilt. [55] However, section 106 does not absolve the prosecution of its principal responsibility of proving guilt beyond a reasonable doubt. [56] The inability of the accused to offer a reasonable justification is insufficient to establish guilt beyond a reasonable doubt.[57] Additionally, it is not required for the accused to prove his argument beyond a reasonable doubt; rather, he needs merely prove his claim by a *preponderance of probability*. [58] Ergo, the last seen theory alone is not conclusive evidence; however, in conjunction with certain other factors such as relations between the two, any animosity or conflict, the absence of a justification for the murder, etc., a presumption of guilt could be formed. [59] It must be evaluated in the context of all the prosecution's other evidence. [60]

51 Batuk Lal, *The Law of Evidence* 32-48 (Central Law Agency, 2020).

52 (2000) 5 SCC 197

53 Devika Sharma, "Bom HC | Can a person be held liable under S. 302 IPC on the basis of 'last seen' theory and not being able to offer sufficient explanation? Significance of 'last seen' theory in establishing homicidal nature of death discussed", *SCC Online,* February 15, 2021, *available at* https://www.scconline.com/blog/post/2021/02/15/homicidal-death/. (last visited on March 22, 2023).

54 AIR 2012 SC 1142.

55 *Sahadevan v. State*, (2003) 1 SCC 534.

56 M. Monir, *Law of Evidence* 1718 – 1724 (Universal Law Publishing, Volume 1, 2018).

57 Kanhaiya Lal v. State of Rajasthan, (2014) 4 SCC 715 ; Re, Naina Mohd., 1960 Cr LJ 620.

58 V.D. Jhingan v. State of U.P., AIR 1966 SC 1762; Narsimhman v. State, AIR 1969 AP 27.

59 *Ashok v. State of Maharashtra,* (2015) 4 SCC 393; *Rohtash Kumar v. State of Haryana,* (2013) 14 SCC 434.

60 *Surajdeo Mahto v. The State Of Bihar* 2021 (6) SCJ 617.

IV. THE AMBIGUITY OF TIME IN LAST SEEN THEORY

The Indian courts have established that the doctrine of last seen cannot be relied upon to hold the accused guilty until there exists a close connection between the time of last seen and the time of disappearance or death. [61] The prosecution must always demonstrate the exact time of death when the prosecution relies on this theory. [62] Furthermore, in cases when the post-mortem report does not give an exact time of death, the recovery time of the dead body is taken into account. [63] Fundamentally, the doctrine only applies when the prosecution establishes that "*the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible*." [64] In certain cases, it could be difficult to prove conclusively that the victim was last seen with the accused if there is a significant time difference and the potential of many other people intervening. [65] In these scenarios, the accused's failure to explain, according to Section 313 of the CrPC, is not indicative of their involvement in the conduct of the offense. [66]

Interpreting "Small" And "Long" Time Gap For Last Seen Theory: Is There A Fixed Standard?

In various cases, judges have construed what comprises a small time gap for the application of the last seen doctrine. In the case of *Krishnan Mahadev v. the State of Maharashtra*, the court held that the last seen theory was relevant since the time period between the husband and wife leaving their house together and the wife is discovered dead in the area *'Kolki'* didn't surpass 3 hours. [67] Moreover, in the case of *Jagroop Singh v. the State of Punjab*, the court deemed a 24 hours' time gap insufficient to disprove the prosecution's story. [68] Additionally, the court applied this theory in *Sahadevan v. State*, wherein it was proved that the deceased was last seen with the accused from the morning of March 5, 1985, until at least 5:00 p.m. on March 5, 1985, and that his body was discovered the

61 *Gautam Kamlakar Pardeshi and Anr v. The State of Maharashtra,* 2022 LiveLaw (Bom) 207; *Poshakadantha v. The State of Karnataka,* 2008 CrLJ (NOC) 72 (Kar).

62 *Niranjan Panja v. State of W.B,* (2010) 6 SCC 525.

63 *supra* note 14.

64 *Bodhraj v. State of Jammu and Kashmir,* (2002) 8 SCC 45.

65 *Sk. Yusuf v. West Bengal,* [2011] 8 SCR 83; *Chattar Singh v. State of Haryana,* 2008 AIR SCW 7426.

66 *Swamy Shraddannda v. State of Karnataka,* AIR 2007 SC 2531.

67 (2021) 2 AIR Bom R (Cri) 387.

68 AIR 2012 SC 2600.

following morning, March 6, 1985. [69] Nevertheless, even in cases where the time gap is short, judges should always seek corroborating evidence.[70]

In contrast, the judges have made abundantly clear what qualifies as a long-time gap in the framework of the last seen theory. According to the post-mortem findings in *Gargi v. State of Haryana*, between 24 and 72 hours transpired between death and the post-mortem, and the court determined that the likelihood of murder occurring a day after cannot be excluded. [71] Moreover, in the case of *Uday v. The State of Rajasthan*, it was determined that when there was a 2-day gap between the time of the crime and the witness's last seeing the accused, such testimony could not be considered as last seen evidence. [72] Besides, the court in *Nizam and ors. v. the State of Rajasthan* ruled that the prospect of others intruding cannot be ruled out due to the 3-day gap between Manoj's body being left in the vehicle and its retrieval.[73] In addition, the court deemed a 4-day gap to be long in the *State of Karnataka v. Chand Pasha* case.[74] Lastly, in *Krishnan v. State of Tamil Nadu*, a 7-day time gap was deemed long since the prosecution failed to produce evidence demonstrating that the victim was not in communication with anybody during the interim period.[75]

Following the above analysis, it can be inferred that when the time gap does not exceed 24 hours, it is regarded as a small-time gap, and any time gap exceeding 24 hours can be termed a considerable time gap. Yet, it is necessary to comprehend that such inferences are not absolute and universal. Indeed, in *Jaswant Gir vs. State of Punjab*, less than 24 hours had elapsed between the time the deceased entered the suspect's car and the time the corpse was discovered. Nevertheless, the judges ruled that there was a significant time difference for the last seen theory. [76] Likewise, in the State of Goa v. Sanjay Thakran, a time difference of merely 8 hours and 2 hours was deemed to be a considerable time gap.[77] This uncertainty over the interpretation of the time gap leads the author to the subsequent subtheme.

69 (2003) 1 SCC 534.

70 2006 (10) SCC 172.

71 AIR 2019 SC 4864.

72 2001 CrLJ NOC 28 (Raj).

73 *Nizam and another v. State of Rajasthan*, AIR 2015 SC 3430.

74 *supra* note 14.

75 (2014) 5 SCC (Cri) 66.

76 (2005) 12 SCC 438.

77 Mohan Rao, "An Overview of the Judicial Decisions on 'Last Seen Together*", Legal India,* August 5, 2012, *available at* https://www.legalindia.com/an-overview-of-the-judicial-decisions-on-last-seen-together/.(last visited on March 22, 2023).

Can Last Seen Evidence Be Disregarded Outrightly If the Time Gap Is Long?

The doctrine of last seen together is much more fragile after a significant time gap. On all occasions, however, it cannot be maintained that this evidence should be disregarded solely as this period between the last seeing of the accused and the victim and the discovery of the crime is lengthy.[78] In this respect, there can be no definite and rigid criteria for the determining length of the time gap, and the court would rely on the proofs presented by the prosecution to exclude the likelihood of any other individual having met the victim in the interim period.[79]

In instances where the prosecution provides such evidence that the probability of any person besides the suspect being the perpetrator of the offense has become virtually inconceivable, the last seen evidence can be considered for convicting the accused, irrespective of the long time gap. [80] However, as mentioned in the *Dharam Deo* case, this alone is not enough to record guilt.[81] For example, the court held in the case of *Subhajoy Tripura v. the State of Tripura* that if the prosecution proves that the accused was in exclusive possession of the location where the crime took place, and there was no potential of a third person intruding on that location, then a comparatively longer time gap would not hinder the prosecution's case. [82] In fact, the time gap of 2 hours was considered a long time gap in the *State of Goa v. Sanjay Thakran* as the location was a public place and everybody had access to it. [83]

V. SUGGESTIONS AND RECOMMENDATIONS

In the present scenario, the theory of last seen together is of utmost importance. Numerous countries throughout the globe apply this doctrine. In fact, this doctrine is not explicitly mentioned in Nigerian statutes, but a multitude of precedents have established this theory as law. [84] Similarly, the judges in Bangladesh have concluded that the last seen theory is an essential component of circumstantial evidence, and the accused could be convicted when all the other evidence points towards his guilt.[85] Intriguingly, the idea of last seen together

78 V. Kesava Rao, Sir John Woodroffe *et.al. Law of Evidence* 4469-4482 (Lexis Nexis, 18th Edn., 2009).

79 *supra* note 45.

80 *State of Goa v. Pandurang Mohite,* AIR 2009 SC 1066; *Kusuma Ankama Rao v. State of AP.*, AIR 2008 SC 2819.

81 *Dharam Deo Yadav v. State Of U.P,* 2014 (2) UC 1041.

82 2007 CrLJ (NOC) 70 (Gau).

83 AIR 2007 SC (Supp) 61; 2007 AIR SCW 2226;(2007) 3 SCC (776).

84 Jide Bodede, *Criminal evidence in Nigeria* 117-125 (2015).

85 "Last Seen Theory – An Evidence and It's Existence in the Court Room*", Jus Commune*, June 25, 2020, *available at* https://thejuscommune.wordpress.com/2020/06/25/last-seen-theory-an-evidence-and-its-existence-in-the-court-room/. (last visited on March 22, 2023).

is implemented almost identically in all three nations: India, Nigeria, and Bangladesh. Before implementing this doctrine, all the nations necessitate the prosecution to present a *prima facie* case against the accused.[86]

Notably, the principle of last seen together is not codified in India. Its applicability is susceptible to judicial interpretations.[87] To avoid additional uncertainty and miscarriages of justice, it is crucial that the legislature properly establish the norms of this doctrine at this moment. Certain portions of these rules must stay constant, while others can remain flexible. Essentially, the essence and connotation of the phrase "last seen together" must be clarified from the outset. It refers to simply seeing the victim and accused, and constant presence is not needed for its application.[88] In addition, regulations relating to the closeness of place and time should be established since they serve a critical role in determining the probative value of this doctrine. The effective implementation of such guidelines, though, will vary from case to case since there is no definite formula for them. Besides this, there needs to be a categorization of offenses concerning this doctrine and distinct parameters to apply it to different offenses. For instance, the parameters for establishing guilt through the last seen theory in murder cases have to differ from those followed in kidnapping cases.

Likewise, special rules need also be developed regarding the relationship between the accused and the deceased. For example, if the wife's body is discovered in her bedroom, there needs to be further evidence implicating the spouse since his presence inside the place was natural.[89] In simple words, the bar for applying this theory ought to be raised in this situation. Moreover, it needs to be explicitly stated to the accused that he will be held guilty if he provides no justification under Section 313 of the CrPC when multiple indicators corroborate this doctrine. Finally, rules relating to the admissibility of testimony must be specified. The testimony must specify that the victim was seen alongside the accused at a certain time. Casual assertions will not be acceptable in light of this doctrine.[90] This will facilitate the application of this principle to numerous situations.

86 C.D. Field, *Commentary on Law of Evidence* 4660-4661 (13th edn., 2011).

87 *Manoharan v. State by Inspector of Police,* (2020) 2 MLJ (CRL) 202.

88 Ratanlal & Dhirajlal, the law of evidence 1391 – 1397 (Lexis Nexis, 2016).

89 Ayush Rahi, "What is 'Last Seen Evidence", *Legal Wires*, June 25, 2020, *available at* https://legal-wires.com/lex-o-pedia/what-is-last-seen-evidence/ (last visited on March 22, 2023).

90 Rajni Sinha, "Circumstantial Evidence: Conviction Principle", September 24, 2017, https://rajnisinhablog.wordpress.com/2017/09/24/circumstantial-evidence-conviction-principle/. (last visited on March 22, 2023).

VI. CONCLUSION

The last seen theory is indeed a vital part of the Act because, when proven, it effectively shifts the burden of proof towards the accused. Nevertheless, this does not totally relieve the prosecution of their obligation to demonstrate the accused's guilt beyond any reasonable doubt. The prosecution must produce conclusive evidence linking the offender to the victim's death. When merely a single factor raises the possibility that the suspect is innocent, he cannot be held guilty since our criminal justice system is founded on the concept that no innocent should be punished. The last seen theory does not necessitate the conclusion that the accused is the perpetrator of the offense. Therefore, it might be well concluded that the judges interpret the doctrine so carefully that there has been no punishment without corroboration and circumstantial evidence. The latest development of the judiciary is to employ Section 106 in conjunction with the last seen doctrine to determine the individual's guilt.

JUVENILE JUSTICE (CARE AND PROTECTION) ACT, 2015: FRAMEWORK ON ADOPTION IN INDIA

Ms. Raghvi Kanwal*

VIPS Student Law Review
August 2023, Vol. 5, Issue 1, 181-195
ISSN 2582-0311 (Print)
ISSN 2582-0303 (Online)

https://vslls.vips.edu/vslr/

ABSTRACT

This paper aims to explore the Juvenile Justice Act, 2015 with special focus on adoption of children and the intricacies regarding the same. This paper starts by providing a brief historical background regarding the laws relating to juveniles and then focuses upon adoption rules in different religions in India. It also focuses on the procedure of adoption and the lack of laws on adoption for the rainbow community. Towards the end this article analyses the lacuna that is present in the existing law along with a few suggestions that might help in alleviating the situation.

Keywords*- Adoption, Juvenile, Human Rights, Protection, Legal Guardian.*

I. INTRODUCTION

Children are seen as the future of any state, and if they are without a legal guardian, their protection and welfare is the duty of the State. In furtherance to the same, India, following many previous legislations, legislated The Juvenile Justice Act, 1986.

The 1986 Juvenile Justice Act established the first consistent national framework for juvenile justice. It defined orphaned, abandoned, and handed-over children, and categorized minor, major, and severe offenses. The Act clarified the roles of the Juvenile Justice Board and Child Welfare Commission. Orphaned, relinquished, and abandoned children can be adopted within this organized system. The 2000 Act was updated by the 2015 Juvenile Justice Act (JJA), which stands as the current law. Legal adoption entails placing a child permanently with non-biological parents, transferring rights. Adoption finds mention in various faiths and myths.

* Student, BA LLB(Hons.), 3rd year, National Law Institute University, Bhopal, Madhya Pradesh, India.

The desire for the idea of adoption has altered in the modern world from giving children to childless people to giving a home to those who are homeless. Adoption under the Juvenile Justice (Care and Protection of Children) Act, 2015 from Sections 56–73 is the subject of the whole Chapter VIII. "Adoption" is defined under Section 2 (2) of the Act.

Having such laws and interest towards the field, however, is not enough to ensure the proper implementation of these laws which affect the lives of children. It is seen that the lack of execution of these provisions leads to abuse and mistreatment of children in the country. Having no legal guardian, these children are the responsibility of the state and their welfare should be ensured by the state itself.

In this article, any lacuna in the provision will be identified and discussed and suggestions as to how it can be improved will be addressed in detail.

II. JUVENILE JUSTICE CARE AND PROTECTION ACT: AN OVERVIEW

The concept of children having special rights was unheard of in the past. The concept of particular protection for children first originated in France in the 1840s. Since 1841, laws have been enacted in France to safeguard children at labor and to guarantee them the right to education. Only after World War I did the world understood the necessity for children to have particular rights. The Declaration of the Rights of the Child was ratified by the International Save the Children Union in 1924. This document was forwarded to the League of Nations, which said that "Humanity must do its best for the child." Following that, the "Geneva Declaration," based on the research of Polish physician Janusz Korczak, was adopted as the first international Human Rights statement in history to particularly address children's rights.[1]

Since 1949, UNICEF has been present in India. It is the country's largest United Nations Organization. They were adopted, by the General Assembly, the Declaration of the Rights of the Child in 1959 (DRC). During the 1970s, UNICEF became an outspoken advocate for children's rights. During the 1980s, UNICEF worked with the United Nations Commission on Human Rights to create the Convention on the Rights of the Child[2]. The Democratic Republic of the Congo opened the way for the Universal Declaration of Children's Rights,

1 Children's Rights history, UNICEF, *available at* https://www.humanium.org/en/childrens-rights-history/ (last visited on December 21, 2022).

2 History of UNICEF, UNICEF, *available at* https://www.unicef.org/about-us/75-years-unicef (last visited on December 21, 2022).

also recognized as the United Nations Convention on the Rights of the Child (UNCRC) which was adopted on November 20, 1989. This made it the first legally binding international instrument to acknowledge all of the inherent rights of a child. The UNCRC provided legal form to the idea that children have autonomous human rights and that these rights should be at the center of all international agreements. Because India joined the UNCRC in 1992, the Indian government is bound to follow the UNCRC's provisions. In February 1997, the Government of India presented the first ever Country Report on the Convention on the Rights of the Child.

India possesses numerous child protection laws, acknowledging child's welfare importance for societal progress. It boasts a comprehensive policy and legal structure ensuring equitable access to quality protective services. Nonetheless, a lack of on-ground human resources hampers effective implementation, resulting in countless children facing risks of violence, abuse, or exploitation. Most of the legislations that focus on the protection and rehabilitation of children in India are included in four main Acts, they are: the Juvenile Justice (Care and Protection) Act 2015, The Prohibition of Child Marriage Act 2006, The Protection of Children from Sexual Offences Act 2012, The Child Labor (Prohibition and Regulation) Act 2016.[3]

A Brief History of Laws for The Protection of Children In India

Special laws for children originated from British colonial legislations during their time in India. The first such law was the 1850 Apprentice Act, allowing minors who committed minor offenses to be treated as apprentices instead of being imprisoned. This did not create a separate juvenile system, functioning within the adult one. The 1897 Reformatories Schools Act later separated children and adults in the legal system for crimes.

In 1919, the Madras Children Act 1920 was passed, following a suggestion from the Indian Jails Committee. It was considered the first step towards Juvenile Justice in the region, initially applicable only in Madras. After independence, these laws were replaced by the uniformly applicable Juvenile Justice Act 1986. In 2000, after the UNCRC signing, it was amended and re-enacted as the Juvenile Justice (Care and Protection of Children) Act 2000. The 2000 Act lacks differentiation between 'conflict-involved children' and those 'needing care and protection'. It also lacks provisions for reporting abandoned or missing children. Amendments to the Act in 2012 followed public outrage after the Delhi gang-rape incident (Nirbhaya Case), involving a 17-year-old perpetrator. The 2015 Juvenile Justice (Care and

3 Child Protection, UNICEF, *available at* https://www.unicef.org/india/what-we-do/child-protection (last visited on December 21, 2022).

Protection) Act was introduced in response. It amended the earlier law to suit current needs and adapt to the evolving society. This Act emphasizes counseling over punishment to hold young offenders accountable.

In 2015, the Act was revised to modify the term "juvenile" to "child" and "child in dispute with the law." Orphaned, surrendered, and abandoned children are also defined in the Act. It also defines 'petty', 'serious', and 'heinous' crimes committed by children. The Act clarifies the Juvenile Justice Board's and the Child Welfare Commission's functions and powers. The Act also establishes a systematic and efficient framework for adoption. It also makes registration of all childcare facilities mandatory.

The modified Act includes an essential clause that allows juveniles aged 16 to 18 to be viewed as adults in cases of severe offenses. Any teenager aged 16 to 18 who is alleged to have committed a severe crime can indeed be tried as an adult. For the same purpose, the Juvenile Justice Board would review the child's physical and mental capacities, ability to appreciate the consequences of the crime, and other factors to determine if the youngster can be treated as an adult. The Central Adoption Resource Authority (CARA) is also given legal character under the Act. The Act differentiates between children in contravention and children who need care and protection.

Under the prior Act, any child, regardless of the offense committed, might be sentenced to a maximum of three years in prison. Under no circumstances may the youngster be tried like an adult in court, imprisoned as an adult, or sentenced for more than three years. This was amended in 2015, with one exception, all children under the age of 18 will be treated equally. That would be, in the instance of heinous acts as well. Subsequently, the JJA, 2015 replaced the Juvenile Justice Act, 2000.

III. PROVISIONS ON ADOPTION IN INDIA

Adoption is the legal process of placing a child with non-birth parents and transferring their rights, it is worldwide and present in many faiths. Historically, it aided orphans but now focuses on providing shelter to the homeless, shifting from adoptive parent benefits to adopted child welfare. Adoption in the 2015 act is given under Chapter VIII, ranging from sections 56-73. *Section 2 (2)* of the Juvenile Justice Act, 2015, gives the definition of 'adoption' as "the process through which the adopted child is permanently separated from his biological parents and becomes the lawful child of his adoptive parents with all the rights, privileges and responsibilities that are attached to a biological child." [4]

4 Juvenile Justice (Care & Protection) Act, 2015 (Act 2 of 2016), s. 2(2).

History of Adoption Legislations

Adoption has ancient origins like Moses' and King Octavian Augustus' cases. Modern regulations emerged after World War I due to the pandemic and war effects. Abandoned and estranged children led to new adoption laws in many states due to war-induced instability and upheaval.[5] England and Wales introduced initial adoption laws with the 1926 Adoption of Children Act. This law required consent from birth and adoptive parents. Although it granted equal rights, it could not ensure full family membership or replace inheritance rights for adopted children. Post-WWII, numerous countries passed new adoption laws, with changes made between 1940 and 1980. Some nations adapted rules for novel adoption forms.[6] Adoption is an ancient Indian practice that has evolved in purpose. Originally driven by humanitarian care for abandoned children, it now includes seeking affection, caregiving in old age, and securing an heir after death. The process remains consistent.[7]

Hindu Law

In India, Hindu law treats adopted children equally to biological ones, driven by the belief in the importance of a son for the family's spiritual and material welfare. Originally, only males could be adopted and orphans were excluded. Modern Hindu Law allows any adult Hindu, male or female, of sound mind to adopt.[8]

Muslim Law

Islamic adoption, termed kafala, differs from typical adoption. It is a caretaker's role, not parental, to preserve family integrity. Islamic law regulates this to safeguard lineage. Adoption is not prohibited but cannot imply biological relations, as Islam prioritizes lineage protection over distortion.[9] Features of Islamic adoption are:

a) Adopted child retains the original surname, not of adoptive families.

b) Inheritance is from biological, not adoptive parents.

c) Adoptive parents manage assets from biological parents, acting as trustees, not owners.

5 United Nations, Department of Economic and Social Affairs, *Child Adoption: Trends and Policies*, (United Nations, New York, 2009).

6 *Ibid.*

7 Kusum, *Family Law Lectures – Family Law I*, (2nd edn., 2008, Lexis Nexis Butterworths).

8 *Ibid.*

9 Islam Today, *available at* http://en.islamtoday.net/quesshow-16-786.html (last visited on December 21, 2022).

Muslim foster families are caretakers and trustees, not parents, under these rules. Orphaned situations are rare, relatives are typically found before a new adoption is considered.[10]

In *Shabnam Hashmi vs. Union of India*,[11] it was noted that Muslim Personal Law opposes adoption. Instead, the 'Kafala system' supports children. Under this, a Muslim cannot adopt but can provide for a child's well-being as a 'kafil'. The child remains linked to their biological parents, being a 'kafil' is not adoption.

Christian Law and Parsi Law

Adoption involves legal child association. Christians lack adoption laws, using the Guardians and Wards Act of 1890. Unified adoption law is stressed by the National Commission on Women. Christians can foster under this Act, but the ties end at adulthood, with no inheritance rights.[12]

The Effectiveness of The Provision and Role Of Central Adoption Resource Agency (Cara)

Initially, the option of adoption was only available to the Hindu community once the Hindu Adoption and Maintenance Act became effective in 1956, that enabled the adoption of Hindu kids by an individual complying toward the Hindu community, but did not extend to groups such as Muslims, Christians, and Parsis who were required to rely just on Guardians and Wards Act, 1890, that allowed them to become guardians. However, the technique simply formed a guardian-ward link. The Juvenile Justice (Care and Protection) Act of 2015 was the very first step towards a secular adoption legislation. The Juvenile Justice Act outlines detailed processes both for in-country and intra-country adoption, that are overseen by the Central Adoption Resource Authority (CARA), a state agency of the Government of India.

Central Adoption Resource Agency

CARA, the Central Adoption Resource Authority, operates as a statutory body under the Ministry of Women & Child Development, Government of India. Its main role is to serve as the central authority responsible for the adoption of Indian children, both within the country and internationally. CARA is specifically designated as the official entity to handle inter-country adoptions in compliance with the Hague Convention on Inter-country Adoption,

10 Huda, Adopting a Child in Islam, *available at* http://islam.about.com/cs/parenting/a/adoption.html (last visited on December 21, 2022).

11 (2014) 4 SCC 1

12 Adoption: Under Hindu, Muslim, Christian and Parsi Laws, Legal Service India, *available at* http://www.legalserviceindia.com/articles/hmcp_adopt.html (last visited on December 21, 2022).

which was ratified by the Indian government in 2003. The primary focus of CARA is to facilitate the adoption process for orphaned, abandoned and surrendered children through its affiliated and recognized adoption agencies. Subordinate to the Central Agency, the other agencies are as follows:

SARA: The State Adoption Resource Agency has been established by the State Government under the guidance of the Authority as per section 67 of the Act. Existing State Adoption Resource Agencies are recognized under the Act. It is headed by the Principal Secretary or Secretary of the adoption department in the State Government. The Governing Body is to include representatives from the adoption department, Department of Health or Hospital Administration, Child Welfare Committee, Specialized Adoption Agency, civil society involved in child welfare and the State Legal Services Authority. The Governing Body is directed to meet regularly to review adoption progress and address operational challenges.

The State Adoption Resource Agency plays a crucial role in handling adoption matters. It recommends recognition for Specialized Adoption Agencies (SAAs) in each district and conducts quarterly meetings to address adoption-related issues. The Agency closely monitors SAAs for accountability and efficiency. It links Child Care Institutions with suitable SAAs, facilitating adoption for eligible children. It enforces adoption standards for the welfare of orphaned, abandoned, and surrendered children. For children with special needs, it identifies SAAs capable of providing quality care and arranges their transfer. The Agency expedites de-institutionalization through adoption and non-institutional alternatives. It focuses on research, training, and accurate data management to promote program expansion. The State Government ensures appropriate action in case of violations, prioritizing the child's best interests.

SAA: The State Adoption Resource Agency oversees several essential functions carried out by Specialized Adoption Agencies (SAAs). SAAs play a vital role in ensuring the well-being of children under their care, catering to their physical, emotional, and educational needs, as well as protecting them from abuse and exploitation. SAAs report all child-related activities, including admissions, restorations, transfers, deaths, and adoptions through the Child Adoption Resource Information and Guidance System. They prepare detailed reports for each child and create care plans, prioritizing options such as restoration to biological families, in-country adoption, inter-country adoption, foster care, or institutional care. SAAs facilitate the adoption process, ensure sibling placement when possible, and provide memory albums to adoptive families. Additionally, they maintain confidentiality and offer counseling support to biological parents during surrender and prospective adoptive parents

during the adoption process. The SAAs also engage in counseling for older children and adoptive parents when needed and they extend post-adoption support to adoptees seeking their roots. Moreover, SAAs establish facilities to receive abandoned children and utilize the Child Adoption Resource Information and Guidance System for accurate documentation and record-keeping, ensuring an efficient and transparent adoption process.

AFAA: The Authorized Foreign Adoption Agency is responsible for several crucial functions. Firstly, it registers prospective adoptive parents interested in adopting children from India and promptly completes their Home Study Report. It also follows up with the Specialized Adoption Agency to ensure swift adoption after obtaining the No Objection Certificate from the Authority. The agency provides orientation to prospective adoptive parents, acquainting them with the culture, language, and food of the child's place of origin. Additionally, it monitors the post-adoption progress of adopted children and addresses any disruption cases as specified in regulation 19. To foster a sense of community, the agency organizes get-together for children of Indian origin and their adoptive families in collaboration with the relevant Indian diplomatic mission. Moreover, the agency assists older adoptees in their root search. Furthermore, the agency uploads attested copies of adoption applications in the Child Adoption Resource Information and Guidance System and forwards the originals to the allocated Specialized Adoption Agency. Finally, the agency diligently adheres to the legal requirements of the host country and the terms and conditions of the Authority's authorization.

DCPU: The District Child Protection Unit (DCPU) has additional adoption-related responsibilities, apart from its mandated functions. These include identifying orphaned, abandoned, and surrendered children and assisting in their legal declaration as adoptable with the help of Specialized Adoption Agencies or Child Care Institutions. The DCPU ensures prompt uploading of essential reports for legally free children in the Child Adoption Resource Information and Guidance System. It also promotes adoption by facilitating partnerships between Child Care Institutions and Specialized Adoption Agencies. Furthermore, the DCPU monitors adoption progress for both legally free children and registered Prospective Adoptive Parents, expediting the process when necessary. It maintains qualified social worker panels and counselling centers to provide adoption-related support. The DCPU supervises and ensures accurate data updates in the Child Adoption Resource Information and Guidance System while assisting the State Adoption Resource Agency, the Authority and the Child Welfare Committee with adoption matters.

Additionally, the DCPU aids in restoration efforts and the legal process of declaring abandoned children as adoptable, including publication of child information, obtaining social investigation and non-traceable reports through Specialized Adoption Agencies. The DCPU ensures the timely uploading of the Child Welfare Committee's certificate for legally free children in the system. It diligently updates adoption-related information according to specified schedules or the Authority's directions on the Child Adoption Resource Information and Guidance System (CARINGS).

Adoption Rules, 2022 as formulated by the CARA have now been enforced with a notification of the Ministry of Woman and Child Development dated 23rd September 2022. These rules supersede the earlier enforced Adoption Rules 2017 in accordance to the power granted to the central government as under Section 68(c) and Section 2(3) of the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016).

The Procedure of Adoption

A prospective parent can apply with the Adoption Coordination Agency (ACA) in their state, which is the CARA-accredited agency for each state. This adoption agency performs a comprehensive examination of the parents, including three years of pre-adoptive therapy. Potential parents can voice their preferences at this phase. Once a suitable kid has been identified, agencies can organise for prospective parents to actually get to know the child. After completing the foster care agreement, the child might be put into pre-adoption foster care if the match is established.[13] Meanwhile, the Specialized Adoption Agency/Child Care Institution as well as the adoptive families file a joint application with the District Court within 10 working days after matching. All proceedings must be held in secret and end within two months after filing, as per Section 61(2) of the Juvenile Justice Act. The CWC is really no longer the "ultimate authority" in instances of children who require protection and care. Anyone connected to the kid may submit a request before a district magistrate, who can examine and make necessary orders. Because he has access to and is better acquainted with all the authorities in his jurisdiction, the district magistrate would be able to oversee the procedure more efficiently and quickly.

Eligibility for Adoption in India

To be eligible for adoption, prospective adoptive parents must meet specific criteria. They should be physically, mentally, emotionally, and financially capable with no life-threatening

13 Adoption Regulations, 2022, framed by 'Central Adoption Resource Authority (CARA) as mandated under s. 68 (c) of Juvenile Justice (Care and Protection of Children) Act, 2015.

medical conditions or criminal convictions related to child rights violations. Marital status and having biological children do not affect eligibility. Married couples need consent from both spouses, while single females can adopt any gender, but single males cannot adopt girls. The intent behind such a law was to prevent instances of abuse at the hands of the adoptive parent, however, it is difficult to prove its realization. Couples should have at least two stable years of marriage, except for relative or step-parent adoptions. The age of prospective adoptive parents at registration that determines the eligibility for children of different age groups is as follows:

a) For children up to 2 years: The combined age of couples should not exceed 85 years and single adoptive parents should be under 40 years.

b) For children above 2 and up to 4 years: The combined age of couples should not exceed 90 years and single adoptive parents should be under 45 years.

c) For children above 4 and up to 8 years: The combined age of couples should not exceed 100 years and single adoptive parents should be under 50 years.

d) For children above 8 and up to 18 years: The combined age of couples should not exceed 110 years and single adoptive parents should be under 55 years.

The minimum age difference between the child and either adoptive parent should be at least twenty-five years. The age criteria do not apply to relative adoptions and step-parent adoptions. Couples with two or more children are generally considered for special needs and hard-to-place children unless they are relatives or step-children. Prospective adoptive parents must revalidate their Home Study Report every three years. The seniority of prospective adoptive parents without any referrals within three years is determined from their registration date, except for those who have surpassed a composite age of one hundred ten years.

Despite the fact that a single parent can adopt a child, the adoption rights of same-sex couples are not yet defined anywhere in the act.

Eligibility of Same-Sex Couples to Adopt Children

The recognition of adoption rights for the LGBT community is not directly derived from constitutional and statutory sources; instead, these rights are often established through judicial decisions. The LGBT community has experienced significant injustices, particularly in relation to marriage and adoption. They face numerous social and economic inequalities in connection with their adoption rights. Despite living in a modern era, the acceptance of

LGBT individuals adopting children is still less common compared to opposite-sex couples. Various procedures and practices continue to create barriers to their adoption efforts. Additionally, many foreign countries prohibit same-sex couples from enjoying adoption rights. This discriminatory trend is also observed in India, where the law neglects the adoption rights of same-sex couples.

In contrast, countries like the United States, the United Kingdom, South Africa, and the European Union have taken progressive steps by legalizing joint adoption for same-sex couples, highlighting the legislative gap that remains to be addressed. The urgency for action is apparent, especially considering the recognition of the rights of the third gender and their protection against discrimination. Denying them the right to family life is no longer tenable.

Advocates of LGBT adoption contend that there is a considerable number of children requiring homes. They argue that as parenting skills are not linked to sexual orientation, the legal system should permit them to adopt children.[14] In contrast, those who oppose this idea posit that purportedly higher instances of depression, substance abuse, promiscuity, and suicide among homosexuals (along with a supposed higher occurrence of domestic violence) could negatively impact children. They also suggest that the absence of both male and female role models during a child's upbringing might lead to difficulties in adjustment. [15] Detractors might further point out that in the case of couples seeking to adopt, there is usually a requirement for a stable marriage of at least two years, whereas LGBTQ marriages might not yet be officially recognized under the law, thus potentially invalidating their adoption efforts from a legal standpoint.

The case of Navtej Singh Johar has brought about a significant transformation by removing the criminalization of sexual activities among homosexual couples. As a result, it is imperative for the government to revise existing laws in order to acknowledge and support adoption by same-sex couples. Numerous nations have already taken steps to legalize adoption by same-sex couples. Furthermore, countries like Estonia, Italy, Slovenia, and Switzerland have embraced step-child adoption, allowing one partner in a relationship to adopt the natural and adopted children of their partner. This points to a growing trend where individuals from the LGBTQ+ community become eligible to legally adopt children and exercise their right to have a family. In light of this, India must revisit and modernize its longstanding adoption laws to effectively address the changing societal landscape.

14 Charlotte Patterson, Wainright, *et. al, Adolescents with Same-Sex Parents: Findings from the National Longitudinal Study of Adolescent Health, Lesbian and gay Adoption: A New American Reality*, pg. 2 (Oxford University Press, New York, 2009).

15 Gordon Moyes, Gordon Moves (26 February 2009) (last visited on August 05, 2022)

IV. ANALYSES OF PROVISIONS RELATED TO ADOPTION

Adoption is defined in the Chapter VIII of the Juvenile Justice (Care and Protection) Act, 2015, ranging from sections 56 to 73. Adoption was first recognized only in Hindu Law, where the adopted child was considered to be the same as the naturally born child. All other religions being Muslims, Christians, and Parsis, were governed by the Guardians and Wards Act, 1890. However, this act did not make provision for the adoptive child to be considered the same as a naturally born child of that family.

In the current scenario, there was a demand of a secular and uniform law to govern the whole of India when it concerned the Adoption of children. The introduction of the Juvenile Justice Act, 2015 was seen as the first and a very significant attempt towards the Uniform Civil Code. It was a revolutionary piece of legislation that has attempted and even succeeded in providing some uniformity and a sense of legal equality to exist in this regard. However, to say that the legislation does not need improvement would be wrong. Some of the points on which improvement can be done are as follows:

Time-Consuming and Tedious Process

Adoption is a time-consuming procedure that must be addressed. The adoption procedure can be exceedingly time-consuming, causing great strain and stress in some families. In both domestic and international adoptions, average waiting durations might range from a few months to years. Adoption is complicated and the state, as well as adoption organisations and specialists, frequently impose highly severe standards in different nations.[16] Moreover, according to data from the Ministry of Women and Child Development, there are many pending adoption cases in India's Civil Courts that have been ongoing for longer than the time limit allowed in section 61(2) of the Juvenile Justice Act. Despite the fact that various changes have already been made over time to address concerns raised during the Act's implementation.

Very Stringent Rules and Procedures

Domestic adoptions follow tight guidelines and adopting families' eligibility is scrutinised. This complicates the adoption procedure and most of the time, the family is unable to adopt a kid due to such laws, which discourages potential adopters and adoptees.[17]

16 How Long Does It Take to Adopt a Child, Adoption Network, *available at* https://adoptionnetwork.com/how-long-does-it-take-to-adopt-a-child (last visited on December 21, 2022).

17 Pros and Cons of Adoption, India Parenting, *available at* https://www.indiaparenting.com/adoption/3_3786/pros-and-cons-of-adoption.html (last visited on December 21, 2022)

Inadequate Availability

According to the Child Adoption Resource Information and Guidance System (CARINGS), only one child is available for every ten adoptive parents in India. Because the institutionalised care ratio of orphaned children to children is unbalanced, there are not enough youngsters available for adoption. As a result, fewer children may be available for adoption, and foster parents may be less eager to adopt minority group children.

Gender Inequality In The Process Of Adoption

Although it was declared following the Act of 2000, that gender discrimination had been removed, it still exists in practice. A married woman cannot adopt, even with her husband's consent, unless her spouse dies, suffers from a handicap or renounces the world. A husband, on the other hand, may adopt with the permission of his wife. To elucidate the same, in the case of *Malti Roy Choudhury* v. *Sudhindranath Majumdar,*[18] Malti, the appellant, was adopted by the now deceased mother. After her mother died, she became the only heir and applied for her mother's assets and possessions. The appellant produced several pieces of evidence, including documentation of the adoption ceremony, natural parents turning over the daughter to the foster mother as in presence of the husband and the priest, recognition through school records and Malti performing her mother's burial ceremony. The Court, however, rejected the claim, holding that "under the provisions of the act, the husband alone can adopt, but here, it is an admitted position that Malti was adopted by the mother Tripti not by the father and thereby, rejected her appeal."[19]

Additionally, in the matter of *Sawan Ram v. Kalavati*, [20] the issue was whether, in the instance of a widow's adoption, the adopted kid would be held to be the late husband's child as well and therefore his heir. The Supreme Court ruled that the adoption will be made not only by the female, but also by her late husband. This argument was founded on the language of Section 5(1) of the Act.

Intercountry Adoption and Child Trafficking

While there is a need to not let the procedures of the act be very stringent which may lead to discouragement of prospective parents to adopt children, there is also a need to make sure that in case of intercountry adoption, the safety of children is preserved and they get the care and protection they need. There is a balance that needs to be maintained. In this regard the case of *Laxmikant Pandey v. Union of India,* [21] serves as an important case. The Supreme

18 AIR 2007 Cal 4.

19 *Ibid*.

20 AIR 1967 SC 1761.

21 AIR 1984 SC 469.

Court of India in this case formulated a handful of principles governing the prerequisites for inter-country adoption. The action was started after an advocate, Laxmikant Pandey, filed a letter to the court claiming that social groups and volunteer organisations who sell Indian infants to non-citizen parents are engaging in malpractice.

Eligibility Grounds Not Clearly Specified

On reading of the legislation in the Juvenile Justice Act that deals with the eligibility of the person to adopt a child as per section 57(1) it is mentioned that "The prospective adoptive parents shall be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to him".[22] This criterion seems to be inclusive on the first reading, however, if we go into the details, all these grounds can be said to be based more on the discretion, and being subjective. Since no strict grounds are laid, it makes decision making complicated and it would definitely lead to disparity. Adoption rights of same sex couples are not mentioned in any legislations despite many judgements passed by the Supreme Court regarding the same.

V. CONCLUSION AND SUGGESTIONS

Adoption is a good endeavor that offers joy to children who have been abandoned or orphaned. This allows the humanitarian aspect of society to show through. It is a helpful program in which the kid is treated as if he or she were a biologically born child and is lavished with love, care and attention. In addition to the same, it fills the gap in the hearts of parents who long for children, their laughter and mischief ringing off the walls of their home.

Adoption in the olden days yielded an heir to the adoptive parents and son to perform religious rights. It was on the adoptive parent's wish and benefits, that the adoption happened in due course with the development of social justice, equality of law, and welfare of children. Adoption in modern days is viewed from the point of welfare and psychological development of the adopted child.

Both the adoptive parents and child are to benefit from adoption. The prospective adoptive parents gain a son or daughter to show their love and to nurture them to their heart's content. The adopted child gets a supportive and loving parent who replaces the loss of the biological parent. Anything less than this results in the failure of the adoption concept especially for the child.

22 Juvenile Justice (Care and Protection) Act, 2015 (Act 2 of 2016), s. 57(1)

Though Numerous laws, regulations, guidelines, and monitoring agencies were employed to prevent abuses on the adopted child, active follow-up of the process is necessary for the welfare of the adopted child. The major focus is on the child as he/she is the future pillar of the society and needs to have proper physical and mental makeup for their prosperous future. Guidance and training from authorized welfare agencies and nodal agencies can ensure this.

The adoption by a single parent is alarmingly high nowadays. Hence it is the responsibility of the child care agencies to train them to handle the children in such a way that they should not feel abandoned or not taken care properly. Gender and religious equality in the adoption process is almost addressed in the Juvenile Justice (Care & Protection) Act, of 2015.

Navtej Singh Johar's case spurred change, decriminalizing homosexuality. India must update laws to acknowledge same-sex adoption. Many nations and even some countries with step-child adoption embrace LGBTQ+ adoption. India should modernize adoption laws for societal progress. The central and state governments need to monitor the latest socio-cultural developments and amend the relevant acts to protect and preserve the rights of children.

The Juvenile Justice Act, 2015 is recognized as the first step towards the Uniform law for adoption. However, there still exists some room for improvement.

Some of the measures that can be taken are as follows:

a) In the researchers' modest opinion, in order to simplify the process, we must guarantee that adoption processes are very well known and that there are enough adoption facilities.

b) Though extensive waiting duration may be required for certain adoptions, many families want to find every means they can to lessen these long waits. This may be accomplished by making those aspects of the procedure that take a long time but are not critical to the child's safety, online. There are steps that may be taken to limit the number of matters that reach the court, yet many cases remain outstanding.

c) The qualifying conditions listed in section 57(1) of the Juvenile Justice Act, 2015 might be clarified so that judges and authorities have less discretion.

d) Legislative gaps should be covered in defining the adoption rights of LGBTQ couples. Their right to create a family should be recognized and protected.

ABORTION AND NATURAL LAW

Ms. Snigdha Rohilla*

VIPS Student Law Review
August 2023, Vol. 5, Issue 1, 196-210
ISSN 2582-0311 (Print)
ISSN 2582-0303 (Online)

https://vslls.vips.edu/vslr/

ABSTRACT

This research article aims to establish a link between the theory of Natural Law and the contentious issue of abortion. The Natural Law theory posits that it is the inherent right of a person to exist in this world of nature and ensures that no person must be devoid of this right. A person is born with this right and dies, withholding his right to exist. In the contemporary world, abortion is not only a legal issue but also a moral one which may depend on how different people view it. People's moral beliefs in life generally affect their views on abortion. Abortion is an issue that raises questions over one's inherent right to live and one's moral judgement that endorses their opinion on human life. The legal and moral aspect of this issue concerned with the woman's right to choose for herself is comparatively linear than whether the foetus should be considered a human being from the date of conception. Different views of people on when life begins make it complex and difficult to decide whether the termination of pregnancy is justified or not and whether the rights of the mother or the foetus should prevail in a given situation. As per Thomas Aquinas, Natural Law dictates that the "good must be pursued, and the evil must be avoided." This view of natural law is endorsed by the Double Effect theory, which ensures an action may have both good and bad effects, but it may still be morally permissible if the good outweighs the bad effects. Clashes of Natural Law with the sociological and feminist school of jurisprudence open a wide perspective that must be considered when it comes to the issue of abortion. Being the critics of natural law theory, sociological and feminist schools of jurisprudence argue that it does not sufficiently

* Student, BBA LLB, 3rd year, Symbiosis Law School, Noida, Uttar Pradesh, India.

address the complexities of pregnancy or respect individual autonomy and choice. Proponents of these theories maintain that the natural law theory offers a principled, rather rigid approach to understanding the morality of abortion. This research paper contends that a nuanced and thoughtful application of natural law theory is imperative to grapple with the intricate moral complexities surrounding the contemporary issue of abortion.

Keywords*- Abortion, Foetus, Human Dignity, Autonomy, Morality, Esteem, Integrity.*

I. INTRODUCTION

An aseptic restroom dimly lit, a young woman on the verge of tears, fear and pain plastered on her face. She held the pregnancy test in her hand, and a chain of thoughts rushed through her head. Twenty-three years old, still in graduate school, pursuing her dream career. Certainly not ready for the responsibilities of motherhood.

Abortion. A subject much debated upon, some theories fall extremely left upon their view, some fall far right, while some fall in the midst. Abortion raises questions over one's inherent ethical and moral beliefs while also clubbed with letting the concerned individual embrace their autonomy. Nevertheless, the question is- is this "autonomy" inherent? Does this "autonomy" pass the constraints of the world's natural order? Natural law theorists aim to establish a delicate balance between intrinsic human values and morals regarding abortion. The contemporary debate around abortion poses questions on whether a woman must be allowed to abort a foetus and raises a question on the degree of autonomy she has over her body.

Natural Law enslaves abortion by keeping it within the sphere of morality. It asserts that the Law of Nature must be binding on all human beings and is inherently irrevocable by any legal, religious, or cultural belief. The elementary postulates of natural Law assert that the dignity of human life is of utmost supremacy. Nothing in this world of nature can take the supreme right of a human being to exist. However, a point of contention to this perspective does exist. If by 'morality,' natural law theorists claim the right of every human being to exist, then does morality not endorse the right of a human being to choose and propound an autonomous decision about their existence in their way? Does it not include the right of human beings to live by their autonomy when it comes to their bodies?

The nucleus of the entire debate on abortion is based on two main questions: Whether the termination of pregnancy is 'morally' justifiable, followed by the standing of an unborn child, and whether the child should be considered a 'human being' from the time of conception.

II. NATURAL LAW AND HUMAN DIGNITY

The philosophical and ethical theory of Natural Law defines 'human dignity' as the ultimate worth. The concept of human dignity, as derived from the theory of natural Law, is based primarily on the premise that human beings are the ultimate beings as affirmed by the order of the universe. This statement is based on the parent assumption that since human beings can exhibit free will and rationality, they are thus given the ultimate place in nature. Natural Law sees human beings as individuals having inherent esteem and integrity. It is a fact that a human being lives all his life protecting his dignity for his survival. In addition to this conception, natural law prescribes that certain laws are 'universal,' apply to everyone equally, and can only be understood through proper human reasoning.[1]

Thomas Aquinas, a 13th Century philosopher and a proponent of the Natural Law Theory, says humans are the ultimate creatures. He says that this discernment has been propelled upon a human being because of his capability to "reason" or realize the good power of his mind. He said natural laws are undebatable, and people are inherently bound to obey these laws. As propounded by St. Thomas Aquinas, the ultimate or the special status of human beings delivers an affirmation of Natural Law. He says that this Law is congenital, and as a result of following this Law, human beings can achieve the ultimate good in their lives. Such good would include giving primary importance to human life i.e., from conception to death. It can be said that a follower of Natural Law would inherently strive to 'live' and 'let live' to attain happiness and fruition.

The concept of Human Dignity is the nucleus of the debate on abortion. Those who oppose the act of abortion argue that it is the human dignity of the foetus which is at stake when an abortion is performed. Their parent argument depends on the assumption that a foetus in the womb is equally entitled to all the rights of a human being. By performing an abortion, the foetus' inherent sense of esteem and integrity is lost. Supporters of abortion argue that applying the concept of Human Dignity must apply equally to the woman's context. It is also a woman's inherent right to decide whether or not she wants to abort the foetus. They

1 VD Mahajan, *Jurisprudence and Legal Theory* (Eastern Book Company, Lucknow, 5th edn., Reprinted 2006, 1987)

argue that forcing a woman to continue unwanted pregnancy violates her 'autonomy' and, as a result, violates their 'Human dignity.'

III. ABORTION, NATURAL LAW, AND THE THEORY OF THE DOUBLE EFFECT

The concept of abortion has always sparked a debate in Christian cultures. The argument that human life is *sacred* and all humans have a moral duty to protect human life from conception to death, as propounded by the natural law theory, is also the teaching of the Catholic Church. According to the Catholic Church, abortion is considered immoral as the direct killing of an individual violates his inherent dignity and worth. Presumably, the whole argument of Natural Law about abortion is based on the single invariant observation that abortion involves taking away the dignity of a human being. This argument can construe the other foundational pillars, including the 'intentional' killing of an 'innocent' human being. The unborn child in the mother's womb is an innocent human. This point further reiterates that Natural Law and the Catholic Church consider an unborn child as a 'fully-grown human being.[2]'

To understand the correct application of Natural Law on the issue of abortion, it is essential to thoroughly filter the proponents of the principle of "Double Effect." It is a theory founded by medieval philosophers such as St. Thomas Aquinas. Only in the 20th Century did people start studying this theory and applying it to contemporary issues. In its elementary sense, the Principle of Double Effect says an act may have good and bad consequences. It answers whether committing a certain action to achieve one is justified. This theory, though, only allows for the act to be committed if the act is morally good in the eyes of society.[3] The *'good act'* may also depend on the societal stereotype where a particular group considers something morally justified and worthy of being committed.

In the case of abortion, the principle of Double Effect may be equated with a hypothetical. However, recurrent, and usual situations- a mother's life at risk, might also put the child at risk. Alternatively, a threat to the mother's life results from the child being the cause. In this situation, we can see that to save one life, one might have to *end* another. The good act here may save the mother's life, and the ill deed may be terminating the pregnancy to save the mother. Both the deeds, however, bring us back to the same question. Was the termination justified? Or was the act of terminating the pregnancy moral?

2 Loren G Stern, "Abortion: Reform and Law," *Journal of Criminal Law and Criminology* (1968)

3 Diane N. Irving, "Abortion: Correct Application of Natural Law Theory," *The Linacre Quarterly*: Vol. 67: No. 1, Article 6. (2000)

For an act to pass the manacles of what is good or bad, it is important to realize the essentials that invoke the theory of Double Effect. The act done must be *inherently* good. This argument does not convince the Catholic Church as, for it, the very act of abortion is inherently wrong. The presence of an intention to deliberately cause the death of a foetus must not be present for an act to qualify double effect. This essential may be met in case of a threat to the bearer's life, and natural law in this regard endorses the theory of double effect. Even though the whole position of Natural Law is based on the argument that a foetus is a 'complete human being' and that the right of the foetus 'must not be taken away,' the theory of double effect raises objections to the elementary definition of Natural Law. As far as Natural Law is concerned, it says that the 'intentional' killing of a human being may be inherently wrong. Still, in conditions where the death of a human being is 'unintentional' and unavoidable, an act done to achieve a greater good shall not violate the principles of natural Law. Natural Law, thus, endorses the theory of double effect in cases where performing a medical procedure saves the mother's life and where the death of the foetus is 'unintentional' and for the good of saving the bearer's life.

As per the theory, the act permitted (here, the death of the foetus) *must not be a direct means* to accomplish the good intended. Thus, the termination of the foetus must not be the ultimate means to achieve the good (say, saving the mother's life.) This proposition means that if an alternative action exists to achieve the intended action, it must be considered first. The theory also demands that the evil must be of a very high degree to permit the commission of the act. Sometimes, the bearer (or the concerned people) aborts the child because they do not want a baby of a particular gender or they want to keep their bodies physically as it is. Such cases would not convince natural law theory to perform the act of abortion because these acts are 'trivial' and do not pose any physical or mental harm to the bearer.[4]

The theory of Double Effect is generally used by those who support abortion in certain cases. These cases may include the questionable health of the mother, where the pregnancy may exacerbate the mother's physical and mental health; cases of rape and incest; cases of foetal abnormalities, where the child may be on the verge of suffering from defects that are not compatible with life. The theory of Double Effect parallelly applies to all these situations and acts as a defence to the argument supporting abortion. However, if we had only based natural Law on the sole argument of the 'right to live' and the 'right to exist,' natural law theory would not have considered such exceptions. A point of contention would be that if a foetus is not aborted as a result of being a 'complete human being,' why would

4 *Id.*

a bearer of that foetus not be considered equally important when the very foundation of natural Law is based on 'protecting' and 'preserving' life? If a foetus is not being aborted just because of being 'innocent,' then 'why should a woman, or the bearer who is herself innocent, be forced to take up a responsibility they did not even consent to? The theory of the Double Effect answers all these questions. The theory of Double Effect ensures this radical shift in the stance of Natural Law.[5]

IV. EXAMINING OTHER LEGAL PHILOSOPHIES' PERSPECTIVES ON ABORTION

The ongoing discourse on the issue of abortion is primarily focused on the constitutional, political, and moral factors of abortion rights. Thus, a jurisprudential perspective on the issue of abortion must focus on the stakeholders' challenges and, as a result, draw a logical conclusion to a particular standpoint on this issue. The issue of abortion is not only limited to the bearer and the child but also extends to the society as a whole. It also affects the laws contemporarily existing and those that would be formulated in the future. [6]

Different legal theories stand on different pedestals on the issue of abortion, and there can never be one correct and absolute theory that answers the discrepancy of this issue. The natural law philosophy, as we have seen, in its true sense, stands against the endorsement of the act of abortion. It says that the legal system in a society must be based on inherent moral principles independent of human interference. The natural law school generally asserts that abortion is inherently immoral from a moral standpoint by countering the assumption that a foetus is not a 'human being' per se. It asserts that a foetus is very much a human being and that killing a human being is a moral wrong. This view of natural law has been countered by the feminist theory of jurisprudence, arguing that natural law fails to recognize a woman's right to her body and her reproductive rights. The historical school of jurisprudence defines Law as an 'evolving entity' that evolves and organizes itself with time. This school of jurisprudence mainly focuses on a comparative study of 'what used to be' and 'what is.' The school does not have a varied opinion on the issue of abortion. Still, from the principles of this philosophy, we can conclude that this theory mainly talks about how abortion has passed the time constraints, how ancient and modern cultures differ, and on what lines. Some societies in the past have permitted abortion, and some have not. The historical school also demonstrates how people's perspective on abortion has changed over

5 Peter J. Cataldo, "The Principle of Double Effect," *Ethics and Medics (Braintree, MA: Pope John Center)* (March, 1995)

6 Mathotaarachchi, Kamani & Thilakarathna, K A A N. "A jurisprudential analysis on abortions: A perspective from natural law and sociological school of law", *International Journal of Law, Policy and Social Review* (2021).

time. This change in perspective can be understood through a historical shift in the legal status of abortion from being completely prohibited to its constitutional recognition in *Roe v. Wade* in 1973.[7]

A school of jurisprudence that focuses on the social and practical perspective on abortion is the sociological school of jurisprudence. It emphasizes the use of the concept of 'social engineering,' where the laws and policies developed in a society are an outcome of the social behaviors and attitudes that exist in a society. In the case of abortion, the sociological school buys the support of the concept of social engineering and says that abortion as an act must depend on the impact it would create in society. It says that 'practicality' must preside over 'morality,' and thus, it can be said that it holds contrasting views concerning natural law theory. Sociologists often criticize the natural law theory for endorsing 'individual' right rather than collective good. This criticism is proved by the precedence of the foetus' right over the mother as per the natural law theory. The sociological school opposes the thought of natural law school by attacking its assumption of universal human rights. This school explains how different societies may have different views on what constitutes a 'right' and how what might be a norm for one society may not even be a norm for another. It counters the natural law theory's contention that laws must be 'fixed' and 'unchangeable.'

V. CRITICS OF NATURAL LAW THEORY ON ABORTION

The two foremost critics of natural law theory seemingly come from the sociological and feminist schools of jurisprudence. As far as both schools are concerned, they recognize aspects of natural law that do not quite sit in the practical world. Roscoe Pound, a 19th-century American philosopher and a propounder of the modern sociological school of jurisprudence, lays down a "jural postulate" that delivers a wider perspective on the issue of abortion. He says that Law implemented in society is an instrument of social change. He says that Law must recognize society's strengths and weaknesses and strive to create a balance between the same. When applied to the issue of abortion, sociological theory, when looked at from Pound's perspective of "jural postulate," seems the most logical in the contemporary world. Pound defines jural postulate as a process by which one evaluates the complete interests of parties involved in a particular conflict. It says that a few parameters should be analyzed when a decision has to be made to bring justice to the people involved and the society. It helps identify what a law must protect and what it must not in any particular legal discrepancy.[8]

7 410 U.S. 113 (1973)

8 *Supra* note 6 at 6.

Regarding abortion, Roscoe Pound's theory of "Jural postulate" solves a huge aspect of the debate on this contested issue. The jural postulates mainly include evaluating the problems of a particular legal discrepancy and identifying the consequences of maintaining a particular standpoint. It objectively identifies the stakeholders involved and how it would affect society in the long run. Abortion is generally a conflict between the rights of the bearer and the foetus, and whose rights would prevail is a question that is difficult to answer. The jural postulates make it easier to evaluate these issues and thus hold that it is necessary to strike a balance between the rights of both.

Roscoe Pound's theory thus counters the natural law theory on abortion because it assumes a universal moral code, disregarding different social and cultural contexts. Additionally, it prioritizes the unborn child's right to life over a woman's autonomy and bodily integrity and is linked to religious and moral beliefs. Sociologists recommend that legal norms consider the social and cultural contexts in which they are applied and neutral principles should defend women's reproductive rights and bodily autonomy.

The feminist school of jurisprudence bases its argument on autonomy and a woman's right over their body and her reproductive rights. Feminists argue that women should be free to choose whether or not to carry a pregnancy to term without external regulation or control. They also criticize the natural law school for not acknowledging the social and economic factors that impact women's reproductive choices and deny women access to abortion services, which can adversely affect their health and well-being.[9] In 1973, the Supreme Court ruled in *Roe v. Wade*[10] that women have the constitutional right to safe and legal abortion. A major argument of this case was based on the feminist theory of jurisprudence. However, there have been numerous attempts to overturn this decision since then, particularly with the appointment of conservative justices to the court in recent years. If *Roe v. Wade* stands overturned, it would have significant consequences for women's reproductive rights and may result in restrictions on access to abortion, especially affecting low-income women, women of color, and those in rural areas who already face barriers to obtaining abortion services. In states with strict abortion laws, women may have to travel long distances and incur significant expenses to obtain an abortion, effectively making it illegal in some parts of the country and leaving them with no choice but to carry unwanted pregnancies to term. This goes against the feminist theory of jurisprudence. The Medical

9 Sauls, Vanessa, "Rewriting reproductive rights – A feminist perspective on abortion law and gender justice in the legal process" (2016)

10 *Supra* note 7 at 7.

Termination of Pregnancy (MTP) Act of 1971[11] is a significant legal ruling related to abortion in India. This act legalized abortion in specific circumstances such as danger to the mother's life, physical or mental health, rape, or fatal abnormalities. The act imposes a 20-week limit for abortion but allows for exceptions in cases where there is a threat to the mother's life or foetal abnormalities.

In 2017, the Indian Supreme Court made another significant ruling regarding abortion in the case of *Ms. X v. Union of India*[12]. The case involved a 35-year-old woman who wanted to terminate her pregnancy due to foetal abnormalities beyond the 20-week limit. The Supreme Court granted permission for the woman to undergo an abortion, affirming that a woman's right to choose her reproductive decisions is a fundamental right under the Indian Constitution.

The ruling was considered a crucial step in expanding access to safe and legal abortion in India, particularly for women who may have faced obstacles due to restrictive laws. It emphasized the importance of upholding women's reproductive rights and ensuring their access to safe and legal abortion services when required. The Indian Parliament approved an amendment to the Medical Termination of Pregnancy (MTP) Act of 1971 in March 2021[13]. This amendment permits the termination of pregnancy for certain groups of women, such as minors, differently-abled women, rape survivors, and victims of incest, up to 24 weeks. Additionally, the upper gestation limit for medical termination of pregnancy has been raised for particular categories of women, including those with severe foetal abnormalities.

VI. CASE STUDY: ABORTION NEEDS OF WOMEN IN INDIA: A CASE STUDY OF RURAL MAHARASHTRA

An Indian study called "Abortion Needs of Women in India: A Case Study of Rural Maharashtra" puts a deep emphasis on the rural perspective of women on the issue of Abortion. The researchers have collected data from prominent rural areas of Maharashtra and clubbed together the perspectives of women on certain grounds.[14] Such grounds include the general perspective of women on whether an abortion is a "right" of a woman or not; and an outlook on what factors drive the women to get an abortion in these demographics. The research also focuses on the marital dynamics affecting the adoption of the process to

11 Medical Termination of Pregnancy Act, 1971 (Act 34 of 1971)

12 (2017) 10 SCC 1.

13 Medical Termination of Pregnancy (Amendment) Act, 2021 (Act No. 10 of 2021)

14 Manisha Gupte, Sunita Bandewar, *et.al.*, "Abortion Needs of Women in India: A Case Study of Rural Maharashtra" *Reproductive Health Matters* 77-86 (1997).

terminate pregnancy- 67 women from different backgrounds were interviewed to establish their views, needs, and experiences, if any, related to abortion.

The findings of this study conducted in various rural areas of Maharashtra reveals a complex array of views on abortion. A significant number of women (around 70%) stand strongly in favor of abortion as a woman's "personal right," affirming that it is their exclusive right over their bodies. It must be noted that among this 70% of women, around 90% of unmarried women support abortion solely because of reasons concerning social stigma, shame, and avoiding familial pressures of marriage and humiliation. Unmarried women are deemed to be seen as "immoral" having sexual relations before marriage due to the existing patriarchy in the society.[15] This is however different for the ground where women opt for abortion if the contraceptives fail. About 33% of women support abortion in cases where sterilization has failed, whereas about 40% support it after reversible methods of contraceptives fail. This lacuna can be based on the realization that if a woman had sterilized herself with the thought of not having any more children, she should abort the child. Although some did not share the same view, they argued that abortion was a more complex issue than a delivery which is usually "natural" in nature. Abortion, for them, is an artificial process. It can have emotional and physical complications, unlike a natural childbirth.[16]

In the study, we also see that "Sex Selective Abortion" is a major issue that governs whether a woman would want to opt for an abortion or not. Around 45% of the women gave economic reasons and backed up the process of abortion, saying that a male child would be less demanding than a female child. This opinion is deeply rooted as a consequence of patriarchy in the minds of the populace.[17] The study also reveals a lack of awareness about the abortion laws existing in India, with a very few people understanding the legal provisions regarding the same. An interesting outlook generated out of this study reveals that the lack of information about the legal framework that women had, had some of them thinking that the signature of the husband (in case of a marriage) is required in order to get a legal abortion. This, however, stands not required.

In this study, Sociological Jurisprudence becomes relevant as the research delves into the societal attitudes and norms surrounding abortion. It illuminates how prevalent social constructs, including societal expectations and gender roles can shape legal structures and individual decisions. The study's focus on women's perspectives and encounters highlights the significance of comprehending the social milieu in which legal judgments are rendered.

15 *Ibid.*
16 *Ibid.*
17 *Ibid.*

Feminist Jurisprudence takes center stage in this study as it critically assesses the legal system's impact on women's lives. The research illuminates how laws, such as the MTP Act, can empower or disempower women, contingent upon their circumstances and societal pressures. The plea for a comprehensive re-evaluation of abortion laws aligns harmoniously with feminist principles that advocate for women's autonomy, agency, and equal rights.

VII. RESPONSES TO NATURAL LAW ARGUMENTS AGAINST ABORTION

The application of Natural Law on the issue of abortion is based entirely on two principles: a) that a person's inherent right to live and exist cannot be taken away, and b) that the person must be protected from conception to death by Law. The Natural Law view on abortion says that morality is universal and ubiquitous. The right not to take away the life of a being is based on this universal moral. The above argument can be challenged by considering different demographics and different cultures. Understanding this sociologically, what might be moral for one group might not be one for another. Morals are subjective and depend deeply on the cultures and demographics of society. It is also affected by individualism and 'personal' judgements. This subjectiveness may depend on factors such as philosophy and religion. This subjectiveness can be understood through a difference in the theological view of two profound communities; the Catholic Church regards abortion as inherently evil, whereas the Jewish view on abortion is at the opposite end. The Jewish Law, or "Halakah," approaches abortion very nuanced. Some Jewish cultures do not consider the foetus as a fully grown human until the 40th day of the gestation period (while some do); some consider aborting the child in cases where the mother's life is at risk, as against the opinion of the Catholic Church. For the Catholic Church, the foetus is a human being right from conception. In this case, the Jewish culture's morality lies in not aborting the foetus after the 40th day of gestation. In contrast, morality lies in not aborting the child in the Catholic Church. There is a difference in morality in both cases.

As Natural Law theorists argue, human life must be protected at all costs, and aborting a foetus would violate its sanctity and right to live. This argument is based on the assumption that a foetus is a complete human being and has all the rights of a natural person. It, however, can be challenged by the view of some feminist theorists that do not depend on the act of abortion on whether the foetus is a fully grown human being or not. For them, the act of abortion solely depends on the autonomy of a woman over her body. They argue that since a foetus does not have the moral standing of a fully grown human being and it cannot be proved that it is capable of a 'memory,' the right of a woman to make her reproductive

choices must precede over anything else.[18] In this argument, morality lies in giving the woman her right to choose for herself autonomously. As per Natural Law, if continuing the pregnancy is not medically viable for the mother to lead a healthy life, a foetus may be aborted at the identified stage of pregnancy. [19]Although often not included in the debate, we can also base our moral argument on the grounds of Sociology. A woman who is a grown-up human being, capable of reasoning and thinking, would always be a greater asset to society than a foetus suffering from disabilities not compatible with life if born. As a fully grown human being, the bearer of the child would be able to contribute towards building a society more than a foetus who would not be able to function freely and reasonably on its birth. This reasoning, however, is ideal to consider only in conditions where the child is suffering from disabilities so ingredient to his bodily functions that he is unable to live a decent life. Thus, the bearer would be a greater asset to society if saved.

A good percentage of arguments favor not aborting the child is based on the patriarchal presumption that since women are entrusted by nature to bear a child, it is the destiny of every woman in the world. The feminist theory of jurisprudence has duly countered this stereotype. Precedence of the right of the foetus is also majorly built upon this radical assumption that it is a duty of a woman or the bearer to carry a child just because they are given a womb by nature. In cases of rape and incest, a woman must not be forced to bear the child of a rapist, a person she does not know nor would want to know. It is unreasonable and unjustified to force a woman to bear a child out of a relationship she did not consent to. Suppose a woman is considered too 'immature' to understand the consequences of such a relationship or such an unconsented sexual act. In that case, it is also outrightly unreasonable to assume that she would be able to develop such maturity in the process of bearing the child for the next nine months. It cannot be justified to assume that she could handle the traumatic experience of bearing an illegitimate child and assume the responsibility of motherhood at a young age.

However, the traditional view on abortion is not always absolute; the debate on abortion is far more complex. Some natural law theorists do not only base their judgement on the 'sanctity' of a foetus but the woman or the bearer's right to control their own body. Different people have different opinions on what constitutes the parameters of maintaining the sanctity of human life. The philosopher David Hume propounds that a human being comprises memory and perception. It is impossible (and almost far-fetched) to prove the presence of a memory of a foetus. Since the foetus has not developed the organs that

18 Hume, *A Treatise on Human Nature*, Book I, part IV, Section 6

19 *Supra* note 4 at 5.

facilitate carrying a memory, it is thus not wise to consider a foetus a 'complete human being.'[20]

VIII. INTERNATIONAL ASPECTS OF THE ISSUE OF ABORTION

Drawing a comparative analysis of the abortion laws and the respective rights in different countries would reveal a diverse range of approaches to avail abortion services in different countries. Countries like the USA, Canada, Australia, and the United Kingdom, presumably the developed countries would have comparatively better reproductive infrastructure as compared to developing countries such as India, China, and Bangladesh. In the USA, the Supreme Court mandated the closure of approximately 50% of abortion centers. A law, regarded as "backward" in 2013 led to a reduction in the number of operational abortion clinics from 41 to just 20. If the Texas law is more stringently implemented, it may lead to just around 10 abortion clinics being operational in the state.[21] It would thus be an understatement to say that developed countries like the US have entirely liberal views on the issue of abortion.

The picture in developing countries is, however, slightly complex. Economic disparities, cultural differences and diversity, and inadequate healthcare facilities for a certain strength of the populace have been a catalyst in depriving women of certain sections, classes, and castes of the right to abort the foetus. Abortion laws in some of the developing countries, although are legal, proper implementation of these laws still remain a challenge. Countries like India and Bangladesh which are religiously rich, also have conservative patriarchal mindsets often acting as barriers and keeping the women under the pressure of exhaustive social stigma. In India, as stated by the Lancet Global Health Report, a total of 156 million abortions took place in 2015, but as per the official data by the Central Government, only 7 lakh cases were reported. Out of the 156 million cases, about 81% were done by medications, 14% by surgical procedures, and around 5% through unsafe methods. The reasons for such great disparities can be expensive costs, social stigma among unmarried women, and lack of medical facilities in rural areas. [22]

Abortion practices in Under Developed countries such as the countries located in the Sub-

20 *Supra* note 19 at 12.

21 "Abortion laws around the world: from bans to easy access" *The Guardian*, *available at* https://www.theguardian.com/world/2016/jan/05/abortion-laws-around-the-world-from-bans-to-easy-access (last visited on May 03, 2023).

22 Susheela Singh, Chander Shekhar *et. al.* "The incidence of abortion and unintended pregnancy in India 2015", *The Lancet Global Health Medical Journal*, p- e111–e120 (2018)

Saharan regions of Africa, like Kenya, Nigeria, and Tanzania have comparatively fewer infrastructural facilities and healthcare, there is a lack of education as well as economic disparities that ultimately put severe restrictions on abortion and lead to unsafe, backstairs procedures which may be dangerous as well as illegal in nature. In South Africa, the Choice on Termination of Pregnancy Act, of 1996 regulates abortion. It has been seen that around 52% to 58% of annual abortions take place illegally and outside the legal framework. An Amnesty International Report reveals that a mere 7% of the total 3,880 public health facilities in the country are authorized to carry out pregnancy terminations. This shows significantly poor access to healthcare facilities for the women living in these countries. [23]

IX. CONCLUSION

The issue of abortion presents complex challenges for both the present and the future generations. Different schools of jurisprudence and their propounders define abortion based on their principles. There can never be one right view on abortion that would be completely able to accept or reject the act. This dilemma on abortion becomes challenging as it affects not only the mother or child but also society, the previous legal precedents and legislations, and those that would be formulated in the future. Natural law school bases its entire argument on the philosophy of the sanctity of human life, which differs from other legal philosophies that act as a tough critic of it. The issue of abortion is widely acknowledged, but consensus remains elusive. As demonstrated by the jurisprudential discussion and analysis above, there are conflicting viewpoints within the natural law school, with both opposition and agreement on permitting abortion. Proponents of natural law schools firmly reject the notion of legalizing abortion due to their belief in basic values such as 'life' and 'religion,' which are fundamentally incompatible with the practice. On the other hand, the sociological and feminist theory of jurisprudence emphasizes society, individual 'autonomy,' and rights and suggests a more favourable view towards permitting abortion.

The sociological school of jurisprudence provides a pragmatic approach to understanding and addressing the social realities surrounding abortion. Roscoe Pound argues that society operates on conflicting interests, and the law should work to bridge the gap between law and society. His concept of 'jural postulate' offers a practical mechanism for resolving social issues through legal means, including law changes to keep up with a changing society. The feminist theory of jurisprudence, under all circumstances, endorses the right of a woman

23 South Africa Government News Agency, "SA's Illegal Abortion Rate Alarmingly High" *available at:* https://www.sanews.gov.za/south-africa/sas-illegal-abortion-rate-alarmingly-high (last visited on Aug. 5, 2023).

to choose for herself and what's best for her, upholding her right to carry or not carry the pregnancy to term. Feminist theorists argue that a woman's autonomy over her body should take precedence over the sanctity of a foetus, and her right to choose must be respected. The debate on abortion is also complex and can depend on various factors, such as the woman's health, the potential disability of the foetus, rape or incest, and societal contributions. While natural law theory assumes a universal moral code that prioritizes the right to life of the unborn child over a woman's autonomy and bodily integrity, sociologists and feminists argue for the importance of considering social and cultural contexts, protecting women's reproductive rights and bodily autonomy and recognizing the impact of social and economic factors on women's reproductive choices. Ultimately, the abortion debate remains highly contentious and requires careful consideration of all parties' interests.

To conclude, natural law theory on abortion receives significant opposition from the sociological and feminist schools of jurisprudence. It can be argued that while Pound's "jural postulate" offers a unique perspective on resolving conflicts in abortion disputes, other scholars may have differing opinions and propose alternative solutions.

Notes

Notes

THE EDITOR
VIPS STUDENT LAW REVIEW
VIVEKANANDA INSTITUTE OF PROFESSIONAL STUDIES - TECHNICAL CAMPUS
AU Block (Outer Ring Road) Pitampura, Delhi-110034
E-mail: vips.studentlawreview@gmail.com, Website: www.vips.edu