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In the entire subjects interface with Law. Since it's an e-journal, it has open access world-wide. The Scholarly research papers will disseminate and enrich our knowledge in various disciplines. It will share the research being done all over the world. This journal shall help in improving the quality of research and teaching. It's a first issue 2021. The ISSN no. shall be obtained as per Rule.

I express my pleasure in launching this Journal and wish its time-frame release. Wishing all the Best to all the stakeholders and the CIRF Team.

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REGISTRAR'S MESSAGE

I express my pleasure on the launching of a prestigious journal **THE CHANAKYA LAW REVIEW (CLR)**. The Journal is half yearly with its first issue from January 2021.This E-Journal is international in character in terms of its circulation online, at the same time it will be a potential pool of academicians, scholars whose discourse will be a great benefit to the students, researchers and scholars all over the world in all disciplines.

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PREFACE

The CHANAKYA LAW REVIEW (CLR) is a half yearly International Journal of multidisciplinary-Fundamental Research in Law, Social Sciences, Sciences and Humanities interface with Law, with SCOPUS index database. The legal education is the backbone and driving force towards social justice. In fact it's a social justice education. The study of law encompasses all the aspects of society. It is a study of society which needs to be regulated by social norms and statutory laws.

The social behaviour depends upon the behaviour of the people living in the society. Since human needs are varied, so the inter relations with various disciplines. It has impact on the administration of Justice System and governance. In order to explore the significance of interdisciplinary study, 'the Chanakya Law Review' is being launched by the CIRF in IPHD of CNLU. This Journal will provide a platform to the academicians all over the world on the inter-disciplinary, cross-disciplinary and multi-disciplinary issues in Sciences, social sciences and humanities interface with laws. Keeping in view the needs and nature of the journal, the editorial board has been constituted. I express my gratitude to all esteemed the members on the editorial board. It is an online journal open access to all. The ISSN no shall be obtained as per rule.

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CORRUPTION IN PROTECTION OF ENVIRONMENT: NEED FOR AN EFFECTIVE LAW FOR ACHIEVING THE SUSTAINABLE DEVELOPMENT GOALS

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"*Corruption is criminal, immoral and the ultimate betrayal of public trust. It is even more damaging in times of crisis- as the world is experiencing now with the COVID-19 pandemic. The response to the virus is creating new opportunities to exploit weak oversight and inadequate transparency, diverting funds away from people in their hour of greatest need***."**

UN Secretary-General, António Guterres

ABSTRACT

Humans cannot neglect to protect the environment. The realization of protection of environment first was sensed by the nations individually. After World War II, the world nations began to establish national frameworks to protect the environment. But the world nations began to unite and cooperate to establish international frameworks from the United Nations Conference on the Human Environment 1972(Stockholm Declaration, 1972) . Though the protection of the environment is customary international law, it requires treaties and conventions legally binding upon nations. Although the international community agreed upon various regional and international conventions that reflected the international law principles such as precautionary principle and polluter pays principles, few countries, while

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incorporating them in their national regime, still failed to protect the environment. Though the problem is not in establishing international, regional or national legal mechanisms, issues like corruption at national, regional and international levels hinder the effectiveness of such mechanisms. Protection and distribution of natural resources are major challenges for nations because they have economic value. Corruption in the government sector, especially related to revenues from natural resources, will directly impact the environment. Thus, corruption is one of the vital reasons in hindering environmental sustainability. This paper analyses various important international conventions and issues in India, such as exploitation of natural resources and corruption by the public authorities. The present study reveals that good governance, justice, and individual participation in curbing corruption at all levels would help protect the environment and achieve the SDGs.

Keywords: *protection, environment, corruption, Government, Conventions, Sustainable Development Goals*

INTRODUCTION

Corruption is always a notorious problem at all levels of development. It can bring a devastating impact on the environmental sector. The utilization of natural resources plays a crucial role in protecting the environment from degradation. Generally, the States have control over the natural resources, especially in safeguarding, handling and distribution. In such a process, corruption gradually enters the system and interrupts the governance. Nations, for centuries, have been protecting natural resources, but after 1970, the states began to believe that international cooperation is a necessity in protecting the environment. The Declaration of the United Nations Conference on the Human Environment (1972 Stockholm Declaration) is an example of the first international initiative for combating the challenges of protecting and preserving the environment through summit diplomacy. After that, many successful international environment protection agreements were concluded and enforced by the world nations. The world nations in the 21st century established various legally binding mechanisms for protecting the environment. For instance, the United Nations Sustainable Development

Goals (SDG) in 2015 created a wider opportunity for the nations to achieve the process of development without deteriorating the environment. This international cooperation also pondered the reasons that hinder the protection of the environment. Corruption acts as a hindrance in the progress of achieving the SDGs. For instance, SDG 16, specifically focuses on peace, justice and strong institutions.

For effectively executing the SDG 16, the judiciary and police play a key role, but these two are most affected by corruption among the various institutions. But the international community, before establishing the SDG, has previously established different regional and international conventions to combat corruption. The United Nations Convention against Corruption, 1993 has 187 parties (as on 2020). Policymakers need to implement the law to strengthen accountability and reduce corruption by monitoring the powers and authorities. Everyone is liable in front of the law and should be equally treated & punished without distinction. Corruption is a widespread phenomenon in various sectors like forestry, fisheries and waste management, and it is a serious issue where social morals play a vital role. Generally, corruption is interpreted as the misuse of public power for personal interest, an incomprehensible and stratified idea that results in complexities in attaining economic and environmental development. [3]

The increase in desire among the people to lead a sophisticated life, and technological advancement in catering the people's needs, has resulted in a serious impact on the environment. As a customary international law, environmental protection are followed by nations. But the issues relating to environment cannot be resolved by states acting individually. The principle concerning state responsibility furnishes that States are liable for violating international law. In such cases, customary international law plays a vital role to claim against violating state, either by diplomatic action or by international mechanisms, where such laws are in place with respect to the issue of subject matter.[4] Thus, safeguarding the environment under municipal law vests with the government-States. The responsibility is delegated based on the administrative hierarchy, where the State enforces its action through its legislative powers. Thus, relying on this system, the state establishes to its people, that it

[3] Alexandra Leitao, *Corruption and the Environment*, Journal of Socialomics, https://www.longdom.org/open-access/corruption-and-the-environment-2471-8726-1000173.pdf

[4] MALCOLM N. SHAW, INTERNATIONAL LAW, Cambridge University Press.

executes its power appropriately by organizing the activities of various sectors under its control. Therefore, corruption and power abuse becomes the reasons in devastating such system. Corruption in environmental protection is a universal problem prevailing in numerous developing nations and is growing at a massive rate. The environmental problems mainly emerge due to the factors like inappropriate managerial activities of an organization, lack of information and mindfulness among individuals.[5]

It is pertinent to note here that, according to a report on environmental accounts provided by the Ministry of Statistics and Programme Implementation, in India, the economic progress had a negative impact on natural resources such as forests, food, and clean air. The report claims that over the period 2005-15, when the average growth rate of gross state domestic product (GSDP) for nearly all states was about 7-8 percent, 11 states have seen a drop in natural capital. Only three states had their natural capital increase by more than 5%, while 13 states witnessed marginal growth in the range of 0-5 percent.[6] According to the report, monitoring natural capital is crucial and should be one of the determinants of sustainable development. Natural capital[7] refers to the components of nature that provide people with valuable goods and services, such as forest stock, food, clean air, water, land, minerals, and so on. It has to be realized, that the natural resources which are legally exploited have also resulted environmental impact. Therefore, it is crucial to analyze the important international conventions and regional agreements relating to environmental protection. These conventions protect the environment where states are vested with legally binding obligations. Nevertheless, the world nations have many challenges in effectively executing the obligations, as the mechanism and institutions responsible for implementing the obligations were influenced by corruption.

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[5] *WCED, Our Common Future: Report of the World Commission on Environment and Development*, Sustainable Development Goals, https://sustainabledevelopment.un.org/milestones/wced.

[6] Kiran Pandey, *India Loses Natural Resources to Economic Growth: Report*. https://www.downtoearth.org.in/news/urbanisation/africa-to-house-86-of-the-world-s-poorest-by-2050-61671. DownToEarth, 9 October, 2018.

[7] The natural capital accounting (NCA) method has been used, in this report, to account for income and costs associated with natural resource used, based on a framework approved by the United Nations in 2012 called the System of Environmental Economic Accounts (SEEA);

(SEEA is a framework that integrates economic and environmental data to provide a more comprehensive and multipurpose view of the interrelationships between the economy and the environment and the stocks and changes in stocks of environmental assets, as they bring benefits to humanity. It contains the internationally agreed standard concepts, definitions, classifications, accounting rules, and tables to produce internationally comparable statistics and accounts. https://seea.un.org/)

MEANING OF CORRUPTION

Corruption is a huge global, national, and local problem since it jeopardizes development, peace, security, and environmental protection. Accepting corruption and corrupt practices destabilizes governments, the rule of law, and our democratic system. No community, wealthy or impoverished, can afford such a waste of resources. The world is under a compulsion to protect the environment from continuing human existence. Therefore, fighting corruption must be intensified at all levels of governance.

The World Bank and Transparency International characterize corruption as "the misuse of public office for private gain"[8]. Further, it comprises of inappropriate and illicit act of public-service officials, including political and non-military servants, whose position or status provides chance in misusing Government's money and property.[9]

SUSTAINABLE DEVELOPMENT GOALS AND PROTECTION OF ENVIRONMENT

Corruption is a multifaceted issue; it has deep roots in bureaucratic and political institutions. Its impact on development varies depending on the circumstances of the country. However, while costs vary and systemic corruption coexists with great economic performance, experience implies that corruption is detrimental to growth. For instance, it prompts governments to intervene when they are not required. Furthermore, it jeopardizes their ability to develop and execute policies in areas where government action is required, such as in environmental control, health and safety regulations, social safety nets, macroeconomic stabilization and contract enforcement.

The United Nations, with the help of its specialized agencies, focuses on the development, protection and in maintaining peace and security. The United Nations Environment

[8] The World Bank, *Helping Countries Combat Corruption: The Role of the World Bank, Poverty Reduction and Economic Management Network,* (Jan. 25, 2022, 11.40pm) http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm

[9]Petter Langseth, *Prevention: An Effective Tool to Reduce Corruption*. United Nations Office for Drug Control and Crime Prevention, Centre for International Crime Prevention, https://www.unodc.org/documents/corruption/Publications/1999/Prevention_An_Effective_Tool_to_Reduce_Corruption.pdf .

Programme (UNEP), plays a crucial role in implementing environmental development activities globally, in various areas like ecosystem management, environmental governance, climate change, disasters and conflicts, chemicals and waste, resource efficiency and the environment under review.[10]

The Sustainable Development Goals, expressly acknowledge the interdependence of the economy, society, and the environment. The SDGs provide an astonishing opportunity to preserve our "natural capital" (which is a nature's gift to mankind), such as climate regulation, clean water, and biodiversity, nearly one-third of the SDG rely on nature for its accomplishment. As nations explore how to meet their obligations, under the SDGs, the Nationally Determined Contributions (NDCs) to the Paris Agreement, 2015, was enforced, which plays a crucial role towards the preservation of 'natural capital' to attain sustainable development. Before SDGs was established, the world nations were committed, in protecting the nature at regional and national level. The critical links between nature and human well-being are incorporated in its targets, practically in all of the SDG objectives. For example, increasing sustainability of fisheries under Goal 14 assists nations in reducing hunger under Goal 2, improving the resilience of the poor under Goal 1, and improving responsible production and consumption under Goal 12. Therefore, it is crucial to realize the significant role of SDGs in protecting the environment. Besides these SDGs 8 relating to decoupling economic growth from resource depletion and environmental degradation. Corruption affects the SDG 8, like the revenue legally generated through wildlife and relevant resources contributes to a country's economic growth.[11]

RULE OF LAW AND UNITED NATIONS

Corruption in the environmental sector can have disastrous consequences. Corruption is a multifaceted social, political, and economic issue that affects all nations. Corruption weakens democratic institutions, suppresses economic growth, and contributes to political instability. By distorting electoral procedures, perverting the rule of law, and creating bureaucratic

[10] *Why does UN Environment Programme matter*?, UN ENVIRONMENT PROGRAMME, https://www.unep.org/about-un-environment/why-does-un-environment-matter

[11] Natural Resources and Pro-Poor Growth. OECD. https://www.oecd-ilibrary.org/docserver/9789264060258-en.pdf?expires=1651741233&id=id&accname=guest&checksum=3640BA5AADF2827888F7295ED7B1355C

quagmires whose sole purpose is to seek bribes, corruption undermines democratic institutions. Corruption also impacts while executing environmental programmes. For instance, corruption takes place in granting permits and license while exploitation of natural resources and law enforcers bribed for overexploiting the natural resources. The best example is sand mining. It is now widely recognized that anti-corruption measures go beyond criminal justice systems and are critical to establishing and maintaining the most fundamental good governance structures, such as domestic and regional security. Further, the rule of law and social and economic structures are effective and responsive in dealing with problems and using available resources as efficiently and with little waste. The UN convention was established in 2003, which is the only anti-corruption instrument, that focuses on five wide regions under preventive measures, criminalization and law enforcement measures, international participation, asset recovery, technical assistance and data exchange. This Convention, additionally gives various types of corruption – bribery, trading in influence, abuse of functions, and different acts of corruption in the private sector. When it comes to the environmental protection issues, most world nations, based on their national legislation, have established pollution control and monitoring agencies responsible for monitoring pollution and protecting the environment.

According to Article 19 of the UN Convention, Each Member State shall consider implementing such legislative and other measures as may be necessary to establish the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or another person or entity, as a criminal offence when committed intentionally. Additionally, Article 21 and 22 of the UN Convention against corruption, obligates state parties to consider adopting legislative measures against persons engaged in private sector, commits offences such as bribery and embezzlement of property in the private sector. The nations can well adopt these operative provisions for controlling corruption in the environment protection bodies at national level. Transparency, civil society participation assists governments in guaranteeing the extensive use of resources, resulting in better service delivery and accountability, both of which contribute towards environment development and economic growth.

INTERNATIONAL CONVENTIONS

The international community before nine decades, had begun to concentrate on protection of environment and realized that it can be achieved only through international cooperation.

There are many international conventions which are established to protect the environment such as:

i. **The Convention on International Trade in Endangered Species of Wild Fauna and Flora,** (CITES) **1973:** The widespread trend of many important animals, like elephants and tigers, are becoming endangered. This results in a need for enforcement of this Convention. However, in 1960s, as a binding instrument, the concept of CITES was initially implemented to eradicate wildlife trading. The trade on plants and animals is carried out for their end product such as food, exotic leather goods, wooden musical instruments, lumber, tourist curios, and pharmaceuticals. Thus, overexploitation through trade causes habitat loss, and many species turn into. Since, through trade, wildlife is overexploited for their products; moreover, it crosses national boundaries to save the wildlife from becoming extinct, CITES was established. This Convention has shown a various levels of assurance in saving beyond 37,000 wildlife, and plant species regardless of trade for animal species or for its end product.

ii. **The Minamata Convention on Mercury, 2013**: This Convention focuses on safeguarding the environment and well-being of humans from the detrimental consequence of Mercury.

iii. **The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989:** An international treaty, which is intended to minimize the risk of harmful waste and disposal of them among nations.

iv. **Rotterdam, 1998:** The Rotterdam Convention was adopted by a Conference of Plenipotentiaries in Rotterdam, Netherlands, on September 10, 1998, and came into force on February 24, 2004. The objective of the Convention is to encourage Parties to share responsibility and help safeguard human health. Further, the Convention aims to protect the environment from potential harms in the international trade of certain hazardous substances; and contribute to the environmentally sound use of those hazardous substances by promoting the exchange of information about their characteristics, establishing a national

decision-making mechanism for their import and export, and publicizing these decisions to State Parties. The Parties incorporated the Prior Informed Consent (PIC) system on the ecological grounds. The Convention builds up legally enforceable obligations by Prior Informed Consent (PIC) procedure, initiated by UNEP and FAO in 1989 and ceased in 2006.[12]

v. **Stockholm Convention on persistent organic pollutants (POPs):** This Convention was implemented on Persistent Organic Pollutants, on meeting of diplomats - 22 May 2001 in Stockholm, Sweden; Further this came into force on 17 May 2004. This Convention safeguards human health and the environment from hazardous pollutants.

vi. **The Vienna Convention for the Protection of Ozone Layer and Montreal Protocol 1985:** This Convention was enforced to safeguard the health of humans and protect the environment from the harmful effects of the ozone layer.

vii. **The Convention on Migratory Species, 1979** (CMS) It is one of the important Conventions in protecting Migratory species, also known as Bonn Convention. CMS's prime objective is to protect the species living within or passing through the State parties national boundaries. As a United Nations environmental treaty, CMS provides a universal forum to safeguard the migratory animals and the ecosystems from depletion. India is a party to this Convention since 1983.

viii. **The Carpathian Convention, 2003**: One of Europe's biggest mountain ranges, is said to be the Carpathians, which is an area of exclusive natural valuables of tremendous vision, having ecological significance, and forms a source for important rivers. It creates a significant environmental, social, economic, cultural, and living environment in the heart of European people. The Parties of this Convention, share a goal of pursuing comprehensive policy and collaboration in order to ensure the Carpathians' conservation and long-term growth. Also, in improving the quality of life, and conserving natural resources. Therefore, this Convention aimed to promote feasible growth and protect the Carpathian area. Seven Carpathian states signed it in May 2003.

ix. **The Bamako Convention, 1991**: The Bamako Convention is an African convention prohibiting importing hazardous (counting radioactive) squander into

[12] *Rotterdam Convention,* UN ENVIRONMENT PROGRAMME, http://www.pic.int/TheConvention/Overview/tabid/1044/language/en-US/Default.aspx

Africa. This Convention, invites parties for bilateral, regional and multilateral agreements on minimizing the harmful waste, which is a prime objective of this Convention. Bamako Convention is also an impact of :

a. The Basel Convention's failure to restrict the trade of dangerous waste to least developed countries (LDCs);
b. The realization that few developed nations were trading hazardous wastes to Africa (*Koko* case in Nigeria, *Probo Koala* case in Ivory Coast).

12 states from African Union negotiated the Convention, and it came into force in 1998. This Convention prohibited the imports of all hazardous and radioactive waste into the African continent. Further, the Convention also aimed in minimizing and control the transboundary movements of hazardous wastes within the African continent. Notably, the Convention establishes the precautionary principle. The countries are banned from importing hazardous waste, radioactive wastes, and all forms of ocean disposal.

x. **The Tehran Convention, 2003:** This Convention assures the Marine Climate of the Caspian Sea, otherwise called the "Tehran Convention" named after the city, entered into force by the five Caspian littoral States in 2003. It is a legally binding regional agreement mandated for the general requirements and institutional mechanism for protecting the environment in the Caspian region. Further, this umbrella legal instrument also extends its protection in preserving, restoring, and protecting the Caspian Sea species and inhabitants. This Convention applied the precautionary and polluter pays principle to fulfil its prime objectives.

Illegal logging is a transnational economic crime that is directly connected to corruption. There are obvious negative consequences such as damage and degradation to the environment, impact on society, and economic consequences that affect a particular nation and the world at large. For instance, conserving forests as a carbon sink is currently a top priority for the international community due to climate change. In such a situation, where wrong done or damage caused to the environment by a few states results in consequence affecting people in general, and the world community together is under compulsion to combat such consequences. The UNODC Transnational Organised Crime Threat Assessment, in its 2010 report stated that the operation of illegal logging involves many

actors, including officials and has become problematic to disentangle legitimate and illegitimate commerce. The international community also insists upon states considering that issues like illegal logging and corruption cannot be combated by one country alone. Even such countries have appropriate domestic legislation, and only international cooperation can eradicate all forms of environmental crimes. Though there are many international conventions and regional agreements, corruption is one prime issue hindering national and international initiatives to protect the environment.

CORRUPTION AS A HINDRANCE TO ENVIRONMENTAL SUSTAINABILITY

India's prime concern is maintaining high economic growth while still ensuring environmental sustainability and social justice. Unfortunately, the mandate of environmental sustainability does not coincide with the high growth rate of the last decade. Cities in India have polluted air, toxic waterways, and poorly handled hazardous waste. This may be due to the widening gap in environmental legislation and regulatory institutions to counter the adverse effects of the environment due to the rapid industrialization that has developed over time. Environmental regulations are designed to ensure that resources are used sustainably and efficiently. The responsibility of regulatory bodies is to safeguard the environment against degradation through an organized monitoring mechanism, enforcement and compliance procedure. However, within the administrative foundations, there are inherent constraints in regulatory institutions such as the Union ministry of environment and forests (MoEF), the Central Pollution Control Board (CPCB) and the State Pollution Control Boards (SPCBs). Thus, such institutions need to be recognized and eliminated to guarantee the substantial establishment of environmental directives in the country.[13]

[13] Nivit Kumar Yadav and Anil Roy, *Turn Around, Reform Agenda for India's Environmental Regulators*, Center for Science and Environment, 1, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiU6sLzuabwAhWqxTgGHXbyBiEQFjAFegQICBAE&url=https%3A%2F%2Fwww.cseindia.org%2Fcontent%2Fdownloadreports%2F479&usg=AOvVaw0b4Q2RDVK8ynSjYx44sTcH

ADMINISTRATIVE ABUSE RESULTS IN ENVIRONMENT DEGRADATION – ISSUES IN TAMIL NADU, INDIA

In India and in many countries, there is administrative abuse in the public sector. Likewise, corruption in environmental protection agencies in India, are building greater problems in efficiently executing the duties entrusted with the environmental protecting agencies. The social activist K.R.Ramaswamy @ Traffic Ramaswamy filed public interest litigation against Tamil Nadu Government regarding violations in granite quarry and Madurai Bench of Madras High court appointed Mr.U.Sagayam an IAS officer as special/legal officer to look into the probe. The granite quarries in Madurai, Tamil Nadu violated, and the scam went to nearly 16,000 crore rupees and resulted in environmental degradation. In another incident, Periyasamypuram in Tuticorin District of Tamil Nadu in 2015, Mr.Victor Rajamanickam, a renowned Geologist in the country, filed a public interest litigation before the Madras High Court and revealed the 1 Lakh crore illegal beach sand mining to the country. The said two incidents in Tamil Nadu happened due to corruption and administrative abuse, which causes a threat to the environment and improper use of natural resources results in environmental degradation. As of December 2020, the Directorate of Vigilance and Anti-Corruption has arrested about 33 government staff for corruption in various departments in Tamil Nadu. A superintendent's (in the environment department) house was on a raid by DVAC, and they seized property worth Rs 1.37 crore. This includes unaccounted money of Rs.88,500, 3 kilograms, 10 carats of diamonds, fixed deposits of Rs 37 lakh and 18 property documents. Another incident in Vellore (a district in Tamil Nadu) where a raid in the zonal officer's residence (who worked in State Pollution Control Board), by DVAC, seized property worth Rs 3.5 crore, 450 sovereign gold and 6.5 kg silver.[14]The above issues establishes as a fact that how corruption has almost invaded in to environmental governance.

India sanctioned the United Nations Convention against Corruption 2003 which implies reaffirmation of Government's obligation to battle defilement. Therefore, India is vested with a liability in undertaking robustly administrative legal reforms to authorize the law enforcement authorities to recover the properties obtained through the practice of corruption.

[14] *Tamil Nadu: Since October, DVAC arrests 33 govt staff for corruption,* TIMES OF INDIA, https://timesofindia.indiatimes.com/city/chennai/since-oct-dvac-arrested-33-govt-staff-for-corruption/articleshow/79767711.cms .

Lately, defilement and conceivable enemy of debasement measures have been widely spoken at public, global and multilateral levels. [15]

The Government of India, in 2010, appointed a Commission of Inquiry as a result of repetitive corruption allegations reported in several states on the mining of irone and manganese ore at a large scale. After the investigation, the Committee was responsible for submitting a report within 18 months.[16]As a result, two reports were submitted by the said Committee, one, based on illegal manganese and iron ore mining across India; the second one on illegal mining in Goa. In reaction to it the Supreme Court imposed a temporary ban on all mining activity in the State. The reporT stated that the State and the Ministry of Environment and Forest (MoEF) were accused of permitting illegal mining in Goa, exposing the region's ecosystem and ecology at risk. According to the report, around 90 mines were operating without the required permit from the National Board for Wildlife, and 33 of them were within 1.5 kilometres of wildlife sanctuaries. Former Karnataka mines and geology department head M E Shivalinga Murthy has been charged with providing fake licences to the Associated Mining Company (AMC), which former minister Gali Janardhan Reddy owns. After further investigation, the mines and geology department identified six of its top officers involved in AMC's illegal iron ore mining.[17]

As an international initiative, combating corruption requires international cooperation. United Nations Convention against Corruption, 2003 and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention), 1997 are the important United Nations legally binding instruments involved in combating corruption in the wildlife related trade and business.

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[15] Na Jiang, *International Ant- Corruption Cooperation: Main Features and Trends*, Vol 2, Issue 4, Intellectual Properties Rights: Open Access, 2014, https://www.longdom.org/open access/international-anti-corruption-cooperation main-features-and-trends-ipr. 1000121.pdf

[16]*China Mining: Indian Illegal Mining Investigation Ends without Explanation*, RIGHTS + RESOURCES, https://rightsandresources.org/blog/china-mining-indian-illegal-mining-investigation-ends-without-explanation/.

[17]ThinThuy Van Dinh, *Addressing Corruption in Environmental Sector: How the United Nations Convention against Corruption Provides a Basis for Action*, UNODC, https://www.unodc.org/documents/corruption/Publications/2012/Corruption_Environment_and_the_UNCAC.pdf .

UNITED NATIONS CONVENTION AGAINST CORRUPTION, 2003

While corruption is not the only factor deteriorating the environment, there are other issues such as inadequate governance leading to ineffective policy creation, management, monitoring, and enforcement, which can manifest as issues with environmental sustainability. Particularly, in many developing countries invested with moderately bountiful normal assets, defilement is viewed as a significant offender in ecological corruption.[18] Corruption can occur both during the earliest phases of resource exploitation and at the time of operation. Whether executed at the national or in the international level, these offences will pave the way for the loss of resources and habitats and affect the ecosystems and livelihood of local populations. Thus, the United Nations Convention against Corruption (UNCAC) is useful for all stakeholders. It is the first, anti-corruption agreement, urging state parties to develop legal and policy frameworks in line with universally acknowledged standards and an international system to combat corruption effectively.

Surprisingly, the UN Convention against Corruption does not define corruption as such. It rather outlines particular acts of corruption that should be taken into account in every jurisdiction covered by the UNCAC. Bribery and embezzlement are examples, but money laundering, and concealment, are obstructions of justice. In addition, when defining who might be considered potential participants in corruption, UNCAC takes a functional approach to the term "public servant": it incorporates any individual who holds an authoritative, managerial, or chief office or offers a public assistance, including workers of privately owned businesses under government contract.

The United Nations Convention Against Corruption, Article 18 on Trading in influence provides "Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences when committed intentionally:

(a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage so that the public official or the person abuses their actual or supposed influence to obtain from an administration or public authority of the State Party an undue advantage for the original instigator of the act or any other person;

[18] Richard Damania, *Environmental Controls with Corrupt Bureaucrats*, Environment and Development Economics, Vol 7, Issue 3, CAMBRIDGE UNIVERSITY PRESS, https://doi.org/10.1017/S1355770X02000256.

(b) The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or another person so that the public official or the person abuses his or her real or supposed influence to obtain from an administration or public authority of the State Party an undue advantage."

The UNAC under Chapter II explains the preventive measures that the State Parties can adopt. Further, the only way to bring down corruption in the non-renewable sector is by increasing accountability and transparency. But unfortunately, in mining, gas and oil asset-rich nations, over and over again, the abundance created by these assets isn't overseen straightforwardly. As a result, the conventional populace stays buried in destitution while not many fill their pockets with the returns of debasement.[19]

Conversely, Article 13 of the UNAC, provides for the participation of society where the state parties are encouraged to promote the active involvement of individuals, public sector, non-governmental organizations and community-based organizations in preventing and fighting against corruption.

INDIA AND ITS INITIATIVES IN COMBATING CORRUPTION

In conformity with recent international practices laid down by the United Nations Convention Against Corruption, India enacted The Prevention of Corruption (Amendment) Act, 2018, which established its attentiveness to curbing corruption. Law enforcement authorities and the judiciary must set the example for the rule of law to be respected. In addition, judicial processes for the investigation and prosecution of corruption need to be expedited to offer credible deterrence. Supreme audit bodies, often independent bodies with the power to review government action (or inaction) and "follow the money", might be used more often to uncover and address corrupt acts. Although corruption may be sufficiently prevalent in some places as to seem like a way of life, as an African proverb says, "Many little people in many small

[19] Supra Note 3

places undertaking modest actions can transform the world".[20]

India also has established a Central Vigilance Commission in 1964. In 2004 the Central Vigilance Commission was authorized as "Designated Agency" to receive written complaints for disclosure on any allegation of corruption or misuse of office and recommend appropriate action.[21]

The judiciary has also played a vital role in combating corruptions at all level. In *K. Veeraswami vs. Union of India and Others*,[22] a complaint against the appellant, who was an Ex-chief justice in high Court, was brought before CBI under Section 5(2) read with Section 5(I)(e) of the Prevention of Corruption Act, 1947 was enlisted on 24.2.1976 and a F.I.R was the recorded in the Court in front of Special Judge on 28.2.1976. The appellant continued on leave from 9.3.1976 and resigned on 8.4.1976 on accomplishing the period of superannuation. The examination was completed, and a charge sheet was documented against the litigant on 15.12.1977 under the supervision of special judge. As per the charge sheet, the appellant in the wake of accepting the workplace of the Chief Justice on 1.5.1969, progressively initiated amassing of resources in the ownership of monetary assets and belongings, in his name and in the names of his significant other two children, lopsided to his revenue in the period between the date of his arrangement as Chief Justice and the enrolment date. Consequently, he carried out the offence of criminal wrongdoing under Section 5(1)(e), culpable under Section 5(2) of the Prevention of Corruption Act, 1947. In the interim, the appellant moved to the High Court under Section 482, Cr.P.C. to subdue the said criminal procedures. A Full Bench heard the proceeding, High Court, which dismissed the petition by 2:1, however, conceded a certificate under Articles 132(1) and 134(1)(c)of the Indian Constitution, taking into account the significance of the law involved. Further, the Court rejected the appellant's plea. It stated that Article 124 of the Indian Constitution is not a shield conferring immunity to a judge from being prosecuted on a corruption charge.

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[20] Marceil Yeater, *Corruption and Illegal Wildlife Trafficking*, UNODC, https://www.unodc.org/documents/corruption/Publications/2012/Corruption_Environment_and_the_UNCAC.pdf .

[21] About Central Vigilance Commission, CENTRAL VIGILANCE COMMISSION, https://cvc.gov.in/?q=about/background

[22] 1991 (3) SCC 655

In *A.C. Sharma vs. Delhi Administration,*[23] the question arises in this case, in setting up either Delhi Special Police Establishment *(SPE)* (for example, CBI) or the Anti-Corruption Branch of Delhi Police. These forces were denied of its ability, to examine the defilement bodies of evidence against Central Government workers. Both SPE and Anti-Corruption Branch could explore, it involved interior managerial plan for the suitable position to direct the examine task as per the requirement of the circumstance. The Supreme Court held that the plan of DSPE Act 1946 doesn't either explicitly or by vital ramifications strip the legal police authority of their ward, power and capacity to examine into offences under some other *appropriate* law.

In *State of Maharasthra vs. Gajanan & Anr.*,[24] under Section 389(1) of the corruption case, stay of sentence and conviction by High Court facilitates the continuance of service of a public servant. The Supreme Court referred *K.C.Sareen vs. CBI Chandigarh*, where the Courts can consider the 'exceptional fact' to stay the sentence by the trial court and facilitate the public servant (who is accused for corruption) to continue to hold the civil post despite the conviction recorded against him. It was observed by the Supreme Court that "the High Court, in this case, has made no mention of the remarkable fact that, in its opinion, prompted it to suspend the conviction in the impugned order. The High Court also ignored this Court's directive that it must consider all factors, including the consequences of keeping such a conviction on hold. The High Court, in our opinion, did not take any of the circumstances as mentioned earlier into account when staying the conviction. It should also be mentioned that the Court's decision in *K.C. Sareen vs. Union of India & Anr*. (above) was later upheld, followed by the Court's decision in *Union of India vs. Atar Singh & Anr*. [SC 212, JT 2001 (10)], not proper and impugned order set aside". In *K.C. Sareen vs. CBI Chandigarh*[25] the Supreme Court observed that "When a public servant, who is convicted of charges of corruption, is allowed to continue to hold office, it would impair the moral of the other persons manning such office and consequently that would erode the already shrunk confidence of the people in such public institution besides demoralizing the other honest public servants who would either be the

[23] AIR 1973 SC 913

[24] *State of Maharashtra vs. Gajanan & Anr*, 2004 Cr.L.R.SC 242

[25] *K.C. Sareen vs. CBI Chandigarh*, (2001 (6) SCC 584)

colleagues or subordinates of the convict person".

However, the Indian judiciary has exercised its power to curb corruption at all level. Still, there are few international best practices such as ARREST (Asia's Regional Response to Endangered Species Trafficking), a project where training is given under the framework of CITES and INTERPOL to the officers involved in monitoring wildlife trafficking which received combined training in navigation, patrolling, reconnaissance, raids, arrest and search which are necessary for forest rangers. In such regional mechanisms, the anti-corruption portfolio should be an integral part so that the anti-corruption wing can effectively execute its initiatives in identifying and curbing officers, government officials and ministers involved in environmental corruption. The judiciary can suggest for such mechanisms based on Article 50 of the United Nations Convention Against Corruption which obligates to adopt various forms of investigation techniques such as electronic or other forms of surveillance and undercover operations. In addition, Article 50.2, encourages state parties to enter into bilateral and multilateral agreements or arrangements to utilize special investigation techniques.

Corruption breeds and thrives in circumstances where governance and accountability systems are weak or non-existent. To reduce corruption in natural resource governance, it is necessary to improve accountability, integrity, and transparency throughout the whole system. Some forms of corruption may be seen as regular aspects of Government, law enforcement, and corporate operations in many nations. Some people may think it acceptable to break the law in order to benefit themselves, their family, or their friends, especially in nations where faith in governmental authority and law enforcement is low. There are many scams which are result of utilization of natural resources in India. For example, mining scandal in Karnataka. The Government realized that the mining activity helped the local communities a little but paved the way for environmental degradation. India is known for is largest production and exporting lucrative minerals such as mica, coal, barites, iron ore, bauxite and manganese.[26]Additionally, corruption also affects wildlife conservation. The 2015 Report by the World Wildlife Fund (WWF) and TRAFFIC Wildlife Crime Initiative states that corruption facilitates worldwide wildlife, forest, and marine crimes, and other harmful environmental consequences, jeopardising biodiversity and communities' livelihoods. Corruption threats abound across the

[26] Paranjoy Guha Thakurta, *Why Mining in India is a Source of Corruption.* https://www.bbc.com/news/world-south-asia-14486290 . 12 August, 2018

global fish, forest, and wildlife supply chains, ranging from minor bribes for forged export licences and back-door access for poachers to highly-organized collaboration to circumvent labour rules on fishing fleets and political payoffs for new timber concessions.[27]

THE UNITED NATIONS GLOBAL COMPACT[28]

The United Nations began to protect the environment by focusing on various stakeholders. The United Nations Global Compact intended to organise a worldwide movement of sustainable businesses and stakeholders to achieve the world we desire. That's our vision for the future.

- To achieve this, the United Nations Global Compact encourages businesses to:
- Develop plans and operations that are in line with the Ten Principles on human rights, labour and the environment; and
- Take strategic steps to achieve wider societal goals, such as the UN Sustainable Development Goals, with a focus on cooperation and innovation.

However, corruption in the environment may occur in the business related to utilization of natural resources. In such kind of business, sustainability originates with a principles-based approach. The UN Global Compact has come out with Ten Principles[29]where Principles 7,8, and 9 relate to business and the precautionary approach to environmental challenges, responsibility and utilization of eco-friendly technologies in business. Further, Principle 10 focuses on, any business must aim at avoiding and be against any form of corruption such as extortion and bribery. For example, the words of the President and CEO, Siemens "Fighting crime and corruption is important for sustainable development. At Siemens, with its 377,000 employees all around the world, there is zero tolerance for misconduct and violations of applicable laws. That is our clear message and the tone from the top. We systematically anchor integrity and compliance in our company culture. Beyond the boundaries of our company and in our support of the global fight against corruption, we are committed to Collective Action

[27] *Strategies for Fighting Corruption in Wildlife Conservation: A Primer*. World Wildlife Fund (WWF) and TRAFFIC Wildlife Crime Initiative Publication, 2015. P-4

[28]"The United Nations Global Compact call the companies to align strategies and operations with universal principles on human rights, labour, environment and anti-corruption, and take actions that advance societal goals". https://www.unglobalcompact.org/what-is-gc

[29] The Power of Principles. https://www.unglobalcompact.org/what-is-gc/mission/principles

to promote fair competition. Thus, we will continue to drive the Siemens Integrity Initiative, which has so far committed more than US$70 million in around 55 projects in all major growth regions and high-risk countries."[30] This kind of company strategies will help to achieve the SDGs 13 on climate action, SDG 16 on peace, justice and strong institutions, SDG 17 partnerships for the goals and provides that the SDGs can be realized only with strong partnership and co-operation. The above SDGs are directly connected with the matters relating to environmental protection where the natural resources are utilized in business and trade.

[30] Promoting Anti-corruption Collective Action Through Global Compact Local Networks, 2nd Edition, United Nations Global Compact, 2018. P-3.

CONCLUSION

Corruption is connected to environmental sustainability and economic and social growth. The corruption in the political system, is at the foundation of non-compliance with environmental legislation, which leads to poor environmental governance and weakens the implementation of regulations as well as mobilization of the natural resources. Ranger service, unlawful dealing of imperilled species, water supply, oil abuse, fisheries, and dangerous waste administration are generally especially inclined to defilement. In certain situations, governments have enacted environmental legislation in accordance with applicable Multilateral Environmental Agreements. On the other hand, corruption distorts the execution of such laws. The ill-effects of corruption resulted in international organization seeking to implement good administration in developing nations. Such policies aim to promote openness, integrity, and accountability in both sectors (Government and private) to achieve continuous growth and better service provider to society. When both a corruption oversight agency and an environmental protection body exist, they should cooperate closely in assessing corruption risks and in developing codes of conduct for public officials in vulnerable sectors (Article 8 of UNCAC), or even develop a common strategy to prevent and combat corruption in the environmental sector. In addition, an effective prevention policy should include activities aimed at raising awareness of the consequences of corrupt practices in the environmental sector among the general public as well as other stakeholders, non-governmental organizations, law enforcement officers, investigators, prosecutors, judges, consumers and the private sector. The Indian judiciary can also be blamed for its inefficiency in deciding corruption-related cases discourages people from participating in combating corruption. Therefore, the lawmakers have to analyze Article 13 of the United Nations Convention Against Corruption, which obligates the State parties to take appropriate measures in accordance with the domestic law in encouraging active participation of the public, individuals, non-governmental organizations, and other community-based organizations in combating corruption.

Additionally, it also mandates state parties to create awareness among public, schools and universities in corruption-related issues and involve them in decision making to combat corruption effectively. Improving transparency, accountability, democracy, and good governance are crucial for combating corruption in the environmental sector. Commitment

from politicians and policymakers in resource-rich nations is required to enhance the legal structure and related institutions. It is crucial that people not exploit natural resources through illegal activities. Furthermore, local communities and the general public who use relevant products may help increase transparency in the process by learning how and with what type of environmental impact such products or outcomes are obtained.

Finally, it is the responsibility of society to curb corruption. Each corrupt transaction necessitates the presence of a "buyer" and a "seller". The Government deals with public officials, who participate in bribery and extortion, but it is the individuals offering bribes to government officials to get specific benefits. Excellent administration, which incorporates a comprehensive obligation to law and order, is essential for ecological supportability and destroying the natural harm brought about by defilement. The legal structure of the country has an indispensable role in combating corruption. The extent of law enforcement determines the level of corruption. Conclusively, as under SDG 16, peace, justice and strong institution, it is difficult. We can't expect sustainable growth until there is peace, stability, respect for human rights, and good governance based on the rule of law in our society.

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CROSS-LISTING OF SHARES: IMPLICATIONS AND THE ROAD AHEAD FOR INDIA

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ABSTRACT

Companies around the world keep treading innovative paths to increase investments and market value. Over the years, cross-listing has emerged as a viable mechanism for companies to improve market presence and gain global attention. Cross-listing of shares refers to the listing of shares on a different stock exchange other than the primary and original stock exchange. India followed a restrictive policy, wherein though Indian companies can list their debt securities on international exchanges (masala bonds), they can list their equity shares only through American Depository Receipt or Global Depository. In a similar manner, companies incorporated outside India could only access the Indian market through the depository route. With the accelerating pace of internationalization of capital markets and the rising need to attain global significance, India has deliberated some key changes to enable direct listing of equity shares of Indian companies in foreign exchanges. In 2018, the Securities and Exchange Board of India (SEBI) constituted a high-level committee to prepare a report and suggest plausible changes in the regulatory framework to realize this objective. The expert committee which submitted its report in 2018 has strongly advocated measures to implement direct cross- listing of shares of companies in India. In line with the report, several key amendments have been introduced in the regulatory framework. The move is predicted to be a game-changer in the Indian capital market scenario.

In this background, the research paper is an attempt to provide an overview of the regulatory changes initiated in India, and analyse its major impacts. The paper seeks to present a solution

as to how the scheme can be implemented in the most feasible manner for the advancement of foreign investment in India and improving access to global markets for Indian companies.

Keywords: Cross-listing, dual listing, shares, stock exchange, investment.

INTRODUCTION

In a world, where corporate entities are vying for investments and improved visibility, cross-listing has emerged as a favourable investment mode for companies across the globe. Most importantly, it extends the crucial benefit of wider market access and recognition for corporate entities.[31] Additionally, companies incorporated in a jurisdiction with poor investor protection and enforcement mechanisms may also choose to commit themselves to greater corporate governance standards by cross-listing in other countries. While most countries have displayed an increasing alacrity to open up their stock exchanges, countries like China still continue to follow a restrictive policy in allowing access of their stock exchanges to foreign shares.[32] India, for a long time has been following a conservative approach to the practice, by allowing access to Indian stock exchanges only through depositories and conversely, permitting direct listing of equity shares in foreign stock exchanges only through American Depository Receipts (ADRs) or Global Depository Receipts (GDRs). In the recent past, India has realized the drawbacks inherent in its conservative practice of cross-listing that could significantly impede the globalisation of Indian capital markets. Consequently, significant amendments have been introduced in the Indian regulatory framework to adopt a liberalized practice of cross-listing. Though the significant legislative changes have taken place, clarity on the scope of implementation has not yet emerged. The Government is still deliberating the rules for implementation of the legislative change in India. In this context, it is pertinent to analyse the implications of the proposed changes and study its important repercussions. The research paper is an attempt to comprehend the global practice in cross-listing, and correlate the same with the changes in the Indian regulatory framework to understand how the Indian practice can be best crafted to suit India's global ambitions.

[31] H K Baker, John R et.al., *International Cross-Listing and Visibility*, JOURNAL OF FINANCIAL & QUANTITATIVE ANALYSIS 495 (2002).

[32] Kamilla Sabitova, *Impact of Cross-Listing on Companies Valuations: Evidence from Emerging Markets Impact of Cross-Listing on Companies Valuations: Evidence from emerging markets* (2018).

UNDERSTANDING CROSS LISTING

One of the principal methods available for a company to raise money from the public is through listing of shares in stock exchanges. Every nation has a domestic stock exchange, where the shares of the companies incorporated in that country are listed and traded for money among the public. Cross-listing allows companies to simultaneously list their shares in multiple stock exchanges. Investors can buy shares of a company from a stock exchange and later trade them in another. Effectively, it obliterates the national boundaries in listing of shares and facilitates the internationalisation of domestic shares across boundaries.

Cross-listing has gained wide traction over the past few decades. Prompted by the increasing popularity of cross-listing among companies, scholars have tried to put out varying hypotheses to deduce the reasons motivating companies to cross-list their shares. Some of the prominent ones among these include the investor recognition hypothesis, market segmentation hypothesis, liquidity hypothesis etc. Investor recognition hypothesis is based on a deduction about investor sentiments. The supporters of the theory expound that increase in market value of a company is correlational with the awareness of investors about the securities.[33] Cross-listing which improves the visibility of a company at the global level, boosts investor awareness which in turn, results in an increased market value of the entity.

The market segmentation hypothesis is based on an analysis of market conditions. The increasing constrictiveness of markets, due to regulatory barriers can make investment tougher in the domestic market.[34] To overcome this, companies tend to cross-list to scatter the risk and compensate for the loss that may arise in the domestic market.

The liquidity hypothesis is based on the notion that improved liquidity of stock is one of the major reasons inducing companies to cross-list.[35] Cross-listing facilitates increased trading hours, thereby increasing the demand for the stock. The resultant competition among traders reduces bid-ask spreads and causes improved trading in the domestic markets.

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[33] Olga Dodd, *Why do Firms Cross-list their shares on Foreign Exchanges? A Review of Cross-Listing Theories and Empirical Evidence* REVIEW OF BEHAVIORAL FINANCE p. 10-12 (2013).

[34] *Id* p. 4-8.

[35] Amir N. Licht, *Cross-Listing and Corporate Governance: Bonding or Avoiding?* CHICAGO JOURNAL OF INTERNATIONAL LAW (2003).

Thus, it can be seen that the hypotheses present varying dimensions of the probable reasons that can prompt companies to cross-list. The hypotheses also give a glimpse into the purported benefits of cross-listing. These include increased liquidity in the market, capability to raise capital at cheaper prices in a more efficient market, widening of shareholder base to expand financial risk and improved visibility and recognition in the investor market.[36] Nuanced approaches to the study of factors motivating companies to cross-list has also shown that familiarity with a neighbouring market also plays a dominant role in a company's choice of a market for cross-listing.[37] Geographic, cultural, and economic similarities and alikeness in stock exchange features with the home country can boost investor confidence to cross-list their shares in a given capital market.[38] While the factors that may influence a company to cross-list is largely subjective, the level of protection afforded within a particular corporate governance regime is found to be only a matter of secondar significance in most cases.[39]

The evolving ability of a market to attract foreign shares for cross-listing is usually considered as an indicator of a country's overall financial market activity.[40] From a development perspective, cross-listing can be a key catalyst for progress of nations, as its implementation may necessitate changes in both the home and target jurisdictions, along with transnational coordination, which in turn can promote comity among nations.[41]

However, in recent times, the notion that cross-listing leads to significant appreciation in the value of companies has been disputed through some empirical studies. The studies point out that in developed economies, where the domestic market itself has attained higher liquidity and integration, there is little incentive for companies to resort to cross-listing.[42] Statistics

[36] G A Ndubizu, *Do cross-border listing firms manage earnings or seize a window of opportunity?* ,THE ACCOUNTING REV. (2007).

[37] Sergei Sarkissan, Michael J Schill, *The Overseas Listing decision: new evidence of proximity preference,* REVIEW OF FINANCIAL STUDIES (2004).

[38] *Id.*

[39] *Supra* note 5.

[40] Sarkissian, Schill, *Cross-Listing Waves,* THE JOURNAL OF FINANCIAL AND QUANTITATIVE ANALYSIS (2016).

[41] Larry E. Ribstein, *Cross-Listing and Regulatory Competition,* REVIEW OF LAW & ECONOMICS 97 (2005).

[42] Joanathan De Landsheere, *Cross-listing in the 21st Century-Benefits of ADR-listings: an ending story?,* TILBURG UNIVERSITY (2011-2012).

over the past few years indicate a decelerating trend among companies to cross-list shares.

Improvement in standards of corporate governance in home countries has also been pointed out as one of the major reasons behind this trend. [43] However, the study also reveals that cross-listing is still a lucrative option for companies in developing countries to access capital and gain visibility at the international level. Despite the initial impact caused by the pandemic, capital markets in developed nations have managed to rebound to their initial levels and register spurts in domestic investment activities.[44] Thus, the findings of these studies still remain relevant for the present analysis.

Cross-border listing can be executed primarily through two means. These include direct listing and indirect listing. In direct listing, companies directly offer their shares to the public without going through an IPO or with the aid of a facilitator such as banks. From an issuer's perspective, direct listing extends the benefit of limited expenses as compared to listing through an intermediary, which entails commission costs.[45] Indirect listing involves issuing of shares through depository receipts such as American Depository Receipts or Global Depository Receipts, evidencing the ownership of shares in companies of other countries. Indian companies may also list their debt securities on international exchanges in the form of masala bonds. As it exists, foreign companies seeking to cross-list in India can do so only through Indian Depository Receipts.[46] IDRs were introduced in India in the post-liberalisation era with the promulgation of the Companies (Issue of Indian Depository Receipts) Rules, 2004. The rules however prescribe higher standards for availing the facility that has made access to IDRs, largely an unviable option for potential investors.[47]

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[43] Richard Dobbes, Marc H Goedhart, *Why cross-listing shares doesn't create value*, MCKINSEY & COMPANY (Nov.1, 2008), https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/why-cross-listing-shares-doesnt-create-value.

[44] Chris Bradley, Peter Stumpner, *The impact of COVID-19 on capital markets, one year in*, MCKINSEY & COMPANY (March 10, 2021), https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/the-impact-of-covid-19-on-capital-markets-one-year-in.

[45] Varma, Shelke, *Direct Listing: The Beginning of Demise of GDR and IDR Routes,* THE SCC ONLINE BLOG (Aug. 12, 2019), https://www.scconline.com/blog/post/2019/08/12/direct-listing-the-beginning-of-demise-of-gdr-and-idr-routes/.

[46] Nicholas, Vikaramaditya, *Reverse Cross-Listings- The Coming Race to List in Emerging Markets and an Enhanced Understanding of Classical Bonding,* CORNELL INT. L. J. (2014).

[47] Bhumesh Verma, *Direct Listing: The Beginning of Demise of GDR and IDR Routes,* SCC ONLINE (Aug. 12, 2019), https://www.scconline.com/blog/post/2019/08/12/direct-listing-the-beginning-of-demise-of-gdr-and-idr-routes/.

INTRODUCTION OF CROSS-LISTING IN INDIA

In 2013, the cancellation of the Bharati-MTN Merger, a $23-billion mega deal between Bharati Airtel and South Africa's MTN, which could have been India's biggest ever M & A transaction made headlines.[48] When the South-African based MTN was not ready to forego its identity by totally merging with the Indian company, the Indian-based Bharti Airtel could not offer a solution to save the deal as the Indian regulatory framework lacked provisions which could have made the deal possible.

The merger could have led to the creation of the third largest telecom company in the world and also the single largest outbound FDIs from India.[49] The situation exposed a critical void in the Indian regulatory system that made the consummation of such a deal impractical. Numerous discussions arose in this context on the impending need to modernize the Indian approach to listing of shares and foreign investments.

It must be noted that the facility that could have come to the aid of the companies here is dual listing of shares as opposed to cross-listing. While cross-listing enables companies incorporated in India to directly list their shares oversees before or after listing in India, dual listing permits listing of shares overseas only after listing in the domestic capital market.

Merging through dual listing takes the form of a dual listed company (DLC). A dual listed company comprises two legal entities functioning as a single business.[50] By mutually listing their shares on the stock exchanges in the respective jurisdictions, the two companies synchronise their operations as a single entity, while maintaining their individual identities.

In cross listing, the cross-listing firm maintains a single identity.[51] For instance, consider that

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[48] *Bharti-MTN deal may be biggest M & A in India's History*, BUSINESS STANDARD (Jan. 19, 2013), https://www.business-standard.com/article/companies/bharti-mtn-deal-may-be-biggest-m-a-in-india-s-history-109052500173_1.html.

[49] Sandeep Joshi, *Bharti Airtel calls off merger talks with MTN*, THE HINDU (Sept. 30, 2009), https://www.thehindu.com/business/Industry/Bharti-Airtel-calls-off-merger-talks-with-MTN/article16884239.ece.

[50] *Dual Listing-When a company's shares are listed on more than one stock exchange*, CORPORATE FINANCE TRAINING, https://corporatefinanceinstitute.com/resources/knowledge/trading-investing/dual-listing/.

[51] David Kimberly, *How do dual listings work?* FREE TRADE (Oct. 25 2021), https://freetrade.io/learn/how-do-dual-listings-work.

a firm has listed in stock exchanges A and B. Buying shares from A will be equalent to buying from B. Consequently, the share purchase process will be interconvertible, which means the shares bought in A can be sold in B.

Though cross-listing appears to present a more liberal approach, dual listing is often preferred over cross-listing due to various reasons. Dual listing comes with the benefit of eased tax burdens. In an ideal merger scenario, the acquirer company is put to bear a huge tax burden in proportion to its capital gains from the merger. As a merging of operations through cross-listing does not lead to accumulation of a vast proportion of capital assets in one company, the tax burden is equitably shared by the merging entities. [52] The prospect of not losing individual identities in the merging process also makes dual listing, an attractive option for companies.[53]

The spike in discussions that followed the failure of the Bharti-MTN deal brought to the fore, the issue of internationalisation of Indian share markets. In 2014, the Government permitted unlisted Indian companies to raise capital in international capital markets without listing in India for a period of two years initially through an amendment to the Foreign Direct Investment (FDI) policy. After about four years, the Securities and Exchange Board of India constituted a 9-member expert committee to review the matter and suggest plausible methods for implementation of the scheme in India. The expert committee report was submitted in December,2018. It contained elaborate provisions for introducing cross listing in India. It suggests certain key amendments to legislations such as the Companies Act, 2013, Foreign Exchange Management Act, 1999 (FEMA), the Income Tax Act etc. to effectuate cross-listing in India.

For a country that has been practicing a restrictive approach to the listing of shares for a long time, despite the changing trend around the world, a decision to allow cross-listing of shares in a renewed regulatory atmosphere is a bold stance. It is notable that while recommending such a drastic change in the policy, the Expert Committee has also carefully considered

[52] Anand Rawani, *SundayET Guidebook: What is dual listing*, THE ECONOMIC TIMES (Oct. 4, 2009), https://economictimes.indiatimes.com/money-you/sundayet-guidebook-what-is-dual-listing/articleshow/5085349.cms?from=mdr.

[53] *Id.*

incorporation of some safeguards to tackle any misapplications of the permissive provisions. Accordingly, it proposes that Indian companies can resort to direct listing of shares only in certain specified jurisdictions identified as "permissible jurisdictions".[54] A permissible jurisdiction is identified as a jurisdiction with which India has treaty obligations to share information and cooperate for investigations.[55] Complementing the status, the committee also recommends that the country must be a member of the Board of International Organization of Securities (IOSCO), and Financial Action Task Force (FATF) or any other jurisdiction notified by the Central Government following consultations with the Securities and Exchange Board of India (SEBI) upon an appraisal of the jurisdictions' capital market regulations. Special emphasis has been given to exclude jurisdictions having inadequate regulatory frameworks to counter money-laundering or terrorism. The qualifications primarily lay down tougher standards, which are difficult to satisfy. Scholarly studies estimate that the tougher standards can lead to exclusion of many major jurisdictions as opposed to inclusion.[56]

In September 2020, the Government notified the Companies (Amendment) Act, 2020, which has introduced provisions permitting direct listing of shares out of India. Section 23 of the Companies Act has been amended to provide for issuing of shares in international markets. As recommended by the Expert Committee, such listing of securities is allowed only in capital markets of "*permissible foreign jurisdictions or such jurisdictions as may be prescribed*" in that regard. Thus, the legislature has taken care to ensure that safeguarding provisions are put in place to curtail misuse of the permissive provisions. Perhaps, the initial restrictive approach to cross-listing might serve as a prelude to the introduction of a liberal cross-listing regime in India in future. While the parent legislative changes have been introduced, ancillary rules laying down the implementation mechanism of cross-listing are still awaited.

Recently, there have been speculations that the government is deliberating legalisation of only dual listing of shares in India. While concerns abound about the possible division in liquidity between countries that dual listing can cause, some also identify it as a more prudent measure

[54] SECURITIES AND EXCHANGE BOARD OF INDIA, REPORT OF THE EXPERT COMMITTEE FOR LISTING OF EQUITY SHARES OF COMPANIES INCORPORATED IN INDIA ON FOREIGN STOCK EXCHANGES AND OF COMPANIES INCORPORATED OUTSIDE INDIA ON INDIAN STOCK EXCHANGE (December 4, 2018).

[55] *Id.*

[56] Padma Singh, *Cross Listing: Benefits Beyond Borders*, JOURNAL OF ADVANCED & SCHOLARLY RESEARCHES IN ALLIED EDUCATION (2019).

for India's business atmosphere. The most common concern raised against cross-listing is that it can lead to export of capital from India as Indian companies seeking overseas operations can directly list shares abroad without primary listing in India.[57] Due to the reciprocal benefits that cross-listing entails, experts fear that it can only benefit overseas companies in the long run.[58] Clarity on the scope of implementation of these changes cannot emerge until the relevant regulations are promulgated. Given the fact that India is still at a nascent stage with respect to these changes, dual listing may be a more practical option for India to gain a foothold in this sphere.

Along with the major policy change, India must also equip itself with sturdy mechanisms to balance the multifaceted reforms with the challenges which could arise in the background of the adoption of a liberal investment policy. This requires increased coordination with the foreign jurisdictions[59] and extension of reciprocal benefits to stimulate good foreign relations. Further, there must be a co-extensive extension of the extra-territorial jurisdiction of the SEBI to empower the regulator to effectively pre-empt or control manipulative acts, which could cause a misuse of the enabling provisions.[60] In this regard, the Supreme Court's ruling in *Securities and Exchange Board of India v. Pan Asia Advisors Ltd. & Anr.*[61] is instructive. In this case, the Apex court held that the Indian capital market regulator has jurisdiction to investigate into the matter of GDRs sold by Indian companies over foreign exchanges. The case related to a finding of the SEBI against a merchant financing firm, Pan Asia Advisors Ltd. that it had committed fraud on the Indian investors and drew undue benefits by manipulating the Indian shares. The regulator proceeded to debar the firm from accessing the capital market in India directly or indirectly for a period of 10 years. The relevant order was challenged. In a landmark decision, the Apex Court ruled in favour of extending SEBI's jurisdiction based on internationally recognized principles such as the "effects doctrine" and appreciation of the legislative wisdom behind the enactment of the SEBI Act, 1992, which

[57] Tarush Bhalla, Jayashree P Upadhyay, *Overseas listing draft norms may have an option of 'dual listing*, MINT (Sept. 11, 2020), https://www.livemint.com/market/stock-market-news/overseas-listing-draft-norms-may-have-an-option-of-dual-listing-11599837365171.html.

[58] *Id.*

[59] Gautham Srinivas et.al. *India: Overseas listing of Indian Companies*, MONDAQ (May 13, 2020), https://www.mondaq.com/india/shareholders/932794/overseas-listing-of-indian-companies.

[60] *Id.*

[61] Securities and Exchange Board of India v. Pan Asia Advisors Ltd. & Anr, [2015] SCC OnLine SC 626.

establishes the regulator. The court observed that in its role as a sectoral regulator tasked with the function of protecting investors and stock markets in India, the SEBI has the necessary jurisdiction to adopt measures for curtailing such practices which it deems contrary to the interests of Indian investors and security market. While observing so, the court also placed reliance on the definition of fraud within the provisions of the relevant regulations pertaining to GDRs. Thus, it is important to realize that statutory backing is essential to give teeth to the regulatory provisions. Therefore, while cross-listing is introduced in India, necessary changes must also concurrently take place in the relevant governing regulations, especially regarding the functions of SEBI to make the system fool proof.

India must be also vigilant to ensure that the situation that ensued after the promulgation of the IDR Rules in 2004 does not reoccur after the introduction of cross-listing. The IDR rules laid down that the companies seeking to issue IDRs in India must have a pre-issue paid up capital and free reserve of at least USD 50 million and a minimum average market capitalization of USD 100 million in the parent company during the past three years. The stricter qualification criteria prescribed under the rules effectively deterred potential foreign companies from issuing IDRs in Indian stock markets. Consequently, it was only after five years from the promulgation of the rules that India received its first ever IDR issue from Standard Chartered Bank.[62] Such a condition can render the reforms meaningless and immature. The immediate focus should be also on ensuring that the intended beneficiaries derive adequate benefits from the major policy changes.

BENEFITS FROM CROSS LISTING

The rationale for utilizing "liquidity pools" is weak as any institutional investor interested in investing in Indian stocks must register as a foreign institutional investor (FII) in order to purchase their shares.[63] Moreover the major international brokerage firms having presence in India provide coverage of the companies of interest to investors. It is therefore wrong for these organizations to carry out further evaluations as they have stronger governing standards. Also, nowadays, corporate practices are becoming more and more integrated in terms of disclosures

[62] *Supra* note 17.

[63] *Supra* note 26.

and increasing partnerships with investors. Thus, Companies need to determine whether the nominal benefit they expect from the cross-listing of their securities is worth the compliance costs associated with cross-listing. Another benefit for companies occurs in the form of higher visibility and global presence, which can be beneficial for extending brands or activities into new areas more efficiently. A secondary listing may provide owners with greater investment diversification, increased liquidity, and perhaps lower investment risk because the shares are exposed to two or more markets rather than just one.

The benefits of cross listing can be analysed on the basis of benefits to the Indian economy and benefits to companies incorporated in India. To date, foreign investors have always benefited from the surge in Indian stocks. While it is true that Indian investors have also experienced the same, they still need to diversify their investments. Such entries help in the globalization of our currency, strengthen our financial position, create better laws, and nurture a professional service environment. This helps the local market, because in such cases it is worthwhile to include more emerging markets in the list. The companies incorporated outside India in partnership with the brand "India" have been fruitful as the Indian market is full of potential that the outside companies can reap. Further by gaining access to the Indian market, outside companies can derive benefits from a wider base of consumers and market participants. As far as Indian investors are concerned, portfolio diversity has increased where eligible investors of India may like to invest in the stock of global blue-chip businesses, and the planned liberalisation of the Indian regulation is an operative means of granting their wishes. Participation in the wealth generated by multinational corporations would also allow Indian investors to participate in the wealth generated by multinational enterprises that have a substantial impact on Indian lives if they were to invest in the equity share capital of companies incorporated outside India. Hence, its high time for multinational companies reaping benefits to share the gains by issuing shares.

CONCLUSION

Though the global trend in cross-listing of shares is receding, for a developing nation like India, enabling cross-listing of shares is a positive move. During the financial year 2015-2016, Indian companies for the first time in 25 years recorded zero raising of funds through overseas equity offerings, which heralded a decreasing popularity of ADRs/GDRs among Indian firms as viable investment routes.[64] The introduction of direct cross-listing of shares coupled with the pressing need for internationalization in the modern days, could possibly revive the enthusiasm of Indian firms to globalize their activities. Legalisation of cross-listing could be a boon to start-ups in India as it comes with the benefit of a diverse listing option and safer investment options.

As it is evident, introduction of cross listing has the potential to propel the Indian economy to new heights, while also ensuring that the brand "India" gets an adequate share of the financial market. It also enhances the credibility and popularity of Indian companies at the global level. However, it also comes with an overarching need to revisit almost all laws containing implicit or explicit provisions dealing with foreign investments or trade. Given the current crisis, which has made a relook into legislative provisions in almost all domains of law practically inevitable, these changes are not easy to come by. Though the Expert Committee constituted by the SEBI has laid the foundation for the law, laying down the law in letter and spirit may require more comprehensive consultations and review at multiple levels. In this context, the moderate and slow approach adopted by the government to implement the changes reflects prudence and appreciation of the complexity of the issue on part of the executive. While a gradual change is preferred, care must also be taken to put in place robust mechanisms and complementary policy changes, which will make the reform more meaningful and conducive for India's business atmosphere.

[64] Rajesh Mascarenhas, *Indian companies didn't raise funds through overseas equity offerings during FY15*, THE ECONOMIC TIMES (March 28, 2016), https://economictimes.indiatimes.com/indian-companies-didnt-raise-funds-through-overseas-equity-offerings-during-fy15/articleshow/51577096.cms.

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AN ANALYSIS OF SEDITION LAW IN INDIA

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ABSTRACT

Sedition law has often been a heated topic of discussion. It was originally introduced by the Britishers to curb nationalist feelings in India. Since then, the Indian government on various instances has used this law to curb dissent against the government.

In this research, the author aims to study the background of sedition law in India along with various opinions about it during the constitutional assembly debates. The research also attempts to analyse the legal provisions supporting sedition law and the Indian judicial trend towards it. Lastly, the aim of the research is to suggest a way forward by suggesting both short term and long term solutions to it.

Keywords

Free speech, expression, sedition, dissent

INTRODUCTION

In a democracy people have rights to express their views and opinions. Free speech and expression are protected under the constitution yet this is a limited right that has restrictions. One such restraint is given in sec. 124-A, Indian Penal Code (IPC), 1860. This Section criminalizes those acts which bring "hatred or contempt, or excites disaffection towards the Government." This section has been a heated topic since its enactment.

Sedition is a result of the Indian colonial history and was enacted by the Britishers.
After its incorporation Britishers used it as a means to overpower protests, dissent or condemnation of the government. Many freedom fighters e.g., Mahatma Gandhi etc got imprisoned because of this law.

This law was enacted by British government for a special and a sole purpose of suppressing Indian voices against the government. In the modern era of 21st century where India is a democratic country the irony is that the world's largest democratic country has laws that were once barriers to their own independence.

HISTORICAL BACKGROUND

Lord Thomas Babington Macaulay added section 113 that was closely related to sec. 124A IPC. The decided punishment prescribed was of life imprisonment. However, even after several discussions when IPC came into force in 1860 sedition law was not inserted in it. The section relating to it was omitted under the act.

The rigorous need to amend the IPC was realised during Wahhabi movement in India. The movement condemned changes into Islamic law and its objective were to preserve the Islam and revisit to its true essence. However, Britishers wanted to curb these uprising nationalist feelings and movements after the revolt of 1857. In order to do so, they finally amended IPC through Special Act XVII of 1870. Sir James Stephen justified the change in the act by stating that the law is free from any vagueness. It penalized an action that aroused ideas of dissatisfaction with the government, nevertheless this disaffection would be separated from disapprobation. As a result, people were allowed to express their displeasure with the government as long as they demonstrated a willingness to submit to his legal authority.

The first case of sedition in India can be traced back to 1892 when the Indian courts had to establish distinctions between "disaffection" and "disapprobation". In doing so, court in Queen Empress v, Jogendra Chunder Bose[65] case, held that Disaffection was described as a notion that is opposite to affection, such as hatred; while disapprobation was defined as simply disapproval.

In 1898, section 124A IPC was amended to include disloyalty and feelings of enmity in it. Queen Empress v. Bal Gangadhar Tilak[66] was the judgment that gave effect to this amendment. In the instant case, Bal Gangadhar Tilak (defendant) published an article in the magazine *Kesari*, where he cited an example of how the great Maratha warrior Shivaji Maharaj killed Afzal Khan. The British government charged him for inciting Swaraj feelings that prompted the murder of two British officers by locals. The court held that it is immaterial to consider that whether the publication in question has provoked or not provoked any feelings of dissatisfaction. The court specifically rejected the idea that this clause should be applied solely to actions that incited insurgence or disobedience to the government.

Further, in Queen Empress v Amba Prasad[67] case, after considering the definition of disaffection, the court determined that a disapprobation would be guaranteed as free speech if it does not amount to disloyalty or undermining the State's legitimate power.

However, in Niharendu Dutt Majumdar v King Emperor[68] case, the Chief Justice of India at that period was of opposite view. In this case, Majumdar was booked for delivering violent speeches in Bengal legislative assembly by being vocal about the State government's inefficiency to maintain law and order. The Federal court of India overturned Majumdar's conviction and decided that the inclusion of vicious words alone do not constitute a speech or article seditious. Further, court held that the words shall provoke public disorder.

[65] Queen Empress v. Jogendra Chunder Bose, ILR (1892) 19 Cal 35.
[66] Queen Empress v Bal Gangadhar Tilak, (1917) 19 BOMLR 211.
[67] Queen Empress v Amba Prasad, (1898), ILR 20 All 55.
[68] Niharendu Dutt Majumdar v. King Emperor, (1942) 4FCR38.

CONSTITUENT ASSEMBLY DEBATES

During the colonial rule, people of India witnessed the arrest of many prominent freedom fighters on grounds of sedition. Mahatma Gandhi, Bal Gangadhar Tilak etc, were among the national leaders who were booked under section 124A IPC. The Britishers used this law to eliminate the dissent and limit the freedom of speech and expression of Indians against British Government.

These were the major reasons that influenced the constitution drafters to exclude sedition law as a position for curbing fundamental right to free speech. Also, this was one of the prominent rights that played a vital importance in developing patriotic feeling and attaining independence from the colonial rule.

However, initially in the Draft Indian Constitution sedition was incorporated as a situation to restrain the free speech and expression yet the constituent assembly voted totally to remove sedition as a valid ground for curbing free speech and expression. It was done to free the modern India from the dark shadow of British laws which caused suffering to our national leaders. K.M Munshi, who was a lawyer by profession and also a national leader significantly advocated for arguments against the use of word 'sedition' as a lawful situation to restrain free speech and expression.

The assembly was of clear view that sedition law is oppressive in nature. They were reluctant to include it. Therefore, the word 'sedition' was not added in the constitution. While it was excluded from the constitution it was validly retained under IPC as a crime against the State.

STATUTORY PROVISIONS

The constitution does not mention word 'sedition' anywhere. Rather, it has been included in various statutes but no statute defines the word 'sedition'. The Indian Penal Code contains provisions of sedition law in multiple sections. Section 124A IPC criminalizes the actions which bring hate. Section 153A penalizes sedition by class hatred and section 295A criminalizes seditious acts that promote religious insults.[69]

[69] KUMAR ASKAND PANDEY, INDIAN PENAL CODE (IPC). (4th ed. Eastern Book Company. 2017).

In 1967, to curb terrorist activities the "Unlawful Activities Prevention Act" was instigated by the Parliament to manage the activities harming the sovereignty of nation.

"The Prevention of Seditious Meetings Act, 1911" was enacted by Britishers. The object of it, was to criminalize seditious meetings to curb the increasing dissent among the people. The District Magistrate or Police Commissioner was given authority under section 5 of the act to prohibit any public meeting which they were doubtful of to be seditious in nature.

The Hon'ble Karnataka High court in N.R. Narayana Murthy70 case held that as per article 51(A), it is the obligation of each Indian citizen to respect the constitution, the National Flag and National Anthem. To prevent acts of insults to these symbols, "National Honour Act, 1971" was introduced by the Parliament.

Article 129 and 215 of the constitution gives the hon'ble courts power to penalize for contempt of court. While, "Contempt of Courts Act, 1971" gives the detailed method for penalizing the offender.71

SEDITION VIS-À-VIS FREEDOM OF SPEECH

Democracy without freedom is an illusion. Therefore, freedoms are significant to truly achieve the principles of democracy. John Stuart Mill advocated that to achieve solidity in a society one should not supress citizen's voices, how so ever contrary it might be.[72] With the intention to achieve this, right to free speech has to be given due importance. The Supreme Court in the case of Re Harijai Singh[73] drew an analogy amongst a democratic civilization and free speech. In a democracy active participation of people is needed. Therefore, it is the right of the citizens to know the political, social and economic events daily and to know the ways in which they are being managed. To attain this goal, people need a clear knowledge of the events. This enables them to form opinions and comments about the government.

[70]N.R. Narayana Murthy v. Kannada Rakshana Vakeelara, AIR 2007 Kant 174.
[71] Law Commission of India, 2018. Consultation Paper on "SEDITION". https://lawcommissionofindia.nic.in/reports/CP-on-Sedition.pdf.
[72]Id.
[73] Re: Harijai Singh And Anr.; In ... vs Unknown, AIR 1997 SC 73.

Alexander Meiklejohn focussed on "right to hear" while observing that to attain self-governance it is vital that people make well-informed decisions. That is also the sole way when people will pay attention to each voice elevated.[74] In S.P Gupta case[75], the apex court apprehended that according to Article 19(1)(a) of the Constitution, the right to know is included in the right to freedom of speech and expression.

In a democracy free speech is vital. It is the foundation on which democratic society works. The primary indicators of a democracy include a free interchange of ideas, unrestricted distribution of information, spreading of information, publicizing of various perspectives, establishing unique opinions and expressing them.

Indeed, free speech and expression is important in a democracy. Yet no fundamental right is absolute in nature. Article 19(2) lays down various reasonable restrictions on free speech and expression. John Stuart Mill as well, explained the importance of certain restrictions on free speech. In his 'harm principle', he stated that for the freedom of speech to be limited, the restriction imposed has to be reasonable. The harm potentially endangers the society's existence or threatens public order and apparently, leads to disorder in the society.[76] In 1951, Indian constitution was amended for the first time and it inserted the words "public order" and "relations with friendly states," as exceptions also "reasonable" was added before the word "restrictions." The case of S. Rangarajan v. P. Jagjivan Ram[77] observed that to restrict right to free speech and expression there needs to be a threat to the society and public order.

The conflicting question raised before the courts from time to time is, whether, sedition be a justified restriction under article 19(2). In Balwant Singh[78] case, the Court declined to punish two people for screaming catchphrases against the state on a few occasions It was argued that two people shouting a few solitary chants on a few instances, with nothing really more, did not amount a danger to the Indian government as defined by law, nor could it cause enmity or hate among other communities, religious or other groups.

Further, the Delhi High Court in a 2015 judgment held that intention plays a vital importance

[74] Supra note 11, pg 22.
[75] S. P Gupta v. Union of India, (1982) 2 S.C.R. 365.
[76] Supra note 14.
[77] S. Rangarajan v. P. Jagjivan Ram, 1989 SCR (2) 204.
[78] Balwant Singh v. State of Punjab, (1995) 3 SCC 214.

in determining sedition and a holistic approach is required to fully understand such cases. The High Court of Allahabad in Arun Jaitley case[79], observed that a mere criticism of a judgment does not attract the offence of sedition.

It is now widely accepted that words, deeds, or writings are only criminal as sedition under Section 124-A IPC if they encourage violence and disturb law and order. Section 124-A demonstrates that the government can be questioned by any legal methods while the state is powerless to intervene.[80]

POST-INDEPENDENCE AND RECENT DEVELOPMENT IN LAW

The drafters of Indian constitution excluded the word 'sedition' from the constitution and retained it under penal laws post-independence. The first case for validity of s.124A IPC came before the courts in Romesh Thapar[81] case. The Supreme Court observed that any provision restricting free speech and expression cannot be a part of Article 19(2) unless it is a threat to State security. The after effect of the case was that it led to the constitutional amendment. And the terms "public order" and "relations with friendly states" were included as exceptions in the Indian Constitution's First Amendment, and the word "reasonable" was added prior to "restrictions."

Later, section 124A IPC was held unconstitutional in Tara Singh v. The State of Punjab case. Also, In the Ram Nandan's Case, section 124A was challenged and this section pertaining to sedition law was held as unconstitutional.

The landmark judgment on sedition was delivered by apex court in Kedar Nath Das v. State of Bihar[82]. The judgment interpreted the sedition law as it is today. In the instant case, various appeals pending for consideration by the court. Those appeals were combined to determine the constitutionality of sec.124A IPC. Provocation to violence was seen as a major condition for the crime of sedition. Reliance was put upon the Majumdar case.[83]

[79] Arun Jaitley vs State of U.P, 2016 (1) ADJ 76.
[80] Supra note 9.
[81] Romesh Thapar v. State of Madras, 1950 AIR 124.
[82] Kedar Nath Das v. State of Bihar, AIR 1962 SC 955.
[83] Niharendu Dutt Majumdar v. The King, (1942) F.C.R. 38.

Additionally, the court gave due importance to pre-independence history of India and the Constituent Assembly debates which added sedition in the draft of the constitution but apparently, through a unanimous voting in the final constitution they excluded it from a ground to restrict freedom of speech.

The court observed that constitutionality of sedition law can be upheld if it falls under the purview of any of the six reasonable restrictions, as stated under article 19(2).[84] Within the six grounds the court felt the "security of the state" as the most suitable justification to upheld the validity of s.124A IPC. Court cited R.M.D. Chamarbaugwalla case, and upheld the principle that if a law provision can be interpreted in more than one way, it must sustain the constitutional interpretation[85] and rest must be disregarded. As a result, this case overruled the judgment given in Ram Nandan's case and sec.124A was declared to be constitutionally valid, and solely the acts that had the aim to provoke public disorder or were decided to be penalized. After this judgment, the provision of sedition stopped applying to statements that criticise the government policies provided they provoke hate or disorder among society or the general public.[86]

RECENT JUDICIAL TREND

Recently, the law of sedition has received a lot of backdrop. Although the principles given out in Kedarnath are regarded as the substantial criteria for assessing of sedition offenses, there are daily news relating to new cases under Section 124A being slapped on some new "offender".

Binayak Sen v. State of Chhattisgarh[87] is a very infamous case basically, for the wrong precedent set by Chhattisgarh High Court. In instant case, a person was convicted for the offence of sedition for possessing and ordering the dissemination of particular letters containing details regarding police crimes and Naxal literature. The High court ignored the "incitement to violence" principle in this case.

[84] Supra note 28, para 38.
[85] Id, Para 39.
[86] Supra note 9.
[87] Binayak Sen v. State of Chattisgarh, Criminal Appeal No 20 of 2011 & Criminal Appeal No 54 of 2011.

Further, in Kanhaiya Kumar v. State (NCT of Delhi), accused was prosecuted for sedition, and he approached the Delhi High Court to obtain bail.

Later, on appeal, the Supreme Court granted the bail, underlining the crucial nature of preserving free speech and expression simultaneously acknowledging the core idea of "Guilt by Association" in its ruling.

Furthermore, in Common Cause v. Union of India case, it was decided that authorities need to respect the principles laid out in the Kedar Nath case when dealing with offences u/s 124A of the IPC, and that charges for sedition can't be brought simply for criticizing the government.

After analysing these judgments one can come to the conclusion that there must be a threatening security of State or the actions must lead to public disorder to constitute the offence of sedition.

POSITION OF SEDITION LAW IN UK

Sedition as introduced in UK, had a much wider scope as it had in India. Furthermore, punishment for doing the crime was unduly cruel. The punishment prescribed was of life imprisonment or high fine.[88] But with the modernization in England the provisions of sedition were rarely used against people.

According to the England law commission it was decided that a significant number of the detrimental actions that are engaged in sedition will be punished individually under various other statute sections. It is also worth noting that the provision of UK sedition law was also against the international human rights obligations. Hence, in 2009 the law was repealed in UK.

[88] DURGA DAS BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA, [25th ed. New Delhi: Lexis Nexis. (2021)].

CONCLUSION

Singing from the same hymn book is hardly a test of patriotism in a democracy. Rather people should be able to express love for their nation in their own unique way. Some do it by constructive criticism of the government and the loopholes in its policy. A person should not be penalized under the section simply for expressing an opinion that is contrary to the current government's policies. There is almost no distinction between before and after independence of India if the nation is not open to constructive criticism.[89] As component of a vibrant democracy, dissent is a required element for a healthy public discussion on policy matters.

International organizations call for quick removal of sedition law in India but each country has its unique cultures and religious feelings. Here communal riots are always a threat. The State has to act as a watchdog in order to maintain harmony and abolishing sedition law in India would certainly create chaos and make things worse than before. On contrary, the State denies to follow the principle that sedition law seeks to achieve when it uses this law as a mere political tool.

The government and all lower courts need to follow the principles laid down by Kedarnath Case where sedition law was rightfully justified as a reasonable restriction under Art.19(1)(2) as “security of the state”. The words “disaffection” and “disloyalty” shall be interpreted cautiously and solely those acts that have the aim to provoke public disorder should be penalized.

[89] Supra note 11.

SUGGESTIONS

The author after going through various judgments, legal commentaries, law commission reports and understanding India's socio-legal position is of the opinion that the time is not right to repeal sedition as a crime. Yet, we cannot accept it in its current form as well.

Therefore, the author proposes a short-term solution and a long-term solution.

- It is impracticable to repeal sedition law overnight. Hence, seriousness of punishment given to offenders can be relaxed.
- The legal principles laid down by Supreme court in Kedarnath case and Common cause case should be followed by all inferior courts. Also, the parliament needs to amend sec.124-A to make the "dissent" and "disloyalty" against the nation rather than against the government.
- In the past, governments have punished innocent journalists and activists who merely criticized the government. To prevent government from using sedition as political tool a special tribunal shall be constituted which will act as a watchdog.
- The police officer shall be given with power to begin a preliminary enquiry before actually registering the FIR. This will reduce political abuse of the law.
- These solutions can be followed until we can truly repeal sedition law and replacing it by a more efficient law where the offenders no longer will be a victim of dirty politics.

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DIPANWITA ROY V RONOBROTO ROY: A CASE COMMENT

Anushka Sharma

ABSTRACT

The Indian law of evidence is an old compilation of rules related to evidence that dates back to 1872. While the legislation is intact with a variety of aspects that still find relevance notwithstanding the passage of time, the provisions related to the latest technological advancements can hardly be found. The recent judgement of Dipanwita Roy v Ronobroto Roy ascertains the validity of DNA testing through scientific advanced tools and thus remains the focus throughout the paper.

This paper aims to exemplify and illustrate the strategy of using the accuracy of scientific tests to escape the conclusive proof asserting legitimacy u/s 112 of the Evidence Act of 1972. The case comments provide brief comprehension of the facts and ruling laid down in the instant case to encompass a clear understanding indicating the tenor of the case. The author then sets the background and the context of the case by exploring some similar previous judgements relating to DNA testing as a means to establish infidelity. Further, the author provides an analysis of the impact of the application of such tests on the right of privacy and liberty. In the light of science as another discipline, the paper situates the synthesis between law and science. The accuracy of medical tests using methods of scientific advancements and the application of relevant provisions of the law of evidence are studied and analyzed together. The author then finally returns to the instant case providing legal justification and describing various ways in which the judgement of Dipanwita Roy revives the present law of evidence.

Keywords: *Scientific accuracy, privacy, conclusive proof, infidelity, DNA testing.*

INTRODUCTION

Indian Law of Evidence is not simply a body of rules incorporated for ascertaining the validity of claims. It is the law that has witnessed its doctrines and application evolving over time. This ostensibly reflects the change in our understanding of law and society and development in various interconnected disciplines like science, technology, philosophy, theology, politics etc. The law of evidence takes into consideration various kinds of presumptions, namely, may presume, shall presume and conclusive proof.[90] While the birth of a child in a continuing marriage is presented as conclusive proof that the baby born to the woman was fathered by the husband, it can only be rebutted only on the ground of non-access to the spouse.[91]

It was a commonly held principle until Dipanwita Roy v. Ronobroto Roy[92] that the conclusiveness under Section 112 of the Indian Evidence Act cannot be rebutted even by substantiating the claim through the scientifically accurate tests when the couple lived together at the time the child was conceived. Formulated back in 1872, the legislators indeed could not contemplate the inclusion of provisions related to several modern scientific advancements like Ribonucleic Acid (RNA) and Deoxyribonucleic Acid (DNA) tests in the law. Thus, the conflict between conclusive proof under the law of evidence and the accuracy of scientifically advanced techniques remained unresolved. Classic judgements[93] were pouring in relating to the legitimacy of the child where the judges placed heavy reliance on the DNA tests, bidding a go-by to the age-old principle of conclusive proof under the law of evidence. However, simultaneously, a contrary view[94] can be observed under the realm of the Indian judiciary that finds such practice against the right of liberty and privacy of either of the spouse. In the recent judgement by the Supreme Court of India[95], the conflict between the application of rule of law and the accuracy of scientific tests ascertaining the truth was settled. The court in the famous judgment Dipanwita Roy settled that issuance of a direction requiring the parties to undergo DNA testing of the child in an instance of the infidelity of the wife being challenged and for determination of the father of the child is not wrong. Further, the court provided clarity on the

[90] *See*, the Indian Evidence Act 1872, § 4
[91] Indian Evidence Act 1872, § 112.
[92] Dipanwita Roy v. Ronobroto Roy, AIR 2015 SC 418.
[93] Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women and Anr, (2010) 8 SCC 633; Goutam Kundu v. State of West Bengal (1993) 3 SCC 418; Dipanwita Roy v. Ronobroto Roy, AIR 2015 SC 418; Nandlal Wasudeo Badwaik v. Lata Nanlal Badwaik (2014) 2 SCC 576.
[94] Rohit Shekhar vs Narayan Dutt Tiwari & Anr, MANU/DE/2351/2010;
[95] Dipanwita Roy v. Ronobroto Roy, AIR 2015 SC 418.

unsettling aspect related to the right to liberty and privacy by giving discretion to the wife to comply or disregard such an order. However, it is to be noted that the court can draw an adverse presumption against the wife if she declines to undergo such a test.

DIPANWITA ROY V. RONOBROTO ROY: AN OVERVIEW

The instant case has been decided by the Supreme Court bench comprising Justice JS Khehar and AK Agarwal. The case was earlier tried by the family court in 2012, where it denied the request of the respondent-husband for conducting a DNA test. The appeal made in High Court at Calcutta was accepted and the request was granted by the HC. However, through the special leave to appeal, the wife of the plaintiff challenged the judgement before the apex court.

In the instant case, Mrs. Dipanwita Roy was married to one Ronobrota Roy (plaintiff). The plaintiff had reached family court for dissolution of the marriage on the grounds of infidelity. He alleged that the respondent had gone astray and had an extramarital relationship with one Mr. Deven Shah.[96] It was further alleged that the child born was not fathered by the respondent but was born out of the relationship with Deven Shah. However, all these allegations were denied by the wife in her statement.

It is to be noted here that the husband requested the court to direct the DNA testing of the child and himself under Section 13 of the Hindu Marriage Act to prove infidelity of the wife.

The Supreme Court in the appeal not only explained the importance of DNA testing[97], but also was deemed to be the most authentic and scientifically flawless method by which the spouse could verify his claim. Further, striking a balance between the right to liberty and the order of DNA testing, the court provided discretion to the wife to comply with or disregard the order. However, as illustrated in illustration (h) of Section 114 of the Evidence Act, 1872, the refusal of such a performance would offer sufficient reasons for the court to make an adverse inference. Deciding the issue in the present case, Justice Khehar said, "Despite the consequences of a DNA test, it was permissible for a court to allow it, if it was eminently needed, after balancing

[96] *Supra* note 4.

[97] https://www.scconline.com/blog/post/2014/10/17/dna-test-can-be-conducted-to-prove-or-disprove-allegations-of-adultery/

the interests of the parties. The interest of justice is best served by ascertaining the truth, and the court should be furnished with the best available science and may not be left to bank upon presumptions unless science has no answer to the facts in issue."[98]

While upholding the judgment by the Calcutta HC, the opinion of the judges was that without the DNA test, it would be next to impossible for the respondent-husband to prove and validate the statements stated while the pleadings were to be made before the court.

PREVIOUS JUDICIAL PRONOUNCEMENTS

Dating back to the 1980s, the Indian courts had a strict opinion against DNA testing, holding it as an intrusion against the privacy between two individuals married to each other. It is clear from the express language u/s 112 of the evidence law that the legislators intended to maintain the sanctity of marriage. The purpose to import such language was to draw a presumption as to the birth of a child under wedlock and retain its status unless proven contrary. The courts have time and again stressed the need to prevent a child from being bastardised.[99]

It can be initially noted that the Indian Evidence Act, being a pre-independence act, does not expressly provide provisions at par with technological growth and scientific advancements for DNA profiling. Hence, it can be understood that some of the Sections of the Act have become archaic due to advancements like DNA profiling, etc.[100] There have been various arguments put forth in support and against DNA testing stating such a method cannot facilitate an escape from the legitimate presumption drawn under Section 112 of the Act.

The constitutionality and validity of Section 112 were upheld by the bench comprising judges of the apex court in the precedent Gautam Kundu v. State of West Bengal[101]. In this case, the apex court reiterated that courts in India cannot order blood tests as a matter of course, and that such requests for roving inquiries cannot be granted; there must be a strong prima facie case, and the court must carefully examine what the consequences of ordering the blood test would

[98] J Venkatesan, *DNA Test can be Done to Establish Infidelity: SC*, The Hindu (October 22, 2014).
[99] Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women and Anr, (2010) 8 SCC 633.
[100] LAW COMMISSION INDIA, REPORT NO 185 (2014).
[101] Gautam Kundu v. State of West Bengal (1993) 3 SCC 418.

be. Further, on the same premise, the conduct of the test was denied to the parties in this case. In Kamti Devi and Anr. v. Poshi Ram[102], shocking remarks were made by the court relating to the conclusiveness of the presumption and burden of proof. In this instance, the judges concluded that Section 112 of the Evidence Act was created at a period when current scientific developments such as Dioxy Nucleic Acid (DNA) and Ribonucleic Acid (RNA) testing were not even considered by the legislators. A true DNA test is considered to provide scientifically reliable results. However, even if a husband and wife were living together at the time of conception but a DNA test proved that the kid was not born to the husband, the law's conclusiveness would remain unrebuttable.[103]

In a judgement similar to that of Gautam Kundu, Sharda v Dharmpal[104], the court provided that the powers to order a person to undergo a medical test lie only with the matrimonial court. Further, it was held that the courts shall resort to such a recourse only in possession of sufficient information and when the applicant has a strong prima facie case.

Regarding the presumption as to the legitimacy of the child, it was again held in Sham Lal @ Kuldeep v Sanjeev Kumar and Ors[105] that presumption shall be rebuttable only when there is a clear, strong, conclusive and satisfying proof. It was further held that proving the adulterous conduct of the wife which amounts to very strong evidence, would not render the escape of presumption drawn under Section 112.

In Bhabani Prasad Jena, the Supreme Court again emphasised that the courts must be very cautious in the usage of scientific advances and instruments which could result in devastating effects on the child and might bastardise an innocent child even when his mother and her husband cohabitated together. Further, in this case, it was held by the court that resorting to such a method of DNA testing shall not be done in the cases relating to the paternity of the child. The courts under such circumstances have to consider the application of presumptions under Section 112 and shall order such a test only in circumstances where there is no other method to ascertain the truth. Further, referring to the above two judgements, it was reiterated that such an issue related to paternity when arises before a matrimonial court, may demand the

[102] Kamti Devi and Anr. v. Poshi Ram AIR 2001 SC 2226.
[103] *Id*.
[104] *Supra* note 12.
[105] Sham Lal @ Kuldeep v Sanjeev Kumar and Ors (2009) 12 SCC 453.

tests however, a civil court would not have any jurisdiction to pass such an order.

Making a conscious departure from the rules of evidence laid down under various above landmark judgments, the Supreme court in the past decade has demonstrated a positive approach towards embracing scientific advancements and developments in the field of technology. The Supreme Court judges enumerated the correctness of DNA testing in the recent landmark case of Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik and Anr, 2014[106] and held that when there is a possibility of producing evidence contrary to the conclusive proof, the presumption will be rebuttable.

The latest and landmark judgement of Dipanwita Roy settled all the anomalies related to the conclusive proof, presumption, and accuracy of scientific tests as evidence and the paternity of the child. The court held that depending on the favourable facts and circumstances, it would be appropriate to hold a DNA examination for substantiating the allegations made by the plaintiff. The courts concluded that DNA testing is the most authentic and scientifically flawless method for proving the husband's claim of infidelity. This should also be considered as the most legitimate, rightful, and correct methods for the wife to refute the Respondent husband's accusations and prove that she had not been unfaithful, adulterous, or disloyal. If the Appellant-wife is correct, she must be proven.

Thus, the settled position legitimizes the examination through DNA testing and provides it as a valid ground for the dissolution of marriage. As a result, DNA-based proof would be sufficient to overcome a presumption u/s 112 of the Evidence Act.

MEDICAL EXAMINATION AND RIGHT TO PRIVACY

While it has been already seen in the light of various judicial pronouncements, DNA tests may hamper the privacy and liberty of an individual.[107]

[106] Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik and Anr (2014) 2 SCC 576.

[107] Bhabani Prasad Jena v Convenor Secretary, Orissa State Commission for Women and Anr, (2010) 8 SCC 633- the court held that the alternative viewpoint is that the court should exercise caution when using technological developments and techniques that result in a breach of an individual's right to privacy and may not only be adverse to the parties' rights but also have a disastrous effect on the baby.

However, the judges have recognised the need to protect the right to privacy and liberty of an individual in the case of Dipanwita Roy. The judges prominently provided the wife with an option to either undergo the DNA test or deny to comply with such an order. As stated by Justice Khehar in the judgement, this is an ostensible effort made to preserve the right of privacy of the individual to a possible extent. In the opinion of Justice Khehar, if she refuses to obey the High Court's order, the accusation will be decided by the relevant Court, who would draw a presumption of the sort envisioned in Section 114 of the Indian Evidence Act, particularly in terms of example (h).[108]

Further, he concluded that this strategy was chosen to protect individual privacy to the greatest extent feasible, while also advancing the cause of justice. By following the aforesaid path, the problem of infidelity would be resolved on its own, without affecting the presumption established under Section 112 of the Indian Evidence Act.

The latest Supreme Court judgement, Ashok Kumar v Raj Gupta and Ors, 2021[109] has reiterated and stressed the preservation of the right to privacy. The concerned case though was related to a property suit where the plaintiff claiming himself to be a legitimate heir was asked and forced to under a DNA test to prove his relationship. The two-judge bench stated that “Forcing a party undergo DNA to test against will impinge on personal Liberty & Right to Privacy”. Further, the judges stated in the judgement that compelling a person who refuses to take a test would plainly violate their right to privacy and personal liberty as enshrined under the Constitution.

DNA TESTING & ESTABLISHING INFIDELITY: INTERDISCIPLINARY ANALYSIS

This relatively new application of placing reliance on scientific advancements has a great appeal in the interest of justice being served through ascertainment of truth rather than banking upon conclusive presumptions where infidelity is claimed to be a ground for divorce. The conflict between existing rules of laws and the accuracy of scientific advancements as evidence was prominent for a time now. The legal position in the light of Section 112 was strict and

[108] *See*, § 114 as also illustration (h).
[109] Ashok Kumar v Raj Gupta and Ors, LL 2021 SC 525.

clear. The rules of evidence provided prominent conclusive proof regarding the legitimacy of a child minimizing any need arising for DNA tests. The only exception that was provided was non-access to the spouse which if proved would lead to the establishment that the child is not a legitimate one. The cases now and then involved such facts which demanded clarity on the rule that shall be applied. It remained unclear for a time what should actually prevail- the conclusive proof under Section 112 or the scientific evidence of DNA testing contradicting the same.

In the famous judgement of Kamti Devi, the apex court explicitly provided that no doubt the results of a genuine DNA test are accurate but the same is not enough to avoid Section 112 of the Act's conclusiveness; for example, if the couple was living together at the time the child was conceived but DNA test indicated that the it wasn't born to the husband, the law's conclusiveness would remain unrebuttable.[110].

Further, in the case of Gautam Kundu, the blood test in the disguise of DNA was explicitly denied by the court. The judges stated that such a presumption under the law of evidence could only be "displaced by a strong preponderance of evidence"[111]

However, the landmark judgement of Nandlal Wasudeo Badwaik provided the required clarity. In this case, a serological test was undergone and the report was taken into consideration. The judges opinionated that the highest interest of justice is served by discovering the truth, and the court should be provided with the best available science rather than being forced to rely on presumptions until science has no solution to the circumstances at hand. When a dispute arises between a legally required irrefutable proof and a proof based on scientific advances regarded by the global community as right, the latter, in our judgement, must win.

Later, leaning towards subsisting the claim by medical evidence, the superiority of the accuracy of scientific tests was supported in the Dipanwita Roy case. The judges further reiterated that such a shred of evidence is the correct, rightful and most authentic method which can also provide enough grounds to the wife to prove that she was not unfaithful, disloyal or adulterous.

[110] Kamti Devi and Anr. v. Poshi Ram AIR 2001 SC 2226.
[111] Gunjan Gupta, *Conclusive Proof of Legitimacy of Child: Silently Wiping Age-Old Law- Legal Analysis and Justification*, Summer Issue, ILI Law Review (2019).

However, the wife can still deny observing such an order by the court and not undergo a DNA test. It is to be noted that such a departure from observation cannot prevent the court from drawing an adverse inference against the wife as stated under Section 114 of the Indian Evidence Act.

CONCLUSION

Every law reform aimed at the law of evidence has generated a positive effort to overcome the side effects of archaic provisions and recognize new scientific advancements providing accurate results. Acting as a substantial piece of evidence, the reliance placed on DNA testing as a legitimate method to check the accuracy of the claim serves a better purpose than to bank upon plain and hollow conclusive proof. Carving out the principles led down in various judicial pronouncements, the present settled situation seems to be in good taste! As a matter of policy, providing for DNA tests along with protecting the right to privacy and liberty of the individual cannot be overviewed as an exemplary tool to serve justice. In conclusion, the Dipanwita Roy case not only offers us insight into the legitimacy and logical application of DNA testing in cases pertaining to infidelity in divorce cases, but it also provides valid premises to understand the difference between the two classes of cases, i.e., the one related to the legitimacy of child and another involving claim for divorce and dissolution of marriages on the ground of infidelity. The landmark judgement has not failed to leave a trace for upcoming judgements in the same line of causes.

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EFFICACY OF TRIBAL GOVERNANCE: A CRITICAL ANALYSIS OF THE WORKING OF THE GOVERNING BODIES UNDER THE FIFTH AND SIXTH SCHEDULE OF THE INDIAN CONSTITUTION

Ananya Sharma and Jayanti Jaya[112]

ABSTRACT

The indigenous people referred to as 'tribals' have time and again made insurgent movements for the preservation of their identity and culture. The Constitution makers in order to uphold the individuality of these primitive people incorporated the fifth and sixth schedule which would work independently for the tribal population taking into account even their slightest concern. But the most important question which needs to be addressed is whether this tribal governance has been able to ameliorate the state of the tribals or not. This paper thus aims to critically analyze the working patterns of the administrative bodies functioning in the Scheduled Areas. The issue of constant conflict between the State Governments and the Local bodies of governance for power is also well highlighted through this paper. The authors seek to question the degree of autonomy granted to the governing bodies constituted under the fifth and sixth schedule and whether these powers are sufficient to efficiently work towards the welfare of the tribal population. The tribal population inhabiting the mainland and the hilly areas has often been subjected to exploitation by the State and hence it is crucial for them to be

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governed by an independent body which would selflessly help them develop but unfortunately the efficacy of such bodies still remains in question.

Keywords: *Governance, administrative bodies, tribal population, efficiency*

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1. INTRODUCTION

The Central and the State Governments cannot be expected to promptly work at every stratum of a huge country like India with enormous population which is quite diverse and also indulges in following various traditions and cultures. Thus the concept of Decentralized Governance was introduced and conceived in an attempt to promote development at every layer. The Constitution of India considering the tribal rights and problems of people residing in villages areas has laid down provisions for special administrative structures at the grass root level.

The fifth Schedule, Sixth Schedule and 73rd Amendment providing for Panchayati Raj Institutions were incorporated in the Constitution to provide autonomy to these local bodies of governance. In this paper, the authors aim to scrutinize the decentralized system of governance and its efficacy in governing the designated areas.

The tribal population is spread over the entire nation but there are certain areas which are majorly inhabited by the tribal population and thus are categorized under the fifth and the sixth schedules. The fifth Schedule on one hand administers the "partially excluded areas" inhabited by tribals in the mainland whereas the Sixth Schedule governs the "excluded areas" inhabited by tribal in the North Eastern region. The Constitution recognizes separate administrative structures for these areas to compensate them for the historical injustice and exploitation they have faced at the hands of the plains people and colonial rulers.

The tribals have always been kept separate and isolated from the rest of the population giving them a sense of inferiority which has also led them to becoming socially and economically backward. The truth is that the tribals have a unique lifestyle and their extraordinary association with nature in physical as well as spiritual way makes their traditions and customs all the more special. We need to acknowledge the distinct livelihood without isolating them from the society and also help them build themselves up.

The Fifth and Sixth Schedules were incorporated in the Constitution for the preservation of the uniqueness of the indigenous people and at the same time for their upliftment but the sad reality is that the autonomy granted under these provisions remain a dead letter with little implementation on land. The efficacy of the governing bodies under the Fifth Schedule is

marred by the constant interference of the State Government which works more towards the interest of the political parties than the indigenous people. Similarly, the autonomous bodies under the Sixth Schedule face also encounter issues impeding their financial autonomy. In both the provisions, it is evident that the autonomy and powers granted to the governing bodies are at stake and thus it becomes imperative for the Parliament to look into these matters and take actions accordingly.

2. EVOLUTION OF THE TRIBAL GOVERNANCE

What is tribal governance? Is it important? Is tribal governance a reality? Tribal governance is empowering tribes on financial, social and infrastructural front without consuming their inherent character. It is important so that their culture could be preserved from extinction. The paper tries to probe how fifth and sixth schedule have administered the tribal region, the existing lacunae and a comparison between both the schedules. The concepts of schedules in Indian constitution evolved for giving autonomy to tribes which they were devoid of for a long time.

2.1 History of Incorporation of the Fifth Schedule

It can be said that laws for 'Backward Tracts' and 'Partially Excluded Areas' of the colonial era became the origin of fifth schedule. The fifth schedule has been the kennel of two contrasting themes of debates one which advocated the assimilation of tribes in the mainstream and other which supported the policy of isolationism or protection. But in order to strike a balance the Indian policy maker chose the meeting ground and proceeded with the policy of 'controlled integration'. During the making of constitution a committee known as the Advisory Committee on Fundamental Rights and Minorities by the Constituent Assembly, 1947 was formed which carefully analyzed the position of tribes at that time. Albeit all the recommendation of committee was not adhered with, schedule Five and Six were added to the Indian constitution[113]. Schedule Five (Article 244(1)) discerned schedule tribes residing in the schedule area of nine state of Andhra Pradesh, Jharkhand, Chattisgarh, Himachal Pradesh, Madhya Pradesh, Gujarat, Maharashtra, Odisha and Rajasthan. The fifth schedule was designed to function through the president, governor and tribal advisory council. But tribal governance has undergone a sea change through new legislations, amendment and due to the arising problem.

The Indian constitution granted a special place in the form of schedule five and six for the welfare and development of tribes. Schedule five covers tribal areas other than the tribes of north-east India and authorizes Tribal Advisory Council and Governor to make laws or amend for the tribes. Schedule six authorizes the legislature, the judiciary or the

[113] MINISTRY OF TRIBAL AFFAIRS, REPORT OF THE HIGH LEVEL COMMITTEE ON SOCIO-ECONOMIC, HEALTH AND EDUCATIONAL STATUS OF TRIBAL COMMUNITIES OF INDIA (May 2014).

parliament to make laws for the north-east India and is also administered by independent institutions like Autonomous District Council. But it is felt that over the years tribes have not been treated the way our constitution visualized instead on the contrary many acts were implemented ruthlessly in these areas[114] which have a negative impact on tribes. As many state governments while enacting the Panchayati law does not takes into consideration the peculiar need of the scheduled areas. But what about the tribes that exist outside these scheduled areas as there are struggles going on like the *Muthanga Struggle* in Kerala to be included in the scheduled areas. States like West Bengal, Uttar Pradesh, Jammu and Kashmir, Karnataka and Tamil Nadu are also striving hard to get themselves marked as scheduled areas in order to screen their tribes from exploitation and protect their right. The paper in its quest of finding loopholes succinctly analyses the role of governor, Tribal Advisory Council and impact of PESA [The Provision Of The Panchayats (Extension To The Scheduled Areas) Act].

2.2 History of Incorporation of the Sixth Schedule

The idea behind setting up of the Sixth Schedule was to provide an efficient and simple administrative set up to safeguard the customs, identity and ways of lives of the inhabiting primitive people. This Schedule was a tool to provide autonomy and a sense of individuality to the tribes residing on the hilly tracts of the North Eastern States. The term tribe is often replaced with the term 'jana' or 'communities of people'.[115] These people though considered to be backward, follow a primitive way of life which is unique in its way and needs to be protected from getting eroded. Our Constitution recognizes the term 'scheduled tribe'[116] and has also incorporated a list of 'backward tribes'[117] acknowledging their presence and placing them on a special footing.

2.2.1 Brief History of ADCs in North East

The North East during the colonial rule was burning with protests against the

[114]Mukul, *Tribal Areas: Transition to Self-Governance*, 32 ECONOMIC AND POLITICAL WEEKLY,(1997) ,<www.jstor.org/stable/4405361> .

[115]Jagannath Ambagudia, *Scheduled Tribes and the Politics of Inclusion in India*, 5 ASIAN SOCIAL WORK AND POLICY REVIEW 37,(2011).

[116]INDIA CONST. art. 366(25).

[117]INDIA CONST. art. 342.

suppressive rule and demanded for autonomy. The hilly areas of North East were malignantly alienated from the plains so that the Colonial rulers could easily administer and control the tribals. Moreover, the colonial rulers intended to isolate the tribal groups from the "main currents of Indian civilization."[118]

Back in the Government Acts of 1919 and 1935, there were separate provisions for the hills of Assam[119] and prior to that the Scheduled District Act of 1874 as well as the Assam Frontier Tracts Regulation of 1880 were devised to govern the various Districts of Assam. But these governing systems were led by crude feudal lords who became agents of British rulers to "act as liaison between Government and the general public."

The Government of India Act of 1935 became the primary source for drafting the Constitution of India. The Constituent Assembly on the issue of inclusion of the Sixth Schedule in the Constitution, devised an Advisory Committee on the Rights of Citizens, Minorities and Tribal and Excluded Areas which further set up two sub-committees: one led by GN Bordoloi and the other led by AV Thakkar. The Bordoloi sub-committee submitted its report recommending the formation of distinct policies for the people inhabiting tribal areas.[120]

Some members of the Constituent Assembly like Kuladhar Chaliaha disagreed with the idea of treating the aspirations of the indigenous people as a separate issue as this approach would keep the tribals isolated. The other members like Bordoloi, Lakshminarayan Sahu and Nichols Ray on the on the other hand supported the formation of Autonomous District Councils and the incorporation of the Sixth Schedule.

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[118] RK Bhadra, *Administrative Responses to the Identity Problems and Social Tensions of the Tribal Communities in North-East India* ,48 IIPA 390-399, (2002), <https://journals.sagepub.com/doi/pdf/10.1177/0019556120020311> .

[119] Government of India Act 1919, s 52-A.

[120] COMMISSION ON CENTRE-STATE RELATIONS, LOCAL SELF GOVERNMENTS AND DECENTRALIZED GOVERNANCE ,Vol. 4 (March 2010).

The main motive behind a separate form of governance was to preserve the socio-cultural and religious beliefs of the tribal people and also emancipate them from the fear of being exploited by the people of the plains. The Bordoloi sub-committee also recommended certain discretionary powers of the Governor which would work both to preserve the autonomy of the ADCs and also to safeguard the indigenous people from oppression at the hands of the ADCs. Unfortunately, the original intention of the Constitution makers could not sustain for long as the reality is far from the dream which we shall critically analyze in this paper.

3. ADMINSTRATION IN SCHEDULED AREA THROUGH FIFTH SCHEDULE

3.1GOVERNOR'S ROLE:

Fifth schedule assigns the governor with a special role in legislating laws pertinent with the progress of the tribes and blocking the legislation which will hinder their growth or violate their rights. Governor is expected to do independent assessment of administration and implementation of welfare schemes in scheduled areas. And this had to be further presented before the Tribal Advisory Council for recommendations. This report caps the degree of development or exploitation occurring in a tribal region including matters of land alienation and brutality suffered by them.

Governor's role in governing the schedule areas has been criticized because his office seems to protect the interest of state more and that of the tribes less. The gubernatorial office has been awarded a special place in the constitution for van guarding the interest of tribes but instances like Bauxite mining in Andhra Pradesh or in cases like *Nilgiris v Vedentaa , BK Manish v State of Chattisgarh, BhuriNath v state of Jammu and Kashmir, Samatha v State of Andhra Pradesh* have questioned the credibility of governor's office[121].The transformation of governor's office from a constitutional office to a political post has made the governor's report a quantitative analysis and not a qualitative one and therefore impact of insurgency continues to be absent from this report. BR Ambedkar said that the governor may take decisions according to his discretion[122]. But this discretionary power has been blatantly misused which is becoming detrimental to tribes and favorable to Multi-national Corporations.

3.2TRIBAL ADVISORY COUNCIL:

Tribal Advisory Council (herein after TAC) is established under schedule five Para 4(1). Tribal Advisory Council is ought to be an autonomous body which can keep in check the

[121]Sonum Gayatri Malhotra, *Governors' Role and Tribal Areas,* 49 ECONOMIC AND POLITICAL WEEKLY, (2014) ,www.jstor.org/stable/24481146.

[122]Constitutional Amendment Debates of India, Vol. IX, 5th September 1949.

decisions of state and governor. But the role of tribal advisory council has been reduced to an advisory body whose advises are not even bounding, it can recommend only when asked for and cannot intervene in any decision. During the constitutional assembly debates its role was seen not only limited to the welfare and development of tribes but was extended to the administration of the scheduled areas. Fifth schedule has enfeebled the TAC's by making its position subordinate to governor which in itself is not an empowered post. Tribal advisory council has become a state run institution as three fourth member are the member of legislative ,rest are appointed by the state with chief minister as its chairperson. In this way the independence of this council is compromised. The other problem associated with TAC is that they do not hold regular meeting and the resolution which are passed are not followed[123]. Then what role does TAC actually play? Has it become a redundant institution?

3.3BHURIA COMMITTEE:

The need and condition of tribes differ from each other and also from the plainsman therefore the governance should be moulded to suit their necessities. Bhuria Commission was constituted before the enactment of (The Provision of the Panchayats (Extension to the Scheduled Areas) Act), 1996. Its suggestion were pivotal in shaping the legislation and in bringing to surface the many issues of tribes.Tribes should be governed in such a manner which helps them to progress on the all the three fronts i.e. social (through education), economical (through jobs) and infrastructural (through good road and transportation). Financial provisions should be made by states considering the geographical uniqueness, development, state services and population of tribes.

The fragile local government did not contribute much as they lacked autonomy and awareness as the Panchayats in tribal regions were inadequately informed. The panchayats were unable to secure tribal land (as with the increase in population the patch of land per tribal individual has drastically decreased), in restoring the land of tribes, and providing them with documentation of lands. Bhuria commission recommended that Gram Sabha should have control over land acquisition, use of natural resources, protecting cultural identity and anything which will affect the future of tribes. And this led to the enactment

[123]*The Tribes Advisory Councils: Time to be replaced by the Autonomous District Councils* (2012 Asia Tribal Nrtwork).

of PESA. PESA gave autonomy to Gram Sabhas and several other power like restoration of land under section 4 (m) (3) of the act.

3.4PESA (THE PROVISION OF THE PANCHAYATS (EXTENSION TO THE SCHEDULED AREAS) ACT):

It was in the year 1996 that schedule nine or Panchayati Raj institution was extended to schedule areas. According to Article 243 of Indian Constitution general provision could not be implemented in area covered under schedule five and six of the constitution. PESA as an act which extended the institution of Panchayats to scheduled areas for giving them the power of self-government by empowering the local institution and to uproot the problem of lack of implementation of provision of fifth schedule, misuse of the principle of eminent domain, land alienation and for protection of customary rights. The Provision of The Panchayats (Extension To The Scheduled Areas) Act, 1996 was a revolutionary step towards the governance of tribes through Gram Sabhas. It bolstered Gram Sabhas to a great extent. This amendment was brought in to give more rights in the hands of tribals so that they can have more say in the management of natural resources, governance and in other words giving them more autonomy. It has benefitted both the minority as well as the majority tribes by reserving half the seats to tribes in the elected local government PESA has been no doubt been a radical legislation as it helped in democratic decentralization and in alleviation of poverty.

3.5GRAM SABHA:

Gram Sabha was empowered through PESA to revive the institutions of self- governance and establish it as a guardian for the tribes. Gram Sabha were targeted in this act as local bodies lost their independence due to red-tapism and corruption in bureaucracy. The Gram Sabha was legally and operationally empowered to conduct social audit of Tribal Development programmes to ensure transparency, accountability and people's participation. Gram Sabha was given the power even to reverse state's decision and authenticate them[124]. Some of the important provisions of PESA were that every village shall have Gram Sabha and they will be accountable for the following:

[124] THIRD REPORT OF THE STANDING COMMITTEE, INTER-SECTORAL ISSUES RELATING TO TRIBAL DEVELOPMENT ON STANDARDS OF ADMINISTRATION AND GOVERNANCE IN THE SCHEDULED AREAS, 2009.

The gram Sabha will approve all the economic and social projects and will also find out the beneficiaries. The Gram Sabha has to be consulted for acquisition of land in scheduled areas or for exploitation of minor minerals[125].

In matters regarding land the views of Panchayats cannot be simply brushed aside otherwise the action of state government will be considered invalid. Consultation has to be prior and informed when talked about land acquisition[126].As land is not only an economic resource for tribes but is a communitarian symbol for them.

Given the importance of PESA every state should make immediate legislation as only sixteen percent of the districts out of the total number of districts in the scheduled areas of nine states[127] have enacted them. The report of Mungekar Commission recommended that dissonance between Gram Sabha and PESA should be rectified by adopting significant provisions of PESA through laws passed by Governor's notification, bestowing ownership of minor forest products to tribals, issuing guidelines for specifying role, responsibilities and functions of Gram Sabha to honor their competence.The tussle between the state and the central government should be solved because even though Gram Sabha is given power but states like Maharashtra have initiated Village Forest Rules[128] which is different from this act. There should be uniformity in adopting PESA as erroneous deviation can ruin the fundamental unit of governance i.e. village. Therefore definition of village is important given under section 4 (l) of PESA. But PESA gives only right of recommendation to Gram Sabha. And eventually Panchayats become an extension of state and does not act as an independent institution. The state has empowered the tribal community on one hand through PESA and when they protest through Gram Sabhas in places like Surja Gardh where they are protesting against mining their voice is gagged by another state machiniery i.e. the police

[125] The Provisions Of The Panchayats (EXTENSION TO THE SCHEDULED AREAS) ACT 1996, s 4(e)

[126]Anupam Chakravartty, *Rights overruled:States are making their own rules to reclaim the authority over forests from tribes, derailing community forest rights* ,Down The Earth (30 May 2016),https://www.downtoearth.org.in/news/forest-management/rights-overruled-53977.

[127]NayakaraVeeresha, *Governance Of The Fifth Schedule Areas: Role of Governor* ,INDIAN JOURNAL OF PUBLIC ADMINISTRATION, (2017) , <https://journals.sagepub.com/doi/pdf/10.1177/0019556117720614?casa_token=srnxror-2zcAAAAA:W5obBNSP1TD9X0wwqzg7SV6TcHWUoSeBYfXQnfkpHzFa3uSxnTAJF9oVVtM_1lSknMCjRNQcIw> .

[128]Pawan Dahat, *Villagers protest mining in Gadchiroli*, THE HINDU , Jan. 26, 2017 ,https://www.thehindu.com/news/national/other-states/Villagers-protest-mining-in-Gadchiroli/article17094501.ece.

and are termed as naxalites or insurgents. Now here we have shown the administrative apparatus existing before and after PESA.

BEFORE PESA:

President

⇩

Governor

⇩

Tribal Advisory Council

AFTER PESA:

Ministry of Tribal Affairs 1999 (a link between president and governor which will keep the political interface at bay).

⇩

State Tribal Ministries (Formative as well as Normative Role)

⇩

Governor (one who reviews the annual report presented by the state).

⇩

Tribal Advisory Council

⇩

National Commission for Scheduled Tribes (2003)

⇩

Gram Sabhas.

The paper here has tried to show the trajectory of administration which existed before PESA and how after PESA the administrative check post have increased. The new development has definitely led to some positive changes in the domain of tribal governance but there are umpteen number of problems which remains unaddressed. The reason for continued exploitation of tribes is the delayed advent of administration for resolving the issues of tribes which is proved by the aforementioned trajectory check of governance. We see that ministry of tribal affairs or commission of scheduled tribes is formed almost after four decades after independence but the problems of tribes is age old as their exploitation can be traced back to landlords then to British rule and now continues to democratic India.

The extension of Panchayati raj to tribal areas has given them opportunity for self-governance. It will help to integrate the marginalized section of the society[129].Governance means different things to different people and is defined differently by different institutions. The race to establish ones ethnic identity and hegemony has increased the conflicts in places like Assam which is a multi-ethnic state consisting of tribes such as Kukis, Nagas and Meitei. It has been seen that the excluded and the partially excluded group were not given the autonomy to rule them. The parameters relying on which the government decides whether autonomy should be given to a particular tribe or not is still not transparent.

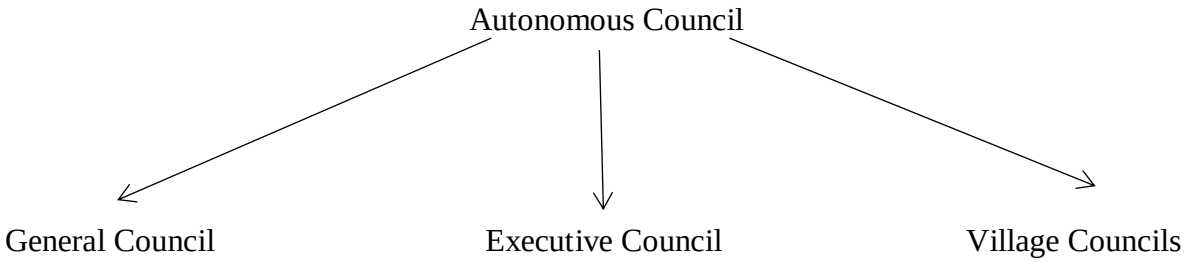
Need of resources and metals such as Aluminum, Bauxite or any other mineral by multinational companies is pressuring the government to mine in tribal areas. Araku region of Andhra Pradesh is an speaking example of it. When mining was initiated in the ecologically fragile area such as the one happening in Araku[130] it not only infringes the land rights of tribes but also make their way of earning livelihood difficult, by polluting the environment and resources by radioactive waste of mining. Politicians have used their popularity to build a consensus. This leads us to a series of question like *Has land distribution among tribes actually happened? If land is not redistributed among tribals then how can they claim right over it?* They are pertinent but are not answered in this paper as they are beyond the scope of this paper. The

[129]Sekholal Kom, *Identity And Governance : Demand For Sixth Schedule in Manipur* ,71 THE INDIAN JOURNAL OF POLITICAL SCIENCE , (2010) ,https://www.jstor.org/stable/42748389 .
[130] N Purendra Prasad, Vamsi Vakulabharanam, K Laxminarayana and Sudheer Kilaru, *Tragedy of the Commons Revisited (II): Mining in Tribal Habitats of Araku Valley,* 47 ECONOMIC AND POLITICAL WEEKLY, (2012) ,https://www.jstor.org/stable/41720260 .

constitutional framework has fallen short in coping up with tribes which borne the problems of Naxalism and Maoism.

4. STRUCTURE OF THE AUTONOMOUS DISTRICT COUNCILS

The Autonomous District Councils are composed of a General Council, an Executive Council and Village Councils which are vested with legislative, executive as well as judiciary powers.



The General Council remains in function for a period of 5 years and is endowed with Executive powers in certain subjects. The Executive Council on the other hand is responsible for executing all the functions of the General Council which is composed of Executive Councilors elected by the General Council and is headed by a Chief Executive Councilor. Lastly, the Village Councils constitute the lowest form of governance which comprises of 10 members directly elected by the people working within the Autonomous Council.

5. ADMINISTRATION OF THE NORTH-EAST AS PER THE SIXTH SCHEDULE

The North Eastern part of India has been the home to a variety of ethnic groups and from the era of the British colonial rule, the tribes residing in the North Eastern areas were subject to isolationist policies devised by the British Government. These areas of hilly tribal tracts were labeled as "wholly excluded areas" which in today's time is governed by the sixth schedule of the Indian Constitution. This schedule[131] was incorporated in the constitution with three major purposes:

a. For the maintenance of the distinct identities of the tribal people;
b. For the prevention of social as well as economic exploitation; and
c. For the development of the tribal people through their indigenous ways.[132]

The North Eastern region is not only governed by the sixth schedule but also other constitutional provisions like the Article 371 and various other statutes like the Manipur (Hills Area) District Council Act. The administrative structure of the North-East can be briefly explained through the following table:

STATE	ADMINISTRATIVE STRUCTURE
ASSAM	Sixth Schedule, Article 371-B, Primary Governance Through Three Autonomous Councils- Dima Hasao District Autonomous Council (Dhdac), Karbi Anglong Autonomous Council (Kaac) And Bodoland Territorial Council (Btc).
MANIPUR	Article 371-C Of Constitution, Manipur Hill Village Authority Act As Well As Manipur Hill Areas District Council.
MIZORAM	Governed By Sixth Schedule And Article 371-G Through Three Autonomous District Councils- Chakma Autonomous District Council (Cadc), Mara Autonomous District Council (Madc) And Lai Autonomous District Council (Ladc).
MEGHALAYA	Sixth Schedule Through Three Autonomous District Councils- Khasi Hills Autonomous District Council (Khadc), Garo Hills

[131] INDIA CONST. sch 6.
[132] L.S. GASSAH, THE AUTONOMOUS DISTRICT COUNCIL (New Delhi: Omson Publications 1997).

	Autonomous District Council (Ghadc) And Jaintia Hills Autonomous District Council (Jhadc).
TRIPURA	Sixth Schedule And One Autonomous District Council- Tripura Tribal Areas Autonomous District Council (Ttaadc)
NAGALAND	Governed By Article 371 A And Article 371 Aa Of The Indian Constitution, Institution Of Village Councils In Major Villages And No Autonomous Councils.
ARUNACHAL PRADESH	Governed By Article 371 H Through Panchayati Raj Institutions, No Autonomous Councils

The institutions of governance in such Scheduled Areas are not restricted to these Constitutional provisions and Autonomous Councils but there are other institutions like Syiems among Khasi, Nokma among the Garos, Pachong for the Kukis of Manipur and many more.[133]

5.1FUNCTIONS AND POWERS OF THE AUTONOMOUS DISTRICT COUNCILS

The Sixth Schedule was devised for the administration of the tribal areas of North Eastern states with the assistance of Autonomous District Councils by vesting them with legislative, executive as well as judiciary powers. This form of decentralization was adopted to promote development in various sectors like health, infrastructure and education[134]. It is thus imperative to analyze the impact of decentralization on the factor of development in such isolated areas and also whether the inclusion of the Sixth Schedule has been successful in providing autonomy to the local institutions of self-governance in these areas. The Sixth Schedule facilitates administration in the designated areas through Autonomous District Councils (ADC) in Autonomous Districts as well as Regional Councils in autonomous regions.[135] The ADCs can be said to possess legislative powers over the following matters:

- For the allotment and distribution of land excluding the reserved forests to the people

[133]C.R. Bijoy and Tiplut Nongbri, *Country Technical Note on Indigenous Peoples*, REPUBLIC OF INDIA IFAD,(2013).

[134]PRANAB BARDHAN&DILIP MOOKHERJEE, DECENTRALIZATION AND LOCAL GOVERNANCE IN DEVELOPING COUNTRIES: A COMPARATIVE PERSPECTIVE (MA: MIT Press 2006).

[135] INDIA CONST. art. 244(2) &.275.

for their livelihood through agriculture and also for the promotion of the interests of the residing people;

- For the use of canal water in irrigation and agriculture;
- For the setting up of town or village committees;
- For health and sanitation related issues;
- For the inheritance of property; and
- For various other social customs

The powers of the ADCs are not restricted to the above points but they are also responsible for the promotion of primary education and construction of roadways as well as waterways to facilitate trading by the non-tribal people residing in such areas. There is an exception to the first point regarding the allotment and distribution of land to the natives which is that the land should not have been mandatorily reserved for public purpose.

The Constitution and Central Government tries to paint a flowery picture of the administration in such tribal areas by conveniently obscuring the flaws in the devolution of powers. There are numerous restrictions imposed on the powers bestowed on such governing bodies though the list seems a lot. The autonomy furnished to these local bodies do not seem sufficient to preserve the traditions, cultures and customs of the indigenous people taking into consideration the immense interference on the part of the Central and State Government.

5.2IMPACT OF GOVERNOR'S DISCRETION OVER TRIBAL AUTONOMY

The Governor purports to be a bridge between the State Government and the ADCs but this may seem a little paradoxical considering the fact that the Governor is an agent of the Centre but is also endowed with the responsibility of bolstering the pillars of tribal autonomy.[136] It is quite evident that the Governor has a say in almost every aspect of the administration of ADCs as was also pointed out by Justice Hidayatullah in a 1966 case[137].

[136]J.K Patnaik, *Autonomous District Councils and Governor's Role in the Northeast India,* IJP, (2017) ,https://journals.sagepub.com/doi/pdf/10.1177/0019556117720594.

[137]Edwingson Bareh v State of Assam, (1966) 2 SCR 770(India).

The Governor is the head of the district till the constitution of ADCs and is responsible for the institution of regional or district councils till the ADCs become functional.[138] The Governor is also entitled to make the first constitution of these local governing bodies.[139] Furthermore, the Governor is authorized to nullify or suspend any act of the District or the Regional Council if it appear to affect the security of the nation or is against public order[140] and can also exercise his discretion to enforce or not to enforce a certain law passed by the State Legislature in these autonomous areas as no Act of the Parliament or State Legislature can automatically apply to such areas. An important question which needs to be addressed is whether the Governor is able to exercise his discretion in these areas or not.

There have been amendments time and again pertaining to the discretionary powers of the Governor but this has led to the erosion of the original intention which to provide autonomy to the tribal people inhabiting in the hilly tracts of North East. A clause[141] was inserted in the Sixth schedule which listed a number of functions on which the Governor may exercise his discretion and also seek the advice of Council of Ministers on these matters[142]. Though the said clause makes it optional for the Governor to implement the advice of the Council, it is a well-known fact that he usually acts on the advice of the Council which in turn defeats the whole purpose of vesting the Governor with discretionary power and also impedes the autonomy of the ADCs. The Schedule in some fields of conflicts lays down that the decision of the Governor shall be deemed to be final and shall prevail over the decision of the District Council.

It is therefore imperative that the Governor takes the decision taking into account the interests of the tribal people and for the preservation of their culture. For instance, in a matter if a dispute arises with regards to the share of royalties, the matter is referred to the Governor and his decision shall be deemed to be final.[143] The bills which the ADCs intend to implement are also to be assented by the Governor. It is conspicuous that the actions of

[138]INDIA CONST. sch 6, para 19.
[139]INDIA CONST. para 2(6).
[140]INDIA CONST. sch 6, para 15(1).
[141]INDIA CONST. sch 6, para 20BB.
[142]INDIA CONST, *amended by* The Constitution (Sixty first Amendment) Act, 1988.
[143]INDIA CONST, sch 6, para 9(2).

the ADCs have to be approved by the Governor and the Governor despite the provisions of his discretionary powers acts on the advice of the Council of Ministers. We can thus infer that that the legislative power of the ADCs is drastically weakened due to lack of independence of the Governor. The purpose of appointing the Governor as the head of these autonomous areas is absolutely defeated due to the constant interference of the State Government.

Another important power vested with the District Councils and the Village Courts is administration of justice where the District Councils act as the appeal court but here too the power and autonomy seems ambiguous as the Governor has the authority to direct the High Court of the respective states to perform the same functions.[144]

As we have already discussed that the ADCs have broad administrative powers like establishing and managing "primary schools, dispensaries, markets, ferries, fisheries, roads and many more" but all these functions have to be approved by the Governor which acts as a check on the powers of the ADCs and hampers their autonomy.[145] In most of the cases, the decision of the Governor is the decision of the State Government which defeats the original intention of the Constitution makers to make the Governor the head in these tribal areas. The Constitution makers aimed at facilitating autonomy in the areas under the Sixth Schedule through the Governor but the current situation speaks volume to the contrary.

5.3IS THE DEVOLUTION OF POWERS IN THE AREAS UNDER SIXTH SCHEDULE SUCCESSFUL

The Constitution lays down various provisions to provide autonomy to the local governing bodies but there are noticeable discrepancies between the formal rules and the actual implementation of the same. The ADCs though vested with the power to draw up budgets for development of the areas, they are enormously dependent on the State Government for their approval and granting of funds. If we take the example of Leh Council, in 1997-98, the Council requested for a grant of 36 crores but was provided only 27 crores with a later

[144] David Stuligross, *Autonomous Councils in Northeast India: Theory and Practice*, ALTERNATIVES: GLOBAL, LOCAL, POLITICAL 497- 525,(1999)
[145] Vijay Hansaria, *B.LHansaria's Sixth Schedule to the Constitution*, 2 JILI 391, (2011).

addition of another 5 crores which was still insufficient for the year.[146] It would not be wrong to say that there is no significant shift from the paradigm of centralized structures as there is sheer dominance of State Government which even has the power to amend or reject the Council's programmes. Furthermore, the legislation passed by the State Government shall prevail over the legislation passed by the Council if they pertain to the same subject.[147] The various ADCs appointed in the States of North East face different problems. For instance, in 1987, the Autonomous State Demand Committee (ASDC) expressed its resentment that the Karbi Anglong District Council "was made and unmade four times within a span of three years at the whims and fancies of the State Government."[148] It is thus imperative to critically analyze the working of the ADCs or other local institutions governing the areas under the Sixth Schedule and it would be more effective if the working of ADCs in each of the areas is analyzed.

[146]Martijn van Beek., *Hill Councils, Development, and Democracy: Assumptions and Experiences from Ladakh* ,(1999) ALTERNATIVES: GLOBAL, LOCAL, POLITICAL 444.
[147]INDIA CONST, sch 6, para 12(A).
[148] Bethany Lacina, *The Problem of Political Stability in Northeast India: Local Ethnicity Autocracy and the Rule of Law* ,49 ASIAN SURVEY 998,(2009).

5.3.1 LADAKH REGION

The Ladakh region is governed by two district Councils, Leh Council and Kargil Council functioning in their respective districts. The first issue faced by the Councils in the Ladakh region is that the State Government causes unnecessary delay in the release of funds due to which all the activities of the Council come to standstill. Another issue within the Council is that the members are representatives of various political parties and thus the manifesto of the Council is shaped considering the National and State political interests.[149] It is thus important that the composition of the Council is done taking into consideration people with neutral political perspectives who would primarily work for the tribals. But this has not been the case as despite continuous attempts to ensure representation by only locals, the Ladakh Council has seen domination of elite groups whose decisions have often elicited outrage from the local people.[150]

5.3.2 ASSAM

The various districts of the State of Assam is governed by a number of ADCs which have been instituted not only as per the Schedule 6 of the Constitution but also other statutory provisions. The State Government has been playing the blame game with the ADCs accusing them of embezzlement of Government funds. The Deputy Chief Executive Member of the Bodoland Territorial Council (BTC) in 2015 expressed his frustration regarding the delay in granting of funds by the State Government and said "every year the Assam Government releases funds at the end of the financial year which makes it impossible for the Council to utilize the money on time."[151] The Deputy Chairman further added that the first installment of the funds is released during September while the second installment is released in January or February leaving little or no time for the implementation of the schemes. The Council head further complained that their discretion over spending the funds was also taken away as the State Government made an amendment and specified areas where money was to be spent.

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[149]Martijn van Beek, *Beyond Identity Fetishism: "Communal Conflict" in Ladakh and the Limits of Autonomy* , CULTURAL ANTHROPOLOGY 545,(1999).

[150]Martin Van Beek. *Hill Councils, Development, and Democracy: Assumptions and Experiences from Ladakh*,, ALTERNATIVES: GLOBAL, LOCAL, POLITICAL 449, (1999).

[151]'*Functioning of Autonomous Councils in Sixth Schedule Areas of North Eastern State*s, **Natural Resource Hub, ActionAid India, 2016**.

The efficacy of the The Dimsa Hasao District Autonomous Council (DHDAC) is hollowed by the increasing instances of corruption and misappropriation of funds. [152] Furthermore, another issue faced by the people inhabiting the Dimaraji is that the members representing them in the Council hardly interacted with the locals and therefore could not work for the interests of the people.

5.3.3 MEGHALAYA AND MIZORAM

The issues with the ADCs working in these two States are similar to most of the issues which have already been discussed like the shortage of funds and delay in release of funds but certain specific issues need to be addressed too.

In Mizoram, the constituted ADCs cover only 15% of the State's population due to which the State Government is ignorant towards these Councils. Moreover, there are constant frictions between various tribal communities due to lackadaisical governance.[153]

In Meghalaya, the ADCs have been deprived of their power through the constant interference of the State Government. This is quite evident from the regulation from forests which is one of the major areas entrusted to the ADCs as all the forest-related activities are carried out as per the directions and policies approved by Forest

Department thus superseding the powers of the ADCs.[154] Furthermore, a number of executive as well as judicial functions of the Councils are taken over by the District Magistrate and Deputy Commissioner.[155]

[152]Triveni Goswami, *Autonomous District Council a tool for diversity management: A boon or bane?* **Institute of Social Change and Development** (2006).
[153]Subir Bhaumik and Jayanta Bhattacharya, *Autonomy in the Northeast: The Hills of Tripura and Mizoram* in, THE POLITICS OF AUTONOMY: INDIAN EXPERIENCES (New Delhi: Sage Publications 2005 Ranabir Samaddar (ed.)).
[154] Robert Tuolar, *Autonomous District Councils and Tribal Development in North East India: A Crtical Analysis* 7(2) IJOART, (2013).
[155] *supra* note 1.

5.3.4 TRIPURA

Tripura is governed by the Tripura Tribal Areas Autonomous District Council (TTAADC). The Expert Committee on Decentralized Planning in the Sixth Schedule observed that the division of TTAADC into the specified zones overlapped with the blocks, tehsils and the Block Advisory Committees (BACs) which led to a tug of war for power between the State Government and the Council because the BACs on one hand were headed by MLAs whereas the advisory committees in the zones and sub-zones were led by members of the TTAADC. This also led to clarity in the roles of the governing bodies and intervened with the autonomy exercised by the Council.[156]

6. HAS GOVERNANCE REACHED THEM?

Governance should result in something. The major fault of our governance has been that since independence tribes have seen governance only in the form of police or brutal repression. The creak in governance has now widened to a gulf in the governance as big companies are claiming their illegal right on the lands of tribes.

The biggest problem in our constitutional mechanism is that it eventually makes the state powerful and clamps down on independence of institution like tribal advisory council. Democracy is all about decentralization of power and not about centralization of power. The flaw in the problem arises when Gram Sabha is weakened by Tribal Advisory Council which is further weakened by Governor as it controls the decision taken by TAC, Governor itself is a weak institution as it is controlled by the state. It was difficult for tribes to participate in democracy due to lack of awareness but even when they follow this route then their voice remains unheard. Therefore tribes have to take to street when operation like is Green Hunt is carried on.

[156] GadadharaMohapatra, *Decentralized Governance and Tribal Development in Scheduled Areas of North East India: A Case Study of the Tripura Tribal Areas Autonomous District Council* ,63 (3) IIPA 475-494, (2017).

6.1 COMMON LACUNAS IN THE GOVERNANCE AS PER SIXTH SCHEDULE WHICH NEED ATTENTION

There are some major lacunas pertaining to the constitution of the ADCs which impede their efficacy and hence require immediate attention.

The most important and common issue the ADCs face is with regards do their autonomy as they are not furnished with enough powers to cover the entire gamut of issues pertaining to the preservation of tribal identities and development of the inhabitants. Furthermore, the Governor is vested with a lot of powers to decide which laws legislated by the State Legislature shall apply to the Autonomous Districts. The Governor's assent is also mandatory for the implementation of the laws legislated by the ADCs. Such overriding powers of the Governors affect the autonomy of the ADCs.

The second important issue lowering the efficacy of ADCs is that no mandatory time limit has been provided for the reconstitution of the ADCs after dissolution due to which election remains postponed for an indefinite period. Furthermore, the election for ADCs is conducted by a separate Autonomous Agency which is not very active and hence an improvement in this field is highly required.

The third issue deals with the lack of representation of minorities (Women and small tribal groups) in the Council. Most of the ADCs working in the North East do not have any provision regarding reservation of seats for women in the Council. Though the 73rd Amendment provides for one-third reservation policy, the Sixth Schedule remains silent on this issue. It is disturbing to notice the absence of women from such governing bodies. The Bodoland Territorial Council as well as the Autonomous District Councils of Mizoram are the only ones with provisions of reservation for women, though the proportion is very low.[157]

Similarly, there is lack of representation of the small tribal groups in the Council and their voice remains suppressed. These small groups despite being indigenous to the region remain neglected and unheard. In order to ensure more vibrant functioning of the ADCs, it is important to incorporate women and members of small tribal groups in the ADCs.

[157] *supra* note 1.

The final and major issue faced by ADCs is with regards to financial autonomy. It has been previously discussed at various instances that the State Governments do not initiate the flow of the funds allotted to the ADCs on time and the funds released are usually meager and much lesser than the grants allocated. In order to ensure the execution of the schemes legislated by the ADCs, it is imperative to furnish them with the requisite funds but that is far from reality.

7. COMPARITIVE ANALYSIS OF THE FIFTH SCHEDULE, SIXTH SCHEDULE AND THE 73RD AMENDMENT:

The paper has discussed both the schedules extensively along with the problem persisting in both the schedules. We find that both the schedules confront problems of corruption and red-tapism. On comparing the provisions of the fifth and sixth schedule, it is evident that the sixth schedule has been conferred with much greater autonomy. The Tribal Advisory Councils along with the Governor on the other hand has failed miserably in performing its constitutional functions. It won't be wrong to say that the protective mechanisms for the tribals devised in the fifth schedule have failed to meet its stated goals. Attributing to these reason the Bastar District of Chattisgarh is demanding to be included in the sixth schedule and removed from the fifth one[158].

An important lacuna in both the fifth and sixth schedule is that they remain silent on the issue of reservation of women. This provision for reservation of women was introduced in the 73rd Amendment of the Constitution and should be incorporated the two schedules too for better representation.

This comparison shows that the less is the state intervention more is the autonomy and development. Both the schedules can function properly only when there is an exchange of administrative learning from both sides.

[158]SomyaGaytriMalhotra, *Right Place Wrong Arrangemet*, THE HINDU, June 18, 2013 ,https://www.thehindu.com/opinion/op-ed/right-place-wrong-arrangement/article4823988.ece.

8. RECOMMENDATIONS

The problem of alienation has been inherent in the Indian society and they have somehow penetrated in the administration as well. And this is the reason that problems like tribes continue to confront problem such as land alienation. Scheduled tribes Bill, 2005 which was passed to distribute the forest land among i.e. 2.5 Hectares among each nuclear family. This act endeavored to fill the lacunae created by previous legislation by giving them natural resources. Forest communities such as tribes and villagers can create a system of checks and balances for schemes of forest department and vice versa the forest department can keep in check the conditions of forest by the tribes who depend on it for subsistence but due to hunger and poverty often collide with poachers. The issue of rights over forest product could be resolved by Lease forestry. Lease Forestry is a good experiment for conserving the forest as well as the community which depends on it which is successfully practiced in Nepal. Tribes should be given rights as well as responsibilities for protecting forest where they can conflate their traditional knowledge with the practical knowledge of the experts and forest department[159]. And these laws should be the prerogative of Governor and assisted by tribal advisory council which can assist in assessing the ground reality. Governor should be allowed to work independently. In case of abuse of discretionary power the judiciary should keep a check.

Tribal Advisory Council should have more say in the decision making process. It should be given similar power to District Council and Register Council. The recommendation of the council should be bounding.

Law should come out of its doctrinal hood to know the realties and protect them from increasing corporate globalization. Problems like naxalism cannot be elimated by law which is made without knowing the ground reality and is used only for crushing them or detaining them.

Governance is created to cure the social evils and strive towards positive development but due to malfunctioning of the government tribes took weapon and became naxalites. The problem of tribes is more of a sociological issue and then a political and further an economic issue. And all this attributes to the poor implementation of the few schemes made for tribes.

Though the Sixth Schedule provides for considerable autonomy and independence to the

[159] S Upadhyay , *Scheduled Areas Need a Fresh Legal Perspective*, ECONOMIC AND POLITICAL WEEKLY, (2010), www.jstor.org/stable/25742172.

governing bodies, there are certain impediments in this Schedule as well and thus need to be looked into. We thus propose certain recommendations for the Sixth Schedule which can make administration more efficient:

The State Government is often seen giving a cold shoulder towards the financial needs of the ADCs and delays the release of such funds too. Hence, it is required that the Autonomous Councils are brought within the ambit of the State Finance Commission so that the financial grant is not left to the discretion of the State Governments. Furthermore, the financial needs of the ADCs must be reviewed on a regular basis.

Currently there is no provision limiting the period within which the ADCs must be constituted. Thus, a time period like 6 months must be laid down for the reconstitution of the ADCs from the date of dissolution. Moreover, the election must be conducted by the State Election Commission instead of Autonomous agencies.

There must be a provision for reservation of minorities like women and small tribal groups in the ADCs so that they can be well represented and their problems are highlighted.

The State must formally recognize these local political institutions which function at the village and district levels.

8.1 125TH AMENDMENT BILL

In 2019, the Parliament in an attempt to ameliorate the current state of governance as per the Sixth Schedule came up with the 125th Amendment Bill[160]. This Bill tries to cover most of the grey areas and also incorporates most of the recommendations we have proposed but the issue once again remains with respect to its implementation. The Bill was introduced in the Rajya Sabha on 6th February 2019 after which it was referred to the Standing Committee on 18th February 2019 and report on the same was received on 5th March 2020. The Bill may prove to be an effective piece of legislation but it remains hanging to become an Act. We cannot assure when this bill will become an Act and even if it does whether it will be well implemented on the land or not.

[160]The Constitution (One Hundred and Twenty-Fifth Amendment) Bill, 2019.

9. CONCLUSION:

Tribes whose custom, culture and lifestyle differ from us today are one of the oldest communities in the world. Tribes initially were not an isolated community but due to system of alienation they were gradually pushed to the fringes of jungle. Keeping the prevailing conditions in mind, the doyens of constitution added schedule five and six to the Indian Constitution. The two schedules are called as 'constitution within constitution' as they were incorporated to safeguard the rights of tribes. Over the years we have seen that the constitutional framework under the schedules has failed to function as was originally envisaged. And this is due to the interventionist approach of the state towards governance. This centralized the axis of power by debilitating the autonomous agencies such as the tribal advisory council. The centralization of power ignored the ground and led to problems like insurgency. Insurgency is a problem borne out of land alienation which is primarily caused due to lack of governance. In order to deal with the issue of autonomy the reformative phase started in tribal governance which led to enactment such as PESA (The Provision of The Panchayats (Extension to the Scheduled Areas) Act) and many other legislations. The reports of commission which gave grass root realities, their recommendation should be instilled in the policies. The Indian democracy is entering that era where laws should not be politically driven but instead need driven which addresses the problems of tribes. There is an immediate need of amendments in functioning of governor. The democratic set up comprising of elections, policies have not been the culture of tribes but it has been after a lot of effort that they have started raising their voices through Panchayats and now it is the government's duty to listen to them. Tribes might constitute a small percentage of our population but their contribution in preserving forest, rivers and other natural resources has been more than the rest of the population. Hence tribal identity should be preserved by governance.

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IS JUSTICE DELAYED, JUSTICE DENIED? ANALYSING THE CONSTITUTIONALITY AND RIGHT TO A SPEEDY TRIAL

Hemant Bohra

ABSTRACT

India, a country with many ideologies, religions, dialects, castes, and terrain, represents unity and integrity. The right to a speedy trial and other rights based on the "Justice Delayed, Justice Denied" principle are aimed to speed up the judicial system since it is unjust for the victim to have to suffer harm with little possibility of redress. Both legal professionals and the public have been aware for some years that court delays are growing more regular. As a result, the court system faces a considerable duty in ensuring that justice is delivered by providing the necessary competent legal instruments. In this context, the purpose of this article is to represent the legality of reservation and to critically assess whether the existing laws are competent enough to satisfy the current requirement. Following the famous quote, "Justice delayed is justice denied," the following article critically examines India's problem with providing Right to Speedy Justice, how it affects the lives of the accused, India's steps to address the issue, including various legal provisions, and whether these steps have been strictly implemented.

INTRODUCTION

Human rights are necessary for human life. Living in a civilized society based on well-developed laws and a good system makes it all the more important to ensure that every person lives a reasonably decent life, and one such critical component to ensuring this is the widely recognized human RIGHT TO A SPEEDY TRIAL. It is a notion dealing with the expeditious resolution of cases to improve the efficiency and trustworthiness of the judicature. The primary purpose of this right is to ensure that justice prevails in society.

The right to a Speedy trial was addressed in the 'Magna Carta', a foundational text of English Law, for the first time. Although the Indian Constitution was first reticent to openly acknowledge and give this privilege, the judicial interpretation of several constitutional articles has changed significantly since then. The fast trial became a fundamental right because of the literal reading of Article 21 of Constitution of India.[161] It was widely held that the fast trials is the only way to ensure that there is no miscarriage of justice and that a fair and just decision has been pronounced.

SITUATION IN INDIA

All non-convicted offenders who are now undergoing or will shortly begin the trial process are referred to as "undertrial." It's worth noting that undertrial detainees account for about 70% of India's entire jailed population.[162] In Babu Singh v. State of Uttar Pradesh[163], Justice Krishna Iyer ruled on a bail plea that, “Even in serious situations, our judicial system suffers from slow motion syndrome, which is fatal to a fair trial, regardless of the final judgment. Because the community cares about the criminal being treated with dignity and eventually punished within a fair time frame, and the innocent being spared from the disproportionate anguish of criminal processes, speedy justice is a component of social justice.” The basic purpose of any state's judicial system is to guarantee that justice is served and that victims are compensated. The institution of an independent judiciary, the provision of fundamental rights, and the guiding

[161] The Constitution of India 1950, s 21.
[162] Jayanth K. Krishnan and C. Raj Kumar, Delay in Process, Denial of Justice: The Jurisprudence and Empirics of Speedy Trials in Comparative Perspective.
[163] *Babu Singh v. State of UP* [1978] AIR 527.

principles of government policy are all examples of the Indian constitution's vision and devotion to the people. However, given the current position that India is in, the court system and all of its administrators have been viewed as ineffective, even after all conceivable measures have been taken, due to the glacially delayed adjudication of issues. For a country that aims to be a leading democratic power in the new millennium, this starts to shake things up a little, and it creates a reasonable doubt in the mind, making it seem impossible to achieve this goal when the right to fast trials for accused and an prominent justice system in general—all the pillars of democracy—remain so unrealized in everyday practice. Various committees and Law Commission papers have also highlighted the deplorable state of things in which the Indian judiciary is delaying the resolution of cases. The right to a fast trial is a right that applies to all phases of the criminal justice system, including investigation, inquiry, trial, appeal, revision, and retry.

THE EMERGENCE OF RIGHT TO SPEEDY TRIAL IN INDIA

The right to a quick trial was not specifically stated when the Indian constitution was written. Even yet, the Indian Supreme Court explored the issue of incarcerating undertrial criminals for long periods of time as early as 1952, although in an unexpected fashion. Even while the Court set a bar for prosecutors to meet to explain their decision to keep undertrial convicts in custody for lengthier periods, it wasn't enough. The Courts did not appear to place much emphasis on the time spent by the undertrial detainees.

In 1979, *Hussainara Khatoon v. Home Ministry*[164] brought about a major change to this. This case established a defendant's fundamental right to a speedy trial under Article 21 of the Indian Constitution for the first time. Because of the delays in the legal system and the deplorable circumstances in various jails, Justice Bhagwati ordered a major overhaul of how the state should handle the prison population. The Court ordered that more people have access to bail, that living standards be improved, and that substantive due process of law be explicitly recognised as a fundamental part of the right under Article 21 of the Indian Constitution.

[164] *Hussainara Khatoon v. Home Ministry* [1979] 3 SCR 169.

ARTICLE 21 OF THE INDIAN CONSTITUTION

This right is enshrined in the constitution's articles 14, 19(1) (a), and 21, as well as the CPC. The government has a fundamental obligation to create and implement processes that enable swift trials. The Supreme Court is a stately institution that must protect citizens' fundamental rights.

PURPOSE OF CRIMINAL JUSTICE

The major goal of quick trials is to protect the innocent from being wrongfully convicted. Due to the large number of cases waiting in the court, proceedings are frequently mishandled, causing plaintiffs mental and financial hardship. It was also pointed out in the case that holding an acquitted person in custody for longer than the authorized period would be a violation of his Article 21 rights.

The accused has the right to request bail if the trial is delayed unnecessarily. Sections 482 and 483 of the Code of Criminal Procedure (CrPC) clearly state that every reasonable effort must be made to resolve a matter within six months and that no adjournments shall be allowed unless the situations are beyond the power of the judiciary.[165] The judiciary is responsible for keeping tabs on under-trial detainees and bringing them to trial. The deprivation of a person's liberty should not be based on overcrowding in the courts or financial constraints. The efficiency and capacity of a judicial system are determined by the time it takes for a court to resolve a case. A well-functioning judicial system will promptly resolve a matter, and while this is not simple, it is vital to accomplish proper social justice.

EFFECTS OF THE DELAY IN JUSTICE

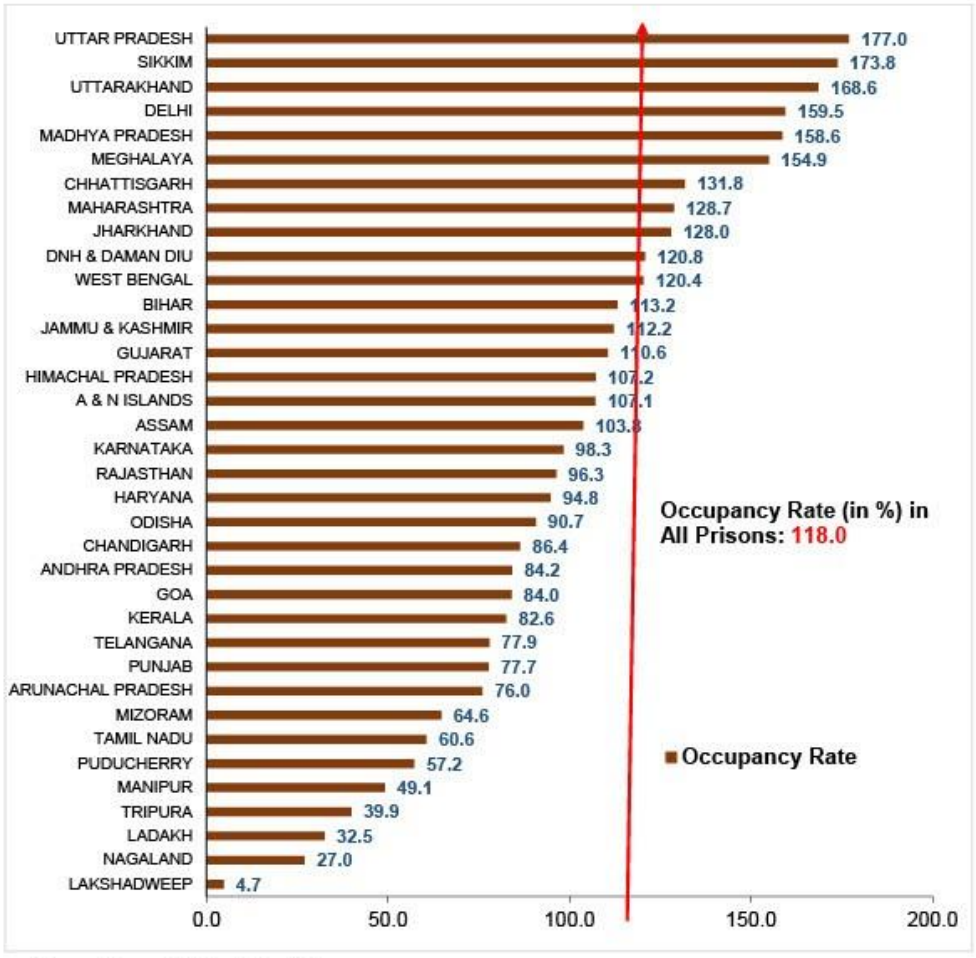
It's vital to remember that stories of inmates slaving away behind cells for years, if not decades, waiting for their day in court are not unusual. It's no surprise, that many of our Indian jails are 100 percent to 200 percent over-capacity in which Uttar Pradesh has the highest occupancy

[165] The Code of Criminal Procedure 1973, s 428 & 483.

rate of 177.0 followed by Sikkim (173.8), Uttarakhand (168.6), New Delhi (159.5), and so on collaborating the total occupancy rate of Indian Prisons more than 100 % with extremely unsanitary and intolerable circumstances, with many of the weaker inmates fearing real physical injury according to Prison Statistics Report 2020[166]. Thousands upon thousands of accused have languished in prisons for far longer than a proper sentence would have provided. Having a chance at justice is like shooting in the dark to these folks.

In Dr. Rajesh Talwar and Another v Central Bureau of Investigation, 2013, In this case, the accused's daughter was discovered dead in her bedroom in May 2008. The parents of Aarushi were convicted and sentenced to life in jail in 2015 by a lower court based on circumstantial evidence, but the Allahabad High Court exonerated them in 2017 after 9 years. The CBI filed an appeal in the High Court after missing the deadline for filing the appeal. The Talwars have been served with notice but justice has not been delivered so far.

[166] Prison Statistics India 2020, National Crime Records Bureau, Government of India, available at https://ncrb.gov.in/sites/default/files/psi_table_and_chapter_report/Chapter-1-2020.pdf



- As per data provided by States/UTs.

Prisons Occupancy Rate in States/UTs as on 31st December, 2020

The released prisoners are still seen as criminals by society, which tries to isolate them since people don't like to consider the final sentence for someone who has spent half of his life in prison. Their family members' lives have become a living misery. Unnecessary delay not only hinders the accused's ability to defend himself but also depletes the resources of the appellant/prosecutor. They spend the majority of their resources pursuing a legal struggle that, even if they win in the end, deprives them of everything they own.

THE REASON BEHIND DELAY IN JUSTICE

Because most under-trials are poor, the amount of time they spend in jail is decided by their capacity, or lack thereof, to pay the bail or hire a good lawyer, not by the crime they are accused of committing. According to statistics on Indian jails, 68 percent of persons incarcerated in India have never been convicted of a crime by a court.[167] Many of them will have to wait years for their cases to be heard by the trial court.

As a result, many languish in prison for years, hoping for the day when their voices will be heard by a court, only to learn that it may be years before that happens. For example, as of November 14, 2019, 18,46,741 criminal cases were outstanding in India's lower courts for more than ten years, as well as 2,45,657 criminal cases pending in India's high courts for more than ten years.[168] It's worth debating whether these people are being detained in prison because they're guilty or because they can't pay bail and the courts don't have the time to try them.

However, there are some major reasons for the delay:

1. The first and most severe concern is the length of time it takes to resolve cases. The cases take years to resolve because they have been outstanding for so long, even though they should only take a few months.
2. Judge-to-population ratio — The number of judges available is today rather restricted, given the country's population and the amount of cases outstanding.
3. The lower court's infrastructure is woefully inadequate. The Supreme Court and the High Court have great facilities, while the other courts are in a different condition. It takes longer to resolve a case since the courts lack convenient premises and physical facilities. A decent library, acceptable furnishings, competent personnel, and adequate space are essential requirements for qualitative justice, all of which are absent in inferior courts.
4. Because of the autonomy of the legal executive, a few adjudicators accept they are not responsible to anybody, which can prompt appointed authorities looking for solace, obliviousness, and different variables that influence cases to be deferred.

[167] Mukesh Rawat, Poor, young and illiterate: Why most Indian prisoners fight long lonely battles for justice, India Today, available at https://www.indiatoday.in/india/story/pakistan-terror-outfits-drop-weapons-via-drones-to-supply-in-kashmir-1723346-2020-09-19.
[168] *Id.*

5. Adjournment provision: The adjournment granted by the court on unjustified reasons is the primary cause of the cases' delays.
6. Court vacation: Furnishing courts with an excursion break has the potentially negative result of further postponing procedures, especially in a nation like India where there are countless forthcoming cases. There is no such provision in most countries, such as the United States and France.
7. It was noticed that the Bhopal gas leak tragedy brought about the passing of around 15000 people. Individuals have still endured altogether in a long time since the event, and no activity has been done against the episode's fundamental casualty. One of the latest instances of the Delay is the Babri Masjid case. Gopal Singh Visharad filed the first of the five title claims in the Ayodhya issue sixty years ago, demanding permission to perform Pooja at the disputed site. The verdict will be delivered on 24th September 2010 by a Division Bench of three Allahabad High Court judges.

INDIA'S APPROACH TO SOLVING THE ISSUE

A. Constitutional approach

Every individual has a fundamental right to receive prompt justice, as provided by the Indian Constitution. The Directive Principles of State Policy enshrined in Articles 38(1), 39, and 39-A of the Indian Constitution make this a constitutional requirement. Our Constitution's Preamble states that the state must offer social, economic, and political fairness to all of its citizens. It was in L. Babu Ram v. Raghunathji Maharaj,[169] where the Supreme Court held that 'social justice' includes 'legal justice', thus, effectively meaning that our justice system must be able to provide cheap, expeditious, and efficient justice to all the sections of people irrespective of their social, economic, or financial resources. It is under Article 39(A) that the provision of free legal aid is mandated.[170] It is from the consolidated perusing of Articles 14, 19, and 21 of the Constitution of India that the right to expedient equity impliedly starts.

[169] *L. Babu Ram v. Raghunathji Maharaj* [1976] AIR SC 1734.
[170] The Constitution of India 1950, s 39(A).

B. Examination of Witnesses and Speedy Trial

The highly slow examination of witnesses during the trial of cases is another factor for the delays in criminal proceedings. The examination of witnesses must be maintained without interruption until all of the witnesses present have been interviewed, according to Section 309 of the CrPC. This is because the entire architecture of a criminal castle is based on the questioning of witnesses, which is a necessary since the accused cannot be judged guilty without proof.

C. Plea bargaining and pendency of cases:

Plea negotiation is important in ensuring that cases are resolved quickly. The prosecution and the accused agreed on a mutually beneficial resolution, which is subsequently approved by the court. In exchange for a reduced term than what would have been given if the allegations had been prosecuted differently, the offender generally admits to a lesser offence, or simply to one or a few of the accusations, or several accusations.

D. Legal Mechanism Identified For the Enforcement of the Right:

The CrPC has several sections that provide for the expeditious disposition of matters and the prompt administration of justice. According to Section 167 of the CrPC, all investigations must be completed within a certain time frame, failing which the accused will be granted bail.[171] Further, it was The Criminal Procedure (Amendment) Act, 2005,[172] that introduced Section 436A,[173] which specified that convicts held before preliminary might be held for something like portion of the most extreme season of detainment expressed for the supposed offense committed under that regulation, with the exception of offenses for which capital punishment is one of the possible punishments. As a result, the right to prompt justice can be maintained by using these clauses. The seven-judge constitutional panel has resolved the majority of the concerns raised by the application of the idea of rapid justice in Abdul Rehman Antulay[174], concluding that setting an outer time limit for the end of proceedings is not advisable.

[171] The Code of Criminal Procedure 1973, s 167.
[172] The Criminal Procedure (Amendment) Act 2005.
[173] The Code of Criminal Procedure 1973, s 436(A).
[174] *Abdul Rehman Antulay & Ors vs R.S. Nayak & Anr* [1992] AIR 1701.

EFFORTS

It is past time to assess the problem of the case pending and take appropriate actions to address it. The sensitivity of the legislature to providing effective justice is primarily expressed in two statutes.

(1) Arbitration and conciliation act, 1996

(2)) Civil procedure code

Assuming the court accepts that specific parts of a potential settlement are OK to the gatherings, the court might characterize the cut-off points for a potential settlement and allude the make a difference to discretion, placation, intercession, or legal settlement. Online ADR (Alternative Dispute Resolution) is getting some forward movement nowadays, but there is an absence of IT mindfulness among the general individuals, as well as a requirement for lawful and ADR aptitude, innovative issues, legitimate sacredness of cycles, industry support, etc. The government's policies, on the other hand, have severe problems. One of them, in my opinion, is the lack of a proper definition of what constitutes a lengthy period of time. The court has taken the approach of looking at each case separately and weighing all relevant factors. The Indian Supreme Court (SC) has moved toward authorizing article 14 (3) of the International Covenant on Civil and Political Rights, which specifies that criminal cases should be attempted immediately. Everyone has the right to a fast trial, according to Article 16 of the principles of equity in the administration of justice. SC held in Raghubir Singh v. State of Bihar[175] that Article 21 stipulates that a timely trial is one of the aspects of the fundamental right to life and liberty. In section 260 of the CrPC, the notion of a summary trial is introduced, whereby the court must dispose of the matter summarily if certain requirements are met.

WHAT HAS BEEN DONE? RECOMMENDATIONS AND REFORM INITIATIVES

Various solutions have been made thus far to alleviate the problem of the criminal trial backlog. The Indian Jails Committee of 1919–1920 conducted the first comprehensive assessment of jail issues. This report, which focused on under-trials, in particular, encouraged the Crown to first separate them from those who had already been convicted and then provide them with

[175] *Raghubir Singh v. State of Bihar*, AIR 149, 1986 SCR (3) 802

dates for preliminary hearings and timely justice. In 1979, a four-member governmental law panel was established (78th Law Commission Report)[176] also laid down several recommendations regarding the "congestion of undertrial prisoners in jails." The Mulla Committee, an administration charged board, then, at that point, devoted a whole part of their three-year investigation of Indian correctional facilities to the subject of "undertrials and other un-indicted detainees" in 1983. Besides, the Indian National Human Rights Commission, an administration made organization that endeavors to guarantee that all prisoners in care are dealt with empathetically and as per the law, has gone to different lengths to advance the circumstance of undertrials.

The following are some of the findings that have been common to all these aforesaid Government papers:

1. The number of judges should be increased to alleviate backlogs and reduce court overcrowding.
2. Technological and infrastructural changes are required for more efficient judicial processes, as well as urging police personnel to speed up investigation processes so that cases can be resolved quickly while also ensuring that evidence is not overlooked.
3. When the former presiding judge is moved to a different court in the middle of a case, cases are transferred from one judge to another more swiftly.
4. Reducing the number of unwarranted adjournments granted to the government by the courts.
5. Increasing the number of offenders eligible for bail for less serious crimes; and
6. Separation of pre-trial detainees from those who have already been found guilty.

Despite all of these good legal judgments, the question remains: Have these decisions resulted in tangible results?

Notwithstanding being more than once supported throughout the long term, some of these recommendations have neglected to convert into genuine strategy changes, featuring an absence of political will as well as an absence of assets to execute the essential changes, as well as the way that no uniform implementation of those couple of drives has been arranged. The Indian legal profession is well aware of these issues.

[176] Law Commission, *Congestion of Under-Trial prisoners in India* (Law Com No 78, 1979).

Even though India just celebrated its 73rd Independence Day, most of the country's industries are still plagued by corruption, which plays a major part in case delays. Even though India's judicial system is self-contained, cases might take years to resolve. Fast Track Courts, which were made with the sole target of settling cases as fast as could really be expected, have moreover neglected to accomplish their main goal. The Indian legal system does not provide enough rehabilitation programs for acquitted criminals who have been held in prison for far longer than the legal maximum.

SUGGESTIONS

Although circumstances have changed, little has changed in the predicament of undertrials in Indian prisons, which has only gotten worse as their numbers have grown. In 1978, undertrials made up 54 percent of detainees in jails; by 2017, that number had risen to 68 percent. Surprisingly, the majority of these undertrials' socioeconomic circumstances have remained unchanged over the years: they are young, illiterate, and destitute. As a result of most of them being poor, the length of time they spend in jail is dictated less by the seriousness of the crime they are accused of committing and more by their inability to afford bail and/or excellent lawyers. Presently, since they are devastated and uneducated, just a little level of them will understand and know about their basic privileges to a brief preliminary and independence from inconsistent detainment. The outcome is that a large portion of these individuals, significantly youthful, mope in correctional facilities for a really long time with next to zero possibility at equity. This perpetuating lethal situation was also reflected in the reports of the National Crime Records Bureau (NCRB)[177], showing that by the end of 2017, more than 3.08 lakh undertrial prisoners were admitted in the Indian jails, which is much higher than the number of convicts in India.[178]

The court system has been significantly dragging, even after multiple favorable cases and attempts to impart the right to a timely trial, and the situation does not appear to be improving

[177] National Crime Records Bureau
https://ncrb.gov.in/
[178] Mukesh Rawat, Poor, young and illiterate: Why most Indian prisoners fight long lonely battles for justice, India Today, available at
https://www.indiatoday.in/india/story/pakistan-terror-outfits-drop-weapons-via-drones-to-supply-in-kashmir-1723346-2020-09-19.

anytime soon. Thus, these arrangements, which incorporate a more prominent utilization of innovation to assist with speeding up the procedures for these undertrial detainees, as well as the reception of court versatility, where judges can visit the prisons holding these undertrials to finish the pre-preliminary prerequisites, can come to work ponders in these shocking conditions. Second, if meaningful progress is to be made, a more systematic approach to recognizing and fighting the various forms of corruption that plague our legal system must be established and implemented. Lastly, a major cultural and attitudinal transformation is required on the part of the society instead of their views with regards to these incarcerated individuals because it was in *Thana Singh v Central Bureau of Narcotics*,[179] that the Supreme Court had itself observed, "for the prisoner, imprisonment as an undertrial is as dishonourable as imprisonment for being a convict because the damning finger and opprobrious eyes of society draw no difference between the two".

OTHER SUGGESTIONS

The following suggestions may be made to ensure that justice is served promptly:

1. Since the ongoing examination office, the police, is one of the reasons for the law enforcement framework's disappointment, the circumstance might be adjusted in the event that the examination is taken care of by a legitimate master with skill.

2. A period limit should be laid out at each degree of criminal procedures, including examination, request, preliminary, allure, correction, and survey, with the goal that the state hardware might be considered responsible for delays at any phase of the lawbreaker case's goal.

3. Arrangements for witness wellbeing, sufficient friendliness toward witnesses, and repayment of uses paid by them for visiting court to give declaration ought to be consolidated in the CrPC for fast case attitude.

4. Plea bargaining is undeniably a technique for speeding up the legal system and minimizing case pending times. It can be efficiently implemented with certain revisions to the current requirements set out in Chapter XXI-A of the CrPC. These are:

a) An obligatory clause must be included requiring the Presiding Officer to tell the accused of the plea negotiating procedure before the trial begins.
b) Lawyers must also explain the plea bargaining process to their clients and, if required,

[179] *Thana Singh v Central Bureau of Narcotics* [2013] 2 SCC 603.

file an affidavit with the appropriate court.

c) Legal mindfulness exercises will draw in Probation Officers, Welfare Officers, and Jail Superintendents, as well as authorities from the Legal Services Authority.

5. The sort of offenses that will be dealt with by unique courts, as well as the cycle for choosing which offenses will be arraigned by extraordinary courts, should be unequivocally expressed in the actual Act. The Government's optional powers to allude criminal procedures have been told by the Supreme Court of India.

CONCLUSION

According to the principle of "justice delayed is justice denied," if a legal remedy is available for a person that has been damaged but will not be supplied within a reasonable period, it's the equivalent of having no legal recourse at all. Because it is inequitable for a party, whether victim or accused, to suffer injury with little possibility of resolution, this concept supports the right to a quick trial, as well as other related rights aimed at speeding the judicial process. In such cases, the law frequently serves as a "transmitter of injustice," rendering the wounded party a powerless victim of the "callousness of the legal and judicial system."

It is critical, however, to finish with these important questions: "Can these undertrial detainees ever be compensated for the terrible difficulties they have endured?" "How will they be compensated for the substantial amount of time and mental clarity they have lost?" "Will society ever be ready to embrace these undertrial offenders, even if they are exonerated, after such a lengthy period in prison?" concludes the author. Many problems and moral dilemmas remain unresolved.

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MATERNITY BENEFIT AS A FACET OF RIGHTS IN LABOUR WORKFORCE: IS IT A DISGUISE OF THEORETICAL ASPECT?

Ishita Yadav

Sonakshi Agarwal

ABSTRACT

The issue of gender equality and women empowerment has once again surfaced as an indispensable question that continues to divide civil society in the form of women's rights in the workplace. From time immemorial, this issue has been floating in almost every legal system around the world. Women in the labor workforce require protection in intricate situations like pregnancy so that they are not harassed in the name of employment. Thus, Maternity protection is recognized as an essential pre-requisite for women's rights and gender equality among the employees at work. In India, the underlying objective for the introduction of the maternity benefits program was to give full honor to the divine act of birth with utmost care and dignity by regulating the employment of women in various ways. Various Amendments can be seen in the light of varied issues faced by the women including postpartum depression. This research paper is an endeavor to study the question of law regarding the concept of maternity benefits schemes prevailing in India by giving an overview of the existing legislation. An analogy has been drawn by comparing the maternal health conditions in India and the United States of America. Moreover, the paramount questions that the papers pursue to answer is, "Whether the Code on Social Security, 2020 address the concerns of the women about the maternity benefits in reality or is just a plain disguise of theoretical aspect shattering before the complexities of the reality of the society?" and "Is United States of America an actual benchmark of comparison or just a glorified and patronized state in the global domain?". The authors have critically analyzed the prevailing policies and have also put forth some

recommendations based on the analysis.

Keywords- *Maternity Benefit, Women Empowerment, Labor Workplace, India, USA.*

INTRODUCTION

"Maternity is divine"

India is a society which is predominantly a society based on the norms of patriarchy: a society ruled by an ideology of female subordination (the Confucian Three Bonds of Obedience-to father when young, to a husband when married, and to son when old-are the same and as abiding as the tenets of Manu,' the ancient codifier of Hindu social laws); a society that is accordingly composed mainly of cells of patrilineal-patrilocal families, with the economic controls (of land, -capital, and the labor processes of women and children) firmly in male hands. Thus, employment is critical for poverty reduction and for enhancing women's status. However, it is potentially empowering only if it provides the women an opportunity to improve their well-being and enhance their capabilities.

On the other hand, in case it is driven by distress and is low-paying, then it would only lead to an increase in a woman's drudgery. To safeguard the interests and rights of the women workforce, the Indian constitution guarantees a right to quality under Article 14 which precludes women from discrimination. Article 39 directs the government to take active measures and direct its policy towards securing that the citizens, men, and women equally, have the right to an adequate means to livelihood,[180] that there is equal pay for equal work for both men and women,[181] that the health and strength of workers, men, and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.[182]-Article 42 calls on the State to make provisions for securing justice and humane conditions of work and for maternity relief. The court reiterated in a number of judgements[183] that Article 42 of the Indian Constitution shall be kept in consonance while reading and deciding cases on The Maternity Benefit Act. Two countries stand out in maternal health issues while looking at the global level. India ranks second in the number of maternal deaths among developing countries in the world with 45,000

[180] INDIA CONST. art.39 (a).

[181] INDIA CONST. art 39(d).

[182] INDIA CONST. art. 39(e).

[183] *Shah v. Presiding Officer, Labour Court, Coimbatore and others,* (1977) 4 SCC 384; ANURADHA ARYA V. PRINCIPAL GOVT GIRLS SENIOR SCHOOL (2013), gangama v. the secretary 2020.

deaths in 2015. On the other hand, looking at developed countries, the United States is the only developed country with an increase in MMR from 7.2 in 1987 to 17.3 in 2013 a decade ago.[184] In this context, this journal seeks to establish a political discussion on reproductive health in India and the United States offers interesting differences in reproductive health status and reproductive health policy frameworks. Despite differences in reproductive health status and different policy approaches, there is a great need for policymakers to prioritize reproductive health, maternal mortality, and reproductive disease in both countries. The document first explains the health model of the female workforce and the concept of reproductive health.

Then, the state of reproductive health and reproductive health policies in India and the United States is reviewed. The next section provides a comparative perspective on reproductive health care between the two countries, focusing on similarities and differences between reproductive health and policy. This is followed by a brief background on the concept of maternal benefit in India. The Maternity Benefit Act, 1961, The Maternity Benefit (Amendment) Act, 2017, and Maternal Benefits under The Social Security Code, 2020 are discussed in detail. The last sections include the critical analysis of the Social Security Code, 2020, and the paper is concluded with some recommendations as suggested by the authors.

MATERNAL HEALTH POLICIES AND MATERNAL HEALTH IN INDIA AND THE US: HISTORY AND BACKGROUND

By the term maternal health, it is meant the health of women during pregnancy, the period of childbirth, and the postpartum period.[185] Maternal Mortality Ratio (hereinafter referred to as MMR) is the number of women who die from pregnancy-related issues or within 42 days of pregnancy termination per 100,000 live births.[186] Maternal mortality is considered to be the extreme consequence of childbirth and almost 800 women die due to different pregnancy-

[184] Pregnancy Mortality Surveillance System, Center for Disease Control and Prevention (Dec. 20, 2021, 9:29 PM), https://www.cdc.gov/reproductivehealth/maternalinfandhealth/pmss.html.

[185] World Bank (2017a), Health expenditure per capita (current US$) (Dec. 7, 2021, 11:00 AM), http://data.worldbank.org/indicator/SH.XPD.PCAP.

[186] World Health Organization (2016, November), Maternal Mortality Fact Sheet, (Dec. 10, 2021, 01:10 PM), http://www.who.int/mediacentre/factsheets/fs348/en.

related issues every day in 2015, with 99% in developing countries.[187]

The MMR declined from 556 per 100,000 live births in 1990 in India to 174 per 100,000 in 2015.[188]-On the other hand, the MMR in the U.S. has virtually stagnated from 12 per 100,000 live births in 1990 to about 14 per 100,000 in 2015.[189] By all these data, it can be concluded that economic growth and development are insufficient in it for decreasing MMR, with other underlying reasons influencing maternal health.

MATERNAL HEALTH POLICIES IN INDIA

The highest number of maternal deaths in the world are unfortunately recorded in India and Nigeria. Although MMR for India was decreased in 2015, then also it varies from state to state. For example, it ranges from 81 per 100,000 in Kerala to 390 in Assam and even higher in rural areas.[190]-Currently, India practices a mixed health care system that is dominated by private healthcare providers. It has been seen that nearly 72% of Indian households are opting for private outpatient care despite free public healthcare.[191]

When the private healthcare system is compared to that of public health care infrastructure, it can be seen that the latter suffers from acute shortages in human resources, financial support, as well as infrastructure which leads to low-quality public healthcare. Less than 5% of the annual gross domestic product is spent on health expenditure in India.[192]-Approximately, only

[187] L Alkema, D Chou, *et. al*, Global, regional, and national levels and trends in maternal mortality between 1990 and 2015, with scenario-based projections to 2030: a systematic analysis by the UN Maternal Mortality Estimation Inter-Agency Group, 462–474 (2016).

[188] World Bank (2015a), *Maternal Mortality Ratio India*, (Dec. 16, 2021, 02:45 PM), http://data.worldbank.org/indicator/SH.STA.MMRT?end=2015&locations=IN&start=1990&view=chart.

[189] World Bank (2015b), *Maternal Mortality Ratio United States of America*, (Dec. 25, 2021, 03:56 PM), http://data.worldbank.org/indicator/SH.STA.MMRT?end=2015&locations=US&name_desc=false&start=1990 &view=chart World Bank.

[190] Census, *House listing, and Housing Census Data Highlights*, India: Government of India, (Jan. 01, 2022, 04:34 PM), http://censusindia.gov.in/2011census/hlo/hlo_highlightshtml.

[191] A Krishna, *Escaping poverty and becoming poor: who gains, who loses, and why?* World Development, 32(1), 121–136 (2004).

[192] P Berman, *India's health: more practical solutions needed*, The Lancet (Jan. 05, 2022, 06:22 PM) https://pubmed.ncbi.nlm.nih.gov/26700534/.

7 physicians and 17 nurses and midwives are available per 10,000 population in India.[193] On the other hand, in the labor workforce, the women do not have resources for consulting private outpatient care, they are limited to the health care facilities which the employer provides.

Infant mortality is closely related to reproductive education and participation in the women's workforce, but a separate analysis showed that women's workforce participation has no effect on infant mortality among women under seven years of education. The relative impact of maternal education on infant mortality is three times greater than that of women's participation in the workforce. The high mortality rate of girls in some parts of India is also closely linked to the length of maternal education and participation in the women's workforce. Participation in a women's workforce has a greater impact on infant mortality than infant mortality altogether.

Factors affecting healthcare utilization include the maternal age, education of women and society, social and economic status, cultural factors.[194] Health experts recommend allocating more resources to improve the public health system and the overall health system towards an integrated national health system built around a strong public basic health care system with a clearly defined role of support for the private and traditional sectors.[195]Reproductive health policies in India rely on public health care providers to provide medical care for reproductive health in rural areas. In the early 1950s, with a health imbalance in maternal mortality, the government relied on traditional birth attendants, many of whom were elderly women from the community who experienced an assisted delivery.

Along with the initiative made by the UN in the 1980s on safe motherhood, India also initiated the Reproductive and Child Health Policy in 1997, which was followed by the initiation of the National Population Policy in the year 2000, then the National Health Policy in the year 2002 and then the establishment of the National Rural Health Mission (NRHM) in the year 2005 took place which was based on the global health commitments for MDGs. NRHM aimed to

[193] Government of India, *Annual Report 2013-2014*, New Delhi: Ministry of Health and Family Welfare, Government of India, (2014).
[194] Y Balarajan, S Selvaraj, & S V Subramanian, *Health Care and Equity in India*, The Lancet (Jan. 14, 2022, 12:53 AM) https://pubmed.ncbi.nlm.nih.gov/21227492/.

[195] A Bang, *Health insurance, assurance, and empowerment in India*, The Lancet (Jan. 13, 2022, 01:13 AM) https://www.thelancet.com/journals/lancet/article/PIIS0140-6736 (15)01174-5/fulltext.

improve the availability and accessibility to quality health care and to encourage women to access public healthcare.

Several health policies related to maternal healthcare were implemented at both the federal as well as state-level in India. Conditional cash incentives to pregnant for in-hospital childbirth were offered at the federal level by Janani Suraksha Yojana in 2005. The Janani Shishu Suraksha Karayakaram was formulated for free medical assistance which would include nutritional supplements, checkups free hospitalization, etc. during pregnancy. Indira Gandhi Matrutva Sahyog Yojana was formulated which provided cash to compensate a pregnant woman for the loss of wages which was suffered by her during pregnancy, subject to age and parity conditions.

These federal policies have been complimented by cash incentives and services to other levels of government at the discretion of the government. In all policies, tested in some way or for all, rural or urban, direct cash incentives or free medical services were provided through the public health system. These policies have produced mixed results from inconsistent implementation. There is not enough evidence to show that money and free medical care are associated with better reproductive health.

MATERNAL HEALTH AND MATERNAL POLICIES IN THE U.S.

For the US, there is a difference in MMR. MMR is referred to as "pregnancy-related deaths" which includes the death of a woman while pregnant or within 1 year of pregnancy termination. This period is regardless of the duration or site of the pregnancy that is from any cause that is related to or aggravated by the pregnancy or its management but not from accidental or incidental causes. This is a broader conceptualization, which is limited to 42 days and the pregnancy-related causes.

Regardless of classification, pregnancy-related deaths have not decreased in the United States. The United States, with 14th MMR, is far behind in other countries such as Singapore (10), France (8), Canada (7)), and Poland. (3).[196] On the other hand, the United States spends about

[196] World Bank (2017c), World Maternal Mortality Ratio (Jan. 15, 2022, 08:44 PM), http://data.worldbank.org/indicator/SH.STA.MMRT.

17% of its gross domestic product per year on healthcare services, the highest rate in the world.[197]-Health care per capita in the United States was approximately $ 9,400 per person in 2014, the third-highest in the world.[198]

In the United States, health care is largely privatized by people who are supposed to purchase private health insurance. Maternal and child health insurance is also provided by Medicaid, the Child Health Insurance Program, the Affordable Care Act, and private insurance providers. Under the Affordable Care Act, maternity care and maternity services are covered by significant health benefits. However, payments for the cost of pregnancy, childbirth, and postpartum care may vary depending on the health plan and some individual "grandparent" plans that do not include pregnancy and childbirth.

COMPARATIVE ANALYSIS AND DISCUSSION: MATERNAL HEALTH IN INDIA AND THE U.S.

There are parallels as well as sharp distinctions in the state of maternal health and health policies in India and the U.S. In this section, first maternal health trends are compared between India and the U.S. followed by a discussion about the differences in health care policy structures.

1. Despite medical advances and a sharp decline in infant mortality, reproductive health care is still scarce in both countries. Complete MMR rates vary between India and the United States but are still higher for each country than their counterparts (developing countries in India, developed countries in the United States).
2. There are significant differences and differences between states within each country.
3. There are significant differences in MMRs between different income groups, between races and ethnicities, suggesting structural differences in access to, access, and use of health care.

[197] World Bank (2017b), *Health expenditure, total (% of GDP)* (Jan. 20, 2022, 03:47 PM), http://data.worldbank.org/indicator/SH.XPD.TOTL.ZS?locations=IN.

[198] Id.

India has adopted a direct subsidized medical care system through its comprehensive public health care system and direct money transfers aimed at encouraging the use of health care. In contrast, reproductive health care in the United States is more personal and insurance-based. The following comparative analysis highlights the similarities and differences between these two approaches and highlights the few missing links between health policy attitudes and reproductive health care.

Both countries recognize economic disparities and cater for low-income women, and almost free public health services in rural India and Medicaid in the United States. In India, social classes and class groups are also recognized and free health care is provided. However, enrollment in certain reproductive health policies is limited to 19 years and older, with the basic assumption that women are not legally allowed to marry before the age of 18, so only pregnant women over the age of 19 can send applications. These age limits do not apply to insurance structures in the United States.

However, both countries fail in addressing the broader conceptualization of maternal health and choice in the following ways:

1. Systematic data collection is absent for maternal morbidity in India as well as the United States.[199]-In the United States, there was an increase of approximately 26% in hospitalization and at least one indicator of severe gynecological diseases from 2008-2009 to 2010-2011.[200] In India, the gynecological disease is not included in reproductive health policies, unless health problems occur during childbirth.
2. Negative psychological outcomes do not take priority in health policy. The medical system does not accept psychological factors such as stress, contraceptive area, depression, or postpartum depression as medical conditions. In India, only 1 in 4 women is diagnosed with postpartum depression.[201] It is more likely to occur in women under the age of 20 or over 30, in school under the age of five, unhappy marriages, victims of physical abuse, favoritism for a boy, low birth weight, and family history of pain.[202]

[199] A Creanga, C Berg, *et al*, *Maternal Mortality and Morbidity in the United States: Where Are We Now?* Journal of Women's Health, 23(1), (Feb 10, 2022, 10:15 PM), https://doi.org/10.1089/jwh.2013.4617.
[200] Id.
[201] R Savarimuthu, P Ezhilarasu, *et al*, *Post-partum depression in the community: a qualitative study from rural South India*, International Journal of Social Psychiatry, 56(1), 94–102, (2010).
[202] Id.

In the United States, 1 in 7 mothers suffers from postpartum anxiety and depression which may require intervention.[203]

3. Reproductive health policies may not include and address high health risks such as substance abuse, chronic anxiety, depression, obesity and obesity, and malnutrition in young people can have serious consequences for the health of mother[204] and child in the future.[205]
4. The role of politics in reproductive health is extremely rare in evaluation. In India and the United States, reproductive health has not been influenced by the party, politics, and the judiciary in formulating and implementing policies. In India, recent laws provide for the extension of monetary policy incentives from rural areas only to the rest of the country, with a significant financial burden, making a unique identification number (equivalent to a social security number) for receiving cash.

These changes have had an impact on the inclusion or exclusion of eligible women in the policy, the suitability of cash incentives, and the adoption of policies. In the United States, a review of contraception (Burwell v. Hobby Lobby Stores case)[206], family planning funding, review of abortion laws, clinical and current clinical needs, uncertainty about future health policy, there may be nothing missing. About the medical definition of pregnancy or childbirth, it will still have a long-term impact on reproductive health and maternal mortality rates.

[203] American Psychological Association Postpartum Depression (Feb. 15, 2022, 11:22 PM), http://www.apa.org/pi/women/resources/reports/pos tpartum-depression.aspx.
[204] U. Ishwarya v. Director of Medical Education, Directorate of Medical Education, and Others, (W.A.No.374 of 2018).
[205] S L Ramey, P Schafer, *et al*, *The preconception stress, and resiliency pathways model: A multi-level framework on maternal, paternal, and child health disparities derived by community-based participatory research*, Maternal and Child Health Journal,19(4), 707–719 (2015).
[206] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

MATERNITY BENEFIT AMENDMENT ACT, 2017

To promote women's participation in the workforce, the Maternity Benefit Act, 1961,[207] was amended to provide more beneficial entitlements to women employees. However, they appear to impose the entire cost of these benefits on employers, which could lead to a negative trend in hiring women in meaningful roles. In 2017, the Parliament of India passed an amendment to the Maternity Benefit Act, 1961(MB Act)[208], which brought about three key changes.

While the MB Act had previously granted female employees maternity leave, the amendment increased the duration of leave entitlement from 12 to 26 weeks. In addition, the amendment also introduced leave for adoptive and surrogate mothers. Finally, the change provides that every company with 50 or more employees must have a day nursery.

The Maternity Benefit Act, of 1961 was enacted to ensure that young mothers are not hindered in their work by childbirth and child-rearing obligations. Women have usually played a primary role in childcare, even if they have partners or spouses. For working women who are not adequately supported in care, this often becomes an obstacle to efficient work. To counteract this and to give employees the time and space they need for a new child, the law requires employers to grant employees paid leave. The change also introduced a requirement to provide a day nursery to encourage women to return to work without worrying about their young children being left unsupervised.

While the law certainly has good intentions, it is important to examine its social and economic implications. In the case of any law, especially those enacted for the benefit of specific groups, there must be no negative consequences that conflict with the good intentions of the law. Without this assessment, laws can be counterproductive, offering nothing but empty promises of equality.

According to the MB Act, the cost of maternity is looked after by the employer by providing the employee with paid leave during her absence.[209] The Supreme Court in the case of Municipal Corporation of Delhi v. Female Workers (Muster Roll) and another, considered the

[207] Maternity Benefit Act, 1961, No. 53, Acts of Parliament, 1949 (India).
[208] The Maternity Benefit (Amendment) Act, 2017, No 6, Acts of Parliament, 1949 (India).

[209] Neetu Bala v. Union of India and Others, (CWP No.6414 of 2014); K Chandrika v. Indian Red Cross Society, (2007 (3) SLJ 479 Delhi).

law regarding the grant of maternity leave.[210] This benefit is not available to male workers and is, therefore, a gender-specific benefit. Therefore, by hiring women, many employers run the risk of incurring additional gender-specific costs if these women choose to become mothers. Consequently, the MB Act will likely be counterproductive because employers will choose to cut costs by not hiring women at all, which will reduce female workforce participation. Therefore, it can be said that the law has the potential to foster gendered discrimination in the workplace.

However, the main problem with the MB Act is that the cost of maternity leave is borne directly by the employer, which makes hiring women a burden for them. This does not mean, however, that women should not be eligible for maternity benefits, which means that the role of the State in supporting working mothers is crucial to minimize discrimination in the workplace and to promote the participation of women in the labor force. The government has a vital role to play in truly implementing it, even though private players can be made to work towards social issues, such as increased employment and equal opportunity.

For Instance, the Pradhan Mantri Protsahan Rozgar Yojana Scheme, under which the government makes a portion of provident fund contributions for certain employees in an endeavor to generate more employment. It is important to note that under the Employees State Insurance Act of 1948[211](ESI Act), maternity allowance payments can be claimed by female workers under social security.

Although the employer incurs costs in the form of regular contributions to the state employee insurance, which in turn finances the maternity allowance, these contributions are not gender-specific, i.e. the contribution amount does not differ according to the sex of the employee. Employers and employees must pay the same contribution rate regardless of whether they are male or female. Under this system, the output may therefore be gender-specific (since only female employees can claim maternity benefit), the costs incurred by the employer are therefore not gender-specific.

[210] (2000) 3 SCC 224.
[211] The Employees State Insurance Act, 1948, No. 34, Acts of Parliament, 1949 (India).

MATERNITY BENEFIT UNDER THE CODE OF SOCIAL SECURITY, 2020.

The Social Security Code 2020 was approved by both houses of Parliament and received presidential consent on September 28, 2020, but the official gazette informing the effective date of the code has yet to be published. The SS Code was issued to amend and consolidate social security laws to extend social security to all employees and workers in the organized or unorganized or another sector.

Section 14 of the Maternity Benefit Act of 1961[212], gave the competent government the power to appoint inspectors to apply the provisions of the Act. In terms of the Social Security Code 2020[213], the responsibilities of implementing the provisions of the Code have been delegated to a new authority, the Auditor-General. The Assistant Auditor also can investigate complaints by non-compliance and make arrangements that he or she considers appropriate and appropriate depending on the nature of the complaint.

The inspector cum-facilitator, before introducing charges against the employer for failing to pay maternity allowance to a woman eligible under the Code, will provide the opportunity for the employer to comply with the relevant conditions through written instructions, which will set the time to comply and, if the employer complies with the order within that time, no such lawsuit will be brought against the employer.

However, this possibility has not been granted to the employer, if the non-payment of maternity benefit[214] is repeated within three years from the date on which the first violation took place. In that case, criminal action is instituted under the provisions of Chapter XII of the Code.

Under Section 142 of the new Code[215], every employee or employee of the informal sector who requests maternity allowance under the Code is required to declare their identity and the identity of the person designated to receive the maternity allowance in case of his or her death, through Aadhaar Number. Without the Aadhar number, no woman will be able to access

[212] Maternity Benefit Act, 1961, §14, No. 53 of 1961 Acts of Parliament, 1949 (India).
[213] The Code on Social Security, 2020, No. 36, Acts of Parliament, 1949 (India).
[214] Smt. Neetu Choudhary v. State of Rajasthan and Ors. (RLW 2008 (2) Raj 1404).
[215] The Code on Social Security, 2020, § 142, No. 36, Acts of Parliament, 1949 (India).

fertility benefits. This requirement was not included in the Maternity Benefit Act of 1961[216]. The new Code has also increased penalties if an employer violates the Code's provisions regarding maternity benefits. Under Section 133 of the Code[217], anyone who as an employer does not provide maternity benefits to which a woman is entitled under the Code is punished with a prison sentence of up to six months or a fine that can extend to INR 50,000 or both.

CRITICAL ANALYSIS OF THE MATERNITY BENEFITS UNDER "THE SOCIAL SECURITY CODE, 2020."

After the research was done, it can be stated that the main objective of the introduction of the Social Security Code, 2020 was to consolidate laws to all employees, but the major question which thus arises is whether the maternity interests of the female workers are getting protected or not. The Code has been proposed to subsume a few of the Central Labour Law Acts under the garb of 'simplifying and rationalizing' the said provisions. But in examining the provisions of the Code relating to reproductive benefits mentioned in Chapter VI of the Code, the intention cannot be fully covered.

Providing maternity benefits to every employee is a basic social responsibility of the state and the employer. But it is quite clear in India that generous maternity benefits provide benefits to only 1.3% of female employees in general. Ensuring maternity allowance is the cry of all. [218] This is important to ensure women's empowerment and gender equality.

A positive impact is yet to be seen from the Maternity Benefits (Amendment) Act 2017 on women's labor force participation. This is due to the drop in women's participation in more than five out of ten sectors since the implementation of the act.[219] Approximately 12 million women lost their jobs in the year 2018-2019 solely due to the Amendment in the Act. Even though

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[216] *Id* at 10.

[217] The Code on Social Security, 2020, § 133, No. 36, Acts of Parliament, 1949 (India).

[218] Manavi Kapur, *India's generous maternity leave policy fails to cover 99% of women who need it* (Jan. 20, 2022, 8:37 PM), https://scroll.in/article/938600/indias-generous-maternity-leave-policy-fails-to-include-99-of-the-women-who-need-it.

[219] ALFEA JAMAL, *MATERNITY BENEFITS ACT YET TO HAVE A POSITIVE IMPACT ON WOMEN LABOR FORCE PARTICIPATION: REPORT*, HINDUSTAN TIMES (JAN. 20, 2022, 10:00 PM), HTTPS://WWW.HINDUSTANTIMES.COM/SEX-AND-RELATIONSHIPS/MATERNITY-BENEFITS-ACT-YET-TO-HAVE-POSITIVE-IMPACT-ON-WOMEN-LABOUR-FORCE-PARTICIPATION-REPORT/STORY GKEABH8FTKQ8TH5OGPVAAL.HTML.

there has been some help of the amendment in terms of the retention rate of women up to 56%, which earlier used to be just 33%, there has been a reduction in the total number of women in the workplace.[220]

A gross underrepresentation in the labor market is evident as only 22.3% of women participate in the labor market, resulting in a gender gap of approximately 72%. A targeted policy is required to cater to the issue of utmost importance. It is pertinent to note that the above findings are based on statistics from 2019 and it is a fair assumption to say that the COVID-19 crisis would have only exacerbated the above issue.[221]

The act was a progressive move towards encouraging female workforce participation. However, in the world, India still stands amongst the bottom 10 countries in terms of women's workforce participation. In FY 2019-20, the Women's Labour Force Participation Rate (LFPR) for India stands at 20.52% compared to 20.71%in FY 2018-19.[222] Moreover, a comprehensive analysis covering the views of all the stakeholders including male employees, felt the act was one-sided. As per the study approximately 36%[223] of the male respondents thought that both parents should get paid leave for childcare.

Due to the lack of awareness about the act, only 40% of all employers provide the mandated 26 weeks of paid maternity leave. As per the report, 53% believe that the act is not cost-effective at present, but that it will be beneficial in the long run. The report also suggests that an increase in the cost and increased burden on fellow employees are some of the fallout employers are attributing to the act.[224]

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[220] Id.
[221] M**ADHU DAMODARAN AND ANIMAY SINGH**, *MATERNITY BENEFITS UNDER THE NEW LABOUR CODES: A MISSED OPPORTUNITY?* TIMES OF INDIA (JAN. 25, 2022, 8:05 PM), HTTPS://TIMESOFINDIA.INDIATIMES.COM/BLOGS/VOICES/MATERNITY-BENEFITS-UNDER-THE-NEW-LABOUR-CODES-A-MISSED-OPPORTUNITY/.
[222] *Id* at 35.
[223] *Id*.
[224] *Id.*

RECOMMENDATIONS AND SUGGESTIONS

There is a need to conceptualize these Maternity Benefit laws in terms of what they need to resolve and what they are purportedly resolving. In a developing country like India, there is a need to rectify the problem from a grass root level so that participation of women in the labor workforce remains intact and does not deteriorate further. Hence the authors propose the following rectifications-

1. The regulation under Section 59 (3) prohibits "hard work" performed by any woman within a specified period before the expected date of delivery. But the same has not been clarified, about what is considered in the context of "hard work". Therefore, there is a need for a specific and uncomplicated interpretation of the word "hard work" to put "assertiveness" so that employers are held accountable for unsafe work as female employees, especially in the informal sector, are often involved in risky activities as well as to ensure their correct and consistent interpretations in the Code.
2. The concept of paternity leave seems to be missing in the code. That eventually will miss out on the possibility of spreading the message that the responsibility of running a family should be of both the parents. According to the MB Act, the cost of maternity is looked after by the employer by providing the employee with paid leave during her absence. This benefit is not available to male workers and is, therefore, a gender-specific benefit. Therefore, by hiring women, many employers run the risk of incurring additional gender-specific costs if these women choose to become mothers. This can also be supported by the judgements of Rakesh Malik v. State of Haryana[225] and Vijendra Kumar v. Delhi Transport Corporation, Govt. of NCD[226]. The respective courts in both the cases rejected the prayer of developing a policy related to Paternity leave.
3. The code shall also cover and extend all the maternity benefits to LGBTQ parents, as it was implemented in 2005 in the USA.
4. Maternal health, maternal mortality, and maternal morbidity are the subjects of major concerns and there is an urgent need for policymakers in India as well as the U.S. to prioritize maternal health.
5. Increasing focused general awareness campaigns for the general public either through efforts within organizations or through a popular media campaign. A Deeper

[225] (2013) SCC OnLine P&H 3546.
[226] 2015 SCC OnLine CAT 3012.

investigation of reasons for non-access or non-utilization of public medical healthcare shall be conducted.

6. Conduct a legal study of powers of the Labour Commissioners that can be utilized to ensure compliance of the MBAs and how they need to be augmented and highlighted for effective action to implement the law. Conduct gender sensitivity programs to imbibe positive attitudes amongst Authorities.
7. To understand the gap between the authority's actions and the maternity benefit awareness among the stakeholders, a rapid assessment needs to be conducted. This would, in turn, identify the problems and also conduct an in-depth audit within the states to understand the reasons for gaps.
8. The focus of maternal health policies shall be moved beyond focusing on the MMR and shall also include monitoring of short-term and long-term maternal morbidity, social, psychological, and cultural factors.
9. The main problem with the MB Act is that the cost of maternity leave is borne directly by the employer, which makes hiring women a burden for them. This does not mean, however, that women should not be eligible for maternity benefits, which means that the role of the State in supporting working mothers is crucial to minimize discrimination in the workplace and to promote the participation of women in our force.

CONCLUSION

Since reproductive health is multifaceted, health infrastructure should be integrated vertically according to severity and needs and equally integrated with social development services in different organizations, policies, places, and activities. The integration of medical care involves integrating services with the non-health sector with traditional and non-traditional partners to support a full range of important prevention, promotion, and improvement activities. The public health perspective can promote greater participation and support for women. In India, where about 60% of the population still lives in rural areas, traditional systems symbolize the knowledge of one's authority, and greater confidence in the traditional style of care, even if it does not conform to medical practices.

In conclusion, reproductive health care services and policies must strive to achieve a positive health status for every woman that enables her to work at the highest level of ability to achieve her personal goals.[227] Only such a general understanding of reproductive health can direct political efforts to prioritize reproductive health not only in India and the United States but in other countries as well. Thus, it can be concluded that although the U.S. is a developed country and has better stakes in the field of MMR, both the countries including India as well the U.S. needs to be more advanced when compared with their subsequent countries. Also, it is very clear from the research that though the Maternity Benefit Act, 1961 has been amended in the year 2017, and not much improvement has been seen in the statistics of the number of working women. Instead, a steep decline can be seen in their number. Thus, it is believed that the situations may improve in the long run as it is presumed that the awareness among people would increase in the future. It can be concluded that in the present times, the practical reality is far different from the theoretical aspect of the same.

[227] Air India v. Nargesh Mirza, AIR 1981 SC 1829.

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DEFAMATION IN THE DIGITAL ERA: NOT JUST ANOTHER FORM OF LIBEL

Christo Sabu

ABSTRACT

In the modern era, individuals can easily exercise their right to free speech and expression by voicing their opinions and concerns on platforms such as blogs and social media. Thus, it can be said that the Internet possesses the unique ability to free speech and communication. However, in recent times, the existing laws have failed to keep pace with the rapid advancement and growth of the digital world. The absence of effective laws and regulations to ensure disciple and security within cyberspace has led to a reckless and unrestrained attitude among some netizens. Hence, internet users are often exposed to potential threats, some of which may even have a deleterious impact on their reputation or privacy. One such threat that may hamper an individual's identity and thus prove to be an obstacle in India's quest to digitalization, in the long run, is Cyber defamation. In this paper, the researcher has attempted to present the legal approach towards Cyber Defamation in India and criticized the contention that it is just another form of libel.

Keywords: Defamation, Internet, cyberspace, libel, reputation.

BACKGROUND

Section 499 of the Indian Penal Code (IPC) states that *"Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter expected, to defame that person."*[228] Defamation is said to be committed when a person publishes to a third party, words consisting of a false imputation against another's reputation. In such cases, the medium of publication is irrelevant.[229] It is a deliberate violation of another's right to his 'good name'.[230] Generally, defamation can be classified into two types- Libel and Slander. The written and permanent form of defamation is known as libel, whereas slander refers to the verbal and transient form of it. Cyber defamation falls under the category of libel as the content published on social media or websites is still permanent in nature. In India, libel is treated as both a civil tort as well as a crime. Section 500 of IPC provides for punishment wherein "*any person held liable under section 499 will be punishable with imprisonment of two years or fine or both*."[231]

What is cyber smearing? It refers to the spreading of a disparaging or defamatory statement, remark, or rumor about a company, its executives, or shares on any internet platform. It is a desperate act to bring down the hard-earned reputation or goodwill of a firm. Some of the common examples of cyber smearing include posting fake negative reviews or spreading false defamatory content on any online platform with the intent of harming an individual or company's reputation.

One of the biggest concerns when it comes to combating cyber defamation is the anonymity of the wrongdoer. Due to the rapid technological advancement, there are several devices available that enable the author to conceal and disguise his true or original identity. Furthermore, the ubiquitous and extensive nature of the Internet enables the wrongdoer to operate from any nook or corner of the world. This makes the ascertainment of the jurisdiction an intricate task. Therefore, law enforcement agencies across the globe may have to work together and formulate a legal mechanism to ensure speedy trials. Also, the existing laws in

[228] *Section 499*, the Indian Penal Code, 1860
[229] Francine Derby, Defamation in the Digital Age, (Jan. 31, 2019) DunnCox, LEXOLOGY
[230] Amit K. Kashyap & Dr. Takesh Molia, Defamation in Internet Age: Law & Issues in India, 1 IJIEMT 17, at 19 (2016).
[231] *Section 500*, the Indian Penal Code, 1860

our country lack flexibility and don't specifically deal with defamation in cyberspace.

Research Questions

1. Which rule of publication has been adopted in the case of Cyber defamation in India?
2. Do defamation laws in India infringe the right to freedom of speech and expression?
3. Are there any exceptions to Section 79 of the Information and Technology Act, 2000?

Research Objectives

1. Examine the statute of limitation and its applicability under the Single Publication rule.
2. Examine the grounds on which Section 66(a) of the IT Act was invalidated.
3. Determine whether Internet Service Providers or intermediaries should be held liable under Cyber defamation suits or not.

Literature Review

The researcher has relied on numerous sources of data including books, journal articles, and case laws. The research article titled; 'Defamation in the Cyberspace' written by Prençe MIRGEN provides a detailed analysis of defamation in cyberspace. It helped understand the various causes of online defamation and jurisdictional issues that arise, especially in those scenarios wherein the perpetrator and the victim are located in different places falling under separate jurisdictions. The author has made use of relevant case laws such as *Griffis v. Luban*[232] and *Dow Jons & Co. v. Guntick* [233]to present his views.[234] In the research article titled, 'Defamation on social media: An Adoption of Single Publication Rule, the author, Manjeet Kumar Sahu, has elaborated on the statute of limitation in case of online defamation. Forging ahead, the research article also throws light on the origin of the single publication rule and an exception to it in the form of 'Doctrine of Republication'. The author has concluded by stating that when compared to the continuous publication rule, this rule is far

[232] *Griffis v. Luban*, 646 N.W. 2d 527 (Minn. 2002)
[233] *Dow Jons & Co. v. Guntick*, (2002) 210 CLR 575
[234] Prençe MIRGEN, Defamation in the Cyberspace, 49 Curentul Juridic, The Juridical Current 97, 97-102 (2002).

more reliable as it prevents multiplicity of actions and probable harassment.[235] The journal article authored by Sanette Nel, titled, 'Online Defamation: the problem of unmasking anonymous online critics' discusses the legal challenges faced by the Plaintiff while attempting to bring a suit against an anonymous poster of a defamatory message on the Internet by undertaking a comparative analysis of litigation in the UK, USA, and South Africa. It also emphasizes the extent to which internet service providers can be forced to disclose the user's identity and provides effective measures to unmask anonymous offenders in cyberspace.[236] The journal article titled "Defamation in Cyberspace" written by Avantika Nandy for Pen Acclaims Journal helped understand the exact meaning of cyberspace. It further elaborates on the 3 types of cybercrimes- 1) Against individuals 2) Against government 3) Against property. The existing cyber defamation laws in India have also been discussed it[237]. Finally, the journal article titled, 'Cybersmears: Dealing with defamation on the Net' written by Jeffrey R. Elkin discusses in length, the concept of cyber-smearing. These days, companies tend to become easy targets to cyber smearing as internet users try to bring down the reputation of the firm intentionally by posting inflammable and false information about a particular firm. Thus, the common law tort of defamation is no longer limited to an individual's right to reputation. False and misleading postings can hurt the company's market shareholdings and business relations. Towards the end, the author points out that with the ever-changing and fast-growing technology at hand, it may become difficult for companies to protect themselves from rumors, innuendos, and falsehoods that occur within cyberspace.[238]

Chapterization

The research paper has been divided into the following chapters:

I. **Introduction:** In this chapter, the researcher has given a brief introduction to the topic of cyber defamation. It also includes the research objectives, research questions, and chapterization. Under the subheading, 'literature review', various articles related to the given topic have been analyzed.

[235] Manjeet Kumar Sahu, Defamation on social media: An Adoption of Single Publication Rule, SSRN, Jun. 2016, 1-5.
[236] Sanette Nel, Online defamation: the problem of unmasking anonymous online critics, 40 CILSA 193, 194-214 (2007).
[237] Avantika Nandy, "Defamation in the Cyber Space", 10 Pen Acclaims 1, 1-9 (2020).

[238] Jeffrey R. Elkin, Cybersmears: Dealing with defamation on the Net, 9 Bus. Law Today, Feb. 2000, 22-26.

II. **Online defamation and the Single Publication rule**: This chapter deals with the judgment given in the case of Khawar Butt v. Asif Nazir Mir and Ors.,. It was the first case dealing with cyber defamation in India. It also explains the rule of Single Publication that was adopted in the judgment.

III. **Cyber defamation & Right to Free Speech and Expression:** This chapter discusses the balance between cyber defamation and the right to freedom of speech and expression in India. It also deals with the significance of censorship in the digital era.

IV. **Liability of Intermediaries and ISPS in India**: In this chapter, the provisions under Section 79 of the IT Act, have been discussed. Furthermore, the liability of intermediaries and its extent in cases of cyberdefamation has also been explained.

V. **Conclusion & Suggestions:** This chapter aims to provide a summary of the research paper. It also provides suggestions as to how to deal with cyber defamation and secure the right to reputation of an individual within cyberspace.

ONLINE DEFAMATION AND THE SINGLE PUBLICATION RULE

In the modern era, social networking sites have amassed immense popularity, especially among the youth. It is a great platform for the internet users popularly termed as 'netizens' to interact and socialize digitally, without having to face any location-based barriers. However, cyberspace is not free from potential threats such as online defamation. At times, social media users may share their thoughts and opinion, a piece of information, or any such content, believing it to be true and in good faith. However, these social media platforms do not provide any mechanism for scrutinizing the authenticity and credibility of this circulated content. In addition to that, information travels at a lightning speed on social networking sites and covers a larger audience, when compared to print media.

As of today, there aren't any specific laws that govern online defamation in India. Hence, online defamation is treated as just another form of libel. Thus, it is quite evident that one of the crucial elements of defamation is publication. Publication in this context refers to the communication of defamatory material to a third party. Defamation causes a cause of action to emerge on the date of publication. The statute of limitations for defamation is one year, and it begins when the libel was first published.

In the case of *Khawar Butt v. Asif Nazir Mir and Ors.*[239], Plaintiff filed a suit for defamation to claim for mandatory injunction and damages. The Defendants were alleged to have committed libel by publishing defamatory content on Facebook, a social networking site. Pamphlets containing derogatory material had also been published. It claimed that Plaintiff was indulged in an outside-marriage or illicit sexual relationship with the defendant's wife. The major concern, in this case, was whether the suit was barred by limitation or not as the suit was initiated in the year 2010, two years after the content was originally published. According to Entry 75 of the Schedule to the Limitation Act, 1963, the limitation period for claiming compensation in a suit for libel is one year from the date of its publication. However, Plaintiff contended that the Facebook post gave rise to a continuous cause of action as it would amount to the fresh publication every time the defamatory content appeared on the website. He further asked for exemption from the law of limitation owing to the particular nature of digital media, where a publication cannot be withdrawn voluntarily unlike print media. The

[239] Khawar Butt v. Asif Nazir Mir and Ors., (2013) CS(OS) 290/2010.

Delhi High Court in its judgment held that if the publication of defamatory content on social media would be warranted owing to its continuous nature, then the purpose of the law of limitation would be lost. Hence, the single publication rule was adopted.

Any kind of mass communication or aggregate publication is considered a single publication under the single publication rule, giving rise to a single cause of action for libel. This rule can be applied where communication is simultaneously available to a large number of people. According to this criterion, the statement is considered published, and the statute of limitations begins when the communication enters the commercial stream. However, under the multiple publication rule, a fresh cause of action arises every time derogatory material appears on the webpage. Thus, the statute of limitation for the offence of libel is insignificant as this rule can lead to limitless retriggering of the statute of limitations and multiplicity of suits. Before the judgment was passed in the case of Khawar Butt v. Asif Nazir Mir in 2013, the multiple publication rule was applied to the Cyber defamation cases by the Indian courts.[240]

CYBER DEFAMATION & RIGHT TO FREE SPEECH AND EXPRESSION

"Article 19(1)(a) of the constitution of India guarantees every citizen of our country the fundamental right to freedom of speech and expression." The basic idea behind this right was to ensure that the citizens of our country can express their convictions and opinions freely, without having any fear in their minds, by words of writing, mouth, pictures, printing, or any other mode. However, the introduction of digital interfaces has changed the whole scenario. The content uploaded on digital media can be copied, altered, and annotated by anyone. Thus, it often ends up becoming the source of fake and misleading news. Hence, a mechanism is required to be developed to organize, sort, filter, and limit the overflowing information.[241]

However, this right is not unconstrained. Article 19(2) imposes reasonable restrictions on this

[240] Vaibhavi Pandey, India: The "Single Publication" Rule Of Defamation On Social Networking Websites, MONDAQ, (Oct. 13, 2014) https://www.mondaq.com/india/libel-defamation/346258/the-single-publication-rule-of-defamation-on-social-networking-websites
[241] INDIA CONST. art. 19, cl. 1, sub. cl. a.

right. The state may impose such restrictions under the circumstances concerning national security, maintaining public order, defamation, or in contempt of court. Thus, any false remark or comment passed or circulated in order to bring disgrace to a person's reputation would invite liability under the defamation law.[242]

Internet embraces all the subjects under the sun. It owes its widespread popularity and usage to its extensive and interactive nature. People browsing through a website can read, comment, and share its contents. Does anyone have control over the data getting accumulated on the Internet? No. Internet is pervasive and here, everyone is a publisher. Even though it exemplifies the freedom of speech, it may even result in the misuse of it. A majority of the content available on the web pages is graphical in nature and therefore, capable of creating a lasting impression on the viewers' minds. Since the internet is considered to be a pictorial medium and the contents can easily be printed into a permanent form, cyber defamation can be categorized as just another form of libel. As discussed earlier, the laws applicable to libel shall also be applied to online defamation. However, the degree of damage in case of online defamation is much more than that through print media owing to its ability to carry words afar and with more impact.

In the digital era, censorship plays a pivotal role in monitoring the plethora of information accessible on the internet and preventing its misuse. Censorship ensures that the internet is free from stuff that has the potential to hurt the religious sentiments of readers or can become a cause for hatred among societies or is grossly obscene. Section 66(A) of the Information and Technology Act, 2000 (hereinafter referred to as '**IT Act**') provided for the criminalization of the practice of sending offensive messages through a computer or any other communication device. However, this section was struck down by a two-judge bench in the case of *Shreya Singhal v. Union of India* [243]in the year 2005. It was held by the Supreme Court that the terms of this section were vague making it vulnerable to abuse of power at the hands of the government. It posed a serious threat to the freedom of speech and expression, a fundamental right guaranteed by the constitution. In one such instance, a cartoonist was detained for making a cartoon of the Bengal chief minister. Thus, striking down Section 66(A) was a groundbreaking judgment as this act earlier provided the government unfettered power

[242] INDIA CONST. art. 19, cl. 2.
[243] Shreya Singhal v. Union of India, (2013) 12 S.C.C. 73.

to suppress and curtail people's freedom of speech and expression.

The case of *SMC Pneumatics (India) Private Ltd. v. Jogesh Kwatra*[244] is regarded as the first-ever case of Cyber defamation in India. In this case, the defendant was an employee working for the company belonging to the plaintiff. He sent pejorative, obscene, and defamatory emails to his employers and several subsidiaries of the firm around the world with the sole intention of defaming the Managing director of the firm and jeopardizing the company's brand image. In its decision, the Delhi High Court issued an ex-parte Ad-Interim Injunction, prohibiting the defendant from sending any further insulting or harmful emails. In another case of *Swami Ramdev & Anr. v. Facebook Inc. & Ors.*[245], videos containing the summary of the book titled – 'Godman to Tycoon- The Untold Story of Baba Ramdev' written by Priyanka Pathak Narain were made available on various Internet intermediaries such as Facebook, YouTube, and Twitter. This book had been barred from publication under a judgment passed by the Delhi High Court in the case of *Swami Ramdev v. Juggernaut Books Pvt. Ltd. & Ors.*[246] as it was observed that the book contained *prima- facie* defamatory content on Baba Ramdev. Thus, the petitioners, in this case, demanded a global blocking order to be passed as the content in question could still be accessed from different global platforms which could cause serious damage to the petitioner's reputation. None of the intermediaries objected to the defamatory content from being removed from India-specific domains but contested against removing it from their international services. In the final judgment, an order was passed by Justice Pratibha Singh to remove the defamatory content available on the Internet without any territorial limit, asserting that if the content has been posted through a computer resource located in India, then the Indian courts should have international jurisdiction to pass global injunctions.[247]

Even though there are laws to prevent people from posting defamatory content on the Internet, most people are simply unaware of the same or are too negligent to realize whether the content posted by them can cause harm to someone's reputation. Thus, at times, it becomes a necessity

[244] SMC Pneumatics (India) Private Ltd. v. Jogesh Kwatra, (2016) RFA 268/2014.
[245]Swami Ramdev & Anr. v. Facebook Inc. & Ors., (2019), CS (OS) 27/2019.
[246] Swami Ramdev v. Juggernaut Books Pvt. Ltd. & Ors., (2018) CM (M) 556/2018.
[247] Meril Mathew Joy & Shubham Raj, India: Defamation on Social Media- What Can You Do About It?, MONDAQ, (Jan. 7, 2020), https://www.mondaq.com/india/libel-defamation/880758/defamation-on-social-media-what-can-you-do-about-it

for the state to draw a clear line of distinction between the right to free speech and the right to the reputation of an individual.

LIABILITY OF INTERMEDIARIES AND ISPS IN INDIA

According to Section 79 of the IT Act, Internet service providers and social media intermediaries cannot be held accountable for any third-party information, data, or communication link made available or housed by them as long as:

1) "Their function is restricted to only granting admittance to communication systems;
2) They do not-
    (a) Commence transmission
    (b) Choose the receiver of the transmission
    (c) Choose or alter the data being transmitted
3) They practice due diligence in their duties and stick to any guidelines which may be prescribed.

However, the intermediaries can be held liable: -

a) Where the ISP has abetted, conspired, or induced the unlawful act.
b) If the ISP fails to remove or disable the information, data, or communication link in question upon receiving the knowledge or on being informed by appropriate government agencies that such information, data, or communication link has been used to commit an offence without meddling with the evidence."[248]

However, in most cases, the intermediaries are joined in as Defendants owing to their deeper pockets even if they are practically not liable for posting or transmitting defamatory content. In the case of *Vyakti Vikas Kendra, India Public Charitable Trust & Ors. v. Jitender Bagga & Anr.*[249], the Plaintiffs filed a suit against the Defendants, for indiscriminately sending e-mails and publishing blogs that were derogatory and insulting in nature. The defendants were accused of making rude and derogatory remarks about Sri Sri Ravi Shankar, the founder of the Art of Living Foundation. The Delhi High Court in its judgment held Defendant No. 2,

[248] The Information and Technology Act, 2000, §79.
[249] Vyakti Vikas Kendra, India Public Charitable Trust & Ors. v. Jitender Bagga & Anr., (2012) Cs (Os) No.1340/2012.

Google to be an "intermediary" under Sections 2 (1)(w) and 79 of the IT Act, 2000. Thus, the court ordered Defendant No. 2 to remove all defamatory content about the Plaintiff posted by Defendant No. 1, as it was under the obligation imposed by Section 79(3)(b) of the IT Act, within 36 hours from the date of knowledge of the court's order. The court further barred Defendant no. 1 from sending any such e-mails or publishing anything on the Internet that may directly or indirectly implicate Plaintiff.

In the digital era, Internet Service Providers often find themselves in a much stronger position as compared to print media publishers since they possess unimaginable amounts of information. A defamatory material circulated on the internet would be read by millions of people across the globe. Hence, the author strongly contends that the liability of the ISP must be equivalent to that of the originator. His liability should not merely depend on whether he was aware of its publication or he had exercised due diligence in order to prevent it. Furthermore, the Internet Service Providers taking the plea of 'no knowledge' concerning the published defamatory content while having access to technological scanning gadgets to scrutinize and monitor the same would be irrational. Thus, Internet Service Providers should be brought within the liability of the publisher.[250]

[250] Talat Fatima, LIABILITY OF ONLINE INTERMEDIARIES: EMERGING TRENDS, 49 JILI 155, 164-178 (2007).

CONCLUSION & SUGGESTIONS

Unlike the traditional forms of media including print and broadcast media, social networking sites possess the potential and means to carry an intense volume of information, making it a critical source of defamation. It is quite evident from this research paper that the approach undertaken by the existing laws in our country towards cyber defamation is rather inadequate. There is a need for the enactment of separate laws as it is nearly impossible to apply the principles of 18th and 19th-century cases to the issue arising on the internet in the 21st century. Furthermore, it is imbecile to treat defamation occurring on the internet as just another form of libel as the nature of both these offences is quite different. One of the major challenges being faced by defamation laws worldwide is with respect to the ascertainment of jurisdiction. Crimes such as online defamation have known no geographical boundaries and can be committed from any nook or corner of the world. Thus, a legislative framework that covers all the lacunae in the existing laws needs to be developed.

Freedom of speech and expression is one of the fundamental rights guaranteed by the constitution. With the advent of digital technologies, this right often ends up becoming a weapon in the hands of the wrong people. Thus, the state must ensure a balance between the right to free speech and a person's reputation. This can be done by implementing a code of conduct that governs the behavior of individuals within cyberspace and by the way of censorship.

Lastly, the amendment of Section 79 of the IT Act, 2000 guarantees the intermediaries comprehensive protection from any liability arising from third-party information and communication links. The primary objective behind this was to ensure that the intermediaries can work without any interventions. However, it leaves the door open for misuse as they can escape liability by contending that they had observed due diligence or weren't aware of the publication of the defamatory content.

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THE INCESSANT INFILTRATION UNDER UAPA: A DOOM UPON FUNDAMENTAL RIGHTS

Prachi Gupta [251]

ABSTRACT

The 'draconian' UAPA having being recently amended has managed to extend the harsh provisions to an individual as compared to a terror organisation. This paper analyses the repercussions of the amendment upon the rights of the individual-accused. Having evaluated the extant literature on Article 14, 19, and 21 of the Indian Constitution and the principle of 'presumption of innocence' of the criminal jurisprudence with respect to UAPA, the paper concludes that the amendment effectively violates the aforementioned. The paper sifts through the vast diapason of legislative and judicial data as well as the current and the controversial instances of powers exercised under the Act to conclude that the Act promotes grave injustice and is redundant for a democratic country such as ours.

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INTRODUCTION

In the 2019 amendment to the Unlawful Activities Prevention Act, 1967 ('UAPA') ('the Act') the state has been granted the power to name individuals as "terrorists". In the erstwhile provision, the state was empowered to name only a group or an organization as a terror organization.

More than 75% of cases filed under the UAPA, in the period of 2014-2016, have been concluded as acquitted or discharged. According to National Crime Records Bureau data,[252] of the 1,226 cases under UAPA filed in 2019, a jump of 33% from 2016, charge-sheets were filed only in 9% of the cases and the conviction rate in 2019 was a mere 29.2 whereas in 2020, out of the 796 cases filed, chargesheets were filed in 126 cases alone. About 50% of cases were sent for trial and a record '0' convictions were recorded. Through this data, evidently the individual accused under the Act faces copious harassment.

The fact that charge-sheets are filed in only 9% of the cases (in 2019) is evidence of the fact that in 91% of the cases, persons are arrested and denied bail for a maximum of six months,[253] within which the charge-sheet is to be filed. Even if the charges are dropped, in the public eye, the individuals concerned will have lost their reputation and their options to seek and avail opportunities in life for a dignified existence. The opportunities for gainful employment would also be limited. This violates their right to life and personal liberty. Their prosecution itself jeopardises the prospects of their livelihoods even in the absence of a charge-sheet or their conviction.[254]

A study of the National Crime Records Bureau (NCRB) reports from the year 2010[255] to 2018[256] reveals interestingly that there were no crimes registered under the UAPA before 2014. Even the crimes registered under the Terrorist and Disruptive Activities Act, which was repealed, is '0' from 2006 onwards. There could be some UAPA cases included generally under the heading 'other SLL crimes' but it seems unlikely because in subsequent years the

[252]'Crime In India' (National Crime Record Bureau, India 2019).

[253]The Unlawful Activities Prevention Act, 1967, § 43D(2)(b), Acts of Parliament, 1967 (India).

[254]Kapil Sibal, 'Unlawful Activities (Prevention) Amendment' *The Hindu* (2020).

[255] 'Crime In India' (National Crime Record Bureau, India 2010).

[256] 'Crime In India' (National Crime Record Bureau, India 2018).

UAPA is marked a separate crime head. The NCRB records crimes under the UAPA only from the year 2014 and from 2014 there is a rise in the use of UAPA. The total numbers of cases filed under the UAPA rose from 976 in 2014 to 897 (2015), 922 (2016), 901 (2017), and 1182 (2018).[257]

The definition of "terrorist" has been given an expansion to now include individual under § 35 and § 36 of Chapter VI of the Act vide the latest amendment to the Act i.e. the Unlawful Activities (Prevention) Amendment Act, 2019 ('the Amendment').
This paper evaluates whether the aforementioned latest amendment is constitutionally valid.

Article 21 duly violated

Right to reputation

The words "life" and "personal liberty" in Article 21 have been interpreted by the Courts to encompass all varieties of life which accumulate to form the personal liberties of a man. Further adding that these words don't entail "the right to the continuance of a person's animal existence". All these aspects of life, which make a person live with human dignity are included within the meaning of the word "life". The State has a duty to enforce the human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence which may include its own officers. Article 21, in its broad application, not only takes within its fold enforcement of the rights of an accused, but also rights of the victim. In certain situations, even a witness to the crime may seek for and shall be granted protection by the State. The right to life and personal liberty is paramount. Likewise, if Articles 14 and 19 are put out of operation, Article 32 will be drained of its blood.[258]

The right to reputation has been held to be a fundamental right guaranteed under Article 21.[259] *The right to protect the reputation from being harmed unfairly inheres in an individual. Such right exists not merely against falsehood but also against certain truths.*[260] Right to

[257]'Analysis Of Use Of UAPA From NCRB Data'.

[258]State of WB v Committee for Protection of Democratic Rights, AIR 2010 SC 1476.

[259]State of Maharashtra v. Public Concern for Governance Trust, (2007) 3 SCC 587.

[260]K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

enjoyment of a good reputation and the right to enjoyment of life, personal liberty and property enjoy equal protection. The term "person" includes not only the physical body and members, but also every bodily sense and personal attribute among which is the reputation a man has acquired. Reputation can also be defined to be good name, the credit, honour or character which is derived from a favourable public opinion or esteem and character by report. The right to enjoyment of a good reputation is a valuable privilege of ancient origin and necessary to human society. Reputation inheres in personal security and enjoys the protection by the Constitution at par with the right to enjoyment of life, liberty and property.[261] Reputation has been held to be a necessary element in regard to right to life of a citizen under Article 21 of the Constitution.[262] In the International Covenant on Civil and Political Rights 1966, the right to have opinion and the right of freedom of expression under Article 19 of the Constitution is subject to the right of reputation of others. Reputation has been stated to be not merely the salt of life, but also the purest treasure, the most precious perfume of life.[263] Right to reputation is a facet of right to life and is inseparable.[264]

In Om Prakash Chautala's case,[265] the court relied on an earlier decision in Kiran Bedi v Committee of Inquiry[266] wherein the court reproduced the following observation from the decision in D.F. Marison v Davis[267] which said:

"The right to the enjoyment of a private reputation, unassailed by malicious slander is of ancient origin".[268]

In another case, the court said that the reverence of life can't be isolated from the dignity of human being, who is divine. Dignity endows a human personality with potential eternity. Such dignity should be sustained and this must be the imperative concern of each individual. Further, it can't be treated momentarily. "When a dent is created in the reputation, humanism

[261]Kishore Samriti v. State of UP, AIR 2012 SC (Supp) 699.

[262]Vishwanath Agrawal v. Sarla Vishwanath Agrawal, (2012) 7 SCC 288.

[263]Umesh Kumar v. State of AP, (2013) 10 SCC 591.

[264]Om Prakash Chautala v. Kanwar Bhan, AIR 2014 SC 1220

[265]*Ibid.*

[266] Kiran Bedi v Committee of Inquiry, AIR 1988 SC 2252.

[267]D.F. Marison v Davis, 55 ALR 11 (1927).

[268]Viswanath Agarwal v. Sarla Viswanath Agarwal, AIR 2012 SC 2586.

is paralysed".[269]

No judicial order can ever be passed by any court without providing a reasonable opportunity of being heard to the person likely to be affected by such order and particularly when such order results in drastic consequences of affecting one's own reputation, since it violates the guarantee under Article 21.[270] Reputation of an individual is an important part of one's life. One has the right to have and preserve his reputation and also to protect it. An individual is entitled to be heard before any order is passed affecting its reputation.[271]

Right to reputation is an element of the right to life of a citizen guaranteed under Article 21 of the Constitution.[272] Any treatment meted to an accused while he is in custody which causes humiliation and mental trauma corrodes the concept of human dignity. The majesty of law lies in protecting the dignity of citizens in a society governed by law. An investigator of a crime is required to possess the qualities of patience and perseverance. A citizen in custody is not denuded of his fundamental right under Article 21. The restrictions imposed have the sanction of law by which his enjoyment of fundamental right is curtailed, but his basic human rights are not crippled so that police officers can treat him in an inhuman manner. On the contrary, they are under an obligation to protect his human rights and prevent all forms of atrocities. A balance has to be struck. Under the impugned s. 35 of the UAPA, the arrest of a person on a mere apprehension of him being a terrorist would tantamount to infringement of his right to reputation and thus his dignity and would have dire consequences of losing right to livelihood as well.

UAPA permits searches, seizures, arrests to be made premised on the 'personal knowledge' of the police officers who don't require a written validation from a superior judicial authority.[273]

Proportionality:

The test of proportionality entails:

[269]Mehmood Nayyar Azam v. State of Chandigarh, AIR 2012 SC 2573 .

[270]Divine Retreat Centre v. State of Kerala, (2008) 3 SCC 542.

[271]*Supra* note 14 at 2.

[272]State of Maharashtra v. Public Concern for Governance Trust, (2007) 3 SCC 587.

[273]The Unlawful Activities Prevention Act, 1967, § 43A, Acts of Parliament, 1967 (India).

a. A rational connection between the means adopted and the objective to be achieved;
b. Such means must be least intrusive to the rights or freedoms affected, and
c. The outcomes of the means must be proportionate to the objective.[274]

The amendment is grossly disproportionate as there is no rational connection between the means adopted and the objects sought to be achieved therefrom. The statement of the object and reasons of the bill indicates that the amendment has been brought in to give effect to various Security Council resolutions. It is unclear as to what legitimate aim does the State seek to achieve by declaring a person as a terrorist without even providing an efficacious remedy to challenge his notification. Moreover, the UAPA already had provisions which are effective in arresting the persons involved in terrorism like under § 35 the Central Government was empowered to declare by notification an organization which it believes is involved in terrorism. Membership of such terrorist organization is an offence under § 38. Giving support to such terrorist organization is an offence under § 39. § 40 makes raising funds for a terrorist organization an offence. So this entails that the least restrictive measure has not been resorted to.

Due process

Nikesh Tarachand Shah v. Union of India,[275] while holding that § 45 of the The Prevention of Money-Laundering Act, 2002 violated Article 21 of the Constitution, this Hon'ble Court held that after Maneka Gandhi v. Union of India[276] and RC Cooper v. Union of India[277], law under Article 21 implies due process, procedurally and substantively.

The procedure or the redressal mechanism followed under the Act is irrational as only government's opinion is considered for banning any organization and now any individual. There is no hearing or procedure followed before designating any organization as terrorist organization, only post-decisional hearing is done by a review committee which is headed by

[274]Modern Dental College and Research Centre & others v. State of Madhya Pradesh & others,(2016) 7 SCC 353.

[275]Nikesh Tarachand Shah v. Union of India, (2018) 11 SCC 1.

[276]Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

[277]RC Cooper v. Union of India, (1970) 1 SCC 248.

sitting or retired high court judge to determine the continuation of designation as such.[278]

The banned organization can make an appeal to government and if it is rejected then an appeal can be made to a review committee, an extended body of government. So same authority is categorizing the organization and same is imposing ban, then hearing appeal and also the second appeal. This safeguard does not have any separation of power. The individual accused under the Act is not informed of the grounds of the inclusion of his name as terrorist, so the remedy under § 36, provided for in the Act, is rendered practically otiose.

Instead, POTA authorizes the central and state governments to establish administrative "review committees," which consist of three members appointed by the central or state governments themselves and whose chair must be a current or former High Court judge. These review committees trace their origin to the directions of the Supreme Court of India when adjudicating the constitutionality of TADA. Without specifying in particular detail the precise form that these entities should take, the court directed both the central and state governments to establish review committees to oversee, evaluate, and make recommendations concerning the implementation and application of TADA, in order to ensure that its provisions were not being misused.[279]

The 2019 amendment designating individuals as terrorist does not provide for any change in the procedure for such designation. So same procedure is to be followed. Individuals being classified as terrorist should have different mechanism and faster mechanism of redressal for the reason that an individual has fundamental rights protected under constitution, unlike an organization. They may be arrested, detained and their movement may be restricted which leads to their violation of fundamental rights guaranteed under constitution. But there is no change in the process of removing an entity listed as terrorist.

Another reason cited by the government for the amendment is that the United Nations Security Council (UNSC) designates individual as terrorists and India being a signatory to the United

[278]The Unlawful Activities Prevention Act, 1967, § 43, , Acts of Parliament, 1967 (India)..

[279]Kartar Singh v. State of Punjab, (1994) 2 S.C.R. 375

Nations Charter is obligated to treat the individual as terrorists.[280] However, the standards as prescribed by the same are not followed.

THE PERSISTING THREAT TO FREE SPEECH

Since the notification of the Amendment, people are being prosecuted without evidence of any alleged "deadly means used", or attempted to be used, or, for that matter, in preparation thereof. Even taking the broad definition of a terrorist act into account, most prosecutions are based on inferences drawn from speeches made, or alleged conspiracies based on alleged statements recorded, or alleged documents recov ered by the investigation authorities.

In response to the instance of the Jammu and Kashmir police imposed UAPA against a journalist named 'Masrat Zahra' under Section 13, UAPA for 'uploading anti-national posts on Facebook with criminal intentions to induce the youth and glorifying anti-national activities' and another named 'Peerzada Ashiq' for stories on 'diversion of COVID testing kits', the Amnesty International Executive Director said that this points towards the authorities' endeavor to deter the right to freedom of expression. He further added that UAPA has been wrongly used to punish those who criticize government policies such as journalists and human rights defenders.[281]

Right to dissent: Indirect Infringement to Free Speech

Dissent is an integral aspect of the right to free speech under Article 19(1)(a) as interpreted in Maqbool Fida Hussain v. Rajkumar Pandey.[282] The impugned Sections, under the guise of prohibiting terrorism, are aimed to target critical speech against the government.

"Again, our Constitutional democracy guarantees the right of free speech and that right is not conditional upon the expression of views which may be palatable to mainstream thought.

[280]Designating Individuals as Terrorists, Published by: Economic and Political Weekly, Vol. LIV No. 32, August 10, 2019.

[281]India: Government must immediately stop intimidation of journalists in Jammu and Kashmir, available at: https://www.amnesty.org/en/latest/news/2020/04/journalists-in-jammu-and-kashmir/ (last visited December 1, 2021).

[282]Maqbool Fida Hussain v. Rajkumar Pandey, 2008 CrLJ 4107.

Dissent is the quintessence of democracy".[283]

Public discussion and debate are required and are necessary for smooth functioning of a healthy democracy. In fact, when there is public discussion and there is some dissent on these issues, an informed and better decision could be taken which becomes a positive view and help the society to grow. [284]

Democracy is based essentially on free debate and open discussion, for that it is the only correction of Government action in a democratic set up. If democracy means Government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making choice, free from general discussion of public matters is absolutely essential. Manifestly, free debate and open discussion, the most comprehensive sense, is not possible unless there is a free and independent press[285].

Dissent is the quintessence of democracy. Hence, those who express views which are critical of prevailing social reality have a valued position in the constitutional order. History tells us that dissent in all walks of life contributes to the alteration of social reforms. Democracy is founded upon respect for their courage. Any attempt by the State to clamp down on the free express of opinion must hence be frowned upon[286].

The Supreme Court held that dissent is part of discussion which in turn is freedom of speech and expression. Public discussion and debates on sensitive social issues like reservation are necessary in a vibrant democracy like India to promote awareness in public, which in turn is necessary for effective working of the democracy. Discussion includes dissent also which in turn helps society to grow.[287]

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[283]F.A. Pictures International v. Central Board of Film Certification,.AIR 2005 Bom 145.

[284]Prakash Jha Production v. Union Of India, (2011) 8 SCC 372.

[285]S. Rangarajan v P. Jagjivan Ram, (1989) 2 SCC 574.

[286]*Ibid.*

[287]State v. Kunji, AIR 1970 All 614.

THE ACT PROMISES ARBITRARINESS

The Hon'ble Supreme Court has held that laws are "manifestly arbitrary" in violation of Article 14 of the Constitution when they are "obviously unreasonable", capricious, irrational, without adequate determining principle, or excessive and disproportionate or ultra vires the act[288].

Section 35 does not provide the detailed grounds and reasons on the basis of which an individual can be notified as terrorist rendering an arbitrary discretion with the government. The amendment fails to specify the grounds on which an individual may be termed as a 'terrorist' and such an anamoly is clearly violative of Article 14 as it confers excessive,unbound, discretionary, and unfettered powers upon the Central government. Take an example, the period of incarceration upon arrest under UAPA is 180 days without the requirementt of filing a chargesheet which clearly impinges upon their right under Article 21 of the constitution. Thirdly, it confers upon the government broad discretionary powers and also authorizes the creation of *"special courts with the ability to use secret witnesses and to hold closed-door hearings."*

Moreover, the lack of fair hearing violated natural justice principle of audi alteram partem or the rule of fair hearing. Invoking Union of India v Tulsiram Patel[289], that violation of natural justice results in arbitrariness and violates Article 14.

In the case of People's Union for Civil Liberties v Union of India[290], it was opined that if while combating terrorism, if human rights are infringed, it will be self-defeating.

Principles of natural justice are naturally flaunted under the Act

Articles 14, 19, and 21 of the Indian Constitution are the substratum of the concept of natural justice. In E P Royappa v. State of Tamil Nadu[291] , it was opined that a properly expressed

[288]Shayara Bano v. Union of India, AIR 2017 SC 4609, at para 101; K.S. Puttaswamy v. Union of India, 2019 1 SCC 1, at para 105; Joseph Shine v. Union of India (2019 3 SCC 39).

[289]Union of India v Tulsiram Patel, 1985 AIR 1416.

[290]People's Union for Civil Liberties v Union of India, (2004) 9 SCC 580.

[291]AIR 1974 SC 555.

and authenticated order can be challenged on the ground that the principles of natural justice have not been observed. In another landmark case of Maneka Gandhi v. Union of India[292] , the court opined that the procedure entailed in the impugned legislation empowering the administrative authority to restrict the fundamental rights of the people is unfair and unreasonable and hence, violates Articles 14 and 21.

It was held that duty to give reasonable opportunity to be heard is implied from the nature of functions to be performed by the authority which has the power to take punitive action. The authorities have a duty to proceed in a way which is free from arbitrariness, unreasonableness or unfairness and must meet the requirements of natural justice. The rules of procedure laid down by law come within the purview of Article 14[293]. It was held that denial of hearing which is reasonably due to a party cannot be made on the ground of the conduct of the party attributing bias[294].

In Maneka Gandhi v UOI[295], the Court held that *"the doctrine of audi alteram partem is intended to inject justice into law and it cannot be applied to defeat the ends of justice or to make law lifeless, absurd, stultifying, self defeating or plainly contrary to commonsense or the situation. The core of it (the audi alteram partem rule) must remain, namely, that the person affected must have a reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relation exercise".*

The right to a fair hearing is "a rule of universal application" in the case of administrative acts or decision affecting rights, as "it is a duty lying upon everyone who decides anything". Natural justice has achieved something like the status of a fundamental right[296].

Under Article 14, the requirement of natural justice has been regarded as an integral part of the guarantee of equality of Article 14, as the violation of a rule of natural justice leads to

[292]Maneka Gandhi v. Union of India, AIR 1978 SC 597.

[293]Ministry of Chemicals and Fertilizers Govt. of India v. Cipla Ltd, AIR 2003 SC 3078.

[294]Orissa University of Agriculture & Technology v. Manoj K. Mohanty, (2003) 5 SCC 188.

[295]Maneka Gandhi v. Union of India, AIR 1978 SC 597.

[296]H.W.R. WADE & C.F. FORSYTH, Administrative Law, 9th Edn, p 36, 496

arbitrariness and consequently, is dicriminatory[297]. In A.K. Gopalan v State of Madras[298], minority decision rendered by Justice Fazl Ali opined that the principle of natural justice that "no one shall be condemned unheard" was part of general law of the land and should accordingly be read into Article 21 as "law" and any adverse order passed without giving an opportunity to be heard is unreasonable and hence void[299].

Violation of principles of natural justice will be violative of Article 14 and would also be destructive of Article 19(1)(g) and negate Article 21 by denying a procedure which is just, fair and reasonable[300]. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power and rules of natural justice operates areas not covered by any law validly made[301]. For, it is only our constitutional commitment to principles of fair procedure in the treatment of individuals which makes majority will, a tolerable, let alone attractive basis of governance[302]. Article 21 has been interpreted to not only protect life and liberty but also follow a fair procedure[303].

The principles of natural justice are now considered so "fundamental" as to be "implicit in the concept of liberty" and therefore implicit in every decision-making function, call it judicial, quasi-judicial or administrative.

Having analysed the extant literature on the point, it is safe to conclude that the Act, post-amendment, effectively violates the principles of natural justice. Firstly, § 35 empowers the government to declare any individual as a terrorist in the Fourth Schedule of the UAPA. However, no procedure whatsoever has been detailed for the government to exercise such

[297]DTC v DTC Mazdoor Congress, AIR 1991 SC 101

[298]A.K. Gopalan v State of Madras, AIR 1950 SC 27.

[299]Nawab Khan v State of Gujarat, AIR 1974 SC 1471.

[300]Charan Lal Sahu v. Union of India, AIR 1990 SC 1480.

[301]Scheduled Caste and Weaker Sections Welfare Association v. State of Karnataka, AIR 1991 SC 1117.

[302]T.R.S. Allan, "Rule of Law as the Foundation of Judicial Review", in Christopher Forsyth, JudicialReview and the Constitution, p 413.

[303]Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra, (2005) 5 SCC 294; Narendra Singh v. State of M.P. (2004) 10 SCC 699.

power, a mere belief is enough for the aforementioned declaration by the government. Therefore, consequently as per the Act the government may notify an individual as a terrorist without a reasonable opportunity of hearing. This renders the impugned provision arbitrary, excessive, unfair and disproportionate.

A fortiori, The basis on which a person can be declared a terrorist is vague and unclear. Whilst § 36 allows an individual notified as a terrorist to appeal to the Government, its operability is difficult and there is no provision for oral hearing at the state of appeal. Conclusively, the impugned sections violate the principles of natural justice.

PRESUMPTION OF INNOCENCE REVERSED

Presumption of innocence has been held to be a Human Right[304]. In Charu Khurana v. Union of India[305], the Court ruled that dignity is the quintessence of human personality as it is a highly cherished value. Therefore, the right to honour, dignity and reputation are basic elements of the right guaranteed Article 21[306]. The presumption of innocence the fundamental principle of procedural fairness in criminal law[307] as well as a quintessence of Article 21[308]. In Noor Aga v. State of Punjab[309], the Supreme Court ruled reverse burdens as constitutional, further stating that policy as well as social control matters justify this extraordinary measure. Sinha J. Opined that to ensure security of the state, individual liberty must be subject to social interest.

The UAPA amendments retain this burden-shifting aspect of the offense. The UAPA posits reverse onus clause, however, the safeguards lack the standard required for its proper implementation. For example, Jayanth Krishnan posits a scenario whose basic elements are entirely plausible: Imagine, for example, a situation in which a person is suspected of owning

[304]Rajesh Ranjan Yadav v. CBI, (2007) 1 SCC 70.

[305]Charu Khurana v. Union of India, (2015) 1 SCC 192.

[306]Bedi, Shruti, "Presumption of Innocence and Reverse Onus Clauses: The State of Criminal and Constitutional Jurisprudence in India". https://law.unimelb.edu.au/__data/assets/pdf_file/0010/3436084/Paper_Shruti-Bedi.pdf

[307]Andrew Ashworth, Principles of Criminal Law 72 (2009).

[308]Nikesh Tarachand Shah v. Union of India, (2018) 11 SCC 1.

[309]Noor Aga v. State of Punjab, (2008) 16 SCC 417.

a firearm that the government thinks was used in a terrorist crime. Suppose the firearm has traces of blood on it, but that it was planted in the person's home by the real terrorist. Now assume because the accused – like many Indians – believes that the police engage in doctoring evidence, he refuses to give a blood sample. The court will be permitted to look askance at the accused not only for "possessing" the firearm, but also for not submitting to the blood test[310].

Moreover, A high conviction rate does not necessarily imply a crime-free society. This is all the more pertinent in reverse onus clauses where a conviction is not a necessary indicator of the proof of the guilt of the accused and may just be the unfortunate result of the accused being unable to meet the high standard of proof imposed upon him. With the probability of erroneous convictions being significantly higher in reverse burdens, public interest stands defeated[311].

Irit Weiser highlights the important symbolic function of the standard of proof beyond reasonable doubt as being indispensable towards shielding the accused from the social stigma, loss of reputation, and psychological and economic harms of a criminal conviction.[312] The convictions also entail dire consequences with severe punishments. Subsequent to the Human Rights Act, 1998, the House of Lords has factored offence seriousness in many decisions to invalidate reverse burdens, such as in R. v. Lambert[313].

In Leary v. United States[314], Harlan, J. Opined that Unless it can be stated that the fact presumed is most likely to be followed by the fact proved on which the former was dependent, a criminal statutory presumption must ordinarily be regarded as "irrational" or "arbitrary", and hence unconstitutional. In the case of County Court of Ulster County, New York v.

[310]Jayanth K. Krishnan, India's Patriot Act: POTA and the Impact on Civil Liberties in the World's Largest Democracy, 22 LAW & INEQ. 265, 269 (2004).

[311]Juhi Gupta, "Interpretation of reverse onus clauses", NUJS Law Review, 5 NUJS L.Rev. 49 (2012).

[312]Irit Weiser, "The Presumption of Innocence in Section 11(d) of the Charter and Persuasive and Evidential Burdens", 31 Criminal Law Quarterly 318, 323 (1988-1989).

[313]R. v. Lambert, [2001] UKHL 37.

[314] Leary v. United States, 395 US 6, 36 (1969).

Allen[315], Stephens J. Opined that in case of a presumption shifting the burden pof proof to the accused, the basic fact must be sufficiently established such as the presumed fact is proven beyond reasonable doubt and only such presumption would be considered as valid.

The extant principle has been duly incorporated in various Human Rights conventions like the Universal Declaration of Human Rights, 1948 ('UDHR'),[316] and the International Covenant on Civil and Political Rights, 1966 ('ICCPR')[317]. Although international conventions are not binding, both the UDHR and the ICCPR hold immense persuasive value as the Supreme Court has held that constitutional principles must be interpreted in the light of international declarations/conventions to which India is a signatory[318].

In addition to this, the Act confers relentless powers which accentuates the injustice that the Act promises of. These include police power to arrest[319], search and seizure[320], making all offences cognizable[321], enhancing the period of detention[322], disallows anticipatory bail[323], presumes the guilt of the accused, in-camera trials and withholding the identity of witness[324] and allowing intercepted communication to be used as evidence[325], giving excessive power to executive.

Moreover, as the Kerala High Court decision in Abdul Sathar @ Manzoor v Superintendent

[315]County Court of Ulster County, New York v. Allen, 442 US 140, 167 (1979).

[316]The Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (December 10, 1948), ('UDHR') Art. 11(1).

[317]International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (December 19, 1966), ('ICCPR') Art. 14(2).

[318]Apparel Export Promotion Council v A.K. Chopra, AIR 1999 SC 625.

[319]The Unlawful Activities Prevention Act, 1967, § 43A, Acts of Parliament, 1967 (India).

[320]The Unlawful Activities Prevention Act, 1967, § 43B, Acts of Parliament, 1967 (India).

[321]The Unlawful Activities Prevention Act, 1967, § 43D(5), Acts of Parliament, 1967 (India).

[322]The Unlawful Activities Prevention Act, 1967, § 43D(2), Acts of Parliament, 1967 (India).

[323]The Unlawful Activities Prevention Act, 1967, § 43D(4), Acts of Parliament, 1967 (India).

[324]The Unlawful Activities Prevention Act, 1967, § 44, Acts of Parliament, 1967 (India).

[325]The Unlawful Activities Prevention Act, 1967, § 46, Acts of Parliament, 1967 (India).

of Police and Ors[326] opines, in cases of terrorism, courts are reluctant to give preference to individual rights when faced with 'public interest' considerations. Section 43D of the UAPA additionally turns the concept of a bail hearing on its head, because it shifts the focus from the CrPC's considerations of the possibility of the accused absconding or tampering evidence or intimidating witnesses to a consideration of the guilt or innocence of the accused.

INTERNATIONAL OBLIGATIONS: FAILURE TO COMPLY

The UN Security Council resolution 1456 of January 2003[327] mandates the measures taken by a state to combat terrorism to be in compliance with the norms and obligations under international law. § 35 of the UAPA is apparently in violation of the same international law that it claims to be premised upon. The United Nations Special Rapporteur, in 2006, enumerated the requirements to be fulfilled for an offense to be termed as a 'terrorist act'. These are: firstly, the means used were deadly, secondly, the intent behind the act must be to cause fear among population or to compel a government or international organisation to do or refrain from doing something, and lastly, the aim must be to further an ideological goal.

The UAPA, in stark contrast to the aforementioned requirements, entails an overbroad and ambiguous definition of a 'terrorist act'. This includes the death of, or injuries to any person, damage to any property, an attempt to over awe any public functionary by means of criminal force and any act to compel the government or any person to do or abstain from doing any act etc., any act that is 'likely to threaten' or 'likely to strike terror in people'. This, in turn, confers unfettered power on the government to name an ordinary citizen as a terrorist despite the brutality of such acts being insufficient[328].

In Apparel Export Promotion Council v A.K. Chopra[329], the court further said that in cases involving violation of human rights, the court must forever remain alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency

[326]Abdul Sathar @ Manzoor v Superintendent of Police and Ors, 2014 (1) KLJ 666.

[327]United Nations Security Council, 'Resolution 1456 (2003)' (2003) <https://www.undocs.org/S/RES/1456%20(2003)> accessed 6 December 2021.

[328]Kapil Sibal, "UAPA undermines personal liberty", *Hindustan Times,* Jun 21, 2021.

[329]Apparel Export Promotion Council v A.K. Chopra, AIR 1999 SC 625

between the international norms and the domestic law occupying the field.

Article 51(c)[1] mandates that the state must foster respect for international law and treaty obligations in the dealings of organized peoples with one another. The impugned provision is violative of art. 11 of the Universal Declaration of Human Right (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), particularly Art. 14, which entail the principle of 'innocent until proven guilty' as a human right.

The Protection of Human Rights Act, 1993 which has been enacted by Parliament refers to ICCPR as a human rights instrument. Section 2(1)(d) defines "human rights":

"2. (1)(d) "human rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India:"

Section 2(1) defines "international covenants":

"2. (1) (f) "International Covenants" means the International Covenant. on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on 16-12-1966 and such other Covenant or Convention adopted by the General Assembly of the United Nations as the Central Government may, by notification, specify;"

Under Section 12 of the Protection of Human Rights Act, 1993, the National Human Rights Commission: "is entrusted with the function of studying treaties and other international instruments on human rights and make recommendations for their effective implementation".

Therefore, the State is bound to follow international covenants through the force of the above mentioned provisions.

Moreover, in Bachan Singh v. State of Punjab[330], the Court, while evaluating the law on death penalty, recognized the obligations that India assumes in international law, after it ratified ICCPR. Further, the Court dre comparison of Article 6 of ICCPR and Articles 20 and 21 of the Constitution, and opined the same to be sustiantially similar. The penal law of India was also observed as being in line with the international commitments. In Francis Coralie Mullin vs The

[330]Bachan Singh v. State of Punjab, AIR 1980 SC 898.

Administrator, Union[331], the Court extensively evaluated the ambit of Article 21 and held that the right under Artcile 21 includes the right to protection against torture or cruel, inhuman or degrading treatment. This right echoes in Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights.

CONCLUSION

In light of the aforementioned decisions of the Hon'ble courts of law along with the legislative provisions, it is apparent that the provisions added through the latest amendment to the UAPA are grossly violative of the constitutional safeguards guaranteed to the people as fundamental rights. The implications of extending the impugned § 35 to include individual are grave as now any arbitrary act of the government directly infringes the fundamental rights of the person so accused. This coupled with the excessive remittance of powers to the government and the shifting of burden on the accused leads to the accused being subjected to undue harassment. Post-trial, even if the accused is acquitted, the loss of reputation, dignity, and livelihood would subsist. This adds to the failure of test of proportionality necessitated by Article 21 of the Indian Constitution. In my view, the 'draconian' law must be altogether struck off as no amount of amendments can mitigate the inherent arbitrariness which the Act entails. Moreover, the conviction rate is spare and the innocent people are being thrashed for rightfully raising a voice against the government.

Ergo, the provisions added through the aforesaid amendment must be struck down as being violative of constitutional provisions of Articles 14, 19 and, 21 of the Indian Constitution.

[331]Francis Coralie Mullin vs The Administrator, Union, 1981 AIR 746

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ANALYSIS OF CONSTITUTIONAL VALIDITY OF THE FARM LAWS, 2020

Shaurya Shrestha Awasthi[332]

ABSTRACT

The Parliament has recently enacted the three farm laws. A lot of controversies and debates have erupted with regard to the constitutional validity of these laws. Apart from questions, like whether the introduced laws are detrimental to the farmers, one of the major questions is that whether the Union is competent to enact such laws. The researcher in the research paper have analysed the various issues in order to find the answer of the above-mentioned question. The researcher discussed about the concept of 'federalism' especially with respect to the basic power sharing scheme, the position of 'agriculture' in the State List, the interpretation and analysis of Entry 33 of List III. With reference to above-listed three issues, the researcher then throws light upon the application of the doctrine of pith and substance with respect to the farm laws. In the suggestions and conclusion part, the researcher has given his opinion with regard to the question of the competency of the Union to enact the farm laws. Moreover, the author has also given the suggestions regarding the issue of farm laws and Entry 33 of List III.

Keywords: *Farm Laws, Federalism, Agriculture*

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INTRODUCTION

Federalism has been held to be one of the pillars of the basic structure of the Indian Constitution. The power division scheme relating to the Centre and States is not provided for under any Central law but in the Constitution itself. The Constitution specifies the division of powers between the Centre and States in the 7th Schedule. The validity of any law passed by the Union of State is judged with reference to their respective jurisdiction as specified in the Constitution.

Recently, the Parliament has enacted three Farm Laws. These three farm laws has erupted controversy among the stakeholders at various levels such as socio-economic, political, legal and constitutional. The present research paper will only deal with the constitutional aspect o the Farm Laws, 2020.

A lot of controversy is going around with regard to the constitutional validity of the farm laws. One section of people feel that the Union is incompetent to legislate the Farm Laws as 'agriculture' is an exclusive 'State' subject and moreover it violates the principle of 'federalism' which is one of the pillars of the Basic Structure Doctrine. The other section feels that the Centre is competent to legislate on the subject. Their argument rests upon the premise of Entry 33 of List III which grants power to the Centre to legislate under 'Trade and Commerce'.

The present research paper will analyse the whole issue of Farm Laws from the constitutional perspective. The researcher will try to find out the competency of the Union to frame the Farm Laws by analysing the following issues:

(i).About the concept of federalism and basic scheme of power sharing.

(ii).Analysing the position of the subject-matter of 'Agriculture' in the State List.

(iii).Interpretation of Entry 33 of List III.

(iv).Analysing the Pith and Substance of the Farm Laws.

BACKGROUND OF FARM LAWS, 2020

The Central Government in 2017 released model farming acts. However, the Standing Committee on Agriculture (2018-19) observed that many reforms mentioned in these model acts had not been implemented by the States. Moreover, the committee also noted that the laws which regulates Indian Agricultural Markets (like those related to APMCs) were not being implemented in a fair manner and thereby not serving the purpose for which they have been formulated.

Therefore, a committee comprised of seven Chief Ministers was formed in July, 2019 to discuss the implementation. The Centre in June, 2020 has promulgated three ordinances.

Later, these ordinances were initiated in the Parliament as Farm Bills in September, 2020. These bills got passed from both the houses of Parliament and thereafter received the assent of the President.

A lot of debates and controversies are going around with regard to the constitutional validity of the Farm Laws, 2020. Many States and the opposition parties feel that Union is incompetent to legislate these farm laws as 'agriculture' is a subject-matter of State List. Moreover, they also feel that these farm laws violate the principle of Federalism and the spirit of Constitution. On the other hand, the Central Government considers these laws to be perfectly valid. It seems that the Central Government has invoked Entry 33 of List III in order to formulate these farm laws.

The matter is pending in the Hon'ble Supreme Court. The Supreme Court stayed the implementation of the Farm Laws, 2020.

ABOUT THE CONTROVERSIAL FARM LAWS, 2020

The three controversial farm laws aimed to change the way agricultural produce is marketed, sold and stored across the country. The three Farm Laws are as follows-

1. **The Farmers' Produce Trade and Commerce(Promotion and Facilitation) Act, 2020**[333]: The Act provides for opening up of agricultural sale and marketing outside the notified Agricultural Produce Market Committee(APMC) mandis for farmers thereby

[333] The Farmers' Produce Trade and Commerce (Promotion And Facilitation) Act, 2020, No. 21, Acts of Parliament, 2020(India).

removing the barriers to intra-state and inter-state trade. This helps in expanding the 'freedom of choice' of farmers with respect to sell and purchase of agricultural produce. The Act also provides for the electronic trading of agricultural produce. The Act prohibits the State Governments from levying any market fee, cess on the trade which is conducted outside the APMC market.

2. **The Farmers(Empowerment and Protection) Agreement on Price Assurance and Farm Services Act, 2020**[334]: The Act provides the legal framework for farmers to enter into a contract farming agreement with companies and big corporate houses for sell and purchase of agriculture produce. The agreement should be made at a mutually agreed price between the parties. The agreement should be in written form and must be entered by both parties prior to the production or rearing of any farm produce. The agreement must contain the terms and conditions with regard to supply, grade, quality, standards and price of farm produce and services. The Act also provide for a dispute resolution mechanism for settling the disputes between both parties.

3. **The Essential Commodities (Amendment) Act, 2020**[335]: The Amendment removes the cereals, pulses, oilseeds, onion, edible oils and potatoes from the list of essential commodities. The amendment deregulates the production movement, storage and distribution of these food commodities. The Centre will regulate such items only under "extra ordinary circumstances" such as war, famine, extra ordinary price rise. The stockholding limits in case of price rise can be imposed if the annual retail price rise exceeds 100% in horticultural produce (basically onions and potatoes) and 50% for non-perishables (cereals, pulses and edible oils).

[334] The Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Act, 2020, No. 20, Acts of Parliament, 2020(India).
[335] The Essential Commodities (Amendment) Act, 2020, No. 22, Acts of Parliament, 2020(India).

THE CONCEPT OF INDIAN FEDERALISM AND THE BASIC SCHEME OF SHARING OF LEGISLATIVE POWER BETWEEN THE CENTRE AND STATES

The Constitution of India is federal in structure. It provides for a dual polity, a two-tier governmental system with one at the Central level i.e. Central Government and the other at the State level i.e. State Government. The Constitution sets out the sphere of powers of each level of government by providing an elaborate scheme of distribution of legislative, administrative and financial powers between the Centre and States. Both the levels of governments should act only within their assigned field and does not encroach upon the field assigned to the other government.

India is a federal country like many other federal countries such as USA, Canada, Australia. But unlike many other federations, India does not follow a strict and conventional federal pattern. Though it follows many of the techniques with regard to federal structure which have been developed in other federations, but it has also devised some unique and novel techniques of its own for maintaining the federal fabric of the country.

The constitution-makers deliberately inserted the word 'Union' instead of 'Federalism' in order to indicate two things (a) the Indian Union has not been made as a result of an agreement by the States, (b) the component states cannot secede from the Union. The entire country though divided into different states is considered as an integrated whole. The Indian Federal System provides for a strong centralisation. The Central Government has a more dominant role than the States. In the Concurrent List, both the Centre and States can legislate but the Centra has an upper hand in case of disagreement. The Emergency Provisions in the constitution changes the federal set-up into the unitary system in order to meet the national emergencies effectively. Moreover, under certain special situations, the Parliament is competent to legislate in the exclusive State field.

In spite of the fact that Centre has an upper hand in the Indian Federal System but the State also enjoy a large amount of autonomy in the Indian Constitution. The States are not the mere agents of the Centre. The States derived their powers from the Constitution and not from the Central laws. In normal times, the States possess the exclusive right to legislate with respect

to the State List and the Centre cannot encroach upon the field assigned to States. Moreover, the Centre needs the support and co-operation of the States for amending the federal part of the Constitution. In the words of Dr. B.R. Ambedkar, "*The basic principle of federalism is that the legislative and executive authority is partitioned between the Centre and the States not by any law to be made by the Centre but the Constitution itself. This is what the Constitution does. The States, under our Constitution are in no way dependent upon the Centre for their legislative or executive authority. The Centre and States are co-equal in this matter*."[336]

The Supreme Court in many cases recognized federalism as an essential feature of the Indian Constitution and also tried to interpret the laws whereby the federal structure could be preserved and protected. In the case of '*S.R. Bommai v. Union of India*', the Hon'ble Supreme Court held that federalism is a part of the basic structure of the Constitution.[337] It further stated, "*Neither the relative importance of the legislative entries in Schedule VII, List I and II of the Constitution, nor the fiscal control by the Union per se is decisive to conclude that the Constitution is unitary. The respective legislative powers are traceable to Articles 245 to 254 of the Constitution. The status quo the Constitution is federal in structure and independent in the exercise of legislative and executive power*."[338]

In the case of *NCT Delhi* case, the Supreme Court emphasized upon the concept of collaborative federalism.[339] It stated that the Centre and States should work in a co-operative and harmonious manner for achieving the common objective. It further stated that the concept of federalism is very vital and it is needed in order to protect the interests of different people who come from different backgrounds and cultures.

Moreover, the Supreme Court in the case of '*Union of India v. H.S.Dhillon'* observed that a challenge can be brought to the Parliamentary Laws if it encroaches upon the State List.[340] It specifically states that the Parliamentary Laws can be challenged only on two grounds (i) if

[336] Dr. B.R Ambedkar, CAD, Vol XI, 25th November, 1949.
[337] S.R. Bommai v. Union of India, 1994 SCC (3) 1.
[338] *Ibid.*
[339] State (NCT of Delhi) v. Union of India (2018) 8 SCC 501.
[340] Union Of India v. H.S. Dhillon, 1972 AIR 1061.

the subject is in the State List, (ii) if it violates the fundamental rights.[341] That's why the current Farm Laws have been challenged by the Petitioners on the grounds of encroachment upon the State List and thereby violating the federal principle of the Constitution.

Article 246 provides for the sharing of legislative powers between the Centre and States on the basis of subject-matter. There is a three-fold distribution of legislative powers between the Union and States, made by the three lists in the Seventh Schedule of the Constitution. The Lists are-

1. **Union List (List I):** In this list, the Union has the exclusive power to make laws. It consists of 98 subjects. The subjects mentioned in this list are of national importance. Example- defense, foreign affairs etc.

2. **State List (List II):** In this list, the State has the exclusive power to make laws. It consists of 59 subjects. The subjects mentioned in this list are of regional or local importance. Example- public order, police, agriculture etc.

3. **Concurrent List (List III):** In this list, both the Union and State have the power to make laws. It consists of 52 subjects. Example- Criminal law and procedure, civil procedure etc. In case of conflict between the Central law and State law in the Concurrent List, Central law will prevail. However, the State law can prevail if it gets the Presidential assent after reservation but the Parliament still has the power to override with its law.

The Centre has predominance over the division of legislative relation. As per Article 246, in case of overlapping between List I and List II, List I will prevail. Similarly, if there is overlapping between List I and List III then List I will prevail and List III will be given priority over List II. Moreover, under the residuary powers the Centre has the exclusive power to make laws in any of the matter which is not mentioned in any of the three lists. Under special circumstances, the Parliament has the power to make laws for the State also. These special or extra ordinary circumstances are 'when Rajya Sabha passes a resolution', 'during national emergency', 'when two or more state make a request', 'to implement International agreements' and 'during President's Rule'. But other than these circumstances i.e. in the

[341] *Ibid.*

normal times State has the exclusive power to make laws in List II and Centre cannot encroach upon it.

IS 'AGRICULTURE' AN EXCLUSIVE SUBJECT-MATTER OF THE STATE LIST?

"In the Seventh Schedule of the Indian Constitution, terms relating to 'Agriculture' has occurred in the 15 places. These are-

1. <u>In the Union List</u>-

(i).Entry 82: Taxes on income other than agricultural income.

(ii).Entry 86: Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies, taxes on the capital of companies.

(iii).Entry 87: Estate duty in respect of property other than agricultural land.

(iv).Entry 88: Duties in respect of succession to property other than agricultural land.

2. <u>In the State List</u>-

(i).Entry 14: Agricultural, including agricultural education and research, protection against pests and prevention of plant diseases.

(ii).Entry 18: Land, that is to say, right in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agriculture land, land improvement and agricultural loans; colonization.

(iii).Entry 28: Market and fairs.

(iv).Entry 30: Money-lending and money-lenders; relief of agricultural indebtedness.

(v).Entry 45: Land revenues, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenues.

(vi).Entry 46: Taxes on agricultural income.

(vii).Entry 47: Duties in respect of succession to agricultural land.

(viii).Entry 48: Estate duty in respect of agricultural land.

3. In the Concurrent List-

(i).Entry 6: Transfer of property other than agricultural land.

(ii).Entry 7: Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land.

(iii).Entry 41: Custody, management and disposal of property(including agricultural land) declared by law to be evacuee property." [342]

As can be seen in the above-mentioned entries related to 'Agriculture', the entries in the Union List and the Concurrent List contains the words 'other than' and 'exclusive' with regard to 'agriculture' except in Entry 41 of the Concurrent List. This shows that the constitution-makers wanted to keep the subject-matter related to 'agriculture' out of the jurisdiction of Parliament. The entries in the State List show that the subject-matter of 'agriculture' is in the exclusive domain of States. Moreover, none of the above entries mentioned in the State List is subject to any entry in the Union List or Concurrrent List.

A large section of Indian population depends directly or indirectly on agriculture. Agriculture is a multi-faceted activity. The term 'Agriculture' has been expressively specified and mentioned in the Entry 14 of List II. Moreover, keeping in mind the multi-dimensional nature of 'agriculture', the constitution-makers made entries 15,16,17,18,21,26,27,28,30,32,45 in List II in order to cover all the ancillary or connected matters with regard to 'agriculture'. However, there are certain ancillary or subsidiary matters related to 'agriculture' which have also been included in Union List and Concurrent List. Moreover, some of the agricultural-related ancillary matters in the State List are subject to entries in Union List and Concurrent List. Example- Entry 17,24,26,27 in List II. In these entries which are subject to Union and Concurrent List, states have the power with respect to all mattes in these entries until the Union occupies the respective matter. If Union occupies any matter in these entries then also the States have the power to legislate with respect to other matters in these entries. Moreover, these agricultural-related entries subjected to Union List and Concurrent List can be used by Parliament in case of extra-ordinary situations or in case the matter is expedient in the interest of public at large. But other than these situations, the State Legislatures will possess exclusive power with respect to agriculture and its related matters. A Constitution Bench in the case of

[342] INDIA CONST. Schedule VII, List I, Union List, Entry 82, 86, 87, 88, List II, State List, 14, 18, 28, 30, 45, 46, 47, 48, List III, Concurrent List, 6, 7, 41.

ITC Ltd. v. Agricultural Produce Market Committee(2002) held that, "*The Constitution of India deserves to be interpreted, language permitting, in a manner that it does not whittle down the powers of the State Legislature and preserves the federalism while also upholding the Central supremacy*."[343]

Thus, on considering the holistic perspective and analysing all the three lists, it can be very well stated that 'Agriculture' is a State subject.

To have a more clearer view with regard to 'agriculture' being an exclusive state subject, Constituent Assembly debates related to Entry 14 in List II should be looked at. One of the member of the Constituent Assembly proposed an amendment to reserve the power to make laws related to agriculture exclusively with the Centre. Another member named Sibban Lal Saxena proposed an amendment to include 'agriculture' in List III instead of List II. Both the amendments got negative and Entry 14 was placed in List II. Moreover, one of the members of Drafting Committee named T.T. Krishnamachari countered the above-stated amendments and said that agriculture in India is a vast topic and Centre is not capable to deal it effectively. Moreover, he also said that with regard to the proposed amendments, a meeting between Drafting Committee and State Ministers was held and it was decided that the provinicial autonomy should be preserved with regard to agriculture and resist the further encroachment of the Centre. He further added that the Union could manage the country's agriculture by supporting the State Governments with grants. Therefore, the intention of the constitution-makers is pretty much clear that they want to keep the 'agriculture' within the exclusive domain of the State.

[343] ITC Limited v. Agricultural Produce Market Committee, AIR 2002 SC 852: (2002) 1 SCALE 327.

HISTORICAL BACKGROUND AND INTERPRETATION OF ENTRY 33 OF CONCURRENT LIST

Entry 33 of Concurrent List states that:

"Trade and commerce in, and the production, supply and distribution of, -

(a).the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;

(b).foodstuffs, including edible oilseeds and oils;

(c).cattle fodder, including oilcakes and other concentrates;

(d).raw cotton, whether ginned or unginned, and cotton seed; and

(e).raw jute."[344]

The Central Government seemed to have invoke Entry 33 of List III for enacting the Farm Laws, 2020. Therefore, in order to assess the constitutional validity of the Farm Laws, 2020, a clear picture of Entry 33 of List III is required.

Historical Background of Entry 33 of List III:

The original version of the Constitution contained only one sub-entry in Entry 33 of List III i.e. sub-entry (a). Other sub-entries from (b) to (e) were not there in the Entry 33 of List III. The original version of the Constitution contained Article 369. With the help of this article, Parliament temporarily got the power to make laws on agricultural trade and commerce within a State for a period of five years.[345] This provision was made because at that time there was federal instability in the country and also the issues with regard to food shortages and supplies, so the constituton-makers felt that in order to deal with such instabilities, Parliament should be given the power to manage agricultural trade and commerce within a State for a temporary period of five years.

The article got lapsed in 1954 but the situation with regard to food shortages and supplies seems to persist. So, a need was felt to continue with the same arrangement. Therefore, in 1954 an amendment was made in Entry 33 of List III and four sub-entries were added with a view to give permanence to the above-mentioned provision of Article 369. The Statement of

[344] INDIA CONST. Schedule VII, List III, Concurrent List, Entry 33.
[345] INDIA CONST. art. 369, cl. a.

Objects and Reasons of the Third Amendment states that;

"Entry 33 of the Concurrent List enabled Parliament to legislate in respect of industries declared to be under Union control. In addition, Parliament was empowered by article 369, for a period of five years, to legislate in respect of certain specified essential commodities. It was not considered advisable that after article 369 lapsed to control the production, supply and distribution of some of these essential commodities. The bill seeks to amplify Entry 33 of the Concurrent List accordingly."[346]

Moreover, the Minister for Commerce and Industry T.T. Krishnamachari in his opening speech clarified that amendment was needed because many states in India were deficit in food production and the Union had to protect the interests of weaker states. Therefore, it can be very well stated that the intention of the Union while amending Entry 33 of List III was only for meeting the exigent circumstances and the scarcity of essential articles. The Union never intended to use the amended entry in the general scenario.

What to be included in foodstuffs:

The term "foodstuffs" does not only mean the final food product that will be consumed but it also comprises of the raw food articles which after processing be consumed as food by human beings. The Hon'ble Supreme Court in the case of '*Nathuni v. State of West Bengal'* held that wheat, wheat products, paddy, sugar and sugarcane would fall under the definition of "foodstuffs".[347]

Definition of Industry:

The sub-entry (a) of Entry 33 of List III talks about 'industry', therefore it is essential to understand the definition of 'industry'-

The Hon'ble Supreme Court in the case of '*Tika Ramji v. State of Uttar Pradesh'* had defined the word 'industry'.[348] As per the court, the expression 'industry' includes the process of manufacture or production and does not include the raw materials which are used in the

[346] INDIA CONST. Schedule VII, List III, Concurrent List, Entry 33, *amended by* The Constitution (Third Amendment) Act, 1954.
[347] Nathuni v. State of West Bengal, AIR 1964 Calcutta 279.
[348] Tika Ramji v. State of Uttar Pradesh, AIR 1956 SC 676.

industry or the distribution of the products in the industry.[349] The court further said that raw materials as goods would be included in Entry 27 of List II and the products of the industry would also be included in Entry 27 of List II unless that products are of the controlled industry which would then fall under Entry 33 of List III.[350]

The same interpretation was carried forward by the Hon'ble Supreme Court in '*ITC Ltd. v. Agricultural Produce Marketing Committee (2002)*', where the court held that the State Legislature is empowered to levy market fee on the sale of raw tobacco in a market area as it is a pre-manufacture activity(i.e. raw materials).[351]

DOCTRINE OF PITH AND SUBSTANCE VIS-À-VIS THE FARM LAWS

About Doctrine of Pith and Substance:

Parliament or the State Legislature should act within the domain assigned to them. It should not encroach upon the domain of the other. Any law made which encroaches upon the domain of the other is declared as invalid. If a subject is exclusively in the State List then the power to legislate in that subject exclusively vests in the State Legislature. But if it also falls under List I then power is with the Union. Similarly, if it is in List III then the power deemed to belong to the Centre.

But such a strict separation of lists would limit the powers of legislatures and every law would deem to be invalid on the ground that it is encroaching upon other's domain. Therefore, for adjudging whether any particular law is within the domain of one legislature or the other, the courts apply the 'Doctrine of Pith and Substance'.

As per this doctrine, the pith and substance(i.e. the true nature and character) of legislation has to be ascertained in order to determine the List to which the impugned legislation belongs to. The Courts for ascertaining the Pith and Substance of the legislation giver regard to (i). the

[349] *Ibid.*
[350] *Ibid.*
[351] *Ibid.*

enactment as a whole, (ii). to its main objects, (iii). to the scope and effects of its provisions. The rule of pith and substance saves the law which impinges upon the domain of the other incidentally. Thus, if the substance of the enactment falls in Union List but incidentally encroaches upon State List then the law will not be declared invalid.

The Supreme Court in a number of cases applied the Doctrine of Pith and Substance. Some of these are-

1. In the case of '*State of Bombay v. F.N. Balsara'*, the Bombay Prohibition Act was challenged on the ground that the prohibition of liquors on the borders was the subject-matter of the Union.[352] The Court applied the rule of pith and substance and upheld the Act by stating that the matter is in the State List though it was impacting the import of liquor.[353]

2. In the case of '*Prafulla Kumar Mukherjee v. Bank of Khulna'*, the Bengal Money Lenders Act was in question.[354] The Act was passed to scale down the debts which have been owed by agriculturists and it was challenged on the ground that being a State Legislation it it affected the promissory notes which is a central subject-matter. The Court while applying the rule of pith and substance stated that the law is valid as it dealt with money-lenders and lending' which is under State List and it incidentally encroaches upon 'promissory notes' which is a central subject-matter.

3. In the case of '*State of Rajasthan v. Shri G Chawla'*, the Ajmer (Sound Amplifiers Control) Act, 1952 which is enacted by the State Legislature was challenged.[355] The Judicial Commissioner of Ajmer held that the Act is invalid as it fell under Entry 31 of List I and not under Entry 6 of List II.[356] The Supreme Court disagreed with the decision of Judicial Commissioner and held the legislation as valid. It stated that considering the pith and substance of the legislation, the State Legislature was well within its power to legislate as the main issue of amplifiers (related to health and tranquillity) was within the domain of State and incidentally encroaches upon the Union List.

[352] State of Bombay v. F.N. Balsara, AIR 1951 SC 318.
[353] *Ibid.*
[354] Prafulla Kumar v. Bank of Commerce, Khulna, 74 I.A. 23.
[355] State of Rajasthan v. Shri G Chawla, AIR 1959 SC 544.
[356] *Ibid.*

Pith and Substance of Farm Laws:

The position of the Entry 33 of List III and the subject-matter of 'agriculture' has been extensively discussed in the previous chapters. The agriculture and its related matters falls under the State List, though it also incidentally falls under Union List and Concurrent List. Entry 14 of List II contains the word 'agriculture' in the general sense and therefore should be given widest possible interpretation extending to all ancillary and subsidiary matters which can reasonably be comprehended within it.

Entry 33 of List III covers some of the incidental matters related to agriculture but on considering the historical background with respect to sub-entries (b) to (e) of Entry 33 of List III it can be very well stated that Entry 33 of list III should be resorted in limited matters of agriculture only under special circumstances and not under ordinary circumstances.

The constitutionality of the three farm laws have been challenged on these broad grounds whereas the Central Government thinks that it is well within its competence to enact the farm legislations. The main argument from the side of Central Government is that 'trade and commerce and the production, supply and distribution' are under Entry 33 of List III and moreover, Entry 26 and 27 of List II are subject to Entry 33 of List III. Therefore, they believe that they have the competence to enact farm laws through the route of 'trade and commerce'. That's why for ascertaining the constitutionality of the Farm Laws, it is important to analyse the pith and substance of these laws. Let's analyse the various areas of the Farm Laws:

(a).**Definition of 'foodstuffs' given in Acts**-

Section 2(c) of 'The Farmers' Produce Trade and Commerce (Promotion and Facilitation) Act, 2020 talks about farmers' produce. It states that:

"farmers' produce means-

(i).foodstuffs including cereals like wheat, rice or other coarse grains, pulses, edible oilseeds, oils, vegetables, fruits, nuts, spices, sugarcane and products of poultry, piggery, goatery, fishery and dairy intended for human consumption in its natural or processed form;

(ii).cattle fodder including oilcakes and other concentrates; and

(iii).raw cotton whether ginned or unginned, cotton seeds and raw jute;"[357]

[357] The Farmers' Produce Trade And Commerce (Promotion And Facilitation) Act, 2020, § 2(c), No. 21, Acts of Parliament, 2020(India).

The same definition of farmers produce is given in Section 2(h) of 'The Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Act, 2020.[358]

Thus, definition of 'farmers' produce' has given rise to certain severe contentions. This definition has tried to equate foodstuffs with agricultural produce. If such a wide interpretation would be given to 'foodstuffs' then the powers listed so elaborately in State List with respect to agriculture would become redundant. The term 'fisheries' is within the exclusive domain of States under Entry 21 of List II. Moreover, the terms 'poultry, piggery, goaetry, dairy' are covered under Entry 15 of List II. Therefore, such enlargement of the definition of foodstuffs would result in the encroachment upon the State List.

(b).**Issue of making these farm laws through the route of trade and commerce by invoking Entry 33 of List III**:

It seemed that the Centre has enacted these farm laws through the route of trade and commerce of agricultural produce. Entry 33 of List III talks about 'trade and commerce and the production, supply and distribution'.[359] Moreover, the Entry 26(deals with Trade and Commerce within the State) and Entry 27(deals with production, supply and distribution of goods) of State List are subject to Entry 33 of List III. Therefore, the Centre could argue that it is well within its powers to legislate on contract farming, intra and inter-state trade and prohibit states from imposing fees/cesses outside the APMC areas.

But, the purview of Entry 33 of List III in 'trade and commerce' with respect to agriculture is limited. The raw materials have been specifically excluded from the definition of 'industry' in sub-entry (a) of Entry 33 of List III. The items of agricultural produce have been specifically given in sub-entries (b) to (e) in Entry 33 of List III. Moreover, it has been previously discussed that enlarging the scope of 'foodstuffs' without following the due procedure specified in the Constitution(i.e. in the form of constitutional amendment and ratification of atleast on-half of the States) would result in encroachment upon the domain of the State and

[358] The Farmers (Empowerment And Protection) Agreement On Price Assurance And Farm Services Act, 2020, § 2(h), No. 20, Acts of Parliament, 2020(India).
[359] INDIA CONST. Schedule VII, List III, Concurrent List, Entry 33.

make the State List redundant.

The committee headed by Ashok Dalwai and Ramesh Chand suggested that 'agricultural market' to be inserted under the Concurrent List. Therefore, it is implicit from the recommendation that 'foodstuffs' in Entry 33 of List III does not empower Parliament to enact these laws and Entry 33 of List III only has the limited purview of trade and commerce with respect to agriculture. On March 27, 2018, the government told the Lok Sabha that it has no intention of including 'agricultural market' in the List III.

Moreover, in the previous chapter, the historical background of Entry 33 of List III showed the conditions under which sub-entries (b) to (e) were inserted. Therefore, the entry 33 of List III should only be resorted under special circumstances and not under ordinary circumstances. At present, there are no special circumstances related to food supplies which forced the Central Government to enact these laws.

One of the law named 'The Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Act, 2020[360] talks about contract farming. This law also seemed to be made through the route of trade and commerce by invoking Entry 33 of List III. Entry 33 of List III does not contain a word about contract farming. Such a wide interpretation of Entry 33 of List III would dismantle the powers related to agriculture given in List II. Moreover, prior to the enactment of the legislation, many State Governments within the powers given under List II have already laid down provisions related to contract farming in their APMC Acts. This shows that state governments within their jurisdiction possess the competency to enact contract farming laws.

One of the most serious problem of enacting the farm laws though the route of trade and commerce is that just like education '**farming is also considered as an occupation and not trade and commerce**'. In my opinion, seeing farming as a trade and commerce would be incorrect. The farmers are exercising their 'Right to Life and Livelihood' in order to realize the 'Right to Life' of all citizens by producing food which is the most basic right of 'Right to Life and Personal Liberty'.

[360] *Ibid.*

(c). **Overriding Effect of Farm Laws over APMC Act**:

Section 14 of 'The Farmers' Produce Trade and Commerce (Promotion and Facilitation) Act, 2020 gave the overriding effect to the farm laws over the inconsistent provisions of the State APMC laws.[361]

Agriculture and its related-matters are the subject-matter of List II. States within their competence have framed State APMC laws. Entry 14, 26, 28 empowers the State Legislatures to frame APMC laws. Therefore, giving an overriding effect to Farm Laws over the State APMC Laws would result in encroachment upon the State List.

(d).**Constitutionality of 'The Essential Commodities(Amendment) Act, 2020**:

As per my opinion this Act is constitutionally valid and it did not encroach upon the State List. The Centre is competent to make this law under Entry 33 of List III. Though farmers have certain contentions with this law but it cannot be challenged on the ground of constitutionality as the policy-making function rests with Parliament.

Therefore, after analysing the pith and substance of the three farm laws, I can say that the laws named; 'The Farmers Produce Trade and Commerce(Promotion and Facilitation) Act, 2020' and 'The Farmers(Empowerment and Protection) Agreement on Price Assurance and Farm Services' are invalid as the pith and substance of these laws showed that Centre doesn't have the competence to enact these laws and by enacting these laws it has encroached upon the List II whereas 'The Essential Commodities (Amendment) Act, 2020' is valid as the pith and substance of this laws showed that Centre has the power to enact this law.

[361] The Farmers' Produce Trade and Commerce (Promotion And Facilitation) Act, 2020, § 14, No. 21, Acts of Parliament, 2020(India).

ANALYSIS OF FARM LAWS VIS-À-VIS DOCTRINE OF COLOURABLE LEGISLATION

About Doctrine of Colourable Legislation

The doctrine of colourable legislation is based on Latin maxim which meant that what cannot be done directly cannot also be done indirectly. The applicability of this doctrine arises when a legislature seeks to do something indirectly when it cannot do it in a direct manner. This doctrine tests the competency of the Legislature to enact a particular legislation which is in question.

The doctrine of colourable legislation does not check the bona fide or mala fide on the part of the legislature while making the legislation. Thus, the competency of the legislature determines the validity of the legislation and not the motive with which the particular legislation has been made. The Parliament and the State Legislatures have to act within their domain of powers as specified by the Constitution. Sometimes while making legislation, the legislature outreaches its limits as specified by the Constitution. That outreach may be patent, manifest or direct or may be disguised, covert or indirect. The doctrine of colourable legislation is applied to the latter class of cases i.e. where the outreach is disguised, covert or indirect. The basic idea is that when legislature while passing any legislation purport to act within its sphere of power but the substance of the legislation and the reality shows that it has overreached its powers by resorting to disguised, indirect or covert means.
A colourable legislation can better be described as, "It is only when a legislature having no power to legislate frames a legislation so camouflaging the same as to make it appear to fall within its competence, the legislation enacted may be regarded as colourable legislation."

The colourable legislation is a fraud on the Constitution. One of the landmark case of Hon'ble Supreme Court with regard to colourable legislation is '*State of Bihar v. Kameshwar Singh'*.[362] In this case, the validity of Bihar Land Reforms Act, 1950 has been challenged. This law dealt with the abolition of landlord system, providing the payment of compensation to landlord on the basis of income which accrues to him on basis of rent. The arrears of rent which due to the landlord prior to the date of acquisition were to be vested to the State and half of these arrears were to be given to the landlord as compensation. The court said that the

[362] State of Bihar v. Kameshwar, 1952 1 SCR 889.

Act is a bad law on ground of colourable legislation and declared it as void under Entry 42 of List III. The Court further said that the Act doesn't provide any compensation; it takes the whole and returns the half which in reality means nothing more than taking half and returning nothing.

Analysis of Farm Laws, 2020 With Respect To Doctrine of Colourable Legislation:

The pith and substance of the Farm Laws, 2020 discussed in the previous chapter indicates that these farm laws are within the legislative domain of the State and the Centre is incompetent to legislate these farm laws. The analysis of Entry 33 of List III and farm laws showed that though 'Trade and Commerce' is in the Concurrent List but the farm laws are related to 'agriculture' which is out of the legislative domain of the Union. The farm laws incidentally touch upon the Entry 33 of List III. There are various provisions in the farm laws which have no connection with Entry 33 of List III. One such example o this is the inclusion of provisions related to 'market' in the farm laws. Entry 28 of List II specifically deals with 'markets' and Entry 33 of List III doesn't include the term 'markets'. That's why it can be said that the Centre has enacted these farm laws by using an indirect or disguised approach. One of the arguments from the Centre side is that the farm laws are beneficial for the economic upliftment of the farmers. This argument of the Centre does not stand on the test of Doctrine of Colourable Legislation as the intention with which the legislation has been made is irrelevant in determining the colourability of the legislation.

Therefore as per my opinion, the farm laws are invalid as they did not stand upon the test of 'Doctrine of Colourable Legislation'.

SUGGESTIONS AND CONCLUSION

With regard to all the previous discussions, the author is of the opinion that the two laws named 'Farmers Produce Trade and Commerce (Promotion and Facilitation) Act, 2020' and 'Farmers(Empowerment and Protection) Agreement on Price Assurance and Farm Services Act, 2020' are unconstitutional. These farm laws come under the ambit of 'Agriculture' which is the exclusive subject-matter of State List. The Centre indirectly through the route of 'trade and commerce' by invoking Entry 33 of List III have enacted these legislations. Such an indirect approach adopted by the Centre to pass these laws violates the spirit of Constitution as well as the spirit of Federalism. Moreover, such a move severely affects the State powers which have been listed so elaborately in the Constitution. There is no doubt that Parliament is superior to States in many matters but that does not give them the legitimacy to encroach upon the exclusive matters which have been listed in the State List.

The Courts in many cases have elaborated on the concept of cooperative federalism. The Centre and States should work in a harmonious manner for achieving the objectives. The Centre should not concentrate the powers at its own level and it's the duty of the Centre to provide breathing space to State in order to uplift the principle of cooperative federalism.

I am of the opinion that the Centre should only act as an assisting and advising body to the State Governments with respect to matters related to 'Agriculture'. I also feel that the scope of Entry 33 of List III should be reviewed. The scope of the Entry 33 of List III should be determined on the basis of the conditions under which the Entry has been framed. For uplifting the principle of federalism, a judicial intervention is necessary to prevent the misuse of Entry 33 of List II.