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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.

The editorial Board has been constituted keeping in view of maximum participation, collaboration, circulation for the exchange of views and contribution to academic world, society, policy makers and industry. In the era of globalisation and on-line /information technology, this e-journal is a need, which the Centre of the CNLU is making efforts in the best possible way. Hence I would like to appeal to concerned to actively participate for making this journal of Repute in quality, standard citation, research methodology, SCOPUS Indexation. Wishing all the members of editorial board and stake holders to Cooperate and make it a journal of high repute in quality, standard and integrity. Wishing all the Best to all and CIRF Team.

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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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1951 REFUGEE CONVENTION: DEFINITION CRISIS OF THE TERM 'REFUGEE'

Saheli Chakraborty

ABSTRACT

"Defining refugees may appear an unworthy exercise in legalism and semantics, obstructing a prompt response to the needs of people in distress"[1]

The concept of migration and refugee has evolved as per the need of the times. From the times of Simpson, in 1938 refugee as one who sought refuge in a territory other than that in which he was formerly resident as a result of political events which rendered his continued residence in his former territory impossible of intolerable[2] *it has come down to recognising race, religion, nationality, members of a particular social group other than political opinion for seeking 'Refugee'.. Yet, the convention falls short and sometimes is the cause of discrimination, with reference to considering any individual or a group of people under the ambit of Refugees. The fact that 'persecution' is not legally defined has presented a problem for some and been of legal significance to others*[3]*. The 1951 Convention, primarily with reference to the preamble, provisions and interpretation speaks about it being executed in a non-discriminatory manner. But it's effect and execution has been in conformity with the 'adult male' standards*[4]*.This paper*

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[1] Guy S. Goodwin-Gill, The Refugee in International Law, 2nd Edition.

[2] Simpson, J.H, Refugees – A preliminary report of a Survey (1938)

[3] Refugee Protection in International Law, UNHCR's Global Consultations on International Protection, Edited by Erika Feller, Volker Turk and Frances Nicholson.

[4] Alice Edwards, Age and Gender Dimension in International Refugee Law

is a doctrinal study of the Article 1 of the Refugee Convention meeting with a definition crisis of the term "Refugee"

Keywords: *Persecution, Climate Refugees, Gender-Age Refugees,*

INTRODUCTION

The significant instrument pertaining about the Refugee Regime is The Convention Relation to the status of Refugees, 1951 (hereafter mentioned as "the 1951 Convention"). But, much before this instrument has been formulated, complimented by the statute of office of the United Nations High Commissioner for Refugees 1950, the refugee regime finds its source from 1907 Hague Convention with respecting the rights and duties of neutral powers and persons in case of war on land.[5]This Hague Convention speaks in length about non refoulment with reference to the persons in case of war on land. Non refoulement is the one of the primary feature of the protection of refugees, which, could be traced back to regional instruments like 'Arrangements with Regard to the Issue of Identity Certificates to Russian and Armenian Refugees', supplementing and amending the arrangements with regard to the issue of certificates of identity to Russian Refugees[6]. Similar structure was followed in case of refugees coming from Germany, codified by 'Provisional Arrangements Concerning the Status of Refugees Coming from Germany, 1938'.

In the Bermuda Conference in 1943 expanded mandate, that was discussed in Evian in 1938 as have been discussed above, and included '*all persons, wherever they maybe, who, as a result of events in Europe, have had to leave, or may have to leave, their country of residence because of the danger in their lives or liberties on account of their race, religion, or political benefits*[7]'

Another important organisation was formed in 1943 which is United Nations Relief and

[5] *Supra* Note 4
[6] *ibid*
[7] Supra Note 1

Rehabilitation Administration whose primary function was providing assistance to civilian nationals of the allied nations and to displace persons in liberated countries, and with the repatriation and return of prisoners of war. It was not authorised to resettle the displaced or to deal with or find solutions for refugees, considered as those who, 'for any reason, definitely cannot return to their homes, or have no homes to return to, or no longer enjoy the protection of the Governments.[8]'

Furthermore, Charter of the International Military Tribunal, in agreement for the prosecution and Punishment of the Major War Criminals of the European Axis, or as known as London Agreement, 1945 spoke at length about non refolument before the United Nations came into existence.

In Constitution of International Refugee Organisation, 'Refugee' included victims of Nazi, Fascist or Quisling regimes, certain persons of Jewish origin, or foreigners or stateless persons who had been victims of persecution, or those who had been referred as refugees before world war – II. Further the organisation had the power to assist the displaced persons[9].

After the formation of the United Nations, a close nexus of the International Refugee regime and the International Human Rights regime can be seen. Universal Declaration of the Human Rights, 1948 which is considered as the foundation of the recognition of International Human Rights, have addressed in Article 14, about everyone having the right to seek and enjoy in other countries asylum from persecution. Similarly, the 1951 Convention in it's preamble considers the affirmed principles of the universal declaration of human rights, which speaks about fundamental rights and freedoms without discrimination. There is close nexus between the two regimes, which is complimentary to one another.

Hence, we can see, the International Refugee Regime cannot be studied in isolation, and is interdependent largely on other regimes, namely International Human rights and the International Humanitarian Law. Adding to this arguments, there are various international human rights instruments who speak about various facets of International Refugee Law. Convention on Rights of Children, 1989 (here in after referred as 1989 Convention) which is

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[8] Supra *Note* 1
[9] *ibid*

the chief international convention addressing various issues of children, have touched upon children who are refugee, in Article 22, which says that "State Parties shall take appropriate measures to ensure that child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present convention and in other international human rights or humanitarian instruments to which the states are parties".

This Article, highlights primarily on attainment of the rights mentioned in the 1989 convention, even by the child who is seeking for refugees. This Article can be read with Article 2 of the same convention, which speaks about the non-discrimination clause, of each child being in the jurisdiction of any state, is not to be discriminated of any kind, irrespective of his or parent's nationality. Again, this Article, encompasses the children who could be coming from different origin, race, nationality, but, does not give any exclusive right to receive refugee status, without any discrimination. These two above mentioned Articles, are rights run parallel to that the International Refugee instruments, addressing the specific people, such as children, from the scope of human rights. We need to consider that, the vulnerable groups like Children, women, etc. are the most affected group of people, during any gross human rights infringing event.

Therefore, it is imperative to address the issue of women, with reference to Refugee Regime. Article 1 of Convention on the Elimination of all forms of Discrimination against Women, describing " Discrimination against women" includes all those distinction, restrictions, made on basis of sex, which can "nullify the recognition, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field[10]" . If this article is read in consonance with the 1951 Convention, definition clause of Refugee, we can interpret that even though gender is not one of the clause to receive refugee status, yet, it cannot be the reason for denying refugee status as well. To elaborate further, Women cannot be denied refugee status, as that shall come under purview of discrimination against women, by nullifying a recognition of fundamental civil and political rights, just on basis of sex.

[10] Basic International Legal Documents on Refugees, UNHCR, Sixth Edition, December 2005

There are three more conventions, which are significant instruments of International Human Rights, but they speak about Non Refoulment, which forms the fulcrum of the International Refugee Law. These conventions are International Covenant on Civil and Political Rights (ICCPR) International Covenant on Economic Social and Cultural Rights (ICESCR) and the Convention against Torture (CAT)

Refugee, a specific class of migration of people, inherited from the time of evolution of humans, yet, in the most formal and legal sense, the refugee crisis occurred mostly in the 20th Century. This crisis, changed the global map during the time of decolonisation. Even though, it's the municipal law, in conformity with the 1951 convention, runs the refugees, yet, refugees all across the boarders became an international issue. And, mostly the gross refugee eruptions occurred much after 1951. This is where, the regional conventions and bodies have been instrumental and influential to combat the poorly drafted 1951 convention, which was mostly criticised for being Euro Centric and having definitional crisis.

OAU Convention Governing the specific Aspects of Refugee Problems in Africa, adopted in 1969, during the period of decolonisation in Africa. This is a regional instrument, covering states of African Unity, broadens the scope of 'Refugee'. Article 1, Paragraph 1 defines refugee just as it has been put down in Article 1 of the 1951 Convention, but Paragraph 2 adds that 'refugee' shall also *apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality*.[11] This Article is not followed with any definition of 'external aggression', "disturbing public order", leaving the interpretation on the states to decipher. But, it primarily is quite about internal aggression or disturbances, and have mentioned of external aggression and foreign domination. On analysing this Article, we can understand, it comes from the scope of the states being colonised for ages, and can result into refugees, which have not been mentioned or addressed in the 1951 Convention.

The concept of Refugee was treated as that of a group of people, effected by any mass exodus.

[11] Supra *Note* 1

There was paucity or no mention of any criteria, what is to be referred to consider the group as that of a refugee. That, is the synonymous to recognising any such person who is forcefully displaced, for any such reasons, is a refugee[12]. Primarily, the individual screening also becomes impractical where there is mass influx of people[13]. The first time, the term Refugee was defined was in the Arrangement Relating to the Issue of identity Certificates to Russian and Armenian Refugees[14]. It had elaborated, on Russian as: *"Any person of Russian origin (e] who does not enjoy or who no longer enjoys the protection of the Government of the Union of Socialist Soviet Republics and who has not acquired another nationality[15]*". And, further it defined Armenian as "*Any person of Armenian origin formerly a subject of the Ottoman Empire who does nor enjoy or who no longer enjoys the protection of the Government of the Turkish Republic and who has not acquired another nationality*"[16] This is a special Document, which only deals with few Refugees from specific nationality. It was later extended to Refugees of several other nationalities[17]. Even though it is limited to specific nationalities, it has helped to develop the present day definition of "Refugee" by including the principle of "Not enjoying Protection of government" as a criteria for any person to seek refuge. This is the landmark, from where the conditions started being put, to determine any individual as a "Refugee". By virtue of this definition, there is no scope for protection of the Statelessness people.

THE TERM "REFUGEES" IN THE 1951 CONVENTION ON REFUGEES

The basic foundation of the definition of "Refugees" lies in the term "Well-founded fear". As discussed in the previous section, the term "Refugee" has undergone morphosis with the need of the time. But, the definitions prior to 1951 was largely based on the background of the people, to recognise them as "Refugees" rather than analysing the situation in which such

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[12] B. Sen, Protection of Refugees: Bangkok Principles and After, Journal of the Indian Law Institute , APRIL-JUNE 1992, Vol. 34, No. 2 (APRILJUNE 1992), pp. 187-217

[13] Andreas Zimmermann, The 1951 Convention Relating to the status of Refugees and it's 1967 protocols: A Commentary <https://opil.ouplaw.com/view/10.1093/actrade/9780199542512.001.0001/actrade-9780199542512>

[14] Certificates to Russian and Armenian Refugees Supplementing and Amending the Previous Arrangements Dated July 5th 1922, and May 31st 1924 (1926 Arrangement) of 12 May 1926

[15] ibid

[16] Supra Note 6

[17] The Arrangement Concerning the Extension to Other Categories of Refugees OF Certain measures taken in favour of Russian and Armenian Refugees of 30 June 1928

background could be the hindrance. Scholar Andrew Zimmerman, stated that "term 'refugee' was exclusively limited to origins, for which the scope of the term was restricted to certain groups of people only[18].

Term "Refugees" in the 1951 Convention on Refugees.

The concept of "Well-founded fear" was not very well founded in the course of development of the Regime. It was the IRO Constitution that had mentioned the "reasonable grounds of persecution"[19] for the first time, which later was the inspiration for this provision of the 1951 Refugee Convention, along with the representative of the United Kingdom introducing the notion for inclusion of "Well Founded Fear". Having a historical background, yet development of this term was largely interpreted by the executive. From the Eligibility Officer of the era of IRO[20] to today's government and their agencies taking the responsibility of drawing the criteria to meet the term "Well-founded fear".

The literal interpretation of the term "Well Founded fear" in French would mean being afraid of[21], and the English translation[22] of it means: "The emotion of pain or uneasiness caused by the sense of impending danger, or by the prospect of some possible evil". Therefore, in both the interpretations, the edifice of fear remains constant, and necessary. The magnitude of this fear is the crux of the provision. So as to say, the fear is so high, that it seeks for granting International protection. Interestingly, this regime doesn't hold account of the states where the refugee crisis has been created or have any provisions for the states to forbid or reduce or take any actions that can create refugees. Rather, the refugee protection convention deals entirely and holds other states responsible.

Since, there is no definition or specificity provided by the provision, it leaves entirely on the interpretation by the states, on their convenience .One of such example is the conflict of timeline of "Persecution" to be referred as well founded in nature. The subjective and the Objective approach are the two methods by which the states adjudge whether the fear of

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[18] Andreas Zimmermann, The 1951 Convention Relating to the status of Refugees and it's 1967 protocols: A Commentary
<https://opil.ouplaw.com/view/10.1093/actrade/9780199542512.001.0001/actrade-9780199542512>

[19] IRO Constitution of 15 December 1946

[20] IRO, Manual of Eligibility, cited in Cox, Brooklyn JIL 10 (1984), pp. 333

[21] Hathway, MJIL 26 (2005), pp. 505

[22] Oxford Dictionary (https://www.oxfordlearnersdictionaries.com/definition/english/well-founded)

persecution “well founded” or not[23]. In saying so, the Subjective Approach is based from the perspective of the individual, and concerned with the plight of such person only. Whereas, the Objective approach tries to give equal weigh to both, the individual plight as well, the circumstance of the state, or the nation of the person and draw the nexus between the reasons of the individual plight with that of the circumstance of the state.

Till the 1951 Refugee Convention, the term “Refugee” was built around the Subjective approach, and it was only based on the background, origin or causes of the plight of the individual. But, with introduction of the “Well founded” the concept is not the same. As, have been mentioned by the Ad Hoc Committee of Statelessness and Related Problems persons, as: *“'a person has either been actually a victim of persecution or can show good reason why be fears persecution”*[24] This statement is a reflection of the Objective approach, giving relevance to the circumstance of the state or the situation in which the person was in.

Apart from the perspective of judgement for recognising a person as a “Refugee”, there is void of certainty with regard to the timeline of persecution, to be referred as “well founded[25]”. Addressing the above mentioned statement of the Ad Hoc Committee of Statelessness and Related Problems persons[26], the person who is a victim of persecution, is analysed basis of his past experience representing the Subjective approach, whereas there is importance given the Objective approach as well, to judge the future risk of persecution. It can be then stated that “Well-founded fear of persecution” includes people who are the victim of past, as well as people who can show the reasonable grounds, as to why there is a risk or fear of persecution[27].

With reference to the debate about Subjective and the Objective approach, there is no constant practise followed throughout the world, even for those states who are the contracting state parties to this Convention. This is a state of concern, as some people by the benefit of positive approach and determination is easily recognise or provided the Refugee Status. On the other

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[23] statement of Robinson (Israel), Ad Hoc Committee on Statelessness and Rélated Problems, UN Doc. E/AC.32/SR.18 (1950), pp. 4-5

[24] Andreas Zimmermann, The 1951 Convention Relating to the status of Refugees and it’s 1967 protocols: A Commentary <https://opil.ouplaw.com/view/10.1093/actrade/9780199542512.001.0001/actrade-9780199542512>

[25] Ad Hoc Committee on Statelessness and Related Problemis, Report, UN Docs. E/1618 and E/AC.32/5 (1950), p. 39

[26] statement of Henkin (US), Ad Hoc Committee.on Statelessness and Related Problems, UN Doc. E/AC.32/SR. 18 (1950), p. 5

[27] ibid

hand, the people who are victim of persecution or there lies reasonable grounds for the fear of persecution, is in a disadvantageous situation[28] by not being provided the refugee status on the ground of lacking enough evidence. The matter of evidence is largely dependent on which approach is applied. Therefore, two people of similar condition could meet with two different destiny regarding being granted the refugee status, due to the non-uniform pattern of analysing the refugee applications.

Taking this argument of the approach further, in some cases, countries have chosen not to abide to any one approach but follow the combination of both the approach, which is Subjective and Objective Approach. Such combined approaches create a situation of juxtapose, where the approaches become indispensable of one another[29]. Not being able to differentiated from one another, the Objective approach is reduced to objective evidence, leaving the majority of the attention of the Subjective Approach. UNHCR had taken the proactive step in conforming to such combined approach as the interpretation of "Well Founded Fear[30]"

The most difficult part in such combined approach is to weigh the aspects differently. The EU Qualification Directive addresses "persecution" from the perspective of Subjective approach in order to understand the sphere of 'violation of human rights[31]'. It can therefore be said that, the states have taken up approach based on the convenience, due the ambiguity regarding the approach of interpretation of the term, and the approach directly impacts on the people being the granted the refugee status.

Term "Persecution" in the 1951 Convention on Refugees.

The concept of 'persecution' has undergone changes with the development of this regime. Largely, persecution refers to the systematic human rights violation[32]. In consideration of such broad outline of the word, its significant to state, that it only considers the general human characteristics. Human Rights, as much as the capacity to address as violation of the same, is

[28] Hathway, MJIL 26 (2005), pp. 505
[29] Cameron, ILRJ 20 (2008), pp 567-585
[30] UNHCR, Handbook on Procedures, paras. 37-50
[31] Andreas Zimmermann, The 1951 Convention Relating to the status of Refugees and it's 1967 protocols: A Commentary<https://opil.ouplaw.com/view/10.1093/actrade/9780199542512.001.0001/actrade-9780199542512>
[32] UNHCR, Handbook on Procedures, para 82

dependent from human to human. That is to say, the tenacity, cultural and economical difference and other factors play a major role, for the similar experience to have different reaction, in form of identifying whether its human rights violation or not. That brings back the debate of Subjective and Objective approach of analyse the human rights violation of the individual.

The broad definition of Persecution, that is systematic human rights violation, is not insufficient only on the grounds lack of the specificity of the rights, but it lacks reflection of the duration to be considered as systematic violation. The issue of "duration" has a major role to play to differentiate one act in isolation as compared to the acts which have continued over a long period of time. The question in this regard, also follows, whether both the act of violation, of which is for a short duration, and one continued over a broad period of time, stand in the same pedestal for being granted the refugee status?

To answer, any act insolation or a single commission of human rights violation, is not persecution per se. An exception to such general notion, is Torture[33]. But, that is not a general or universal criteria of the time duration being referred to, during analysing the applications for the Refugee Status. But, the importance of duration is not with regard to identifying, whether it was significant enough[34]. But, it should act as an objective evidence, during analysing the applications. With regard to those acts which have continued over a period of time, and cannot be limited to one single experience, is in itself an objective evidence. It is to show the persecution, inform of infringement of rights have taken place, but there is also nexus between such act and the well-founded fear in the future. To elaborate on this circumstance, case analysis of a landmark case[35] is extremely significant. In the case of this is a case of 1987, when most parts of south Turkey was under Emergency Rule. The petitioner, who is a Turkish national[36] and a 17 year old girl had complained that she has been subjected to ill treatment and have been raped, by an official, while she was detained for interrogation. There was procedure of investigation conducted including medical examination. The petitioner had contended that the act of the state not being able to safeguard her rights as well defending such personnel, has infringed her rights under Article 3,6,13,25 of the United

[33] Supra Note 1
[34] Grahl Madesn, Status, vol. I,p.192
[35] Supra Note 1
[36] ibid

Nations Convention against torture and other cruel, inhuman or degrading treatment or punishment. Where, the European court of Human Rights held it's only violative of Article 3 and 13 of the Convention. This case in significant to understand the ambit of the convention as well as the parallel development of International Human Rights, where such acts of rape amounts to torture as per the Conventions.

Now, that the duration and the nexus between the act and the fear is drawn. The question about "Human Rights" is to be interpreted in the perspective of it being referred as currency for analysing 'persecution'. Human Rights doesn't have a strait jacket definition, and further not an exhaustive one as well. It depends on the people to perceive it. Several International Human Rights instruments have been drawn and have addressed several lacunas of the societal practises, and there are rights for education, to religion, to maintaining ones culture.

In order to under the scope of rights, one has to be dependent on the International Human Rights instruments, like International Covenant on Civil and Political Rights, 1966 (Hereafter referred as ICCPR). ICCPR makes crucial differentiation amongst the rights, under two categories: (1) Derogable and (2) Non-Derogable. This states that, some rights are superior to others, for which there cannot be any restriction, infringement. We can extend such contention and state that, these Non Derogable rights, being imperishable, are to be referred to, for granting Refugee status.

i. Right to Life and Right to Livelihood.

Right to life is one of the broadest right[37] that is a cumulative of all the rights that make life of person worth living. Such rights just don't limit to right to integrity, livelihood, etc. but is extended against arbitrary arrest, torture, inhuman treatment, etc[38] Any arbitrary action, which is not with due process is precisely denying a person of his freedom, liberty and justice. These are the basic rights, on whose foundation other rights develop. Without the basic right to life, that is the acknowledgement of life and it's worth, other rights are void.

ii. Right to Religion

Religion, is an interpersonal relationship with one's soul and human kind with divinity, which cannot be defined or limited to any set of practise of belief. The Right to Religion,

[37] Article 6, ICCPR
[38] Article 7, ICCPR

Freedom to conscience, expression etc[39], is duly recognised by all the landmark International Human Rights Law instruments. In can be drawn a parallel nexus between, one's existence that is freedom to live and the freedom to live with dignity and personality

iii. Right to Privacy

The concept of Privacy when it was introduced by ICCPR, it referred to the private lives of people, in home[40], in the protection and safeguard of the family. But, Privacy, in the age of data and virtual communication is not one dimensional. It is multidimensional, and is in consonance with right to movement. Any arbitrary interference in one's privacy is synonymous to intrusion in someone's basic freedom to live. One of such specific mention is the freedom to practise different sexual orientation. Refugees status has been granted to such people who were persecuted in their own state, for choosing to practise sexual orientation, which was declared immoral.

iv. Right to Due Process

Right to life is meaningless without being accompanied by Due Process[41]. To add, no one's right can be violated without the reasonable grounds suggesting to do so, that is Due process being maintained. Public hearing, speedy trial, etc are a few mechanism that have developed in the International Law, to ensure due process.

v. Socio-Economic Rights

It is pertain important to say that, social and economic phenomenon are interlinked with one another, where they have become indispensable of each other[42]. But, in this regime, specially in the 1951 Convention, violation of economic rights have not been given the scope of "persecution". Poverty, which is a product of systematic class struggle conducted over a period of time, with division in social strata and further the marginalisation, at one end cannot seek protection, for being economic refugees. On the other hand, it is also a by-product of the societal phenomenon like marginalisation, which can refer to it as social refugees.

[39] Article 9, ICCPR
[40] Article 17, ICCPR
[41] Pellonpaa, In Changing Nature, pp.139
[42] Hathway, Status, p. 119

On the same line of contention, the people seeking for better avenues of economics, cannot be referred as refugees, as looking for better opportunities doesn't show there are any lack of opportunities further right to livelihood is being violated. But, someone who seeking for refugee status, on the ground that he is unable to survive in his country, for having any opportunities, or the objective approach suggests that the state has failed to maintain economic rights, then on such ground, people should be granted Refugee Status. As have been mentioned above, economic rights, as much as they are significant, protection from violation of such rights should also be ensured.

vi. <u>Right to Education</u>

Education, has emerged as a significant right over the period of time. But, in some states the policy of education is limited to certain class. Groups like women, or those belonging to the underprivileged section are at times denied the right to education[43]. In such circumstance, what needs to be considered whether violation of the rights of individual to education, can be considered as persecution. Courts have given positive decree with respect to children not being allowed to be educated, or women who are restricted to education, as 'Refugees"

Agents of Persecution

Act of private individual or a group infringing someone's right may tantamount to 'persecution'. But, to judge such actions, the scope of the state is further more significant[44]. The action can either be committed by the State actors, or the Non State Actors. For the former case, the influence of the state decision is direct. In saying so, the functions of the state actors in their official capacity can be deciphered and the state's role is directly linked with the actions of its agents. Whereas, actions of the Non State actors have a difficult stance. With regard to the second category of commission, the role played by the state in the stage of redressal plays a crucial role. In saying so, whether the State does interfere and cease violation of human rights of an individual, or the state decides to encourage the actions of private individual If the state decides the tolerate the continuous commission of gross violation of human rights of an individual by a non-state actor, the state also becomes a party to such commission for it's failure to protect it's citizen.

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[43] Foster. Refugee,p.103
[44] Hathaway, Status, p.129

In saying so, not every act of act of delay of justice adds to failure on part of the state. But, if any primary organ of the state denies to take an actions to provide any redressal, it counts as active participation of the state as well. To understand this situation, one of the landmark case is Olimpia Lazo Majan v. Immigration & Naturalization Service[45]. This case was decided by the United States Court of Appeal, by the Ninth Circuit, about a widower seeking for political asylum in United States of America, after being raped, sexually and physically being abused by Salvadoran military personnel over a period of time. This case plays a significant role to understand the expansion of the terms 'political opinion', where it is not used in a constricted way, but, it was recorded that "*male chauvinism is itself a political opinion and, male domination, particularly when exercised by any police officer or member of the military, however low of rank, constitutes political persecution".* Though, in this case, due to lack of evidence to support that the alleged violence committed by the Salvadoran personnel was motivated by the Government, the petitioner was not provided asylum. The basic concern was, a violence or crime by a single individual motivated or authorised by the Government or those in power, it cannot be referred as fear of persecution or persecution, to seek asylum

The way the agent of persecution have a significant role to play, the kind and the number of victims also influence on the approach of analysing the grant. In saying so, Asian countries like India has mentioned the 1951 Refugee Convention to be lacking the provisions for group Refugees[46], which is the kind of refugee crisis seen in such countries. In brings to an important discussion on the Group of victims of persecution. There a large number of people, whose life or rights is at stake, for them being member of such group. There need not be any common agenda of such group. But people, who can be classified under one group, under any set of conditions, as is persecuted based on it, can referred as Group persecution. And, mass influx of such group of victims does put a massive burden on the state, to which it seeks refuge from. In the state of emergency, when lives of several people is at stake, and on account of the group being identified, there individual analysis and determination is prolonging the protection. Similar views have been taken by UNHCR[47] as well US court[48] in certain cases.

[45] 813 F.2d 1432,9 June 1987
[46] Santhy S. Pillai, 'Legal Conditions of Refugees in India' (2010) <http://borispaul.wordpress.com/ 2010/09/11/legal-conditions-of-refugees-in-india/> accessed 17 April 2020
[47] UN handbook on procedures, para 44
[48]Kotazv. Immigration and Naturalisation Service, 31 F.3d 849 (US),852

But, the refugee crisis in US is very different from the Refugee crisis in Africa. Similarly, Refugee crisis in Europe is different than in Asia. Therefore, this practise is not uniform all throughout. On such contention, India has failed to provide the uniform reception and determination of Refugee status to Refugees coming Tibet[49], at different times.

Race

The definition of "Refugee" mentions of five grounds of persecution, which are: (i) Race (ii) Religion (iii) Nationality (iv) Member of a social group (v) Political Opinion

In brief it can be said that, due to lack of any prescribed interpretation and absence of uniform pattern of practise, States have utilised such lacuna to their benefit. Deliberation about the group, that is race, religion, nationality etc is required as much as the risk or fear is established. Going by the literal interpretation of the definition, it makes it a clear that "Fear of persecution" is compulsory to be shown, as much as the cause of the persecution is to be shown.

In saying so Race is a concept that has developed from the times, it was referred only for the Jews, who were victimised from the Nazi ill treatment during the Second World War[50]. Scholars suggest that, such term was introduced to provide protection to the Jews Community. But, the term has been used in various complex societal interrelationship and phenomenon like Racial Cleansing, Racial Superiority and Racial isolation. But such categorization is majorly based on the physiological characteristics of individual, rooted to the concept of the Biological classification[51]. Where people based on colour[52], body type is brought under a group. Like the most contemporary outburst in the name of "Black Lives Matter[53]" is a form of protest for the racial discrimination.

Racial Discrimination is a long term form of persecution, as it is denying the basic right of "Equality" for the discrimination on the basis of skin colour. This has been reaffirmed by the

[49] Tsoltim N. Shakapba, 'The Issue of Autonomy of Tibet' in Rajiv Mehrotra (ed), Voices in Exile (1st edn, Rupa Publications India Private Limited 2013) 47.
[50] Grahl-Madson, Status, vol. 1, p.217,
[51] Sejdic and Finci v. Bosnia and Herzegovina, 22nd December 2009, p. 43,
[52] Oxford Advanced Learner's Dictionary
[53] Black Lives Matter protest disrupted by racist abuse, BBC NEWS, 9 June 2020 <https://www.bbc.com/news/uk-england-beds-bucks-herts-52979267>

London Charter[54], as well as the UNHCR Guidelines[55]. They refer to the underlining condition of 'ethnicity' as the ground to distinguish between 'Race' and other groups. However, the domestic courts tend to interpret "Race" is a skewered pattern, by not differencing amongst other groups of people[56].

Religion

The second condition, which has been laid down by the 1951 Convention is "Religion". There is no straight jacket definition of Religion. The largely accepted motion is that, Religion is a set of practise, faith and beliefs. The founding feature is the nexus between humanity and the divinity, in the most practical as well as spiritual space. [57] Religion is the most widely interpreted on personal and individual level. And, religion is not restricted to one set of believes or rules, even if a group of individual recognise themselves under such religion. The idea of worship is interlinked and rooted to the recognition of relation with the soul, faith, obedience, etc. But, it is not limited to belief of existence of any super natural power, it could be about certain practises that have taken the stage of worship, belief and such be referred as "Religion". As we can deduce, religion is a personal decision and a right of an individual, as stated by Universal Declaration of Human Rights[58], International Covenant on Civil and Political Rights[59], and other landmark instruments. Ironically, the infringement of this right to religion is largely done so by private parties or non-state actors, as compared to state endorsed agents. One of such reason is, direct conflict of belief or following the contemporary practises.

In elaborating, the contemporary practises have been referred by the UNHCR's interpretative Guidelines concerning religion-based claims[60], as those practise which are followed as way of life. Such way of life, includes atheistic, theistic, etc. These practises don't conform to the traditional pattern of religion[61]. The forefront conflict of conviction, existence of divinity or

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[54] 1945 Charter of International Military Tribunal <https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf>

[55] UNHCR, Handbook on Procedures,

[56] Santiago Peedro-Mateo v. Immigration Naturalization Services, 224 Ed.1147 (US) p.5

[57] Goodwin-Gill, Refugees, p.71

[58] Universal Declaration of Human Rights,1948

[59] International Covenant on Civil and Political Rights, 1966

[60] Andreas Zimmermann, The 1951 Convention Relating to the status of Refugees and it's 1967 protocols: A Commentary <https://opil.ouplaw.com/view/10.1093/actrade/9780199542512.001.0001/actrade-9780199542512>

[61] UNHCR, HCR/GIP/04/06 (2004), p. 3

identity becomes reason for persecution. But what is the perimeter of such practises, and what is the pattern of determining people following such unconventional practises. In some cases, there is symbolic representation, or sometime there is some pattern of lifestyle followed by them. But, such practises having its basic agenda of not conforming to any conventional pattern or practises, is difficult to draw the lines of definition, to elaborate on the scope of whether such individual fall under the ambit of persecuted due to religion. It was observed in the case of Verwaltungsgericht München[62], where the German Court had mentioned "*'basic subsistence of the religion' (religiöses Existenzminimum*) does not establish refugee status under the 1951 Convention[63]. It was later reversed by the Qualification Directives in another case.[64]

The concern with determining Refugees following unconventional practises, or Religion as way of life, is not as people who don't conform to other societal practises. Those following certain age long set of belief or practises are not antagonist of those who are not following. Even, if on the blank slate they may look like opposite of one another. They are not by the practise. They both are extremely personal decision and has individual consent, greater than the influence of a group. In saying so, Right to religion as much as encompasses the traditional believes are as analogous to those not living by those set of believes. Therefore, both the set of people should fall under the category of 'Religion' even if they both are distinctly different to one another.

Membership of A Particular Social Group

Membership to a group, is not in particular restricted to any one kind of societal group of people. This category leaves the ambit of individual quite broad and is a net[65] for any individual who could be the victim to any societal pressure leading to his rights being violated. Inclusion of this category suggest that there is a consensus to increase the periphery of the definition of the "Refugees" in this 1951 Convention. And, further to meet with the future development in form of crisis that have erupted after 1951, such category which leaves a wide range of people to be brought under it. It is not an alternative option but a cumulative set,

[62] Verwaltungsgericht München (Administrative Court of Munich, Germany),
M9 K06.51034, 22 January 2007
[63] Bundesverfassungsgericht (Federal Constitutional Court, Germany), 2 BvR 478, 962/86, 1 July 1987
[64] Verwaltungsgerichtshof Baden-Württemberg (Higher Administrative Court of Baden-Württemberg. Germany), A 10 S70/06, 20 November 2007
[65] Foighel, Nordisk Tidskrift for International Ret 48 (1979), pp. 217, 222.

which provides scope of inclusion.

To understand the importance of “Social Group”, the two significant interpretation is necessary. One is ‘Social’ and the other ‘Group’. A single individual victim of any societal consequences, or a large group of people being victimised, or small fraction of people being violated of their basic rights[66], don’t fall under the same pedestal during determination, in practise. By virtue of the term ‘social group’, it can be perceived that is against the societal norms and patterns, hence, the major fraction of this society would cannot be part of this “Members of social Group”. By default, the group of people will small in number. On the other hand, that doesn’t erase the scope of large group of people, inspite of being mammoth in number being subjected to any victimisation. The size of the group doesn’t signify the link[67] whether the group of individual can fall under “Social Group”

The next deliberation that is required “what falls as societal”. On general interpretation, any such actions, commission of act which are concerned with the social phenomenon are under this group. To elaborate further, any social phenomenon that creates discrimination, isolation, disparity or any kind of victimisation of any or a group of individual, is to referred as “Societal”. But, the 1951 Refugee Convention has not made an attempt to elaborate, the distinction between this category of refugees and the refugees under Race or Religion. All of the three are closely interlinked, and any religious practise that influences the social norms, and on violation of rights of any certain individual on such grounds create a condition of knot, where the root cause being religion, the further concern is “Societal” in nature[68]. Where does one draw a line of demarcation between these categories.

To extend the above mentioned contention, the division of “Class, caste, creed” are product of inter relationship between society norms followed over ages, influence of the economic structure and the characteristics of the different societies. In such scenario, the economic refugees who are victims of the lack of livelihood don’t fall under this category directly.

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[66] Morato v. Minister for Immigration, Local Government and Ethnic Affairs (1992) 39 FCR 401, (1992) 111 ALR 417 (Australia).

[67] Lõht, Kinderspezifische Auslegung, p. 136; Marx, ZAR 25 (2005), pp. 177, 181; UNHCR, HCR/GIP/02/02 (2002), para. 18.

[68] Andreas Zimmermann, The 1951 Convention Relating to the status of Refugees and it’s 1967 protocols: A Commentary <https://opil.ouplaw.com/view/10.1093/actrade/9780199542512.001.0001/actrade-9780199542512>

Which states that the societal class, caste are the only group that can fall under this category.

In saying so, the Domestic Court have recognised “Societal Class” as “Refugees” under the 1951 Refugee Convention. The next question that arises, as to what is “Societal Class[69]” and how could it be differentiated from the economic class, for the sake of reducing the Definition crisis of the 1951 Convention.

The social Class would largely incorporate the group of people, who are denied the fundamental human rights and dignity and led to survive on the surface, with no societal due recognition. For the sake of protection, these group of people could be referred as “Societal Groups”. But, societal phenomenon like Poverty that is the inter relationship between the Economic structure, that is the class division that have continued for ages, combined by ostracise by the societal pressure, cannot be referred as “Economic Refugees” or “Societal Refugees” in isolation. But, some court have recognised Poverty under this category[70]. This places a conflicting position, where some courts have recognised a phenomenon as under this category, some courts have not stated any clear interpretation about the same.

Political Opinion

Political Opinion is a very vast class, where both the terms ‘political’ and ‘opinion’ in itself acts as a category of people. It is linked with the “Government”, “State”, etc.[71] With regard to ‘Political’ it necessarily isn’t restricted to only political rights that are guaranteed by the Universal Declaration of Human Rights[72], International Covenant on Civil and Political Rights[73]. However, it further encompasses the right of voice, opinion, views and expression, which is also guaranteed by the two above mentioned International instruments. But the latter category isn’t necessarily only about political ideologies or policies. Views, opinion on social policies or phenomenon. Leading to persecution or fear of it clearly doesn’t come to this category. It can be deduced from the terminology “Political Opinion” that holds those people, who are persecuted or are in the fear of persecution due to voicing opinion or views that are about political system or political in nature.

[69] ibid
[70] Sinora v. Canada (Minister of Employment and Immigration) (1993)FCJ 725
[71] Oxford Advanced Learners Dictionary
[72] Universal Declaration of Human Rights, 1948
[73] International Covenant on Civil and Political Rights, 1966

But, 'political opinion' doesn't count only those who are member of any political party, or are party to any political affiliation. The idea of 'political' cannot be limited by only referring to political parties[74], as the political parties are mere representation of any set of Political ideologies. The view of Justice, Liberty is an underlying concept in this category. To elaborate on this, political opinion, need not necessarily be of any conventional set of theories[75]. But concepts like 'liberty' or 'justice' which are the propounder of 'freedom' are as much political opinion, on its own. This argument is similar to that of those following religion, by a set of belief and practise whereas, another set of people doesn't conform to any belief or practise as the idea of 'Religion'.

A. **Children:** There is no attempt made in drawing compartment of sections or classes of people who are majorly referred as the vulnerable group of people, in the normal circumstance in the society. Children, is one such category who are dependent on any legal guardian for their survival. In context of Refugee Protection, there is no specific provision to deal with children who are without any guardian or parents. The 1951 Refugee Conventions falls short on this lacuna. The Convention on Child Rights 1989[76] states that children on their own can also seek for refugee status as an individual claims. In circumstances, where a person is granted refugee status, his immediate dependent that is his children are may or may not be provided the same. The 1951 Convention remains silent on such condition, as well. This crisis becomes a conflict, when read with Article 22 of the same Convention[77], which speaks about 'Public Education'. Clearly, there is no provision or mention of the children being determined as refugees, by virtue of their guardians or parents recognised so, but there has been attempt made to ensure basic rights of the children, such as education.

   The second concern is that, the Children may form a class of people, who are victims of the circumstance, but the definition of the "Refugees" is insufficient to consider the kind of persecution, that are only child specific[78]. The standard of persecution also cannot be same for an adult and that of a child, to be provided protection under this regime. By virtue of age and vulnerability, they cannot be treated as equals with all adults. Basic tenants of the protection is to ensure, protection is provided as per the

[74] Hathway, Status ,p. 153
[75] UNHCR, Handbook on Procedures, paras. 80
[76] Article 22 of the Convention on Child Rights
[77] The Convention relating to the status of Refugees, 1951
[78] INS, Guidelines for Children's Asylum Çlaimis, p. 19, available at <http://www.uscis.gov/USCIS/>

needs of the people, and not cover as general blanket.

B. **Gender:** Gender though includes two kinds of people, but in the course of victimisation it necessarily put the men on back-foot. To elaborate, in question of protection of refugees, from the perspective of gender, it refers to protection of the vulnerable group that is the women. That is the conventional idea and have been widely discussed. By virtue of gender, only the women have benefitted under the category of 'Gender[79]' precisely stating that the men don't face any gender based persecutions. That brings to the lacuna of this Convention, which doesn't address the gender based persecutions, which cannot be either put in the category of 'social group' or 'political opinion'. Persecution due to gender, is not necessarily a political opinion, unless it's a state endorsed policy to which the group of people has voiced an opinion, leading to fear of persecution.

Due to lack of provisions in this 1951 Refugee Convention, the other International Human Rights and International Criminal Law instruments have to be resorted to for determination of refugee status, of gender based persecutions.

Gender based persecutions are interchangeably used as women based persecutions[80]. In the normal circumstances, the women are marginalised, by virtue of the socially and culturally constructed edifices of the society. The morales and the foundation of the society keeps the women on the disadvantageous position. Such condition makes the women a vulnerable group of people. In order to understand, there has to be a differentiation made between "women being persecuted, and persecution done because they are women". This differentian is necessary, as both are not same. And, a woman being persecuted is similar to any person of any gender, age, class being persecute. Whereas, a woman being persecuted because she is a woman, is one of such example of gender based persecutions. In the cases of Islam (A.P.) v. Secretary of State for the Home Department Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.)[81] which were heard as co joined appeal by the house of Lords, were the question was about asylum to two Pakistani women on the grounds of

[79] Binder, Verfolgung, pp. 348-349.
[80] UNHCR, HCR/GIP/02/02 (2002), para. 3
[81] Conjoined Appeals decided on 25th March 1999

'Membership of a particular social group'. The facts of the case, states that these women were subjected to domestic violence and were forced to leave their house, by their husband. They feared that, they would be subjected to false allegations of adultery and sexual immorality. The parties contended that, due to the social and moral constraints of the country, if women are found with such charges, guilty or not, they are subjected to stone peddling and violence to death. They further feared any such criminal proceedings against them under such charges. The court in this case explained about who could qualify for refugee status, which is who refuse to conform to the discriminatory laws and thus become a member of any particular social group, which is the criteria for such status. In this case, the discrimination and violence that the women are subjected to are deep embedded in the society they belong to, they have not up sprung one night. Further, as per the court, they would be persecuted as individuals not as women specially, which the petitioners couldn't establish.

But, the pertaining question is, what constitutes as Women based persecutions? Any form of moral, physical violation of rights of a woman for her gender can referred under this category. To elaborate, rape, sexual abuse, domestic violence, which are necessarily inflicted only on women, and is caused due to the gender are standard of "women based persecution". There is no exhaustive list of form of persecution that women faces, which ranges from mutilation[82], to forced marriage[83], restricting to certain practises including dress code[84].

But, Gender based persecution cannot be limited[85] to "Women based persecution" in this contemporary age of law and policies. Several countries like India, have their legislation safeguarding the rights of the women over men. One of such staking observation is "Rape" is one of such act which can only be inflicted on women, similar provision for 'domestic violence' and so on. The vulnerability of women has not ceased to exist, and the domestic laws, in conformity with Convention on the Elimination of all forms of Discrimination against Women ensure protection of women, as much as possible. But, that shouldn't curb on protection of another gender

[82] Binder, Verfolgung, Pp. 365 et seq., 390
[83] ibid
[84] ibid
[85] UNHCR, HCR/GIP/02/02 (2002), para. 3. Cf. also Bindér, Verfolgung, p. 346.

on the idea of general equality. There are men, who face the wrath of sexual harassment, rape and even domestic violence, but is unable to seek for redressal for any of such action against a man, is not recognised by law. In these cases, it can stated that such persecution, induced by a non-state actor, by not being judicially redressed, is state endorsed persecution indirectly.

C. **Sexual Orientation** The literal expression of Sexual Orientation refers to *"person's capacity for profound emotional, affection and sexual attraction to, and intimate and sexual relations with, individuals of a different gender*[86]". Just like the other vulnerable groups, "Sexual Orientation" is not mentioned in the Convention, nor is any special provision introduced for ensuring the protection of the same. Primarily the group of "Sexual Orientation" is about Gender identity and Gender fluidity, where various kinds of people having different sexual preferences can be brought under, including the four prominent class, Lesbian, Gay, Bisexual and Transgender persons (LGBT+)[87]. The transgender community is one that deals with Gender based community like women, as because there founding crisis is not about sexual orientation. But, the form of persecution faced by them is not similar to the Gender based but rather based on sexual orientation.

Inspite of being one of the many vulnerable groups, the LGBT+ group of people are subjected to double sword. On one hand, the community has to undergo social marginalisation, persecution because of their orientation and on the other hand, some nations still don't recognise the other sexual orientations. The concern of Social as well political persecution becomes the concern for such group of people, which makes them very unique from other classes.

Sexual Orientation, is a psychological pattern, yet the persecution is interlinked with social, political, civil[88] and sometime even religious. Some religions don't recognise every sexual orientation, and any one not observing it is made to either pay the penalty or are persecute by various methods. In such situation, it is difficult to decipher

[86] Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexial Orientation and Gender Identity, 2007, Preamble, available at <hrep://www.yogyakartapriaciples.org/ principles en.htm>.
[87] ibid
[88] UNHCR, HCR/GIP/02/01 (2002). para. 16;

whether such persecution has taken place due to the person not conforming to religious practise, or because he has chosen to express his sexual orientation. The concern has another layer of social pressure, which at times is interlinked with the political decisions. So to say. In countries governed by Constitutional Morality[89] would be able to recognise the people with difference under the ambit of equality. However, there are several countries, which are run by populous morality in which any such practise not in conformity with the set societal norms is either penalised or is persecuted. In such circumstances, it is first necessary to find the root cause of the persecution.

This conflict was explained in Halmenschlager v. Holder, Attorney General[90] which is a significant case, in understanding the scope of "fear of Persecution" and "Homosexual being a referred as the member of a social group". Furthermore, this case highlights the disparity in the two countries, USA and Brazil, providing judicial resolution, to the homosexuals. The court in this case had ordered that *'Persecution on account of membership in a particular social group'*" is "directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic and that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences. In the case of *Karouni v. Gonzales*[91], it was formally adopted the position that homosexuals do constitute a particular social group

CONCLUSION

The very foundation of the regime, is determining the individuals who are in dire need of International Protection. In saying so, the interpretation of each word which cumulatively make the definition of "Refugees" needs to be read harmoniously with the object and the purpose of this Convention. It has been observed that, the different countries have adopted different approaches to interpret the term "Refugees". During the determination of Refugee status, various individuals have faced the wrath of discrimination. Discrimination is a broad

[89] LON L. FULLER, THE MORALITY OF LAW (1964)
[90] , No. 08-9514, United States Court of Appeals for the Tenth Circuit, 31 July 2009
[91] 399 F.3d 1163, 1171 (9th Cir. 2005)

and general term to express the plight that the individuals are made to undergo. The interpretation has undergone changes, and development. The 1951 drafting has not ceased to what was referred as “refugees” then. Various kinds of persecutions have come under the ambit, along with perimeter of the five criteria’s put across that is “Race, Religion, Nationality, Members of Social Group, and Political Opinion” has increased with time. But, there is no universal trend followed. Different parts of the world have interpreted the terms differently. On such foundation, the concept of Universal Refugee Law has deviated, and the idea of International solidarity for the protection of the Refugees have has ceased to happen. In saying so, inspite of the Regime being International in nature, the application of it is domestic. It doesn’t punish, penalise or prohibit the country where the Refugee Crisis was created. Rather, it puts a responsibility in the standard of compulsion by virtue of Article 33(1) of the Refugee Convention, on the other contracting states, to protection those in fear of persecution.

Hence, it is suggesting International protection, in the scope of domestic determination and protection. This is why the Regime is deviating, as because the domestic courts are interpreting the term to its own convenience. Lack of specific guidelines, or drawing the perimeters around the term, has led to such definition crisis. Adding to this list, there is no body or organisation deployed with the responsibility of foreseeing the interpretation or act as an independent body.

On another account, it has also been beneficial, for the flexible structure as it has stood against the test of time. The major Refugee crisis have happened after 1951, along with mammoth decolonisation and displacement of the people. Yet, the Refugee Convention is the only guiding force universally, for this Regime. This is because of its flexible, non-exhaustive drafting. Various groups of people, who have faced the wrath of societal or political violation, amounting to persecution, could be brought under the term “Refugees” by extending the five criteria mentioned in the Convention. But, this interpretation that have extended the protection, is precisely dependent on the Domestic Courts. There is no single, universal body to look after the application and execution of the Convention. The scope of UNHCR is not sufficient for ensuring the interpretation of the definition of Refugees is maintained universally.

There is a need of a Quasi-Judicial body to look after the interpretation, application and

execution of the provisions of the Convention. The Article 33(2) acts an exception clause to the founding object of this Convention. There is need of a body to look into the reasonability of refouling any individual, inspite of having valid evidence of such individual having fear of persecution. This will ensure, that the verdict of the domestic courts don't become the final body of interpretation of the provisions of this Convention. This will reduce the scope of deviation or structural changes in the application, as per the states domestic policy and principles. This, on a long run will be able to reduce the deep rooted discrimination that has been going on.

However, in an attempt to make the structural application of the Convention, by ensuring the interpretation of the provisions are applied universally, the regional crisis will be ignored. Every region have similar historical, cultural, ethnic similarity for which the kind of crisis or issues that arise can be resolved as a regional system of redressal. The initial draft of the 1951 Refugee Convention, was largely established to meet the crisis of Europe, and had come with the timeline and a geographical limitation. This precisely shows the influence of certain regions or states, in the drafting of any universal instrument. Therefore, there is also a need of Regional instruments, whose intervention will not shift the application of the universal notion of the provisions. But, it shall supplement the universal interpretation. So to say, there are various kinds of persecutions which are very region specific and may not be acknowledged on the universal platform. Yet, there is a significant need of International Protection, for which the Regional Instruments can act as the guard.

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BATTERED WOMAN DEFENCE AND THE INDIAN PENAL CODE: AN ANALYSIS

Chanda S.

ABSTRACT

In countries such as India, where conversations around mental health, let alone family issues and instances of violence are hushed up and victims are discouraged, often by their own family members, from speaking out and pursuing legal action, the lack of psychological and physical support to victims of long-term domestic violence has severe complications to the mental stability of the victims. It also becomes difficult to gauge the position of a woman who has committed severely violent acts, thus complicating not only determination of mens rea, but also the application of general exceptions under the Indian Penal code and accommodating for nuances in sentencing and punishment. Often critiqued as weakening the social and public image and understanding of women in society as well as attempting to weaken robust criminal laws that seek to accurately and justly determine responsibility and culpability in criminal acts, not to mention murder, Battered Woman Syndrome may be analysed in light of penal provisions of exceptions and defences to crimes, particularly that of provocation and private defence in the Indian context. This paper seeks to address those exceptions that represent the intersection of grey areas of mens rea and diminished mental faculty of battered women and victims of abuse alike. It also becomes necessary for courts to consider the exceptional circumstances of cases of BWS in redefining the age-old standards and principles of proportionality and reasonableness of behavior in line with the "prudent man" standards as well, not only to posit BWS within the Indian legal system but to also address similar mental disorders that culminate in criminal acts and offer general defences that may achieve the fair and just delivery of justice.

The uptick in domestic violence during the coronavirus has joined the myriad of reasons for the updating of criminal law concepts of fault.

Keywords- *Battered Woman Syndrome, provocation, right of private defence, PTSD, mental disorder*

INTRODUCTION

What first arose as a psychological theory attempting to explain what society has repeatedly asked of its domestic violence victims – "Well, why did you stay in an abusive relationship?", Battered Woman Syndrome, hereinafter referred to as BWS has transformed into a theory that has led to discussions in psychological circles on violence and its consequences, as well as a legal defence in crimes such as murder, assault, arson, committed by female partners in abusive, violent relationships; *women*, who display a very specific set of characteristics as a result of prolonged violence and mental abuse at the hands of their partners [92].

Domestic violence is one particular err in man's ways that cuts across continents and oceans, races and ethnicities, and one which has disastrous consequences on the parties involved, most devastating being the psychological and physical effects on children that bear witness [93]. First used in the late 70s as a result of a psychological study on victims of intimate partner violence, BWS was characterized as a sub-category of Post-Traumatic Stress Disorder (PTSD) [94] in specific incidents of "criminal acts committed by victims of victims of abuse under duress against their abusive partners"[95]. As a legal defence, it came to be used by defense attorneys in the West to argue that the pronounced and prolonged effects of domestic violence have the

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[92] Aman Deep Borthakur, *The Case For Inclusion Of 'Battered Woman Defence' In Indian Law*, 11 NUJS L. REV. 1 (2018).
[93] Kurz, Demie. *Women, Welfare, and Domestic Violence*, 25 SOC. J. 105 (1998).
[94] LENORE E. A. WALKER, THE BATTERED WOMAN SYNDROME 43 (3rd ed. 2009).
[95] Lenore E. A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J. OF L., ETHICS AND PUB. POL. 321 (2012).
Non-confrontational victims include the men in state of sleep, rest, non-violent drunken rambling.

ability to greatly affect a battered woman's mental composure, including resorting to acts of homicide against "non-confrontational" victims [96].The most unique characteristics of BWS are perhaps those that shape the attitude of the battered woman towards her abuser, wherein she not only believes and completely owns and admits responsibility over her actions, showcases an "inability to to place the responsibility for the violence elsewhere", continues to fear for her own life and safety despite the committing of the act and displays an irrational, almost manic fear of her abuser being "omnipresent and omniscient" [97].

The Madras High Court in a breakthrough finding in Suyambukkani v. State of Tamil Nadu[98], first propounded the Indian equivalent of BWS in the Nallathangal Syndrome, by acknowledging that abused women resort to violent acts, including homicide and suicide to "escape the misery of the violence they are subjected (to)" [99]. The name stems from an 18th century Tamil folk legend, part of the epic poem Kannagi, which describes a woman so deep in the miseries of poverty and social stigma that she not only commits suicide but also drives her children to commit suicide with her, to escape misery [100]. It can be argued that the understanding of BWS seems to be faulty in the application of Nallathangal Syndrome to Indian cases of battered women, in that although it is true that battered women find themselves in "misery", as described by the ballad Nallathangal, the violence at the hands of the male partner that causes misery in battered women is completely ignored in the concept of Nallathangal, thereby creating space for doubt whether courts using the name have been able to adequately understand the impact of abuse. In light of the above, it is also necessary to consider the factors that have heightened the occurrence of such case. The coronavirus pandemic brought with it a surge in domestic violence, exacerbated by unprecedented financial struggles due to failing business and mounting medical bills faced by families across the world[101].

This paper will undertake an analysis of BWS as not only a mental disorder but also as legal defence, specifically addressing some of the general exceptions contained by the Indian Penal Code, and trace the close relationship of mens rea, operation of general exceptions relating to

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[96] *Id*. at 322.
[97] LENORE E. WALKER, THE BATTERED WOMAN 95 (1979).
[98] Suyambukkani v. State of Tamil Nadu, 1989 LW (Crl.) 86.
[99] *Id.* ¶ 25.
[100] C. S. Lakshmi, *Bodies Called Women: Some Thoughts on Gender, Ethnicity and Nation*, 32 ECON. & POL. WEEKLY 2953 (1997).
[101] Anuradha Kapoor, *An Ongoing Pandemic*, 56 ECON. & POL. WEEKLY 73 (2021).

mens rea component and cases of BWS.

PTSD and other mental disorders: Positing mental health in BWS:

The Battered Woman Syndrome as formulated by Dr. Lenore Walker constitutes two primary facets: "learned helplessness" and "cycle of violence"[102]. Learned helplessness has been described as an extension of the "learning theory" wherein the battered woman loses the will and motivation to combat the abuser's actions (usually, in physical manner) and "learning" to succumb and become subservient to abuse. Factors that culminated in learned helplessness have been detailed by Walker to include frequency and regularity of violent incidents, frequency and regularity of forced sex, incidence of fear of death at the hands of abuser, number of injuries sustained during an incident of violence and so on [103]. Most notably, indirect threats, threats to kill and futility of numerous attempts by the battered woman to "put an end to the abuse" contributed to the learned helplessness in the battered women[104]. Contrary to public opinion, it is not true or necessary that the battering occurs constantly. Cycle of violence has been described as a "definite battering cycle, involving a tension-building phase, an acute battering incident, and a contrition phase"[105]. Here, the tension building phase consists of a "gradual escalation of tension which the batterer displays hostility and dissatisfaction and the woman attempts to placate him" followed by the acute violence incident wherein the act of violence by the abuser occurs, leading to the contrition phase wherein the abuser repeatedly apologises and expresses remorse towards the battered woman, including public displays of love and remorse and gifting.

In order to analyse the psychological effects of long-term domestic violence, it is necessary to discuss the nature of the "battering" and the effects and symptoms of the same. The "battering" has been described to include "being slapped, punched, kicked, thrown, scalded, cut, choked, smothered or bitten, attacks with guns, knives, razors, broken bottles, iron bars and beatings with belts, chains, clubs, lamps, chairs, wrenches" etc, often readily available household items[106] resulting in physical and visible signs and symptoms in the form of bruises, black-eyes, broken jaws and bones, including miscarriages. However, in order to accurately

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[102] LENORE E. A. WALKER, THE BATTERED WOMAN SYNDROME (4th ed. 2017).
[103] *Id.* at 129.
[104] *Supra* note 7 at 133.
[105] *Supra* note 7 at 146.
[106] Debby L. Roth & E. M. Coles, *Battered Woman Syndrome: A Conceptual Analysis of Its Status Vis-a-Vis DSM IV Mental Disorders*, 14 MED. & L. 641, 642 (1995).

diagnose BWS, it is necessary to establish a pattern in the abuse, through analyses of both physical and psychological symptoms. The most commonly listed psychological symptoms include depression, low self-esteem, denial of violence among other behaviours that manifest in social isolation and lack of contact with "outsiders" due to fear of assault by the partner [107].

In an authoritative piece on the need for criminal justice systems to adequately and accurately consider mental health implication of abuse in women, A. Kaiser, C. Strike and L. Ferris discuss BWS and similarly defined mental health diagnoses in light of use as defence before courts[108]. Most notable was the categorization of BWS as a form of Post-Traumatic Stress Disorder (PTSD), under which "exposure to a traumatic event, persistent re-experiencing of that traumatic event; persistent avoidance of stimuli associated with the traumatic event; and persistent symptoms of increased arousal" form four stages of PTSD, in accordance with the Diagnostic and Statistical Manual of Mental Disorders (DSM) V norms[109], closely followed in pattern by BWS occurrence. Considering PTSD as a "diagnosis with implied causality", the authors reiterate that the "ongoing and intermittent", continuous and cyclical nature of domestic violence creates a "constellation of symptoms frequently exhibited by victims"[110]. Battered women have thus described to suffer from an "impaired mental capacity"[111]. It is pertinent to note that DSM V has made several updates to the manual in relation with repeated sexual assault under the PTSD standards, in addition to enshrining certain aspects of BWS as well by including "behavioral symptoms that accompany PTSD… (such) as re-experiencing, avoidance, negative cognitions and mood, and arousal" and most importantly includes a "fight response" exhibited by those afflicted as opposed to only a "flight response" previously included under the DSM IV [112]. Redefining the "reasonable": BWS, the provocation exception and right of private defence:

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[107] *Id*. at 644.
[108] Amy Kaiser et al., *What the Courts Need to Know about Mental Health Diagnoses of Abused Women*, 19 MED. & L. 737 (2000).
[109] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).
[110] Amy Kaiser et al., *What the Courts Need to Know about Mental Health Diagnoses of Abused Women*, 19 MED. & L. 737, 743-745 (2000).
[111] Jimmie E. Tinsley, *Criminal Law: The Battered Woman Defense,* 34 AM. JUR. PROOF OF FACTS (1983).
[112] *Supra* note 15.

PROVOCATION:

Section 300 of the Indian Penal Code under Exception 1, lays out the requisites for a defence of "grave and sudden provocation", under which "....if the offender whilst deprived of the power of self-control by grave and sudden provocation, causes death..."[113], then such an instance would serve as a mitigating factor for an offence of murder. In order to construe the traditional meaning and operation of the provocation exception, the case of R. v. Duffy[114] is relevant, wherein the exception was described as "some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his [or her] mind."[115]. The quintessential concept of "reasonable man" thus figures in determining acceptance of the provocation defence by courts.

In the infamous case of Nanavati v. State of Maharashtra[116] discussed the factors that constitute grave and sudden provocation, namely that the act resulting in the death must be "an act of passion and not occur after a lapse of time". At the face of it, such definition of the provocation exception seems inapplicable to deaths as a result of BWS. However, courts have admitted, to an extent, the need for a subjective outlook within the provocation exception under Exception 1 of Section 300, most particularly in the case of Budhi Singh v. State of HP[117], wherein the Supreme Court categorically stated that "the doctrine of grave and sudden provocation is incapable of rigid construction leading to any principle of universal application". Courts have indeed adopted an attitude of subjective analysis in cases of murder upon anger and jealousy, for instance in cases such as that of Gnanagunaseeli v. State[118], wherein a woman, constantly berated and insulted by her husband, and who had murdered her husband upon catching him with another woman, was allowed the "partial defence of 'grave' and 'sudden' provocation" and subsequently having scaled down the offence from that of murder to culpable homicide not amounting to murder. Similarly, courts have also acknowledged the nuances of the human mind in light of provocation and forwarded the concept of "sustained provocation", under which a wider ambit is laid out. This widening of

[113] PEN. CODE, § 300, No. 45 of 1860, INDIA CODE.
[114] R. v. Duffy, (1949) 1 All ER 932, 935.
[115] *Id.*
[116] Nanavati v. State of Maharashtra, 1962 AIR 605.
[117] Budhi Singh v. State of HP, (2012) 13 SCC 663.
[118] Gnanagunaseeli v. State, 1995 (II) CTC 610.

the provocation exception has occurred in manner of *ejusdem generis* to the pre-existing exceptions under Exception 1 of Section 300 in a number of cases including Boya Munigadu v. Queen[119], Murugian, In re.,[120] Chervirala Narayan In re[121], mirroring the English understanding of cumulative provocation in the landmark case of R. v. Davies, as sustained provocation in India, since, simply put, "a series of acts over a period of time could also cause grave and sudden provocation"[122].

Ultimately, it was the case of Suyambukkani v. State of Tamil Nadu that laid down in clarity, the meaning, ambit and scope of application of sustained provocation. In this case, the court laid down the "cardinal difference" between sustained provocation and provocation otherwise provided under Exception 1 to Section 300 and stated that a series of seemingly less grave, insignificant acts that occur over a period of time have the potential and the ability to vest as a violent act, with the last of the series of acts serving as "the last straw". Such an observation is invaluable to the scholarship surrounding BWS since it recognises that prolonged physical violence and mental insult, beratement and abuse can result in a provoked act of violence resulting in death. In fact the court's comments in Suyambukkani gain heightened importance in light of Dr. Walker's study of BWS wherein the series of acts not in the least "insignificant" but are very significantly violent in nature and can reveal themselves in both physical and psychological long-term effects in battered women as discussed above in this paper. However, despite having been introduced in India prior, the sustained concept finds a much more frequent and wider application in the United Kingdom (known as "cumulative provocation") and Australia[123].

PRIVATE DEFENCE

The general exception of private defence has been enshrined in Section 96-106 of the Indian Penal Code, whereby the right of private defence is said to extend to "causing of death" as

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[119] Boya Munigadu v. Queen, ILR 3 Mad 33.
[120] In Re: Murugian Alias Murugesan vs Unknown, (1957) 2 MLJ 9.
[121] In Re: Chervirala Narayan vs Unknown, (1957) SCC OnLine AP 242.
[122] R. v. Davies, 1975 QB 691.
[123] *Supra* note 1.

well[124]. The requisite conditions under Section 100 are such that "a reasonable apprehension of danger" must exist in order to justify an act resulting in death. More importantly, the act of private defence is justified so long as the "reasonable apprehension of danger persists"[125] thereby jeopardising the application of such right to cases of BWS. Further, as has been held in case of Yogendra Morarji v. State of Gujarat[126], private defence can be resorted to when there seems to exist no other "safe or reasonable mode of escape by retreat for the person confronted with an impending peril to life or grave bodily harm except by inflicting death on the assailant"[127].

The cases of R. v. Ahluwalia[128] and R. v. Thornton[129] are valuable in discussing the need to incorporate a wider understanding of "apprehension of danger" in applying in private defence provisions. In Ahluwalia, the abusive partner was asleep when the battered woman, Kiranjit Ahluwalia, set her husband's room on fire by pouring petrol and lighting a candle. [130] In Thornton, the abusive partner had been tied up and stabbed by a freshly sharpened knife, yet, English courts have accepted the provision of self-defence offering valuable precedent to courts across the world. The following aspects of the abovementioned cases shall outline justifications of applying and accepting pleas of self-defence in cases of BWS deaths. Firstly, the battered women were under constant fear and apprehension of danger, due to the prolonged and cyclical nature of domestic abuse. Secondly, the apprehension was reasonable owing to a variety of repeated physically abusive and gruesome acts, including scarring the face of the battered woman with a hot iron, dropping heavy utensils and articles on their bodies, and marital rape among others. Thirdly, the danger as well as the apprehension of danger by the battered women was continuous in nature; extending to perpetual in nature as well since the battered women had already found themselves in and suffered through multiple cycles of violence. Further, the danger and apprehension of such danger by the battered women also is of "renewed violence" wherein the battered women are faced with danger to physical self on a renewing and repetitive basis. These above factors clarify that the right of private defence is one such defence for women with BWS since it is best suited to be widened

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[124] PEN. CODE, § 100, No. 45 of 1860, INDIA CODE.
[125] Vishwanath v. State of Uttar Pradesh, 1960 SCR (1) 646, 649.
[126] Yogendra Morarji v. State of Gujarat, (1980) 2 SCC 218, 226.
[127] *Id.*
[128] R. v. Ahluwalia, (1993) 96 Cr App R 133.
[129] R. v. Thornton, (1993) 96 Cr. A R. 112.
[130] Julie Bindel, *'I wanted him to stop hurting me'*, THE GUARDIAN (Apr. 4, 2007), https://www.theguardian.com/world/2007/apr/04/gender.ukcrime.

in order to adequately consider the exceptional circumstances in BWS cases.

An analysis of the Indian understanding of self defence[131] is that only when deemed "immediate", acts of self defence have been validated. Similar to discussions around provocation, in light of Dr. Walker's theoretical framework surrounding BWS - the cycle of violence and learned helplessness, BWS presents a scenario wherein self-defence provisions would be deemed prima facie inapplicable. The cycle of violence discussed in this paper by itself dismantles the need for immediacy as setup by Indian courts since battered women are observed to commit violent acts resulting in death only at non-confrontational periods of the cycle, as opposed to the provision under the Indian scheme of private defence wherein a "reasonable apprehension of danger" that is immediate in nature is a requisite. It would be an obvious assertion that although BWS does not seem to fit within the legal framework of private defence, battered women act in furtherance of the need for self-preservation as well as the fear of danger to her children, in an abusive home.

Instances of gendering of criminal law concepts finds no dearth in the Indian criminal law system, including the "reasonable man" principle which conceptualises a test for provocation and/or private defence is one that fails to account for subjective and unique experiences of women, let alone battered women.[132] Although not an issue unique to the Indian context, courts have acknowledged the need to account for gender differences in analysing, subjectively, whether there has been provocation according to the "reasonable man" principle. In the case of *Director of Public Prosecutions* v. *Camplin*,[133] The English Court of Appeals, as well as the House of Lords observed that gender as part of the "reasonable man" standard is to be construed as an "abstract notion", thereby sparking a change, in that, "reasonable man" came to increasingly consider a female perpetrator as part of a newer, "reasonable woman" standard. [134] However, this is not to assert that such a standard would then automatically consider the exceptional circumstances of that of BWS cases[135] since the "reasonableness" of a battered woman's actions are to be, ideally, judged within a narrower

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[131] Aishwarya Deb, Battered Woman Syndrome: Prospect Of Situating It Within Criminal Law In India (May 30, 2018) (unpublished L.L.M. dissertation, NALSAR University of Law) (on file with author).
[132] R.V. Kelkar, *Provocation as a defence in the Indian Penal Code*, 5 J. OF THE INDIAN L. INST. 319, 329 (1963).
[133] Director of Public Prosecutions v. Camplin, 1978 AC 705.
[134] J. Smith, *Commentary on R. v. Thornton*, CRIM. L. REV. 54, 55 (1992).
[135] ALISON YOUNG, FEMINITY AS MARGINALIA: TWO CASES OF CONJUGAL HOMICIDE, *in* CRIMINAL LEGAL DOCTRINE (P. Rush et al. eds., 1997).

context of the pattern of violence exerted by their abusive partner.[136]

RECOMMENDATIONS AND CONCLUSION

It thus becomes clear that cases involving the Battered Woman Syndrome are those that are characterized by pronounced and exceptional circumstances that not only differ across households but also across victims and abusers, their intentions and nature of actions. This paper therefore *recommends the following* in light of the research and analysis undertaken.

Firstly, Section 300 of the Indian Penal Code with Exception 1, encapsulating the grave and sudden provocation defence may be amended to be inclusive of the following factors:

1. Long-term physical abuse
2. Long-term psychological abuse
3. Cyclical physical and psychological abuse (as opposed to merely continuous)

The amended provision may henceforth convey the words of Exception 1, followed by: "For purposes of Exception 1, a 'period of provocation' may constitute the entire period of abuse where there is long-term physical abuse and long-term psychological abuse suffered by the accused." The purpose behind recommending such an amendment is to enshrine the concept of "sustained provocation" in the statutory framework, having already been applied and adapted by courts as discussed in this paper.

Secondly, similar to the UK model, to further strengthen the use of the provocation exception, it is recommended that the Indian statutory framework adopt an amendment in furtherance of enshrining those instances that, when occurred, would constitute justified usage of the provocation exception. The UK model identified through the Coroners and Justice Act of 2009[137] that there exist certain "triggers" that provoke victims of abuse. The Indian scenario could hence incorporate "qualifying triggers/ exceptional circumstances/ mitigating factors"

[136] Lee Leonard, *Celeste Commutes Sentences of 25 'Battered' Women*, UPI (Dec. 21, 1990), http://www.upi.com/Archives/1990/12/21/Celeste-commutes-sentences-of-25-battered-women/3383661755600.
[137] Coroners and Justice Act 2009, c. 25 (Eng.), https://www.legislation.gov.uk/ukpga/2009/25/section/55.

as part of the Exception 1 to Section 300 to include a "fear of violence" as a trigger or provocation. It is opined that "fear of violence" is wide enough in meaning to be applied to the cycle of violence that exists in cases of BWS.

Thirdly, it is recommended that Section 100 of the Indian Penal Code be amended to include the following factors:

1. Recurrent and cyclical nature of acts causing reasonable apprehension of danger to life and personal property.
2. Proportionality must be construed in light of the repeated and cyclically occurring acts causing reasonable apprehension of danger to life and personal property and not in isolation of the latest act that is usually understood to have provoked the offence.

The amended provision may henceforth read as additions to the six pre-existing clauses under Section 100 : "(Seventhly) – An assault with an intention to end the recurrent and cyclical occurrence of acts causing apprehension of danger to life and personal property may be deemed 'reasonable', (Eighthly) – An assault in furtherance of that described in (7) must be proportional to the recurrent and cyclical occurrence of acts causing apprehension of danger to life and personal property so deemed reasonable".

Lastly, the author also wishes to recommend a three-pronged test, in light of Dr. Walker's scholarship on BWS, to determine the true incidence of BWS for courts to consider in adjudicating cases where BWS has been alleged. Firstly, the *length of the abuse* must serve as a primary factor. Although deciding from a third-person perspective, that abuse has occurred long enough, would be difficult, empirical evidence involving cases of BWS can be sourced to arrive at an average time period deemed either necessary or upto the discretion of the court to consider a valid plea of BWS. Secondly, the severity of abuse, must serve as a factor, wherein acts that are minor in nature, are to be distinguished by severe acts of violence. It is necessary that a "reasonable woman" standard is adopted in this stage of adapting BWS as a legal defence. Thirdly and lastly, the opportunities to flee must be analysed in light of the special context of the alleged battered woman wherein the opportunities can be considered to include, for instance the adequate setup of women's shelter providing mental and physical rehabilitation and separate wings part of the local police force that tends to domestic violence complaints i.e., facilities that could adequately protect the alleged battered woman.

To summarise, the present paper has traced the background of the Battered Woman Syndrome and its reception in Indian courts, examining the mental health aspect of the syndrome and its likeliness to PTSD, the exceptional factors that heighten and distinguish BWS from that of one-off instances of domestic violence, in addition to assessing the adequacy of provisions of the IPC such as provocation and private defence in bringing cases of BWS within the exceptions. The paper has also attempted to offer recommendations in the form of amendments to the IPC to enshrine the nuances of BWS discussed in the paper, as well as offer an approach for courts to adopt in deciding whether or not to accept pleas of Battered Woman Syndrome.

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CORPORATE SOCIAL RESPONSIBILITY- A STUDY OF IMPLEMENTATING ISSUES IN INDIA

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ABSTRACT

Company Social Responsibility is the path through which the corporate entity addresses the large group of stack holder. The CSR gesticulation has been actively supported by several Worlds renowned Organizations like as World Bank, European Commission, Multinational Companies. In present days Corporate Culture the practice of CSR is still now a benevolent but now day by day it has move from nation and institution building to community development with comprehensive influence. The Researcher has carried out the research through Doctrinal Research by way of extensive survey of documents and the reports available concerning the research area.

Keywords: - *Corporate Social responsibility, stakeholders, Corporate entity*

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INTRODUCTION

In recent past decade it can be noticed that different Scholars were still looking at the concept of CSR from different aspects. The phrase "Corporate Social Responsibility" came into use in the tardy 1960's and initial 1970's after many MNC's formed the term stakeholders, meaning those on whom activities have an gross impact . Companies must voluntarily do transactions in an economically, socially and environmentally responsible manner to be sustainable over the long term. The main goal of CSR is to enclasp responsibility for the company's actions and encourage a positive impact through its activities on the environment, consumers, employees, communities, stakeholders and all other members of the public sphere. The World Business Council for Sustainable development defines CSR as the continuing commitment by business to contribute to economic development while improving the quality of life of the workforce and their families as well as of the community and society at large. CSR brings benefit to the corporate entities in the matter of cost savings, consumer relationship, human resource management, Humanitarian Social Image etc. For those unfamiliar with the term, it simply refers to the idea that corporations have a duty to do more than just make profits for their shareholders or investors. Additionally, firms are obligated to take care of stakeholders including employees, consumers, the community and the environment. A company's corporate social responsibility (CSR) encompasses a company's commitment to social and environmental responsibilities, as well as a company's focus on employee well-being.[139]There was a realization that something would have to be done to modify the way we were utilizing our planet's resources back in the 1970s and 1980s because of environmental issues including deforestation and pollution. As a result, world leaders met in Rio de Janeiro, Brazil, in 1992 for the Earth Summit. A commitment to halt unsustainable resource use and promote sustainable development was made by nations in Rio. To put it another way, sustainable development is mostly about ensuring that future generations have the same resources as we have. There must be a careful examination of all three aspects of a project, not just one or the other. Conventions on biological diversity and climate change were among the many agreements made during the Earth Summit in Johannesburg. CSR is now seen as a commercial answer to the problem of sustainable development. Maintaining a balance between economic and social aims may be difficult for organizations. Because of this, they must operate in a way that incorporates social or environmental issues into their business functions and relationships

[139]Premlata, and Agarwal, A. (2013). corporate social responsibility: An Indian perspective. Journal of business low and ethics 1(1).

with stakeholders. India has certainly become one of the world's top nations in requiring companies to engage in CSR activities. As of 1st April, 2014, the first full year of corporate social responsibility reporting and implementation began. In 2013, the Central Government had no qualms regarding the legality of corporate social responsibility in the India. CSR activities have been clearly seen in India with the groundbreaking passage of Section 135 of the Companies Act, 2013, Schedule VII and the Companies (Corporate Social Responsibility Policy) Rules, 2014.[140]When it comes to corporate social responsibility (CSR), it's not only about protecting the environment; it's about cultivating long-term, mutually beneficial ties with the society at large that help businesses develop. The Companies (Corporate Social Responsibility Policy) Amendment Rules, 2021 ("Rules") were enacted by the Indian government on January 22, 2021.[141] The Companies (Corporate Social Responsibility Policy) Rules, 2014 ("Existing Rules") were revised by the Rules.The Companies Amendment Acts of 2019 and 2020 made significant amendments to Section 135 of the Companies Act's CSR provision. The Ministry of Corporate Affairs (MCA) announced the Draft Companies (Corporate Social Responsibility Policy) Amendment Rules in March 2020 ("Draft Rules") 2 to accommodate for the indicated modifications. The MCA eventually released the Companies (Corporate Social Responsibility Policy) Amendment Rules ("New Rules") 3 on January 22, 2021, putting into effect the amendments made to CSR by the Companies Amendment Acts of 2019 and 2020.[142]Rule 4 of the Existing Rules has been totally modified by the Rules. The amended Rule 4 states that a company can engage in CSR activities directly or through any of the following entities: (a) a company incorporated under Section 8 of the Act; (b) a registered pubic trust; (c) a registered society under Sections 12A and 80G of the Income Tax Act, 1961; (d) any entity established under an Act of Parliament or a State legislature; or (e) any company incorporated under Section 8 of the Act, registered public trust, registered society under this Section.

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[140]AnkitaSingla, 'Corporate Social Responsibility (CSR) as Per Companies Act, 2013' (*TaxGuru*) <https://taxguru.in/company-law/corporate-social-responsibility-csr-companies-act-2013.html> accessed 12 December 2021.

[141]AshimaObhan, 'NEW RULES GOVERNING CORPORATE SOCIAL RESPONSIBILITY - Obhan& Associates' (*Obhan& Associates*, 3 February 2021) <www.obhanandassociates.com/blog/new-rules-governing-corporate-social-responsibility/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration> accessed 12 December 2021.

[142]AshimaObhan, 'New Rules Governing Corporate Social Responsibility - Corporate/Commercial Law - India' (*Welcome to Mondaq*, 4 February 2021) <www.mondaq.com/india/corporate-governance/1033048/new-rules-governing-corporate-social-responsibility> accessed 12 December 2021.

Significance of Study:-

This Research seeks to investigate how Corporate Social Responsibility (CSR) is an integral part of Indian Corporate Culture. An increasing number of Social Scientists are turning their attention to investigation into topic related to implementation of CSR policies in India in modern days. This work will analyses how Indian govt. enacting laws for implementing CSR policies in India also part of CSR in several religious beliefs in India and the challenges faced by the authority time of implementing CSR .

The Proposed Research will specifically contribute towards the following:-

1. Development and Evolution of CSR in India.
2. Challenges faced by Implementing CSR in India.
3. Provisions governing CSR in India.
4. Suggestions in reference to Corporate Social Responsibility- A Study of Implementating Issues in India.

Literature Review

Krista Bondy, The Paradox of Power in CSR: A Case Study on Implementation.[143]

Despite the fact that current literature assumes positive outcomes for stakeholders as a result of an increase in power associated with CSR, this research suggests that this increase in power can lead to conflict within organisations, ultimately resulting in almost complete inactivity on CSR initiatives. Methods The focus of this single in-depth case study is on the concept of power as an underlying concept. Results to demonstrate how some players exploit corporate social responsibility to advance their own positions within a business, empirical evidence is provided. In order to demonstrate why this may be a more serious problem for CSR, resource dependence theory is applied to the situation.

Conclusions, it is possible that increasing the power of CSR would result in increased personal power for those who are involved with it. This has the potential to attract opportunistic actors who have little interest in realising the benefits of CSR for the firm and its stakeholders. In this way, power can become an impediment to the advancement of CSR strategy and actions at the individual and organisational levels.

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[143] Bondy, K. The Paradox of Power in CSR: A Case Study on Implementation. *J Bus Ethics* **82,** 307–323 (2008). https://doi.org/10.1007/s10551-008-9889-7

Prodromos Chatzoglou, Examining the antecedents and the effects of CSR implementation: an explanatory study[144]

Increasingly important for both global and local organisations, corporate social responsibility (CSR) is a notion that is becoming more widely recognised. While it is widely recognised for its importance, there is still a lack of awareness of its full scope of operations, both within and outside of the organisation. The goal of this paper is to design and empirically test a conceptual framework (research model) that analyses the antecedents (drivers) and consequences of corporate social responsibility (CSR) implementation. ERP deployment has a number of antecedents and consequences, which are examined in this study using an innovative three-dimensional conceptual framework developed specifically for this research. In the current literature, a multidimensional method of this nature has been tried at random. For the second time, this study looks into the topic of corporate social responsibility in a time of economic crisis. According to past empirical investigations in the same field, this approach is quite unusual. Third, the findings of the current study may be applied to other nations with similar economic[145] realities and characteristics, which would be a significant advance (e.g. Cyprus, Spain, Italy, Portugal and Ireland). The study concludes by pointing up particular managerial consequences for company leaders.

Research Design

The empirical work is grounded on Company Social Responsibility and its implementating methods in India. For the purpose of assaying the methods implementing CSR policies methods of Doctrinal research has been applied.

Research questions

The research aims to answer the following questions:-

1. What is CSR and what are the laws governing implementation of CSR in India?
2. What are the challenges to the implementation of CSR in India?
3. What are the possible solutions to the proper implementation of CSR in India?
4. What are the Worldwide guide line on CSR?

[144] https://doi.org/10.1108/EMJB-12-2016-0035

Research methodology

This is a descriptive research explaining the situation of CSR that are to be studied in this study. In order to gather data for the study, the researchers used secondary sources such as academic journals and research papers, as well as reports from various institutions and publications and theses.

WORLDWIDE GUIDELINES ON CSR:-

In this present modern world all the big multinationals used CSR as an effective business tool. There are several recognised guidelines, scaffolding in this business world relating to CSR are available.

Some of within these are discussed in this article.

- **United Nations tutoring principles on business and Human rights:-**

  In the year of 2011 United Nations Human Rights Councils embrace strong guidelines for procuring principles of Human Rights for action, the leading principles on Human Rights and Business intended to move beyond the debate on voluntary versus binding instruments in the area of Social Rights and Human Rights . The Main Principles stands on three pillars:

  A. It's State duty to protect Human Rights.
  B. It's corporate responsibility to respect.
  C. Proper access to remedy.

- **OECD Principles for Multinational Enterprises :-**

  This Organisation framed an encyclopaedic code of conduct for Multinational Enterprises with governance and support in their interactivity with trade unions and in the area of fight against corruption and maintain customer interest. This frame work also contains enjoinder on Foreign investments and Foreign suppliers.

- **The International Labour Organization(ILO) :-**

  This organisation was founded in 1919, aims to provide minimum social standards around the world. The concept behind these efforts to intercept corporate entity from vouchsafe benefits by infringing Labour/worker rights. The main motto of ILO based on 4 basic principles:

i. Right to freedom of association and have a right to collective bargaining.
ii. Scrapping of Child Labour.
iii. Eradicate of child labour.
iv. Eradicate of discrimination in respect of employment and occupation.

PULLULATING IMPORTANCE OF CSR:-

Company Social Responsibility makes a gross benefit to a corporate entity because it enforces the company owners to research and implement way to be a way for society. The enlistment of a CSR strategy is a vital ingredient of a corporate competiveness and something that should be led by the company itself. It means having strategies and procedures in place which integrate social , environmental ,ethical human rights or the market concern into trading operations and core scheme all in near combination of stakeholders.

In the study of **Kenex High Performance Institute in London 2015** – A worldwide provider of trading solutions for Men resources found that establishments that had a proper unique commitment to CSR substantially out performed those that did not, with an average return on assets 19 times higher .Additionally the study showed that CSR –orientated companies had a higher level of employee engagement and provided a markedly better slandered of customer service.

In the Study of **Nielsen worldwide survey of 30,000 consumers in 2015)-**it clarify that 66 % of peoples are agreed to pay more moneys if the company product and services which gives positive social and environmental impact to the companies. More of 58 % of people said they were agreed to pay more money if company products are environmentally friendly products. Again 56 % of people said they are agreed to pat more money if the company is known for his Social community development works.

Apart from this CSR gives his own advantages to the company like as

- **For the Interest of endeavour :-** It gives more essential benefit's to the companies in risk management, cost saving ,Human resource Management, customer relationship and their potency to inaugurate .
- **For the Interest of the Economy: -** It makes Corporate entities more continual and creative which continual to the more innovative economy.
- **For the interest of Society:** - it increases social values of the companies.

COMPANY SOCIAL RESPONSIBILITY IMPLEMENTATION IN INDIA:-

From the ages India is known for its Social values. And After independence more of after industrial revolutions Big Corporate entities like TATA GROUP, ADITYA BIRLA GROUP, INDIAN OIL CORPRATION were engaged in Several Social activities like giving donations, organise charity events etc. In the modern India after implementation of Companies Act-2013 by the upper & Lower house of the parliament on 29th 2013 , Sec-135 inserted in this act by which it was clarify that Corporate entities with an net worth Rs-500/- crore or annual turnover of Rs- 1000/- crore or net profit Rs-5/- crore are mandatorily liable to performed their CSR responsibilities . After this Act several corporate entities in India day by day realizing that they should include and performed CSR activities in their business activities .The New Act was in motion from the year 2014 to 2015 onwards and all Corporate Houses are require to establish a CSR committee consisting of their Board members including at least one independent director. The basic intention of CSR in last few years is to increase the role of companies in social activities for the overall benefit of societies. Corporate bodies are responsible bodies they had a sense of duty towards environment and community. Now big entities are setting up specific department for making policies regarding their activities relating CSR. This departments and Committees are make policies, strategies and their issues for their CSR programme and allotted Budget for this.

PRESENT CSR ACTIVITIES OF SOME INDIAN COMPANIES:-

The first and for most company in Indian corporate regime is INFOSYS .Not only in India but also in the World this company made a Bench Mark that how to handled social responsibility and gauge it for outside corporate World. The main issue is here that Companies not only talked about CSR but also extrapolate their CSR achievements to the macrocosm. The second one is TATA GROUP. From the very beginning of Indian Industrialisation, J.R.DA TATA made his footmark and after this RATAN TATA makes this group a mostly cherished Corporate Citizen in India. Tata group has lots of contribution regarding Corporate Social Responsibility. He contributed lot in the Health Sector, Environmental issues, Educations by implicating CSR Policies. Among all TATA group companies 4 companies secured their place in top 10 ranks in CSR for consecutively 2 years. Except these companies Mahindra & Mahindra, Ultra tech

Cement, Sri Cement makes good contribution in CSR.

1. Infosys

This software giant made entrenched Infosys foundation in 1996. The main object of this foundation is to promote education, fight against poverty, fight against malnutrition, and strengthen village economy, established gender equality, Women empowerment in India.

2. TATA GROUP[146]

In the year of 2014 the "TATA SUSTAINABILITY GROUP" has been partnering with Tata Companies to embed sustainability in their business strategies, and there by demonstrating responsibility the earth and people. This group's social beneficial activity relates to Health sector, primary education, women empowerment. 10 principles of CSR at TATA are –

i. Beyond compliance
ii. Impactful
iii. Linked to business
iv. Relevant to national and local context
v. Sustainable Development principles.
vi. Participative and Bottom Up
vii. Focused on the disadvantages
viii. Strategic and built to last
ix. Partnership
x. Opportunities for volunteering

TATA group use his money to solve Social and environmental Problem.

3. ITC[147] :-

ITC belief that a Company Performance must be measured by its Triple Bottom Line Contribution to build economic, social and environmental capital towards enhancing societal sustainability . In every year ITC group donate hand some amount to Ramakrishna Mission Ashram for performing their relief work as a part of Company Social Responsibility.

4. M & M- Mahindra and Mahindra :-

[146] https://www.tatamotors.com/corporate-social-responsibility/
[147] https://www.itcportal.com/sustainability/corporate-social-responsibility.aspx

This automobile company give emphasis on girls education, farmers development, youths up liftment by supporting them in their education, livelihood enhancement, joining them in innovative, carrier building program. This company think about the well-being of customer, the environment.

Recent days the main issues of Company Social Responsibilities in this country are labours rights, labours standard working condition, environmental management, eco effectiveness, implementing anti-corruption measures.

PROBABLE BENEFITS OF COMPANY SOCIAL RESPONSIBILITY:-

The variety benefits of corporate entity depends upon their business activities. In materialistic sense it depends upon their nature of enterprise. The probable benefits of CSR depends upon these logics.

I. Human Resource Management :-

CSR activities of a company increases the chances of recruitment and enjoyment. The aspiring candidates often asked in their interviews about the CSR activities of a company and having an extensive policy give them an ascendancy.

II. Catastrophe management :-

It's an art of a company strategies how to tackle crisis situation of a company. It takes a decade of time of the company to build up a reputation but it takes a few hours to ruined the same .Some elements like corruption, negligent attitudes get unwanted attention of the media, regulatory authorities. So making a proper strategy and work culture of a company upset these elements.

III. Brand exhilaration :-

In this open market economy every corporate house tries to sell more product then others. CSR activities of an enterprise attract customers to buy product of that particular brand and it will uplift the name of the corporate house. Customers' adhesion depends upon the moral values of the company

IV. License to operate enterprises :-

Corporation are desirous to avoid intrusion in the business through taxation. By initiating several steps they are dogging govt. authorities that they are taking care burning social issues

like as health, education, freedom of women as an exemplary corporate citizen which makes a good impact upon the Government.

CHALLLENGES OF CSR:-

Paucity of Awareness of Citizens regarding CSR: - In third world Countries specially in India Publics are unwire of CSR activities of Corporate entities .For this reason publics are reluctant to actively participate and contribute in CSR activities of the corporate.

Transparency issues: - Deficiency of transparency in the CSR activities of small companies is big issue. Small Companies are unable to spread out their program to the public also unable to disclose their audit of fund, assessments .It makes a negative impact upon the public.

Effulgence factors: - Media houses often high lighten the successful stories of the CSR activities of the big corporate. It will help them to branding their companies and several nongovernmental organisations involved themselves in CSR activities in issue based programs .But on another side it will often neglect the consequential integral intercession.

Low insight regarding CSR activities: - Government and NGO's have lean point of view regarding CSR activities of the corporate. Sometimes these organisations defines CSR activities as a pledge campaign *of company. As a consequence corporate houses are in dilemma that whether they performed and engaged themselves in a CSR activities for a long time or not.*

Absence of adequate CSR Guidelines: - *in the matter of CSR no such statutory guideline has been by any authority .Basically it depends company sizes and their business turnover. For that reason business entities are reluctant to engage themselves in CSR activities.*

SUGGGESSIONS

In order to make firms feel accountable and open to the market and concerned stakeholders, the objective is to discourage unethical business practices and make earnest efforts, regardless of size or volume, to support community and social development. In order to achieve this aim, organizations should take the following steps:-

a. Corporate entities should emphasise on education, environmental protection, employment generation, Poverty preferment programme in their CSR activities.
b. In India Companies Act-2013 can only prove punishment for non-filling of

adequate details of CSR activities. But it has no penal section for non performing CSR activities. So this type of section should be inserted in the act for the benefit CSR movement.

c. Generate public awareness relating CSR movements of corporate and urged them to contribute and engaged themselves within it.

d. Nongovernmental Organisations should take proper initiative for implementing CSR activities.

e. Media Houses should take active participation to spread the true news of Corporate entities CSR activities.

f. Government authorities and some big NGO's should change their attitude regarding CSR activities. They should think in a wider way.

g. Statutory regulations should be initiated by the Govt. regarding CSR activities of enterprises.

h. Small Companies should maintain transparency about their CSR activities, audits and funds assessments.

CONCLUSION

The Study come to the end and it's pertinent to said that today the concept of Corporate Social responsibility is deeply entrenched in the world-wide Corporate Culture . But in order to move conceptual to practical, many hurdles need to be overcome. Lack of proper regulatory guidelines also makes barrier to implement CSR strategies. In recent days Indian Middle and small Scale Corporate enterprises are take initiative to introduce CSR to enhance their business activities in Remote areas. There is a need of mature mind to understand the usability of Corporate Social Responsibility as an indispensable part of adequate Corporate Culture .Because multinational firms in India have embraced the Western paradigm of corporate social responsibility (CSR), the practice of CSR in India has changed significantly over the years. Another element contributing to the shift in thinking is the entry of Indian enterprises into the global market to compete with their competitors throughout the globe. Indian firms are being compelled to revaluate their CSR efforts and bring them in line with global norms as a result of the growing public knowledge of global trends. Since the advent of globalization, the multi-stakeholder approach has emerged as a prominent component of India's CSR. All stakeholders, including workers and members of the community and financial institutions, are held

accountable for the activities of corporations under this policy. This method entails the incorporation of corporate social responsibility into a long-term business plan of operation. Sustainability-conscious companies must take an all-encompassing view of the problems they face and the solutions they devise. Sustainable development performance (i.e. social equality, environmental protection, and economic growth) must be proven and practiced in their operations if financial drivers are to be integrated into mainstream company strategy and anchored in organizational values.[148] People, planet, and profit" is the day's slogan, which is sometimes referred to as "Triple Bottom Line." Additionally, according to Indians, firms should try to minimize human rights violations and relieve poverty in addition to delivering high-quality goods at affordable rates. They want businesses around the world, as well as those in their own backyards, to step up and take responsibility for the societies and communities in which they operate. 8 Businesses need to adopt these ideas if they want to remain viable in a failing society, let alone prosper. Success for a company typically hinges on public acceptance of its activities, especially in a foreign market. However, public acceptance will only occur if the organization is seen as sympathetic to local goals and values. Investors are increasingly considering a company's social performance when making investment choices.[149] They are wary of putting their money into a company that isn't concerned about its social responsibilities. This has led to the importance of a company's social report card in recruiting new investors. Even though the public's expectations of Indian companies may appear high at first glance, they are similar to shifts in public opinion currently taking place around the world. Companies have the ability to participate and make a difference in India's socioeconomic situation, where "corporate social responsibility in India has significant potential for boosting corporate environmental and social conduct."[150] The contribution does not have to be massive and is not simply the obligation of major, multinational corporations with tremendous financial resources to make a contribution. However, even small and medium-sized businesses have a role to play, but only to a certain extent. Increasingly, company plans include elements of CSR.

LIMITATION OF THE STUDY

[148]TAJANA CHAHOUD ET AL., CORPORATE SOCIAL AND ENVIRONMENTAL RESPONSIBILITY IN INDLIA - ASSESSING THE UN GLOBAL CoMPAC's ROLE 24-26 (2007).

[149]SumanKalyanChaudhury, Sanjay Kanti Das, Prasanta Kumar Sahoo, Practices of corporate social responsibility (csr) in banking sector in india:an assessment, Research journal of Economics, Business And ICT, Volume-4,2011, Page no.-76.

[150]TAJANA CHAHOUD ET AL., CORPORATE SOCIAL AND ENVIRONMENTAL RESPONSIBILITY IN INDLIA - ASSESSING THE UN GLOBAL CoMPAC's ROLE 96 (2007).

1. The study is barely based on secondary data.
2. The study is not covered overall areas of CSR.
3. The study has barely for short tenure.
4. The study scarcely applies few analytical and statistical method to draw the conclusions.

SUGGESTION FOR FUTURE RESEARCH

On the basis of this work, the study will offer input resources for further research. The CSR policies of the entrepreneurs in the modern world is day by day improving in a scheduled manner and Govt. tries to make proper rules and regulations to implement this . More research works need to be done in the similar path by applying different time phase and different methodologies. The study recommends that the compulsory CSR policies prescribed by the Company Act 2013 and its new amendment rules should be implemented by the entrepreneurs. Finally, it is recommended that more research should be carried out to find out more about the impact and competence of CSR in Companies.

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DEMYSTIFYING THE 'NEXUS OF CONTRACTS' THEORY THROUGH RIBSTEIN'S 'UNCORPORATION' CRITIQUE

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Siddharth Anand Panda[152]

ABSTRACT

In traditional legal theory, the fundamental notion of a 'corporation' was solely contractual. Many legal scholars buttressed the idea that a 'corporation' is merely a legal fiction borne out of the simultaneous intersection of contracts. This notion was forwarded by Jensen and Meckling's 'Theory of the Firm' hypothesis and later established by Easterbrook and Fischel in their seminal work 'The Corporate Contract'.

However, modern corporations don't perfectly fit into the 'Nexus of Contract' (hereinafter "NoC") model for it is difficult to handle corporate operations only through multiple differential contracts. In response to this, Larry Ribstein advanced the idea of 'Uncorporation'; an evolutionary corporate setup based on the NoC that is more autonomous and flexible than the traditional conception of corporation.

Part I of this paper attempts to bring conceptual precision in this discourse through a descriptive study of the NoC. Part II tries to critically evaluate the corporate status quo to check the veracity of NoC. Part III deals with Ribstein's 'Uncorporation' hypothesis and examines its claims and the model advanced by it. Consequentially, Part IV presents the

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proposition that NoC has finally crumbled, and is no more a relevant theory of corporation.

Keywords: *Uncorporation, Corporation, Corporate Governance, Nexus of Contracts, Firm*

CORPORATION AS THE 'NEXUS OF CONTRACTS' THEORY: AN INTRODUCTION

A corporation is not a contract; it is a legal entity created by the state. It has legal personhood with the option to frame and enter into contracts, suffer liability for torts arising therefrom, languish responsibility over misdeeds, and make a lawful case for itself.[153] Nonetheless, numerous scholars of corporate law have stayed loyal to the notional allegory, model, worldview which perceives a corporate as an extension or "nexus of contracts".[154] The 'Nexus of Contracts' hypothesis is intended to propel the financial and independent nature of the Corporation and to pardon the possibility that it owes anything to the state.[155] It is likewise utilized to buttress or preserve the corporate status quo as opposed to dynamical state policy. The theory contends that the corporation reflects what the parties to a contract have uninhibitedly intended.[156] The fundamental corporate model wherein investors and creditors choose the top administrative staff, who then deal with the arrangement of the supporting staff and authorities isn't viewed as the decision of the state. It is the result of free determination of corporate chiefs, board of directors, creditors, and different partners of the corporate arrangement. To debate this design is to scrutinize the market choices of the people who are, evidently, in the best place and shape to make these decisions.[157]

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[153]Grant M. Hayden and Matthew T. Bodie, *The Uncorporation and the Unraveling of Nexus of Contracts Theory*, 109 MICH. L. REV. 1127 (2011) [*hereinafter* "Hayden"].

[154]*Id.*

[155]Henry N. Butler, *The Contractual Theory of the Corporation,* 11 GEORGE MASON LAW REVIEW 99-123 (1989).

[156]Michael C. Jensen and William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, in* A THEORY OF THE FIRM: GOVERNANCE, RESIDUAL CLAIMS AND ORGANIZATIONAL FORMS (Michael C. Jensen ed., Harvard University Press 2000) [*hereinafter* "Jensen"].

[157]Hayden, *supra* note 1.

This standard supposition by Micheal Jensen and William Meckling, presenting a positive theory of corporation, has been at the helm of developmental corporate theory for decades. The Nexus of Contracts hypothesis, by and large, ascribes to Jensen and Meckling's "Theory of the Firm" which holds that the firm (or the corporation as an extension) is just a product of simultaneous contractual agreements.[158] Jensen and Meckling stress that the corporate is merely a "legal fiction" devoid of a legal personality or autonomous presence of its own. This hypothesis tries to reconceptualize the traditional notion of the corporate as a solitary unit and disaggregates it into its segment parts. These segments are identified through legally binding contracts amongst different stakeholders engaged with the corporate: creditors, directors, executives, suppliers, employees, and customers. That is to say, the existence of the corporate is redundant in itself.[159] Ergo, corporate law should simply be an expansion of law of contracts and should concentrate on encouraging these interrelationships in the most proficient way.

On parallel lines, Frank Easterbrook and Daniel Fischel reinforced the contractarian nature of the corporation.[160] They opined that the fundamental nature of laws for corporate governance is useless as "divergence between private and social interest is rare".[161] Ergo, it doesn't matter what objectives are sought by the Corporate: social welfare, profit-making, or charitable purposes. It also didn't make a difference whether companies operated for a long-term or temporarily. In light of the notion that a corporate was essentially a mesh of 'private contracts' these suppositions do not hold much value. The objectives of corporate law were already accomplished in the law of contracts, or the law of torts, or explicit legislations outside corporate law. Corporate law itself was only a sub-class or an extension of contractual law where the main aim is to uphold and enforce private deals. Frequently, the express terms of the 'corporate agreement' runs out regularly. Thereafter, corporate law makes default rules or individual contracts for unique situations. Thenceforth, in the event that you impertinently enquired about the fundamental idea of corporate law, the answer was exactly: "Who cares?" [162]

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[158]Jensen, supra note 4.

[159]Lewis A. Kornhauser, *The Nexus of Contracts Approach to Corporations: A Comment on Easterbrook and Fischel*, 89 COLUMBIA LAW REVIEW 1449-460 (1989) [*hereinafter* "Kornhauser"].

[160] Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract,* 89 COLUMBIA LAW REVIEW 1416 (1989) [*hereinafter* "Easterbrook and Fischel"].

[161]Easterbrook and Fischel, *supra* note 8.

[162]Ewan McGaughey, *Ideals of the Corporation and the Nexus of Contracts,* 78 MODERN LAW REVIEW 1057-1090 (2015).

This argument of Frank H. Easterbrook and Daniel R. Fischel lays on the possibility of the "nexus of Contracts". The aforementioned theory infers that, a typical investor has a little stake - little in contrast with the huge size of the venture. Then again, the board of directors of the concerned corporate know about the complexities of the business. This established notion describes an entity that is in actuality not present but is more akin to a legal fiction made up of several constituent parts, which are the contractual obligations between different parties.[163] Along these lines, corporate law, ought to be an augmentation of law of contracts which administers with more accuracy, the connections comprising the foundation of the corporate organization itself. One of the proponents of the Uncorporation theory, Stephen Bottomley, vehemently argues that:

“Why not just abolish corporate law and let people negotiate whatever contracts they please? The short but not entirely satisfactory answer is that corporate law is a set of terms available off-the-rack so that participants in corporate ventures can save the cost of contracting. There are lots of terms, such as rules for voting, establishing quorums, and so on, that almost everyone will want to adopt. Corporate codes and existing judicial decisions supply these terms ‘for free’ to every corporation, enabling the venturers to concentrate on matters that are specific to their undertaking.” [164]

The “Nexus of Contracts” theory has been essential in the development of Statute of corporate regulation. Nonetheless, despite its academic strength, there is still confusion over - whether hypothesis is a normative theory or a descriptive idea, or a mix of both.[165] Jensen and Meckling introduced a “positive theory of the corporation” and its interrelations. That string has been acknowledged in the legal academia, with Easterbrook and Fischel solidifying the idea advanced. But even at the most basic of levels, the “Corporation as Contract” claim is ambiguous.

Corporations don’t perfectly fit the NoC theory.

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[163] A. Schwartz, and R.E. Scott, Contract Theory and the Limits of Contract Law, 113 YALE LJ 541 (2003) [*hereinafter* “Schwartz”].

[164] STEPHEN BOTTOMLEY, RETHINKING CORPORATE GOVERNANCE, 99 (1st ed, Taylor and Francis 2016)

[165] Melvin A. Eisenberg, *The Conception That the Corporation Is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819 (1999).

THE STATUS QUO STUDY OF MODERN 'CORPORATION' VIS-À-VIS 'NEXUS OF CONTRACTS'

Since contractarians have vehemently explained corporations solely as a product of multiple contracts, it seems only plausible that, by inductive reasoning, every functioning corporation must therefore readily fit into the theory of Nexus of Contracts. However, as it will be apparent from the discussion below, this does not seem to be the conclusion.

Corporations have long suffered from the prevalence of high corporate taxes and strict corporate governance, but despite these pitfalls, a large majority of businesses have adopted the traditional form of the corporation as the default organisational structure by the majority of businesses.[166] This behaviour can be satisfactorily explained by focusing on the lucrative opportunity to avail a limited liability which, only the corporations used to offer to businesses. Now, although this is a plausible explanation, the fact remains that 'limited liability' is not, in any way a feature or product of Nexus of Contract, which according to contracterians is the basis of corporations. Surprisingly, Ribstein agrees that it was the promise of low risk and limited liability, which only the corporation provided, that attracted so many proponents.[167] It is this particular reason why the partnership structure of organization paled in comparison to the corporation. Nevertheless irrespective of the actual reason, limited liability is not a product of Nexus of contract, therefore, the very fact that it is this feature that has led to the widespread adoption of corporations, casts serious doubts on the basic presumption that corporations are by nature a product of the intersection of contracts.[168]

The aforementioned proposition already reveals cracks in the NoC model. But Ribstein teething to dodge the implication explains this phenomenon by arguing that it was the lawmakers who grasped onto the benefit that limited liability provides, and channelled this benefit into the corporation structure so that a quid pro quo can be extracted in return of availing the benefit.[169] Ribstein also claims that this was one of the reasons for the late rise of 'uncorporations'. And in a final attempt to defend the Nexus of contract, Ribstein posits that parties valued the benefit offered by limited liability, over increased taxation and state regulation imposed by the

[166]Marco Becht, Patrick Bolton, and Ailsa Röell, *Corporate Governance and Control*, *in* HANDBOOK OF THE ECONOMICS OF FINANCE 93-109 (1st ed., Elsevier 2003).
[167]LARRY E. RIBSTEIN, THE RISE OF THE UNCORPORATION 1 (1st ed., Oxford University Press 2010) [*hereinafter* "RIBSTEIN"].
[168]Kornhauser, *supra* note 7.
[169]S. Levmore, *Uncorporations and the Delaware Strategy*, 45 U. ILL. L. REV. 195 (2005).

government, and adopted the corporation as the preferred model of the business framework.[170]

Additionally, the notion that one can simply produce a corporation out of a connexion of contracts is also not entirely without blemishes. Furthermore, the idea that state intervention is absent in the formation of a corporation which is strictly a product of contractual obligation between parties, is also merely another superficial allegation. Because, no matter the contractual basis, the state is still required to grant permission for the establishment of the entity, the mere fact that states readily grants said permissions does not erase the requirement for the permission and does not in any form imply the absence of influence on the part of the state. Minimal obstructions cannot be construed as the absence of impediments altogether. Although there does exist the counter-argument that the theory of NoC is merely a model, it is however not solid, since it has never been confirmed whether the theory is a normative prescription or just a descriptive idea.[171] Additionally, the theory heavily propounds the contractual nature of corporations to such a degree that it invariably leads to the conclusion that, parties have an extremely high degree of, if not complete, freedom to be able to choose the terms of the contract that form the corporation, and therefore, the governing corporate law should in actuality be an extension on contract law which functions as a facilitator of free markets and freedom of contracts, and governs the minute intricacies of interpersonal contracts of the parties all the while shunning completely all compulsory regulations.[172] This simply isn't true, since, the corporate code in almost every state is an "enabling" statute and an empowering statute enables administrators and investors to set up frameworks of administration without substantive intervention and larger hindrances on corporate administration. As is evident by now, there are plenty of loopholes in the proposition of the contractarians, and attempts to elucidate any general model of the corporation as a product of the theory of NoC does not often, if not all the time, result in a perfect fit.[173]

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[170] *Id.*
[171] Charles RT O'Kelley, *Coase, Knight, and the Nexus-of-Contracts Theory of the Firm: A Reflection on Reification, Reality, and the Corporation as Entrepreneur Surrogate*, 35 SEATTLE UL REV. 1247 (2011).
[172] Richard L. Langlois, The Corporation Is Not a Nexus of Contracts. It's an iPhone, (July 2016) (Unpublished PhD thesis, The University of Connecticut)(On file with author).
[173] Kenneth Ayotte and Henry Hansmann, *A Nexus of Contracts Theory of Light Entities*, 42 INT'L REV. L & ECON. 5 (2015) [*hereinafter* Ayotte and Hansmann].

UNCORPORATION: THE TRUE EMBODIMENT OF THE 'NEXUS OF CONTRACTS'

The rise of the Uncorporation is more of a narrative than a theory. The rise points towards a paradigm shift that has taken place in the business world. This paradigm shift is now gradually destabilising the long-held theories of contractarians and refuting the proposition of contracts being the basis of corporations.[174] In the aforementioned narrative, Ribstein vehemently tracks the growth and prevalence of both the corporations and the uncorporations throughout history. He carefully plots the periods of dominance of uncorporations, their eventual demise and the rise of corporations with the advent of the 19th century, and finally the resurgence the previously dormant uncorporations.[175] As to the nomenclature, it is of no surprise that Larry Ribstein himself being a stout contractarian, choose to name these other entities as 'Uncorporations'.

It must be made clear at the behest that Ribstein remains through and through a contractarian, but is unable to ignore the changes in the corporate structures where the 'uncorporations' are now in the dominance. However, it is here that the narrative is introduced to a rather interesting twist. Ribstein in an attempt to uphold the contractarian theories posits that these 'Uncorporations' do after all follow the theory of NoC. He proceeds to explain that the Uncorporations are an evolution of the corporation itself and represent a much purer embodiment of, closer resemblance to, the original nexus of contract idea; even more so than the corporations ever have.[176] Ribstein also claims that, "Uncorporations provide a fundamental alternative to the corporation in addressing the central problems of business organization: how to minimize the costs of delegating power over investments to non-owner managers and controlling owners."[177] The highly specialized nature of Uncorporation(s) is indeed the manifestation of the interest and intention of parties to have more freedom in contracting business framework. And it is as a result of these endeavours that the Uncorporation(s) have started to dominate again. [178]

Irrespective of the current resurgence, it remains a fact that corporations have dominated the

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[174] *Id.*
[175] RIBSTIEN, *supra* note 15.
[176] John R Boatright, *Contractors as Stakeholders: Reconciling Stakeholder Theory with Nexus-of-Contracts Firm*, 26(9) J. BANK. FINANC. 1843, 1837-1852 (2002) [*hereinafter* 'Boatright'].
[177] RIBSTIEN, *supra* note 15.
[178] Boatright, *supra* note 24.

organisational framework of businesses for years, so shouldn't this be adequate proof of the effectiveness of the NoC theory of corporations? No. The initial rise of the corporations can simply be explained by the fact that corporate law, as opposed to contract law, provides various benefits to the incorporated entities which would otherwise be unavailable.[179] On the other, it remains a matter of fact that corporate law also imposes some mandatory requirements on the parties to the corporation which would otherwise be absent in contract. This raises serious doubts as to the actual reason for wide-scale adoption by parties, who, imbibed with the ideals of a free economic construct agree to a regime of compulsory obligations via a process of free contracting (as proposed by the NoC theory). Especially, when the very idea of a corporation made up of contracts, is to be able to choose any and all terms that are imposed on the parties on their own consent.[180]

Another observation is that the basic structure of a corporation has remained the same even for markedly different businesses. This structure of governance always invariably comprises of shareholders, a board of directors elected by the shareholders and a right provided to the shareholders to be able to sell their shares in the market for further profits. It is this basic organisational structure which is found across all corporations which once again is completely sardonic on the face of the theory that, if corporations are the result of free contracting between parties, then having the same basic structure for every corporation makes little sense if at all, and defeats the very purpose of the system. As is evident by now, the NoC theory is packed to the brim with similar doubts and cracks that have not been satisfactorily resolved by the proponents of the theory. This invariably leads to the failure of the theory of "Nexus of Contracts".[181]

UNCORPORATION & CONTRACTUAL FREEDOM: NOT TRULY FREE

The liberal or the free, or the laissez-faire economy is not an economy of freedom but an economy of license. The planned economy is not rational, it is an economy of restraint. This implies that free enterprise must be defined as a contrast to both laissez-faire and planned

[179]Joseph A McCahery et al., *A Primer on the Uncorporation*, 14 EUR. BUS. LAW REV. 331, 305-342 (2013).
[180]*Id.*
[181]Marcel Clément, *From "Laissez-Faire Entreprise" To Free Enterprise*, 67 BULLETIN DES RELATIONS INDUSTRILLES 33 (2011).

economy because real liberty is defined as much by its difference from license as by its difference from restraint.[182]

The greatest advantage that the Uncorporations have over traditional corporations is the flexibility in terms of contractual obligation that they offer. In fact, "Uncorporations differ from corporations in terms of their ability both to choose contract terms that suit the particular firm and to modify terms to adjust to changes in the firm or its business environment."[183] After all, the term 'Uncorporation' is merely a tag Ribstein put on all other forms of business frameworks that were dissimilar to that of the corporation. The flexibility that these Uncorporations offer results in a far more specialised arrangement for parties, which then enables them to mould the structure to fit the various idiosyncratic objectives they might fester. In fact, owners of Uncorporations tend to have a greater admittance to assets of the business, and can demand further liquidation or buyout to suit their specialised needs[184]. It is this increased access that offers parties fortification against managerial costs that have historically beleaguered traditional corporations. However, even though Ribstein considers Uncorporations as being more 'contractual' in spirit than corporations, he is weary to admit that not all are fully contractual even in the world of Uncorporations. For example, it is typical to have Uncorporations where the right to transfer management rights have been handicapped to some extent to preserve the structure and overall functionality of the said Uncorporations. Lastly, Ribstein also admits that complete and total flexibility might not always be the most efficient answer. He denotes that standardization is in fact, at times necessary "to clarify the expectations of the many people with whom the corporation deals."[185]

WHY 'NEXUS OF CONTRACTS' THEORY STARTS TO CRUMBLE?

At this point, the aforementioned deliberations have conclusively unravelled the frail and untenable foundations of the proposition that the corporation is the direct product of a Nexus of Contracts. As discussed previously, the initial rise of corporations eventually started to witness some major shifts due to the change in tax laws across the world, these tax reforms

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[182] Ayotte and Hansmann, *supra* note 22.
[183] *Id.*
[184] RIBSTIEN, *supra* note 15, at 139.
[185] RIBSTIEN, *supra* note 15, at 149.

were introduced with the objective of providing nation-states with leverage to compete in the increasingly globalised economy that was emerging towards the end of the twentieth and the start of the twenty-first century. Corporations and firms all over the world were now being 'double taxed', subjected increasingly strict scrutiny and regulation.[186] As a result of which businesses were forced to start the search for other organisational structures to avoid paying the newly imposed corporate taxes, and escape the stringent government regulations. Therefore the troubled businesses finally started to settle on the idea of 'limited liability companies'. And as a result, LLCs and LLPs started becoming more and more prevalent.[187] This phenomenon warranted the reconsideration of various traditional theories of the corporation.[188] This rise of the uncorporations, and their continued success also meant that the traditional components of the corporation, i.e. the shareholder voting, fiduciary duties, directors etc. are not indispensable parts of a successful business venture. This development also highlights that state corporate law, and not contract law is responsible for structuring and re-structuring of modern-day business organisations.[189]

This shift is not only a reflection of how corporations and businesses responded to the changing times but also is the inception of the deterioration of the NoC theory. Especially with the push for a more laissez-faire oriented global economy, transitioning businesses were able to judiciously juggle operational costs and profits until they were able to finally escape the tax conundrum.[190] Ribstein however, does not side with this narrative. Instead, he is adamant on insisting that the real object behind this paradigm shift is that the "contractual desires" of businesses and the pressures of the new age commerce were at last able to break out of the traditional framework which was forcing businesses to morph themselves into one specific structure irrespective of their varied objectives. Nevertheless, regardless of the differences between Ribstein's narrative and the one proposed above, it is undeniable that in both the narratives, there exists a common appreciation for the importance of the state and corporate law in shaping the organisational arrangement of even these "uncorporations".[191]

Finally, notwithstanding the arguments and counters, the definitive inference at the end of this

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[186]Kornhauser, *supra* note 7.
[187]RIBSTIEN, *supra* note 15, at 120-121.
[188]*Id.*
[189]Hayden, *supra* note 1.
[190]*Id.*
[191]Schwartz, *supra* note 11.

lengthy discourse is that, the corporation, as was previously hypothesised by contractarians, is in fact not just a nexus of contracts. It is, as it turn out, a fluid organisational structure that is constructed on top of various state sponsored benefits, along with some mandatory regulations and guidelines. This implies that the state does in fact plays a much larger and prominent role in the formation of the corporations and/or uncorporations alike. This is in direct contrast to the ideals advocated by the proponents of the Nexus of Contract theory.[192]

CONCLUSION

Ribstein seems to have finally accepted uncorporations as the downfall of the Nexus of Contract theory, albeit as a positive description. As it appears, the corporation is after all not a central vertex at which myriad contracts superimpose. Instead, it is an entity created with the active sanction of the government containing certain obligations and restraints on the parties to the business. This seems to be the price to be paid by a specialised business entity, for it to be able to thrive in the globalised open economy of the 21st century. This suggests that the takeover of the uncorporation is a global phenomenon and is there to stay. After all, in affirmation to Ribstein's beliefs, the uncorporation is indeed an evolution of the corporation forced by the demands of the modern economy. But, as opposed to Ribstein and other contractarians, even the uncorporations are not truly made up of a free nexus of contracts and are in the end at the mercy of state sanctions.

Maybe we are advancing towards a profoundly decentralized future in which we would witness and participate in a market held by small corporates, each customized to the requirements of its customers. Such a future is undoubtedly appealing and lucrative, and 'The Rise of the Uncorporation' makes appreciable efforts in selling the advantages of an "Uncorporation." But as Ribstien himself recognizes, we are far away from such a world. The "Nexus of Contracts" theory doesn't mirror or even acknowledge the realities of a modern corporate. It's an ideal opportunity to follow Larry Ribstein back to this present reality where hierarchical structures and the legislatures that make them-genuinely make a conspicuous difference.

[192]Kornhauser, *supra* note 7.

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HISTORICAL DEVELOPMENT AND EXPANSION OF FUNDAMENTAL RIGHTS UNDER THE INDIAN CONSTITUTION

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ABSTRACT

The Indian Constitution has granted certain rights to the people that are referred to as "Fundamental Rights" These rights can be enforced through the use of the legal system. However, the government has cited these rights as "obstacles" to its policies on a number of occasions, particularly those pertaining to state security and those pertaining to social welfare legislation. As a result, the Parliament has updated these rights on an as-needed basis over time. In fact, Part III of the Constitution, which contains the Fundamental Rights, is one of the most often modified sections of the document.

INTRODUCTION

It is the purpose of rights-based democratic constitutions to identify and safeguard the conditions that allow for the flourishing of human life. Social institutions, it is claimed, are important for a life that is worth living since they offer the basic needs of a civilised human existence, which are provided by them. Throughout history, the ultimate aim of human existence has varied, but it has always contained some element of pleasure for those who seek it in the pursuit of it. The enhancement of one's physical and mental capacities has long been considered to be the ultimate goal in one's journey through life. It is believed that human beings are collections of creative impulses that must be nurtured and developed in order to live a fulfilled life. Growth and development of a person's inner self are essential to their overall development and evolution.[193] All these are tied around the rights and respects that once is accorded in the society and primarily at the hand of the state. In challenging conditions, such as those that limit their freedom of movement or jail them unjustly, people who are unable to completely develop their initiative will be disadvantaged. Nobody can reach their full potential unless they have the freedom and equality that all people enjoy in our world. The actual self of a person will be strangled by constraints on their freedom of movement, speed, and activity, among other things. This means that we will not be able to enjoy our rights unless we comply with these requirements. The notion of basic rights, on the other hand, is a very new addition to the legal landscape. Since the beginning of time, governments have recognised that safeguarding and defending people's basic rights is a vital issue, and this has been the case for hundreds of years. Since its inception during the Medieval Era, the weight of authority has strangled human individuality throughout the whole length of that era. Personal liberty was often seen as an impossible goal for the majority of people as soon as the Modern Era began and governments were established. Contrary to popular belief, despite the expansion of humanism and the ethos it represents,[194] there has been a pervasive disregard for human existence and individuality throughout history, despite the advancement of humanism and the ethos it symbolises. A half-century ago, political developments were taking place all across the globe. These developments need to be located in the Indian subcontinent and these developments need to be understood in an elaborate manner.[195] This paper seeks to do the same.

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[193] R Blower, "*Rights and Wrongs",* (FR, 1997).
[194] A Kapuskasing, "*A Remedy worse than the Disease," (HP,* 1998) 16.
[195] H Khari, "*Judicial Activism: The Good and the Not So Good"* (HP, 1997) 11.

Hypothesis

This paper hypothesises the unique Indian history that went into the cultural adoptions of fundamental rights from across the world and from the internal conflicts that India itself saw with the advent, presence, and the conclusion of the British Rule here and the movements that led to emancipation of the Indian polity.

Research Questions

1. Whether there exists some continuity in the entire discourse of Fundamental Rights in their development in India?
2. Whether this continuity points to the broader populist factions getting into the political powers?

Research Objectives

The objective of the paper is to produce a fairly elaborate historical comment on the development of Fundamental Rights in India and how these have been looked at by the general populace, courts, and the workers of the constitutions.[196]

THE LATE COLONIAL ERA

There have been a number of new states founded as a result of the Second World War's conclusion and the breakup of the British Empire. For vanquished nations like Germany, Italy, and Japan, as well as newly independent former colonies in Asia and Africa, establishing governments based on the rule of law after they had been defeated was a time-consuming and difficult task. When Japan, Italy, Germany, and India created their own constitutions, they did it in accordance with a Western-influenced paradigm (1950). Following the Holocaust and other heinous tragedies, a number of countries have come up with innovative methods to ensure the continuation of international peace. In the history of the world and the modern human rights movement, there have only been a handful of governments that have had a major effect. The United Nations General Assembly approved the Universal Declaration of Human Rights on December 10, 1948, and it has been in effect ever since (according to the Universal Declaration

[196] A Kapuskasing, "*A Remedy worse than the Disease," (HP,* 1998) 16.

of Human Rights.).[197] Many basic human rights, as described in the Universal Declaration of Human Rights, were being infringed or neglected prior to the outbreak of World War II. As a result of their establishment and steady implementation in newly independent countries, it was believed that these essential rights would serve as a starting point for genuine constitutionalism across the globe once they were implemented. Many of the newly independent governments of the former Soviet Union currently adhere to constitutions, bills of rights, and the rule of law, according to international standards.[198] When it comes to Great Britain, a nation that has historically supported the authority of parliament, the debate over the need of having an official document that contains the constitution and a bill of rights is still raging. An internationally recognised Western export, 2 is one of the most well recognised Western exports. In the last half-century,[199] there has been a tremendous comeback of constitutionalist thought. As already stated, this is the central theme of the paper whereby it will examine strategies for building on the accomplishments made over the preceding half-century in terms of strengthening India's constitution for the next hundred years, with an emphasis on the country.[200]

THE INDIAN CONSTITUTION AND ITS BIRTH

The Indian Constitution was established decades ago, marking a significant milestone in the country's history. One piece of paper, the National Charter of Liberties, contains the basic rights of one billion individuals, encapsulated in a single document. Within this group of individuals, there is a diverse range of social and theological backgrounds represented. The fact that India's Constitution has been in existence for more than 50 years is a monument to how far the nation has come in terms of democratic development since independence. For the sake of world peace and security, the progress of India's constitutionalist movement must be properly observed. Because it combines many of the most basic characteristics of American constitutionalism, the Indian constitution may be utilised as a testing ground for difficult constitutional law issues in the United States. As a result, it is an excellent choice for such a role. There are five fundamental elements in this "five-point" set of guidelines: constitutional liberty, written constitutions, and the supremacy of the constitution. The United States

[197] H Khari, "*Judicial Activism: The Good and the Not So Good*" (HP, 1997) 11.
[198] S Sorabjee, "*Protection and Promotion of Fundamental Rights by' Public Interest Litigation in India*" 51 R. INT'L CJ 31, 37 (1993).
[199] U Baxi, "*Dialectics of the Face and the Mask," 35* J. INDIAN L. INST. (1993) 6.
[200] N. Palkhiwala, 'OUR CONSTITUTION DEFACED AND DEFILED' (LZ, 1981).

Constitution has had a "major" and "direct" effect on society in terms of human rights protection, according to those who have studied the subject. Following the lead of "the American judicial institution and its constitutional purpose," the founding fathers of India believed that the only way to establish a more open, fair society was to model it after the "American legal system." While their different constitutions differ, the United States and India have a number of aspects that make them similar in nature. In recent years, intellectuals, lawyers, and judges in North America have paid insufficient attention to international constitutionalist concepts, despite their importance.[201] However, although studying the constitutions of other nations might be very beneficial, it is not a pre-requisite. As this article convincingly argues, there are various lessons to be learned from India's history and modern practises of constitutionalism, which include the questions of feasibility. Is it feasible that our nation's founding fathers were already aware of the need of maintaining Indians' human rights prior to our country's freedom from the British Empire? It was the core of Tilak's address to the British administration in 1895. There are certain former British colonies in India whose constitutions do not have a bill of rights, which is a source of contention between the two countries. In 1928, the idea of enshrining fundamental political rights in the Constitution was floated about for consideration. As a result, when the members of the Constituent Assembly met to draught Article III of the Constitution, it was clear that the United States Bill of Rights was being referred to in the document. There are some excellent metaphors for human rights in this book when it states things like "Potomac, not Thames, fertilised the flow of Yamuna.".[202] The terminology of India's "basic rights" has been strongly impacted by American legal thought, as has the wording of the Indian Constitution. As a consequence of India's unique history, the country's commitment to civil rights has left a lasting influence on the whole world. The imposing of particular limits on basic rights does not invalidate the constitutional protections afforded to such rights under the Constitution.[203]

THE CONTENT OF RIGHTS

People's rights are safeguarded by Articles 14 to 32, which are numbered 1 through 32 in Part III of the Constitution, which covers a broad variety of topics and concerns a wide range of

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[201] U Baxi, "*Dialectics of the Face and the Mask," 35* J. INDIAN L. INST. (1993) 6.
[202] A VA naik, 'THE FURIES OF INDIAN COMMUNALISM: RELIGION, MODERNITY AND SECULARIZATION' (OP, 1997).
[203] A Kapuskasing, "*A Remedy worse than the Disease," (HP,* 1998) 16.

issues in general. Non-citizens are entitled to the same protections as citizens in the United States. The following section provides a succinct overview of the most important rights categories in India, as they are classified and fought over in the courts. Historically, European kings believed that as their kingdoms evolved in tandem with the Divine, they would be able to wield unrestricted sovereignty over the affairs of humankind.[204] Upon taking power, absolute monarchs implemented unreasonable restrictions and punishments that only served to further deteriorate the state and the people over which they governed, as well as themselves. A movement was created to solve these issues as a result of these circumstances, since it became more difficult to recognise the worth of a person while still creating socially organised living entities. Incorrectly implemented policies that have been re-configured to function in new ways. Consequently, the upheaval of absolute monarchy provided as an inspiration for the novel.

With the exception of rights pertaining to the myriad ways in which individuals desired to express their human identity, this resulted in essentially little change in social standing. This has resulted in a large number of tutorials covering a wide range of topics related to tuition, many of which are seen as essential for self-realization by many individuals. As stated in the Polish Constitution, "the secret of letters and other communication may only be disturbed in cases provided by law," and "Children denied proper parental care, respect for education, have a right to public support and protection," and "Children denied proper parental care, respect for education, have a right to public support and protection," and "Children denied proper parental care, respect for education, have a right to public support and protection," respectively. People will be protected against unjustified searches and seizures of their personal property, houses, and documents, and every accused individual will be entitled to a speedy hearing in all criminal proceedings. In the United States, it is against the law to seize property as a means of punishing a criminal offender. It is stated that "the right to freedom of expression is safeguarded." Petitioners may submit petitions to public authorities signed by one or more individuals from any location in the globe, including their home country. Private teaching should not be outlawed, and any activities that block it should be treated as unlawful violations of the law. It is the responsibility of the Riksmal, when it nominates persons to construct the yearly market rate table, to ensure that the table is followed until a regular

[204] S Sorabjee, "*Protection and Promotion of Fundamental Rights by' Public Interest Litigation in India*" 51 R. INT'L CJ 31, 37 (1993).

revision is sought and achieved. The Riksmal employs appropriation law assessors, who are not held responsible for their work under Swedish law. Global constitutions demonstrate that basic rights apply in a wide range of circumstances, no matter where or when they are experienced. Because of the wide range of topics covered in this book, it seems to cover the whole spectrum of human experience, even the most prosaic elements of day-to-day existence.[205] As far as history is concerned, eliminating obstacles to a person's spiritual growth was unquestionably one of the primary goals of the civil rights movement.[206] However, even if it is always vital to address the most basic demands of human growth, the issue mother is negatively influenced by the current conditions.[207]

The meaning of the term underwent a considerable transformation in the late twentieth century. Because of the rapid growth of the industrialised world, the scope of basic rights has also increased rapidly. As a consequence of this growth, the scope and complexity of basic rights have also increased through time as well. [208]At first, it seemed that the situation was hopeless, but as time went on, the scenario became more positive. In the same way, as the threats of authoritarianism recede, so does the requirement for retaliatory measures. When you consider the importance of a person's basic rights, it is essential to guarantee that a country's educational system is protected.[209] This is especially true in developing countries. Example: A written constitution or a grouping of written constitutions may comprise "a collection of prescriptions defining and protecting the political rights of the people, as well as guidelines for how those rights might be protected via the exercise of government power." When it comes to state laws, they must meet a higher level of sanctity and certainty of enforcement than normal laws if they are to be more powerful than regular laws. Incorporating mental health provisions into the Constitution makes them more easily administered and has a greater impact[210] on society as a result of their increased influence. Since the beginning of the progressive movement and its unique historical epoch, every clause of the constitution has been scrutinised. Once they have been included into the constitution, it is very difficult to

[205] A Kapuskasing, "*A Remedy worse than the Disease," (HP,* 1998) 16.
[206] M. Abel, "*American Influences on the Making of the Indian Constitution,"* 1 J. CONST. PARLIAMENTARY STUD. (1967) 35.
[207] A Kapuskasing, "*A Remedy worse than the Disease," (HP,* 1998) 16.
[208] G. A. Christenson, "*Using Human Rights Law to inform Due Process and Equal Protection Analyses,"* 52 U. CIN. LR. (1985).
[209] R Kothari, "*India: The Growing Courage of the Poor* (T Press, 1997) 13.
[210] A VA naik, 'THE FURIES OF INDIAN COMMUNALISM: RELIGION, MODERNITY AND SECULARIZATION' (OP, 1997).

have them changed later on. Having these three characteristics in place when dealing with something as intimate as human rights is vital to a successful outcome. Taking into consideration this viewpoint, it is feasible to assess India's constitutional safeguards for basic rights and freedoms. This real scenario has been blamed in large part for the lack of basic rights in India, which is largely composed of a collection of Parliamentary Acts that were pushed on the nation in order to maintain peace during the British colonial era. Since India was a British colony until relatively recently, the needs of the Indian people have received little attention from the authorities of the country.[211] In spite of the fact that the 1919 Act was supposed to represent a watershed point in India's march toward responsible governance, the preamble of the Act has remained almost intact for nearly one hundred years. Discrimination in the public sector on the basis of caste, creed, or skin colour became outlawed after a series of royal proclamations rendered it unlawful. Unlike these pronouncements, which were made without the power that comes from being inscribed in the constitution. Sections 298 and 299 of the 1935 Government of India Act were modelled after Sections 298 and 299 of the United States Constitution, respectively. When India was ruled by the British, Indian citizens were not subjected to any type of discrimination on the basis of their religion, ethnic heritage, or lineage. Indian residents of British India are prohibited from being discriminated against on the basis of their race or national origin by Section 298 of the Indian Residency Act of British India. While the above observations were made in 1935 (according to the citation). They behaved in an unreasonable manner.[212] The following three categories may be used to categorise wards in most cases:[213] A second point of worry is whether or if lawmakers are willing to expose themselves to a more rigorous legal system that may result in constitutional safeguards for these rights being established. However, they were more concerned with the inclusion of basics than they were with the significant psychological influence they had on those who were exposed to them, which was a worry for them as well. Prof. Arnold Zurcher says that, despite the fact that rights are integrated into the constitution as political nostrums, they may cause problems since they are as applicable to India as global basic rights while not providing any difficulties for the Indian constitution's framers. It is critical to limit the authority of the legislative branch in order to avoid it from becoming a totalitarian and

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[211] M. Abel, "*American Influences on the Making of the Indian Constitution,"* 1 J. CONST. PARLIAMENTARY STUD. (1967) 35.

[212] S Sorabjee, "*Protection and Promotion of Fundamental Rights by' Public Interest Litigation in India"* 51 R. INT'L CJ 31, 37 (1993).

[213] U Baxi, "*Dialectics of the Face and the Mask," 35* J. INDIAN L. INST. (1993) 6.

potentially dangerous institution in the future. Following the adoption of the Constitution in 1935, the fundamental rights of citizens were carefully safeguarded. Despite the fact that the Constituent Assembly of India ratified the new Indian Constitution in 1947, it took more than a century for India's long-held desire for basic rights to be eventually realised in the new Constitution. This committee, which is directed by Sardar Vallabhbhai Patel and was established by the Constituent Assembly on January 24, 1947, has been in existence ever since. The Committee on Minorities and Fundamental Rights was established by the Constituent Assembly in 1947 and has been in existence ever since.[214] The Committee gave its recommendations to the president of the Assembly on April 23, 1947, which was the 23rd of April in 1947. According to the Committee, one set of rights should be legally enforceable, while the other set of rights should just serve as guidelines for social policy. In order to be consistent with the professed goals of democratic freedom and equal opportunity, the state was needed to act in accordance with the principles of democratic freedom and equal opportunity, as well as the Constitution.[215] In its report, the committee recommended that all inhabitants over the age of 21 should have equal access to political participation, including the right to vote and the ability to run for elective office in the municipality. What matters is that you have as many members of the Dominion as possible working for you. No discrimination is tolerated in the provision of public services such as public restaurants, hotels, entertainment, wells, tanks, and highways to the general public, so long as they are available to all people regardless of their religious, racial, or sexual orientation affiliations. They also work to eradicate any in accessibilities in order to ensure that everyone has an equal opportunity to hold public office.[216] Anyone who suffers a physical disability as a result of their own heinous conduct shall be held accountable by the law. Honorary titles or emoluments for anyone in the Union are prohibited by international treaties, and it is also prohibited by international treaties for anyone in a position of profit or trust to offer or accept honorary titles or emoluments for anyone in the Union without first obtaining the consent of the Government of the Union.[217]

The freedoms of assembly, association, travel, and settlement in any area of the United States,

[214] R Kothari, "*India: The Growing Courage of the Poor* (T Press, 1997) 13.
[215] U Baxi, "*Dialectics of the Face and the Mask," 35* J. INDIAN L. INST. (1993) 6.
[216] M. Abel, "*American Influences on the Making of the Indian Constitution,"* 1 J. CONST. PARLIAMENTARY STUD. (1967) 35.
[217] A VA naik, 'THE FURIES OF INDIAN COMMUNALISM: RELIGION, MODERNITY AND SECULARIZATION' (OP, 1997).

as well as the right to acquire, preserve, and dispose of property, are among the rights guaranteed under this category.[218] A person's life and liberty cannot be taken away from them unless and until the necessary legal processes have been followed. It is expected that any hazardous employment in the Units will have at least six children under the age of fourteen working in it. This is in accordance with federal regulations. In order for a religion to exist or advance, the freedom of conscience of its believers must be balanced against societal order and morality, among other things. In accordance with international human rights legislation, the rights to freedom of speech, opinion, and education are all safeguarded. It is important to preserve those who speak and write in minority languages, scripts, and traditions, and it is as important for educational institutions to prosper without intervention from the state.[219]

Property rights, criminal convictions, and legal rulings are just a few examples of things we take for granted in our society. Additional benefits are available in addition to the ones listed above. No matter whether the property is moveable or fixed, it is against the law to take or acquire it for public use before paying a decent price for it first. To summarise, civil judgements obtained in any of the Union's units will be enforceable throughout the others, subject to any restrictions set by the Jaw on their applicability.[220] There are no criminal charges that may be brought against anybody, with the exception of situations in which an existing law has been violated. Additionally, when it came to the Committee's suggestions for remedies, these justiciable basic rights were set out in great detail. The Supreme Court has the authority to compel lower courts to follow its orders via the use of writs such as Habeas Corpus, Mandamus, Quo Warranto, and Certiorari. Following 10 years, plans were put up to combine electorates with seats designated for minorities, after which the whole situation would be re-evaluated in light of minority rights. Upon completion of its study, the Committee recommended that this course of action be taken. It is specified in a document named The Government Of India Act, 1935, that the Governor of the country shall make[221] his best efforts to appoint council members from among the migrant population; nevertheless, in line with paragraph VII of the legislation, which specifies that the Governor of the nation should: Taking into account attributes such as talent and production,[222] it is advocated that minorities

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[218] G. A. Christenson, "*Using Human Rights Law to inform Due Process and Equal Protection Analyses,"* 52 U. CIN. LR. (1985).
[219] R Kothari, "*India: The Growing Courage of the Poor* (T Press, 1997) 13.
[220] U Baxi, "*Dialectics of the Face and the Mask," 35* J. INDIAN L. INST. (1993) 6.
[221] A Kapuskasing, "*A Remedy worse than the Disease," (HP,* 1998) 16.
[222] A VA naik, 'THE FURIES OF INDIAN COMMUNALISM: RELIGION, MODERNITY AND SECULARIZATION' (OP, 1997).

be given a fair share of the workforce, in accordance with the Committee's recommendations.[223]

Despite the fact that India's Constitution was heavily affected by the constitutions of other countries, it seems that the country's unique circumstances were not taken into consideration when it was drafted.[224]In spite of the fact that they cover a wide variety of topics and have many characteristics with other constitutions, it does not seem that they were created with Indian concerns in mind.[225] There is no reputable research to back up any of these assertions, hence they are all false. In all constitutional constitutions, the basic rights have always prioritised human dignity above all other factors, including social, economic, and political issues, in their deliberations. In India, basic rights are protected, however the second condition is awful, according to the Constitution. When compared to other industrialised nations, the programmes of these countries to attain economic equality, social reform, and the recovery of the industrial sector are badly underdeveloped. Despite the fact that agriculture is the country's most important source of income, the agricultural sector is not included in the country's basic rights constitutions or laws. When it comes to addressing basic rights in India, these factors must be taken into mind. In accordance with the Committee's work, the situation has worsened substantially in recent months. It should not be necessary to prioritise the safety of minorities at the expense of other, more pressing issues.[226] In a society with such a vast range of interests and concerns as the United States, basic human rights should have been defined far more broadly than they actually were. On the other hand, it would be unfair to hold our forefathers responsible for everything that has transpired. Because of the short amount of time available, a more substantive discussion was ruled out. In order to adequately answer the true demands of the Indian populace, Indian government officials must take a seat and educate them when the country is in a more peaceful state.[227]

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[223] A Kapuskasing, "*A Remedy worse than the Disease," (HP,* 1998) 16.
[224] G. A. Christenson, "*Using Human Rights Law to inform Due Process and Equal Protection Analyses,"* 52 U. CIN. LR. (1985).
[225] M. Abel, "*American Influences on the Making of the Indian Constitution,"* 1 J. CONST. PARLIAMENTARY STUD. (1967) 35.
[226] R Blower, "*Rights and Wrongs",* (FR, 1997).

[227] A Kapuskasing, *"A Remedy worse than the Disease," (HP,* 1998) 16.

CONCLUSION

When the nation's founding fathers convened in New Delhi to finalise the country's constitution, which had been the product of decades of struggle, the country's independence was looming closer than it had ever been before. However, instead of battling with bayonets or rifles, they fought bravely for freedom, armed only with the great concepts of nonviolence and truth, in order to rebuild India into a just and loving society. They were entirely fearless of the consequences of their actions. In order to provide equal opportunity and religious freedom to all of India's residents, the nation's founding fathers created the country as a republic with a constitution in the year 1947. A draught of the Indian constitution was regarded to be one of the most significant political decisions of the twentieth century at the time it was prepared. In the absence of it, Indians would not be able to enjoy the kind of liberty that they already enjoy. Today, despite tyranny, poor government, and religious intolerance, this core devotion still shines through brilliantly. For Indians, regardless of their political party allegiance, the debate over the Preamble's appropriation of constitutional principles, as well as the lessons it sends to the next generation, should serve as a warning tale to them. "Republics are established by virtue, civic spirit, and intelligence of the people." It is the knowledgeable who are expelled from public councils for their honesty, and the extravagant who are rewarded for their dishonest seduction of the masses, which bring these tyrants to an end. Particularly at this time in history, when the Republic is endangered not just by its own corruption but also by the ignorance and indifference of its people,[228] Joseph Story's perceptive warning is especially relevant for Indians.[229]

Hence, in the due course of this thesis, we do note that certain continuities existing across the entire discourse and many more breaks whereby the populist factions were able to have their own voice in the political adoptions and developments.[230]

[228] A VA naik, 'THE FURIES OF INDIAN COMMUNALISM: RELIGION, MODERNITY AND SECULARIZATION' (OP, 1997).
[229] G. A. Christenson, "*Using Human Rights Law to inform Due Process and Equal Protection Analyses,"* 52 U. CIN. LR. (1985).
[230] A Kapuskasing, "*A Remedy worse than the Disease," (HP,* 1998) 16.

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JUDICIAL GOVERNANCE IN INDIA AND ITS IMPLICATIONS FOR SOCIAL JUSTICE, CHANGE AND DEVELOPMENT

K. Shiv Sidharth

ABSTRACT

A democratic society governed by a constitution, has a well-defined and established separation of power which lays the scope of exercise of power and duties by its different organs. There are three different branches of government namely, the legislature, the executive and the judiciary under the Indian Constitution even though it is not specifically mentioned in it. Theoretically, if these branches function in their limits keeping in mind the fundamental principle of separation of power, the governance would be smooth. However, there have been issues and challenges that these three branches have had to face, e.g., the parliamentary power to amend the Constitution, legislatures' law-making powers, appointment of judges to the Higher Courts, matters of public policy, etc. India's constitutional courts - the Supreme Court and state high courts play a very important role in defining and developing Indian federalism as the courts are not only the arbiter of disputes, but they give rulings over the interpretation of the Constitution. The judiciary is of vital importance when it comes to development of human rights and ensuring smooth functioning of the government institutions by infusing accountability. Many a times, judiciary not only examines the constitutionality of legislative acts and executive actions, but it has also ruled upon policy matters and general governance issues. This research paper aims not only to examine the role of Indian judiciary (particularly the Supreme Court) in governance, but it also deals with the constitutional aspects of such role and how judiciary from time to time involved in the policy and administrative decisions in the country, thereby giving itself a prominent role in the general governance. The judicial system has an important role to play ultimately in ensuring better public governance.

INTRODUCTION

"There is no better test of the excellence of a government than the efficiency and independence of its judicial system" - Lord Bryce[231]

Looking at this statement of Bryce, it can be inferred that the judicial system plays a vital role in any country as it not only ensures justice and protection of law to the people, but also ensures good governance by providing protection of the freedoms and the rights of the people which is a hallmark of an excellent governance. It also protects the Constitution by providing a viable interpretation of it, especially in case of any constitutional or administrative dispute among the different organs of the state. Also, the Judges have to play a significant role as representatives of people even though they are not elected by the people, but such role emanates from the very virtue of their constitutional office.

The values of democracy one can find, where the will of the people shall be the basis of the authority of government and people's basic rights should be protected by the rule of law.[232] By recognizing this, Indian constitutional framers through the Constitution of India provided parliamentary democratic political structure, which works on the principle of fusion of power and in the making of law, there is direct participation of the legislature and the executive, it is the judiciary that remains independent and strong safeguarding the interests of the citizens by not allowing the other organs to go beyond the Constitution. It acts, therefore, as a check on the arbitrariness and unconstitutionality of the legislature and the executive.[233]

The concept of governance is as old as human civilization. It is *the action or manner of governing a state, organization, etc.*[234] It simply means the process of decision making and the process by which decisions are implemented. We generally relate governance as the business of the legislature and the executive. *Judicial governance* is a tricky term, for the reason that judiciary cannot be involved in general governance and public administration because under a broader separation of powers, judiciary has a different function related to providing protection of law to the people through civil and criminal justice delivery system. It is very difficult to

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[231] James Bryce, *Modern Democracies*, 384 (1929).
[232] See M.P. Jain, Outlines of Indian Legal and Constitutional History, 54 (6th ed. 2006).
[233] See Koneru Anuradha, *The Role of Indian Judiciary In Promoting Good Governance*, available at http://www.legalserviceindia.com/legal/article-599-the-role-of-indian-judiciary-in-promoting-good-governance.html, last seen on 10/02/2022.
[234] See *Governance*, Lexico, available at https://www.lexico.com/definition/governance, last seen on 03/03/2022.

define but in simple terms, Judicial Governance can be understood as an approach of the judiciary, particularly the constitutional courts (the Supreme Court and the High Courts – having power to interpret the Constitution and check constitution validity of laws) to overturn the legislative acts or administrative actions on the grounds of constitutionality by adopting an activist approach.[235] Judicial activism is an approach to the exercise of judicial review, or a description of a particular judicial decision, in which a judge is generally considered more willing to decide constitutional issues and to invalidate legislative or executive actions.[236] But at the same time it does not mean that a court observing judicial restraint cannot or will not involve in governance through judicial review. The role of judiciary has always been difficult as it faces opposition from the other branches of the government, legal scholars, civil societies, etc. where it tries to use its power of Judicial review, which is the most important aspect of this judicial governance. But at the same time, it is also being criticized if it refrains from ruling over the legislative or executive actions which seem to be violative of the constitution or any other law/statute.

Judicial governance is not just a matter of implementing and enforcing the constitution, rather it is a complex process which ensures the respect for laws, protects the rights of the citizens, avoids conflict between different organs of the state and most importantly upholds the rule of law. Different courts around the world have seen their role in judicial governance in different ways, depending particularly on the constitutional setup and evolution of their judicial powers. But the involvement of judiciary in governance has not only reinforced the need for enhancing the efficacy of the government institutions but has also challenged the accountability of the executive powers and the parliament. Judiciary (the Supreme Court) in India has become the final arbiter in interpreting constitutional arrangements.[237]

India like numerous other countries, is seeing a rise in populism where the democratic systems and institutions are endangered due to majoritarianism. The central government of the day

[235] See Anthony J. Scirica, *Judicial Governance and Judicial Independence,* 90 New York University Law Review (2015), available at https://www.nyulawreview.org/issues/volume-90-number-3/judicial-governance-and-judicial-independence/, last seen on 10/02/2022.

[236] See *judicial activism*, Encyclopædia Britannica, available at https://www.britannica.com/topic/judicial-activism, last seen on 02/02/2022.

[237] See Amit Anand & Ranjit Kumar Sinha, *SC says it is final arbiter of Constitution*, The Outlook (January 10, 2007), available at https://www.outlookindia.com/newswire/story/sc-says-it-is-final-arbiter-of-constitution/442837, last seen on 02/03/2022.

enjoys landslide majority in the legislature and the opposition is not as strong as it ought to be. Also, due to the parliamentary form of governance in India, there is no such robust system of checks and balances as in the countries like the United States, because the legislative and executive branch are very much dependent on each other due to the political and electoral reasons and the political executive in India consists of the members of legislature including the Prime Minister and the Cabinet. The judiciary's effort to infuse accountability in the functioning of government institutions and the growth and development of human rights jurisprudence have demonstrated the importance of judicial governance. Pratap Bhanu Mehta concedes the contingent rise of judicial authority but adds that *"there is a profound inner conflict at the heart of India's constitutionalism: the question, who is the Constitution's final arbiter, admits no easy answer. The Court has declared itself to be the ultimate judge, and has even assumed the power to override duly enacted constitutional amendments …… In India, Parliament and Judiciary have been and are likely to remain competitors when it comes to interpreting the Constitution."*[238] In such a situation the role of Judiciary attains paramount importance in ensuring rule of law and maintaining the constitutional spirit.

ROLE OF JUDICIARY IN PROMOTING DEMOCRACY AND GOOD GOVERNANCE

The judiciary is uniquely placed in the background of power structure within the system of governance. In India, the judges are not elected but clearly have the power and indeed the responsibility to check the exercise of powers and actions of elected representatives and appointed officials. The judiciary as an institution is vastly respected, notwithstanding huge challenges in ensuring access to justice, judicial process and issues of transparency and accountability. It is vested with the power to ensure that the rights and freedoms of the people are protected, and the powers exercised by the government in adopting policies are in accordance with the Constitution and other legislation.

Judiciary is the final arbiter in interpreting constitutional arrangements. It is the guardian of the normative values and rights that are allocated by the state, especially when the state itself

[238] Pratap Bhanu Mehta, *"India's Unlikely Democracy: The Rise of Judicial Sovereignty,"* Journal of Democracy 18, no. 2, 74-5 (2007).

violates those rights and values. In India, the major source for rights is the Constitution and it is mainly based upon the concept of *'rule of law'*. Simply speaking it restricts the arbitrary exercise of power by different organs of the state. To ensure the rule of law in all governmental activities, the judiciary has been provided with a special power known as 'the power of the Judicial Review' to monitor governmental actions and to put them within the limits of the Constitution. Judicial Review and its scope are discussed in detail in the succeeding sub-chapters.

Fight for the Basic Structure Doctrine

Under the Indian Constitution, the Parliament and the State legislatures have the competency to make laws within their jurisdictions, but the power to amend the Constitution is only with the Parliament under Article 368[239]. However, this power of the Parliament is not absolute in nature and the judiciary has the power to declare any law that it finds unconstitutional, void. As per the Basic Structure Doctrine, any amendment or law that tries to change the basic structure of the constitution is invalid.

The Indian Constitution does not mention the term "Basic Structure" anywhere in it. The idea that the Parliament cannot introduce laws that would amend the basic structure of the constitution evolved gradually over time and through many judicial pronouncements. The main idea behind this, is to preserve the nature of Indian democracy and protect the rights and liberties of the citizens.

The basic structure doctrine was a judicial creation in large part out of the immediate political circumstances in which the Supreme Court and the country found themselves (***Kesavananda Bharati v. State of Kerala***, (1973) 4 SCC 225). The Indian judiciary has exercised the judicial review power under various constitutional provisions to safeguard rights of the people from arbitrary action of the government and to uphold the democratic spirit of the Constitution.

The Supreme Court recognized Basic Structure concept for the first time in the historic case of ***Kesavananda Bharati vs. State of Kerala***[240]. Decided in 1973 by an unprecedented thirteen

[239] The Constitution of India 1949, Art. 368. Power of Parliament to amend the Constitution and procedure therefor.
[240] A.I.R. 1973 S.C. 1461.

justices, it is widely considered one of the most important Indian constitutional law cases. In the face of parliamentary and public pressure, the Court overruled ***Golak Nath***.[241] However, in a bare seven to six majority, it also held that although the fundamental rights could be amended, a certain "basic structure" to the Constitution could not. The Court justified its intervention on two grounds. First, it found that although the founders did not explicitly restrict amendment of the Constitution, there were implicit limits. Second, the Court argued that certain principles of "civilization" or good governance exist that all modern democracies must follow. Through these two justifications, the Court claimed that representative bodies, even constituent ones, are not free to remake their constitutions however they wish; rather, they have a duty to do so only within acceptable limits.[242]

The opinion was heavily fractured (there were seven opinions for the majority), leading to uncertainty about what the basic structure included. The Justices in the majority, though, described the basic structure as containing such principles as judicial review, democracy, federalism, secularism, and many of the fundamental rights. Only six judges on the bench (a minority view) agreed that the fundamental rights of the citizen belonged to the basic structure and Parliament could not amend it.

Even with this more conservative ruling, it was certainly unclear whether the Court had a powerful enough argument or adequate political influence to enforce its decision. The Emergency, however, would change this calculus decidedly in the Court's favor. In June 1975, Indira Gandhi's government declared a National Emergency, suspending several fundamental rights and rounding up political opponents.[243] Five months into this low point of Indian democracy, the Court decided ***Indira Nehru Gandhi vs. Raj Narayan***[244], where the Supreme Court applied the theory of basic structure to protect democratic structure. In this case Court struck down clause (4) of Article 329A[245], which was inserted by the constitution (39th Amendment) Act, 1975 on the ground that it was beyond the amending power of Parliament

[241] Ibid, at 1565.
[242] Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court,* 8 Wash. U. Global Stud. L. Rev. p. 27 (2009), available at http://openscholarship.wustl.edu/lawglobalstudies/vol8/iss1/2, last seen on 11/03/2022.
[243] S. P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits,* p. 101 (2003). The Emergency suspended the right to petition courts for the enforcement of the fundamental rights guaranteed by articles 14 (equal protection of the laws), 21 (protection of life and personal liberty), and 22 (procedural rights of those detained).
[244] AIR 1975 SC 2299.
[245] The Indian Constitution, 1949. Article 329A.

as it destroyed the 'basic feature' of the Constitution. The Supreme Court struck down the amendment on the ground that it violated the free and fair elections which was an essential postulate of democracy which in turn was a part of the basic structure of the constitution and held that these provisions were arbitrary and destroy the rule of law.

The Supreme Court has decided several cases involving the basic structure doctrine since *Indira Gandhi case*. In January 2007, the Court in ***I.R. Coelho vs. State of Tamil Nadu***[246] further developed its interpretation of Article 31B, which created the Ninth Schedule to protect particular laws from fundamental rights review. In a unanimous decision the Court reasserted in ***Coelho*** that many, if not all, of the current fundamental rights were part of the basic structure of the Constitution, and that the laws in the Ninth Schedule would have to be tested by them.[247]

Safeguarding Fundamental Rights

In modern times, it is widely accepted that the right to liberty is the hallmark of a free society and that it must always be safeguarded. The fundamental idea is to remove certain basic and fundamental values out of the reach of momentary political majorities. The concept of basic rights protects a person against oppression and injustice and against excesses by the State. Understanding that a government's role is to protect individual rights but acknowledging that governments have historically been the major violators of these rights, several measures have been devised to reduce this likelihood. Judiciary has an obligation and a Constitutional role to protect Human Rights of citizens. It not only protects the rights enumerated in Constitution but also has recognized certain unenumerated rights by interpreting the fundamental rights and widened their scope.

Protection of the dignity of a person is essential for peace in the society, as its violation can have grave impact on individual in particular and on society in general. Everyone is entitled to some rights which are inherent to human existence. Such rights should not be violated on the grounds of gender, race, caste, ethnicity, religion etc., these are called human rights. Human rights are also known as basic rights, fundamental rights, natural rights or inherent rights.[248]

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[246] (2007) 1 S.C.R. 706.

[247] Ibid.

[248] See Amartish Kaur, PROTECTION OF HUMAN RIGHTS IN INDIA: A REVIEW, 2 Jamia Law Journal, 21 (2017), available at http://docs.manupatra.in/newsline/articles/Upload/82F6F397-6AE0-4253-940E-

The most significant of the Human Rights is the exclusive right to Constitutional remedies under Articles 32 and 226 of the Constitution of India. The persons whose rights have been violated have right to directly approach the High Courts and the Supreme Court for judicial protection, redressal of grievances and enforcement of Fundamental Rights. In such a case the courts are empowered to issue appropriate directions, orders or writs. By virtue of Article 32, the Supreme Court of India has expanded the ambit of Judicial Review to include review of all those state measures, which either violate the Fundamental Rights or violative of the Basic Structure of the Constitution.[249] The right to move to the Supreme Court to enforce Fundamental Rights is itself a Fundamental Right under Article 32 of the Constitution of India.

The 1980s era saw a new dimension of protection of these rights by the judiciary after the Supreme Court relaxed the rules of standing and gave rise to the Public Interest Litigations. The post-1990 Court also asserted an interstitial policy-making and legislative function to address crucial governance failures in human rights, environmental policy, police custodial violence, and police reform - areas in which the Central Government failed to legislate or provide guidelines. For example, in ***Vishaka vs. State of Rajasthan***, the Court promulgated new regulations governing sexual harassment.[250] The Court held that sexual harassment violated the right of gender equality and the right to life and liberty under Articles 14, 15, and 21 of the Constitution. In ***PUCL vs. Union of India***, the Court recognized that the right to food was an element of the right to life in Article 21 and therefore justiciable, and that the government had a positive duty to help prevent malnutrition and starvation.[251]

Judiciary protects the rights of its citizens including prisoners. The Supreme Court by interpreting Article 21[252] of the Constitution protected and preserved the rights of the prisoners. In the case of ***Prem Shankar vs. Delhi Administration***[253] Supreme Court held that practice of using handcuff and fetters on prisoners violates the guarantee of human dignity. Similarly, Court in ***Sheela Barse vs. State of Maharashtra***[254] dealt with an issue of mistreatment of

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58C9B0BDEC32.%20Amartish%20Kaur__Human%20Rights.pdf, last seen 02/03/2022.

[249] See *The Role of The Supreme Court of India in Enforcing Human Rights* (Chapter-VII), Shodhganga, available at https://shodhganga.inflibnet.ac.in/bitstream/10603/8112/16/16_chapter%207.pdf, last seen 02/02/2022.

[250] *Vishaka vs. State of Rajasthan*, (1997) 6 S.C.C. 241.

[251] *People's Union for Civil Liberties vs. Union of India,* (2007) 1 S.C.C. 719, p. 728 (ordering state governments and union territories to implement the Integrated Child Development Scheme).

[252] The Constitution of India 1949, Art. 21. Protection of life and personal liberty.

[253] (1980) 3 SCC 538.

[254] AIR 1983 SC 378.

women in police station and laid down various guidelines for the protection of rights of women in custodial/correctional institutions. Further in ***Citizens for Democracy vs. State of Assam and others***[255], Supreme Court held that handcuffing and tying with ropes is inhuman and in utter violation of human rights guaranteed under the international laws and the laws of the land. The Court has also actively asserted a role in addressing issues of police custodial violence and police reform. In response to PILs documenting widespread cases of custodial violence and killing by police, the Court in the ***D.K. Basu case***, established a set of national guidelines to govern how the police take suspects into custody and interrogate suspects, and then issued orders to state governments to implement these guidelines.[256]

In addition, the Court continued its activism in the areas of air and water pollution and exercised broad remedial powers, closing factories and commercial plants found to be in violation of environmental laws. After monitoring the situation for three years, the Court in the ***Taj Mahal Pollution Case*** ordered 292 industries either to switch to natural gas as an industrial fuel, or relocate from the Taj Mahal "Trapezium" area.[257] The Court was able to secure strong compliance with its orders in the Taj Mahal Case. In the ***Delhi Vehicular Pollution Cases***, the Court issued a series of orders requiring that buses and other vehicles convert to clean natural gas to help reduce pollution in Delhi.[258]

The recent judgments pronounced by the Supreme Court related to privacy rights, homosexuality and adultery, has again strengthen the democratic and civil spirit in the country and the legitimate expectation of the people in this grand institution has been well upheld by the Court. ***Justice K.S. Puttaswamy (Retd.) vs. Union of India***[259], is an unquestionable victory for the privacy rights. The ruling is the outcome of a petition challenging the constitutional validity of the Indian biometric identity scheme *'Aadhaar'*. The nine-judge bench vehemently held that *"The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution"* and created a legal framework for privacy protections in India. The opinions of the judges covered a wide range of issues in clarifying that privacy is a fundamental inalienable

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[255] (1995) 3 SCC 743.
[256] *D.K. Basu vs. State of West Bengal,* (1997) 1 S.C.C. 416.
[257] *M.C. Mehta (Taj Trapezium Matter) vs. Union of India,* (1997) 2 S.C.C. 353, 354, 386 (ordering factories to shift to cleaner fuels or relocate to arrest degradation to the Taj Mahal caused by pollution).
[258] *M.C. Mehta vs. Union of India,* (1999) 6 S.C.C. 9; *M.C. Mehta vs. Union of India,* (2002) 4 S.C.C. 356.
[259] WRIT PETITION (CIVIL) NO. 494 OF 2012, available at https://indiankanoon.org/doc/127517806/, last seen 03/03/2022.

right, intrinsic to human dignity and liberty. The Court overruled its own 41 years old judgment in ***ADM Jabalpur vs Shivkant Shukla (1976)*** where it was held that during Emergency, fundamental rights were not available to citizens and that they couldn't even approach the high courts to file *habeas corpus* pleas. In the present case, the Court observed that the judgments rendered by all the four judges constituting the majority in *ADM Jabalpur case* are seriously flawed. Life and personal liberty are inalienable to human existence.

The concept of human rights is based on the central premise that all humans are equal. The human rights of lesbian, gay, bisexual, transgender and queer people (LGBTQs) are coming into greater focus around the world, with important advances in many countries in recent years, including the adoption of new legal protections. The LGBTQ people are very much discriminated in the society and even sometimes subjected to violence and persecution. The year 2018 brought a new beginning and hope for LGBTQs in India as the Supreme Court struck down a colonial-era law that criminalized homosexuality. In ***Navtej Singh Johar & Ors vs. Union of India,*** the constitutional validity of Section 377[260] of the Indian Penal Code, 1860 was challenged. The five-judge bench of Court unanimously held that Section 377, insofar as it applied to consensual sexual conduct between adults in private, was unconstitutional. With this, the Court overruled its decision in ***Suresh Koushal vs. Naz Foundation***[261] that had upheld the constitutionality of Section 377. The Court relied upon its decision in ***National Legal Services Authority vs. Union of India***[262] to reiterate that gender identity is intrinsic to one's personality and denying the same would be violative of one's dignity. The Court relied upon its decision in *K.S. Puttaswamy* and held that denying the LGBT community its right to privacy on the ground that they form a minority of the population would be violative of their fundamental rights.[263]

An Instrument of Accountability

As the nature of democratic problems and issues shifted, the Supreme also shifted its role and functions. Corruption is a subject of intense debate and discussion in India, especially the deep-rooted corruption in politics and public offices. The major cause of concern is that corruption not only weakens the political body but also dilutes the democratic system, thereby widening the gap between privileged and unprivileged. It is damaging the utmost importance of the rule

[260] The Indian Penal Code Section, 1860, Section 377. Unnatural offences.
[261] (2014) 1 SCC 1.
[262] (2014) 5 SCC 438.
[263] See *Navtej Singh Johar v. Union of India*, Global Freedom of Expression, Columbia University, available at https://globalfreedomofexpression.columbia.edu/cases/navtej-singh-johar-v-union-india/, last seen 03/04/2022.

of law governing the society.

The Supreme Court in the mid-1990s has more assertively intervened in corruption cases involving high-level officials and politicians in the government. The Court became a major site of anti-corruption activism in India, with anti-corruption activists, media houses and NGOs bringing litigation to a strongly counter-majoritarian Court. In ***Vineet Narain vs. Union of India***[264], the Court decided a petition (Public Interest Litigation) that challenged the failure of the Central Bureau of Investigation (CBI) to investigate and prosecute several prominent politicians who had been implicated in the Jain Hawala scandal. The Court began taking over monitoring and control of the CBI's investigation, noting that "the continuing inertia of the agencies to even commence a proper investigation could not be tolerated any longer."[265] The Court relied on Articles 32 and 142 of the Indian Constitution to issue a set of directives to make the CBI more autonomous by delinking it from political control. Finally, the Court invalidated the "single directive" protocol, which required that the CBI receive prior authorization from officials in the Prime Minister's Office before proceeding with an investigation against senior government officials. The Court's intervention into the CBI's investigation resulted in the filing of charge-sheets against fifty-four persons, including leading cabinet ministers and other government officials.

Because of these circumstances, the Supreme Court began invoking the doctrine of *continuing mandamus*[266], which involved directly supervising corruption investigations.[267]
Court-monitored investigations into big corruption cases have become an institutional feature of anti-corruption litigation. The case of ***Samaj Parivartan Samudaya vs. State of Karnataka***[268], exemplifies this. In the southern state of Karnataka, several leaders of the political party in power, including the Chief Minister B. S. Yeddyurappa, were implicated in corrupt dealings. The issue before the Supreme Court was whether to expand the scope of a CBI investigation already underway into illegal mining in Karnataka and Andhra Pradesh to possible misuse of public office by Yeddyurappa's close relatives. The Court held that the basis

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[264] (1998) 1 S.C.C. 226.
[265] See S. Muralidhar, Public Interest Litigation, 33-34 ANN. SURV. OF INDIAN L. 525, 537 (1997-1998) (citing *Vineet Narain v. Union of India*, (1998) 1 S.C.C. 226, 237).
[266] Continuing mandamus is a process by which the court issues directions periodically, keeps the matter pending and monitors the process of implementation, available at https://seclpp.wordpress.com/2019/03/29/continuing-mandamus-a-boon-or-bane/, last seen on 03/03/2022.
[267] Pratap Bhanu Mehta, *The Indian Supreme Court and the Art of Democratic Positioning*, 233, 249 in *Unstable Constitutionalism: Law and Politics in South Asia*, (Mark Tushnet, Madhav Khosla, 1st ed.).
[268] (2012) 7 SCC 407.

for judicial intervention was to “ensure that the rule of law prevails over the abuse of process of law.”[269]

Litigation relating to corruption before the Supreme Court of India has been the beneficiary of an extant trend in Indian jurisprudence and an emerging theme in Indian politics. From the 1980s the Supreme Court had relaxed rules of locus standi, as a result of which NGOs, concerned citizens, and even lawyers, if they were public-spirited, pointing out public wrongs could bring such matters to the attention of the Court. The development of public interest causes from social justice and human rights issues in the 1980s to concerns of the middle class in the 1990s and 2000s brought corruption cases before the Court more often and with considerable visibility.[270]

JUDICIAL REVIEW

The Constitution is the supreme law. All the other laws of the land derive authority from the Constitution. H.L.A Hart puts it: the Constitution works as the touchstone for all the other laws. The validity of other laws is to be checked according to the Constitution. If the law in question is not in line with the principle enshrined in the Constitution, then the law is to be declared unconstitutional. The same parameter is also used for executive actions. The executives are also prohibited to make any decision, which violates the basic norms or the principles important for the identity of the Constitution. The task to check the Constitutionality of the laws and of the action is done by the judiciary.[271] If a law made by the legislature violates any provision of the Constitution, the Supreme Court and the High Courts have the power to declare such a law unconstitutional or ultra vires. This power of judiciary is known as Judicial Review.

Judicial review is the idea, which the actions of the executive and legislative branches of government are subject to review and possible invalidation by the judiciary in the situation they are in conflict with the constitutional scheme or beyond the delegated administrative or legislative power of a country. Judicial review allows the Supreme Court or the Constitutional Court in a country to take an active role in ensuring that the other branches of government

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[269] Ibid, at para 66.

[270] Ibid, at 12.

[271] Justice Dr. B S Chauhan, Judicial Review, available at http://www.nja.nic.in/Concluded_Programmes/2018-19/P-1110_PPTs/8.Judicial%20Review.pdf, last seen on 01/04/2022.

abide by the constitution.[272] In India, the Constitution has entrusted the Supreme Court with the vital responsibility of acting as the apex arbitrator of disputes, and the fountainhead of jurisprudence; it has been conferred diverse jurisdiction, powers and duties to secure justice and the objectives of the Constitution.

The Supreme Court of India has repeatedly affirmed the power of Judicial Review, by reasoning that such a power is implicit in a written Constitution, unless expressly excluded by the constitutional provisions. It has held, that the power of Judicial Review is available under the provisions of the Constitution that declares its supremacy. Laws can be struck down on two grounds: if they violate fundamental rights, or if the concerned legislature lacks 'legislative competence' (for instance, a Union law is made on a subject which falls within the state list, or a state law is made on a subject which falls within the Union list).[273]

The Supreme Court of India resorts to the troika provisions of the Indian Constitution, i.e. Articles 32, 226 and 142, to justify its power of Judicial Review.

Judiciary has generally refrained from interfering with the economic decisions of the government and observed that wisdom and advisability of economic policies are not amenable to judicial review. But the Supreme Court never shied away from interfering with the economic policies whenever the situation so demanded. In the case of ***R.K. Garg vs. Union of India***[274], the Supreme Court considered the validity of the provisions of the Special Bearer Bonds (Immunities and Exemptions) Ordinance, 1981 and Special Bearer Bonds (Immunities and Exemptions) Act, 1981, and made the following observations: - *"……... What is necessary in order to pass the test of permissible classification under Article 14 is that the classification must not be "arbitrary, artificial or evasive" but must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislature ……… Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuse. There may be crudities and inequities in complicated experimental economic legislation but on that account*

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[272] See Judicial Review, Legal Information Institute, available at https://www.law.cornell.edu/wex/judicial_review, last seen on 11/03/2022.
[273] See Raju Ramachandran, *Judicial supremacy and the collegium*, available at http://india-seminar.com/2013/642/642_raju_ramachandran.htm, last seen on 03/03/2022.
[274] AIR 1981 SC 2138.

alone it cannot be struck down as invalid .... There may even be possibilities of abuse, but that too cannot itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions".

EXPANSION OF JUDICIAL POWERS: PUBLIC INTEREST LITIGATION

The Supreme Court of India has developed the strategy of public interest or social action litigation, with the motivation of making the legal system more accessible to the poor and disenfranchised. In doing so, the Court redefined the doctrine of standing, or *locus standi*. *Locus standi* means a right to appear in a court or before anybody on a given question or a right to be heard.[275] Traditionally, the doctrine required a plaintiff to show that some personal legal interest had been invaded by the defendant and it barred a person who was merely interested as a member of the general public in the resolution of a dispute to be heard in the courts, he must have had a personal stake in the outcome of the controversy. The judiciary in a significant departure from the traditional outlines of the doctrine, has given a liberal interpretation of *locus standi* and with an activist mode the Supreme Court of India has held the view that any member of the public or social action group may approach the Court on behalf of a victim who is unable to do so, due to poverty, disability, or socially or economically disadvantageous position. The basic motivation behind the relaxation of the doctrine of standing is to promote the rule of law. Even the Judges themselves have in some cases initiated *suo moto* action based on newspaper articles or letters received.

Public interest Litigation (PIL) means litigation filed in a court of law, for the protection of *"Public Interest"*, such as pollution, exploitation of casual workers, issues of neglected children, road safety, food adulteration, constructional hazards, etc. Black's law Dictionary

[275] *Locus standi*, MERRIAM-WEBSTER, available at https://www.merriam-webster.com/dictionary/locus%20standi, last seen 02/04/2022.

(Sixth Edition), defines Public Interest as *"Something in which the public, the community at large has something pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interest of the particular localities, which may be affected by the matters in question. Interest shared by the citizens generally in affair of local, State or national government..."*[276]. Any matter where the interest of public at large is affected, can be redressed by filing a Public Interest Litigation in a court of law. It is not defined in any statute or in any act, rather it is a creation of judiciary through judicial activism to consider the intent of public at large. However, the person, NGO or advocate filing the petition must prove to the satisfaction of the court that the petition is being filed for a public interest and not just as a frivolous litigation for some personal or ulterior motives.

During the late 1970s and early 1980s, under the leadership of *Justices P.N. Bhagwati, V.R. Krishna Iyer,* and other activist justices, the Court transformed its role in governance through a new activism championing the causes of social justice and human rights for the poor and oppressed classes of India.[277] In a series of decisions, the Court reinterpreted Article 32 of the Indian Constitution to expand standing doctrine for PIL claims against government illegality and governance failures.[278] In addition, the Court also relaxed its formal pleading and filing requirements and developed equitable and remedial powers and procedures that enabled it to assert new monitoring, oversight, and policy-making functions.[279]

SOCIAL JUSTICE, LIBERAL REFORMS AND DEVELOPMENT

In modern period, all countries adopting democratic polity and welfare state concepts have the administrative authorities vested with vast discretionary powers. The exercise of those powers often becomes subjective in the absence of specific guidelines. Hence the need for a control of the discretionary powers is essential to ensure that rule of law exist in all governmental actions.

Citizens over the world overlook up to the nation-state and its organs for high quality

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[276] See *Public Interest Litigation:- Its origin and meaning*, Legal Service India, available at http://www.legalserviceindia.com/article/l273-Public-Interest-Litigation.html, last seen on 02/03/2022.

[277] Upendra Baxi, *Courage, Craft and Contention: The Indian Supreme Court in The Eighties,* 122-23 (1985).

[278] The Court expanded standing doctrine and court access in *S.P. Gupta v. Union of India,* (1981) Supp. S.C.C. 87 (upholding executive primacy in judicial appointments).

[279] See *Bandhua Mukti Morcha vs. Union of India,* (1984) 3 S.C.C. 161 (issuing orders and directives aimed at ending bonded labor and improving the working and living conditions of laborers).

performance. When good governance is guaranteed, citizens go about their personal business and pursuits with enhanced expectations. On the other side of the spectrum, bad or indifferent governance not only restricts opportunities of success, but it can even degenerate into sectarian conflicts and civil wars. In such an atmosphere personal accomplishment as well as social achievements get severely restricted. Good governance helps create an environment in which sustained economic growth becomes achievable. Conditions of good governance allow citizens to maximize their returns on investment. Good governance does not occur by chance. It must be demanded by citizens and nourished explicitly and consciously by the nation state.[280]

The role of judiciary is to achieve the dream of social justice as enshrined in the preamble of the Constitution of India. There are several inter-related aspects of securing justice including security of life and property, access to justice, and rule of law. The rule of law is expressed through the idea that no one is above the law. Beside the State, the Judiciary also plays a significant role in dispensing social justice while interpreting relevant statutory and Constitutional provisions,[281] adjudicating upon rights of parties involved, and providing remedies. Therefore, Judicial attempts to interpret law is in a manner which ensures the attainment of social justice without any deprivation of legal rights.[282]

In the Indian constitutional system, every person is entitled to equality before law and equal protection under the law. No person can be deprived of his life or personal liberty except according to the procedure established by law.[283] Thus, the state is bound to protect the life and liberty of every human being. In the majority opinion in ***Keshvananda Bharti vs. State of Kerala***, "rule of law" and "democracy" were declared as the basic structures of the Indian constitution not amenable to the amendment process under article 368 of the constitution.

A necessary corollary of this phenomenon is called 'judicial activism'. A large number of Public Interest Litigations are filed in High Courts and the Supreme Court against the apathy of the executive. The public interest litigation is a form of such activism and is a strategic arm of the legal aid movement and is intended to bring justice within the reach of poor masses. It

[280] Balmiki Prasad Singh, The Challenge of Good Governance in India: Need for Innovative Approaches, 6, available at https://www.innovations.harvard.edu/sites/default/files/103461.pdf, last seen on 11/02/2022.
[281] *S.P. Gupta vs. Union of India and Ors.,* [1982] AIR 149 (SC) 26.
[282] *Sadhuram Bansal vs. Pulin Behari Sarkar,* [1984] AIR 1471 (SC).
[283] The Constitution of India, 1949, Art. 14. Equality before Law, and Article 21. Protection of life and personal liberty.

is a device to provide justice to those who individually are not in a position to have access to the courts.

The Supreme Court has recognized that both Directive Principles of State Policy and fundamental rights are complimentary to each other and are equally fundamental in the governance of the country and they must be read as an integral and incorporeal whole with possible overlapping with the subject matter of what is to be protected by its various provisions.[284] Therefore, fundamental rights have to be construed in the light of directive principles. The important decision which has been the pillar of reform both in civil and political liberties and socio-economic justice has been the decision in ***Maneka Gandhi vs. Union of India***[285]***,*** where it was held that the fundamental rights are not islands but have to be read along with the other rights. Hence reading article 21 with 14 and 19, it was held that "procedure established by law" under article 21 of the Constitution means not just any procedure but a just, fair and reasonable procedure. This decision also stressed on the fact that the words "personal liberty" must be given the widest possible amplitude.[286]

The social and political climate has radically changed in the country from what it was in 1950 and what it is in 2022. The governments can sometimes fail in their duty to ensure social justice and empowerment due to political compulsions, but the Courts in India at most of the times came to the rescue of poor and needy. One example is the Supreme Court's landmark Judgment in ***Indira Sawhney & Ors. vs. Union of India and Ors.***[287], while upholding the reservation of 27% of vacancies in the civil posts and services in the Government of India in favor of other backward classes (OBCs) provided for exclusion of socially advanced persons/sections among them commonly known as "the creamy layer". The Supreme Court further directed the Government of India to specify socio-economic criteria for exclusion of "the creamy layer" from the OBCs.

Thus, we can say that the Indian judiciary has played a pivotal role in making India a welfare

[284] Excerpted from *Delhi Transport Corpn. vs. D.T.C. Mazdoor Congress*, AIR 1991 SC 101; *Kesavanada Bharti vs. State of Kerala*, (1973) 4 SCC 225.
[285] (1978) 1 SCC 248.
[286] See Gopal Subramanium, *Contribution of Indian Judiciary to Social Justice Principles Underlying the Universal Declaration of Human Rights*, 50 Journal of the Indian Law Institute, No. 4, 593, 595 (2008), available at https://www.jstor.org/stable/43952179, last seen on 03/02/2022.
[287] AIR 1993 SC 477

state and realizing the dream of Social Justice. The Supreme Court and the High Courts have acted as the Instrument of social Justice and have given adequate support to causes of weaker sections of Society. The Judiciary virtually enforced Directive principles through the doors of fundamental rights by the active instrument of Interpretative power. Nevertheless, social justice cannot be administered through the exercise of such power in supersession or contravention of applicable statutory or constitutional provisions.

CONCLUDING REMARKS

The Supreme Court of India is arguably very assertive and powerful constitutional court in matters of governance and policymaking. There may be a plethora of regulations, rules and procedures but when disputes arise, they have to be settled in a court of law. There is no area where the judgments of Supreme Court have not played a significant contribution in the governance or good governance - whether it be environment, human rights, gender justice, education, minorities, police reforms, elections and limits on constituent powers of Parliament to amend the Constitution. This is only illustrative. Indian Judiciary has been pro-active in guarding the rights fundamental for human existence. The promotion and protection of Human Rights is depending upon the strong and independent judiciary.

As this research paper illustrated, Judiciary in India enjoys a very significant position since it has assumed the role of the guardian and custodian of the Constitution. It not only is a watchdog against violation of fundamental rights guaranteed under the Constitution and but protects all persons, Indians and aliens alike, against discrimination, abuse of State power, arbitrariness etc. The Court broadened its jurisdiction and adjudicated a broader array of governance issues, asserting an expanded role in policymaking and governance.

The Indian Supreme Court through its activism has many a times assumed the role of the Legislature; however, the criticism can be made that it has not only performed the limited role of a law giver, but that it has actually assumed the role of a plenary law-making body, like the Legislature. Put differently, it has been stated that the Supreme Court has clearly overstepped the limits of the judiciary and has ventured into the domains of the other branches of the

government. An apt example to this is the *suo-moto* adoption of the Collegium System by the Supreme Court, where the judges appoint themselves (and their successors) in the name of independence of judiciary. It has also been felt, that some remedies designed by the Supreme Court such as the *'continuous mandamus'* demonstrate the failure of the judiciary to observe judicial restraint, and that is undesirable because it is a failure to accord respect to other co-equal branches of the government.

After these observations the basic question that arises is whether the Supreme Court has followed the principle of separation of powers even as it has embraced judicial activism? The answer has to be a resounding 'Yes'. The Court has if not always, but at maximum of times abided by the Constitution. It has fulfilled its primary responsibility of upholding the Constitutional goals. It is the Court's constitutionally mandated duty to enforce the law, not for each minor violation but for those violations that result in grave consequences for the public at large.

Despite being inspired by the constitutional objective of socio-economic justice, the Court has been rather cautious in its activism. It is only when both the legislature and the executive have failed to provide legislation in an area, that the Court has found it to be the duty of the judiciary to intervene and, that too, only until the Parliament enacts proper legislation covering the area. Some of them are admittedly legislative in nature, but the same have been issued only to fill up the existing vacuum, till the legislature enacts a particular law to deal with the situation. Being pragmatic and prudent, the Court has withstood the test of time and proved to be an illustrious example of an active judiciary in a democratic set-up.

The judicial governance as followed by the Indian Judiciary has served as an invaluable tool in strengthening the Indian democracy. Employing it strategically and cautiously, the Supreme Court of India has profoundly enriched the fundamental rights jurisprudence. The activism of the Indian judiciary has indisputably enhanced the conception of liberty and has also helped the end the suffering of many an oppressed.

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MODELLING LAWS AND MISTREATMENT OF WOMEN - AN UNDERMINED CLAUSE IN AN UNDERSTUDIED INDUSTRY

Jumanah Kader Ilakkiya Kamaraj

ABSTRACT

Barbara Goalen, Jinx Falkenburg, Lisa Fonssagrives, Dorothea Church, AlesiaRaut, MilindSoman, Candice Pinto, and many other models do not corroborate just unique bodies but also names that are set as taglines for their idiosyncrasies. The glitz and glamour of the said industry are not as radiant as it always seems to be. Anorexia nervosa, Achalasia, Body dysmorphic disorder, Bulimia nervosa, Celiac disease, Illness anxiety disorder are diseases primarily associated with modeling. The "Big Four" fashion capitals of the 21st century - Milan, London, New York, and Paris have exclusive legislation paralyzing the modeling agencies. It prevents them from pressurizing models either physically or mentally. The Indian Modeling Industry is an ever-growing giant and, surprisingly, there is no legislation here that would govern and avert the industry from degrading and derogatory practices. Our goals are modest. In these pages we make a small attempt to right the ship by offering a primer on the essentiality of criticizing the existing legislation - The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 and the need for having an appropriate one in this regard. We endeavor to explain the unspoken and less-gleamy face of the modeling industry. We, authors, provide for a study of the understudied industry via pressing the need for an appropriate ruling in the existing statue.

INTRODUCTION

Fashion-display mannequins were replaced by live models in the late nineteenth century.[288]With the advent of photography, fashion and modeling took a new dsimension. The transmogrification of modeling into a profession is treasured by the distinct history it holds. It is believed that modeling is rarely associated with craftsmanship since the models are required only to pose without the involvement of any other skill. It is also reckoned that the photographers, fashion designers, stylists, and all others attached to the industry excluding models to be the “real artists”. However, the said belief is highly controversial. Models get represented through agencies called the modeling agencies. These agencies are capable of making and breaking models. India holds a legacy for owning the largest and award-winning agencies for ages. Gladrags, Crizaze, Inega Model Mangement, Runway Agency are the most trending and best agencies in recent times.

HUMAN PUPPETS

Models are coerced to act as the puppets of modeling agencies since they are obliged to do as directed. Managers at as dictators and harass models in every possible way. When this is the scenario, ample excuses are made available to the authorities for exploiting the models. It is an admittable fact that not all modeling agencies and managers are diabolical but most of them are. The non-existence of a legislation in this in regard in India lubricates the entire process for making matters to the advantage of the said authorities. The agencies deprive the models of their constitutionally guaranteed fundamental rights and freedom by forcing them to actagainst their bodies. Deprivation of fundamental rights and likewise inhumanity happen predominantly in women-centered industries.This paper will throw light on the less radiant face of the said glitz and glamour industry which is also one of the women-centered industries today.

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[288]Vanessa Helmer, *A Quick History Of Fashion Modeling*, THE BALANCE CAREERS (Jan. 23, 2022, 10:35 AM), https://www.thebalancecareers.com/a-quick-history-of-fashion-modeling-2379382.

CONCEPTUALIZING THE WORK OF A FASHION MODEL

Marie Augustine Vernet of France was the first-ever model who initiated the business of modelling. In the early 1850s, she modeled the designs of her husband, Charles Frederick Worth, who is also celebrated as the "father of haute couture." The origin of the modelling industry can be tracked from the onset of using modern female fashion-display mannequins.[289] Originally, those were used for exhibiting the work of artists and writers. In 1835, a wirework mannequin was introduced by a Parisian ironmonger. Soon after that France became the hub for fashion mannequins. These mannequins were made to look lifelike and the inherent urge for realness opened gates for models like Marie Augustine Vernet. Till date the urge remains the same. Charles Frederick Worth took modelling to the next level by first and frequent use of live models and that's when he made his wife to pose. The popularization of sophisticated photography led to the emergence of fashion magazines and that, in turn, functioned as the stimulator for the overall development of the fashion industry. Eileen Cecile Ford fashion agency elevated the standard of models and painted modelling as a professional career. Thereafter, the work of fashion models transcended social stigmas, races, and cultures and provided a platform for celebrating and appreciating diversities, just as how it is depicted in the magazines today. In some cases, the need for perfect models has made the agencies to go overboard and that's when they start treating models as mannequins. This zealous industry does not always send the right vibration and that is how the work of a fashion model has been conceptualized.

THE GLITZ AND GLAMOUR IN THE INDIAN SUBCONTINENT

Fashion in India dates back to 322 to 185 BC, which is exactly the period of Indus Valley Civilization.[290] The urge for styling and fashion reached its peak during the Mughals period but that didn't allow women to step out of their houses for showcasing themselves owing to the stigmatized society. The modelling industry in India is not easily trackable since it does not merely flow from the use of mannequins. Although there are myriads of bold and beautiful models glowing in the industry it still remains an understudied industry. This statement is made crystal clear when we have a look at the work concerning this industry - "Luxury Indian

[289]De Marly Diana, *Father Of Haute Couture,* LOVE TO KNOW (Jan. 15, 2022, 10:49 PM), https://fashion-history.lovetoknow.com/fashion-clothing-industry/mannequins.
[290]Herman Schichi, *Models And The History Of Modeling*, SPRINGER LINK (Jan. 15, 2022, 9:51 PM), https://link.springer.com/chapter/10.1007/978-1-4613-0215-5_2.

Fashion,[291] A Social Critique," is a book by TerezaKuldova. This is by far the only literary work wherein the author has criticized the Indian modelling industry for being an oxymoron, ever-growing yet remains understudied. Fashion made its way through artisans in our country and the same happens to be a reason for it being a hazy cloud. Our society encourages artisans and their work but the same society does not let them be in the limelight for their creations. Fashion designers gave a distinct lens for the fashion industry and we have borrowed it to see for what we seetoday.

Legendary designers like RohitKhosla, TarunTahiliani, Satya Paul were the opticians who designed the magical lens for fashion in India. They were the pioneers for elevating this industry. The very first Indian supermodel was Anna Bredmeyer and she brought home the Miss Asia Pacific title in the year 1976. In that line, we have many winning models who were celebrated for their diversity and ethnicity even on international platforms. The significant transformation is the transition of haute couture culture to ready-to-wear. The glitz and glamour industry in the Indian Subcontinent took numerous turns and is still an ever-growing industry.

THE OTHER SIDE OF THE COIN

The "bubble reputation" expression of William Shakespeare is a perfect metaphor for exhibiting the so-called glitz and glamour in the modelling industry. A model's life and reputation are always at stake. It is fragile and is bound to get collapsed anytime. Hence, the authors have compared the same to the life-span of a bubble. Ramp walk is not, in most cases a cakewalk. A great deal of endurance is unquestionably a part and parcel of any profession but the same goes in vain when certain agencies in the modelling industry employ unlawful, inhumane, and derogatory practices. "It was time to put an end to the years of abuse, dubious practices, and the flouting of labour laws," said Ekaterina Ozhiganova, a Paris catwalk regular.[292] The other side of the coin tells the maltreatment of the model's story.

[291] John Armitage, *Luxury And Visual Culture*, BLOOMSBURG LUXURY (Jan. 16, 2022, 10:40 AM), https://www.bloomsbury.com/uk/academic/academic-subjects/fashion/luxury/.

[292] FASHION UNITED, https://fashionunited.uk/news/fashion/slaves-to-debt-fashion-models-speak-out-about-catwalk-misery/2018092739173 (last visited Jan. 16, 2022).

THE RACISM IN THE INDUSTRY

Modelling is exhaustively filled with modernity in fashion and clothing, but it only claims to be one when we profoundly talk about philosophy, human rights, principles of neutrality, and isonomy. Although there are prosperous black models in the industry, their quantity still does not speak for their community. English supermodel, JourdanSherise Dunn reported, "people in the industry say if you have a black face on the cover of a magazine it won't sell."[293] With this inherent spirit of xenophobia and ethnocentrism in the industry, they shut doors for diversity. The inclusion of black models, as we get to see in the magazines is nothing but depiction. All the above-said affirms that being a black model brings nothing but challenges.[294]

IMMORAL MANDATES:

Skinniness has become the trademark for models in the industry. Models are forced to fit in size zero clothes. They are made to starve and undergo plastic surgeries including breast enlargements for getting perfect bodies.[295] The fetishization for indistinguishability has been killing individuality. Modelling agencies endorse incorrigible principles for their signed models and mandate the same for them. Any violation would result in the loss of their reputation. The modelling industry has been a pool for generating eating disorders. Diverse torturous techniques are devised by agencies to mould the bodies of the models.[296] They are treated fewer humans and more as mannequins.[297]

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[293] Hayley Campbell, *I Got Picked On For The Way I Looked In School*, GUARDIAN WEEKLY (Jan. 16, 2022, 12:00 PM), https://www.theguardian.com/lifeandstyle/2017/oct/07/jourdan-dunn-i-got-picked-on-for-the-way-i-looked-at-school.

[294]John Smalls, *Being Black And Latin Proved A Double Obstacle*, THE IRISH NEWS (Jan. 17, 2022, 07:00 AM), https://www.irishnews.com/magazine/2017/02/16/news/model-joan-smalls-being-black-and-latin-proved-a-double-obstacle-934060/.

[295]Zainab Salbi, *Ex Fashion Model Opens Up About The Dark Side Of The Modeling Industry*, WOMEN IN THE WORLD (Jan. 17, 2022, 10:05 AM), https://womenintheworld.com/2017/12/19/ex-fashion-model-opens-up-about-the-dark-side-of-the-modeling-industry/.

[296]Hadly Freeman, *Why Black Models Are Rarely In Fashion*, THE GUARDIAN (Jan. 17, 2022, 01:15 PM), https://www.theguardian.com/commentisfree/2014/feb/18/black-models-fashion-magazines-catwalks.

[297] Sonam Joshi, *In India Models Are Seen As Mannequins And Modelling Is Still Not A Real Work*, TIMES OF INDIA (Jan. 17, 2022, 07:54 PM), https://timesofindia.indiatimes.com/home/sunday-times/all-that-matters/in-india-models-are-seen-as-mannequins-and-modelling-is-still-not-real-work/articleshow/64140179.cms.

SLAVES TO DEBT

Models don't get paid often unless they are supermodels. Financial instability arising out of delay in payment and in some cases, non-payment is another big struggle. The modelling agencies without prior notice deduct the model's fee from their paychecks. It costs a king's ransom for their travel, accommodation, food, and other beauty products that are required by them to maintain their charm and the way they look. Agencies shoulder the models with all this burden even without paying them their due. As a result, till they get name and fame they remain slaves to debt.[298]

PHYSICAL ADVANCES

Young girls are habitually molested in this field. Sexual harassment has become the tag-line of the modelling industry. Designers and superior personas in the field take advantage of innocent girls. Whilst promising big offers they force models to have intercourse with them. They also involve them in human trade practices. Physical advances in modelling terminology first take the shape of inducements and then lands on intimacy. "Men would touch and try all manner of come-ons in attempts for inappropriate activity," says Anyelika Perez, a former model.[299] Women are objectified in this industry to the next level and that facilitates physical advances.

THE DISEASE BAG:

Not every model is Audrey Hepburn or Marilyn Monroe. Modelling agencies and contractors rush the models to be ravenous for "being flawless." Out of that pressure, models opt numerous plastic surgeries which include face-lift, blepharoplasty, liposuction, nose and ear job, collagen injections, breast implant, and the list goes on. However, facial surgery tops the list.[300] The probability of successful surgeries is not very attractive. There are models like Catherine Cando who lost their lives due to the aforementioned list of surgeries.[301] Models are also forced to use steroids even at a very young age. Loosing of appetite, excessive desire for losing weight, etc

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[298] ZAINAB, *supra* note 8, at 5.
[299] ZAINAB, *supra* note 8, at 5.
[300] MA, *Plastic Surgery In The Modeling World*, COSMETIC TOWN JOURNAL (Jan. 18, 2022, 02.00 PM), https://www.cosmetictown.com/journal/news/Plastic-Surgery-In-The-Modeling-World.
[301] Rebecca Perring, *Model Dies After Undergoing Cosmetic Surgery-Which She Had Won At A Beauty Pageant*, EXPRESS (Jan. 18, 2022, 10:51 PM), https://www.express.co.uk/news/world/551720/Model-dies-cosmetic-surgery-liposuction-beauty-competition.

is also there in this bag of both physical and mental disorders.

All the said factors on the other side of modelling pertain to be a very personal decision but the line between personal and professional conduct is super blurry inthis industry. Having said that, the managers and contractors always have an upper hand and they are responsible for this less glittery side of modelling and negating the rights of a model. Models before entering this industry are not made aware of the conditions and circumstances in which they will be asked to work in. The modelling agencies promise anything and everything to get models on track but in the due course, it all vanishes. They are tormented for being themselves. These instances are common in all the women-centered industries. The other side of modelling is nothing but a black hole which consumes models and leaves no trace of them.

CRITICIZING THE CURRENT LEGISLATION

The existing legislation that buckles up women from violent behaviors of sexual predators is the Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013. This is a very interesting Act formulated from the Vishaka Guidelines. Section 2(a) of the Act, 2013 provides for the definition of an aggrieved woman. It specifies that the section relates to women who are all alleged to have been subjected to any act of sexual harassment and the same has been laid down as a precondition. A plain reading of the Act would tell us that offenses related to sexual harassment occupy the centre stage and it involves everything that revolves around it. Act, 2013, in fact, is the only statue that strives for promoting and providing a safe and secure environment at the workplace for women.

Harassment is not the only impediment that a woman has to come over. Mistreatment is a bigger and a distinguishable part of sexual harassment which affects the dignity of a woman remarkably. Although the preamble and object of the Act, 2013 include in it instruments such as Convention on the Elimination of all Forms of Discrimination against Women, it predominantly focuses on issues related to sexual harassment. The entire motto behind this paper stays there. Despite a legislation that is there to protect the dignity of women, the non-inclusion of “deterrence from mistreatment” clause is a setback. The idea for the want of a legislation in this regard owes to the reason that modelling is one of the women-centered industries.

The Act, 2013 is not exhaustive to cover all the unfortunate concurrences that are happening and are yet to happen in the women-centered industries. Section 9 of the Act with the title "Complaint of Sexual Harassment" affirms the existence of the legislation exclusively to restrain unwanted sexual advances at the workplace. This cannot be the sole aspiration of a legislation. However, section 3 of the Act contemplates various modes which confine in it the definitions of sexual harassment. It includes implied or explicit preferential treatment, detrimental treatment, humiliating treatment, and likewise. This provision is definitely handy for women working in industries like modelling but it is not the golden key.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013 is criticized for not offering complete protection from different shades of victimization. It must either hold clauses that will speak for the mistreatment of women or there must be an enactment that will serve the purpose. It is high time we give it a thought and act out. It is, in fact, our paramount duty to make this world a safer place for everyone to prosper.

LEGISLATIONS AROUND THE WORLD AND ITS IMPACT

Countries like Israel, France, Spain, Italy, United States of America, and Denmark have come up with the notion of "Ethical Fashioning". The fashion and modelling industry is at its peak today as it always was. Its growth is alarming and so are the challenges associated with it. The immoral standard it has set forth for itself is, in some cases incorrigible. Therefore, to curb the miscellaneous negative aspects of the industry, these countries came up with assorted monitory mandates to ensure ethics in modelling. After briefing the initiatives taken by the aforesaid countries, we will embark on the positivity it has brought around the globe concerning modelling.

Israel

The state of Israel was the first country to adopt a legislation for "ethical fashioning" in the year 2012.[302] It became prevalent in the country as the "Photoshop Laws" since it took steps to

302 Talya Minsberg, *What The U.S Can And Can't Learn Israel's Ban On Ultra Thin Models*, THE ATLANTIC, (Jan. 19, 2022, 03:30 PM), https://www.theatlantic.com/international/archive/2012/05/what-the-us-can-and-cant-learn-from-israels-ban-on-ultra-thin-models/256891/.

curb the illusion of unrealistic beauty directives even via editing. Rachel Adato and AdiBarkan advocated this huge step. According to their law, a model's Body Mass Index (BMI) must be at or above 18.5 recapitulating the mandate of the World Health Organization in line with malnutrition. Adding on, frequent medical checkups were also commanded. Thereby, the country has shattered the unrealistic portrayal of beauty.

France

The Lean Model Act[303] has become the talk of the town in France. Gwenola Guichard and Ekaterina Ozhiganova, Models and the founders of Model Law association, propagated the manifesto they drew up for Model Law. The Law there bans super lean models. Models are also required to have a medical certificate validating their current health report. They are also following up on the Body Mass Index strategy.

United States of America

Here, we have a regulation that looks into the issues of modelling. The Council of Fashion Designers of America (CFDA) has come with health initiatives to reduce the malpractices in the industry. They have prescriptions for developing industry workshops on eating disorders. However, they don't follow the Body Mass Index recommendation. Denmark is another country that has got guidelines for modelling.

Italy

Italy's fashion industry is also in the mission of banning ultra-thin models. The Italian Government has taken steps to reduce the upsurge of eating disorders in the country.[304] They require medical certificates of frequent checkups from the models in order to let them for a runway. It has even become a nationwide campaign. The glorification of super skeleton looks has been shifted to the glorification of full-bodied looks.

Spain

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[303] Nicola Mira, *Model Law Is New French Body Promoting Fashion Model Rights*, FASHION NETWORK (Jan. 19, 2022, 05:05 PM), https://uk.fashionnetwork.com/news/Model-law-is-new-french-body-promoting-fashion-model-rights,948727.html.

[304]Human Rights International Corner and International Federation for Human Rights, *A Model For A Human Rights Due Diligence Legislation?,* ITALIAN LEGISLATIVE DECREE (Jan. 20, 2022, 12:30 PM), https://www.business-humanrights.org/en/report-italian-legislative-decree-no-2312001-a-model-for-a-human-rights-due-diligence-legislation.

Spain is one of the first countries to ban super-skinny models. Spain's Minister of Health and the president of Madrid's regional government took this brave initiative of banning skinny models. This country banned one-third of super-thin models from Madrid's premiere fashion show. "In Madrid this week, models who are little more than skin and bones are being banned from the runway," said Jerome Socolovsky, a reporter.

The above-mentioned legislations are attempting to protect the universally guaranteed rights and freedom of human beings. An initiative in some form is necessary to either cut down cruelty or to uphold compassion. The initiatives taken by these countries are awed by the models for making this world a better place for them. The dark shade of modelling is slowly turning white and that is evident from minimal abusive complaints and low mortality rates among models in countries where there is a legislation in this regard.

THE PRESSING NEED FOR A 'RULING' ON 'MODELLING' IN INDIA

The Hon'ble Supreme Court of India, in the case, Vishaka & Ors v. State of Rajasthan & Ors[305] *laid down guidelines for addressing the issues of sexual harassment at* workplace. This was called the "Vishaka Guidelines." An enactment in this regard, titled "The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013" came only after 16 years from the decision that was made in the aforesaid case law. In this instance, the authors would like to cite the case, Ellison v. Brady[306] which was decided by the Hon'ble Supreme Court of the United States. Here, the Court gave an enthralling interpretation for the phrase "sexual harassment" by stating, "We, therefore, prefer to analyze harassment from the victim's perspective." This statement allows for a wide range of interpretations but at the same time, it brings the most appropriate definition for harassment with a connected intensity from the harassed.

[305] (1997) 6 SCC 241.
[306] 924 F.2d 872 (9th Cir. 1991).

THE WORDPLAY

A victim's perspective is of utmost importance to ascertain if a particular conduct of a person was harassment or mistreatment. The case Ellison vs. Brady opens the door for distinguishing sexual harassment from mistreatment that doesn't have anything in connection with sexuality. Although sexual harassment is closely associated with sexual assault and sexual abuse, it certainly is different from mistreatment and cruelty. The thin line of distinction is about the question "whether there was the presence of unwelcome sexual advances?" When we get an answer to that question, we get two words with completely different meanings.

THE DIFFERENTLY SAME COUNCILS:

We have the Fashion Design Council of India (FDCI), a non-profit and independent association solely dedicated to propagate the fashion and its business in India. It hosts various events and conventions for promoting fashion. The functions of the National Institute of Fashion Technology, a public institute is also monitored by the Fashion Design Council of India. Per contra, we have the Council of Fashion Designers of America (CFDA) which has the same motto and carries the same business as the Fashion Design Council of India but it recently affiliated itself to policy and that has become its outstanding feature. It issued updated guidelines comprising of rules and regulations for keeping an eye on the modelling industry.[307] This was done to ensure the ethical fashion business. The difference between the Fashion Design Council of India and the Council of Fashion Designers of America tells the sad reality of the Indian models and Indian modelling industry.

THE DOMESTIC AND INTERNATIONAL RIGHTS:

The fundamental rights guaranteed under Articles 14, 19, and 21 of the Indian Constitution are gravely violated. In addition to that, Articles 5 and 12 of the Universal Declaration of Human Rights (UDHR) which guarantees the right to be free from cruel, inhuman and the likewise treatment and the right to be not subjected to any arbitrary interference with one's privacy and to guard oneself against attacks on upon his/her honor and reputation, respectively are also

[307] Ellie Krupnick, *CFDA Health Guidelines For Models Released Focuse On Age And Eating Disorders,* HUFFPOST (Jan. 19, 2022, 07:49 PM), https://www.huffingtonpost.in/entry/cfda-health-guidelines-for-models_n_1236213.

violated. Modelling agencies intentionally force models to get in touch with unethical principles. They threaten them by letting their hard-earned reputation at stake. India, being a signatory to the UDHR, it is mandated for it to uphold the principles enshrined under the Articles of UDHR and it can in no way volume down the voice for violation of constitutionally guaranteed fundamental rights.

A NEW DIMENSION

In India, we have the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 for dealing with issues related to sexual advances at the workplace and we also have the protection of Women from Domestic Violence Act, 2005 to deal with *"all acts of physical, sexual, psychological or economic violence* ***by family or intimate members,"*** as enumerated under section 3 of the said Act. The mistreatment of women stands between sexual harassment and domestic violence. We authors conclude it be so because we define mistreatment as an act of harassment sans sexual urge comprising of *"all acts of physical, sexual, psychological or economic violence"* **by persons involved in the workplace**. Having all that said, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 is not sufficient for looking into the issues that have arisen in modelling and the issues that are yet to arise in some other understudied industry. The Act, 2013 must be amended to include the "prevention of mistreatment" clause. It must clearly define and distinguish sexual harassment and mistreatment.

CONCLUSION

Modelling is never glorified as a profession and models are often looked down upon by our stigmatized society. Adding on, they are made to face managers who are deep-rooted molesters and are obsessed with super skinniness**.** Moreover, models are not ready to step forward to express the egregious acts of the managers as they are afraid to lose their career. The Indian modelling and fashion industry is growing day by day and yet it remains an understudied one because of the attention it gets from actual thinkers and actual citizens. It is a colorful profession but it does not showcase the same colors for everyone. For some, it is name, fame, and everything that defines them and for others, it is nothing but a bundle of challenges. Legislation in this regard has proven to place models in a better position than they are at present. It is not just the models but women in women-centered industries. This paper has brought to light the mishappenings in one of the women-centered industries. Models get to reach the road of success only after going through a series of trauma. In our country, a distinction between sexual harassment and mistreatment is very much necessary to classify and target the trauma. We must remember that not all sexual harassment is mistreatment and not all mistreatment is sexual harassment. Therefore, an Amendment to the Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013 is the need of the hour.

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POWER OF SEARCH, SEIZURE AND COMPLIANCE OF PRINCIPLE OF NATURAL JUSTICE

Anushree Modi

ABSTRACT

The paper study the power of search and seize inbuilt in many statutes in compliance of Principles of Natural Justice. It is a structure of jurisprudence followed by respective Authorities, as they have overriding power for the protection of public tranquillity and safety which are regulated by the different provision of different statutes dealing the wide area and covering every aspect. The interesting thing is how hideously all the power conferred to officials are checked through compliance of the Principles of Natural Justice.

Every Section of various statutes which enables power of search and seizure also mentions of how citizens fundamental rights and principles of natural justice are affected only to negligible extent except in some circumstances. One of the aspects of the Natural Justice Principles is reasoned decision-making, which has effectively become an important component of decision-making processes by judicial, quasi-judicial, or even administrative authorities. This is also the most commonly seen factor in protecting civilians against official authority's misuse of the power of search and seizure.

INTRODUCTION

Power to exercise search any place or person is of course can be said as derogatory to the person on whose premises search is happening or on whom it is happening. But through the power of search no restriction is imposed on the right to enjoy the property or hold it. It is when the power to seize comes into picture and person fundamental rights are violated but within the reasonable restriction but the thing to keep in mind is compliance of Principles of Natural Justice (hereinafter referred to as "PNJ").

Seizure is taking possession of something against the wish of the owner or possessor of the belongings it is done in pursuance of demand under legal right. While exercising the power to seize it curbs and deprives the affected person from those particular goods which he can no longer enjoy, until he/she restore them back. Thus, the unilateral act of the person seizing is the very essence of the concept of seizure.[308]

Rules of Natural Justice are not codified nor are they unvarying in all the matters. That does not comply that they are stagnant but instead are flexible and expanding concept. They may however be summarised in one word: fairness.[309]

One of the objectives of the PNJ is Audi Alteram Partem, which states that everybody impacted by a decision has the right to be heard, implying fairness. The idea is usually believed to mean "hear the other side or both sides before making a judgement".[310] The precise content of the audi alteram partem principle is difficult to determine. What natural justice requires alters with time and circumstances.[311] There are three basic essentials of Doctrine of Audi Alteram Partem i.e.

i. Firstly, a person whose rights are likely to be affected adversely or against whom an order would be passed must be granted an opportunity of fair hearing or oral hearing.
ii. Secondly, a fair and transport procedure should be produced.
iii. Lastly, concerned authority should have applied mind and dispose the matter by reasonable or speaking order.

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[308] State of Punjab v. Dial Chand Gian Chand & Co., (1983) 2 SCC 503.
[309] Dev Dutt v. Union of India (2008) 8 SCC 725.
[310] M.P. JAIN & S.N. JAIN, PRINCIPLES OF ADMINISTRATIVE LAW 303 (Lexis Nexis 2015).
[311] S.P. SATHE, ADMINISTRATIVE LAW 187 (Butterworths India 1999).

The state has an overriding power of search and seizure which are enabled for the protection of social and public security.[312] Such power infringes on the privacy, reputation, property rights, freedom, and business of the person who is being searched or whose premises is being searched, and materials are taken as a result of the search. Without invoking the Principles of Natural Justice, such power can be exercised.[313] The power of seizure cannot be employed unless the other party is treated with natural equity. Similarly, the power of confiscation cannot be used unless the individual who would be impacted is given an opportunity to be heard in opposition to the intended confiscation.[314]

POSITION OF PRINCIPLE OF NATURAL JUSTICE IN EXERCISING SUCH POWER IN VARIOUS STATUTES

Sec. 110(2) of The **Custom Act, 1962** when r/w Sec. 124(a) tells us that when goods are seized by Collector Officer, such goods cannot be confiscated for more than six months and hence need to be returned. However, if they want to keep the goods seized for more than six months a notice is to be issued with reasonable cause showing sufficient grounds for goods to be confiscated for more than six months.

In **Narcotic Drugs and Psychotropic Substances Act, 1985** (hereinafter "NDPS Act), natural justice preserved through the inbuilt safeguards under the Act. U/s. 42 and 53, recovery and investigations are to be done by two different officers i.e. officers empowered under sections respectively. U/s. 42[315] concerned officer does not possess the power to investigate instead they are designated the role limited to "effect", "search", "seizure" and, "arrest". Whereas, Sec. 52 (3)[316] requires concerned officer u/s. 42 to handover every arrested person or Passover article seized to the officer entitled u/s. 53 or an officer in charge of police station having the power to investigate the case under Code of Criminal Procedure (hereinafter "Cr. P. C.). When officer u/s. 42 is required to Passover the articles seized and person arrested by him/her to police station's officer in charge or officer u/s. 53 of the NDPS Act, the material and information

[312] MP Sharma v. Satish Chandra, District Magistrate Delhi, AIR 1954 SC 300.
[313] HALSBURY, ADMINISTRATIVE LAW 89 (Lexis Nexis) (ebook).
[314] Asst. Collector of Customs and Superintendent, Preventive Service Customs, Calcutta v. Charan Das Malhotra, AIR 1972 SC 689.
[315] Narcotic Drugs and Psychotropic Substances Act, 1985, § 42, No. 61, Acts of Parliament, 1985 (India).
[316] *Id*, § 53(3).

given is considered as the First Information Report as investigation starts by relying on them and hence are recorded u/s. 154 of Cr. P. C[317].

The **Arms Act, 1954**, Sec. 24[318] deals with seizure and detention of arms and ammunition by Central Government when it thinks necessary for public tranquillity and safety, nevertheless that such person is entitled by virtue of any other law or this Act. U/s. 22[319] Magistrate is entitled to search and seize arms and ammunition if they think they are in possession of someone which could be danger to public tranquillity and protection or with some unlawful person. This power is huge and somewhere hinders the fundamental rights of the citizen so to safeguard them, they are affected to a minimal extent hence PNJ is to be complied with.[320]

Sec. 5 of **The Public Gambling Act, 1867**[321] (hereinafter "PGA") enables power to, Magistrate of district or any other Magistrate authorised with such power, or the District Superintendent of police or police officer authorised by District Superintendent (not below the rank of sub-inspector), to enter and search any gaming house which they believe are involved in wagering and betting or consist of any instruments of gaming. This power is exercisable only when they believe that the information or tip, they received are credible, and after proper inquiry and some evidences if they still think necessary to barge in, then only they should exercise this power. Ensuring that they have reasonable reasons hence fulfilling the one of the elements of PNJ.

Sec. 5(A) of PGA[322] empowers the District Magistrate or the Addition District Magistrate or a Police Officer (not below the rank of Asst. Superintendent of Police to confiscate or seize and register, record or writing of any kind on which digits, symbols, digit figures or signs which relates to any form of gaming (betting, wagering etc.). The instruments found and seized would be considered as instruments involved in gaming unless the person, from whom it is seized, shows otherwise and connects it with any lawful and legal action. This highlights, that the person from whom the record, register or writing is seized is given an opportunity to hearing where they can prove that the instruments which are taken to be related to any gaming activity are actually related to any lawful trade industry, profession, business or vocation of any lawful

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[317] Code of Criminal Procedure, 1973, § 154, No. 2, Acts of Parliament, 1974 (India).
[318] Arms Act 1959, § 24, No. 54, Acts of Parliament, 1959 (India).
[319] *Id*, § 22.
[320] Hari Singh Harnam Singh Khalsa v. E. F. Deboo and Anr., AIR 1969 Guj 349.
[321] The Public Gambling Act, 1867, § 5, No. 2, Acts of Parliament, 1867 (India).
[322] *Id*, § 5A.

personal transaction of any person or are not an instrument of gaming.

JUDICIAL INTERVENTION OR ANALYSIS

In Krishna Bus Service[323] case where private operators of motor vehicles contested that when exercising power or discharging duties is in hand of General Manager of Haryana Roadways to stop the vehicles and search them, seize them or detain the vehicle belonging to others but going easy on the vehicles of his own department by being over-fervent is not fair and bias. The court observed that it cannot be expected from the General Manager of Haryana Roadways cannot be expected to be completely fair and reasonable towards their opposing business of private operators. Fundamental rights of the owners to carry on the business of their own interest would also be violated if he is bias towards his' own department. Moreover, when concerned officer is bias confidence rooted in administration by people, which is must would be destroyed.[324] Therefore, SC upheld the contention and quashed the notification.

The **Custom Act, 1962** Sec. 110(1B)[325] the goods pass-through Customs (under Custom Clearance) can be search and seized by the proper officer as specified under sub-section (1A) where he would note all the necessary information as mentioned. U/s. 110(2)[326] says that goods can be restored by the person in whose possession the goods are if the concerned officer, who seized them, does not show any notice stating reasons for search and seizure within six months under clause (a) of Sec The question was put forth in SC i.e. whether after six months, the person whose goods were seized is enabled to get a notice and a fair hearing.[327] The court observed that:

"Even without proceeding of a judicial nature that does not waive off the Right to Notice. But indeed, the proceedings get its character when it goes beyond the basic reason, and that reason is that there may be prejudiced in the notice and the person's rights may be violated if he/she is not enabled with an opportunity to put forth his case in the proceedings." [328]

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[323] Krishna Bus Service (P) Ltd. v. State of Haryana, (1985) 3 SCC 711.
[324] *Id*, at 716.
[325] The Customs Act, 1962, § 110, No. 52, Acts of Parliament, 1962 (India).
[326] *Id.*
[327] Asst. Collector of Commission v. Bibhuti Bhushan, (1989) 3 SCC 202.
[328] *Id.*

In Hari Singh[329] case it was observed that elementary PNJ are always open to review in the cases of search and seizure of arms and ammunition u/s 22 and 23 of the **Arms Act, 1959**. As the other two principle are bit illusory which would hinder Central Government and Magistrate to maintain public peace and safety. So fair opportunity hearing would be reasonable restriction which would balance the power of Central Government and Magistrate and fundamental rights of the citizen, affecting to a minimal extent.

When informant/ recovery and investigation officer are same u/s 42 and 53 of **NDPS Act** it violates the rule against bias principle which a one of the PNJ. Protection from biasness is also enshrined in Article 14 and 21 of the Indian Constitution.[330] In Mukesh Singh[331] the court held that the accused will not be acquitted just on the basis that recovery and investigator officer was same. Though, it is not a general proposition of law laid down by court through various judgments i.e. Bhagwan Singh[332] case; Megha Singh[333] case; and State by Inspector of Police, NIB, Tamil Nadu[334] case that in each and every case the officer has prosecuted the case with biasness and prejudice, when he/she is informing as well as investigating officer.

Leading to drop the whole prosecution and acquit the accused. The question of bias and prejudice is dependable on the facts and background of each case. The matter has to be decided on a case to case basis. Therefore, the vice of unfairness and bias when informing and investigating officer are same person cannot be a ground for accused acquittal. Though, if accused feel that there is some biasness and unfairness, he/she can file the suit and they will be provided with fair hearing.[335]

To prevent the victimisation of any innocent person in gaming activity (betting, wagering etc.) by putting certain checks when it proceeds to provide for prosecution and detection of the offenders against the Act. The power to search and seize are given u/s 5 and 5A of the PGA which empowers only high authority or superior officers i.e. District Magistrate or any other Magistrate authorised by him or District Superintendent or any other officer authorised by him not below the rank of sub-inspector to act on such power reasonably and after due confirmation

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[329] Hari Singh Harnam Singh Khalsa v. E. F. Deboo and Anr., AIR 1969 Guj 349.
[330] Mohan Lal v. State of Punjab, (2018) 17 SCC 627.
[331] Mukesh Singh v. State (Narcotic Branch of Delhi), 2020 SCC OnLine SC 700.
[332] Bhagwan Singh v. State of Rajasthan, (1976) 1 SCC 15.
[333] Megha Singh v. State of Haryana, (1996) 11 SCC 709.
[334] State by Inspector of Police, NIB, Tamil Nadu v. Rajangam, (2010) 15 SCC 369.
[335] Mukesh Singh v. State (Narcotic Branch of Delhi), 2020 SCC OnLine SC 700.

(which can by any kind of evidences, material, information etc.).[336] Additionally, the officer who arrested, searched and seized the articles or instruments need to show reasonable grounds to the court satisfying court that their suspicion was based on them and hence they raided the place. Following the principle of fairness is very important to not only violate PNJ but also Fundamental Rights of the accused.

A temporary government servant is dismissed or removed from their post at any time without due notice due to which they have no right to hold the post. If the order of termination, reversion, or reduction in rank causes a stigma on the character or integrity of the government servant, it will be a penal consequence under Article 311(2) of the Indian Constitution, and an inquiry order for search and seizure can be issued after giving him/her a proper opportunity to defend.[337]

NON-COMPLIANCE OF PRINCIPLES OF NATURAL JUSTICE

Principles of Natural Justice are diverse and flexible (changing with changes in the society) and hence they cannot be imprisoned with each and every code or set of sections, they cannot be put into a "straitjacket formula". As under the Act of Income Tax every Income Tax Officer is required to act as judge of his/her own case therefore excluding one of the PNJ where a person cannot be appointed as a judge for his/her own case.[338] He/she also exercise the power search and seizure under the **Income Tax Act, 1961** and examines them by interrogating the assessee and their relatives or other person related to them regarding the seized and searched goods. Sections 143 and 144 mandate that the assessment be made only by the Income Tax Officer. According to Sections 143(3) and 144, the Officer must persuade the assessee to provide the material conducting penalty procedures in order to apply the penalty. The first norm of natural justice cannot be stated to be relevant in light of the specific provisions of the Income-tax Act of 1961.[339]

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[336] Krishna Chandra & Ors. v. State of Madhya Pradesh, AIR 1965 SC 307.
[337] Moti Ram Deka v. N.E. Frontier Railway, AIR. 1964 SC 600.
[338] M. Chockalingam and M. Meyyappan v. CIT, Madras, (1963) 48 ITR 34 (SC).
[339] *Id.*

In Kanungo & Co. v. Collector of Customs[340] the authority searched a person's company premises and confiscated particular types of watches under **Sea Customs Act, 1963**. Cross-examination of the person, who gave the figures, was not allowed. The court determined that there was no breach of the PNJ, and that natural justice does not involve cross-examination of the individual concerned to witnesses of a seizure of goods under the Sea Customs Act. If the individual in question is given the chance to cross-examine, the method outlined in the Indian Evidence Act, 1972, is not required. It is can be considered as classic case where statutory provision prevailed over PNJ.

It is necessary for a wholesome investigation to exercise the power to search and seize. Sec. 94-98 of the Cr.P.C. enable the District Magistrate and Sec. 165 Cr.P.C empowers the police officer in-charge of the police station to conduct searches. Any other Police Officer besides the Officer in Charge of the Police Station may not conduct a search without the approval of the letter or a Magistrate.[341] Any investigating officer (police officer) or police officer in charge of the police station can conduct a search without a warrant from a court (though they must record the grounds for doing so and on what basis), without prior notice or an opportunity to be heard. The Delhi HC found that it is redundant to make detailed examination on the aspect. It is sufficient to simply state that an accused has no right to prior notice or an opportunity to be heard in connection with his arrest, search of his home, or seizure of any property in his possession associated with the offence, unless otherwise allowed by law.[342]

Central Government have the unrestrained power, reserved by them, through which they can search, inspect and seize any property when they believe that the other person has violated the Environment Act, to safeguard environmental law and procedures.[343] Sec. 10 of **Environment (Protection) Act, 1986**[344] Central Government or any person empowered on their behalf can enter any place, at any time with the assistance required. For the purpose to inspect whether anything is done which is in violation of the provisions of this Act or rules made or any notice, direction, order, authorisation given under this Act has to be complied with.

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[340] Kanungo & Co. v. Collector of Customs, AIR 1972 SC 2136.
[341] Union of India v. W.N. Chaudhary, AIR 1993 SC 1082.
[342] Rahul Saraf v. Union of India, (2017) 244 DLT 86.
[343] Sanjay Jose Mullick, *Power Game in India: Environmental Clearance and the Enron Project*, 16 STAN. ENVTL. L. J. 256, 273 (1997).
[344] The Environment (Protection) Act, 1986, § 10, No. 29, Act of Parliament, 1986 (India).

Any place, material, records, documents etc. found while searching can be seized if they are believed to be used to conduct offence under the Environment (Protection) Act, 1986 without any notice or explanation to the person from whose possession these are confiscated.[345] This is done to reserve the secrecy of the investigation and caught the accused by surprise hence not following elements of natural justice.

PRINCIPLES OF NATURAL JUSTICE APPLICATION WHERE STATUTES DOES NOT EXPRESSLY PROVIDE.

In Peerless General Finance & Investment Co. Ltd.[346] it was found that PNJ can be presumed if they are not expressly prohibited by the statutes. SC held that PNJ could be formulated unless they are strictly or specifically barred from the application. It is a necessary tool in order to protect the civil liberties of the people and giving him/her reasonable opportunity of fair hearing before judgment or order is passed.[347] As court cannot ignore the legislate mandate, so they can provide with an opportunity to fair hearing to make up for it.[348]

Now, the question that arise is that which would prevail when both are on equal footing. Provision of Statute would prevail over PNJ. But if there is no particular exclusion mentioned in the statute the application of the principles can be assumed in the circumstances where in administrative jurisdiction the rights of citizen are affected to their prejudice.[349] It was also observed by SC that order by administrative order and a quasi-judicial order are hardly distinctive. Adding to it SC said that now the line of difference between order of administrative authority and quasi- judicial authority stands obliterated and hence there will be no difference of opinion.

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[345] *Id.*
[346] Peerless General Finance & Investment Co. Ltd. v. Dy. CIT, (1999) 263 ITR 671.
[347] Sahara India (Firm) (1) v. CIT, (2008) 14 SCC 151.
[348] G. S. DAS, LAW RELATING TO SEARCH AND SEIZURE WITH ASSESSMENT OF SEARCH CASES 261 (Taxmann, 2014).
[349] Asiatic Oxygen Ltd. v. Registrar of Companies, 1981 SCC OnLine Cal 192.

CONCLUSION

Compliance of Principles of Natural Justice is really important while giving superior officials powers such as search and seize. Through this check and balance is maintained from both the side not stepping them on equal footing. Which ensures that the State would not abuse their power while exercising search or seize for their benefits as well as the citizen abide by the procedural law of the nation and not indulge in any illegal or unlawful act. When power of search and seize is exercised it directly intervene with the personal space or instrument of the affected party and one wrong move by the legal authority would cost them their privacy and freedom to life with dignity.

As this power can be exercised in various scenario or circumstances so all the statutes dealing with such circumstances have proper legislature on how such power needs to be exercised by the concerned officers or judges in compliance of elements of natural justice and fundamental rights of the citizen. Almost all legislature states that reasoned notice should be given prior to the inspecting and seizing the goods or arresting the person. After that affected person should be given an opportunity to fair hearing and defending himself/herself. Though as there always exception in certain statutes this power is not complied with PNJ so that smooth investigation can be processed and the person do not get chance to erase or remove the evidence.

If a statute does not state anything about natural justice it is to be taken that they need to be followed while exercising such power unless the statutes expressly prohibit following PNJ. But when question of prevails comes into context it is always statutory provision of natural justice. Similarly, Public Tranquillity and Safety is priority for Central Government hence when question comes of who prevail who come it is always Social Safety above Principles of Natural Justice.

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RIGHTS OF EMPLOYEES, EMPLOYER IN REFERENCE WITH MINIMUM WAGES ACT, 1948

Kalp Aggarwal

ABSTRACT

The importance of awareness brings us to highlight the important aspect of an employee who works day and night to get his salary. While many are there getting a good chunk; rest are not even getting their basic dues. The world has a sharp contrast between these two categories and the awareness of the rights and duties will ensure in reducing the differences and lighting up a bulb at a place where there remained darkness till date. Justice doesn't come easy; for when it comes takes away all the worries and brings hope for all the more positive vibes. The basic necessities are essential and thereby no one shall be deprived of the same and the minimum wages are the basic essential which shall be paid and not to be denied in any sense by the employer. The importance of wages in the life of labourers cannot be foreseen by rich class and how each penny acts as a bonus for them. There is a big role of government and the committee in ensuring no employee is devoid of any kind of justice in any form and everyone shall be treated equally and the concept of welfare state is promoted keeping in mind the welfare of everyone. The essay tries to explain the hardships faced by employees, the exploitation by the employers and the rights which may bring a change in the society.

Keywords: *wages, exploitation, fine, employee, awareness*

INTRODUCTION

The minimum wage stands for the basic wage to be provided by the employer to the employee in lieu to fulfill his basic necessities and thus earn a livelihood to survive. The Minimum Wages Act, 1948, provides for fixing minimum rate of wages in certain employments. Any employee who has been refused minimum wages by the employer fixed under the Act has the right to make a complaint either by himself or through the prescribed agents to the authority mentioned in the Act.[350] It is an act of parliament concerning Indian Labour Law that sets minimum wages that must be paid to skilled and unskilled labour. The Supreme Court in Express Newspaper V. Union of India[351] classified minimum wages as one which can only provide for a bare subsistence. The securing of minimum wages to labourers not only ensures bare subsistence but also maintenance of health and decency which is a DPSP under Article 43 of the constitution.[352] It is very essential to be provided with basic minimal facilities and earn a livelihood. To subsist is to live in this world, with bare basic essentials without any fancy materialistic objects. Minimum wage rates are determined by factors such as poverty, threshold, prevailing wage rates as determined by the labour force survey and socio economic indicators which insures better workers protection.

OBJECTIVE BEHIND SETTING UP MINIMUM WAGES

The object of the act is to prevent exploitation of the workers, and for that purpose the act aims at fixation of minimum wages which the employers must pay.[353] There is a need to follow and respect this legislation in the nation; if not followed shall invite penalties and legal repercussions. The legislature intends to apply these provisions to those industries or localities in the areas of unorganised labour.[354] We often see the labourers employed in the unorganised sector suffer the most, thereby causing damage to their own family as being unaware of their rights. Article 14 forbids class legislation but does not prohibit reasonable classification for the purpose of legislation.[355] The minimum wages shall be fixed for overtime work and shall be paid accordingly and to be double of what ordinarily be the minimum wages for a fact

[350] Pabbojan Tea Co. Ltd. v. Dy. Commr., [1968] 1 SCR 260
[351] [1958] AIR 578 (SC)
[352] Bijay Cotton Mills Ltd. V. State of Ajmer, [1955] 1 SCR 752
[353] Bhikusa Yamasa Kshatriya v. Sangamner Akola Taluka Bidi Kamgar Union, [1963] Supp (1) SCR 524
[354] Ibid.
[355] Ibid.

respecting the DPSP.[356] The necessity of establishing this statement was clearly made due to the non-payment of overtime wages to the employees as were given threats of losing their job if anyone opposed this way.

WHY IS MINIMUM WAGE SO IMPORTANT?

The payment of wages less than the minimum wages is a violation of fundamental rights under Article 21 of the Constitution.[357] In the view of the above statement, it is completely legal and valid to award the compensation to be three times of the minimal wages.[358] The Indian constitution characterizes the 'living wage' for a worker. The term 'living wage' guarantees a fundamental way of life, which incorporates health, pride, comfort, and training. It likewise accommodates possibilities. The basic necessities are to be ensured by the employer so that the employee doesn't suffer; helping him to grow as an individual fully enjoying his rights. If you employee someone, that doesn't necessarily implicate that you just pay them for the work you hired them for. You need to take care about the basic amenities and ensure the employee lives a decent life. It is necessary, therefore, about the provision of a permanent base for residence at or near the work site.[359]

WHO IS ELIGIBLE FOR MINIMUM WAGES?

Under S.2 of the U.P. Industrial Disputes Act, 1947, it is clearly stated that all the workmen falling under S.2 are eligible for the benefits of being an employee. However, it was held that the Act does not apply to a teacher in a private educational institution.[360] So no one of private institution shall keep any kind of hopes from the courts or the legal structure of the nation because in the end, he won't have legal rights to fight against the same. The Minimum Wages, Dearness allowance and bonus paid in two different departments differed which shows that there was no unity of employment and no unity of purpose.[361] This means that whenever there are two different activities going on, there may be different workload and thereby the employer may employ on different pay-scale and the minimum wage may vary accordingly.

[356] Y.A. Mamarde v. Authority under the Minimum Wages Act, [1972] 2 SCC 108
[357] General Security & Information Services (P) Ltd. V. East Coast Railway Admn. [2012] SCC OnLine Ori 370
[358] Ibid.
[359] Ibid.
[360] Hindu Inter College v. Prescribed Authority (Minimum Wages Act, 1948), [2004] SCC Online All 1103
[361] Fine Knitting Co. v. Industrial Court, Bombay, [1962] Supp (3) SCR 196

WHAT IF THE MINIMUM WAGES ARE NOT PAID?

If the minimum wages prescribed under the Minimum Wages Act are not paid, it is punishable under S.22 of the Act and an agreement /contract contrary to the notification shall be void under S.25 of the Act.[362] Non-payment and underpayment of the minimum pay permitted by law are considered as a chargeable offense. The punishment of the wrongdoer might be as long as 5 years of detainment with a fine of Rs 10000 as given in Section 22 of the Act. When minimum wages are fixed for an industry there can be no settlement for payment of lower wages even in respect of factories.[363] The benefit of fixing this amount is that everyone gets to know about this basic minimal amount on which he shall be employed. The campaigns and awareness drives helps in ensuring in educating the employees about their rights which in turn help them to safeguard their own future and save themselves from getting exploited by their employers.

WHO GETS TO DECIDE THE MINIMUM WAGES?

The minimum wages are decided by the Government and not be considered as arbitrary or unguided because there is a procedure for gathering information about the type of employment and its nature which is secured by the Government.[364] The power to fix the minimum wages is of the Government. Under clause (a) of sub section (1); the Government can appoint as many committees and sub-committees as it considers necessary to hold enquires and advise in relation to fixation or revision of Minimum wages.[365] The committee comprises of high dignitaries who hold eminent positions and thereby not to be questioned as they have been appointed keeping in mind the dignified past record of those eminent persons. The people comprised under the committee shall not be from a particular scheduled employment, rather there has to be a single nexus established which shall be sufficient for their inclusion in the committee.[366] For example, the controller of bureau of mines, president of state mines corporations and a few others relating to the same shall be deemed to connect regarding the mining industry. The authority under Minimum Wages Act, 1948 is entitled to decide all questions as are necessary to be decided and which arise under the Act but not such matters such as wrong or erroneous classification of the employee's job.[367] The question of categorising

[362] U. Unichoyi v. State of Kerala, [1962] SCR (1) 946
[363] Ibid.
[364] Chandra Bhavan Boarding & Lodging, Bangalore v. State of Mysore, [1969] 3 SCC 84
[365] State of Rajasthan v. Hari Ram Nathwani, (1975) 2 SCC 517
[366] Ministry of Labour and Rehabilitation v. Tiffin's Barytes Asbestos & Paints Ltd., [1985] 3 SCC 594
[367] C.S. Parmeswaran v. Authority under Minimum Wages Act. 1948, for Nandgaon and Mannmad, [1968] SCC

the person and placing him in a certain category is a matter of analysing the issues on technical basis to solve the problem. Therefore, the authority is not given the power to decide this issue.[368]

DOES TIMING OF THE EMPLOYEE MATTERS?

The timing of the work done is always questioned considering the amount of workload instilled onto them, for such a meagre amount. So, what about the timings of these employees? The legislation has taken care of it, with the help of judicial precedents with time clearly specified that the hours of work cannot be more than 9 in a day and taken with the intervals for rest these 9 hours may be spread over 10+ hours.[369] The worker must not be made to work for more than 5 hours at a stretch before he has had an interval for at least half an hour (this provision is in factories act, 1948 only). The reason for unavailability of this provision is that in some employments time for work depends on some extraneous factors and hours of rest cannot always be fixed to break up those hours. [370]

CAN YOU FILE A SUIT AGAINST ANY EMPLOYER FOR NOT PAYING OVERTIME DUES?

There are fixed hours in every job but there are someday when you have to work over the time to get some task done; are the employers bound to pay for this extra efforts they asked us to put to finish the task within some specific time breaking the working hours? The Minimum Wages Act does not talk about any rule or provision relating to additional payment over and above what shall be payable for overtime as such.[371] However, there can be an extra pay which need to be paid by the employers in case of extra workload and which doesn't include in the minimum wages as it only covers basic workload.[372] However, this cannot be tried in the courts against the employer. Whether any action is taken against employer or not, no penalty shall be imposed by any tribunal in shape of making the employee getting paid for

OnLine Bom 122

[368] Ibid.

[369] Workmen v. Trustees of Port of Bombay, [1966] 2 SCR 632

[370] Ibid.

[371] Workmen, Bombay Port Trust v, Trustees of Port of Bombay, [1962] Supp (1) SCR 36

[372] A.M. Allison v. B.L. Sen, 1957 SCR 359

the work done on Sundays something more than he would have otherwise was to be paid.[373] This means that the employer has a free hand in some matters and when someone has accused the employer under Minimum Wages Act,1948; he shall not be bound to pay for the extra workload however, Factories Act,1948 may serve the purpose and help the employee in getting some due for the overload he had done.

CLASSIFICATION OF SKILLED, SEMI-SKILLED AND UNSKILLED

Government cannot distinguish or creates categories on its own like unskilled or semi-skilled and if the Government tries to do the same, it shall be held invalid as per the Act which only provides about minimum wages and fixed rates.[374] Section 3(3) of the Act speaks about different minimum rates. It says minimum wages can be fixed based on different employment different classes which are included as skilled unskilled semi skilled works in the same employment. It was said that minimum wages fixed based on adults children and apprentice. It is also based on different of realities in addition minimum wages will be fixed based on our work day or by month. In Mahendra Chandra Dev vs. Union of India[375] it was observed that the power of the government to prescribe minimum wage rate or revision thereof does not include the power to vary the other terms of the contract. While fixing the minimum wages recommendation of advisory board for different sectors such a skilled unskilled becomes necessary. In, Bijay Cotton Mills Ltd. vs. The State of Ajmer[376], the Supreme Court observed that “As regards the procedure for fixing a minimum wage the appropriate government has undoubtedly been given very large power, but before fixing the rate it has to take advice from advisory committee ". The committee has been discussed above; who has enough powers to decide on the fixed rates and also on the welfare of the employees and not cause any bias towards any segment of the society.

[373] Ibid.
[374] Hindustan Sanitaryware & Industries Ltd. V. State of Haryana, [2019] 15 SCC 774
[375] [1970] SCC (1)
[376] Supra. 4

ROLE OF TRAINEE AND WHETHER HE SHALL BE TERMED AS AN EMPLOYEE?

Any minimum wages notification or modification does not cover the trainee and therefore the trainee has no locus standi to appeal for the same.[377] This is done to ensure that the trainee does not claim the rights same as claimed by any employee who has been working at the workplace for years. The trainee has been at the workplace for a temporary period, to learn and to help him grow as an individual. Any mistake/negligence done by him shall be predicted on a general basis; thereby not giving him the basic benefits for the initial period will make him give his best and strive for the permanent employment at the workplace. The Government is beyond jurisdiction and it shall be on employer's discretion to decide the fixed training period of the trainee.[378] The trainee has been at the employer's place to learn a skill and it is not fixed on his part to continue as an employee or not be continued as one; thereby the Act has given enough space to not cover the trainee under the purview of this Act which might have delved into further confusion about who shall be treated as a trainee and otherwise.

EMPLOYEE EMPLOYED FROM DIFFERENT SOURCES

There is no distinction between the employee employed by the employer while other employed by the contractor. Both shall be under the same purview of the Act.[379] There are times when a person is not directly employed by the employer and there are many sub-agents involved in the scenario but this shall not mean that in any way, the employee shall be discriminated on the grounds of his way of employment. He may be employed in any of the authorised way, shall be deemed to be treated as an employee and be covered under the Minimum Wages Act, 1948 and thereby be eligible for the minimum wages as fixed under that category of employment.

[377] Supra. 22
[378] Supra. 22
[379] Ibid.

WHO GETS TO ENJOY THE BENEFITS UNDER ESI ACT, 1948?

There should be a provision of compulsory insurance introduced to minimise the risk which may act as a backup in emergency times.[380] There has been no prescribed period for which the employee has to work to avail the benefit Employees' State Insurance Act, 1948[381] This acts as a plus point for the people who might not be at the employer's place for a long time, however, insurance does act as a guardian in the emergency times for the ones who can't afford the basic necessities and thereby the insurance helping them to bring the life back to the track. The basic amenities might not be holding any significant value in the eyes of the employer who are rich-class brats but the meagre initiative on the part of employer might help the employee in not losing a big chunk out of his pocket in case of emergency.

WHAT IS THE TIME PERIOD UPTO WHICH YOU CAN FILE A COMPLAINT AGAINST AN EMPLOYER?

S.20 (2) of the Act stipulates "sufficient cause" should be given by the employee for making the application beyond the period of six months.[382] If a litigant has chosen to come to court after considerable delay, for which, he has no explanation, he has to blame himself for his matter being thrown out of the court without the merits being considered.[383] The litigant cannot make a complaint that the cause of justice has been defeated because of his own delay. No litigant can take advantage of his own fault and demand a premium relating to the same.[384] This is being framed keeping in mind to avoid any kind of ill intention in the mind of employer who may frame his employer in false cases due to some old rivalry. Usually, when the employee is being scolded or not being granted leave on an emergency purpose; it instils a sense of revolt in the heart of the employee who looks at his employer in a negative manner ready for balancing the sub-due.

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[380] Bandhua Mukti Morcha v. Union of India, [1991] 4 SCC 177

[381] Royal Western India Turf Club Ltd. V. ESI Corpn., [2016] 4 SCC 521

[382] Rambal Ltd. v. Commr. Of Labour, 2015 SCC OnLine Mad 313

[383] Ibid.

[384] Ibid.

ROLE OF CHILDREN AND RESPONSIBILITY OF EMPLOYER TO PROVIDE BASIC AMENITIES

The employment of children in the factories is taken very seriously and ensured that they are not exploited there.[385] The children are the future assets of the nation which can give a golden future in the hands of their future generations by working hard and making this nation more developed. The spirit of the Constitution provides that the children should not be employed in the factories and shall be educated, thereby bringing Article 21A making education as a compulsory means until the age of 14.[386] There have been frequent reports of children working in hazardous industries relating to the fireworks though it is not at all permitted by the State. However, some children can get employment under the hazardous factories provided they clear the age criteria and are not exploited at their workplace. The children can be employed in the process of packing area; however, proper minimum wages shall be fixed for the children which shall be 60% of what an adult man will earn of doing the same job. There should be special facilities made for improving the quality life of children. These facilities include the basic essentials which may provide for a better and healthy future of the child. The legislation and the judiciary has repeatedly stated to frame the laws and implement them which can benefit the children in the best possible manner. The state government should enforce facilities of recreation and education as provided under Factories Act, 1948.[387] Health care of workmen and members of their families and education of the children in any exclusive locality should be the responsibility of the employer.[388] There are locations where there is no basic amenity available; making it hard for the employees to survive and live out a decent life. In these circumstances, the employer shall take care and provide the basic essentials to help in the survival of its employees.

[385] M.C. Mehta v. State of T.N., [1991] 1 SCC 283
[386] Ibid.
[387] Supra. 36
[388] Bandhua Mukti Morcha v. Union of India, [1991] 4 SCC 177

MAINTENANCE OF REGISTERS, COLUMNS AND PROPER DATA ON MINIMUM WAGES

When deductions are made by the employer, he has to give reasons for the same and if any of the deduction is made by way of fine, he has to indicate the same.[389] There should be proper registers maintained for fines, deductions and wages including the overtime wages in a separate column.[390] This system ensures that there is transparency in the system. It will help in the long run and may even prove to be beneficial for the employer who may present these documents as a proof to safeguard his defence. There may be times when he might be falsely accused in any case of old-rivalry, thereby these documents will help the court to establish the fact that the employer had done its job in true sense and the other party has filed the case on false charges.

CONCLUSION

The Central Government must ensure that every payment of wages, whether it be normal wages or overtime wages shall be made directly to workmen without the intervention of *khatedars* and free from any deductions whatsoever, except those authorised by the law.[391] This ensures that there is no third-man who interferes and takes the money of the deserved class who earned it. It is not enough merely to go periodically and examine the muster-rolls or muster-sheets showing payment of wages, for that would not show the reality if there were any secret commissions or mischief done by the *khatedars*.[392] This will bring a change in ensuring that there is no exploitation going around and the employees are being treated the way they should be. Changes must be brought to bring a revolution and help in the overall growth of the individual. when there is an inspection on a daily basis, it keeps the employer aware that there is a higher agency looking out for the employees and he shall not practice any kind of exploitation which may invite any kind of penalties or any other serious repercussions.

[389] Maya Chandra v. Inspector, Minimum Wages Office, [1979] 38 FLR 184 (Cal)
[390] Ibid.
[391] Labourers, Salal Hydro Project v. State of J&K, [1983] 2 SCC 181
[392] Ibid.

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NEED FOR RATIFICATION OF UNCAT- COMBATING POLICE BRUTALITY IN INDIA

Darshi Sharma

ABSTRACT

The pandemic was indeed the most difficult time for the entire world. There was a section of society which faced heat the most, the prisoners. This article intends to spark the discussion regarding police atrocities in India, which are increasingly becoming the norm of today's culture. Firstly, the article will begin with a brief historical background of torture laws in India. Secondly, the article will shed light on how the aftereffects of the pandemic have further escalated custodial violence, torture by public servants and inhumane behavior towards undertrial prisoners. Thirdly, in a descriptive analysis, the article will discuss India's stand on the United Nations Convention against Torture (UNCAT) while addressing an alarming need for an anti-torture law in India. Lastly, with the aid of guidelines pronounced by Supreme Court, and reports of Law Commission and of National Human Rights Commission (NHRC), the article will aim to suggest measures which need to be adopted to deter rising abusive practices by the police.

Keywords: Human Rights, Pandemic, Police brutality, Torture, UNCAT

INTRODUCTION

In a general context, 'police brutality' is the physically harsh and lethal treatment of accused persons and undertrial prisoners. According to an Amnesty International study from 1992, the most prevalent kinds of torture include intense beatings, often while the offender is hanged upside down, and electric shocks. People have also been crushed by large rollers, burnt, and stabbed with sharp objects. There have been reports of maiming sexual organs of victims. Rape is also a common form of torture. Apart from these, there are several other devastating methods used to obtain information from the accused. Police officials have approved such techniques for extracting confessions.

Custodial abuse in India has long been a subject of debate and discussion. Cruel and humiliating treatment of accused is strictly prohibited under the provisions of the Constitution and Criminal Laws. Torture is never acceptable, whether it occurs during an inquiry, an investigation, or a trial.[393] Active steps have also been taken by government institutions and not-for-profit organizations to curb the menace of unethical and inhumane treatment of persons in police and judicial custody.

1.2 Historical Background

The police and its functions are historical concepts, from Jivagribhs (Rig Ved) to Ugras (in the Upanishads), in our historical documents one can find the trace of policing system. With time as the police system developed, it introduced the concept of police brutality as well.

1.2.1 Andhra Pradesh

The events of extra judicial killings and encounters in the state of Andhra Pradesh gave it a status of being a state which gave birth to police brutality in India. The rampant killing of over 2000 farmers and innocent peasants during Telangana Peasant armed struggle between 1946-51 was one such incident. The conduct of officials in the state was equal to Human Rights violations at its core. The gruesome history of killings by police raised concerns. The political killings as well as of those who were considered 'unmanageable' by policemen in the name of 'encounters' tops the list. The encounter killing of journalist Ghulam Rasool who was covering these illegal deaths proved the situation of the state.

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[393] Aditi Patil and Sarthak Roy, *Need for a Separate Anti-Torture Law: Probing India's Ethical Egoism on Torture* 96 Special Issue IJLIA (2019)

1.2.2 Bhagalpur Blinding, 1980

Bhagalpur, a city in Bihar saw a rampant rise in crime rates during 1980s. The incident is inscribed as the darkest chapter in history. To curb the surging crime records and instil fear in criminals, police officials injected acid into the eyes of the accused. During the span of 2 years, 33 people were blinded. The habeas corpus petition was filed in apex court in 1981 by Hingorani on behalf of all the victims[394]. The case became the very first judicial precedent to order compensation for human rights violations.

1.3 INTERNATIONAL DOCUMENTS

The right to be free from torture is codified in several international human rights instruments that protect individuals from being exposed to physical and mental turmoil by acts of public servants. The prohibition of torture has also been adopted in various regional and universal human rights treaties.[395]

BILL OF HUMAN RIGHTS

- Universal Declaration of Human Rights, 1948 – Article 5
- International Covenant on Civil and Political Rights, 1966 – Articles 4, 7 and 10
- International Covenant on Economic Social and Cultural Rights, 1966 – Preamble, Article 2 and 5

UN CHARTER

- Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), 1984 – Articles 1, 2, 10 and 11

1.3.1 United Nations Convention Against Torture (UNCAT)

The convention is an international human rights treaty under the backing of United Nations. It aims to safeguard every person from cruel and degrading treatment while in custody. It prevents harsh punishments and acts of torture which are practiced by public servants, especially towards people belonging to marginalized communities. It requires obligation of States to provide fair trial to the accused persons. The optional protocol to the convention requires public officials to work in a just and reasonable manner without committing atrocities in their jurisdiction. It encompasses certain rights and obligations –

[394] Khatri and Ors. V. State of Bihar, 1981 SCR (2) 408

[395] Law Commission of India 273rd Report on Implementation of "United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment" through Legislation (October 2017)

- The right of persons to be protected from torture by the state
- The right of the State to protect individuals from torture by its agents
- *The obligation of the state to prosecute torturers*
- *Individuals' right not to be deported or extradited to another state where they may be subjected to torture*

1.3.2 International Bill Of Rights

The Universal Declaration of Human Rights (1948), The International Covenant on Civil and Political Rights (1966) and The International Covenant on Economic Social and Cultural Rights (1966) together form the Universal Bill of Rights.[396] These instruments are significant treaties which most States have signed and ratified. They provide a wide array of protection against violation of civil and human rights.

1.4 India's Stand On The UNCAT

The right to life and personal liberty is enshrined in Indian Constitution. It protects every person from deprivation of basic rights as an individual. In line with right to life as a fundamental right, the constitution also recognizes right against self-incrimination, protection in respect to arrest and detention, and protection in respect of conviction. The legal position in India is in much discussion as regards to Anti-Torture laws. Through legislations, the parliament has justified taking stern measures to combat torture in prisons. Under the Code of Criminal Procedure, 1973, many safeguards have been provided to the accused – right to fair trial, right to free legal aid, right to default bail, right against double jeopardy, etc. Further, in accordance with provisions of Indian Penal Code, 1860, punishments have been prescribed against public servants who commit atrocities against arrested persons.

The Prevention of Torture Bill, 2010 was passed in the Lok Sabha to address the ongoing debate. However, after decision of Rajya Sabha's Select Committee, the bill lapsed in the parliament and is yet to be passed. India has been a signatory to UNCAT since 1997 but the ratification in parliament is still pending.

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[396] *Id* at 2

WHY INDIA HAS NOT RATIFIED UNCAT TILL DATE?

India made promise on international platform in the year 1997, but even after 23 years has not acted upon it. Even almost after quarter of century there is no law on national level for the same. 170 countries including Pakistan and China has ratified the convention, where India stands with minority of 25 countries with no legislation to ratify it[397]. The main contentions behind non-fulfilment can be inconsistency between domestic laws and the clauses of UNCAT. But there exist few loopholes between legislations, which are discussed below:

2.1 Domestic Laws Covering The Crux Of Convention

There has been a contention that the major provisions of UNCAT have been covered under existing criminal laws of the country. There are conclusive definitions provided under IPC for 'hurt' and 'grievous hurt' but 'Torture' has not defined anywhere. However, courts included psychic torture, tiring interrogative prolixity etc in the sphere of torture.

Apart from that Section 330 and 348 of Indian Penal Code, 1860 penalizes offences that can be considered as torture (with 7 and 3 years of imprisonment respectively). Both the provisions are not dedicated for torture by public officials as such. Therefore, they fall deficient to the elements of Torture as defined under UNCAT. Section 331 and 342, however, ostensibly talks about deterring police officer on using third degree during interrogation, that may amount to torture[398].

Under Indian Evidence Act, 1872, the provisions of proper victim medical examination and laws circling witness protection falls short of what is a necessary requirement under convention. Though, section 24 discusses the confession caused by threats and section 25, talks about Confession which cannot be proved against him in court of law[399].

There are also few safeguards mentioned under Constitution of India, under Article 20 and 21. Article 20 gives right against conviction of offences (based on the principle of double jeopardy and self-incrimination). Article 21 can be interpreted through lens of protection from torture or right to be free from torture by state and its functionaries. The same can be extracted from the term 'Personal Liberty' as expressed in the article. Further Article 22 also provides four-fold

[397] Som Thomas, *Every custodial death A reminder of Why India must ratify the convention against torture*, The Wire (Oct 7, 2021, 15:00 PM), https://thewire.in/rights/custodial-deaths-india-convention-against-torture
[398] The Indian Penal Code, 1860, § 330, 331, 332, 348, No 45, Acts of Parliament, 1860 (India)
[399] The Indian Evidence Act, 1872, § 24, 25, No.1, Acts of Parliament, 1872 (India)

rights surrounding conviction, like preventive detention, production before Magistrate, meet the lawyer of choice and inform grounds of arrest[400].

Code of Criminal Procedure, 1973, specifies various sections to inhabit anti-torture traits. Section 50-56 are in tunes with Article 22. Another essential provision is under Section 176 which gives powers of magisterial inquiry on custodial deaths. Also, section 482 talks about complaints to High Courts if magistrate fails to look into the complaints of custodial torture[401]. Lastly, Section 7 and 29 of Police Act, 1861 talks about suspension, penalizing of police officers who are negligent in terms of discharging their duties and violating the constitutional provisions and non-compliance of statutory guidelines[402].

There is a lacuna in legal provisions as well. The compensation to the victims of torture has received a minimalistic attention by courts because of void in legislative provisions. The situation is, even if the act of torture is established there is no legal obligation for compensation under law. However, in several cases like Nilabati Behera v. State of Orissa[403], the court has awarded compensation to victims, the concrete legal framework is still missing.

2.2 Unable Or Unwilling?

India has a customary practice of passing a domestic legislation before ratifying an international convention. Although India is bound under Article 51C and 253 of Constitution[404] to encourage settlements and respect international treaty obligations, the step towards formulation of anti-torture legislation is still absent after 23 years. However, as mentioned above there were instances in 2010, 2017 and 2018 when the domestic legislation under Prevention of Torture Bill was passed in Lok Sabha[405]. The bill keeps on getting lapsed due to dissolution of Lok Sabha.

There have been legislations like National Food Security Act, 2013 (Right to Food), the controversial Land Acquisition Act, 2013 passed during the same reign but Prevention of Torture Bill failed to make cut through the priorities list. It has been confirmed by then Law

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[400] India Const. art 20, 21, 22
[401] The Code of Criminal Procedure, 1973, § 50-56, 176, 482, No. 2, Acts of Parliament, 1973 (India)
[402] The Police Act, 1861, § 7, 29, No. 5, Acts of Parliament, 1861 (India)
[403] Nilabati Behera v. State of Orissa, AIR 1993 SC 1960.
[404] India Const. art 51C, 253
[405] PRS Legislative Research, https://prsindia.org/billtrack/the-prevention-of-torture-bill-2010 (last visited Oct. 18, 2021)

Minister Ashwini Kumar that standing committee prepared the draft of Anti-torture bill in 3 months but even after 11 years, there has been no action taken to pass, consider or review the same[406].

Most of the laws in India are introduced or borrowed by British. The laws were adopted post-independence but are in application till date. Since the Britishers set up the legal structure, such as policing system in India, it was more of a dominating nature. In a democratic set-up like India, where police is for assistance, the necessary amendments are not passed yet. Therefore, if India chooses to ratify UNCAT, it will demand to make necessary alterations to such acts which probably too much work.

2.3 Other Reasons

According to various experts like Ajai Sahni, the convention is "political and discriminatory" in nature. He says that another scrutiny will burden the police officials and that will be reflected in exercise of their duties[407]. Further he adds, that India will continuously be under radar for international scrutiny if it ratifies the convention. Former CJI Deepak Gupta stated that before ratifying the UNCAT or formulating the fresh piece of legislation, the existing discrepancies must be tackled. The active laws must be rectified first before ratifying international convention[408].

Also, according to reports, the ratification will trigger debates on Human Rights violations in Jammu Kashmir and North-East India, which might reduce India's prestige on global scale. Central government time and again in Supreme court has mentioned that they are considering the recommendations proposed by 273rd Law Commission Report but at the same time determined on the fact that minor amendments in existing domestic laws will be adequate, therefore will come in tune with Committee against Torture[409].

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[406] Karan Thapar, *India's 23-year-old failure to ratify UN Convention Against Torture is Shameful,* The Wire (Oct. 13, 2021 16:10), https://thewire.in/rights/watch-indias-23-year-old-failure-to-ratify-un-convention-against-torture-is-shameful

[407] Azaan Javaid, *States,UTs yet to reply on ratifying UN convention against torture,* Hindustan Times (Oct 12, 2021 09:30), https://www.hindustantimes.com/india-news/states-uts-yet-to-reply-on-ratifying-un-convention-against-torture/story-hsJNbwM2znbfzZ4UECfd6J.html

[408] R.K. Vij, *Why separate anti-torture law?* The Hindu (Oct 19, 2021 19:16) https://www.thehindu.com/opinion/op-ed/why-a-separate-anti-torture-law/article32132114.ece#:~:text=The%20Bill%20was%20not%20only,but%20that%20was%20left%20undefined.

[409] *Id.* at 12

NEED FOR RATIFICATION OF UNCAT

Article 21 affirms the right against torture. According to the reports of National Campaign against Torture (NCAT), there were almost 111 people who died in police custody between April 2019 to March 2020. 18 deaths were reported on roads by police during enforcing lockdown, whereas 1,569 deaths were recorded under judicial custody[410].

3.1 Surge in Number Of Torture Cases During Covid-19

According to United Nations Office on Drugs and Crime (UNODC), there was almost 50% drop in robbery, theft and burglary cases during Covid lockdown. At the same time, In India there was rampant rise in cases of deaths in police custody[411]. In reports of NCAT, 50 people died by suicide due to torture by police. However, in last 10 years, 400 out of 1000 cases of custodial deaths were listed due to illness or natural deaths. This raises issue of ambiguity in answering the reasons for deaths in custody[412].

3.1.1 Tamil Nadu Custodial Deaths

Known as George Floyd incident of India, the case took place in Thoothukudi district of Tamil Nadu. The rage and wrath of policemen met with deadly consequences. The father-son duo was arrested under the offence of keeping the shop open post curfew. Jayaraj (father), had an argument with the police petrol team a day prior to his arrest. The duo was charged under various sections of IPC. The witnesses and localities mentioned about illness of both the accused and also said that they were bleeding while they were presented in court. Where one section of population termed it as 'revenge' by police, there is no deny in the fact that the act was sheer violation of Human Rights and the duo was robbed on their dignity.

3.1.2 Assam Firing, 2021

In Sipajhar district of Assam, several people were injured and three lost their lives in police firing on encroachers, on government orders. The issue faced huge public rage and court ordered judicial enquiry on same.

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[410] National Campaign Against Torture, http://www.uncat.org/in-media/custodial-death-torture-a-human-rights-abuse-indian-and-international-perspective-latest-laws/ (last visited Oct 20, 2021)

[411] National Campaign Against Torture, http://www.uncat.org/press-release/india-torture-report-2020-increase-in-custodial-deaths-despite-covid-19-lockdown-at-least-one-suicide-every-week-due-to-torture-in-police-custody/ (last assessed on Oct 20, 2021 14:28)

[412] Record Of Discussion of The Interaction Between NHRC, India and The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions

3.2 International Pressure

According to Asian Center for Human Rights, a report by EU, lack of initiative by India in framing laws to prevent torture, rising cases of custodial deaths and abuse is no surprise. The Vice President of UNCAT, Claude Heller, has urged India to ratify the convention[413]. There has been an international pressure on us to not only ratify UNCAT but also to formulate the necessary domestic Anti-torture laws. While presenting Universal Periodic Review (UPR) in 2008 and after, India, time and again gave word on ratifying convention but futile[414].

India's submission to UN Human Rights Council have always on a positive note affirmed that India will soon ratify the treaty and legislate the domestic laws. Non-performance of the promise for past 23 years has put us in bad light on global arena.

3.3 India And Human Rights: A Silent Tussel

UNCAT provides a blueprint to assure total eradication of torture. Being a richest democracy in the world, it is a paradox that India is still out of it. The instances of torture and ill-treatment of people in custody surfaced in last couple of years. The moral need for anti-torture law exceeds legal need by colossal margin. The holistic aspect of treaty covers the investigation as well as victim welfare and rehabilitation. The inclusive legislation in a country with such a vibrant democracy will have great impact, especially with free press.

Recent cases of Police brutality are:

1. Attack by police in college campuses in Delhi, in 2019[415].
2. The Hyderabad Encounter, 2019[416]
3. Vikas Dubey Encounter, 2020[417]
4. Death of Sagar Chalavadi during lathi-charge outside SSLC center, 2020[418]

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[413] Conference Report Strengthening Legal Protection Against Torture in India

[414] Id 21

[415] Prakash K Datta, *Jamia Protest: Can police enter university campuses?* , India Today,(Oct 20, 2021 14:50) https://www.indiatoday.in/news-analysis/story/jamia-protest-can-police-enter-university-campuses-1628941-2019-12-17

[416] Murali Karnam, *Hyderabad 2019 'Encounter': Inquiry Panel Exposes Cover-Up, Lies in Official Narrative,* The Wire (Oct 19, 2021 18:55) https://thewire.in/law/hyderabad-2019-encounter-inquiry-panel-exposes-cover-up-lies-in-official-narrative

[417]Manish Sahu, *Vikas Dubey encounter case: Judicial panel exonerates UP Police,* The Indian Express (Oct 20, 2021 12:00) https://indianexpress.com/article/india/vikas-dubey-encounter-case-inquiry-commission-gives-clean-chit-to-up-police-7282806/

[418] Revathi Rajeevan, *18-year-old Dies Outside Exam Centre in Karnataka's Bijapur, Family Claims Police Assaulted Him*, News18, (Oct 10, 2021, 21:23 PM), https://www.news18.com/news/india/19-year-old-diesoutside-exam-centre-in-karnataka-family-claims-police-assaulted-him-2690161.html

5. Brutal beating of Dalit Family in Guna, M.P, 2020[419]

These are some incidents which were out in public, one can only imagine the situation behind lockups. Therefore, there is a need for dedicated law to combat police brutality. One must understand that Human rights are made for people, they are inclusive and are guaranteed to people for sake for their well-being. The absence of legislature against torture is a sheer violation of our human rights. Issues of human rights is not partisan, they are not based on yes or no factor. These issues are necessary to be out for discussions and debates.

GUIDELINES SURROUNDING POLICE ACCOUNTABILITY AND REFORMS

The role of state and non-state actors is crucial in determining the volume of cases that are filed in violation of custodial violence. Technological advances in social media usage also compel a need to bring anti-torture legislations. Some peculiar instances for such acts may include spread of communal violence through social media networks.

4.1 National Human Rights Commission (Nhrc)

- 1997 Report
    1. Regarding encounters, the officer-in-charge is bound to record details of the encounter in an appropriate register as soon as he receives the information of the same.
    2. In cases of death and serious offences, expedited course of action should be pursued to investigate into facts and circumstances of the case
    3. Independent investigation agencies like CID and CBI should be handed the task of investigating felony and organized crimes
    4. For cases ending in conviction, compensation to the dependants of the deceased must be considered

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[419] Anuraag Singh, *Cops in MP brutally assault Dalit couple, kids and kin for resisting removal of encroachment*, The New Indian Express, (Oct 15, 2021, 11:37 PM), https://www.newindianexpress.com/nation/2020/jul/15/copsin-mp-brutally-assault-dalit-couple-kids-and-kin-for-resisting-removal-of-encroachment-2170211.html

- 2003 Report

1. As held by the Supreme Court in Lalita Kumari vs Govt. of UP[420], FIR must be registered by police officer for cognizable offences. The police do not have the power to conduct inquiry and then proceed with FIR.
2. The concerned Magistrate should be bound to inquire the case within 3 months of complaint.
3. The Senior Superintendent of Police must report the case to the commission before 48 hours of filing of complaint.
4. The postmortem report, inquest report, and findings of the magisterial enquiry must be reported within 3 months.

4.2 Supreme Court Guidelines

- Prakash Singh vs Union of India[421]

1. The Supreme Court directed to set up a State Security Commission.
2. The SSC would lay down directions and policies for efficient working of prisoner security.
3. The state would have no authority to interfere in police investigation and the police shall work in autonomous manner.
4. The Indian Criminal Law requires judicial magistrate to conduct every custodial death inquiry.
5. Community policing and advanced training camps must be set up for better working of police force.
6. The idea is to depart from colonial policing measures and adapt to a more democratic approach towards police reforms.
7. The constitutional framework must be maintained while executives perform their functions.

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[420] Lalita Kumari vs Govt. of UP (2014) 2 SCC 1
[421] Prakash Singh vs Union of India, (2006) 8 SCC 1

4.3 Law Commission's 273rd Report (2017)

- Title of the report: Implementation of "United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment" through Legislation.
- Several recommendations made in respect of torture cases –
    1. The definition of 'torture' expanded to a large extent to include physical and mental injuries.
    2. The Commission advised the government to ratify UNCAT and provided a legal framework of anti-torture law to be considered for enactment.
    3. Need to amend existing legislations (CrPC and Evidence Act) to include compensation and burden of proof.
    4. Torturers be held accountable for violation and victims be provided adequate compensation.
    5. Prioritize protection of victims, witnesses, and complainants in custodial violence cases.

JUDICIAL RESPONSE: SUPREME COURT'S ATTEMPT TOWARDS POLICE REFORMS

Due to lack of a particular legislation to prevent torture, many cases are registered against public servants under Section 330 and 331 of Indian Penal Code. Section 330 is the offence of "voluntarily causing hurt to extort confession, or to compel restoration of property." Section 331 deals with "voluntarily causing grievous hurt" for the purpose of extracting information. The term of imprisonment in both the offences is seven years and ten years, respectively.

1. In Francis Coralie Mullin v. Administrator, U.T. of Delhi[422], the Supreme Court observed "any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity." The court further noted that a violation of Article 21 cannot be held valid by procedure prescribed by law. If a law authorises procedure which leads to such torture, the test of reasonableness and non-arbitrariness would fail.
2. In the landmark decision of D.K Basu v. State of West Bengal[423], the Supreme Court held that "custodial violence including torture and death in lock ups strikes a blow at the rule of law." The court deliberated on powers of executives to be limited by law.

[422] Francis Coralie Mullin v. Administrator, U.T. of Delhi, 1981 SCR (2) 516
[423] D.K Basu v. State of West Bengal, AIR 1997 SC 610

The Supreme Court provided some remedies to define protection in such cases and in cases of disappearance after arrest, burden of proof shall be upon police.

3. In Rama Murthy v. State of Karnataka[424], the Supreme Court recognized the need for prison reforms and related issues of inmates facing ill-treatment and torture.
4. In the case of Sube Singh v. State of Haryana[425], Supreme Court stated various reasons for prevalence of third-degree torture during interrogation and suggested preventive measures for such unethical treatment.
5. In Nandini Satpathy v. P.L Dani[426], the Court looked upon different methods of torture other than the traditional physical beatings. It was held that not only bodily harm, but "psychological torture", "atmospheric pressure", and "environmental coercion" used in interrogation by police are illegal.
6. The Supreme Court in Mehmood Nayyar Azam v. State of Chhattisgarh[427] dealt with atrocities against a social activist who was falsely accused in criminal cases. The police tortured him physically while in custody. The Court observed that functionaries of the state must not become lawbreakers as it would amount to contempt for law.
7. In State of M.P. v. Shyamsunder Trivedi[428] the court pointed out that in cases of custodial death or police torture, it is difficult to expect direct evidence of the complicity of the police. The Court called deaths in police custody as the "worst kind of crimes in civilised society, governed by rule of law."

SUGGESTIONS AND CONCLUSION

Fundamental re-evaluation of police reforms fixing police action and accountability is a need of the hour. The convention ensures safeguards to prevent torture and enhance training of law enforcement. India needs to understand that ratifying UNCAT will build inter as well as intra countries mutual confidence. Being the part of system, it will lead to better international support and restructured domestic reforms to combat much required anti-torture law. There is

[424] Rama Murthy v. State of Karnataka, Criminal Appeal No. 443 Of 2010

[425] Sube Singh v. State of Haryana, 1988 AIR 2235

[426] Nandini Satpathy v. P.L Dani, 1978 AIR 1025

[427] Mehmood Nayyar Azam v. State of Chhattisgarh, CIVIL APPEAL No. 5703/2012

[428] State of M.P. v. Shyamsunder Trivedi, Appeal (crl.) 217 of 1993

a need for specific law that determines torture and at the same time provide provisions to address and penalise the same. Therefore,

1. Need for comprehensive bill that includes the definitive structure for the term 'torture' and defines the punishments for the same. Also, compensation scheme must be provided.
2. It should not only be seen through legislative point of view but also through lens of Human Rights.
3. State Security Commission, as instructed by Supreme Court must be established with immediate effect.
4. Police officials indulged in fake encounters must be arrested, prosecuted and punished severally.

Before law and policy reforms, the attitude of India towards human rights needs restructuring. The time stresses to uphold the rights enriched in constitution, to protect and secure lives of citizens. In order to achieve good governance and holistic legal order, there is a dire need to stop barbarism by police and take up cognizance to tackle the issue of brutality. The ratification of UNCAT will therefore, reiterate India's international commitment towards law enforcement in protection of Human Rights.

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CONSTITUTIONAL AND JUDICIAL PERSPECTIVE OF NOISE POLLUTION IN INDIA

Dr. Manoj Kumar[429]

ABSTRACT

The intensity and the frequency of noise has increased in the modern age due to urbanization, industrialization and technological advancements which causes noise pollution. Noise pollution contaminates the environment and affects the health of persons, their activities and mental abilities. The problem of noise pollution has already crossed the danger point in threatening proportion and has become a serious challenge to the quality of life of people globally. With the advancement of science and technology new devices like microphones, loudspeakers have been invented which have made the right to freedom of speech and expression more meaningful as with their help an individual could express himself more vividly and reach more audience but at the same time if this results into noise pollution it violates various rights of public such as right to leisure, right to silence, right to sleep, right to privacy, etc.

The constitution of India creates an obligation on the part of "state" as well as "citizens" to protect and improve the environment. The environmental rights are considered as third generation rights and pollution free environment has been held as involving greatest social justice. The Supreme Court and High Courts in India have held through creative interpretation of the article 21 that to live in healthy and pollution free environment is part of right to life

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enshrined in article 21 of the constitution. Noise pollution has its interface with articles 19(1)(a), 19(1)(g), 21, 25 of the constitution of India. In this background this paper is an attempt to analytically analyse the constitutional and judicial perspective of noise pollution in India.
Keywords: *Noise, Pollution, Environment, Development, Health, Constitution.*

INTRODUCTION

Noise is a kind of environment pollution in the form of waves.[430] It is called a "shadowy public enemy".[431] Noise pollution has been identified as a "slow killer".[432] Noise causes pollution when it contaminates the environment in such proportion that it becomes a nuisance and cast ill effects on the health and well-being of persons. Noise pollution may be held as "unwanted sound released into the atmosphere without having regard to its adverse effects".[433] The intensity and the frequency of noise has grown now a days due to urbanization, industrialization and scientific and technological advancements. It is an offshoot of industrial culture and civilization which is transgressing environment in invisible way and in severe proportion. The intensity of noise pollution has reached the danger level and it is posing a serious challenge against right to have pollution free environment.

With the advancement of science and technology new devices like microphones, loudspeakers have been invented which have made the "right to freedom of speech and expression" more meaningful as with their help an individual could express himself more vividly and reach more audience but at the same time if this results in noise pollution it violates various rights of public such as right to leisure, right to silence, right to sleep, right to privacy, etc. In this backdrop the author has made an effort in this paper to analytically analyse the constitutional and judicial perspective of noise pollution in India.

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[430] Ranjit Singh, "Legal Control of Noise Pollution in India: A Critical Evaluation", 3 *International Journal of Research in Humanities and Social Studies* 34 (2016), available at: https://www.ijrhss.org/pdf/v3-i4/5.pdf (last visited on Jan. 2, 2022).
[431] *Ibid.*
[432] Shatish Shastri and Manju Trivedi, *Noise Pollution- Its Scientific and Legal Perspectives,* (Divya Publication, Jodhpur, 1988).
[433] M. C. Mehta, II *Lal's Commentary on Water & Air Pollution and Environment Protection Laws*, 1326 (Delhi Law House, Delhi, 2014).

NOISE POLLUTION: MEANING AND CONCEPT

Noise cannot be defined in a wholly satisfactory manner. The word noise is derived from the Latin word "nausea" which imply "unwanted sound" or "sound that is loud, unpleasant or unexpected".[434] It may be defined in law in simple words as "excessive, offensive, persistent or startling sound". It has also been defined as "unwanted sound, a potential hazard to health and communication dumped into the environment without regard to the adverse effect it may have on unwilling ears."[435] Further, noise can be defined as "any unwanted, harsh and loud sound which is annoying, uncomfortable, interferes with speech, damages the hearing capacity, reduces concentration and work efficiency". Therefore, when the sound is unwanted/undesirable by the recipient or loud enough to be the cause of annoyance, it may be described as noise. However, the *Encyclopedia Britannica* defines noise as "any undesired sound, either one that is intrinsically objectionable or one that interferes with other sounds that are being listened to."[436] The *Encyclopedia Americana*[437] defines noise as "unwanted sound". Therefore, a sound may be noise if circumstances cause it to be disturbing and depends on a person's psychology to a great extent. Noise is one of the by-products of the mechanized modern developments. It is mainly caused by machinery of one kind or the other, particularly transportation vehicles, industrial processes and construction works.

It has been stated that "a legally significant objective definition of noise is complex and difficult to discern, for noise is not purely a matter of acoustics but of psychology. Subjective factors such as mental attitude, environment, time and place etc., are important in the determination of actionable noise which differ and are hard to quantify. The law cannot take into account every unwanted noise. On the other hand, any sound which becomes excessive, unnecessary or unreasonable has to be put under regulation in order to shield public against unbearable and harmful noise or for its cessation. Scientific methods to that extent may be useful in determining situations where noise steps out from its background and becomes actionable."[438]

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[434] Lavanya, C., Rajesh Dhankar and Sunil Chhikara, "Noise Pollution: An Overview", 6 *International Journal of Current Research* 6536 (2014) available at: https://www.journalcra.com/sites/default/files/issue-pdf/5464.pdf (last visited on Jan 13, 2022).

[435] B. R. Jindal, K. L. Toky and P.S. Jaswal, *Environmental Studies*, 160 (1998). See also, In *Re Noise Pollution* (V), (2005) 5 SCC 733 at 746.

[436] See, https://www.britannica.com/science/noise-acoustics (last visited on Dec. 15, 2021).

[437] Francis Lieber (ed.), 21 *Encyclopedia Americana*, 400 (1969).

[438] *Supra* note 4 at 1325.

ENVIRONMENTAL LEGISLATION AND CONTROL OF NOISE POLLUTION

The term "noise pollution" is not defined in any Central legislation. The Air (Prevention and Control of Pollution) Act, 1981 was amended in 1987 which widened the definition of "air pollution".[439] "Noise" is now included as an "environmental pollutant" in section 2(a) of the Air (Prevention and Control of Pollution) Act, 1981 and hence, held as a type of "air pollution".[440] It may be noted that the Air Act is not the proper legislation to "prevent and control noise pollution". The Act gas some lacunae and the "standards for control of noise pollution there under remain unimplemented in the paucity of effective control mechanism".[441] Indeed, noise is a form of sound which is not a substance but is a proliferation of compression waves, excess presence of which is called noise pollution. Noise, thus, does not fall within the ambit of "environmental pollutant" which is defined in section 2(b) of the Environment (Protection) Act, 1986 as "any solid, liquid or gaseous substance present in such concentration as may be, or tend to be injurious to environment" nevertheless it has been held as environmental pollutant as the term noise has found place in Section 6(2)(b)[442] wherein it is stated that the Central Government may make "rules to regulate environmental pollution"[443]. It states that "such rules may provide for the maximum allowable limits of concentration of various environmental pollutants (including noise) for different areas". However, in the definition of "environmental pollutant" noise is not expressly included.[444]

The Central Government by exercising the rule making power under the Environment (Protection) Act, 1986 read with Rule 5 of the Environment (Protection) Rules, 1986 has made the Noise Pollution (Regulation & Control) Rules, 2000. The rules purport to "regulate and control noise producing and generating sources with the objective of maintaining the ambient air quality standard in respect of noise". This was for the first time that specific law was made for controlling noise pollution in India. The 2000 Rule "permits the use of loudspeaker only with the consent of the authority, and proscribes the use of loudspeaker or public address system at night between 10.00 p.m. to 6.00 a.m., except in closed premises for

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[439] The Air (Prevention and Control of Pollution) Act, 1981, Section 2(a).
[440] *Supra* note 4 at 1326.
[441] *Id*. at 1330.
[442] The Environment (Protection) Act, 1986, Section 6(2)(b).
[443] *Id*., Section 2(c). It defines 'environmental pollution' to mean "the presence in the environment of any environmental pollutant."
[444] P.G. Kurup, "Environment: A Scientist's View" in P. Leela Krishnan, *Law and Environment,* 254 (Eastern Book Company, Lucknow, 1992).

communication."[445]

CONSTITUTIONAL PERSPECTIVE ON CONTROL OF NOISE POLLUTION

The constitution of India creates an obligation on the part of 'state' as well as 'citizens' to "protect and improve the environment".[446] The Supreme Court and High Courts in India have held through creative interpretation of the article 21 that "to live in healthy and pollution free environment is part of right to life enshrined in article 21 of the constitution". In *T. Damodhar Rao* v. *Municipal Corporation, Hyderabad*,[447] the Supreme Court observed that "It would be reasonable to hold that the enjoyment of life and its attainment and fulfilment guaranteed by article 21 of the constitution embrace the protection and preservation of nature's gifts without which life cannot be enjoyed. There can be no reason why practice of violent extinguishment of life alone should be regarded as violative article 21 of the constitution. The slow poisoning by the polluted atmosphere caused by environmental pollution and spoilation should also be regarded as amounting to violation of article 21 of the constitution." Also, in *Subhash Kumar* v. *State of Bihar*,[448] the Supreme Court observed that "Right to live is a fundamental right under article 21 of the constitution and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to article 32 of the constitution for removing the pollution of water or air, which may be detrimental to the quality of life."

The problem of noise pollution is linked to some fundamental rights conferred through article 19(1) of the constitution which provides that "all citizens shall have the rights- (a) to freedom of speech and expression; (b) to assemble peacefully and without arms; (c) to form associations or unions; (d) to move freely throughout the territory of India…". However, these rights are not absolute and subject to reasonable restrictions imposed or imposable by law "in the interest

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[445] K. Rajasekharan, "Landmark Cases on Noise Pollution and How to Deal with it!", available at: https://www.lawyersclubindia.com/articles/landmark-cases-on-noise-pollution-and-how-to-deal-with-it--11143.asp#:~:text=Person%20accused%20in%20noise%20pollution%20was%20fined%20under%20IPC&text=The%20order%20of%20the%20trial,and%20dismissed%20the%20revision%20petition. (last visited on Dec., 18, 2021).

[446] See, The Constitution of India, Article 48-A and Article 51-A(g).

[447] AIR 1987 AP. 171.

[448] (1991) 1 SCC 598.

of- the sovereignty and integrity of India; the security of the state; friendly relations with foreign states; public order, decency or morality or in relation to contempt of court, defamation or incitement to offence; general public.” Article 19(1)(g) provides the freedom to all citizens “to practice any profession or to carry on any occupation, trade or business”. However, this right is also not absolute and is subject to reasonable restrictions. Therefore, no person can claim that he has fundamental right to carry on any profession, occupation, trade or business irrespective of the fact that it causes nuisance including nuisance caused by noise to other persons.

In view of the fundamental rights conferred by the article 19(1), the use of loudspeaker assumes the status of a fundamental right which may be a causal factor of noise pollution. The right to use a loudspeaker has not been specifically mentioned in article 19(1)(a) of the constitution but the same is covered in the said clause because it is an integral part of the basic nature and character of the right mentioned therein. The state can enact law to put reasonable restriction on the use of loudspeakers and mechanical or other devices which are used to amplify sound, but a condition that the mike, loudspeaker etc. cannot be used at any time amounts to an unreasonable restriction on the right under article 19(1)(a).

Further, article 25 is about “Freedom of conscience and free profession, practice and propagation of religion” and provides that “all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion”. However, this right is also “subject to reasonable restrictions on the ground of ‘public order’, ‘morality’ and ‘health’ and other provisions of the Part III of the constitution”.[449] This right as it is inclusive of ‘right to propagate’, may be understood to include the right to use loudspeakers and amplifiers, day and night when non-stop recitations are made as in case of akhand path of Ramayana or the Guru Granth Sahib, or at frequent intervals of the day, as in case of the Azan by Mulla of a Mosque.

This right has been made “subject to health”, therefore the “noise caused by loudspeakers can be prohibited in view of public health” but in such circumstances the “nexus between noise and public health is required to be judicially established”. The propagation part of religion is also a part of the right to freedom of speech and expression falling within the ambit of article

[449] The Constitution of India, Article 25.

19(1)(a) which is subject to reasonable restrictions on the ground of decency. The right under article 25 is subject to the other provisions of Part III of the constitution, and thus the propagation of religion, by recitations of a scripture or the cries of a Mulla, through loudspeaker may be banned on the ground of decency.[450]

JUDICIAL PERSPECTIVE ON NOISE POLLUTION

There are certain necessities of life which are very much essential to remain healthy and may be termed as biological necessities such as silence, sleep, rest etc. They are held as human rights. Noise is held as a health hazard which is required to be addressed properly in order to maintain public health and therefore courts at times have not hesitated to interfere in matters concerning noise pollution. If there is noncompliance of constitutional mandates by the administrative agencies so far as they relate to enforcement, the courts cannot turn blind eyes if actions are brought before them. It has been held that "the fundamental duties are intended to promote people's participation in restructuring and building a welfare society and the directive principles are intended to build the edifice of a welfare state."[451] To protect the environment and to preserve it is a constitutional directive to both the state and citizens as well. Neglect of this constitutional mandate is express invitation to disaster. Environmental concerns are therefore a matter of priority and actions brought by citizens "cannot be dismissed on the technical ground of *locus standi"*.[452] It has further been held that "where on account of human agencies, the quality of air and the quality of environment are threatened or affected, the court would not hesitate to use its innovative power within its epistolary jurisdiction to enforce and safeguard the right to life to promote public interest."[453]

In *Moulana Mufti Syed Md. Noorur Rehman Barkati* v. *State of West Bengal*,[454] the Apex Court held that "a citizen of this country must be allowed to live in a society which is peaceful, free from mechanical and artificial sounds which creates a tremendous health hazards and adverse effects on the citizens. Citizens have a right to live in a society which is free from pollution. If

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[450] R. G. Chaturvedi and M. M. Chaturvedi, *Law on Protection of Environment and Prevention of Pollution*, 53 (The Law Book Company (P) Ltd., Delhi, 1993).
[451] *V. Laxmipathy* v. *State*, AIR 1992 Kant. 57.
[452] *Ibid.*
[453] *Ibid.*
[454] *Moulana Mufti Syed Md. Noorur Rehman Barkati* v. *State of West Bengal*, AIR 1999 Cal. 15 at 24.

pollutants are encouraged, in that event it would be the beginning of the end of the civilization." The Court further held that "if a citizen has a right, it is also equally a duty on the part of the court to see that such rights are preserved and not allowed to be destroyed. Legislature may not rise to the occasion but that does not mean that court will keep its hands folded in the absence of any legislative mandate. The courts are the custodian of the rights of the citizen and if the court is of the view that citizens' rights guaranteed under the Constitution of India are violated, the court is not powerless to end the wrong. Principle of judicial activism confers power upon the court to be active and not to remain inactive for the purpose of protecting rights, duties and obligations of the people."[455] In *A.P. Pollution Control Board (II)* v. *Prof. M. V. Nayudu,*[456]the Supreme Court observed that "In today's emerging jurisprudence, environment rights which encompass a group of collective rights are described as 'third generation rights'. The first-generation rights are generally political rights such as those found in the International Convention on Civil and Political Rights while 'second generation rights' are social and economic rights as found in the International Covenant on Economic, Social and Cultural Rights." Thus, right to a noise- free environment is a third- generation right.

ARTICLES 19(1)(A) AND 21 OF THE CONSTITUTION AND NOISE POLLUTION

Article 19(1)(a) provides to all citizens a fundamental "freedom of speech and expression"' whereas article 21 gives citizens a 'right to live in a healthy environment'. The freedom provided under article 19(1)(a) "is not absolute and is subject to reasonable restrictions under article 19(2) of the constitution".

In *Rajni Kant* v. *State of U.P.*,[457] the bylaws of Municipal Board, Allahabad required that permission from executive officer of the Board is necessary for using loud speaker. It was challenged by the petitioner as "violative of freedom of speech and expression which includes the right to use loudspeaker as well". The court held that "the use of mechanical appliances is not covered by the guarantee of freedom of speech and expression under article 19(1)(a)". However, no reasons were given by the court for holding so.

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[455] *Ibid.*
[456] (2001) 2 SCC 62. See also, *Shobana Ramasubramanyam* v. *Chennai Metropolitan Development Authority,* AIR 2002 Mad. 125.
[457] A.I.R. 1958 All. 360.

But in *Indulal* v. *State,*[458] the Court held that "the right to use loudspeaker is included in the freedom of speech and expression." The court compared "the freedom of press" with that of "freedom of speech and expression" and held that "the freedom of speech and expression includes the freedom to use loudspeakers". The court held that "this fundamental right is not merely a right to make use of one's larynx... Thus, the essence of the right does not consist in merely making use of the human noise, but it lies in the ability to convey one's views to others.... It follows from this that the right includes not merely the right to propagate one's views but also comprehends the right to circulate those views to as large an audience as one can possibly reach. If the mechanical appliances and instruments other than the press can help the citizen in reaching a wider circle of audience, than the limits of his voice can permit, there does not appear to be any good reason why the citizen should not be permitted to avail himself of them".[459]

In *State of Rajasthan* v. *G. Chawla*,[460] the Ajmer (Sound Amplifier Controls) Act, 1952 was challenged as violative of "freedom of speech and expression". It was argued that "the state cannot enact such laws as it violates the fundamental freedom of the citizens under article 19(1)(a)". The question before the Supreme Court was "whether the state legislature has the right to prevent and control loud noise and make it punishable" and "whether such restrictions or state enactments amount to violation of the freedom of speech and expression". The Supreme Court held that "the freedom under article 19(1)(a) is not absolute and it is subject to reasonable restrictions imposed in the interest of public order and the state is empowered to enact such laws in the exercise of its power under Entry 8, dealing with Public Health and Sanitization of List II, of the Seventh Schedule. The States have the right to control loud noise when the right of such user in disregard to the comfort and obligations to others, emerges as manifest nuisance to them. No citizen can exercise his fundamental freedom under the Constitution in such a way that it creates nuisance or becomes a health hazard. Now such an activity is also considered as violative of constitutional duty imposed on every citizen under article 51-A of the constitution of India."

In *P.A. Jacob* v. *Superintendent of Police, Kottayam*,[461] the Kerala High Court held that "the

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[458] AIR 1963 Guj. 259.
[459] *Id.*at 263.
[460] AIR 1959 SC 544.
[461] AIR 1993 Ker. 1.

fundamental right to freedom of speech and expression guaranteed under article 19(1)(a) of the constitution does not include the right to use loudspeakers or sound amplifiers." It was rightly observed that "the right to speech implies, the right to silence. It implies freedom, not to listen and not to be forced to listen. The right comprehends the freedom to be free from what one desires to be free from." The court further observed that "apart from the right to be let alone, freedom from aural aggression, article 21 guarantees freedom from tormenting sounds. What is negatively the right to be let alone is positively the right to be free from noise. Exposure to high noise, is a non-risk and it is proved to cause bio-chemical changes in a man which may be dangerous and sometime disastrous to a person and thus, it would amount to a clear infringement of the constitutional guarantee of right to life under article 21 of the constitution. In other words, right to life comprehends right to a safe environment, including safe air quality, safe from noise."

In *Burrabazar Fire Works Dealers Association* v. *Commissioner of Police, Calcutta*,[462] the Calcutta High Court held that "under article 19(1)(a) read with article 21 of the constitution of India citizens have a right to a decent environment and they have a right to live peacefully, right to sleep at night and to have a right to leisure which are all necessary ingredients of the right to life guaranteed under article 21 of the constitution. There are various other sources where the noise is created or generated but which offend citizens right guaranteed under article 19(1)(a) and 21 of the constitution."

In *Free Legal Aid Cell* v. *Government of NCT of Delhi*,[463] a PIL was filed contending that "as a result of display of fireworks and use thereof during festivals and marriages, physical and mental health hazard is suffered by adults as well as children." It was also contended that "because of indiscriminate use of loudspeakers, noise pollution has become a routine affair affecting mental as well as physical health of citizens." The Delhi High Court rightly observed that "the effect of noise on health is a matter which has yet not received full attention of our judiciary which it deserves. Pollution being wrongful contamination of the environment which causes material injury to the rights of an individual, noise can well be regarded as a pollutant because it contaminates environment, causes nuisance and affects the health of a person, and would therefore offend article 21, if it exceeds a reasonable limit." In *Ramlila Maidan Incident*,

[462] AIR 1998 Cal. 121.
[463] AIR 2001 Del. 455.

re ,[464] it was held that "the citizens/ persons have a right to leisure; to sleep; not to hear; and to remain silent. The knock at the door, weather by day or by night, as a prelude to a search without authority of law amounts to be police incursion into privacy and violation of fundamental right of a citizen."

ARTICLES 19(1)(G) AND 21 OF THE CONSTITUTION AND NOISE POLLUTION

The constitution of India guarantees its citizen a fundamental freedom "to practice any profession or to carry on any occupation trade or business" under article 19(1)(g). But this fundamental freedom is also not absolute and it is subject to reasonable restrictions in the interest of "general public" which can be imposed under article 19(6). Thus, "citizens cannot exercise this fundamental freedom under article 19(1)(g) in such a manner so as to violate the fundamental right of other persons under article 21 of the constitution".

In *Ramlal* v. *Mustafabad Oil and Cotton Ginning Factory*,[465] the Punjab and Haryana High Court rightly observed that "Once a noise is considered to be a nuisance of the requisite degree it is no defence to contend that it was in consequence of a lawful business or arose from lawful amusements or from places of religious worship."

In *Burra Bazar Fireworks Dealers Association* v. *Commissioner of Police, Calcutta*,[466] a question of seminal importance before the court was whether citizens have an inherent right to manufacture fireworks which creates sound beyond permissible limits and whether restrictions can be imposed on the manufacturing of such fireworks by the authorities. The Calcutta High Court held that "Safety, health and peace is guaranteed to citizens of India and no one can carry on any trade or business which may seriously affect safety, health and peace of the community. Accordingly, it must be held that article 19(1)(g) of the constitution of India does not guarantee the fundamental right to carry on trade or business which creates pollution or which takes away that communities' safety, health and peace. It cannot be said that a citizen has fundamental right under article 19(1)(g) of the constitution of India to carry on trade or business and/or manufacture poison which may be used for killing of people." Accordingly, the court held that

[464] (2012) 5 SCC 1.
[465] AIR 1968 P & H 399.
[466] AIR 1998 Cal 121.

"there is no inherent or fundamental right in a citizen to manufacture, sale and deal with fireworks which will create sound beyond permissible limits and which will generate pollution which would endanger the health and the public order. A citizen or people cannot be made a captive listener to hear the tremendous sounds caused by bursting out from noisy fireworks."
In *Farhd K. Wadia* v. *Union of India*,[467] the question involved was "whether musical functions, being Rang Bhawan, in an open theatre should be allowed to be carried on or not despite the fact that it is situated within 100 metres of an educational institution and hospital." The brief facts were that "Rang Bhavan is an institution owned and run by the State of Maharashtra. It is the only open theatre in the city of Mumbai. It is let out on hire for the purpose of holding music and cultural programmes". The Bombay High Court had band use of loudspeakers under the Noise Pollution (Control and Regulation) Rules 2000. The State of Maharashtra following the order denied the permission to book Rang Bhawan stating that the use of loudspeakers during cultural programs at Rang Bhawan will not be permitted. Thereby the Bombay High Court was approached for seeking permission to book Rang Bhawan. The petition was dismissed. The Supreme Court did not interfere in this matter and observed that "Interference by the court in respect of noise pollution is premised on the basis that a citizen has certain rights being 'necessity of silence', 'necessity of sleep', 'process during sleep' and 'rest', which are biological necessities and essential for health. Silence is considered to be golden. It is considered to be one of the human rights as noise is injurious to human health which is required to be preserved at any cost."

In *Anirudh Kumar* v. *MCD*,[468] a writ petition was filed by way of public interest litigation alleging that hardship and nuisance is caused by the commercial activities of the pathological laboratory under the guise of a nursing home. It was contended that "when the Diagnostic Centre was started, it employed about 50 people and installed 25 Air Conditioners, two diesel generator sets of 25 KVA and 40 KVA each in the set-back area of the building along with kerosene oil tanks, gas cylinders and electric panels." With more than 100 cars parked in the vicinity and a count of 300 patients visiting regularly, it created a parking problem for the residents of the area. The Supreme Court observed that "the running of this large pathological lab has led to emission of hazardous substances and in that process human beings, plants, microorganisms and other living creatures are being exposed to harmful physiochemical

[467] (2009) 2 SCC 442.
[468] (2015) 7 SCC 779.

properties. Not only this, they also create pollution which contaminates water on account of the discharge of chemical properties used in the process of running the pathological lab, causing nuisance and harm to public health and safety of the residents of the area.” Therefore, the court ordered the pathological laboratory to be immediately shut down and sift to an alternative place within 4 weeks.

In *M. Mahshook Rahman* v. *City Police Commissioner*,[469] the Kerala High Court held that “... the right to live in an atmosphere free from pollution is a fundamental right protected by article 21 of the Constitution of India, and noise pollution beyond permissible limits is an inroad into that right. The fundamental right guaranteed under article 19(1)(g) to carry on any occupation, trade or business is not absolute. Any attempt to create noise by amplifying the sound with the help of hi fi amplifier systems and loudspeakers or even the playing of high sound instruments like drums, tom toms, trumpets, bugles and the like which create noise beyond tolerable limits, thereby compulsorily exposing other unwilling persons to hear noise raised to unpleasant or obnoxious levels, will amount to violation of their right to peaceful, comfortable and pollution free life guaranteed by article 21 of the Constitution of India....”.

ARTICLES 19(1)(A), 21 AND 25 OF THE CONSTITUTION AND NOISE POLLUTION

There is a close relationship between the freedom of speech and expression under article 19(1)(a) and that of right to religion under article 25 of the constitution. For example, “if one wishes to propagate his religious ideas as guaranteed under article 25, it is possible through the exercise of his fundamental freedom of speech and expression guaranteed under article 19(1)(a) of the constitution.” The problem becomes more complex when people under the garb of exercise of their right to religion make use of loudspeakers resulting in noise pollution, which becomes a health hazard to the people and violates their fundamental rights under article 21 of the constitution. The judiciary has examined the right to use loudspeakers in exercise of freedom of religion in the light of right to live in pollution free environment.

[469] (2020) SCC Online Ker 4250.

In *State of Bombay* v. *Narasu Appa Mali*,[470] the Bombay High Court made distinction between religious faith and religious practice and observed that "A sharp distinction must be drawn between religious faith and belief and religious practices. What the state protects is religious faith and belief. If religious practice run counter to public order, morality or health or a policy of social welfare upon which the state has embarked, then the religious practice must give way before the good of the people of the state as a whole."

The Supreme Court in the case of *Acharya Maharajshri Narendra Prasad ji Anandprasadji Maharaj* v. *State of Gujarat*,[471] observed that "No right in an organised society can be absolute. Enjoyment of ones right must be consistent with the enjoyment of rights also by others. Where in a free play of social forces it is not possible to bring about a voluntary harmony, the state has to step in to set right the imbalance between competing interests." The court further observed that "A particular fundamental right cannot exist in isolation in a watertight compartment. One fundamental right of a person may have to coexist in harmony with the exercise of another fundamental right by others and also with reasonable and valued exercise of power by the state in the light of the directive principles in the interests of social welfare as a whole."

In *Bedi Gurcharan Singh* v. *State of Haryana*,[472] the appellants were refused permission to use the loudspeakers under the Punjab Instrument (Control of Noise) Act, 1956. This was challenged on the ground of violation of articles 19 and 25 of the constitution. The Supreme Court while explaining the true scope of freedom of speech and expression and that of religion observed that "The fundamental rights guaranteed under articles 19(1)(a), 19(1)(b) and 25 of the constitution are not unfettered and absolute. The right to propagate religion freely, is subject to the condition that it does not violate similar fundamental rights of the followers of other religions. It cannot be said that any person has the right to address a congregation of another religion in order to propagate his own, if it is likely to be resented by the congregation and which may lead to the breach of peace."

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[470] AIR 1952 Bom. 82.

[471] (1975) 1 SCC 11.

[472] 1975 Cr.L.J. 917 (SC).

Similarly, the Calcutta High Court in *Masud Alam* v. *Commissioner of Police*,[473] upheld the "ban on the use of loudspeakers for calling Azan five times a day". It was held that in such cases, "causing disturbance in the area could not be justified on the ground that it was in connection with religious purposes". Again in *Om Birangana Religious Society* v. *State*,[474] the Calcutta High Court held that "every citizen has a right to leisure, right to sleep and a right not to hear. Noise generated from loudspeakers and microphones posed a serious threat to public health. It cannot be stated that a citizen should be coerced to hear anything which he doesn't like or which he does not require." The court also asked "the police to be vigilant in the discharge of its duties and directed All India Radio and Doordarshan to disseminate information and create awareness on the harmful effects of noise pollution."

In *Chairman, Guruvayur Dewasvon Managing Committee* v. *Superintendent of Police, Thrissur*,[475] the question before the court was related to the use of "horn type loudspeakers" by the petitioner in and around the temple premises. The petitioner prayed that the respondent authorities be restrained from removing the horn type loudspeakers from the premises of the petitioner. The court obtained the expert opinion from the state pollution control board, which showed that there was no noise pollution by the use of such type of loudspeakers. Thus, the court permitted the petitioner "to use horn type loudspeakers which were used only for a limited duration every day for broadcasting devotional songs and audibility of which was limited within the temple area only."

In *Maulana Mufti Syed Muhammad Nurul Rahman Barkati* v. *State of West Bengal*,[476] the Kerala High Court upheld "restriction on the use of microphone and loudspeaker at the time of giving Azan" and held that "this restriction doesn't violate the freedom of religion under article 25 of the constitution". The court held that "citizens have right to be protected against excessive sound under article 19(1)(a) of the constitution." The court further held that "simply because no such formal restriction has been imposed in the other parts of India and the fundamental rights under article 19(1)(a) is enforced strictly in the State of West Bengal and it is not enforced in other parts of India that doesn't amount to any case of any discrimination."

[473] 59 CWN 293 (1954-55).

[474] (1996) 100 CWN 617.

[475] AIR 1998 Ker. 122.

[476] AIR 1999 Ker. 15.

In *Church of GOD Full Gospel in India* v. *K.K.R. Majestic Colony Welfare Association*,[477] the questions in an appeal before the Supreme Court were that "whether in a country having multiple religious and numerous communities or sects, a particular community or sect of that community can claim the right to add to noise pollution on the ground of religion" and "whether beating of drums or reciting of prayers by use of microphones and loudspeakers so as to disturb the peace or tranquillity of the neighbourhood should be permitted". In this case the appellant was "using loudspeakers, drums and other sound producing instruments while reciting prayers, which caused noise pollution thereby disturbing and causing nuisance to the normal life of the residents of the K.K.R. Majestic Colony". The appellant contended that "the right to profess and practice Christianity is protected under articles 25 and 26 of the constitution", which cannot be taken away by the courts. The Supreme Court observed that "Undisputedly, no religion prescribes that prayers should be performed by disturbing the peace of others nor does it preach that this should be through voice amplifier or beating of drums. In our view, in a civilized society, in the name of religion, activities which disturb old or infirm persons, students or children having their sleep in the early hours or during day time or other persons carrying on other activities cannot be permitted. It should not be forgotten that young babies in the neighbourhood are also entitled to enjoy their natural right of sleeping in a peaceful atmosphere. A student preparing for his examination is entitled to concentrate on his study without there being any unnecessary disturbance by the neighbours. Similarly, the old and the infirm are entitled to enjoy reasonable quietness during their leisure hours without there being any nuisance of noise pollution. Aged, sick, people afflicted with psychic disturbances as well as children up to six years of age are considered to be very sensible (sic sensitive) to noise. Their rights are also required to be honoured."

The Supreme Court referred to article 19(1)(a) and the Noise Pollution (Regulation and Control) Rules, 2000 and dismissed the appeal and observed that "the right to religion under articles 25 and 26 of the constitution is subject to public order, morality and health and no religion prescribes or preaches that prayers are required to be performed through voice amplifiers or by beating of drums. In any case, if there is such practice, it should not adversely affect the rights of others including that of being not disturbed in their activities". In this case the court also observed that "even though the Noise Pollution (Regulation and Control) Rules,

[477] (2000) 7 SCC 282.

2000 are unambiguous there is lack of awareness among the citizens as well as the implementation authorities about the rules or their duty to implement the same."

In *Sayeed Maqsood Ali* v. *State of M.P.*,[478] the Madhya Pradesh High Court followed the decision given in *Church of GOD Full Gospel in India* case. In this case, petitioner was a cardiac patient whose house was situated near a Dharmshala. It was alleged by the petitioner that "various religious functions were held in the Dharamshala throughout the year. The Dharamshala was also given on rent for the purposes of holding marriages and other functions in which the loudspeakers were utilised and music was played at a very high pitch creating disturbance to the petitioner and other persons residing in the said locality." He pleaded that respondent's act caused noise pollution due to which the petitioner suffered in health. The High Court in view of the totality of the circumstances and after referring to the Noise Pollution (Regulation and Control) Rules, 2000 directed the respondents "not to let out the premises to such persons or associations or organisations which have not obtained the permission of the competent authority with regard to the use of loudspeakers/ public address systems." The court further directed that "the concerned authority should see it that no function is carried out in violation of the Environment (Protection) Act, 1986 and the Noise Pollution (Regulation and Control) Rules, 2000 and if anybody is found to be violating them, then proper steps should be taken to book him as per the law. The District Magistrate is regarded as an authority under rule 2(c) of the Noise Pollution (Regulation and Control) Rules, 2000, it is the duty of the District Magistrate to see that rules are followed in real spirit so that citizenry spirit does not face any disquieting situation".

The Supreme Court in Noise Pollution (V), *In Re*,[479] has made it clear that "by restricting the time of busting the crackers there is no violation of religious rights of any person as enshrined under article 25 of the constitution". In this case, the Supreme Court *inter alia*, issued the following directions- "(1) the department of explosives may divide the firecrackers into two categories (i) sound emitting fire crackers and (ii) colour/ light emitting firecrackers; (2) there shall be a complete ban on bursting sound emitting fire crackers between 10:00 p.m. and 6:00 a.m.; (3) the noise level at the boundary of the public place, where loudspeaker or public address system, or any other noise source is being used shall not exceed 10 dB(A) above the

[478] AIR 2001 M.P. 220.
[479] (2005) 5 SCC 733.

ambient noise standards for the area or 75 dB(A) whichever is lower; (4) no one shall beat a drum or tom-tom or blow a trumpet or beat or sound any instrument or use any sound amplifier at night (between 10 p.m. to 6 a.m.) except in public emergency; (5) the peripheral noise level of privately-owned sound system shall not exceed by more than 5 dB(A) than the ambient air quality standards specified for the area in which it is used, at the boundary of the private place; (6) no horn should be allowed to be used at night (between 10 p.m. to 6 a.m.) in residential area except in exceptional circumstances; (7) there is need of creating general awareness towards the hazardous effects of noise pollution." For this purpose, "the need to add a suitable chapter in the textbooks of children to sensitize them, role of the resident welfare association and service clubs, and special public awareness campaign in anticipation of festivals, events and ceremonial occasion" has been emphasized.

In *Aash Mohammad* v. *State of Haryana*,[480] the petition was filed in Punjab and Haryana High Court against Singer, Sonu Nigam, based on his statement on twitter on April 17, 2017 as "I'm not a Muslim, and I have to be woken up by the Azaan in the morning. When will this forced religiousness end in India." The petitioner contented that this amounts to insult of religion and religious belief. The court observed that "If the contents of the complaint are seen in the context of Section 295-A of the Indian Penal Code (hurting religious sentiments), the words used in the tweet are not meant to insult any religion or religious belief of any class of citizens, and are apparently not deliberate or malicious." Justice Bedi held that "the petition was just a cheap way of gaining publicity by making a well-known singer a scapegoat in the name of religion. Such practices deserve to be deprecated." The court further held that "azaan is indeed an essential part of the Muslim religion, but the use of microphones is certainly not an integral part of azaan, and a combined reading of the tweets by the singer are meant to criticise the use of electricity / microphones for religious purposes".

In *Forum for the Prevention of Environment and Sound Pollution* v. *Union of India*,[481] the Supreme Court held that "under the Noise Pollution (Regulation and Control) Rules 2000, prohibition on use of loud speaker during 10.00 p.m. to midnight is not invalid or unconstitutional". Justice R.C. Lahoti observed that "we have no concern with any religious practice. We have only concern with fundamental rights of the citizens and protect their right

[480] AIR 2017 P&H 106.
[481] A.I.R. 2006 SC 348.

from noise pollution." The court held that "there were no loud speakers in the old days. So the use of loud speakers cannot be must for performing religious act." The Hon'ble Supreme Court observed that "any exemption granted by State beyond the parameters of the Environment (Protection) Act 1986, the Noise Pollution (Regulation and Control) Rules 2000 should be considered as violation of articles 14 and 21 of the Constitution."

In a recent Judgement of Allahabad High Court in *Sushil Chandra Srivastava* v. *State of UP*,[482] the High Court issued following guidelines to the state government: "i) The District Magistrate shall give adequate publicity in leading newspapers regarding this direction and Rules, 2000. He shall notify the name of the authority under the Rules, 2000 and his contact number. Detailed notice shall be put up in the offices of Divisional Commissioners, District Magistrates, District Court Premises, Police Stations, Municipal Corporation Offices, Development Authorities Offices and prominent places of the city. (ii) A toll free number shall be provided to the citizens to make the complaints. If a loudspeaker, public address system, DJ, a Musical Instrument, a sound amplifier or any sound producing instrument is used beyond the permissible limit of sound, a person can make a complaint on telephone number 100 to police or toll free number provided by the authorities. The concerned Police of the area will immediately visit the spot and shall measure the noise level by the equipment (Noise meter application) supplied to it. If it is found that there is violation of Rules, 2000 it will stop the nuisance forthwith and shall inform the appropriate authority regarding complaint and action taken by it. The authority shall take action against offender in terms of Rule 7 of Rules, 2000. The name and identity of the complainant shall not be disclosed to the wrong doer or to any person. Under Rule 7 of Rules, 2000 an oral complaint can be made. All the complaints received by the Police under Rule 7 of Rules, 2000 shall be maintained in a register and a copy thereof shall be forwarded to the competent authority. The action taken shall be recorded by the Police in the register. (iii) Under the Rules, 2000, no permission for DJ shall be granted by the authority for the reason that noise generated by DJ is unpleasant and obnoxious level. Even if they are operated at the minimum level of the sound it is beyond permissible limits under the Schedule of the Rules, 2000. A DJ is made up of several amplifiers and joint sound emitted by them is more than thousand dB(A). They are serious threat to human health particularly

[482] Writ (C) No. 1216 of 2019 delivered on 20.8.2019, available at: https://indiankanoon.org/doc/137484462/#:~:text=Sushil%20Chandra%20Srivastava%20And%20...,Others%20on%2020%20August%2C%202019&text=HIGH%20COURT%20OF%20JUDICATURE%20AT,Case%20%3A%2D%20WRIT%20%2D%20C%20No.&text=This%20writ%20proceedings%20has%20been,residential%20area%20regardless%20of%20time. (last visited on Jan. 26, 2022).

children, senior citizens and patients admitted in the hospitals. (iv) The team constituted by the District Magistrate shall make regular visit of their area particularly before commencement of any festival and apprise the organizers regarding compliance of the Rules, 2000 and the directions of Supreme Court and this Court. (v) All places of the worship of all religion shall be bound by the provisions of the Rules, 2000 and directions issued by the Supreme Court and this Court. Any breach of the Rules, 2000 shall be treated to be violation of fundamental right of a citizen. (vi) The District Magistrate/ Senior Superintendent of Police shall convene a meeting before commencement of festivals like Dussehera/ Durga Puja, Holi, Shab-e-barat, Muharram, Easter and Christmas festival with organizers and representatives of civil society, to impress upon them to observe the law strictly and in the event of failure the legal consequences that may follow. (vii) Whoever fails to comply with or contravenes any of the provisions of Noise Pollution Rules shall be liable for a penalty in terms of section 15 of the Environment (Protection) Act, 1986. Non-compliance of the rules attracts the imprisonment for a term which may extend to five years and fine which may extend to Rs.1,00,000/-. It is the duty of the authorities of the State to ensure that the offences under Section 15 of the Environment Protection Act, 1986 are duly registered. (viii) The State Government is directed to categorize the areas in all the cities of State into industrial, commercial, residential or silence areas/zones for the purpose of implementation of the noise standard in terms of Rule 3(2) of Rules, 2000. A fresh exercise be conducted in the light of definition provided under Rule 2(e) and (f) of Rules, 2000. We find that in Prayagraj the zones have been made in breach of the above mentioned Rules. (ix) The competent authority under the Rules, 2000 and the SHO /Inspector of concerned Police Station are charged personally with the duty of ensuring compliance of the order of the Supreme Court, extracted above, the Rules, 2000 and this order, failing which they shall be answerable to this Court in contempt jurisdiction. We grant liberty to any aggrieved person to approach this court for appropriate order for compliance of the above order/directions."

In *Hardeep Singh* v. *SDMC*,[483] it was alleged that "DJs, sound systems, community address systems were used at marriages or other events, and that noise was generated at irregular times that adversely affected the safety of people." The National Green Tribunal (NGT) held that "the authorities of Delhi Government have failed to comply with the directions of the Green

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[483] See, Order of the National Green Tribunal regarding noise pollution, Delhi, 12.02.2019, available at: http://niohenvis.nic.in/newsbulletin/Feb2019/Feb%2012,%202019_Order%20of%20the%20National%20Green%20Tribunal.pdf (last visited on Nov. 14, 2021).

Tribunal and therefore directed the Government to deposit a sum of Rs. 5 Lakhs with the Central Pollution Control Board (CPCB) within a week and granted a month's time to the authorities to file a compliance report, for the failure of the statutory authorities of the government in controlling the noise pollution as per statutory mandate of the Noise Pollution (Regulation and Control) Rules 2000."

CONCLUSION

Noise has become a great nuisance these days. Its excessive presence in the environment leads to noise pollution. Urbanization, industrialization and advancement of science and technology are the leading causes of the problem of noise pollution. It is posing a serious challenge to quality of life of the people. Noise is held as an unavoidable by-product of industrialisation and it is increasing rapidly with the advancements in industrialisation. Noise pollution has not gained serious public concern because of public unawareness regarding its serious ill effects. Even people are unaware that noise pollution is a type of pollution. Therefore, Indian judiciary has not confronted with noise pollution cases in large numbers. The degree of noise pollution is always relative and varies with respect to a person and place.

India is a secular country with different culture and religion. Article 25(1) of the Indian constitution provides that a person is free to profess, practice and propagate religion and the state cannot interfere but on the other hand article 25(2) also provides that this right is not the absolute right and restrictions can be imposed if matter is related to public order, morality or public health. It means one cannot use sound system or other instruments for practice of religious activity if the same amounts to unreasonable interference in the peaceful enjoyment of others' rights.

However, some judicial decisions on noise pollution make it amply clear that the Indian judiciary has taken noise pollution seriously. The legislature has also responded well and created the Noise Pollution (Control and Regulation) Rules, 2000. However, as pointed out by the Supreme Court, "there is lack of awareness as well as implementation of these rules." There is also a need for a specific legislation to control and prevent noise pollution. Therefore, the need of the hour is to create awareness among the people about the noise pollution and its effect

on their health. Now it’s duty of every citizen, whatever be his religion or culture to make full efforts to prevent noise pollution. It is also the duty of the executives to implement the laws in their true spirit so that the people could enjoy a pollution free environment.

The scientists have opined that trees and plants are good absorbers of sound and they dissipate sound. Planting trees along the streets may be very helpful to contain traffic noise. Further, people may be encouraged to fit efficient mufflers or silencers to their vehicles to reduce noise.

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ACQUISITION & ANALYSIS OF EVIDENCE FROM RANDOM ACCESS MEMORY (RAM) UNDER CYBER CRIME

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ABSTRACT

The growing necessity of acquiring Random Access Memory (RAM) data of working computer systems found on crime scenes has been challenging from the very beginning and there is a need to resolve this problem for a better proceeding towards live forensics.When the crime is being committed from a working computer, the RAM (live) data becomes most important from where the crime related evidence from the computer is gathered. Proper acquisition of RAM data is enough for appreciation of the potential digital evidence in a particular cyber-crime and convicts the cyber criminal before the court of law. In this paper, the researchers present a standard method of acquiring and analyzing RAM data from a working computer system found at a crime scene. Starting from the basics of digital forensics, this paper will talk about how the live data should be acquired and analyzed onspot. Finally, an experiment demonstrating what type of data will be acquired and analyzed using the forensic tools.

Keywords: Digital Forensics, Crime Scene, Random Access Memory, Live System, Live Data Acquisition, Live Data Analysis, Forensic Toolkits, Authenticity.

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INTRODUCTION

In the age of information technology and communication, crime patterns have been changing and have shifted to cyberspace. Now, computers are being used as a source and as a target of cyber-crime as well as traditional crime. Obviously, in such a situation, the computer is the potential source of digital evidence. It consists of a large amount of evidence in the form of data in different locations of the computer system. These data are volatile and non-volatile in nature. Non-volatile data is permanently stored inside the hard drive. But, volatile data is available only in a running computer system. Volatile data, that includes unsaved tasks, open file and folders, running applications or software, and Internet activities on a computer. Volatile data is also known as live data or RAM (Random access memory) data. These data are very valuable in police investigations. Because, in many cases only such data (evidence) has established the matter before the court. Onspot data acquisition and analysis of RAM play a vital role in the appreciation of digital evidence before the court of law. However, law enforcement agencies usually ignore such data (evidence) because of the complex nature of the acquisition and analysis process and ignorance about their appreciation before a court of law. Therefore, possible evidence is usually left at the crime scene.

Digital forensics or cyber forensics has led to a revolutionary change in helping to put an end towards these crimes by identifying evidence on various storage devices. Traditionally, data was stored on memory devices like, Hard Drives, Magnetic Tapes, Floppy Disk, CD's, DVD's, etc. Nowadays, data is stored on Cloud Storage, Servers, etc. as well.

The traditional process of acquisition and analysis of data has been impactful in cyber forensics, but this method fails to recognize live data as evidence. Live data exists in volatile memory devices like, Random Access Memory, Cache Memory etc. As the name volatile memory suggests, the data inside this memory are flushed out as soon as the power source is switched off or the system is disconnected. This means, once there is no power supply to the CPU, the possibility of recovering the contents inside the volatile memory is zero. So, live data can be prescribed as the critical data that is able to provide with intuition towards as to how the target system was functioning on the time of acquisition [7].The acquisition and analysis of live data will definitely provide a much larger prospect of the crime being committed and we can say this because, when we get evidential data which was being processed on the target system(s) is enough for the judges to convict the criminals.

DIGITAL FORENSICS

The science of obtaining, preserving and documenting evidence from electronic media, such as PC, Network System, Smart Phone and various memory storage devices without altering the authenticity of original evidence[1, 2] is known as Digital Forensics or Cyber Forensics. The main objective of the digital forensic is an acquisition, analysis and documentation of digital evidence, which is presented before the court. Digital forensic process has six major classifications:

- Identification of digital evidence is when an Investigating officer or first responder is reporting a crime scene; the identification of the target system makes it easier to proceed the investigation. Identifying the evidence present in any memory storage device makes it easy to recover useful data within no time.
- Seizure and preservation of digital evidence of memory storage means that whenever any evidence is found, the device containing the evidence must be seized maintaining the seizure list according to chain of custody. The device must be preserved from physical & logical factors which may affect the evidence, for example, if a hard disk is seized from a crime scene which contains potential evidence against the suspect, the Investigating team must ensure that the hard disk packed in faraday bag or anti-static bag, so that no harm may come to it.
- Acquisition of digital evidence means making an image of the evidence. An image is the bit-by-bit copy of the original storage device. There are many forensic tools for this process. This step ensures that the authenticity of the device either said to be containing the evidence or containing the evidence is not altered after its seizure and we can freely examine the image copy of the storage device for the evidence.The major feature which makes the acquired image equivalent to the original file is the SHA1 checksum calculation of the acquired extraction dump.
- Analysis of digital evidence is the process of extraction, processing and the interpretation of digital data of the image. Extraction produces a binary junk which is turned into human readability by using forensic tools.[2]
- Documentation of recovered digital evidence means documenting the evidence in a particular format which is easy to understand with other necessary information.

- Presentation of digital evidence means reporting the digital evidence before the court with related documentation and other follow up procedures. This includes thedocumentation of the evidence collected and the evidence itself.

ACQUISITION TYPES

Data acquisition is the process which ensures that the authenticity of the digital evidence is preserved. Some widely used tools are FTK, Wireshark, etc. [5]. There are, basically two methodologies by which we can acquire the image of digital evidence and are as follows:

1. Dead/ Offline Acquisition
2. Live Acquisition.[3]

1. Dead/ Offline Acquisition

Dead acquisition of a target system means creating an image of a system by either powering off the system first or the system found is already either in turned off or offline state. Image creation in such acquisition is done by checking the initial power state first. If the system is turned on, it is turned off first to make sure no further processing takes place. After this, the hard disk is removed from the target system and connecting it to hardware or software writeblocker for its image creation along with forensic tools.

Write-blocker tools help in maintaining the authenticity of data like time stamps, hash value, etc. by disabling write properties on the disk, giving the tools read-only access [3]. This makes the device immutable and no changes can be made.

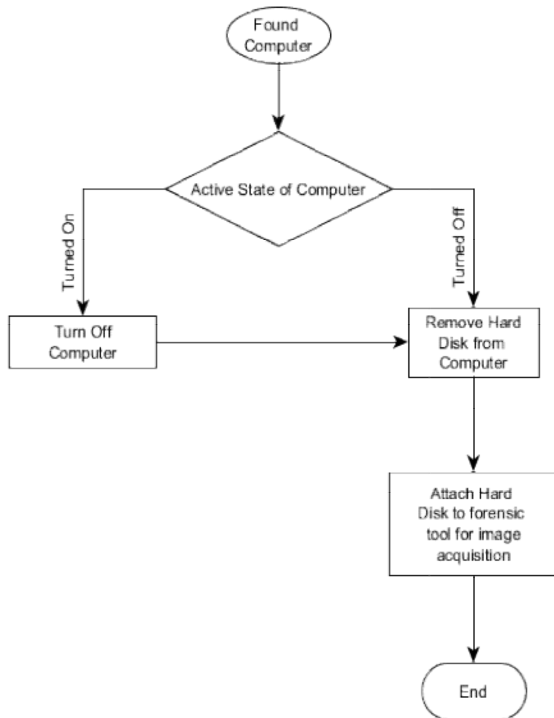

Figure 1. Dead Forensic Image Acquisition Process [3].

2. Live Acquisition

Live Acquisition of a target system means, creating an image of the system while it is functional that is image is created on spot of the crime scene with the help of forensic tools. Image acquisition in such a case is done first checking the state of the computer. If it is turned off, then the investigators must proceed with Dead Acquisition otherwise, acquisition of data should be done by using forensic tools.

Forensic acquisition tools use read only mode in the system for live data acquisition. Care must be taken that the device which contains the image after live acquisition must have write blocker enabled after the process has been finished. This ensures that data authenticity is maintained from live acquisition of the evidence.

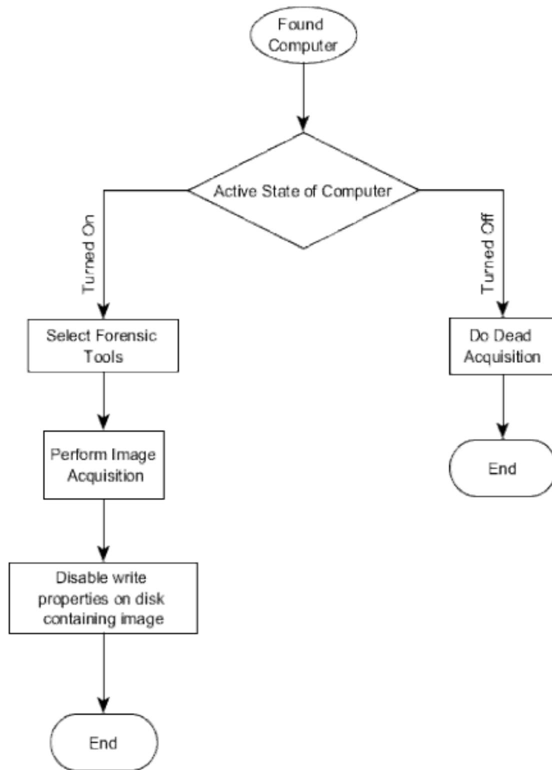

Figure 2. Live Forensic Image Acquisition Process [3].

ANALYSIS TYPES

The data acquired is further subjected to extraction and its interpretation as per the case requirements [3]. Forensic tools like, FTK, Magnet Axiom, EnCase etc.[5] are some commonly used tools for the analysing the image. There are two basic techniques of analysis of acquired data and are as follows:

1. Traditional Analysis
2. Live Analysis [5]

1. Traditional Analysis

Traditional Analysis may also be referred to as static analysis [5] because the data extraction and interpretation is done from the dead acquisition of the target system. This means that the image created during the acquisition is done through dead/ offline acquisition process.

This analysis process has been preferred by the experts in the past, because carrying the forensic tools to each crime scene was pretty hefty back when the companies manufactured

these tools as their hardware version only. So, as a result the target system containing the evidence was brought back to the lab for further process.

However, this process cannot help towards the analysis of live data from the target system. [4] This is so, because the acquisition has been done when the volatile memory was non-function. So, it can be considered as a major drawback of static analysis of data.

2. Live Analysis

Live analysis, as the name suggests is done on a target system when it is in functional state [5]. The most important functionality that live analysis brings with it is that we get to analyse the volatile memory of the system since the acquisition is done by using the Live Acquisition process.

This process also ensures that the data which is being analysed contains the description of live data generated on the system which was acquired during the period when the system is fully functional.

PROCESS MODEL FOR ON- SPOT ACQUISITION AND ANALYSIS OF RAM

Traditionally, whenever an investigation team reports to a crime scene, upon seeing the system, whether they shut down the system procedurally or simply pull the plug out. Pulling the plug preserves the current contents of the hard disk maintaining the time stamps and preserving the contents from overwriting. On the other hand, shutting the power down may alter them [6].

We do know that preservation of nonvolatile memory is possible in both these cases but this process doesn't help in findings of what constitutes where being run while the system was found in running state, because as soon as the power is cut, contents of the volatile memory are completely wiped out. As a result, acquisition of RAM data is not possible and further analysis of the same cannot be done.

In an attempt to reconsider on spot acquisition and analysis of RAM data, we've taken a target system as a computer which is functional and we'll be using two forensic software tools namely Access Data FTK Imager LITE version 4.2.1.4 [for data acquisition and will be referred as FTK Imager LITE (version 4.2.1.4)] and Magnet Axiom version 4.10.0.23663 [for data analysis and will be referred as Magnet Axiom (version 4.10.0.23663)]. These two are very powerful tools for acquisition and analysis of RAM data.

This attempt will basically tell us how RAM data can be acquired and analysed and how much data is gathered on spot of crime scene where we found the target system as functional.

Further, it must be taken care that no software or hardware changes are done on the target system before/ after data acquisition is being done/ has been done on it as doing so will disintegrate the authenticity of the evidence.

The analysed image will be directly stored on the USB hard disk on which write properties will be disabled after the process is finished. This step will ensure that image authenticity is maintained.

The investigating team will be carrying a computer having the analyser software [Magnet Axiom (version 4.10.0.23663)] installed on it which will be used to analyse the acquired image taken from the read-only USB hard disk. The image extraction will produce meta-data, which will further be organised by the software in its report improving user readability and better handson analysis of data.

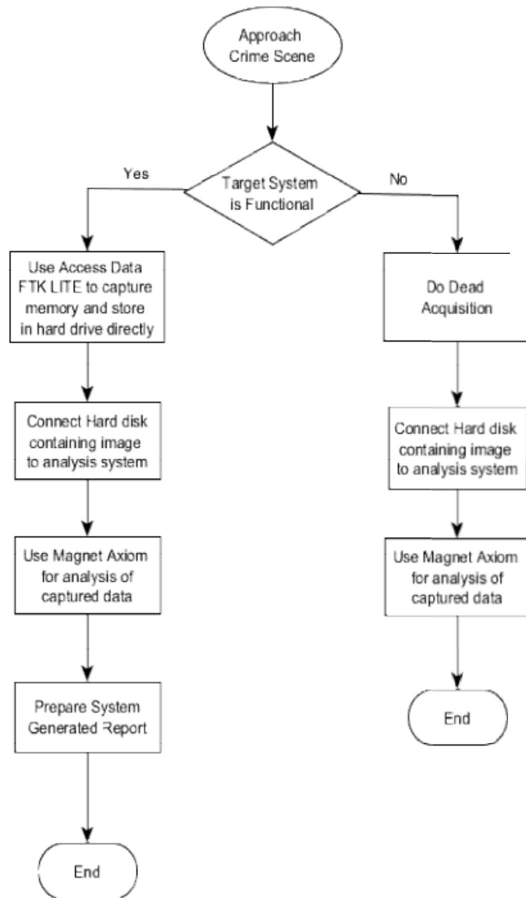

Figure 3. Process Model

IMPLEMENTATION

A. Target System

Our target system will be a desktop pc with Microsoft Windows 10, 64-bit operating system equipped with 32GB RAM, connected to the internet and with the following applications running on it:

- Windows Explorer o FTK Imager Lite (version 4.2.1.4)
- Google Chrome o Webmail o Cisco Webex Meeting
- CDR Analysis Software
- MS PowerPoint
- MS Word

Apart from these end user applications, there were many system applications that accounted to about 40% of the RAM usage i.e., the time when the system was encountered for the very first time 11.45 GB out of 32.0 GB RAM was being used.

As mentioned earlier, the system was connected to the internet through local ethernet cable using RJ-45 jack. The time when the flash pen drive containing FTK Imager LITE (version 4.2.1.4) software was inserted to the target system along with a 1 TB hard drive for data collection was 12:26 P.M. IST on 09th April, 2021.

B. Live Acquisition

As soon as the flash drive and the hard drive were connected, FTK Imager LITE (version 4.2.1.4) folder was opened and details of the end user applications were noted. After noting down all the necessary details for the research purpose, the acquisition process took place.

FTK Imager LITE (version 4.2.1.4) was launched on the target system and Capture Memory option was selected. The essential details were provided to the software like the destination folder where the acquisition dump would be store. A separate folder in the Hard Drive was created and named for the same.

This process started at 12:32 P.M. IST on 09th April, 2021 and ended after 15 minutes on 12:47 P.M. IST on 09th April, 2021. The dump file generated from this process had a size of 24.9 GB. Both the flash drive containing FTK Imager LITE (version 4.2.1.4) and the hard drive containing the Image of the target system were disconnected as soon as this process ended and the target system was powered off.

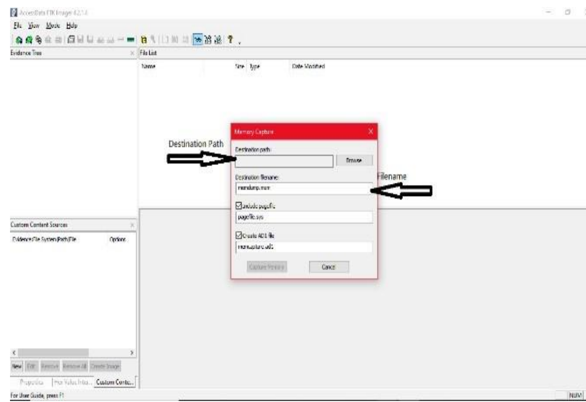

Figure 4. A look into the acquisition process using FTK Imager LITE (version 4.2.1.4). (Note: This image is just for reference and it is in no manner related to the experiment as no external disturbances were created during the experiment)

Live Analysis & Report Generation

The hard drive was connected to our system on which we had Magnet Axiom (version 4.10.0.23663) installed. On launching Magnet Axiom (version 4.10.0.23663) we created a new case for the image prepared and provided essential details to the software like case number, case name, examiner name, etc. in the AXIOM Process software. Magnet Axiom (version 4.10.0.23663) Process Software processes the image acquired. After providing other necessary information related to the Image type, the software started with the analysis phase of the image at 01:23 P.M. IST on 09th April, 2021. This process lasted for around 21 minutes and ended at 01:45 P.M. IST on 09th April, 2021.The Magnet Axiom (version 4.10.0.23663) Examine software analyses the processed image and generates the detailed report of the image.

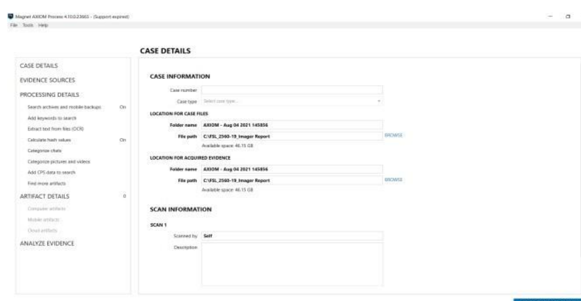

Figure 5. A look into the Magnet Axiom (version 4.10.0.23663) Process Software. (Note: This image is just for reference and it is in no manner related to the experiment as no external disturbances were created during the experiment)

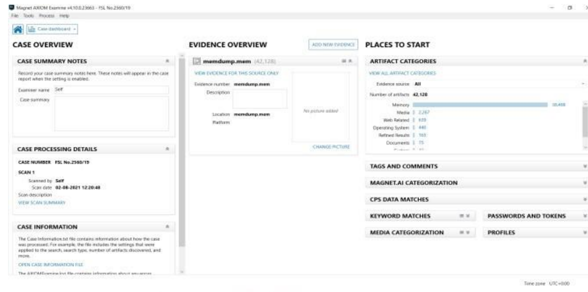

Figure 5. A look into the Magnet Axiom (version 4.10.0.23663) Examine Software.

(Note: This image is just for reference and it is in no manner related to the experiment as no external disturbances were created during the experiment)

The report generated by the software was in .pdf format and it was taken into consideration for analysis of data collected form the target system.

RESULTS & CONCLUSION

Result

Upon opening the report generated by Magnet Axiom (version 4.10.0.23663), the researcher has found that the results obtained in this experiment were astonishing and exceeded their expectation.Apart from the end user applications and system applications that were using the RAM of the target system, there was relevant data regarding social media activities and other profiles as well.

The listed data achieved from this process is as below:

- Carved Archives (content not searched): 46 items
- Carved Audio: 45 items
- Classifieds URLs: 1 items
- Cloud Services URLs: 17 items
- Edge/Internet Explorer 10-11 Content: 61 items
- Edge/Internet Explorer 10-11

Daily/Weekly History: 8 items

- Edge/Internet Explorer 10-11 Main History: 66 items
- Facebook Chat: 4 items
- Facebook Status Updates/Wall Posts/Comments: 1 items
- Facebook URLs: 86 items
- File System Information: 1 items
- Google Maps Tiles: 8 items
- Google Searches: 84 items
- Google WebP Images: 10 items
- Hotmail Webmail: 6 items
- Identifiers - Device: 38 items
- Identifiers - People: 9 items
- IP Addresses - Audio/Video Calls: 10 items
- LinkedIn Emails: 2 items
- LNK Files: 198 items
- Locally Accessed Files and Folders:

50 items

- Parsed Search Queries: 20 items
- PDF Documents: 3 items
- Photoshop Files: 16 items
- Pictures: 6507 items
- Potential Browser Activity: 3223 items
- Prefetch Files - Windows 8/10: 22 items
- RTF Documents: 5 items
- Sina Weibo Carved Searches: 2 items
- Social Media URLs: 11 items
- Twitter: 1 items
- Videos: 42 items

- Web Chat URLs: 3 items
- WebKit Browser Session/Tabs (Carved): 3 items
- WebKit Browser Web History (Carved): 617 items
- Windows Event Logs: 1225 items
- Windows Event Logs - Firewall Events: 1 items
- Windows Event Logs - Office Alert Events: 1 items
- Windows Event Logs - Service Events: 10 items
- Windows Event Logs - User Events: 3 items
- Yahoo! Webmail: 16 items

In addition to the above results found in the research, one important thing the researcher found was that if the storage device containing the image was previously used by the investigator, all old deleted or formatted data reappeared. VII.II. Conclusion

As from the above results the researcher has found that, how much relevant RAM (Live) data we can acquire apart from system data. The use of this technique will enable the law enforcement agencies to collect relevant data (Potential evidence) regarding any case on spot.

Recommendations

- Researcher has highly recommended performing live data acquisition on spot in every such condition.
- As researcher has found that storage device containing the image of RAM data was previously used, the all old deleted or formatted data reappeared. Therefore, always use new storage device.

Suggestions

- A proper training is suggested to all investigation officers and first respondent to perform live data acquisition successfully.
- Ensure the appreciation of this digital evidence before the court.

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