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It's a matter of great pride and happiness for Chanakya National Law University Patna that the Centre for Innovation research and facilitation in Intellectual Property for Humanity and Development (CIRF in IPHD) is launching International E-Journal: **THE CHANAKYA LAW REVIEW (CLR)**. It's a half yearly journal with SCOPUS Index, multidisciplinary in character in Law , Social Sciences, Sciences ,Humanities interface with Law. It's a journal of innovation in research in the entire subjects interface with Law. Since it's an e-journal, it has open access world-wide. The Scholarly research papers will disseminate and enrich our knowledge in various disciplines. It will share the research being done all over the world. This journal shall help in improving the quality of research and teaching. It's a first issue 2021. The ISSN no shall be obtained as per Rule.

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

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Hon'ble Justice (Mrs) Mridula Mishra

VICE-CHANCELLOR

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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 poolof 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 towardssocial 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 needsare 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 interfacewith 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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RIGHT TO 'UNRESTRICTED' EDUCATION IN INDIA – ANALYSING THE IDEA OF FAIR AND COMPLETE EDUCATION AS ENVISAGED BY THE INDIAN JURISPRUDENCE AND CONSTITUTION.

Abhiraam Shukla*

ABSTRACT

"*You cannot stop the spread of an idea by passing a law against it.*"

- Harry S. Truman

The Preamble to the Constitution of India, one of the most important texts which gives the nature of the rights of the citizens of the country, states that India shall be a nation that shall secure the liberty of thought and expression of every citizen. It is a well-known and axiomatic fact the education of a person vastly affects his thought and expression. Thus, it is crucial for a democracy like our nation to ensure that the education imparted in our country is designed to enable every citizen to think in a liberal way and live a dignified life.

Recently the Central Board of Secondary Education (CBSE) along with the Assam Higher Secondary Education Council (AHSEC) made some reductions in the curricula which are to be studied by secondary students for the year of 2020-21. A perusal of topics removed gives us a fair idea that these reductions have been politically motivated to push forward a certain ideology.

This paper seeks to delve into the Right of 'Unrestricted" Education of children in India. The paper shall start with a comprehensive analysis of the Right to Education using statutory developments and judicial observations. After that, the right to "receive information" which is recognized by the Indian jurisprudence as a fundamental right under Article 19(1) of the Constitution, shall be perused in depth- including all its facets and restrictions on it. In the conclusive parts of the paper, the author shall venture to interpret both the article together with the help of sociological principles of JS Mill to infer whether

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the children in India have a right to "undoctored" and "unrestricted" education in India and whether the State is violating the fundamental Right to Education enlisted in Article 21A by trimming key portions of syllabus which are a prerequisite for their knowledge, information, and well-being.

KEYWORDS

Right to Education, Right to Receive Information, JS Mill, Article 21A, Individualistic Dignity

I. INTRODUCTION

Swami Vivekananda, one of the greatest luminaries our nation has ever produced, once highlighted the sanctity of education in an individual's life by expressing that -

"*Education is the manifestation of perfection already present in a man. Education – what a huge meaning it has in our lives, but sadly the meaning is reduced to the fact that it will go on to become our source of bread and butter – nothing more and nothing less. Is this what education stands for in our life? Is not education a way to make life better? I believe that education is not an accessory to life but it is a necessity."*[1]

Education, which is one of the most basic needs of the individual, is a process that provides for the development of humans. The aim of education is to nurture the person and to help him realize the full potential that already is in existence within him.[2] Such is the reason why the significance of quality education is monumental in a person's life.

One strand of educational thought has always believed that the strengthening and vitalization of a child's thinking and perception abilities should be the cardinal aim of schools and other institutions and not just a tangential outcome.[3] Proper and unchanged education imparted should show the students what and how to learn. This leads to the enhancement of thinking capacities in a student.[4] As Cotton [1991] has expounded "*If students are to function*

[1] Swami Vivekananda, "My Idea of Education" [Advaita Ashrama India Publications 2010].
[2] Meyer, J., and B. Rowan. "Notes on the Structure of Educational Organizations." Paper read at the annual meeting of the American Sociological Association, San Francisco, August, Mimeographed. Stanford, Calif.: Department of Sociology, Stanford University. [1975].
[3] Lipman, M. Thinking in education. [Cambridge University Press 2003].
[4] Serap Emir, "Education faculty students' critical thinking disposition according to academic achievement" [Procedia Social and Behavioural Sciences 1 (2009)].

successfully in a highly technical society, then they must be equipped with lifelong learning and thinking skills necessary to acquire and process information in an ever-changing world"[5]

Another important objective of "*unmanipulated"* education should be developing students' thinking as well motor skills, which is the main goal of current approaches in education. This leads to students being active and not passive while they are realizing critical education.[6] Such is the importance of proper and unrestricted education for a human being.

Recently, the Central Board of Secondary Education [CBSE][7] made some cuts [up to 30 percent] in the syllabus of class 9th and class 10th students for the year 2020-21. CBSE expressed that such reduction in the syllabus in order to ease the burden on students because of the Covid pandemic.[8] The Board dropped topics like Democracy, Gender, Religion, Cast, and Secularism.

On the other hand, (AHSEC) decided to remove important and sub-topics on India's first Prime Minister J. Nehru's contribution to building of the nation, his term in the office, foreign policies implemented by him, and the pioneer general elections of the nation which etched India's position in the modern world as a successful democratic nation from the course material of 11th and 12th class students.[9]

Furthermore, topics including Navnirman Movement in Gujarat, politics of '*Garibi Hatao',* Anti-Sikh riots, Suspension of 5-year plans, Mandal Commission Report, 2004 general elections, Ayodhya Dispute and the Gujarat riots of 1992, etc. have also been axed from the curriculum.[10]These moves of the CBSE and AHSEC have drawn sharp criticism from the

[5] Cotton, K. "Teaching thinking skills. School Improvement Research Series", [NW Archives 1991].
[6]Linda Eder and Richard Paul, "Critical Thinking: Intellectual Standards Essential to Reasoning Well Within Every Domain of Thought".
[7] Business Standard Web Team, "CBSE syllabus reduction: Controversy and the politics explained in pictures" Business Standard, (April 12, 2021, 10:21 AM) available at: https://www.business-standard.com/article/education/in-pictures-politics-over-cbse-s-changes-in-class-9-12-syllabus-120070900333_1.html.
[8] *Id.*
[9] Gaurav Das, "Rewriting History: Assam Higher Secondary Council Criticised for Dropping Key Topics" (April 12, 2021 11:23 AM) The Wire, available at: https://thewire.in/education/rewriting-history-assam-higher-secondary-council-syllabus-cut-covid-19.
[10] *Id.*

Opposition parties[11] like Mamta Bannerjee[12] and Manish Sisodia[13] and other experts[14] who are accusing that the state government's actions are aimed at 'saffronisation', 'brainwashing' and 'coercing' young minds into following the agenda backed by the Bharatiya Janata Party (BJP) and the Rashtriya Swayamsevak Sangha (RSS)."

If we observe the syllabus reductions made by both the educational boards, we will see a particular ideology being pushed forward by both of them by reducing the important course material for students. Key sections of the syllabus are trimmed which have greatly compromised the quality of education to be imparted to these students. As CBSE is an instrumentality of the State[15] for the purposes of the Constitution[16], this move of the CBSE has violated Article 21A of the Indian Constitution which gives every child in India a right to education.

The primary purpose of this paper is to evaluate the right of 'unrestricted' education of children in India. The author shall first discuss in depth the fundamental right to education of children in India. After that, the right to "receive information" which is recognized by the Indian jurisprudence as a fundamental right under Article 19(1) of the Constitution, shall be perused in depth- including all its facets and restrictions on it. In the conclusive parts of the paper, the author shall venture to interpret both the article together with the help of sociological principles of JS Mill to infer whether the children in India have a right to "undoctored" and "unrestricted" education in India and whether the State is violating the fundamental Right to Education enlisted in Article 21A by trimming key portions of syllabus which are a prerequisite for their knowledge, information, and well-being.

[11] TOI Web Team, Opposition slams dropping of chapters like Secularism, Democracy;" CBSE says syllabus reduced only for this year Mixed Response form the Academicians" (April 14, 2021, 8:34 PM) available at: https://timesofindia.indiatimes.com/india/opposition-slams-dropping-of-chapters-on-democracy-secularism-cbse-says-syllabus-reduced-only-for-this-year-mixed-response-from-academicians/articleshow/76860159.cms.

[12] Express Team, Shocked to know deletion of important topics like secularism from the syllabus: Mamata Banerjee (April 23, 2021 9:34 PM) available at: https://indianexpress.com/article/india/shocked-to-know-deletion-of-important-topics-like-secularism-from-syllabus-mamata-banerjee-6497075/.

[13]The Mint Web Team, CBSE syllabus reduced; Deputy Cm Manish Sisodia expresses Concern (April 3, 2021, 2:26 PM) available at: https://www.livemint.com/news/india/cbse-syllabus-reduced-delhi-deputy-cm-manish-sisodia-expresses-concern-11594251942139.html.

[14] "Rewriting History: Assam Higher Secondary Council Criticised for Dropping Key Topics" Supra note at 9.

[15]CBSE is controlled by the Ministry of Education, Government of India.

[16] INDIA CONSTI. Art 12.

II. RIGHT TO EDUCATION AS ENUNCIATED IN THE CONSTITUTION AND EXPOUNDED BY THE JUDICIARY

In this § , I shall analyse the entire meaning, ambit, concept, and implications of the Right to Education of children in India. I shall be tracing the development of said right using a multitude of judicial observations from the time of inception of the Constitution till recent years. This § of the paper shall be focused on tracing the nature of the Right to Education in a comprehensive and exhaustive manner.

In the starting years of the working of the Constitution, the Right to Education was not one of the fundamental rights.[17] It formed a part of the Directive Principles of State Policy [hereinafter "DPSP"] which required the State to endeavour to provide for free and compulsory education of all children under they complete 14 years of age.[18]

According to this directive, ideally speaking, the education of children up to age of 14 years should have been free at the latest by 1960. However, only a few states in India made fitful efforts to pass laws in accordance with Article 45 of the Constitution.[19]

DIRECTIVE PRINCIPLES' OBLIGATION ON STATE VIS-À-VIS RIGHT TO EDUCATION

During the period between "1950-1960", the Supreme Court inferred the "right to education" from provisions of the Constitution of India such as Articles 21-24, 30(1), and 39(e) and (f).

In *Re Kerala Education Bill*[20] the Apex Court observed that the action of the State of Kerala banning charging of fees from pupils who studied in institutions aided by religious minority groups was violative of Article 30(1) of the Constitution since the State had made no provision for payment of grants for compensation of loss caused to them as a result of such ban.

The Court noted that the only obligation imposed on the State due to Article 45 is to *"provide free and compulsory education for children"* can be discharged by institutions or government-aided schools and it is not required by Article 45 that "*obligation is to be discharged at the expenses of minority communities"*[21]

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[17] MP JAIN, INDIAN CONSTITUTIONAL LAW, 1280 [8th ed. 2018].
[18] INDIA CONST. art 45.
[19] Assam, Andhra Pradesh, Bihar, Goa, Gujarat, Himachal Pradesh, Maharashtra, Orrisa, Punjab, Rajasthan, Sikkim, Uttar Pradesh, Haryana, Chhattisgarh, Sikkim, Tamil Nadu, West Bengal, Delhi, etc.
[20] Re Kerala Education Bill, AIR 1958 SC 956: 1959 CR 995.
[21] *Id.* at para [57].

In *Unnikrishnan*,[22] the highest court of the nation understood the right to education from the ambit of the right to life and personal liberty as under Article 21. Given the fact that Fundamental rights of the individual and DPSP of the State complement each other, the meaning and concept of the right to education were discussed in Article 41 [*Right to work, to public assistance and to education in certain cases*], Article 45 [*Providing for free and mandatory education for children*], and Article 46 [*Promoting economic and educational interests of members of Scheduled Castes, Scheduled Tribes, and other weaker sections*. Therefore, the concept of the right to education of a child w.r.t. to DPSP amounts to -

a. *Every child has an inherent right to be educated free of cost till the age of 14*
b. *After he has attained 14 years of age, his/her right to education shall be circumscribed by the economic abilities and capacity of the State and its development.*

The Court had further emphasized in Unnikrishnan case that such obligation on the State on the State also be discharged by Govt. schools or private schools run by NGOs which are aided and recognized by the State.[23]

Further, it has been recognized that is compulsory for the state to grant aid to recognized institutions imparting education to children between 6 to 14 years of age.[24] Here, the Supreme Court while expanding the rights and liberties of an individual noted that a citizen has a right to call upon the State to provide free education within its limits of economic capacity. This does not mean that the Court was seeking to transform a DPSP[25] into a Fundamental Right. The Court was "*merely relying upon the Article 41 to illustrate the content of the right to education flowing from Article 21".*[26]

The Court further observed that it had held right to education as implicit in the right to life under Article 21 because of its intrinsic significance. It had referred to Articles 41, 45, and 46 merely to determine the limits of this right.[27]

Article 45 of the DPSP has also been held to be supplementary to Article 24 of the Indian Constitution which bars child labour below 14 years of age since no employment of a child less

[22] Unnikrishnan JP v. State of Andhra Pradesh, AIR 1993 SC 2178, 2231. : (1993) 1 SCC 645; See also Royal Polytechnic College and Ors Vs State of J. & K. And Ors, AIR 1997 J K 123; Maria Grace Rural Middle School vs The Government of Tamil Nadu, 2006(5) CTC 193.
[23] *Id.* at Para [43].
[24] State of UP vs. Pawan Kumar Dwivedi, 2014 (10) SCJ 297: (2014) 9 SCC 692.
[25] INDIA CONSTI. Art 45.
[26] Pawan Kumar, Supra note 24.
[27] *Ibid.*

than 14 years of age obligates the State to keep him occupied in some educational institution.[28] Article 45 has also been held to complement to Article 39 (e) and (f).[29]

RIGHT TO LIFE AND RIGHT TO EDUCATION – MOHINI JAIN AND SUBSEQUENT RULINGS.

The consequence of quality education in stimulation of an adequate and solemn life has prompted the Supreme Court to imply "Right to Education" as a fundamental right flowing from Article 21 of the Constitution. The precise reason for attaching the "Right to Education" to 'life' is the monumental importance of it in a person's life.

The landmark case of *Mohini Jain*[30] gave a Division Bench of the Supreme Court [*Kuldeep Singh*, J, and *Sahai, RM*, J] the first opportunity to include Right to Education in Article 21. The main question of fact considered in this case was whether private educational institutions could levy exorbitant capitation fees on students?

The Court held that although Right to Education is not expressly stated in Part III of the Indian Constitution, cumulative reading of DPSPs[31] along with Article 21 of the Constitution, the Court noted that it was clear those framers of the Constitution of India made it compulsory for the Sate to provide education for its subjects.[32]

The Court in this case, observed that, without ensuring that right to education under Article 41 is a reality, the Fundamental Rights would remain unattainable for the generality of Indian citizens; it is impossible for a citizen to fully understand and enjoy his Fundamental Rights including freedom of speech and expression, unless he is completely aware of individualistic dignity. [33] Along with other rights cannot be fully comprehended and cherished unless a citizen is fully aware of his individualistic dignity. Further, 'life' in Article 21 means living with human dignity.[34] Right to Life is a compendious term encompassing every right which is vital for enjoyment. Thus, the Court ruled, *"The right to education is directly connected to the right to life"* and emphasised that the right to education is concomitant to the fundamental rights,

[28] MP Jain, *Supra* Note 17, pp 1280.
[29] MC Mehta (Child Labour Matters) vs. State of Tamil Nadu, AIR 1997 SC 699; (1996) 6 SCC 692.
[30] Mohini Jain vs. the State of Karnataka, (1992) 3 SCC 666; AIR 1992 SC 1858.
[31] INDIA CONST. art 38, 39(a), 41, and 45.
[32] Mohini Jain, Supra Note 30.
[33] INDIA CONST. art 19(1).
[34] Mohini Jain, Supra note 30.

and that it is the constitutional duty of the State to provide education institutions at all levels for the advantage of its people.[35]

Viewing the rights of the citizens in an absolutist manner, the Supreme Court lastly observed that charging capitation fee in consideration of admission for educational institutions is a patent denial of fundamental rights of a citizen.[36]

In *Mohini Jain*, the Court took an extremely expansive and particularly unreasonable view of the State's obligation to provide education to everyone at all levels. Assigning the State, the obligation to provide an adequate number of institutions to provide professional and higher education to everyone was an approach that could not be considered viable, feasible, and reasonable from a pragmatic point of view. The present-day economic condition of the country could not provide for such measures and it would have placed an impossible financial burden on the State. Furthermore, there was no reasonable justification for completely ousting private institutions from the field of higher education. Also, it was axiomatic that if private institutions could not receive funds from the State, they should be allowed to charge higher fees to make both their ends meet.

Accordingly, the question of whether the State could permit private institutions to permit capitation fees was considered by the Supreme Court in the case of *Unnikrishnan*[37] by a Constitution Bench of the Court.

The Court in *Unnikrishnan*, as has been previously stated in this paper[38], held that the fundamental right to education of an individual was absolute till the age of 14. However, after the attainment of that age, such obligation of the State is restricted as per the limits of the economic and financial capacity and development of the State. Court further observed that private organizations and institutions are necessary for the State but "*commercialization of education could not and should not be permitted*" and that private institutions could charge capitation fees only up to a certain ceiling.[39]

[35] Mohini Jain, Supra note 30.
[36] Mohini Jain, Supra note 30.
[37] Unnikrishnan Supra note 22 .
[38] See § I (a) of this Paper.
[39] Unnikrishnan Supra note 22.

This scheme in Unnikrishnan was later overruled, although only temporarily[40], in *TMA Pai Foundation*[41] , in which Court opined that *"The scheme has the consequence of nationalizing education in respect of key elements, such as a private unaided institution's right to admit students and set its own fees."*

The confusion regarding the say of the Government vis-à-vis charging of fees by private unaided educational institutions continues, with courts resorting to a certain amount of *ad hoc* practices in resolving disputes.[42] As a result, only the State and its instrumentalities are bound by Article 21 of the Constitution, not private assisted educational institutions.[43]

Thus, up till now, we have seen how the Right to Education was given utmost importance and gravity by the Apex Court. In the next § , we shall discuss the development of the Right to Education when it was incorporated as a fundamental right under Article 21A of the Constitution.

EDUCATION AS A FUNDAMENTAL RIGHT- INCORPORATION OF ARTICLE 21(A)

The incorporation of Article 21A in the Constitution by the *Constitution Eighty-Sixth Amendment Act, 2002* expressly declared the right to education as a fundamental right of every child between ages six to fourteen. The manner in which this right is to be exercised is to be decided by the law made by the State.[44] By adding clause (k)[45] in Article 51A in the Chapter of Fundamental Duties, compulsoriness is sought by making it incumbent on a parent or guardian to provide opportunities for education to their child/ward.[46] At the same time, a new Article 45 was added, directing the state to make every effort to provide early childhood care and education to all children until they finish six years of education.[47]

[40] Islamic Academy of Education vs the State of Karnataka, (2003) 5 JT 1; (2003) 6 SCC 697.
[41] TMA Pai Foundation v. the State of Karnataka, AIR 2003 SC 355; (2002) 8 SCC 481; See also PA. Inamdar v. the State of Maharashtra, AIR 2005 SC 3226; (2005) SCC 6 537.
[42] See for example Cochin University of Science and Technology v Thomas P John, AIR 2008 SC 2931; Modern Dental College v State of MP AIR 2009 SC 2432.
[43] Pramati Educational and Cultural Trust v UOI, AIR 2014 SC 2114; (2014) 8 SCC 1.
[44] See Society for Unaided Schools in Rajasthan v UOI, (2012) 6 SCC 1.
[45] INDIA CONST. art. 51A (k), amended by The Constitution (Eighty-Sixth Amendment) Act, 2002.
[46] See State of Maharashtra v Sant Dhyaneshwar Shikhshan Shastra Vidyalaya, (2006) 9 SCC 1.
[47] The Constitution (Eighty-Sixth Amendment) Act, 2002.

Article 21A has been hailed as one of the most important provisions in the Indian Constitution and stands above other rights as "*one's ability to enforce one's fundamental rights flows from one's education."* [48]

Article 21A when read along with Article 19(1) of the Constitution has been construed to give each child a right to be given education in a medium of instruction of the own choice.[49] Article 21A has also given each child a right to study in a safe and secure environment.[50]

Ultimately in 2009, ***The Right of Children to Free and Compulsory Education Act, 2009***[51] was enacted by the Parliament which gave statutory backing to the right to education for children who have attained the age of 6 years. According to this Act, charging capitation fees is prohibited and no screening procedure is to be conducted by the schools on the child or her family. In accordance with Article 51A of the Constitution, the Act mandated that every legal guardian enroll or enable his or her child or ward, as the instance may be, to primary school in the neighbourhood school.[52]

Thus, we can conclude that the Right to Education has been solidified and given legislative backing which only goes to prove its sanctity and pre-eminence. Therefore, any compromise with the quality of education imparted to the children of the nation has significant ramifications on the way of life and thinking of a child which violates its fundamental right under Article 21A.

III. RECEIVING IMPARTIAL AND COMPLETE INFORMATION – AN ESSENTIAL PART OF FUNDAMENTAL RIGHTS

In this § of the paper, I shall discuss the entire jurisprudence related to the "Right to Receive Information" under Article 19(1) (a) of the Indian Constitution. The main 3 facets of the said right -1) Information related to elections and electoral rights, 2) Information related to matters of public interest, and 3) Restrictions of Right to Information under Article 19 (1)(a).

[48] Ashok Kumar Thakur v Union of India, (2208) 6 SCC 1.
[49] Associated Managements of Primary and Secondary Schools in Karnataka v The State of Karnataka by its Secretary, Department of Education and Ors. ILR 2008 KAR 2895.
[50] Avinash Mehrotra v. UOI, (2009) 6 SCC 398.
[51] The Right of Children to Free and Compulsory Education Act, 2009, No. 35, Acts of Parliament, 1949 (India)
[52] Id. §10.

A. SUPREME COURT'S VIEW UNDER ARTICLE 19(1)(A) AND ELECTORAL RIGHTS

Article 19(1) (a) of the Indian Constitution gives the fundamental right to "freedom of speech and expression" to every citizen of the country. In this article, [53] the term "freedom of speech and expression" has been interpreted to include the ***right to obtain and share information***.[54]

In *People's Union for Civil Liberties,*[55] the Supreme Court carefully scrutinized the application of this principle in Right to Freedom of Speech and Expression. It was observed that the right of citizens to obtain information on matters relating to public acts, flows from the Fundamental Right enshrined in Article 19(1)(a). Obtaining information on candidates running for State Legislatures or Parliament fulfills the concept of freedom of expression, and thus the access to information is a natural and fundamental component of Article 19(1) (a).[56] The Court noted that the "expression" has manifold meanings and ballot is the instrument by which the voter expresses his choice between candidates.[57]

Voters have a right to know about the educational qualifications of the candidates contesting in an election. The Fundamental Right is concomitant to Electoral Rights.[58]

In case allegations of public patronage are made, the public, in general, has the right to know the circumstances regarding which their elected representatives got such allotment.[59]

If the right to freedom of speech and expression includes the right to disseminate information to as wide a § of the population as is possible, the access which enables the right to be so exercised is also an integral part of the said right.[60] A wider range of circulation of information or its greater impact, cannot restrict the content of the right nor can justify its denial.[61]

The Delhi High Court has also emphasized in *Association for Democratic Reforms,*[62] that the right to receive information acquires great significance in the context of elections.

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[53] INDIA CONST art 19(1) (a).
[54] MP Jain Indian Constitutional Law, Supra note 17.
[55] PUCL v. UOI, (2003) 4 SCC 399; AIR 2003 SC 2363.
[56] Id.
[57] Id.
[58] Mairembam Prithviraj v. Sharatchandra Singh, 2017 (3) ALD 79; 2017 (2) SCC 487.
[59] Onkar Lal Bajaj v. UOI, (2003) 2 SCC 673.
[60] Shreya Singhal v UOI, 2015 (4) SCALE 1; (2015) 5 SCC 1.
[61] Id.
[62] Association for Democratic Reforms v. UOI, AIR 2001 Del 126.

B. RIGHT TO RECEIVE INFORMATION AND MATTERS OF PUBLIC INTEREST

In the landmark *Raj Narain*[63] case, the Supreme Court markedly observed that Article (19) (a) not only guarantees freedom of speech and expression, it also ensures the rights of citizens to know and the right to receive information regarding matters of public interest and concern. The right to know in a democracy was underlined by the Court when it noted that:

"It is one of the most fundamental rights of the people of the country to know every public act, everything that is done in a public way, by their public functionaries. In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can but few secrets. When secrecy is claimed for transactions that can, at the very least, have no repercussions on public security, the right to know, which is drawn from the principle of freedom of expression, though not absolute, is a consideration that should make one skeptical. The public's interest is not served by concealing regular activity behind a shroud of secrecy. Such anonymity is rarely desired legitimately. It is commonly sought for the sake of political parties, personal gain, or bureaucratic routine. Officials' responsibility to explain and justify their actions is the most important safeguard against oppression and corruption."

In *Secretary, Ministry of Information and Broadcasting,*[64] the Supreme Court reiterated the observation that freedom of speech and expression guaranteed by Article 19(1) (a) includes the right to information and to disseminate the same vis-à-vis matter of public concern.

In *Dinesh Trivedi*[65] the Supreme Court observed that people should have a right to know about the operations of the government that, having been voted by them, strives to design reasonable strategies of governance directed at their welfare in modern constitutional democracies."

Thus, it is clear that every citizen of the country has a fundamental right to seek and gather information regarding matters of public interest and the Supreme Court has upheld the same with utmost conviction. In *Dinesh Trivedi*, the Apex Court very rightly remarked *"Democracy demands transparency, and transparency is an essential component of a democratic society, and the best disinfectant is sunlight."*

[63] State of Uttar Pradesh v Raj Narain, (1975) 4 SCC 478; AIR 1975 SC 865.
[64] Secretary, Ministry of Information and Broadcasting, Government of India v. Cricket Association of Bengal, AIR 1995 SC 1236.
[65] Dinesh Trivedi, MP vs UOI, (1997) 1 SCJ 697; (1997) 4 SCC 306.

C. RESTRICTIONS ON FUNDAMENTAL RIGHT TO RECEIVE INFORMATION

Right to Information is a facet of the right to freedom of speech and expression and is indisputably a Fundamental Right.[66] However, the right to information under Article 19(1) (a) is limited by reasonable restrictions under Article 19(2) and is further bounded by working of Article 21[67] [though the right to privacy is not absolute].

In *People's Union for Civil Liberties* [2004][68] the petitioners sought divulgence of information from the respondent regarding safety defects and violations in various nuclear power plants in India. The Court accepted the contention of the Union of India that information regarding the fissile matter is a matter of sensible information which may enable the enemies of the nation to monitor the activities of the country, hence any information regarding technology, process, and structure of nuclear power plants could not be disclosed.

Generally, the right to receive information is restricted vis-à-vis following subjects of information[69]:

1) Relations with other countries
2) Public Safety and National Security
3) Criminal inquiry, detection, and prevention
4) Governmental internal debates
5) Information obtained in confidence from a non-government source
6) Information on scientific breakthroughs
7) Information that would infringe on an individual's privacy
8) Economic information that would provide some people or businesses an unfair edge
9) Information that may be subject to a legal professional privilege claim.

Most of these subjects have been covered in the ***Right to Information Act, 2005***[70] which have legislative backing to the Right to Information. Thus, it is clear that in some spheres of information, there is a reasonable restriction on the right to seek information.

After analysing all the observations made by the Supreme Court regarding fundamental Right to Information under Article 19(1) (a), we can understand the significance of complete and

[66] MP Jain Indian Constitutional Law, Supra Note 17 pp. 1063.
[67] Thalappalam Ser Cooperative Bank Limited v State of Karnataka, 2013 (12) SCALE 527; (2013) 16 SCC 82.
[68] People's Union for Civil Liberties v. UOI, AIR 2004 SC 1442; (2004) 2 SCC 476.
[69] MP Jain Indian Constitutional Law pp 1064.
[70] Right to Information Act, 2005 No. 22, Acts of Parliament, 2005 (India).

impartial information in a person's life. In this regard, former PM Atal Bihari Vajpayee has rightly said, "*The Government wants to share power with the humblest; it wants to empower the weakest. It is precisely because of this reason that the Right to Information has to be ensured for all."*

IV. CONCLUSION - READING RIGHT TO RECEIVE INFORMATION WITH RIGHT TO EDUCATION SUING THE SUPPORT OF WORKS OF JS MILL

Thus, after perusing both Right to Information under Article 19(1) (a) and Right to Education under Article 21A of the Indian Constitution, we can safely say that both play an epoch-making role in the shaping of a person's life.

For tracing a connection between the said two rights, it is expeditious to revert to the *Mohini Jain* observation to note the following observation from the judgment – "*Article 19's essential rights, such as the right to freedom of expression and other rights, cannot be completely appreciated and enjoyed until a person is thoroughly educated and aware of his individualized dignity."*

In order to explore the meaning of this "individualistic dignity", let us refer to a theory of the renowned sociologist JS Mill –

"An overall State education is merely a ruse for influencing people to be precisely like one another; and because the mold in which it casts them is that which pleases the prevalent political power, whether this be a ruler, a ruling class, or a majority of the existing generation, it establishes a despotism over the mind, leading by a natural tendency over one's body."[71]

This statement of the well-known philosopher very well highlights the two concerns which I had in mind when I came to know of the previously mentioned syllabus cuts made by CBSE and AHSEC. These are –

1) Imposition of ideological discipline on the student of the country
2) Political cleansing of ideas thorough education in the country

In the author's belief, the situation presented by the syllabus reduction is a classic example of the patronizing and paternalistic act, which goes against libertarian principles of individuality.

[71] John Stuart Mill, On Liberty (Penguin Classics 2006).

The author agrees with the view of JS Mill when he emphasizes on the importance on the liberty of people to investigate complete truth. Only through exploring and recognizing all aspects of the truth will an individual be able to assert their identity in the greatest meaning.

The view of *Mohini Jain* which requires that the education of a child should be able to help him attain individualistic dignity when combining with Mill's view of individuality gives a fair idea of the quality of education, the Indian jurisprudence has intended to be imparted in India.

To get a clearer picture of the significance of ideal quality of education, we should refer to the US case of *Ambach v Norwick*[72] as well in which it was opined – *"...The instructor has the ability to affect pupils' attitudes regarding government, the electoral process, and citizen social duty, and this impact is critical to the democracy's survival."*.

John Dewey, a philosopher and psychologist of the USA has noted – "*The public schools are seen as a kind of 'assimilative force,' bringing together disparate and opposing components of our community on a broad but shared ground."*[73]

As far as the substance of Right to Information under Article 19(1) (a) is concerned, we can relate the theory and principles of JS Mill regarding the nature of education to them as well. Right to Information under the said article placed absolute importance on the expression of choice of voters. If we analyse the theory of Mills, we will find that he laid great emphasis on half-truths in his works. If chapters such as the works and contributions of J. Nehru and the political history of India are removed, it would impede the ability of students of the country to compare the works of the present government to the works of the past governments. This shall be serious ramifications on their voting preferences because it will impede the level of understanding they have of the working and contributions of governments in the country.

Thus, we can conclude that the current reductions made by CBSE and AHSEC violate the fundamental Rights of Education and the Right to Receive Information of the children of the country. Right to Education and Right to Receive Information when read in a complementary manner safeguard the well-being of the students of the country by giving them a Right to Unrestricted Education.

Therefore, in my opinion, CBSE and AHSEC as a State have arbitrarily exercised their power and discretion. The judicial review should look at deciding elements such as topic selection

[72] Ambach v. Norwick, 441 U.S. 68, 99 S. Ct. 1589 (1979).
[73] John Dewey, Democracy and Education: An Introduction to the Philosophy of Education (Cambridge University Press 2017)..

process, board member diversity, and so on. Even if nothing can be done for this situation, the Court should set a precedent by barring the educational boards from making such politically motivated and arbitrary amendments in the curricula of children in the future. The Right to Unrestricted Education in India is superior and should overpower any attempt made by the State to manipulate the young minds of the country.

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ANIMAL LAWS: RIGHTS BASED OR DUTY BASED APPROACH?

Anukriti Poddar and Nandini Sureka[*]

ABSTRACT

In recent times our eyes have caught plenty of news related to animal cruelty, be it feeding animal crackers or tying them behind the vehicle and dragging them. Humans have continued to show cruel and inhuman treatment towards animals in every possible way. In this regard, there are several judgments delivered by the courts that state that animals should be recognized as legal persons under Article 21 of the Constitution and be granted equivalent rights. They argue that animals being a living part of the habitat should have constitutional recognition as a human. This paper stands on the argument that this 'right-based approach' would not be a viable option. It first explains the court's stand on this topic by discussing the case of A. Nagaraja[74] *and then examines in detail both the right-based and duty-based approach. It tries to use the concept provided by Martha Nussbaum*[75] *to explain the duty-based approach and talks about the 'capabilities approach' and 'concept of dignified existence'. It then compares them to reach the conclusion that the duty-based approach will be a more reasonable and successful approach to reach the goal of animal welfare.*

KEYWORDS: Animals, Right-based, Duty-based, Welfare, Cruelty

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[74] Animal Welfare Board of India v. A. Nagaraja, (2014) 7 SCC 547.

[75] Professor Martha C. Nussbaum is a well-known humanist and philosopher who is focusing her efforts on the animal kingdom as a whole. Her capabilities approach provides a strong and intuitively sound foundation for analysing animals in terms of justice ideals.

V. INTRODUCTION:

The desire to regulate the ruler's authoritarianism, arbitrariness and dictatorship leads to the concept of having a Constitution. The ruler has to be committed for ensuring the welfare, interest and protection of its subjects. But, this protection not only extends to humans but also to all non-human creatures. Switzerland, in 1992 became the first nation to include animals in its constitution, with a clause guaranteeing the preservation of "the dignity of the creature".[76] Likewise, many other countries like Germany also constitutionally granted protection to the animals.[77] Animal rights is based on the principle that any conscious creature having interests must be protected and respected. No conscious being shall be belittled to a thing. They have a right to life and a right to fulfil their fundamental needs- out of which one is avoiding pain.

Animals' rights for a long time have been a subject of a lot of debates. Long back, Aristotle had stated that all non-human creatures, that is, animals have "natural good" in respect of their efficiency or productivity in the habitat they live and this 'good' should be directed exclusively towards human benefit. It was later, through the influence of the treaty of Darwin that the resemblance between animals and humans was drawn, and the concept of 'moral rights' came into the picture.[78] It was further supported by Bentham who said that animals' magnitude for hardships formed the foundation for giving them rights. It is the hardships that the law must deter and prevent.[79]

The principle of sentiency and misery emerged to be the framework for defending the rights of animals because it elicited sympathy in humans for the non-human creatures. It can therefore be branched out as- a ground for granting rights to non-human beings on one hand and as a justification to legislate for their well-being by a duty on the other.

The right based-approach for animals involves recognising animals as legal persons in some extent and granting them entitlements which they can enforce against State and also the Non-State bodies if their rights are violated by them. The duty based approach on the other hand, creates a direct and positive duty on the State as well as private persons.

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[76] Meenu Katariya, 8 Countries with The Strictest Animal Welfare Laws in The World That India Can Take Cues, SCOOPWHOOP (Apr. 2, 2021, 6:08 PM), available at: https://www.scoopwhoop.com/countries-with-strict-animal-welfare-laws-in-the-world/.

[77] Ibid.

[78] Christophe Traïni, The Animal Rights Struggle: An Essay in Historical Sociology, 1 HAL 5, 48 (2016), available at: https://halshs.archives-ouvertes.fr/halshs-02864005/document.

[79] Johannes Kniess, Bentham on Animal Welfare, CORE (Apr. 6, 2021, 6:40 PM), https://core.ac.uk/download/pdf/327373664.pdf.

The most important statute for animal welfare in India is The Prevention of Cruelty to Animals Act, 1960, which recognizes that animals have the ability to suffer both mentally and physically, implying that all creatures have the capability to be sentient. Its primary purpose is to safeguard animals from undue suffering and pain. This underlying acknowledgment of animal sensibility is also repeated in India's Constitution, which embodies the notion of Ahimsa and requires people to "have compassion for living creatures".

There are many other current legislations in place in India that seek to protect and ameliorate the existing situation of animal welfare in the country- The Wildlife (Protection) Act, 1972 makes it illegal to kill, poach, trap, poison, or injure any bird or wild animal in any manner. It also mandates the formation of Wildlife Advisory Boards in each State; The Performing Animals (Registration) Act 2001 also states that without statutory approvals no animals can be showcased, exhibited or exploited for performances. This was done principally to keep a track on the treatment given to animals in the zoos and circuses all around the country. There are 149 zoos (including 14 rescue centres and 1 circus) currently (31.03.2020) as defined by § 38H (1) of Wild Life (Protection) Act of 1972.[80]; The Performing Animal Rules, 1973 prohibits the utilisation of animals for entertainment purposes unless registered; The Prevention of Cruelty to Draught and Pack Animals Rules, 1965 also divides animals into 3 categories of " large", "medium" and "small" with maximum load limits for each and allows the Animal Welfare Board or the concerned authority to take custody of the animals in the event of any suspected crime.

However, despite all these legislations there is an opportunity for improvement in a variety of animal welfare related areas. The PCA Act for example, exempts animals involved in scientific research from cruelty concerns. Religious slaughter can also be carried out in India without the need for pre-stunning.[81] Moreover, there is a dearth of rules governing rearing and breeding of farm animals, most notably the uncontrolled dairy systems in urban areas that are rapidly emerging with extremely low welfare levels. The Indian law also permits hunting of the endangered animals for a variety of objectives. Fur cultivation is also not prohibited in our country. Additionally, the lack of enforcement measures linked with animal cruelty reflects on the government's unwillingness to take such cruelty sternly. Another structural hurdle to

[80] CENTRAL ZOO AUTHORITY, available at: https://cza.nic.in/uploads/documents/reports/english/ar%202019-20.pdf (last visited Dec. 11, 2021).
[81] WORLD ANIMAL PROTECTION, https://api.worldanimalprotection.org/sites/default/files/2020-India-UPLOADED.pdf (last visited Dec. 11, 2021).

improving animal welfare is the lack of significant penalties for animal cruelty violators. All these areas require improvements so that India can edge nearer to the goal of animal welfare.[82]

The Indian Judiciary has been slowly but steadily incorporating effective changes. Though the clash between right and duty based approach still remains the thing which is sure is that, non-human animals cannot be treated as property and they are entitled to humane and dignified existence. The question remains that which approach would be better.

A. A BRIEF SUMMARY OF ANIMAL WELFARE BOARD OF INDIA V. A. NAGARAJA & ORS ON 7TH MAY, 2014[83]

Every animal is worthy enough to enjoy a good life and obtain the benefits of their five domains, i.e., nutrition, environment, health, behaviour and mental state.[84]Keeping this in mind, the apex court professed a breakthrough judgement of Animal Welfare Board of India v. A. Nagaraja & others on 7th of May, 2014 by banning the practice of jallikattu and bullock cart racing.[85]

FACTS OF THE CASE

This case deals with two separate cases of similar nature. First, which challenged the decision of the Madras High Court, where it questioned the rationality of the Tamil Nadu Registration of Jallikattu Act and some writ petitions. Secondly, it challenged the judgement of the Bombay High Court which upheld the Ministry of Environment and Forests notification of 11.07.2011.

The Supreme Court prohibited the practice of jallikattu bull fights and bullock cart racing, which were traditionally carried out in the states of Tamil Nadu and its neighbouring places. This was done in order to preserve the animal rights and to ensure welfare of the bulls that participated in these events and were subjected to brutality.

In 2006, a petition was filed at the Madras HC in order to seek permission for conducting jallikattu. The court didn't grant permission, but through an appeal the division bench allowed its practice with some conditions.

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[82] Ibid.
[83] Animal Welfare Board of India v. A. Nagaraja, (2014) 7 SCC 547.
[84] WORLD ANIMAL PROTECTION, https://www.worldanimalprotection.org.nz (last visited Apr. 2, 2021).
[85] Prachi Bhardwaj, Jallikattu: Constitution Bench to decide the constitutionality of the TN Amendments to Prevention of Cruelty to Animals Act, 1960, THE SCC ONLINE BLOG (Feb. 3, 2018), available at; https://www.scconline.com.

The Animal Welfare Board of India (AWBI) issued a notice prohibiting use of bulls as performing animals. So, they approached the apex court against the order of the division bench of Madras and also to enforce their notice.
Hence, it was held that an interim order should be passed by validating the AWBI's notification and also the rights which were guaranteed to the bulls under the Prevention of Animal Cruelty Act.

But many instances are coming up in order to continue the practice of jallikattu, but all are going to vain when the matter comes to the court. In 2016, a case came up in order to strike down the notice issued by the AWBI, but it was held that this notice is absolutely valid on the grounds of brutality towards the bull and the need of the hour is animal welfare rather than claimed customs and tradition.[86]

ISSUES RAISED

The main issue of this case is that whether the activities carried out in the states of Tamil Nadu and Maharashtra violate § s 3, 11(1)(a) and (m), 21 and 22 of the Prevention of Cruelty to Animals Act, including articles 51A(g) & (h) of the Indian Constitution and the notice issued by the AWBI.[87]

ARGUMENTS ADVANCED

It is argued by the people who want the continuance of jallikattu that it is their tradition and custom to carry out this activity and conducting this event does not cause harm to any individual or an animal. But in reality, it is not true.

In the name of tradition, a lot of social evils like sati, dowry, poaching, etc. are carried out, which harm the society in a diverse way. But this does not act as a defence for the continuance of its practice.

On the other hand, AWBI has presented stats that show that about 40 persons lost their lives to this event from 2008 to 2014. The bulls are brutally treated where they are chained, hit by a stick, applied burning powder on their body, etc., which causes them contusion.

The constitutional stand on this point is that in many occasions it is concluded that animals have a fundamental right against administering pain. It should be the responsibility of the

[86] Compassion Unlimited Plus Action & Ors. V. Union of India & Ors., Writ Petition (Civil) No.24 of 2016, the Supreme Court of India, Dated 12/01/2016.
[87] SUPREME COURT OF INDIA, available at: https://main.sci.gov.in (last visited Apr. 7, 2021).

government and the animal welfare organisations to protect the various freedoms of animals, i.e., freedom from starvation and dehydration, freedom from pain, freedom from agony, injury and illness, freedom from fright and freedom to showcase regular behaviour.[88]

HELD

The Supreme Court of India held that the practice of jallikattu, bullock-cart racing and similar events violate § s 3, 11(1) (a) & (m) of the Prevention of Cruelty to Animals Act and affirmed the notice issued by the AWBI and hence these activities are prohibited throughout the country.

The court manifested the following directions[89]:

1. The court mentioned that the bulls are guaranteed certain rights under the PCA Act, i.e., § s 3 and 11, also Article 51A (g) and (h), which cannot be taken away.
2. The five freedoms given to animals must be secured and guarded by the governments and animal welfare organisations.
3. The responsible authority should set up a body and employ an in charge to look after whether the welfare of animals is being taken care of or not.
4. The authority's duty is to ensure that no harm or pain is inflicted on the animal.
5. The government and the welfare organizations should take necessary measures to impart awareness and education in matters of humane treatment of animals.
6. In case of violation of any provisions of the PCA Act, fines, penalties and punishments should be imposed.
7. The Tamil Nadu Registration of Jallikattu Act was found to be constitutionally void as it infringed article 254(1) of the Indian constitution, as it was repulsive to the PCA Act.

VI. THE RIGHTS-BASED APPROACH:

The Indian Constitution is the principal law of the land which includes the elementary political laws, rights and duties of the people, DPSPs, methods, policies and powers of the governmental institutions. This "living document" acknowledges the sanctity of animal existence and inculcates as a fundamental duty of the citizens to protect and treat these animals with dignity.

[88] INDIAN KANOON, https://indiankanoon.org/doc/39696860/ (last visited Apr. 7, 2021).
[89] Aparajita Balaji, Animal Welfare Board of India vs A. Nagaraja & Ors, LAW TIMES JOURNAL (Mar. 25, 2019), available at: https://lawtimesjournal.in/animal-welfare-board-of-india-vs-a-nagaraja-ors.

In our country, despite of having local laws and rules preventing animal brutality, further identification is given to animal rights under the constitution itself. The constitutional validity and framework for animal protection in our country is vested in the following parts of the constitution[90]:

1. ***FUNDAMENTAL RIGHTS-*** Part III of the Constitution deals with the fundamental rights, inculcating articles 12- 35 within it. They lay down general rights which are necessary for mental, moral and religious development of the people. When dealing with animal welfare, Article 21 i.e., Right to life and Personal liberty has vast relevance. The mentioned article states that no person shall be deprived of his life and personal liberty except through a proper procedure established by law. The jallikattu case has resulted in imposing some animal rights which fall under the ambit of article 21. It states that every genus has a right to life and safety and it has been given a wide interpretation that 'life' includes all the forms of life which are basic to the environment that should be preserved and protected with dignity and honour. The court held that article 51A (g) of the Indian constitution is the "magna carta of animal rights".[91] In a case[92], it was held that animals should also be granted with some legal rights as compared to humans as they also have inherent value and moral worth. Similarly, in another case[93], the high court mentioned about the fundamental rights of birds to fly in the sky as opposed to keep them in a cage.
2. ***DIRECTIVE PRINCIPLES OF STATE POLICY-*** Part IV of the Constitution deals with the directive principles of state policy, inculcating articles 36-51 within it. These are just basic guidelines, which the state may use as a basis for forming laws and policies. They are not enforceable in the court of law. When dealing with animal welfare, the DPSPs which assist the state and devising laws and policies are articles 48 and 48A. The former mentions that the state must protect and improve the species and forbid the killing of cows, calves, dairy and bovine cattle's. Whereas, the latter aims at directing the states to preserve and conserve the environment and wild life of our country. The matter regarding cow slaughter was a very controversial issue due to the sacredness of the animal in Hindu culture.

[90] Taruni Kavuri, The Constitutional Scheme of Animal Rights in India, ANIMAL LEGAL & HISTORICAL CENTER, MICHIGAN STATE UNIVERSITY (2020), available at: https://www.animallaw.info/article/constitutional-scheme-animal-rights-india.
[91] Abha Nadkarni & Adrija Ghosh, Broadening the scope of liabilities for cruelty against animals: gauging the legal adequacy of penal sanctions imposed, 10 NUJS L. REV.1, 12-13 (2017), available at: https://nujslawreview.org/2017/08/16/broadening-the-scope-of-liabilities-for-cruelty-against-animals-gauging-the-legal-adequacy-of-penal-sanctions-imposed/.
[92] N.R. Nair and Ors. V. Union of India, AIR 2000.
[93] People for Animals v. Md. Mohazzim, 2015 SCC Online Del 9508.

In a 1961 case[94], a petition was filed in the apex court on the grounds of constitutional validity of laws on banning cow slaughter in Bihar. The petitioner argued that his fundamental right of right to freedom of religion[95] was getting infringed as they celebrate the festival of Bakr-Id by sacrificing a cow. On the other hand, the court mandated that no Muslim texts allowed cow slaughter. Hence, it held that no rights of the Muslims are being violated.

3. ***FUNDAMENTAL DUTIES-*** Part IV A of the constitution deals with the fundamental duties and are included in article 51A. This article was inculcated in the constitution through the 42nd Constitutional Amendment Act, 1976 in order to incline itself with the UDHR. Just like the DPSPs, even the fundamental duties are not enforceable in the court of law, but are taken up for understanding various constitutional and judicial interpretations. In matters relating to animal rights, clauses g and h of article 51A is of paramount importance. The former imposes a duty on the people of India to preserve, secure and boost the natural environment and have empathy for all living creatures.

   In a 2005 case[96], it was held by the Supreme Court that the purpose of the parliament in validating article 51A was to sync and incline it with articles 48 and 48A, in order to guarantee that the essence of all provisions are appreciated.

4. ***ALLOCATION OF POWERS BETWEEN THE CENTRE AND STATES-*** The ability of the parliament and the state legislatures to propound laws are mentioned in article 246 of the constitution. The matters on which they can make the laws are divided into three lists i.e., union list, state list and concurrent list, which is mentioned in the seventh schedule. When dealing with animal welfare and their rights, there are some items mentioned in the aforesaid lists on which laws are made. In the state list, item 14 empowers the state to conserve, safeguard and enhance stock, ward off any kind of animal diseases and spread awareness about animal welfare and how to ensure their well-being. Whereas, items 17 and 17B empowers both the centre and state to make laws regarding preventing any kind of brutality against animals and safeguarding wild species of animals and birds.[97]

[94] Abdul Hakim Quraishi and Ors. V. State of Bihar, 1961 AIR 448, 1961 SCR (2) 610.
[95] INDIA CONST. art. 25.
[96] State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat & Ors. 2005.
[97] Taruni Kavuri, Overview of Animal Laws in India, ANIMAL LEGAL & HISTORICAL CENTER, MICHIGAN STATE UNIVERSITY (2020), https://www.animallaw.info/article/overview-animal-laws-india.

VII. THE DUTY-BASED APPROACH:

Gandhi has endorsed for the "lower animal world" and he had encouraged people to be compassionate towards them.[98] He laid emphasis on the fact that "the more impotent is a life, the more pity we should have for them".[99] From this, it is implied that giving animals parallel rights to that of humans was not what he advocated for.

Duty-based approach rests on the principle that human beings have a duty and responsibility to protect and ensure a non-human's welfare. Animals do not have the competence to express their feelings and hardships and thus, humans should be duty-bound to them as they are a part of the word "species". The Prevention of Cruelty to Animals Act 1960, has been the primary law against any form of cruelty that is inflicted towards animals and it is favourable to the principle of necessity which means that any 'unnecessary harm and suffering' should not be inflicted.[100]

Martha Nussbaum, a philosopher gave the capabilities approach where she argued that compassion should not be thought about as an emotion but it should be a duty.[101] Thus, if a suffering caused by an animal is a result of a human action, then the person should be punished because of the direct duty stemming from the compassion. This duty of compassion means not causing any suffering and hardships on the animals and hence, it is a form of right for the animals whose violation, will lead to be a matter of justice.

She also gives the concept of "dignified existence" for animals, which would comprise of-having sufficient and proper nutrition and physical activities, liberty from any kind of cruelty or suffering, liberty to adopt to their characteristics, liberty from all kinds of fear and freedom to be at peace.[102] Hence, the duty which humans have to non-human animals are not because

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[98] Dr. Sonali Mahapatra, Evolution of Animal Rights in India: From Property to Person (Analysis), FRIENDS BEYOND SPECIES (Last visited on Feb. 28, 2020 at 02:14 p.m.),
Available at: https://saaewnluo.in/2020/02/28/evolution-of-animal-rights-in-india-from-property-to-person/.
[99] *Ibid.*
[100] Animal legal & historical center the prevention of Cruelty to animals act, 1960 (59 of 1960), as amended by central act 26 of 1982. The prevention of cruelty to animals act, 1960 (59 of 1960), as amended by central act 26 of 1982, available at: https://www.animallaw.info/statute/cruelty-prevention-cruelty-animals-act-1960 (last visited Apr. 7, 2020 at 02:30 p.m.).
[101] Jonna Wiblom et al., Self-examination, compassion and narrative imagination in students'Learning Culture and Social Interactions, Vol. 29, June 2021, ELSEVIER LTD. 1, 4 (2021), available at: https://reader.elsevier.com/reader/sd/pii/S2210656121000271?token=E6AEBE1C91B223298C4DA57F54E69CF20CE40B8490EFF20B3BF3C126BD04ABDE5391BF1D1AE59F0250FD030DC496A15F&originRegion=eu-west-1&originCreation=20210407075859.
[102] Maratha Nussabaum, Justice For All Shortcomings and potentials of the capabilities Approach for protecting animals, Frontiers of justice, University of Virginia, available at:

of any kind of charity but it is because they have an inherent quality that gives them a right to dignified existence and to flourish and strive. This similar thought was also given in the N.R Nair judgement.

There is a need for a positive and direct duties rather than negative and indirect ones. It is so because human beings possess control of some animals directly and hence, the responsibility of their dignified existence vests on them. Also, with the development of the society, humans are disturbing and taking away the habitat of the animals. The "balance of nature' can only be maintained by enforcing positive and direct duties.

This concept of duty of compassion is also found in the Indian Constitution. Article 51A (g) (which is a part of Fundamental Duties) states the humans should have compassion for all the living creatures. The various judgements also aim for welfare of the animals (but with the exception of doctrine of necessity).[103] The legal system of India classifies two categories- one of property and the other of juristic person.[104] Animals can be placed in the category of property but is animate object. So, a duty-based approach can be helpful to protect the animals. The main problem is not of giving rights to the non-humans but it is, that of implementation of the positive and direct duties.

VIII. PARENS PATRIAE AND THE PUBLIC TRUST DOCTRINE:

In literal words, this doctrine means 'parents of the country'. It symbolises the state as a parent and imposes on it an obligation to protect those who are helpless and need protection. The doctrine came into light in the landmark case of *A. Nagaraja*, where it was used by the Supreme Court to impose duty on the state to safeguard and protect the animals as they were speechless creatures who did not possess the ability think logically as humans do.

The Public Trust Doctrine enables the state to act as the trustee and preserve and oversee the natural resources. In terms of animal welfare, it means that government has a right to safeguard

https://www.law.virginia.edu/system/files/news/f17/Bob_Barker_Prize_Jennifer%20Davidson.pdf (last visited Apr. 7, 2020).

[103] Gilles Tarabout, Compassion for Living Creatures in Indian Law Courts, 10 RELIGIONS 1: MDPI, 18 (2019), available at: https://www.mdpi.com/2077-1444/10/6/383.

[104] Id. at 13.

the animals and also have the duty to ensure their well-being. In a case[105], the High Court of Bombay invoked the fundamental duty enshrined in Article 51A(g) in addition to the doctrine of public trust and ordered that the elephant should be removed from the possession of the temple and be kept at a sanctuary because of the cruelty which it was subjected to.

Therefore, the state has the following duties-

(1) To weigh all the probable consequences of any organised activity;

(2) Only the activities which does no significant harm to the wildlife resources should be permitted;

(3) The activities allowed should be continuously monitored so as to preserve the trust;

(4) File a law suit in lieu of parens patriae doctrine, to prohibit activities that would cause harm to the animals and recover the damages.[106]

IX. COMPARATIVE ANALYSIS BETWEEN RIGHTS BASED APPROACH AND DUTY BASED APPROACH:

Animal welfare and their rights have been a persistent issue in India. Many judicial judgements have decided to bring these species under the domain of Article 21 of the Indian Constitution where the right to life and personal liberty could apply to animals as well. But after a lot of deliberations, the result is that the rights based approach of animal welfare is not a viable option because they are inconsistent with the concept of jurisprudential rights and there may be difficulties in differentiating between human and animals, if same rights are conferred upon them. In order to cover up these lacunas, some of the jurists have suggested a shift to a duty based approach, where responsibility is imposed on the governments and the people to protect and safeguard the wildlife and the forests.

When determining whether animals possess legal rights or not, the main focus lies on their claim rights, i.e., right to be treated equally, right not to be harmed, right to be protected against cruelty, etc. Generally, it is considered that animals are not legal subjects because they cannot

[105] M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388.
[106] Deborah G. Musiker, The Public Trust and Parens Patriae Doctrines: Protecting Wildlife in Uncertain Political Times, 16 PUB. LAND L. REV. 87, 115 (1995), available at: https://core.ac.uk/download/pdf/232674198.pdf.

obtain a legal right without performing a legal duty. We also know that since they are not in the position to understand their legal relationship with others, they cannot perform a legal duty. Also, in the jallikattu case[107], the maxim of Parens Patriae was emphasized, which meant that the state is responsible or is under a duty of securing and protecting the rights of the animals, since the animals are unable to take care of themselves.

The duty of the state to take care of the animals can be compared to that of the will theory, where even if we assume that animals have rights, they can also be represented by someone else, who has authority over them. For example, a parent is under the authority to exercise the rights of its child, similarly the legal holder of the animal can exercise the animal's right on its behalf.[108] But, this is not possible in the case of animals as practically speaking, for an animal to have a 'legal representative', the animal firstly should be qualified to be a 'right-holder' which is not possible.

Though, both the approaches ultimately have the common goal of protecting animals, but the debate arises on the fact that which is better suited to its achievement. It is important to adopt an approach that is more practical and will aim at the well-being and security of the animals. Time and again, it has been proved that bending towards the duty based approach is a much more viable and feasible idea. The proponents of the duty based approach advocate the harsh truth about animals being property of the humans and this idea is highly disregarded by many jurists. Also, the courts have given a wrong interpretation by including animals under the ambit of Article 21 of the constitution. Hence, it is time we put an end on the rights based approach and help increase the role of the humans in preserving and safeguarding wildlife in our country.

X. CONCLUSION:

Granting the non-human animals legal rights will only lead to inconsistency. With the rising cases of animal cruelty, a method needs to be brought that would make a visible change. Human beings have to change their outlook and see the animals as dignified creatures who deserve to

[107] Animal Welfare Board of India v. A. Nagaraja and Ors, CIVIL APPEAL NO. 5387 OF 2014 (@ Special Leave Petition (Civil) No.11686 of 2007) (2014).
[108] Torben Spaak, Animal Law: Human Duties or Animal Rights, RESEARCH GATE (Oct., 2020), available at: https://www.researchgate.net/publication/344445577_Animal_Law_Human_Duties_or_Animal_Rights.

be protected and cared. Animals should not be harmed and be subjected to unnecessary suffering.

In India, the judicial development has also come a long way and in many judgements, the courts have granted "legal personhood" to animals.[109] The Delhi High Court in its recent decision ruled that animals have a legal right to be regarded with dignity, compassion and respect. It went on to state that the community/street dogs have "right to food" and the residents have a "right to feed" the dogs. The ruling though well-intended presents several critical problems- first is the implementation issue and second, is of judicial overreach, particularly in situations concerning legal status of the animals.[110]

In the another recent landmark judgment of *Narayan Dutt Bhatt v. Union of India*[111], the Uttarakhand High Court declared that the whole animal kingdom is bestowed with privileges, responsibilities and liabilities just like a natural living person and it has a separate legal identity of its own. This decision was a result of a Public Interest Litigation which was filed by the petitioner in 2014 regarding the well-being and physical condition of animals which were being used as a mode of transport (for example-donkeys, horses, etc.) for carrying persons and goods from the area of Uttarakhand to Nepal. The verdict was supported with the provisions of the Constitution through Article 21 as the interpretation of the term 'life' was also extended to animal life. This judgement provided for a crucial development in the aspect of animal welfare and protection as they were conferred with legal rights and even be represented in the court of law by their guardian.

In India the legislations for animal welfare (like the PCA Act) rests on the notion of ownership of the animals. Even the Constitution is tilted towards the welfare or duty based approach rather than a rights based one. These judicial developments do not itself guarantee animal well-being as these decisions are not binding in nature. Giving animal rights without any sought of legislative basis leads to a system in which these judgements are the only source of such rights.[112] Therefore, the first initiative towards changing the status of animals has to be taken by the legislature and no one else so that maximum security is provided to the animal kingdom, keeping in mind the importance of the legal personality of human beings.

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[109] Pranjal Pranshu, A Study of Animals as Legal Persons, 1 ILR 1, 3-4 (2020), available at: https://indraprasthalawreview.in/wp-content/uploads/2020/10/Paper-9-converted.pdf.
[110] Apporva, Though Well-Intentioned, Courts' Recognition of Rights for Animals Is Legally Problematic, THE WIRE, available at: https://thewire.in/law/courts-animal-rights-legal-problems (last visited Dec. 11, 2021).
[111] Narayan Dutt Bhatt v. Union of India and Ors, 2018 SCC Online Utt 645.
[112] Ibid.

A PIL was filed to grant 'legal personhood' to the non-human animals. Though it is not this part that is supported in the article yet, it addressed the possible steps that could be taken to improve the current situation of animal cruelty- It requests that the court orders the National Crime Records Bureau to publish and report figures and cases concerning animal cruelty; It also asserts that provisions of the PCA Act is falling short of protecting the animals and hence, it should be amended accordingly; It also urges on the need to create emergency units for animal care, online portals for reporting any violence and autonomous committees to review allegations; Lastly, it also asks the court to order states to ban animal fights, set up funds for animal well-being, slowly phase out animal testing and in case of subordinates' inability to administer and implement the laws, the superior should be made liable.[113]

[113] Dr. Rajesh K. Reddy, Groundbreaking Litigation Seeks to Extend Formal Personhood Status to India's Animal Kingdom, LEWIS & CLARK (Sept. 8, 2020), available at: https://law.lclark.edu/live/news/44234-groundbreaking-litigation-seeks-to-extend-formal.

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POLICY SHORTCOMINGS: EFFECTIVE IMPLEMENTATION OF THE RIGHTS OF PERSONS WITH DISABILITIES ACT, 2016

Apurva Thakur[*]

ABSTRACT

Disability rights movements around the world have made societies recognize the need of an effective law and policy to ensure rights of Persons with Disability (PWD). To attain this, the United Nations Convention on Rights of Persons with Disabilities (UNCRPD), 2006 was accepted by countries around the world. Encouraged by international commitments, India enacted the Rights of Persons with Disabilities Act, 2016 (RWPD Act) with an intent to balance the moral-social-legal and political aspirations of PWD. The effectiveness of any legislation, however, depends on its efficacy and not merely in text.

The Paper suggests that implementation of the RPWD Act requires effective policy strategies from governments. The Paper also identifies inadequacies in the National Disability Policy, 2006 and identifies wrong steps taken in designing appropriate policy thereunder. The pressing need to revamp the existing disability policy will necessitate structural changes along with a shift in perceptions of disability. The focus should be to create accessible external environments rather than any inability of the disabled individual. The author suggests universalization of disability policies to address endemic shortcomings and also create an un-stigmatized and equal society for PWD.

KEYWORDS: Accessible, RPWD Act 2016, Disability, policy

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I. INTRODUCTION

In a popular painting titled 'The Cripples', four men with locomotor disability are depicted, each of them, holding some form of prosthetics and having a deformed face. All of them are looking for the best begging spot and are engaged in overcoming challenges that are thrown up due to their disability. The painting depicts uncertainty, ordinariness and persistence rather than privilege. Disability presents an opportunity for solutions along with throwing up a multitude of problems. [114] It forces us to look at the unusual and seek non-linear solutions. Disability is intrinsic in the fact of human life.[115]

Approximately 15% of the world's population has some form of disability[116]. An estimated 2.1 % of the Indian population is disabled, amongst which, 12.6 million are male and 9.3 million are females.[117]

The understanding of disability in India is mired in a complex web of stigmatization, a belated disability rights movement and an over-reliance on westernized models of law and policy formulation. As a result, disability in India lacks a clear definition, which gives wide power to the government to add, remove and decide, what constitutes disability. The categorization of disability is overly reliant on the medical model despite an increasing trend towards inclusivity and a theoretical shift from the medical model to the sociological model.

In keeping with international obligations under the United Nation Convention on Rights of Persons with Disabilities, 2007[118] (UNCRPD), the Government of India passed two legislations entitled Rights of Persons with Disabilities Act, 2016[119] (RPWD) and Mental Health Care Act 2017, (MHCA). These legislations were intended to bring about sociological shifts in perceptions of disability. However, a gap soon yawned between the intention of the RPWD

[114] ALBRECHT, G. L., SEELMAN, K. D., & BURY, M. 51 (2001). Handbook of disability studies. Thousand Oaks, Calif, Sage Publications.
[115] Garland-Thomson, Rosemarie. Eugenic World Building and Disability: The Strange World of Kazuo Ishiguro's Never Let Me Go. Journal of Medical Humanities. (2015). Available at: DOI- 38. 10.1007/s10912-015-9368-y.
[116] World Health Organization, World Report on Disability (last accessed on April 12,2020) available at: https://www.who.int/disabilities/world_report/2011/report/en/
[117]Office of the Registrar General & Census Commissioner, India Ministry of Home Affairs, Government of India available at: https://censusindia.gov.in/Census_And_You/disabled_population.aspx (last accessed on April 12, 2020)
[118] UN General Assembly, Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106, (last accessed on April 12,2020) available at: https://www.refworld.org/docid/45f973632.html
[119] Rights of Person With Disabilities Act(2016), Act 49 of 2016.

Act and the intent thereof. The Paper will examine these deficiencies and suggest measures to achieve effective implementation.

XI. PERCEPTIONS OF DISABILITY

In order to gauge the true nature of disability, it is necessary to divorce impairment from disability. Impairment means that a person has limited function of one or multiple bodily function, and is a purely medical term. On the other hand, disability is a socio-political barrier which hinders full participation of Persons with Disability (PWD) in society, primarily due to the inability of the State to formulate an effective integration policy.

Perceptions of disability are multi-faceted and stem from systemic discrimination based on cultural perceptions. This paper explores the two theories of disability viz., the medical and the sociological model.

A. THE MEDICAL MODEL:

The medical model of disability describes it as something of a personal tragedy that an individual has to face and sometimes their families too. It categorizes disability based on medical science and devises strategies aimed at alleviating such disadvantages. The focus is on remedies which lean towards compensation, whether by way of concessions or relaxations, rather than remedies which should be based on inclusion. Under the medical model, PWD are based on an *inherent* inequality by way of their disability and need to be treated specially by way of reservations. The medical model is criticized because of a singular focus on impairment of the disabled for the purpose of legal redressal distracts attention from the social and structural barriers that prevent 'equal participation' of the disabled in the society.[120]

B. THE SOCIOLOGICAL MODEL:

The sociological model of disability focuses on inclusion by presuming that disability is a mere difference and that persons with disability are able and equal. Some authors have regarded disability as another form of human diversity.[121] The only circumstance that makes such people different is the apathetic approach of the government while drafting policies for the disabled, i.e., the policy which overlooks constructing a ramp to every staircase and doesn't provide a

[120] Renu Addlakha and Saptarishi Mandal, Disability Law in India: Paradigm Shift or Evolving Discourse? 44 EPW 62-68, (2009).
[121] Greg Bognar, Is Disability a Mere Difference, 42 Med Ethics 46–49, (2016).

braille copy of all texts. The sociological model attempts to break free from the constraints of mere medical incapacity toward a truly equal society.

In India, even in decisions around disability, the medical definition is primarily relied upon, since it is the most visible and available piece of evidence. If medical disability of a petitioner can be proved (for rights) and disproved (for liability), then the result of the case hinges on this sole factor. In *Deaf Employees Welfare Association v UOI*[122], equal treatment of deaf as well as blind government employees with regard to transport allowance was sought. The court, in its wisdom, allowed the petition granting the concession, stating that the type of disability cannot be a ground of further discrimination. In passing such an order, the court unknowingly used the medical definition of disability, albeit to prevent a social discrimination. While disability is defined as a medical concept, its implications in law are socio-legal. These two concepts of disability are inter-woven and cannot be extricated. When these two fundamentally conflicting definitions of disability are applied, it is a jurisprudential nightmare, as the scope widens beyond comprehension, leading to dilution of common law and policy.

More recently, the Supreme Court in *Vikash Kumar v. Union Public Service Commission*[123] has emphasized the need of an inclusive disability policy in order to effectively implement the RPWD Act, 2016. It discussed the ambit of 'reasonable accommodation' and urged the states to have a purposive approach towards disability law and policy.

XII. THE INDIAN DISABILITY POLICY

The National Policy for Persons with Disability was framed in 2006[124] (Policy) was enacted to usher in physical as well as physiological changes in the approach to PWD. Interestingly, it states that *"every child with disability must have access to appropriate pre-school, primary and secondary level education by 2020"*.[125] It states that special care must be taken to increase accessibility - physically, structurally and socially. The recommendations include barrier free access to buildings, adapting methods of teaching to suit needs of disabled children, availability of braille/audiobooks/ sign language interpreters and promotion of distance learning programs

[122] Civil Petition 107 of 2011, decided on December 12, 2013
[123] Vikash Kumar v. Union Public Service Commission, SLP No. 1882 of 2021
[124] National Disability Policy, 2006 (last accessed on 18 June, 2020) available at: https://www.mospi.gov.in/sites/default/files/reports_and_publication/statistical_publication/social_statistics/Chapter%208%20-National%20redressal.pdf.
[125] National Policy for Persons with Disabilities, No.3-1/1993-DD.III Government of India Ministry of Social Justice and Empowerment (Last accessed on 18 June, 2020) available at: https://disabilityaffairs.gov.in/upload/uploadfiles/files/National%20Policy.pdf.

etc. However, even after notification of the RPWD Act, 2016, the Policy remains the same, in spite of having been framed a decade earlier. Moreover, even the recommendations contained in the Policy are yet to be implemented since much of the suggestions are still being recycled and shuttled between the Human Resource Development Ministry and the Ministry of Social Justice and Welfare.

XIII. HURDLES IN POLICY IMPLEMENTATION

DIVESTMENT OF RESPONSIBILITY TO STATE AND LOCAL GOVERNMENTS

The RPWD Act has made the Central, State and Local governments responsible for ensuring implementation of its obligations[126]. The formulation of the Policy has now been divested to the respective State Governments and local bodies. This divestment of power to the state governments has proven to be ineffective as most states lack the will and finances to introduce disability programs. In 2018, merely one-third of the States had notified the Disability Rules.[127].

National budgets will be tight for the foreseeable future, especially in light of the COVID-19 pandemic. Any policy will need to justify expenditure of every rupee in order to see the light of the day. This raises the age-old policy dilemma, of whether to cut-back benefits from a small § of society or to continue long standing welfare policies for a larger § of society, despite increasing fiscal deficits.

Devolution is the panacea of the day. While the Union Government has increasingly devolved its responsibilities under the RPWD Act to the states, it has not provided enough funds to the states to enable them to do so. This pattern is, in turn, repeated in local Governments. Political agencies are apparently constrained on their operational roles to private sectors and NGOs as much as they can. However, this has led to an abdication by the Government of its responsibilities under the RPWD.

[126] Supra Note 6; §2 (b)

[127] Only one third states have notified rules under disabilities act: NCPEDP, Business Standard, (July 22, 2018) Available at: https://www.business-standard.com/article/pti-stories/only-one-third-states-have-notified-rules-under-disabilities-act-ncpedp-118072200333_1.html. (last accessed on June 18, 2020).

POOR BUDGETARY ALLOCATION

The budgetary allocation to the Department of Social Welfare and Empowerment Ministry is INR 1325.39 crores for the year 2020-2021, which is a slight improvement from the budget allocation of INR 1009.11 in 2019-2020.[128] The allocation of a mere 0.04 per cent of the total expenditure of the Government is grossly inadequate to address the needs of a population of nearly 2.6 crore persons.[129] Moreover, the allocations for the Department of Social Welfare have remained constant for the last three years.[130] It is discouraging that even those policy schemes which are focused on only medical rehabilitation of PWD such as Assistance to Disabled Persons for purchasing/fitting of aids/appliances (ADIP), Artificial Limbs Manufacturing Corporation of India (ALIMCO); and National Handicapped Finance and Development Corporation (NHFDC), show a declining in budgetary allocation[131]. The Research and Rehabilitation Institutes and the Institute of Sign Language find no allocation in this financial year (2020-2021). Scheme for Implementation of Persons with Disabilities Act (SIPDA), which concerns accessibility and district rehabilitation, finds a reduction of funds from INR 63.50 crores when compared to 2019-2020.[132]

The Government's dictum seems to be "devolution" down the chain of government and out into the private-profit making sectors or to the individual in the form of tax reliefs. The Disability Policy requires the state and local governments to spend on providing facilities to PWD, yet, the Financial Memorandum does not provide any estimate of the finances required to meet the Policy obligations.[133] There is no estimate of the expenditure expected to be incurred by the Centre or States, or the manner of sharing of funds between them. The memorandum states "since disability is a state subject under the Constitution, it is also expected that over time the states will contribute substantially to the implementation of the provisions

[128] Ministry of Social Justice and Empowerment Demand No. 93 Department of Empowerment of Persons with Disabilities, Govt. of India, (last accessed on 20 April, 2021)available at: https://www.indiabudget.gov.in/doc/eb/sbe93.pdf.

[129] Disabled Persons in India: A Statistical Profile (2016) (Last accessed on 1 June, 2021) available at; https://mospi.nic.in/sites/default/files/publication_reports/Disabled_persons_in_India_2016.pdf.
CRPD Alternate Report for India (2019) (last accessed on 20 April,2021) available at: https://accessability.co.in/wp-content/uploads/2019/02/CRPD-Alternate-Report-for-India-1.pdf, pp. 44
[131] Decoding the Priorities: An analysis of the Union Budget (last accessed on 25 April, 2021) available at: https://www.cbgaindia.org/wp-content/uploads/2020/02/Decoding-the-Priorities-An-Analysis-of-Union-Budget-2020-21-2.pdf?cv=1.
[132] Ibid.
[133] CRPD Alternate Report for India (2019) (last accessed on 20 April, 2021) available at; https://accessability.co.in/wp-content/uploads/2019/02/CRPD-Alternate-Report-for-India-1.pdf.

of the Bill." [134] However, without adequate funds, the implementation of the Bill is at best patchy, and at worst, non-existent.

The spending by the Central Government towards PWD has remained fixed at 0.02% in the last three years.[135] Even though the budgetary allocation is dismal, even those funds remain underutilized.[136] The end result is a complex administrative web of under-funding and mis-management.

FAULTY STATISTICS AND POOR MONITORING

India lacks a comprehensive statistical research study on disabled population, this is so, in part, due to poor interest and therefore poor fund allocation to promote policy-research through better disability census. Moreover, even the veracity of the census data gathered is questionable as being outdated and under-reported. Governments often, also inflate the level of effort and success in implementation of welfare schemes. There is no independent and reliable research organization that may gather unbiased data. As a result, what remains is the official government, non-contested data.

For instance, the 2011 census states that the disabled population in India is 2.21%[137], which is lower than global average. The World Bank however, estimates that there is a prevalence of 4-8% disability in India.[138] This shows a variance of 2-6% in disability estimates. When put in percentages, it may look like insignificant, but when put in absolute numbers, that translates to one in every forty-four persons that are disabled. This sort of statistical representation depicts the disabled population as a small minority which then may justify the meagre involvement of the Policy makers toward PWD, allowing governments to focus on larger agendas, like poverty eradication or mal-nutrition. This approach denies the fact that disability should be a major part of the healthcare policy- *"we are all temporarily abled*[139]*"*. If India's largely young, population

[134] Legislative Brief: The Rights of Persons with Disability Bill, 2004, PRS India (last accessed on 20 April, 2021), available at: https://www.prsindia.org/uploads/media/Person%20with%20Disabilities/Legislative%20Brief%20%20-%20Disabilities%202014.pdf.

[135] CRPD Alternate Report for India (2019) (last accessed on 20 April, 2021) available at: https://accessability.co.in/wp-content/uploads/2019/02/CRPD-Alternate-Report-for-India-1.pdf.

[136] Ibid, pp. 4.

[137]Office of the Registrar General & Census Commissioner, India, GOI (last accessed on 10 May, 2021) available at: https://censusindia.gov.in/census_and_you/disabled_population.aspx.

[138]The World Bank, People with Disabilities in India: From Commitments to Outcomes (last accessed on 20 June, 2020) available at: https://documents.worldbank.org/curated/en/577801468259486686/pdf/502090WP0Peopl1Box0342042B01PUBLIC1.pdf

[139] Parth Shastri, TOI, We all are temporarily abled, says Pranav Desai (Dec 5, 2016) available at: https://timesofindia.indiatimes.com/city/ahmedabad/We-all-are-temporarily-abled-says-Pranav Desai/articleshow/55798052.cms (last accessed on June 20, 2020)

realizes that a disability policy is likely to benefit it in the future, they are more likely to push for government reforms.

Deficient and derisory data and monitoring sets the government up for failure across all levels of governance, which makes it difficult to calculate and estimate population data and in turn leads to inadequate design, implementation and monitoring targeted programs. Though RPWD Act, 2016 talks about 'social audit[140]' of all schemes and programs concerned with PWD, this is not reflected in policy design.

LACK OF CROSS - SECTORAL APPROACH

Disability inclusion falls under by the Ministry of Social Justice and Empowerment (MSJE)[141]. However, unlike the intent of the RPWD Act, 2016 which speaks of looking at policies in a cross-sectoral manner, only 8 out of 100 Ministries and Departments include PWD in their programs and schemes.[142] In addition, many government websites lack inclusivity and accessibility, intensifying the need for a Cross-Sectoral approach to inclusion strategies.

There is also a gap in the study of inter- § alism in disability, leading to blind spots in policy formulation. For instance, women with disabilities are more likely to face violence at home[143]. A 2018 World Bank Study disclosed that women with disabilities are more likely to be victims of violence or rape than non-disabled women[144]. A 2004 survey in Odisha, India found that virtually all the women and girls with disabilities were beaten at home, 25% of women with intellectual disabilities had been raped and 6% of women with disabilities had been forcibly sterilized.[145] The skewed disability perspective that views disability only through the lens of men, has overlooked the discrimination of women that stems especially from disability, particularly those of childbearing and employment[146]

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[140] § 48, RPWD Act, 2016.
[141] Department of Disability Affairs, https://disabilityaffairs.gov.in/content/.
[142]National CRPD Coalition-India, towards Parallel report, (2019) (last accessed on June 21, 2020) available at: https://accessability.co.in/wp-content/uploads/2019/02/CRPD-Alternate-Report-for-India-1.pdf .
[143] United Nations Organization, Department of Economic and Social Affairs, Women and girls with disabilities (last accessed on, May 11, 2021) available at: https://www.un.org/development/desa/disabilities/issues/women-and-girls-with-disabilities.html .
[144] The World Bank Study, Disability Inclusion (2018), (last accessed on, July 1, 2020) available at: https://www.worldbank.org/en/topic/disability.
[145] Departmet of Economic and Social Disability, Factsheet on Persons with Disability, (last accessed on July 1, 2020) available at: https://www.un.org/development/desa/disabilities/resources/factsheet-on-persons-with-disabilities.html.
[146] Thomas J. Gerschick, 25 Toward a Theory of Disability and Gender Signs, 1283-1268, Feminisms at a Millennium, The University of Chicago Press (2000).

A cross Sectoral outlook would imply bringing together various discrimination markers of disability. Research on how aspects like caste, gender or income support or unsettle the disability experience is crucial and involves difficult analysis across socio-cultural categories, which Indian policymaking, at present, lacks.

OVERLOOKED INCLUSIVE EDUCATION

Inclusive education has gathered momentum amid rising awareness of Disability Rights'. India, too, has given inclusive education a fair thought, establishing safeguards through the RPWD Act. The Act is ideal, balancing the medical and sociological schools of thought into a modern, updated outlook towards PWD. However, the effect of the RPWD Act, like its predecessor, has remained ensconced in legal jargon with little or patchy implementation.

The RPWD Act uses the term 'accessibility' with its many facets and has wisely, included various facets of accessibility including access to education, housing, and justice among others. It seems to have disregarded, however, inclusive education and a workable strategy to include children with disability into the mainstream of education practices.

Right to Education is a fundamental guarantee of equal rights for children with disabilities and their social inclusion. In 2002, the provision of universal primary education was recognized as a fundamental right under Article 21A[147] of the Indian Constitution, thereby guaranteeing all children between the ages of 6-14, a justiciable right to free and compulsory primary education. This was subsequently mandated through legislation such as the Right of Children to Free and Compulsory Education Act, 2009[148] (RTE Act). The RTE Act buttresses its intention to include disability within its ambit by clarifying that the right to education includes those who belong to a broadly termed 'disadvantaged groups.'

The RPWD Act defines inclusive education as *"a system of education wherein students with and without disability learn together and the system of teaching and learning is suitably adapted to meet the learning needs of different types of students with disabilities."*[149] It also imposes an obligation on the government to take steps to ensure inclusive education.

[147]Eighty sixth Constitutional Amendment Act, 2002 (December 12, 2002).
[148] Act No. 35 of 2009.
[149] Rights of Persons with Disability Act, 2016, Act 49 of 2016, §2(m).

In the face of evolving legal standards, there are many irregularities between the RTE Act and the RPWD Act which have resulted in an inconsistent legislative and regulatory framework for inclusive education. Since the RTE Act was enacted prior to the modification of the disability law framework, it appears to have carried forward the approach of "integration" as opposed to "inclusion". As Sharma and Deppler explain, integrated education emphasises the "student to fit in the system rather than the system to adapt", while inclusive education emphasises changes in system-level practices and policies to meet student needs."[150]

Disability and lack of education share an uncomfortable bond. According to the 76th National Sample Survey[151], 2018, about 48% of disabled people are illiterate and only 62.9% of disabled people between the ages of 3 and 35 had ever attended regular schools. Meanwhile, only 4.1 % of those not enrolled in regular schools had ever been enrolled in special schools. Disabled children rarely progress beyond primary school, and only 9% have completed higher secondary education.4 The 2011 Census estimates that there are 2.13 million children with a disability, of which 28% are not in school. Overall, children with disabilities are less likely to be in school and more likely to drop out of school.[152] In light of these realities, it is imperative that the RTE Act and the RPWD Act be brought on the same page, with regard to the ideation and implementation of inclusive education.

LACK OF DESIGN INNOVATION

India lags behind on its inclusivity and accessible design innovations. A study shows that a mere 3% of buildings in India are accessible.[153] There is no aggregated data of public transport and institutions, however, state studies show that these figures are dismal. One of the most common problems when designing for accessibility knows what needs you should design for.[154] Moreover, all the accessibility data has been collected is only with respect to physical disability.

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[150] Umesh Sharma and Deppeler Joanne, 1 Integrated Education in India: Challenges and Prospect Disability Studies, Quarterly 25 (2005).

[151] The World Bank, 'People with Disabilities in India: From Commitment to Outcomes' (2007) (last accessed on June 5, 2020) available at: https://documents1.worldbank.org/curated/en/358151468268839622/pdf/415850IN0Disab1ort0NOV200701PUBLIC1.pdf.

[152] Parul Bakhshi, Ganesh M Babulal and Jean Francois Trani, 1 'Education of Children with Disabilities in New PLoS ONE 12 Delhi: When Does Exclusion Occur?' (2017)

[153] Disabled Accessibility, Hindustan Times, (2018), available at: https://www.hindustantimes.com/editorials/with-just-3-of-india-s-buildings-accessible-our-disabled-are-at-a-huge-disadvantage/story-Rh2rd4QzNzw9kHpmaTPV1H.html (last accessed on June 5,2020)

[154] Steven Lambert, Designing for accessibility and inclusion, Smash Magazine (9 May 2018) available at: https://www.smashingmagazine.com/2018/04/designing-accessibility-inclusion/ (Last accessed on July 6, 2020)

Traditional measurements of accessibility may be flawed, as they often ignore organizational barriers and individual mobility limitations which may affect travel time, effort, and even successful completion.[155] Several studies done by the Dr. Bhanuben Nanavati College of Architecture for Women[156] in Pune have shown that though accessibility measures have been undertaken by the local government, they are done without a proper understanding of the exercise and without conducting feasibility studies. Basic design errors such as awkwardly placed tactile tiles and unevenly placed footpaths, too steep slopes, ultimately result in redundancy of the exercise. Accessibility training of architects will ensure the aim of such inclusivity measures is effectively translated and reproduced.

INADEQUATE PARTICIPATORY PROCESS

Stakeholders' engagement is the key to a participatory and democratic process. It is imperative that policy decisions involve those who are directly affected by them and have a keen insight into the impediments in implementation strategies. Stakeholders may support or oppose decisions and may be influential in the organization or within the community in which they operate. Inputs from stakeholders will help identify areas of agreement and disagreement by providing a platform for dialogue and will hence present an opportunity to address key stakeholder questions. It will also help policy makers identify underlying community beliefs and align policy with them. Welfare policies often involve a high volume of complex, statistical information that may cause policy-drafters to overlook the finer, indispensable aspects of disability policy-design and hence, it is essential to take the help of on-ground workers and PWD themselves to design a holistic and workable stratagem. Moreover, by building mutual understanding, credibility, and trust, policies are more likely to be implemented as they were intended.[157]

Trends show India lags behind in encouraging participatory process, despite being the largest democracy[158]. The UNCRPD requires all state parties that have ratified the treaty to submit reports on their progress to a committee established by the United Nations.[159] The 2019 parallel

[155] CHURCH, RICHARD & MARSTON, JAMES. Measuring Accessibility for People with a Disability. Geographical Analysis. (2003). 10.1111/j.1538-4632.2003.tb01102.x.
[156] Universal Design, https://www.bnca.ac.in/bnca-cells/universal-design/ (Last accessed on July 6,2020)
[157] Lemke, Amy A, and Julie N Harris-Wai. "Stakeholder engagement in policy development: challenges and opportunities for human genomics."17 Genetics in medicine : official journal of the American College of Medical Genetics 949-57 (2015): doi:10.1038/gim.2015.8
[158] G. Palanithurai, 68, Participatory Democracy in Indian Political System, 9-20, IJPS available at: https://www.jstor.org/stable/41858816 (2007) (Last accessed on August 1,2020)
[159] United Nations Convention on Rights of Persons with Disabilities, §33

report filed on the municipal implementation of UNCRPD in India shows that very little progress has been made with respect to the parameters set out by the UNCRPD. PWD have not been included in the policymaking and planning by the respective ministries. This is crucial to designing good policy is to make the relevant stakeholders' part of the process.

LACK OF TRAINING PROGRAMS

Many developing countries lack inclination to conduct training programs for rehabilitation professionals. According to the 2005 global survey of 114 countries, 37 had not taken action to train rehabilitation personnel and 56 had outdated medical knowledge on disability.[160] Feasibility of training programs is dependent on several factors such as political stability, availability of trained educators, adequate financial support, domestic educational standards, cost and time for training and the overall desire of local governments to facilitate such training programs. [161] Training for rehabilitation personnel must be designed keeping in mind relevant national and international legislation, particularly the UNCRPD. This will help promote a client-centred approach and encourage sharing of ideas between people with disabilities and professionals[162]

India trails behind in its training initiatives which are limited to scattered sensitization programs, workshops and seminars. In order to achieve a well- rounded implementation of disability initiatives, it is imperative to introduce training at the institutional levels, and make it a mandatory process. Every person must be trained in disability empathy and approaches, and only then will it be possible to achieve a truly inclusive society.

PREOCCUPATION WITH WESTERNIZED MODELS OF DISABILITY LAW AND POLICY

Despite the engagement with disability studies in the western countries, countries at the periphery of the English-speaking world, such as India, South Africa and the Asia- Pacific rim countries, require analyses of disability that reflect their own specific colonial-settler histories.[163] In India, disability theory is varied and inconsistent; occasionally, derived from

[160] World Health Organization, Expanding education and training, WHO Library Cataloguing-in-Publication Data, 134 available at: https://www.who.int/disabilities/world_report/2011/report.pdf (2011) (Last accessed on August 1,2020)
[161]Ibid.
[162] HEINICKE-MOTSCH K, SYGALL S, eds. Building an inclusive development community: a manual on including people with disabilities in international development programs. Bloomfield, Kumarian Press (2004).
[163]MEEKOSHA H, Contextualizing disability: developing southern/ global theory (2004)

folklore and myth. It is a belief that one is born disabled to pay for the sins of past karma.[164] While it is spiritually impossible to refute this notion, science, has yet prove the same.

Shaun Grech seeks to challenge the shortcomings implicit in the assumptions of disability studies that originate from the more developed nations. Such assumptions conceptualize the less developed (Global North) and developing nations (Global South)[165]. Empathy is key to change the context of understanding disability and must, especially in anti-discrimination research, be understood, not only in the context of the researcher's frame of mind, but also in terms of the existing history of the area where the study is being carried out. In India, it takes on myriad tints when viewed through various lenses - religion, folklore, cultural underpinnings and prevailing jurisprudence, leading to discrimination that is both sociological and physiological. It is therefore vital, that when carrying out research in disability, historical, political and theosophical moralities are examined.

India's disability is mired with realities of poverty, colonization and caste-class divisions.[166]

It is important to remember that in de-colonized nations, concerns associated with educational inclusion, human rights and the development of positive disability cultures might be of less importance to people who are living a hand to mouth existence.[167] It is therefore, essential that policy initiatives should take into account social realities rather than toe the line of westernized models of disability law and policy.

Such an approach is not the solution to addressing disability rights in India. With its cultural underpinnings, disability in India needs a unique approach- contextualizing superstitions, local belief systems and religious ideology.

XIV. TOWARDS UNIVERSALIZATION OF A DISABILITY POLICY: FUTURE COURSE OF ACTION

The objective of public policy for disability seems to focus largely on solo efforts for an individual and isolated set-up. Policy must be aimed not only at generating employment for PWD, but also at eliminating barriers-both physical and physiological, at present and future

[164] Disabilities and Bad Deeds in Past Life (Last accessed on August 12, 2020) avaialable at: https://www.lonelyphilosopher.com/do-people-with-disabilities-have-done-bad-deeds-in-their-past-lives/.

[165] Grech, Shaun. Disability, Poverty and Development: Critical Reflections on the Majority World Debate. 771-784 Disability & Society 24.6 (2009).

[166] ANITA GHAI, Disability in the Indian Context: Post-colonial perspectives, Disability/Postmodernity: Embodying Disability Theory, (2002).

[167] Dan Goodley, 28:5 Dis/entangling critical disability studies, Disability & Society,631-644 (2013) available at: DOI: 10.1080/09687599.2012.717884

work-places.[168]. Placing disability in a context which is universal, and realizing that we are all disabled in some sense will help expand the scope of disability interventions- gradually allowing for a shift from internal incapability to external environments and social realities. Ultimately, to rethink disability policy will necessitate re-examination of our elementary values.[169] A disability policy that only focusses on PWD will invariably be a short-sighted approach. A universal policy, which imagines entire populations as disabled and in doing so, designs would help achieve an inclusive and effective result.[170]

The lack of such an approach has led to a circular path of segregation and exclusion. Who is considered disabled, is consistently determined by the medical model of disability as codified in the RPWD Act as it classifies anyone who has a dis-use of 40 % of a limb/ sensory organ as a disabled person.[171]

Any disability policy must be a community policy, applicable to all persons, irrespective of their 'able-ness'. The problems of disability are therefore not purely statistical and not confined to a fixed number of people. It is not essential that issues faced by someone with a disability is merely medical, it could be the result of a number of inter § al disabilities arising from social, architectural, attitudinal and political environments.

A universal design strategy as envisaged by architect Ronal Mace may be the answer to problems of both accessibility as well as stigma. He famously stated, "*Universal design is the design of products and environments to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design*"[172]

There is a dire need to acknowledge that design practices- whether physical, educational, or physiological are biased. An able-bodied measure is flawed since everyone is at some point, disabled. For instance, the standard temperature for air-conditioners in office buildings is found uncomfortable by the employees as being too warm or too cool. The reason for this is because

[168] Zola, Irving Kenneth. "Toward the Necessary Universalizing of a Disability Policy." The Milbank Quarterly (2005). Available at: doi:10.1111/j.1468-0009.2005.00436.x.
[169]Lawton, M. P., & Moss, M. (1987). The social relationships of older people. In E. F. Borgatta & R. J. V. Montgomery (Eds.), Sage focus editions, Vol. 86. Critical issues in aging policy: Linking research and values 92–126, Sage Publications, Inc.(1987)
[170] Supra, 42, at 8
[171] No.3603 5/1 /2012-Estt.(Res) Government of India Ministry of Personnel, Public Grievances and Pensions Department of Personnel and Training (Last accessed on August 13, 2020) available at: https://documents.doptcirculars.nic.in/D2/D02adm/36035_1_2012-Estt.Res.-29112013.pdf
[172] Universal Design vs. Accommodation, Disabilities, Opportunities, Internetworking, and Technology (DO.IT), (Last accessed on August 8, 2020), available at: https://www.washington.edu/doit/universal-design-vs-accommodation.

the standard-measure is based on a 'normative' male body that weighs about 70 Kgs. [173]. This is an example of a design bias- where a homogenous measure is presumed to be suitable for all.[174] To be more inclusive, it is essential to design for a varied, heterogeneous group of people. When design is formulated in such a way, disability, no longer remains an inability.[175]

The stigma of disability is ever present—it can be used to indicate inferiority, withdraw privilege, and evoke sympathy. This makes it crucial to break the barrier of able-ism by adopting universal design practices, not just in architecture but also in education, arts and technology.

We must remember Anita Ghai's wise words, "*we are all temporarily-abled*"[176].

XV. CONCLUDING REMARKS

Reform efforts focused on establishing basic legal rights for PWD and defending equality have culminated in the enactment of the RPWD Act, 2016. The Act attempts to pave the way towards an inclusive society, by designing comprehensive disability policies. Policy development, however, cannot be done only through the medium of statue-law. A successful policy requires coming together of governments, civil society, stake holders and law. One of the biggest barriers in a policy implementation for PWD remains the 'morality' angle of such a policy. How much spending is justified to benefit a numerically small population?

Research and technology provide solutions to help people overcome or compensate for disabilities, and offer the promise of eventual cures for many conditions. Evolving knowledge of the human genome offers nearly unlimited opportunities to prevent disability. The revolution in communications technology promises benefits to help people overcome disabilities such as deafness or speech problems, and to allow people who have mobility impairments to "commute" to the office or "visit" a museum from their own home. However, questions remain as to the availability of such measures to all. The questions about funding, and discrimination are always looming large in any policy designed for PWD. Dilemma over bio-ethics and the

[173] Pam Belluck, Chilly at work? Office formula was devised for men. NY Times, (2015), available at; https://www.nytimes.com/2015/08/04/science/chilly-at-work-a-decades-old-formula-may-be-to-blame.html, (Last accessed on August 9, 2020).

[174] Ronald Mace, A perspective on Universal Design (August 1998) available at: https://projects.ncsu.edu/ncsu/design/cud/about_us/usronmacespeech.htm (Last accessed on August 9,2020)

[175] DOLMAGE, JAY TIMOTHY. Universal Design. In Academic Ableism: Disability and Higher Education, 115-52. Ann Arbor: University of Michigan Press, (2017). Available at: www.jstor.org/stable/j.ctvr33d50.7. (Last Accessed on 15th Oct 2020).

[176] *Supra* note, 42.

pursuit of a normatively defined “perfect” baby are also worrisome developments. Will the "information superhighway" lead to an isolation of individuals and a re-segregation of people with disabilities.[177]

Attempting to balance justice and efficiency is an ‘Achilles Heel’ for all social policymakers. Any form disability policy will have some efficiency cost, and hurdles in implementation. However, for reasons of equality, society must offer some stipulated level of Disability benefits even if it results in some efficiency losses. Perhaps, the shift to a wider net for Disability Policy, will add to unnecessary costs, however, that is a cost Governments must be willing to pay in order to truly achieve an accessible society.[178] If all citizens were fully accommodated, there would be little need for concessions and reservations specifically related to disabilities. It is therefore, essential to build consensus around disability as a reality, and to incorporate a policy for disability as a part of a universal healthcare and national policy rather than an isolated disability policy.

[177] Scallet, Leslie J. "Disability Policy and Legislation: A Retrospective and Prospective Overview" 5 Mental and Physical Disability Law Reporter 622-26 (1996) available at: www.jstor.org/stable/20784738. (Last accessed on August 11,2020)

[178] Richard V. Burkhauser; Mary C. Daly, 16 Policy Watch: U.S. Disability Policy in a Changing Environment, The Journal of Economic Perspectives, 213-224, (2002) http://www.jstor.com/stable/2696583. (Last accessed on August 11, 2020).

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REVIVING A TOUCHSTONE OF INDIAN DEMOCRACY: JUDICIAL ACCOUNTABILITY

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ABSTRACT

Judiciary for a long time has been worshipped as a sacred institution with a sacrosanct spell casted around it. However, a glimpse at the recent accusation against the institution reiterates the need to rethink, redesign and revive the brittle judicial accountability. The aim of the paper is to investigate the efficiency and sufficiency of the various constitutional checks and balances that exist to ensure judicial accountability. The discussion about judicial accountability becomes highly relevant given the newly evolved role of the organ in the contemporary times. At first, judiciary was not conceived as a source of socially relevant power that could independently impact the society, but has now transformed into the centre of activism by taking a significant position in protection of rights. As judiciary and its actors are considered to be the guardians of fundamental rights, it becomes pertinent to find out "who guards the guardians of our Constitution". The paper would analyse the friction between the concepts of judicial accountability and judicial independence, it would discuss the status of judiciary Vis-a-Vis Article 12 of the Constitution and later it will evaluate the efficiency of the internal and external checks and balances against the functions of the judiciary.

KEYWORDS: Judicial Accountability, Judicial Independence, Appointment of Judges, Impeachment

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I. INTRODUCTION

Individuals possess rights, which are exercised to "preserve their humanity and respect their civility"[179], by the fact that they are human being and it is a "fallacy to regard them as a gift from the State to its citizen"[180]. However, these rights would be mere parchment promises if there is an absence of any authority to effectuate them. This function of giving life to these inherent rights is vested in the hands of the Judiciary, one of the three essential pillars of a democratic state. It protects the rights of individual and groups by interpreting, applying and complying with the rule of law. This is the reason why Judiciary is considered as the "guardian of the Constitution"[181] and the last bastion of hope for the masses to seek redressal[182].

At first, judiciary was not conceived as a "source of socially relevant power that, in its own right, might be expected to have an impact on the society"[183], but now judiciary has transformed into the "centre of activism"[184] to protect, preserve and promote rights of individuals. At the same time, with these evolved roles, judiciary has also obtained few characteristics that disturbs the fundamental principles on which the democratic state rests. As a result, the judiciary as we understand today possess dual-contrasting characteristics by being both "fountains of justice"[185] and "cesspools of manipulation"[186]. This contrast could be visualised through considering the diverging views of two contemporary writers. One claims that through creating social awareness and upholding human rights in every sphere of nation's activity, the judiciary has "transformed the Supreme Court of India into a Supreme Court for Indians"[187]. Taking a contrasting view the other author claims that, judiciary is now "more and more intractable, dilatory, whimsical and protective of the criminal and law breaker having influence or financial

[179] Fahed Abul-Ethem, The Role of the Judiciary in the Protection of Human Rights and Development, 26 (3) Fordham International Law Journal 781, 783 (2002).
[180] *Id.*
[181] M.C Setalvad, Former Attorney-General for India, The Hamlyn 12th series lectures, The Common Law In India, (1960); Sarojini P Reddy, Judicial Review Of Fundamental Rights 25, National Pub. House (1976); P.B Gajendragadkar., Law, Liberty and Social Changes, Asia Pub. House (1965).
[182] Jetling Yellosa, Judicial accountability in India: A myth or reality, 3(3) International Journal of Law 48, 49 (2017).
[183] R. Sudarshan et al., Judges and the Judicial Power, Sweet & Maxwell (1985).
[184] Rajvir Sharma, Judiciary as Change Agent: Some Insights into the Changing Role of Judiciary in India, 58(2) International Journal of Public Administration, 246, 249 (2017).
[185] Marc Galanter, Competing Equalities: Law and the Backward Classes in India, University of California Press (1984).
[186] *Id.*
[187] Upendra Baxi, Inhuman Wrongs and Human Rights, Har-Anand Publications (1994).

clout"[188]. Therefore, even if judges are the guardians of the Constitution, the possibility of them acting contrarily to the fundamentals of the Constitution can't be completely excluded. This casts doubts on the integrity of the organ.

A glimpse at the recent accusations against judiciary would amply reflect the need for ensuring judicial accountability. An In-house committee of the Supreme Court on May 6, 2019, ruled that there was "no substance"[189] to the accusation by a former junior court assistant against the former CJI Ranjan Gogoi. On April 19th 2019, the complainant wrote to 22 Supreme Court Judges accusing the former CJI of sexual harassment[190]. Even before initiating any investigation, the Secretary General of the Supreme Court out rightly denied the allegations for being "completely and absolutely false and scurrilous"[191]. The CJI formed a bench constituting of Justices Sanjiv Khanna, Justice Arun Mishra and himself, who heard the complaint on a special hearing and dismissed the same holding that the complaint was an attempt to "deactivate the office of the CJI"[192]. As a response to the criticisms for violating the principle of *Nemo Judex in Causa Sua*, by sitting in the bench to judge his own case, an In-house committee constituting of Justice Indira Banerjee, Justice Indu Malhotra, and Justice S A Bobde was formed[193]. The complainant after a multiple due process violation by the committee, opted out of the inquiry as she "[I] felt I was not likely to get justice"[194]. She was not allowed

[188] Y.P Anand, A People"s Election Manifesto, A Gandhian Minimum Needs Constructive Programme, (1996).

[189] Deepika Tandon & Shahana Bhattacharya, PUDR Issues Statement Against "Supreme Injustice" in Sexual Harassment Case Against CJI Ranjan Gogoi, 54(19)Economic and Political Weekly (2019); No Substance In Charges": SC Panel Gives Clean Chit To CJI Ranjan Gogoi In Sexual Harassment Case, Outlook, May 16, 2019, available at: https://www.outlookindia.com/website/story/india-news-no-substance-in-charges-supreme-court-panel-gives-clean-chit-to-cji-ranjan-gogoi-in-sexual-harassment-case/329925#:~:text=An%20in%2Dhouse%20inquiry%20committee,employee%20of%20the%20top%20court. (Last visited on March 11, 2021).

[190] *Id.*

[191]Puneet Nicholas Yadav, Dipak Misra Was Reviled as CJI but Ranjan Gogoi Beguiled His Way to Power, Outlook India, August 24, 2020, available at: https://www.outlookindia.com/blog/story/india-news-dipak-misra-was-reviled-as-cji-but-ranjan-gogoi-beguiled-his-way-to-p/4159. (Last visited on March 11, 2021).

[192] *Id.*

[193] Shruti Rajagopalan, Justice Is Dead, Long Live the Justices, The Wire, May 06, 2019, available at: https://thewire.in/law/supreme-court-cji-allegations-justice (Last visited on March 11, 2021); Siddharth Varadarajan, From the Supreme Court, a Reminder that Justice Was Sacrificed to Save a Judge, The Wire, January 23, 2020, available at: https://thewire.in/law/supreme-court-justice-sacrifice-sexual-harassment-allegations-ranjan-gogoi (Last visited on March 11, 2021); Law Students to SC Judges: Principles Of Justice Violated In Sexual Harassment Case Against CJI, News Click, May 11, 2019, available at: https://www.newsclick.in/law-students-sc-judges-principles-justice-violated-sexual-harassment-case-against-cji. (Last visited on March 11, 2021).

[194] Kaunain Sheriff M, CJI sexual harassment case: Not likely to get justice, says woman complainant, walks out of SC probe, Indian Express, May 1, 2019, https://indianexpress.com/article/india/ex-sc-staffer-who-accused-cji-of-sexual-harassment-says-wont-participate-in-in-house-inquiry-5703328/. (Last visited on March 11, 2021); Complainant Against CJI Withdraws From Inquiry Panel, Citing Lack of Sensitivity, The Wire, May 01 2019, available at:https://thewire.in/law/cji-ranjan-gogoi-allegations-complainant-inquiry-committee. (Last visited on March 11, 2021).

to have her lawyer present, her request to submit evidences on record was rejected, her right to get a copy of depositions was rejected, her request to video record the proceeding was denied and she was not notified in advance about any of the In-house committee procedures. The committee decided on an *ex parte* basis by violating the principle of *Audi Alteram partem* and concluded that, after "careful examination"[195] that accusations were "baseless"[196]. Throughout this paper we could consider this particular instance as a case in point to evaluate how the existing mechanisms have failed to create checks and balances against judiciary. Multiple other instances including: when former CJI Dipak Misra misused his role as the "master of roster" by allegedly working under duress[197], when former CJI Jagdish Singh Khehar handpicked investigators by himself to inquire the allegations against him for being involved in the death of former Chief Minister of Arunachal Pradesh, Kaliko Pul[198], and when no actions were taken on the allegation of financial misappropriation against Justice Soumitra Sen, are indications that "the great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by"[199]. In a World Bank working paper it was noted that, applicants from advantaged classes had almost 73% higher probability of succeeding in a claim of violation of fundamental rights equated to only 47% for non-advantaged classes[200]. This apparent discrimination in the most crucial organ in our democratic State raises concerns. Therefore, the derogating values of judiciary, incidentally or unintendedly, calls for reviving a significant

[195] A Vaidyanathan, Sex Harassment Charges Against Chief Justice Baseless, NDTV, May 6, 2019, available at:https://www.ndtv.com/india-news/sex-harassment-charges-against-chief-justice-baseless-finds-supreme-court-in-house-panel-2033721 (Last visited on March 11, 2021); SC gives clean-chit to CJI; woman complainant "disappointed, dejected, Deccan Chronicle, May 6, 2019, available at:https://www.deccanchronicle.com/nation/current-affairs/060519/sc-finds-sexual-harassment-charge-against-cji-baseless.html. (Last visited on March 11, 2021).

[196] *Id.*

[197] Samanwaya Rautray, SC rejects independent probe in Judge Loya's death, says PIL an attempt to malign judiciary, Economic times, April 19, 2018, available at:https://economictimes.indiatimes.com/https:/economictimes.indiatimes.com/news/politics-and-nation/loya-death-verdict-live-no-reason-to-doubt-statement-of-4-judges-says-Supreme-Court/articleshow/. (Last visited on March 11, 2021); Supreme Court crisis: All not okay, democracy at stake, say four senior-most judges, The Hindu Business, January 18, 2018 available at: https://www.thehindubusinessline.com/news/Supreme-Court-crisis-all-not-okay-democracy-at-stake-say-four-seniormost-judges/article10028921.ece# (Last visited on March 11, 2021).

[198] HC rejects plea for FIR on Kalikho Pul's alleged suicide note, Deccan Herald, May 22, 2017, available at: https://www.deccanherald.com/content/613018/hc-rejects-plea-fir-kalikho.html (Last visited on March 11, 2021).

[199] B. N. Srikrishna, International Standards for the Independence of the Judiciary 122, (Sujit Choudhry ed., 2016)

[200] Varun Gauri, Public Interest litigation In India Overreaching or Underachieving? November 2009, available at: https://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-5109. (Last visited on March 11, 2021)

feature of the Constitution "the principle of checks and balances by which every organ of state is controlled by and is accountable to the Constitution and the Rule of Law"[201].

It is essential that all authorities vested with power and position in democratic State is accountable to its sovereign masses. Further, with this newly evolved "activist role" that judiciary has taken up in pivotal areas like, health, child labour, political corruption, environment, education etc.[202], it becomes even more necessary to make sure that there exists checks and balances in ensuring that judicial activism doesn't transform into judicial overreach. However, the contention for judicial accountability is countered with the need for judicial independence. These two principles become central in the discussion of checks and balances. The aim of the essay is to evaluate the existing forms of accountability on their sufficiency and efficiency in an aspiration to create an understanding of the various principle and features of judiciary that are interwoven together. Simply put, it is to evaluate and find out "who guards our guardians"? It is not the aim of the paper to suggest any alternative forms of creating accountability model, but simply is to identify, review and critique the existing checks and balance and start afresh the discussion on judicial accountability.

Part 2: I would discuss the friction between the concepts of judicial accountability and judicial independence;

***Part 3*:** I would discuss the status of judiciary Vis a Vis Article 12 of the Constitution, whether it falls under the purview of "State". The discussions whether, judiciary being a determinant of the contours of fundamentals rights, is subject to the scrutiny of fundamental rights, would become relevant in understanding accountability. Though these discussions related to the scope of Article 12 of the Constitution and judiciary are taken up by courts to understand jurisdictional limits, I argue that bringing judiciary under the definition of "State" would create constitutional checks and balances.

Part 4: To create judicial accountability, it becomes important to comprehend, to whom are the judges accountable to? The paper would identify and analyse four existing modes for "judging our judges". There are broadly two mode, internal checks and balances and external checks and balances. *In Subpart 4.1*, internal accountability, to higher echelons of judiciary, would be discussed. *In subpart 4.2*, External accountability, to the co-equal branches and to the public,

[201] Justice S. Muralidhar, The Expectations and Challenges of Judicial Enforcement of Social Rights, available at: https://delhidistrictcourts.nic.in/ejournals/Social_Rights_Jurisprudence.pdf. (Last visited on March 11, 2021)
[202] Nagarathnam Reddy, Judicial Activism Vs Judicial Overreach in India, 7(1) Global journal for research analysis, 82 (2018).

would be discussed. It is also imperative to note that the different modes overlap too, for instance, through the provisions of appeal both accountability to public and internal accountability are created.

XVI. JUDICIAL ACCOUNTABILITY V. JUDICIAL INDEPENDENCE

When we discuss the concept of checks and balances against the judiciary, it becomes important to keep in mind that, any mode of creating judicial accountability doesn't suffocate, one of the hallmarks of democratic system, judicial independence. When the accusation against Former CJI Ranjan Gogoi was raised it became a "matter of great public importance touching upon the independence of the judiciary"[203]. Judicial independence is the appropriate degree of autonomy to allow the judges to adjudicate and protect Rights of individuals as they are "owed to the law, (to protect) peace, order and good governance of all in community".[204] The notion that "the greatest scourge an angry heaven would ever inflicted upon an ungrateful and sinning people, is an ignorant, a corrupt, or a dependent Judiciary"[205], signifies the importance of an independent judiciary in rendering impartial decisions[206]. On many occasions, the United Nations Human Rights Council has expressed that an independent judiciary is "essential to the full and non- discriminatory realisation of human Rights instruments and indispensable to the process of democracy"[207], as it acts as a pledge of the integrity of the judicial organ to ensure

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[203] CJI-led bench holds hearing on sexual harassment charges against CJI Ranjan Gogoi, India Today, April 20 2019, available at: https://www.indiatoday.in/india/story/cji-led-supreme-court-bench-hold-unusual-hearing-on-matter-of-great-public-importance-1506092-2019-04-20. (Last visited on March 11, 2021)

[204] Gerard Brennan, The State of the Judicature, 72 ALJ 33, (1998).

[205] An Independent Judiciary: Report of ABA Special Commission on Separation of Powers and Judicial Independence, Institute for Court Management Court Executive Development Program Phase III Project, available at: https://www.abanet.org/govaffairs/judiciary/report.html.

[206] Hon. Melissa Miller-Byrnes, Judicial Independence, Interdependence, And Judicial Accountability: Management Of The Courts From The Judges Perspective, Institute for Court Management Court Executive Development Program Phase III Project, 2006, available at: https://www.ncsc.org/__data/assets/pdf_file/0018/17622/millerbyrnesmelissacedpfinal0506.pdf. (Last visited on March 11, 2021)

[207] Resolutions 50/181 of 22 December 1995 & 48/137 of 20 December 1993, Human rights in the administration of justice, United Nations: General Assembly; See also Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, Basic Principles on the Independence of the Judiciary, United Nations Human Rights office of the high commissioner; Guidelines for the development of legislation on states of emergency, United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, United Nations document E/CN.4/Sub.2/1991/28; Human Rights and Law Enforcement : A Trainer's Guide on Human Rights for the Police, United Nations, Professional Training Series No. 5/Add.2 (2002).

public trust on the judiciary. Over the years, few indicators of judicial independence have been developed, which can be broadly categorised into five types: **Institutional independence, Counter-Majoritarian independence, Operational independence, Law making Independence and Decisional independence**[208]. Institutional independence mainly deals with appointment of judges[209] and ensures a fixed and adequate salary and tenure for the judges[210] and Counter- majoritarian independence refers to the power of courts to override and reverse legislative and executive acts, which has been widely recognised as not an essential part of judicial independence[211]. Ensuring availability of sufficient funding to facilitate its function[212], assignment of cases to judges and the power to transfer judges are envisaged under Operational independence[213]. Further, Decisional independence which is the core aspect of judicial independence, deals with the primary function of courts to adjudicate[214]. Among the above said five kinds, it is in the enforcement of Institutional and Operational Independence, the tussle between judicial accountability and independence centres at. Mainly as Thomas Plank contends, Institutional and Operational independence comprises of some of the essential elements necessary to ensure decisional independence[215].

Judicial accountability ensures that there is no vesting of unbound power in the hands of judiciary which may create a shift from democracy to *juristocracy*[216]. Accountability is not seen as a command and control relationship anymore but rather as a fluid concept involving public scrutiny and dialogue which creates individual accountability of judges leading to

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[208] R Ananian Welsh & G Williams, Judicial Independence from the Executive: A First Principles Review of the Australian Cases, 40 (3) Monash University Law Review, 593, 596 (2015); See also Gordon Bermant & Russell R. Wheeler, Federal Judges and the Judicial Branch: Their Independence and Accountability, 46 MERCER L. REV. 835, 837, 839, 844-45 (1995).

[209] The Rule of Law in A Free Society, The International Commission of Jurists, 293 (5-10 January 1959).

[210] Thomas E. Plank, The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia, 5 (1) William & Mary Bill of Rights Journal, (1996).

[211] Id.

[212] Chief Judge Dr. John Lowndes, Presented at The Northern Territory Bar Association Conference: Judicial Independence and Judicial Accountability at the Coalface of the Australian Judiciary (July 2016).

[213]Article 7, Basic Principles on the Independence of the Judiciary (1985); Clauses 10 and 13, Bangalore Principles of Judicial Conduct: Commentary, United Nations Office on Drugs and Crime (2007); Article 24, Siracusa Principles: International Commission of Jurists (1985); See also Anthony Mason, Judicial Independence and the Separation of Powers – Some Problems Old and New, 94 (Geoffrey Lindell ed., 2007).

[214] Welsh, Supra note 30.

[215] Plank, Supra note 32.

[216] Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism, 24-25 Harvard University Press (2007).

institutional accountability of judiciary as a branch of the government[217]. It is not only in the issue of overreach where creation of accountability becomes relevant but also the issue of under reach where the courts may not full fill their responsibilities in spite of having jurisdiction. There have evolved two theories of judicial accountability as captured by Professor Vernon Bogdanom namely, "explanatory accountability" and "sacrificial accountability". The former is embodied in the duty of courts to give reasoned judgments and orders, to assist in scrutiny and transparency. The latter is to "take the blame for what goes wrong"[218] and forfeiting one's position in judiciary, if something goes seriously wrong.

Then, what is the nature of the relationship between accountability and independence? Is it mutually exclusive? Or Are they correlative obligation by being complimentary? As we can evidently see, the features of both the concepts are indeed in contradiction. For instance, operational independence seeks to provide for a fixed tenure but on the other hand sacrificial accountability tends to disturb the tenure by conferring authority to remove the judge in case of misconduct. However, this contradiction is to be taken "complementary rather than antithetical"[219] as judicial independence shouldn't be considered as an end in itself. They are complimentary in the sense that, both seek to achieve the same goal of maintaining public confidence in the judicial organ. Judicial independence tends to create confidence by ensuring the masses that their function of decision making is free from external influences and judicial accountability seeks to create the same through transparency of functions. As Stephen Burbank and Barry Friedman puts, we shouldn't treat "judicial independence and judicial accountability as dichotomous but rather as different sides of the same coin"[220]. The critical issue lies in creating an appropriate amount of independence required to ensure a satisfactory level of adjudicatory independence[221]. Keeping this in mind, the analysis of the existing modes of check and balance would be made.

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[217] Judiciary of England and Wales, The Accountability of the Judiciary, 3, (2007) available at: https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Consultations/accountability.pdf Last visited on March 11, 2021)

[218] Id.

[219] RD Nicholson, Judicial independence and accountability: can they co-exist? 67 ALJ 404, 406 (1993).

[220] Stephen B Burbank & Barry Friedman, Judicial Independence at the Crossroads, SAGE Books (2002).

[221] Thomas Church & Peter Sallman, Governing Australia's Courts, Australasian Institute of Judicial Administration 68, (1991).

XVII. JUDICIARY AS STATE

Part III, the *Magna Carta* of the Constitution of India, is enshrined with the Fundamental Rights. DD Basu contends that "the Fundamental Rights were incorporated into our Constitution to limit the power" of the three main organs. Then, could the principles of fundamental right be construed as an efficient form of check and balance against judiciary? Presupposing that analysis is the necessity to ascertain whether judiciary falls under the purview of "State" under Article 12 of the Constitution. "The object of Part III is to provide protection for the freedoms and Rights mentioned therein, against arbitrary invasion by the State"[222] and therefore, the Constitution defines "State" under Article 12 of the Constitution. As a result, every claim against violation of fundamental right leads to the theoretical inquiry of Article 12, to conclude whether the alleged violator would qualify as a "state". It states,

Article 12- Definition: In this part, unless the context otherwise requires, the State includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

On interpreting the above definition, it is true that the judiciary doesn't have an explicit mention like the other two organs of the state, legislature and executive. However, the definition is inclusive in nature and non-exhaustive[223], which is evident by the usage of "includes"[224] and the "other authorities"[225], which aids the courts in adapting to the changing circumstances, so that the transformative nature of the Constitution could be upheld[226]. A perusal of the constituent assembly debates, where Dr. B.R. Ambedkar explained that the word "authority" in Article 12 is "every authority which has got either the power to make laws or the power to have discretion vested in it"[227], indicates that judiciary must fall under the scope of "other authorities". On the other hand many scholars argue that, judiciary was intentionally left out by the drafters to ensure and uphold its independence[228].

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[222] State of W.B. v. Subodh Gopal, AIR 1954 SC 92.
[223] V.N. Shukla, Constitution of India 378 Eastern Book Company (2010).
[224] The Constitution of Indian, 1949, Article 12, Part II: Fundamental Rights.
[225] *Id.*
[226] Durga Das Basu, Comparative Constitutional Law, 8 (4th ed., 2013).
[227] Dr. Ambedkar, Constituent Assembly Debates, Volume 7, November 25th 1948, available at: https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-25. (Last visited on March 11, 2021)
[228] Yellosa, *Supra* note 4.

As a result, a significant amount of controversy surrounds the debate of whether judiciary would fall under the purview of "other authorities" to be considered as state? The centre of controversy is the implication of its inclusion under the definition of "State", if it is not considered "State" then it would mean that judicial decisions can violate fundamental right which would result in grave miscarriage of justice. On the other hand, if it is "State", it would lead to infinite modes of redress through Article 32 of the Constitution creating a significant burden on the court system.

To begin with, let's analyse whether Judiciary would meet the standard of requirements formed by the courts to examine "other authorities" under Article 12 of the Constitution. The court in International Airport Authority's case laid down six criterions which are: whether "the entire share capital of the corporation held by government"; whether " the financial assistance of State meet almost entire expenditure of the corporation"; whether "the corporation enjoy monopoly status which is state conferred or state protected"; whether there exists "deep and pervasive state control"; whether the function is of "public importance and close related to governmental functions" and whether "a department of the government was transferred to the corporation"[229]. It must also be noted that the court in *Ajay Hasia V. Khalid Mujib*[230] clarified that, while interpreting these criterions a cumulative analysis of all the factors must be considered rather than a strict interpretation. Examining the functions, characteristics and nature of judiciary on the basis of these standards would aid in our enquiry. Firstly, the "entire expenditure" to run the judicial organ comes from the government for both, its judicial and administrative function, which is allotted through the annual budgetary provisions[231]. Further, the judges and other functionaries of the court are paid from the consolidated fund of India[232]. Secondly, judicial and quasi-judicial authorities do exercise "monopoly status which is State conferred and State protected"[233], that is, monopoly to adjudicate by interpreting laws and acts of parliament and to issue orders or directions that are binding in nature. Thirdly, the functions of judiciary are of "public importance" as it is "truly the defensive armour of the country and its Constitution and laws"[234] and the "watching tower above all the big structures of the other limbs of the

[229] Ramana Dayaram Shetty v. The International Airport, 1979 AIR 1628.
[230] Ajay Hasia V. Khalid Mujib, AIR 1981 SC 487.
[231] Budget 2019-2020, Department of Justice, Government of India, available at: https://doj.gov.in/page/budget-2019-20. (Last visited on March 11, 2021)
[232] INDIA CONSTI.1949, Article 112(3) (d) (i).
[233] Ramana Dayaram Shetty v. The International Airport, 1979 AIR 1628.
[234] James Medison: Jack N. Rakove, Judicial Power in the Constitutional Theory of James Madison, 43(8) William and Mary Law Review, 1513 (2002).

state"[235]. Even though judiciary can't enforce Directive Principles of State Policy (DPSP) enshrined in the Constitution on the other branches of the government, it has a positive obligation to apply and interpret DPSP in its judicial function as it does have limited power to "issue directions to the parliament and the legislature of the states to make laws"[236]. Justice Mathew in *Kesavananda Bharti* held that, "the judiciary is bound to apply the Directive Principles in making its judgment"[237]. It was further reiterated in *N.M. Thomas*[238], that the court has the task to "inform and illuminate"[239] the goals in Part IV. Hence, judiciary's function is of public importance and would pass the test formulated in *Airport Authority*. However, the position isn't that straightforward and remains a highly disputed grey area, given the unique characteristics of judiciary. These tests fall short as their basis of enquiry is to simply measure the "dependency*"* of the body on the government on the basis of which they determine the "State" like characteristics. Though judiciary is dependent on the government for its administrative activities, it still is the hallmark of democracy to ensure that independency of judiciary from the government exists in its adjudicating function, which these standards fail to consider. Here, it becomes important to differentiate between the judicial and non- judicial functions of judiciary. It is settled law that judiciary falls under the purview of "State" when it is acting in its non-judicial capacity[240] that is while exercising its administrative powers, which the above mentioned standards assent. Such non-judicial function of the organ is envisaged under Article 145 and 146 of the Constitution, which empowers judiciary to make rules for regulating the practise and procedure of the court and appointment of staffs and servants and decide their service condition[241]. The implication being, for instance, if an appointment of a judicial officer is violative of Article 16 of the Constitution, it would be considered void. In this sense, judiciary is merely acting in the capacity of an executive[242], but it is the function of judiciary in its judicial capacity that still remains a debatable area.

The *locus classicus* related to this issue is *Naresh Sridhar Mirajkar v. State*[243], where the validity of an interlocutory order passed by the High Court was challenged for being violative

[235] Justice Untwalia in Union of India v. Sankalchand Himatlal Sheth, AIR 1977 SC 2328.
[236] Reddy Chinnappa, The Court And The Constitution Of India: Summit And Shallows 73, Oxford University Press (2010).
[237] Kesavananda Bharati v. State Of Kerala, (1973) 4 SCC 225.
[238] State of Kerala v. N.M. Thomas. (1976) 2 SCC 310.
[239] *Id.*
[240] Smt Ujjambai v. State of Uttar Pradesh and Anr AIR 1962 SC 1621; Prem Chand Garg vs Excise Commissioner, 1963 AIR 996.
[241] H.M Seervai, Constitutional Law of India: A Critical Commentary, (4th ed., 2019).
[242] *Id.*
[243] Gajendragadkar, C.J, AIR 1967 SC 1.

of Article 19 of the Constitution, through a writ petition under Article 32 of the Constitution. In the majority decision written by Justice Gajendragadkar it was observed that, "it is singularly inappropriate to assume that a judicial decision pronounced by a judge of competent jurisdiction can affect the Fundamental Rights of the citizens", and formed a non-rebuttable presumption of sorts that its adjudicatory function can't contravene Fundamental right. Further, they observed validity or propriety of a judicial order can be questioned only under Article 136 by invoking the appellate jurisdiction and not under Article 32 of the Constitution on the ground that it violates the Fundamental Rights[244]. In a most recent judgment the court in *Rupa Ashok Hurra vs Ashok Hurra*[245] directly addressing the issue held that "courts of justice do not fall within the ambit of "State" or other authorities"[246] under Article 12 of the Constitution.

Multiple courts while answering the issue whether Judiciary comes under the purview of Article 12 of the Constitution, have tied it to another question, whether an action performed by a judge of appropriate jurisdiction, be challenged under Article 32 of the Constitution. Many courts have started with the second limb as unless it is answered in the positive, the first issue will automatically fall out of examination. When a tax liability determined by a sales officer in Quasi-judicial authority was challenged under Article 32, the court held that except in cases where, (a) the action is ultra vires to a statue (b) the action taken is without jurisdiction (c) the action is procedurally ultra vires, remedy under Article 32 is not maintainable[247]. The court in *Parbhani Transport Co-operative Society Ltd. V. Regional Transport Authority*[248], reiterated that a proper remedy for correcting an error in an order is to take the route of appeal or if it is an error apparent on the face of the record, then by an application under Art 226 of the Constitution, as Article 32 doesn't empower the apex court with an appellate jurisdiction. Almost persistently courts have dismissed the petitions filed under Article 32 challenging judicial orders and decisions on similar grounds[249], which indicates that the courts refuse to fathom a possibility of judicial orders or decisions rendered in application of its judicial authority, in an undoubted exercise of its jurisdiction pursuant to the provisions of law, can violate fundamental rights. These observations seem to be in stark contradiction to other

[244] *Id.*
[245] Rupa Ashok Hurra vs Ashok Hurra, (2002) 4 SCC 388.
[246] *Id.*
[247] Ujjam Bai v State of Uttar Pradesh, AIR 1962 SC 1621.
[248] Parbhani Transport Co-operative Society Ltd. V. Regional Transport Authority 1960 AIR 801.
[249] See also Smt. Ujjam Bai vs State Of Uttar Pradesh, 1962 AIR 1621; Surya Dev Rai v. Ram Chander Rai and ors., (2003) 6 SCC 675; Mohd Aslam v. Union of India 1995 AIR 548; Khoday Distilleries Ltd v. Registrar General, Supreme Court of India 1996 (3) SCC 114.

opinions of the court where they have held that, Article 136 of the Constitution "can't be substituted to the guaranteed right under Article 32"[250] and a petition can't be rejected on a mere ground that the aggrieved has alternative remedy available to them[251]. The courts have even gone to the extent of observing that "a court has jurisdiction to decide wrong (emphasis added) as well as right".

To the contrast, in *Prem Chand Garg v. Excise Commissioner, U.P., Allahabad* [252], observed that, "an order which this court can make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws". Justice Mathew in *Keshavananda Bharti v State of Kerala*[253], observed that judicial process should be considered State action as "Article 20(2) which provides that no person shall be prosecuted and punished for the same offence more than once is generally violated by judiciary and a writ under Article 32 should lie to quash the order*"*. On a similar vein it is important to note that, there are guaranteed fundamental rights such as, right against self-incrimination under Article 20 (3) of the Constitution [254], right against conviction as per an *ex post facto* law under Article 20 (1) of the Constitution[255], protection against double jeopardy under Article 20 (3) of the Constitution[256], adherence to "procedure established by law" under Article 21 of the Constitution [257], which are specifically designed and designated against the functions of judiciary and would be rendered "nugatory"[258] if remedy under Article 32 against the decision of the court doesn't exist.[259]

Further, judiciary has both the function of "creating (emphasis added) and applying law"[260] and not bringing the rule making function of court under the scrutiny of Article 13 of the Constitution would create gross injustices. Judicial decisions, opinions and order have precedential value by becoming a general norm. If judiciary doesn't fall under the purview of "State" under Article 12, it would mean that the judges have a free ticket to enact laws that

[250] Hidayatullah J., Naresh Sridhar Mirajkar v. State, AIR 1967 SC 1.
[251] Das J., Kavalappara Kottarathil Kochunni Moopil Nayar v. The State of Tamil Nadu, 1960 AIR 1080.
[252] Gajendragadkar J., Naresh Sridhar Mirajkar v. State, AIR 1967 SC 1.
[253] AIR 1973 SC 1462; Reiterated in State of Kerala v NM Thomas, (1976) 2 SCC 310.
[254] INDIA CONSTI. Part III: Fundamental Rights.
[255] *Id.*
[256] *Id.*
[257] *Id.*
[258] Seervai, Supra note 63.
[259] *Id.*
[260] Seervai, *Supra* note 63.

"take away or abridge fundamental rights"[261]. However, a basic interpretation of Article 13 would reveal that, for judicial decisions to be considered as "law"[262], compliance with Part III of the constitution is prerequisite. In this sense, Judiciary while pursuing its judicial function must adhere to the fundamental rights.

Moreover, Article 36[263] in Part IV of the Constitution provides that the definition of State for the purpose of embarking the duty to enforce DPSP would have the "same meaning as in Part III", that is the definition of "State" under Article 12. And as we have seen before, "*Part IV of the Constitution is as much a guiding light for the judicial organ of the state as the executive and legislative*"[264], that judiciary does have the duty to advance the goals of DPSP. Hence, it would create a paradox in judicial approach if it were to be deemed that judicial action has to be in pursuance of DPSP by being "State" under Article 36 but should be excluded from the interpretation as "State" under Article 12.

A comparison between U.S jurisprudence and the Indian position on this grey area would aid in our enquiry, as the framers of the Constitution adopted Part III from the U.S Bill of Rights[265] and it is crucial that precedents and the intention of U.S law are considered while clarifying the parameters of Fundamental Right.[266] The U.S Supreme Court held in the case of *Commonwealth of Virginia v Rives*[267] that, a judicial action would fall under the purview of State action as, a judicial decision too, must be in "due process of law"[268] and not violate "equal protection"[269]guaranteed in the fourteenth amendment. Instances where, a conviction of contempt was struck down for violating freedom of expression[270], a judicial restraint order being quashed for being violative of freedom of discussion[271], indicates that Superior Courts in U.S are empowered to issue the writ of certiorari if a judicial action is inconsistent with the

[261] INDIA CONSTI. Part III: Fundamental Rights, Article 13(2); Hidayatullah J., Naresh Sridhar Mirajkar v. State, AIR 1967 SC 1.
[262] INDIA CONSTI. Article 13(2), Part III: Fundamental Rights.
[263] INDIA CONSTI. Article 36: "Definition in this Part, unless the context otherwise requires, the State has the same meaning as in Part III".
[264] Common Cause v. Union of India, 2015 7 SCC 1.
[265] Basheshaar Nath v. CIT, AIR 1959 SC 149 (138).
[266] Krishan S. Nehra, The Impact of Foreign Law on Domestic Judgments: India, (2010) available at: https://www.loc.gov/law/help/domestic-judgment/india.php. (Last visited on March 11, 2021)
[267] (1880) 100 U.S. 313.
[268] U.S CONSTI, 1868, 14th Amendment.
[269] *Id.*
[270] Bridges v California, (1941) 314 US 252.
[271] American Fed. Of Labor v Swing (1941) 312 US 321; Amalgamated Food employees v Logan (1968) 391 U.S. 308.

guaranteed fundamental rights[272]. What we can gather from the comparison is two-fold: firstly, it is not a "fanciful speculation"[273] to contemplate that the judicial officers can act in contravention to the fundamental rights; secondly that if court's decision in violation fundamental rights, U.S courts provide due recourse to remedy such injustice.

In a limited sense, a judicial order or decision in violation of Part III could be considered void[274]. This is a significant change in the perspectives of the court, as through this observation, the courts have implied that judiciary doesn't have jurisdiction to issue decision in contradiction to the fundamental rights. However, the judges limited its application by restricting the claim of "denial of equal protection of law" against a judicial action to be acceptable, only when there is "wilful and purposeful discrimination"[275]. The same can be challenged only through invoking appellate jurisdiction[276]. Contradistinguishing from the above contention, Justice Shah noted that "... denial of equality before the law or the equal protection of the laws can be claimed against executive or legislative process, but not against the decision of a competent tribunal"[277].

Justice Hidayatullah in his dissenting judgment in *Naresh Sridhar Mirajkar v. State of Maharashtra*[278], whose opinion is considered "preferable"[279], notes that the attempts to restrict the remedy available to the aggrieved party ignores the fact that "Article 32 is an overriding and additional constitutional remedy" irrespective of the other remedies available. As he notes, for instance, if a judge were to arbitrarily bar the entry of an individual on the basis of his social background, then, "must an affected person in such a case ask the Judge to write down his order, so that he may appeal against it?"[280] Therefore, this limited application leaves the affected individual with no other remedy to evade the arbitrary discrimination meted against him.

[272] Moore v Dempsey (1923) 261 U.S 86; Griffin v Illinois, (1995) 351 U.S 12.
[273] Seervai, *Supra* note 63.
[274] Bhudhan Choudhry v. State of Bihar, 1955 AIR 191.
[275] *Id.*
[276] *Id.*
[277] Sahibzada Saiyed Muhammedamirabbas Abbassi & Ors v. The State of Madhya Bharat& Ors 1960 AIR 768; See also Ratilal v. State of Bombay 1954 AIR 388; Triveni Ben v. State of Gujarat 1989 AIR 1335.
[278] Naresh Sridhar Mirajkar v. State of Maharashtra, 1966 SCR (3) 744.
[279] Basu, Supra note 48; Accepted in Hans Raj Mathew J., Bharati vs State Of Kerala, (1973) 4 SCC 225; Kerala v. N.M. Thomas (1976) 2 SCC 310.
[280] Naresh Sridhar Mirajkar v State, AIR 1967 SC 1, (as per Hidayatullah J dissenting opinion).

Going back to the contention that it was the intention of the drafters to explicitly exclude judiciary from Article 12 of the Constitution [281], this argument becomes problematic to accord after our analysis. As firstly, the intention of framers were also to "make sure that every citizen is in a position to claim those Rights"[282] from those bodies which have the "authority" to "make law or the power to have discretion vested in it"[283] and judiciary being excluded from it wouldn't converge with this intention. Secondly, even if the intention of the drafters were to ensure independence by excluding judiciary from the definition of "State", the role of this branch has evolved over the past 70 years from the incorporation of Constitution. The newly transformed operative role calls for higher standards of accountability.

There seems to be no justifiable reason why the judiciary shouldn't be a "State" and there seems to be multitude of justifiable reasons for its inclusion. The only counter-contention raised is the effect it would create on application of Article 32[284] by creating infinite mode of redressal against a decision by courts and this issue has not been sufficiently addressed by any benches. Maybe a reasonable restriction in terms of number of times Article 32 can be invoked in the same matter to challenge a decision or judgment or decree by court for violating fundamental rights can be stipulated. However, this sole issue can't negate the need for considering judiciary as "State". Though the reasons for inclusion of judiciary seems to be obvious and necessary, the question that becomes relevant to the thesis is, would such an inclusion prove to be a sufficient and efficient form of check and balance. One of the short fallings of this constitutional check is that the role of deciding whether the judicial decision has violated a fundamental right, if it is challenged under Article 32 or Article 226, falls yet again in the hands of the judiciary themselves. This calls for looking into other modes available for upholding accountability.

XVIII. EXISTING MODES OF ACCOUNTABILITY

[281] Yellosa, *Supra* note 4.
[282] Dr. Ambedkar, Constituent Assembly Debates, Volume 7, (November 25, 1948), available at: https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/1948-11-25. (Last visited on March 11, 2021)
[283] *Id.*
[284] INDIA CONSTI. Part III: Fundamental Rights.

INTERNAL ACCOUNTABILITY

Lord Cooke of Thorndon argued that "[j]udicial accountability has to be mainly a matter of self- policing; otherwise, the very purpose of entrusting some decisions to judges is jeopardised"[285]. Theorizing this idea, both the Supreme and High Courts have self-monitoring provisions and power to supervise inferior courts. It is an accepted international norm for senior members of judiciary to monitor and regulate the function of judges[286]. It is through the various provision for internal accountability such as appeal, review, revision etc., the higher echelons of judiciary keep a check on the functions of courts. The scope and extent to which such provisions can successfully act as check and balance system which is both sufficient and efficient, has been examined below.

THE WRIT OF CERTIORARI AND PROHIBITION

The Writ of Certiorari and Prohibition, can be issued when there has been an "error in jurisdiction", "lack of jurisdiction", "excess of jurisdiction", "abuse of jurisdiction" and "error of law apparent on the face of the record"[287]. If the decision of any inferior judicial or quasi-judicial authority passes these standards, the High Court or the Supreme Court has the authority to quash the proceeding. By quashing the judgment or order or decree, on the above mentioned grounds, the court simply sets aside the decisions but doesn't substitute it with its own opinion or direction by reviewing or reweighing evidences and facts[288]. It is important to note that, by empowering the High Court and Supreme Court through this "corrective jurisdiction", they act in the capacity of a "supervising authority" and not as a court with appellate jurisdiction[289]. As it empowers them with a supervisory authority, it becomes relevant to understand the scope and extent of its power and determining "who can issue the writ of certiorari and against whom?"

If we trace back the origin of *Certiorari*, in England the king had a universal jurisdiction[290]. Later the king's prerogative to issue writ was transferred to the High Court of England through

[285] Robin Cooke, Empowerment and Accountability: the Quest for Administrative Justice, 18(4) Commonwealth Law Bulletin 1326 (1992).
[286] Law Commission of India, The Judges (Inquiry) Bill, 2005, Report No. 19510 (January 2006).
[287] Syed Yakoob v. K.S. Radhakrishnan 1964 AIR 477; State of Kerala v. N.M. Thomas (1976) 2 SCC 310.
[288] T. C. Basappa v. T. Nagappa 1955 1 S.C.R 250.
[289] M.P JAIN, Indian Constitutional Law 8, Lexis Nexis (2003).
[290] T. C. Basappa v. T. Nagappa 1955 1 S.C.R 250.

a statue[291]. However in India, we don't have a court of universal jurisdiction and formulation of a test to identify an "inferior court" becomes necessary, which is also challenging. If the test is that of "appealability", whether an inferior court is the one against which the appeal can lie to another Court, the test would fail. There are tribunals from which no appeal can lie with the High Court, but High Court enjoys the power to issue Certiorari against them[292]. If the test is based on the existence of a supervisory jurisdiction, this test would also fail as the Constitution doesn't stipulate any supervisory jurisdiction for Supreme Court but it has the power to issue certiorari. As Justice A. K Sarkar notes "the question is of haziness"[293]. This has been partly dealt by courts when they observed that, the Supreme Court can't issue a writ of Certiorari to High Court[294], that an order of the Supreme Court is not amenable to correction by issuance of a writ of Certiorari under Article 32 of the Constitution[295] and it cannot lie from a bench of one court to another bench of the same High Court[296]. It is important to keep in mind that the power to issue the writ, carries with it the power to supervise[297], but this "haziness" is one of the reason why the power to issue Certiorari falls short from being an efficient mode to create accountability.

APPELLATE JURISDICTION

The Supreme Court with a multi-jurisdictional power enjoys appellate jurisdiction under Article 132, 133 and 134 of the Constitution in all matters and is the highest court of appeal[298]. A judgment, decree or final order, that involves a "substantial question of law"[299] and in civil matters after a receipt of certificate of fitness from the High Court under Article 132(1), 133(1) or 134 of the Constitution that "the question needs to be decided by the Supreme Court"[300], can

[291] *Id.*
[292] Sarkar J., Naresh Sridhar Mirajkar v. State, AIR 1967 SC 1.
[293] *Id.*
[294] *Id.*
[295] Rupa Ashok Hurra v. Ashok Hurra, AIR 2002 SC 1771.
[296] Hidayatullah J., Naresh Sridhar Mirajkar v State, AIR 1967 SC 1.
[297] *Id.*
[298] INDIA CONSTI.1949, Part V: The Union.
[299] Darshan Singh v. State of Punjab, AIR 1953 SC 83; Thansingh Nathmal v. Supdt. Of Taxes, AIR 1964 SC 1419, 1422; State of Mysore v. Chablani, AIR 1969 SC 325; Supreme Court of India, Jurisdiction of the Supreme Court, available at: https://main.sci.gov.in/jurisdiction. (Last visited on March 11, 2021).
[300] *Id;* See also Law Commission Report, The Appellate Jurisdiction Of The Supreme Court In Civil Matters, Report No. 44 (1971): "It is true that a certificate of fitness for appeal to the Supreme Court is not to be granted lightly, as the Supreme Court has repeatedly pointed out. That is precisely how we think it should be."

be appealed to the Supreme Court. This means that the petitioner is barred from challenging the propriety of the decision appealed against on any other ground than the ones approved by the High Court. Further, the appeal must be made within 60 days from the date of grant of such certificate. As we can see, the appellate jurisdiction is not an absolute power conferred on the Supreme Court. A decision of court can't be challenged on the ground of simple being "erroneous or unjust", as the High Court wouldn't issue a certificate to appeal against its own decision on these grounds. If the High Court rejects an application for issuing certificate of fitness, the only remedy available to the aggrieved is to challenge the petitions through a special leave petition.

SPECIAL LEAVE PETITION (SLP)

Over and above the appellate provisions provided above, Article 136 of the Constitution provides judiciary with plenary power in the form of SLP, characterized as an "untrammeled reservoir of power incapable of being confined to definitional bounds"[301]. The power is plenary in the sense that there are no restrictions placed under Article 136, qualifying the authority. Unlike the appeal provisions, "any court('s)"[302] and not just the High Court's, decisions, decree or order, even if it hasn't reached finality, can be challenged under this provisions. However, it must be "exercised sparingly and in exceptional cases only" as reiterated in *Pritam Singh v. the state*[303], as it is not a sweeping power. To avoid floodgates of petitions the Constitution has mandated it to be only a "special or residuary powers" [304] and even if the SLP is granted, the court does not take into cognizance all the relevant factors and decide them on merits as in an appellate jurisdiction.[305]

REVIEW

[301] Kunhayammed v. State of Orissa, (2000) 6 SCC 359; See also Mahendra Saree Emporium II v. G.V. Srinivasa Murthy (2005) 1 SCC 481.
[302] INDIA CONSTI. Article 136.
[303] Pritam Singh v. the state, 1950 AIR 169.
[304] Durga Shankar v. Raghu Raj, AIR 1954 SC 520.
[305] Taherkhatoon v. Salambin Mohammad, AIR 1999 SC 1104.

A decision or order of the Supreme Court can't be challenged through invoking an appellate jurisdiction of Supreme Court. To fill this gap, the drafter of the Constitution, under Article 137 of the Constitution empowered the Supreme Court to review its decision or order pronounced subject to the rules under Article 145 of the Constitution, the inherent philosophy being, and acceptance of human fallibility to which the judges are not an exception to. The power of review can be exercised only when there is a discovery of important and new matter of evidence or there "exists a grave error or mistake apparent on the face of the record[306] which manifestly is illegal or leads to "palpable injustice"[307]. This provision can't be employed to "seek a review of a judgment delivered by this Court merely for the purpose of a rehearsing"[308] to uphold the principle of "*stare decisis"*. Such a petitions has to be filled within 30 days from the date of final decision and has been. This power to re-examine is a discretionary right of the Court on limited grounds and is circumscribed[309].

CURATIVE PETITION

As the Supreme Court is considered to be the court of last resort, the court in *Rupa Ashok Hurra V. Ashok Hurra and Anr*[310] formulated the provision of curative petition which could be invoked in rarest of rare cases as a final remedy, as it is not legally obligatory but also morally to hold justice in a Higher pedestal than the principle of finality of its judgment (*stare decisis*). However, a curative petition would be allowed by the court only in a circumstance where there has been a "genuine violation of principle of natural justice"[311]and must be accompanied with a certification from a senior lawyer. This provision has been invoked very sparingly by courts that out of 98 curative petition filled in the year 2019, none of them were allowed by the Supreme Court[312]. Though one of the reason is the sheer number of frivolous petitions filed, the major reason is the high standards of requirement set by the court for admission of a curative

[306] Lily Thomas & Ors. V. Union of India & Ors. 2000 (6) SCC 224.
[307] S.Nagaraj & Ors. V. State of Karnataka & Anr. 1993 Suppl. (4) SCC 595; Ramdeo Chauhan v. State of Assam 2001 (5) SCC 714; Lily Thomas & Ors. V. Union of India & Ors. 2000 (6) SCC 224.
[308] M/s. Northern Indian Caterers (India) Ltd. V. Lt. Governor of Delhi, 1980 AIR 674.
[309] Maganlal Chhaganlal (P) Ltd. V. Municipal Corporation of Greater Bombay & Ors, 1974 (2) SCC 402.
[310] Rupa Ashok Hurra V. Ashok Hurra and Anr, AIR 2002 SC 1771.
[311] Rupa Ashok Hurra V. Ashok Hurra and Anr, AIR 2002 SC 1771.
[312] Collected from Supreme Court Registry, available at: https://main.sci.gov.in/registry-officers. (Last visited on March 11, 2021).

petition. Further, this provision has been criticised as "an old wine in a new bottle" for being simply a second form of review petition[313], rather than being a new jurisprudential ground.

Similarly the High Courts too, have the power to review its decisions on the ground of error apparent on the face of the record. Apart from the appellate jurisdiction and provisions for reference[314], revise[315] and review[316], the High Court also enjoys power of superintendence over all lower tribunals and courts except military tribunals and court under Article 227(1) of the Constitution. By virtue of this power, the court can make and issue general rules and regulations for the regulation of proceedings, can call for returns from such courts[317] and make decisions of both administrative and judicial nature. Yet, these provisions too, face the same deficiencies by being limited in the scope of application.

IN-HOUSE PROCEDURE

Apart from the provisions to examine judicial decisions, an In-house procedure in the form of "*peer review"*[318], was developed to deal with complaints of misconduct, incapacity or misbehaviour against the judges and has the power to impose *"minor measures*"[319]. The purpose being that the process doesn't threaten the independence of judiciary and to create an alternative to the complex and limited scope of impeachment process, which would be discussed in the later § of the paper. The complaint could be made to the president or the CJI and a committee of three member would be constituted to investigate the complaint[320]. However, the process has multiple shortcoming. There are no statutory provisions or guidelines to ensure an unbiased and fair procedure. A critical look into the In-House procedure employed to enquire the sexual harassment allegations against former CJI Ranjan Gogoi would showcase the glaring issues of the process. There were no representation from other staff members as the committee solely comprised of members from judiciary which creates an asymmetry of power.

[313] Muteti Mutisya, The Indian Supreme Court and Curative Actions, 10, injiconlaw, 202, 211 (2007).
[314] The Code of Civil Procedure, 1908, § 113; The Code of Civil Procedure, 1908, Order XLVI.
[315] The Criminal Procedure Code, 1973, § s 399 & § 401; The Code of Civil Procedure, 1908, § 115.
[316] The Code of Civil Procedure, 1908, Order XLVII, Rule 1(1).
[317] INDIA CONSTI. art. 227(2).
[318] C. Ravichandran Iyer v. Justice A.M. Bhattacharjee, 1995 SCC (5) 45.
[319] *Id.*
[320] K.Venkataraman, How Supreme Courts judges to be probed, The Hindu, April 28, 2019, available at: https://www.thehindu.com/news/national/how-is-a-Supreme-Court-judge-to-be-probed/article26967323.ece. (Last visited on March 11, 2021)

The allegations against the leader of an institution were investigated by his subordinates[321]. There is still ambiguity about the different roles and powers of the gender sensitisation and internal complaints committee and the in-house procedure[322]. Further, a complainant doesn't have the right to have an advocate during proceedings to represent their interests fairly and there is no transparent statutory provision that governs the same[323]. All this cumulatively contributes to this coarse provision being an inefficient mode of self- governance, where the committee has a complete discretion to admit a complaint and initiate an investigation or reject it.

Any form of external intervention gets the knee jerk reaction of it being dangerous to independence of the organ, as it did in the case of CJI Ranjan Gogoi. Therefore, it becomes even more important to make sure that the internal checks and balance are adequate. However, through this analysis of the various internal modes we can come to conclusion that they are limited in its application making it inefficacious to ensure judicial accountability. As DD Basu observes, there is no provision to correct a "mere wrong decision"[324] which doesn't involve a substantial question of law or full-fill the requirements for an appeal. It has been condemned at multiple instances that the Supreme Court being the highest court of the land, shouldn't be restricting the scope of these provision for "buckling under pressure for expediency and convenience"[325]. As Justice Robert H. Jackson, the courts are "not final because we are infallible, but we are infallible only because we are final[326].

EXTERNAL ACCOUNTABILITY

In this § the checks and balances that the other two branches create and the need ensure democratic accountability to the people as another mode, would be discussed. The principle of

[321] A Vaidyanathan, Sex Harassment Charges Against Chief Justice Baseless, NDTV, May 6, 2019 available at: https://www.ndtv.com/india-news/sex-harassment-charges-against-chief-justice-baseless-finds-supreme-court-in-house-panel-2033721 (Last visited on March 11, 2021); SC gives clean-chit to CJI; woman complainant "disappointed, dejected", Deccan Chronicle, May 6 2019 available at: https://www.deccanchronicle.com/nation/current-affairs/060519/sc-finds-sexual-harassment-charge-against-cji-baseless.html. (Last visited on March 11, 2021)

[322] Gender Sensitization and Sexual Harassment of Women at Supreme Court (Prevention, Prohibition and Redressal) Guidelines, 2015, Supreme Court, available at: https://main.sci.gov.in/pdf/GSICC/GSICC%20Guidelines%202015-SC.pdf. (Last visited on March 11, 2021)

[323] Shruti Rajagopalan, Justice Is Dead, Long Live the Justices, The Wire, May 6, 2019 available at: https://thewire.in/law/supreme-court-cji-allegations-justice. (Last visited on March 11, 2021)

[324] Basu, *Supra* note 48.

[325] Mutisya, *Supra* note 135.

[326] Brown v. Allen, 344 U.S. 443 (1953).

judicial independence has an "intimate relationship"[327] with doctrine of separation of powers[328]. In fact, only with the expansion of judicial independence, did the concept of judiciary as a separate branch of the government originate[329]. Separation of power doesn't symbolise a barrier that prevents any contact or connection between the organs, in fact, it creates a "reciprocal supervision"[330] by balancing the power through an appropriate level of intervention by following the ideology that "power alone can be the antidote to power"[331]. The drafters of the Constitution recognised that providing for a system in which the powers of State are distinct from and independent of each other, would enable one branch to usurp power from the other two. As contended by Attorney General Mukul Rohatgi "the Constitution has devised a structure of power relationships with checks and balances wherein limits are placed on the power of every authority or instrumentality under the constitutional scheme"[332]. This is reflected in the power to appoint the heads and members of different organs. As a result, few powers in the hands of executive and legislature acts as a checks and balances for the judiciary, their efficiency and sufficiency are discussed below. Further, while discussing this form of accountability it is important that these modes do not affect the decisional independence, that is, judiciary shouldn't be considered as subservient to legislature while creating checks and balances. Resting such excessive power would lead to replication of the legislature overreach in Ecuador, where through the judicial reform programme, hundreds of judges were removed by the parliament in the name of misconduct, to intimidate the judges[333].

[327] Honorable John Doyle AC, Chief Justice of the Supreme Court of South Australia, Judicial independence and judicial accountability in the coalface of the Australian judiciary, July 2016, available at: https://localcourt.nt.gov.au/sites/default/files/judicial_independence_and_judicial_accountability_at_the_coalface_of_the_australian_judiciary_.pdf. (Last visited on March 11, 2021)
[328] Charles De Montesquieu, The Spirit Of Laws, The Colonial Press (1748).
[329] Forrest Mcdonald, Novus Ordo Seclorum: The Intellectual Origins of The Constitution 80-86, University Press of Kansas (1985); M.J.C. Vile, Constitutionalism And The Separation Of Powers 54, Liberty Fund (2nd ed., 1967).
[330] Aaron Barak, A Judge on Judging; The Role of the Supreme Court, 116 Harvard Law Review 19, 25 (2003).
[331] Montesquieu, *Supra* note 150.
[332] Attorney General Mukul Rohatgi, Supreme Court Advocates-on-Record. V. Union of India, (2016) 5 SCC 1.
[333] HRW, Ecuador: Political Interference in the Judiciary, HRW, April 20, 2018, available at: https://www.hrw.org/news/2018/04/20/ecuador-political-interference-judiciary. (Last visited on March 11, 2021)

APPOINTMENT OF JUDGES

Appointment of judges is a crucial aspect in the function of judiciary as the right appointment "would go a long way towards securing the right kind of judges who would invest the judicial process with significance and meaning, for the deprived and exploited § s of humanity"[334] and it has also become a central pillar in the debate around judicial independence. Tracing the changes in the procedures of judicial appointment would expose a ghost of deep suspicion between the executive and judiciary and the reasons why the government organs are at loggerhead. The process of judicial appointment was for the first time challenged in the *first judges'case*[335], the Court held that the executive must play the major role in judicial appointment. Further they also observed that, under Article 217 of the Constitution, the suggestions of none of the constitutional functionaries "was entitled to primacy"[336]. The Court through this judgment reiterated Dr. Ambedkar's view that "the Chief Justice of India is also human being after all, liable to err and vesting such power singularly on him would not be desirable"[337]. A tectonic shift in this perception was in the second *judge*[338] case where the court established the primacy of the chief justice of India, in case any disagreement in the process of consultation arises. The court also formed the collegium system by observing that the authority to appoint is "within the judicial family and the executive cannot have an equal say in the matter"[339] and that the pro-executive model would lead to "germs of indiscipline"[340]. However, as the function of the judiciary is to adjudicate and process of appointment being purely an administrative function, concerns of it creating a "double responsibility"[341] were raised. The *third judge*[342] case reiterated the same principles and cemented the supremacy of judiciary with regards to appointment and transfer of judges. The judgment received multiple criticisms for violating the intention of drafters and for giving raise to nepotistic tendencies and favouritism.

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[334] Bhagwati, J., S.P. Gupta v. Union of India, AIR 1982 SC 149.
[335] S.P. Gupta v. Union of India, Supreme Court Registry, AIR 1982 SC 149.
[336] *Id.*
[337] Dr. Ambedkar, Constituent Assembly Debates, Volume 8, May 24th 1949, available at: https://www.constitutionofindia.net/constitution_assembly_debates/volume/8/1949-05-24. (Last visited on March 11, 2021)
[338] J.S. Verma J., Supreme Court Advocates on Record Association v. The Union of India, AIR 1994 SC 868.
[339] *Id.*
[340] *Id.*
[341] Dr. Anurag Deep, Shambhavi Mishra, Judicial Appointments, In India and The NJAC Judgement: Formal Victory Or Real Defeat, 3 Jamia Law Journal, 49 (2018).
[342] AIR 1999 SC 1.

To reclaim the control, the legislature enacted the 99th constitutional amendment, the National Judicial Appointments Commission Act of 2014[343] and inserted Article 124 C of the Constitution[344] to empower the parliament to enact statutory provisions with regards to appointment process and set up a "legislative supremacy". § 4 of the National Judicial Appointments Commission Act, 2014[345] transferred the power of initiating the proceedings for appointment, to the commission from the CJI. However, the Act gained condemnation for its ambiguous and vague provisions, including lack of standards to evaluate an "eminent person" who would be part of the Commission and lack of criterions to bestow the "veto power" to two members of the Commission. The Act was criticized as an "evil absurdity"[346] which would lead to a Constitutional Crisis[347]. The culmination of the tussle between the organs was the judgment in *Supreme Court Advocate on Record Association v Union of India*[348], where the court struck down the 99th Constitutional Amendment by upholding that judicial primacy in the appointment process by considering it a basic structure of the Constitution[349]. Though the court held that the President had the power to object, in case of a stalemate, the final decision fell in the hands of the Collegium[350]. This system of "judges appointing judges" was condemned for forming an "extra constitutional device" with aim to meet judiciary's own ends rather than accepting a system lawfully enacted by an elected Parliament"[351]. Yet, the Collegium system of appointment remains law of the land. It shouldn't be construed that the executive based model was free from criticisms, the possibility that it could throttle judiciary by suffocating its independence still remains, for instance, in the past the executive and legislature have exploited the power by applying "committed judges theory"[352] where seniority is overlooked to support their "favourite" judges. Justice A.N Ray was made CJI, superseding

[343] The CONSTI. (Ninety-Ninth Amendment) Act, 2014.
[344] INDIA CONSTI. Part V: The Union.
[345] The National Judicial Appointments Commission Act, 2014, Act No. 40 Of 2014 (December 31, 2014)
[346] Ram Jethmalani calls NJAC an "evil absurdity", Live Mint, July 7, 2015 available at: https://www.livemint.com/Politics/haghpkzvaqip7d7biwnm7n/Ram-Jethmalani-calls-NJAC-an-evil-absurdity.html. (Last visited on March 11, 2021)
[347] C Raj Kumar, Reasons why the NJAC Act is bad in law, Economic Times, May 3, 2015, available at: https://economictimes.indiatimes.com/news/politics-and-nation/reasons-why-the-njac-act-is-bad-in-law/articleshow/47133370.cms?From=mdr. (Last visited on March 11, 2021)
[348] Supreme Court Advocates-on-Record Assn. V. Union of India, (2016) 5 SCC 1.
[349] *Id.*
[350] *Id.*
[351] Suhrith Parthasarathy, An Anti-Constitutional Judgment, The Hindu, October 30, 2015, available at: https://www.thehindu.com/opinion/lead/njac-verdict-an-anticonstitutional-judgment/article7819287.ece. (Last visited on March 11, 2021)
[352] M.P Singh, Securing, The Independence Of The Judiciary-The Indian Experience, 10(2) IND. INT"L & COMP. L. REV 245 (2000).

three senior most judges[353], and Justice H.R Khanna was denied appointment as CJI due to his dissenting remark in ADM Jabalpur, against the Government.

IMPEACHMENT OR REMOVAL OF JUDGES

Impeachment or removal of judges, embodies the concept of sacrificial accountability that was discussed before. The Constitution through Article 124 (2) 124 (4)[354], Article 217[355] and Article 218[356] of the Constitution, as well as the Judges Inquiry act, 1968 governs and empowers Legislature to "remove"[357] the judges. The procedure is extremely tedious as firstly, a motion must be passed on the support of a minimum two-third members in either house and if the motion is admitted the speaker would set up an Inquiry Committee[358]. This committee doesn't constitute of external members but only members from judiciary, a Supreme Court, a High Court chief justice and an eminent jurist[359]. The committee will frame the charges and examine the witnesses and have the authority to determine the validity of the charges and then submits the report[360]. If the inquiry committee finds the judge not guilty, there would be no further action taken[361]. The findings of the inquiry committee is not subject to judicial review as it is not envisaged in the "constitutional scheme"[362]. If the committee finds the judge guilty, the parliament would have to pass the impeachment order in two third majority in both houses and later it would be sent for the assent of the President[363]. It must be noted that, though the finding of the committee are not subject to review, the order of removal under Article 124(4) of the Constitution can be scrutinized under judicial review[364], which again leaves it in the hand of

[353] R Prasannan, Wars of the robes: Executive asserts; judiciary counterattacks, The Week, January 28, 2018, available at: https://www.theweek.in/theweek/cover/executive-asserts-and-judiciary-counterattacks.html (Last visited on March 11, 2021); See also Tahir Mahmood, When Judges Got It Wrong, Indian Express, June 28, 2016, available at: https://indianexpress.com/article/opinion/columns/emergency-india-1976-adm-jabalpur-case-supreme-court-hr-khanna-column-2879952/. (Last visited on March 11, 2021)
[354] INDIA CONSTI.1950, Part V: The Union.
[355] *Id.*
[356] *Id.*
[357] INDIA CONSTI.1950, Part V: The Union, Article 124.
[358] Idhika Agarwal, Judicial Impeachment In India: Features, Drawbacks And Suggested Changes 2(3) Fast forward Justice's Law Journal 2581 (2020).
[359] Judges Inquiry act, 1968, § 3, Consideration of report and procedure for presentation of an address for removal of Judge.
[360] Judges Inquiry act, 1968, § 4, Report of Committee.
[361] Judges Inquiry act, 1968. § 6, Consideration of report and procedure for presentation of an address for removal of Judge.
[362] Mrs. Sarojini Ramaswami v. Union of India, AIR 1992 SC 2219; Id.
[363] *Id.*
[364] *Id.*

the judiciary to make the final pronouncement. As can we can see through the analysis, the procedure is not independent of involvement from members of judiciary itself[365]. Further, the grounds of impeachment must be only on the grounds of "proved misbehaviour"[366] or "incapacity"[367] which are not defined either under Article 124 of the Constitution or any other statutes. As a result, the function of interpreting the scope and extent of these ground is also the prerogative of judiciary. In *Krishna Swami vs. Union of India*[368], the court observed that "misbehaviour" is not "every act or conduct or even error of judgment or negligent acts by Higher judiciary", which means that minor allegation don't warrant impeachment of judges as the scope is limited. As we can see, the procedure onerous and tedious, as a result, out of the six Supreme Court judges who have faced impeachment proceedings, none of them have been removed, making it a mere parchment tool[369]. Case in point is the impeachment process initiated against Justice V. Ramaswami, who was found guilty of gross misbehaviour by three eminent inquiry committees but the impeachment motion failed due to the overwhelming support from one political party in the parliament[370]. Another way in which this form of creating sacrificial accountability lacks is that, if a judge wilfully gives a judgment in guilty mind they "may be removed or punished even though the judgements which they have rendered stands"[371].

POWER TO OVERRIDE JUDICIAL DECISIONS

Further, legislature also has the power to override the judgment of the court, in some circumstance. It is a settled principle that the function of making law falls in the hand of the legislature, but the principle of separation of powers allows for overlap in the function within the co-equal branches too. The overlap commonly referred to as doctrine of overlapping

[365] Sub-Committee on Judicial Accountability v. Union of India, AIR 1992 SC 320.
[366] INDIA CONSTI.1950, Article 124 (4).
[367] *Id.*
[368] K. Ramaswamy. J., AIR 1993 SC 1407.
[369] See also K. G. Kannabiran, Selection and Impeachment of Judges: Issues for Debate, 39(49) Economic and Political Weekly, 5221-5225 (2004); Prashant Bhushan, A Historic Non-Impeachment, (June 4, 1993), available at: http://www.judicialreforms.org/files/cover_story_ramaswami.pdf . (Last visited on March 11, 2021)
[370] Z. Agha, India Today, Justice V. Ramaswami-survives-impeachment motion due to abstention of Congress mps, India Today, August 7, 2013 available at: https://www.indiatoday.in/magazine/indiascope/story/19930531-justice-v.-ramaswami-survives-impeachment-motion-due-to-abstention-of-congressi-mps-811113-1993-05-31. (Last visited on March 11, 2021).
[371] Benjamin N.Cardozo, The Nature of the Judicial Process 129, Yale University Press (1921).

functions[372], is not considered as a violation of doctrine of separation of powers and it is through the internalisation of this concept the judiciary also has the authority to make laws through its decision and orders. Though legislature doesn't have the power to make judicial order or decisions or judgments inoperative, it still has the authority to change the basis of law that the judgment was founded on. In *Commissioner of Customs v Sayed Ali*[373], the Supreme Court struck down duties imposed by custom officials who weren't authorized to take such action. However, by passing the Customs Bill, 2011 the parliament retrospectively authorised, the custom duties collected and thus, struck down the court's decision[374]. Another such instance was in , *Mahalakshmi Mills v Union of India*[375], where the court held that the State should follow the Statutory Minimum Price (SMP) while purchasing sugar to ensure that Fair and Remunerative Price (FRP). Subsequently, the Parliament enacted Essential Commodities (Amendment) Ordinance, 2009, to do away with the requirement of paying SMP. Hence, if the judiciary were to make a decision that is arbitrary, prejudiced or violative of fundamental right, the legislature still has the power to legislate or alter laws that are the foundation of the judgment. This form of check and balance is limited in scope as, firstly, the error in the judgment should be of a nature that an amendment or enactment of law would make it stand corrected. Secondly, this mode doesn't bestow the aggrieved individual with any remedy as it is the legislature who has the right to take *Suo Moto* cognizance of the issue in a decision or order. Lastly, the Supreme Court in a recent judgment held that, court's decisions can't be overruled retrospectively with legislative action as "judicial pronouncements must be respected"[376], which has further restricted the scope.

POWER TO PARDON, COMMUTE, REPRIEVE, RESPITE AND REMISSION

[372] N.W Barber, Prelude to the Separation of Powers, 60(1), The Cambridge Law Journal, 59, 63 (2001).
[373] Commissioner of Customs v Sayed Ali, (2011) 3 SCC 537.
[374] *Id.*
[375] Mahalakshmi Mills v Union of India, (2009) 16 SCC 569,
[376] State Of Karnataka v. Karnataka Pawn Brokers Assn, (2018) 255 Taxman 12 (SC).

Lastly the power to pardon,[377] commute,[378] reprieve,[379] respite[380] and remission[381] envisaged under Article 72[382] and Article 161[383] of the Constitution are entrusted to the President and the Governors of various states under. When this power enjoyed by the Executive was challenged in *Kehar Singh v. Union of India*[384], the Court acknowledged that even a supremely legally trained mind is not precluded from human shortcoming, as result it recognised the need to provide remedy to such an error through another degree of protection which can "scrutinize the validity of the threatened denial of life or the continued denial of personal liberty"[385]. However, this power is limited in nature and is an act of grace in the discretion of the authorities and is not a "right"[386]. Further, there are few other significant endeavours including, the introduction of the lapsed Judicial standards and Accountability bill, 2010[387], the Restatement of Judicial Values issued in 1997[388] and the Bangalore principles on Judicial Conduct issued by Judicial Integrity Group in 2002[389] which are significant measures but fell short in fulfilling the needs.

DEMOCRATIC ACCOUNTABILITY

Our opening page of our Constitution declares India as a democracy, which gives life to the fundamental postulate that the ultimate political sovereignty is vested with the people. This notion is premised on the belief that the constitutional instrumentality submits to the broad supervision of the sovereign people, only then, it can achieve dynamic viability and social reality. Further, the reinvented "new judiciary" has to be beholden to more public accountability and public control which necessitates to reinvent tools to ensure the same

[377] Means completely absolving the person of the crime and letting him go free.
[378] Means changing the type of punishment given to the guilty into a less harsh one, for example, a death penalty commuted to a life sentence.
[379] Means a delay allowed in the execution of a sentence, usually a death sentence, for a guilty person to allow him some time to apply for Presidential Pardon or some other legal remedy to prove his innocence or successful rehabilitation.
[380] Means reducing the quantum or degree of the punishment to a criminal in view of some special circumstances, like pregnancy, mental condition etc.
[381] Means reducing the quantum or degree of the punishment to a criminal in view of some special circumstances, like pregnancy, mental condition etc.
[382] INDIA CONSTI. Part V: The Union.
[383] INDIA CONSTI. Part VI: The states.
[384] Kehar Singh v. Union of India, 1989 AIR 653.
[385] Kehar Singh v. Union of India, 1989 (1) SCC 204.
[386] *Id.*
[387] The Judicial Standards and Accountability Bill, 2012, Bill No. 136-C of 2010, (March 29, 2012), available at: https://164.100.47.4/billstexts/lsbilltexts/passedloksabha/Judicial%20136C%20of%202010%20eng.pdf. (Last visited on March 11, 2021)
[388] Restatement of Judicial Values, Rajasthan Judicial Academy, (1997) available at: https://rajasthanjudicialacademy.nic.in/docs/3_s1.pdf . (Last visited on March 11, 2021)
[389] The Bangalore Principles of Judicial Conduct, United Nations, (2002) available at: https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf. (Last visited on March 11, 2021)

becomes significant. Though the masses don't and can't exercise a direct control to monitor the functions of judiciary, through the right to dissent and right to provide reasonable criticisms against judicial action they can keep them in check. The explanatory form of accountability, discussed above, opines that the judiciary must give reasoned judgement to enable people to exercise their right to dissent and comment as, "there can be no democracy without dissent"[390]. However, there are many hurdles for the people to ensure democratic accountability of the organ. One of them is the contempt jurisdiction envisioned under Article 129[391] and 215[392] of the Constitution which empowers the court of record to punish acts that "scandalises"[393] or "lowers" the authority of the Court"[394]. It is claimed that the aim of Contempt of Courts act, 1971 is to secure public confidence[395] and respect in judicial process[396]. Often, this provision with its origins rooted in the monarchic rule of England, is criticized for being archaic and for excessively sacrificing freedom of speech[397]. Though the provision was enacted to secure "not the judges as persons but for the function which they exercise"[398], many at times it has been misused to revive and safeguard the esteem of individual judges. For instance, Praja Rajyam, a Telugu Weekly, published an article under the caption: "is the Sub-Magistrate, Kovvur, corrupt?" with cited instances when the alleged judge had taken bribe. But they were prosecuted for contempt and were found guilty[399]. Judiciary's own functionaries too have had to face the rigours of contempt law. Former Supreme Court judge Markandey Katju was subject to contempt charge for calling out the "fundamental flaws"[400] and "grievous error"[401] that a bench headed by Justice Gogoi made, Justice C S Karnan's was imprisoned for sending a list

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[390] Supreme Court Justice Deepak Gupta, Outlook India, February 24, 2020, available at: https://www.outlookindia.com/newsscroll/right-to-dissent-is-essential-to-democracy-criticism-cant-be-termed-antinational-sc-judge/1743096 (Last visited on March 11, 2021); see also Kranti Associates Pvt. Ltd. V. Masood Ahmed Khan, (2010) 9 SCC 496.

[391] INDIA CONSTI. Part V: The Union.

[392] INDIA CONSTI. Part VI: The states.

[393] The Contempt of Courts Act, 1971, § 2: Definition.

[394] *Id.*

[395] Re: Arundhati Roy, AIR 2002 SC 1375.

[396] Dr. D.C. Saxena v. Hon'ble The C.J.I., J.T., 1996 (6) S.C. 529.

[397] Prof. G.C.V.Subbarao, Commentary on Contempt of Courts Act 70 of 1971, 2, Lexis Nexis (1988).

[398] Pennekamp v. Florida, (1946) 90 Led 1295.

[399] District Judge v. Ravindra Pai, ILR 1991 KAR 124.

[400] Harish V Nair, Is there anyone to escort Katju out of Court, SC asks after ex-judge stirs drama, India Today, November 12, 2016 available at: https://www.indiatoday.in/mail-today/story/markandey-katju-Supreme-Court-contempt-justice-ranjan-gogoi-351612-2016-11-12 (Last visited on March 11, 2021); Samanwaya Rautray, Supreme Court issues contempt notice to ex-judge Markandey Katju, Economic Times, November, 12, 2016 available at: https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-issues-contempt-notice-to-ex-judge-markandey%20katju/articleshow/55374152.cms?Utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (Last visited on March 11, 2021)

[401] *Id.*

of Madras High Court judges who were accused for being discriminatory and corrupt, to the Prime Minister[402] and very recently, Advocate Prashant Bhushan was found guilty for criticising CJI S.A. Bobde and the top court for functioning in "lock down mode"[403] by not upholding fundamental rights and protect dissent.[404]. In another instance, when a bench lead by CJI Gogoi didn't hear senior advocate Sanjay Hegde as he made a "very, very derogatory"[405] statement against the judiciary in an another matter, showcases how the criticisms against the organ may not aid in keeping it in check. When the communist leader, E.M.S. Namboodiripad, made a statement publicly that the "judiciary was an engine of class oppression"[406], the Courte convicted him by holding that, "an attack upon judges [...] which is calculated to raise in the minds of the people a general dissatisfaction with and distrust of all judicial decisions [...] weakens the authority of law and law Courts"[407]. However, the courts fail to consider this "general dissatisfaction"[408] against the judiciary would be caused even if the fundamental right to freedom of speech and expression is violated in the name of contempt law. Justice Krishna Iyer, captured the inherent issues with contempt law by claiming that "a vague and wandering jurisdiction with uncertain frontiers, a sensitive and suspect power to punish vested in the prosecutor, a law which makes it a crime to publish regardless of truth and public good and permits a process of *brevi manu* conviction"[409]. To further intensify the disable the masses from keeping the judiciary in check, the court held that right to information, a guaranteed fundamental right, can be invoked against the office of CJI only in exceptional circumstances as "RTI can't be used for as a tool of surveillance"[410]. With regards to appointment of judges, only the names of the judges recommended can be disclosed through RTI and not the reason for those suggestion[411]. Even if the restrictions are to protect the independence of judiciary, the public have a right to know the true processes of administration of justice in a democratic

[402] Justice C.S. Karnan v. The Hon'ble Supreme Court of India & Others, (2012) 6 SCC 491.
[403] Harish Nair, Times Now, Prashant Bhushan contempt case: Here's what happened in SC, (August, 31, 2020) available at: https://www.timesnownews.com/india/article/prashant-bhushan-contempt-case-here-s-what-happened-in-sc/645378#:~:text=New%20Delhi%3A%20Noted%20advocate%20and,apex%20court%20and%20destabilized%20the. (Last visited on March 11, 2021)
[404] In Re: Prashant Bhushan And Anr, Suo Motu Contempt Petition (Crl.) No.1 Of 2020 (Reportable)
[405] AAP MP made "derogatory" remarks on courts, won't hear his Rafale plea: SC, Hindustan Times, March, 6, 2019, available at: https://www.hindustantimes.com/india-news/aap-mp-made-derogatory-remarks-on-courts-won-t-hear-his-rafale-plea-sc/story-ezmheaqytwjejg7cnh4twl.html. (Last visited on March 11, 2021)
[406] E. M. Sankaran Namboodiripad v. T. Narayanan Nambiar, 1970 AIR 2015.
[407] *Id.*
[408] *Id.*
[409] Justice V.R Krishna Iyer, Contempt of Court (6th ed., 2016)
[410] Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal, 2019 SCC online SC 1459.
[411] *Id.*

State[412] and it raises the predicament as to whether judiciary should be independent from the people it seeks to protect, by creating an opaque system? Further, even if an aggrieved individual were to file a complaint against the conduct of a judge or a judgment in the department of justice, the ministry merely has the authority to guide the individual to judicial remedies that are available[413]. There are no other bodies that are accessible to ensure that a fair enquiry, without violating the principle of *nemo judex in causa sua*. Free speech and expression is considered as the "fountain-head"[414] of democracy, even though it is subject to reasonable restrictions, *bonafide* critique on institution cannot be challenged on any pretext, be it according to the constitutionally conferred power or statutory contempt law. In fact "if a country has to grow in a holistic manner where not only the economic Rights but also the civil Rights of the citizen are to be protected, dissent and disagreement have to be permitted, and in fact, should be encouraged"[415]. Removing judiciary from public scrutiny and accountability, through the provisions that were discussed above, detaches the organ from the society that it was set up to serve.

XIX. CONCLUSION

The following conclusions could be made through the above analyses:

Firstly with regards to judiciary as "State", we can see that there is a justifiability and the need for recognising judiciary under Article 12 to ensure scrutinisation by fundamental rights on judicial action. However, a recognition of judiciary as "State" and a bar against the remedy under Article 32 in instances of miscarriage of justice would render it inefficient.

Secondly with regards to the internal forms of accountability, the different provisions discussed are narrow in scope as they are time bound, discretionary in nature which could be invoked only on limited grounds to uphold the doctrine of *stare decisis*. As a result, these modes are not sufficiently efficacious. It shouldn't be misconstrued that this analyses and critique on the limited application of these various provisions discussed above, are arguments to widen their scope. The need for restricted scope of application to ensure principles of *stare decisis*,

[412] Iyer, *Supra* note 231.
[413]Guidelines on Grievances Received in the Department of Justice, available at: https://doj.gov.in/sites/default/files/GUIDELINES.pdf. (Last visited on March 11, 2021)
[414] Iyer, *Supra* note 231.
[415] Right to dissent is essential to democracy, criticism can't be termed anti-national: SC judge, The Outlook, February 24, 2020, available at: https://www.outlookindia.com/newsscroll/right-to-dissent-is-essential-to-democracy-criticism-cant-be-termed-antinational-sc-judge/1743096. (Last visited on March 11, 2021)

separation of power and judicial independence are upheld, is recognised. However, the analysis is to point out the lack of efficient and sufficient forms of checks and balance.

Thirdly with respect to the external forms of accountability, it is important to note the significance of the tussle between the organs which has existed since the internal emergency in India. Is the tension a necessity? Inter-branch conflict arising out of trust deficit between these organs of the government, has made the creation of checks and balances very complex and also makes the need to ensure that the bodies don't transgress upon each other's function pertinent. Therefore, judicial accountability has being rendered as a mere faddish chronicle due its inadequate mechanisms.

As "power tends to corrupt, and absolute power corrupts absolutely"[416], we have come to understand that excessive power in the hands of the judiciary may result in catastrophic outcomes, which showcases the need for judicial accountability. The challenge is in analysing the cost and benefit of judicial accountability at one hand and its independence in the other. The true goal would be to ensure "Judicial neutrality"[417]. Transparency in judicial functions becomes important as "sunshine is the best disinfectant"[418] and the understanding that the principle of independence is to protect the public and not for self-protection of judges becomes pertinent. In India, conventionally, we have had only what are best termed as hard accountability tools, such as the impeachment process. Perhaps we need to re-think about the alternative tools that could be employed, which may not warrant impeachment but requires some other form of disciplinary action. There is a need for the disciplinary procedures to be transparent, unbiased and most importantly, trusted by all.

[416] John Emerich Edward Dalberg Acton, first Baron Acton.
[417] A.P. Shah, A Manifesto for Judicial Accountability in India, The Wire, July 29, 2019, available at: https://thewire.in/law/cji-ranjan-gogoi-supreme-court-judiciary. (Last visited on March 11, 2021)
[418] David Ridpath, Sunshine is the best Disinfectant--It is Time to Recognize that in Sports Gambling, Forbes, September 16, 2015, available at: https://www.forbes.com/sites/bdavidridpath/2015/09/16/sunshine-is-the-best-disinfectant-it-is-time-to-recognize-that-in-sports-gambling/#676f35414636.(Last visited on March 11, 2021)

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PROBLEM OF PENDENCY IN COURTS: A CRITICAL APPRAISAL FROM TECHNO-LEGAL APPROACH

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ABSTRACT

As on May 2021, the total pendency before the Subordinate Courts across India is 38293489 cases, including 28031014 Criminal and, 10262475 civil cases. The prevalent situation is not so appreciable even at the High courts, as the total pendency there ranges over 5761046 Cases, including 4129641 Civil and 1631405 Criminal Cases. Moreover the Pendency before the Supreme Court is over 67,279 cases. In view of the disheartening statistics, the most famous and widely discussed among the legal fraternity, the fundamental "right to speedy trial" as categorically and explicitly recognised by the Supreme Court in Hussainara khatoon's case to be integral part of "right to life" under article 21, seems to have been almost forgotten or to a certain extent being impliedly infringed. Various reasons are attributable to this grave and most pertinent cause before the entire legal and judicial system of the greatest democracy of the world, despite of having the most powerful Supreme Court under the comprehensive constitutional framework. This paper examine the feasibility to incorporate adaptable changes in the functional approach and manner of working of the Indian judicial system, from traditional to a modern one, in spite of blaming one-another for the most common reasons. It emphasises upon the critical appraisal of complexities in the existing legal framework and their societal impact from the socio-legal perspective. It puts forth the necessity of inculcating the scientific temperament and technological approach for just and proper solutions, in addition to due attention towards the most genuine causes affecting the fair administration of justice without unnecessary delay.

***KEYWORDS*:** delay, pendency, fair and speedy trial, administration of justice, scientific, technological, temperament, approach

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I. INTRODUCTION

An aggrieved person moves to the court in the hope to get justice administered fairly and without unnecessary delay, but the existing sorry state of affairs disheartens the aggrieved persons, when they faces the problems of unnecessary delay and several forms of unfairness in their dealings with the system of administration of justice. One of the most common causes responsible for the delay is huge pendency in the courts. The problem of pendency prevents the courts from administering justice fairly, properly and, without unnecessary delay. In such a complex situation courts are also helpless, in spite of the fact that several recommendations and suggestions were made by various commissions and committees, including the law commission. Several efforts were attempted and some are in the process of implementation to reduce the pendency, but in effects they seem to be futile or less effective. This paper examines the problem of pendency and other inseparably connected issues preventing the courts and obstructing the divine function in furtherance of administration of justice. The paper critically examines the gravity of the problem, evaluates the intensity of causes and, explores the possibility of effective and workable solutions with the help of feasibility and implication of scientific temperament and, technological approach in their dealings with the contemporary socio-legal problems from techno-legal perspective.

II. CONCEPTUAL BACKGROUND

Justice is one of the noble and pious ideals in legal and judicial system of every civilized and developed as well as developing country around the world. Administration of justice is the central idea behind the establishment, existence and continuance of the courts. The faith and confidence of the people reposed on the legal and judicial system get frustrated and invites abhor criticism, when justice is not administered within reasonable time frame so as to meet the people's expectations from the system. One of such instances appears, when inordinate delay is caused due to various reasons including the huge pendency of cases.

Securing justice to all its citizens in social, economic and political sphere of their lives is one of the prominent goals as reflected from the mirror of the constitution[419]. It includes ensuring administration of justice within reasonable time, otherwise of no relevance. The state thereby is duty bound to fulfill the constitutional objective by striving to attain the aforesaid goal.

[419] CONSTI INDIA, Preamble.

Moreover it is specifically incorporated[420] under article 38as a part of directive principles of state policy[421], which although not justiciable but fundamental in the governance of the country[422], whereby the state is guided and expected to adhere, while enacting laws, laying down the policies as well as implementing those laws or policies.

Rule of law is a basic constitutional principle for ensuring of which the constitutional provisions are designed and directed towards. Maintenance of rule of law and observance thereto is the constitutional as well as moral obligation of the state authority. Administration of justice fairly, without unnecessary and unreasonable delay is one of the facets of, and a step towards maintenance of rule of law.

Equality before law is one of the fundamental aspects or features of the doctrine of rule of law, also incorporated under the Indian constitution[423]. The constitutional mandate of equality before law is equally applicable in relation to the administration of justice, which requires that similar cases involving equal nature, pecuniary value, gravity of offence or severity of punishment as well as their impact on society, should be disposed of within equally reasonable time without unnecessary delay. In the form of negative mandate to the state, it is obligation on the concerned authorities to prevent discrimination in the form of disproportionate and inordinate delay in disposal of similar cases.

Equal protection of law as another facet of rule of law explicitly recognized under the constitution[424] in the form of positive mandate to the state, requires affirmative steps on the part of the concerned authorities to ensure administration of equal justice within reasonable period of time having regard to fairness, absence of arbitrariness, in cases of similar nature and kind. Several legislations are examples of the efforts of the state in this direction.[425]

Right to speedy trial recognized as integral part of right to life[426] in *Hussainara Khatoon's case*[427], is required to be enforced by the state without failure, otherwise it would result into miscarriage of justice by the state authorities leading to infringement of fundamental right to life. In case of such infringement the constitutional courts must immediately rush to the rescue of the aggrieved person, and should ensure the enforcement of such crucial right, by issuing

[420] *Id.*, art. 38.
[421] *Id.*, Part IV.
[422] *Supra* note 1, art. 37.
[423] CONSTI INDIA, art. 14.
[424] *Ibid.*
[425] The POCSO Act, 2012; The Juvenile Justice (Care and Protection of Children's) Act, 2015, etc.
[426] CONSTI INDIA, Art. 21.
[427] AIR 1989 SC 1360.

any order/directions/writs, through appropriate proceeding in suitable cases. Such dynamic and courageous steps would strengthen the people's faith and confidence in the legal and judicial system, which in turn will ultimately conscientiously empower the courts to come forward for the cause in furtherance of justice without unreasonable delay.

Equal justice & free legal aid is one of the important and sincere obligations of the state under the constitution. [428] It has to be ensured that the legal system operates in a manner to promote justice, on the basis of equal opportunity. For that state should provide for free legal aid, by enacting suitable legislation or framing schemes or in any other manner to prevent denial of opportunities for securing justice to any citizen by reason of economic or other disabilities.

Independence of judiciary: in terms of material, manpower and other resources, as well as judicial infrastructures including court rooms, accommodation for judges and other court-staffs, autonomous funds for development, repairing and management of judicial administration. These are issues located at the very core of the constitutional vision[429] for impartial, independent and fearless judiciary, aimed at fair and efficient administration of justice without unnecessary delay.

III. ISSUES RELATING TO PENDENCY

Huge pendency is one of major factors causing heavy obstruction in the efficient and expeditious functioning of the legal and judicial system including courts. It has the effect of creating mental pressure and physical tiredness on the individual judges, which indirectly affects their intellectual ability to apply their legal acumen in course of deciding a matter pending before him. The graph of Pendency is surprisingly rising day by day. Since the independence due to tremendous increase in the heterogeneous population of Indian, the present situation in terms of pendency of cases seems to be or may be referred to as *litigation explosion*.

Moreover the advent of era globalization, liberalization and privatization has also significantly contributed to the gravity of the issue of pendency. Due to enormous increase in and widening the scope of functions of government on account of development in various spheres of life of the public, in most of the pending litigation government is one of the parties. No doubt, another

[428] CONSTI INDIA, art. 38.
[429] CONSTI INDIA, art.50.

facet of this issue is also evidence of the fact of increase in awareness among the people about their legal rights and remedies for grievances.

Although howsoever good or bad and for whatsoever reason, the problem of huge pendency has by and large affected the fair trial without unnecessary delay, which impliedly results into infringement or deprivation of right to speedy trial. More particularly inordinate and unnecessary delay in criminal trial has more cascading effect and very adverse impact on life and personal liberty of the accused, victim and their dependents also.

Several causal factors may be attributed to the vital and contemporary issue of pendency before courts, which has significant bearing on the smooth functioning of legal and judicial system of a constitutional democracy. These issues may be briefly discusses below as:

A. RELUCTANCE TO TRADITIONAL WAY OF FUNCTIONING

The court staffs as well as some of the judicial officers are not familiar with the operation and functioning of contemporary technology, and more particularly technology relating to the functioning and management of court affairs. Moreover even after introduction of the technology, many of the staffs are reluctant to the traditional manner of function, some of them are not interested nor do they want to learn and adapt themselves with such technology. Due to this reason still the courts are functioning in orthodox manner, resulting into increase in pendency.

B. INADEQUATE PHYSICAL AND MATERIAL INFRASTRUCTURE

The infrastructure relating to or in terms of courtrooms, for proper maintenance of records of judicial proceeding and other records, for properly and safely housing the technological equipment used in court, for accommodation of judicial officers and other auxiliary court staffs is another barrier in the speedy disposal of cases. These factors are contributing towards the increase in pendency.

C. INSUFFICIENT TECHNOLOGICAL RESOURCES

The courts in India, particularly those located in remote area is also facing the problem of scarcity or insufficiency of the technical resources such as Desktop, Monitor, CPU, keyboard, Printer, Photocopy Machine, Scanner, Laptops, CCTV cameras, other resources used for, recording of evidences, copying of documents, storage of data, conduct of judicial proceeding through virtual mode including video-conferencing, and maintenance of judicial records.

D. LACK OF ADEQUATE AND PROPER TECHNICAL TRAINING

Lack of Adequate & proper technical training to the judicial officers and court staffs for properly and efficiently operating the technological equipment is another facet of the problem. Some of the staffs either do not undergo such training or take it lightly as a part of formality. On this point, the court administration as well staffs both are equally obliged. But in absence of compulsion for training or proper assessment of their technical efficiency, a large number of auxiliary court staffs are technically untrained or inefficient.

E. DELAY AND DEFECTS IN POLICE REPORT AND CASE DIARY

In most police stations across the country case diary or police report is prepared manually. It is well known fact that everyone can't be able to write legibly and accurately, same is the case with police officials also. Therefore many times a case diary or police report is not so legible or precise, as to enable someone to understand its true and accurate meaning, using ordinary skill and prudence within reasonable time. Moreover even after preparation of such case diary or police report, enormous delay happens in production of such documents before the courts. There is no existing mechanism to submit these documents to court through online mode. These factors jointly and severally contribute to the delay in judicial proceeding.

F. DELAY IN PROCESSING WITHIN COURT REGISTRY

The processing of a case within the registry is a slow process on account of several aforesaid and other reasons, which cause unexpected delay in listing the case for admission/ hearing/ disposal/ order, etc. This aspect also contributes significantly toward the graph of pendency.

G. DELAY IN GETTING COPY OF BAIL/INTERLOCUTORY ORDERS

Due to lack of staff as well as insufficiency of technical resources and required skill to efficiently operate such resources, enormous delay occurs in uploading, serving or communicating such order to the proper parties. Moreover, when a party requires a copy of such order, it also takes some time ranging to weeks and months due to inability or improper maintenance of records of judicial proceeding. In most of courts no mechanism exists to obtain such copy through online mode, which may reduce some sort of delay.

H. DELAY IN JUDICIAL SCRUTINY OF POLICE REPORT

After the completion of investigation, a police report is submitted before the court of judicial magistrate competent to take cognizance of the offences alleged in the report.[430] It takes much time to scrutinize the submitted police report in order to take appropriate action on the report. Moreover the cognizance is taken in mechanical manner, but it is required to be taken judiciously. It is well established rule of procedure and judicial prudence that he magistrate is not bound to agree with and accept the police report as it is. Therefore he may either take cognizance or refuse to accept the report and direct further investigation.[431] In all these processes it takes much time, which results in unnecessary delay in the process of trial, contributing to the pendency.

I. DELAY IN SERVICE OF NOTICE OR OTHER PROCESSES

After taking cognizance of the matter court issues process in the form of summon or warrant as the case may be. In suit or other civil proceeding summon is issued to the concerned party.[432] In criminal proceeding, generally the court issues summon to the accused, but if the court is otherwise satisfied of the necessity, may issue warrant also to procure the attendance of accused.[433] Even after the issuance of such process, in absence of any instantaneous mode of service of summon or warrant to the appropriate person or authority, it takes much time in service thereof to the party concerned, so as to procure their attendance or representation at the earliest opportunity, either in person or through pleader as the case may be, which ultimately delays the initial process before trial, thereby causing delay in the commencement of trial.

J. DELAY IN ATTENDANCE AND EXAMINATION OF WITNESSES:

Even after the issuance and service of summon or warrant, due to various reasons delay occurs in the attendance or examination of witness. Some of the reasons may be the complex lifestyle, being busy in some other important work, or may be the fear in appearing before the court due to lack of adequate awareness about the legal processes and their importance. In addition to these factors absence of adequate technological resource and required skill to properly operate them so as to ensure the attendance and examination of witnesses through virtual mode through

[430] The code of criminal procedure, 1973, § 173(2).
[431] *Id.*, § 156(3)
[432] The Code of Civil Procedure, 1908, §§. 27-31, read with. Order V & XVI
[433] The code of criminal procedure, 1973, § 204,

video-conferencing or any mode other than physical appearance, in order to enable the conduct of judicial proceeding smoothing, within reasonable time and without unnecessary delay.

K. DELAY IN PRODUCTION OF EVIDENCE AND DOCUMENTS

The production of evidences and relevant documents during the process of inquiry or trial at the appropriate time as and when called upon, contributes significantly a lot towards the expeditious disposal of the cases. But traditional way of functioning judicial system, particularly physical mode of production of evidences or relevant documents takes much time resulting in to delay in judicial process. Moreover, even after providing legal recognition and validity to the use of electronic-records or documents or signature under the IT Act, 2000[434] as well as incorporation of provision for electronic evidence under the evidence Act, 1872[435], the absence of any instantaneous mode or other mechanism for production of evidences or relevant documents including through online or very few acceptance in digital form, causing the inordinate delay in judicial process and contributing a lot to the huge pendency.

L. LACK OF COORDINATION AMONG AGENCIES

The system of administration of justice comprises of various stake holders such as courts, prosecution, police, prison and other person or authorities connected therewith and relating thereto either directly or indirectly. For the smooth functioning of the entire judicial system and expeditious conducting of judicial process, proper coordination among them is of great significance to produce fruitful and effective outcome in the form of administration of justice without undue delay. But in spite of existence of various facets of application of information and communication technology, there is grave lack of effective coordination among the constituent agencies of justice delivery system, which is largely resulting in to delay contributing to pendency.

IV. SOCIO-LEGAL IMPLICATIONS

The pendency before courts is not only a problem of or pertaining to the judicial system only, rather it has quite wide amplitude and ramifications over and throughout the other legal as well as social institutions of the society, which has various social, legal and, socio-legal implications affecting vividly the individual life and societal perception with respect to justice administration system. Some of the implications may be briefly illustrated as:

[434]The Information technology Act, 2000, §§ 4-6.
[435]The Indian Evidence Act, 1872, § 3.

A. DELAY IN DISPOSAL OF CASES

Due to the huge number of pendency of cases, the speed of disposal get reduced, which results into delay in disposal and deficiency in quantum as well as the rate of disposal of cases. It is so happening because each and every case is required to be considered on their own merits in view of their peculiar facts and circumstances, and to be decided judiciously, which consumes considerable amount of time. During all these exercises as part of judicial process, due to prevalent rate of disposal the already existing pendency is not cleared within a particular duration, rather the rate of filing of new cases is increasing day by day, which adds to the existing dockets of pendency of cases, resulting into more and more delay in disposal of previously pending cases, posing increased amount of burden on the judges.

B. INCREASED BURDEN AND PRESSURE ON JUDGES

More and more filing of fresh cases and rise in the graph of pendency has effect of causing and tends to cause increased burden of workload resulting into physical as well as mental pressure on the judges. The existence of feeling of burden and effect of pressure cumulatively affects in conveniently acting in judicious manner and all around professional efficiency of judges to dispose of cases expeditiously.

C. HURRY IN DECISION MAKING

Considering the huge pendency of cases and regularly increase in backlogs, judges burdened with workload, therefore out of feeling of pressure, in order to avoid delay in disposal, they act hurriedly in course of the decision making process. Avoiding delay is quite good for the smooth functioning of judicial system, but hurry in decision making may result in to failure or miscarriage of justice. In such situation the famous saying “justice hurried is justice buried” seems to be coming true.

D. DENIAL OF OPPORTUNITY OF ADEQUATE AND FAIR HEARING

The litigant or parties to case are unable to get the opportunity of adequate and fair hearing on account of several disheartening factors such as lack of time, extreme urgency to dispose quickly, and some others like the above discussed. Thus the parties are unable to press their contentions properly and substantially so as to convince the court in order to arrive at a rightful and fair conclusion in relation to the matter in controversy. Therefore the feeling of being aggrieved is developed in their mind, which hurts their conscience and thereby tends to result into loss of their faith and confidence towards the justice delivery system.

E. LOSS OF RELEVANCE OF DECISION

The expectation of any person aggrieved by injustice caused to him starts growing more and more right from the day on which he or she firstly approached the system for justice. But such expectations begins turning into frustration or feeling of hate against the system, when administration of justice to him gets delayed day by day. If justice were administered within reasonable time, that would have of great relevance to him. But as much as justice gets delayed, it loses relevance to him and left to be merely as a decision that means nothing to him. That is also quite far away from the administration of justice in real sense, which could have satisfied him conscientiously and emboldened his faith and confidence in the system.

F. WASTE OF TIME AND MONEY OF PUBLIC

As it is well known fact that like other affairs of the daily life of human being, litigation also requires the investment of considerable time as well as sufficient money to diligently and efficiently pursue the matter in order to and in the hope of administration of justice within reasonable time. However unnecessary delay on account of several factors including huge pendency in courts spoils the expectation, and ultimately appears to be resulted into the wastage of time and money of common man, particularly to those having insufficient means.

G. MENTAL TRAUMA TO THE AGGRIEVED PARTIES

The aggrieved person approaches the court in the hope and expectation of justice. When the matter gets delayed day by day frequently the parties go through mental trauma in the expectation of justice in the form of the decision in the case. Their hope from the system degrades, which causes severe tension in the mind resulting into mental trauma. Due to which they are unable to think more effectively about the progress in their family life. That ultimately causes obstruction in the social as well as national development.

H. IMPLIED DENIAL OF JUSTICE

Huge dockets of pending cases one of the obvious reasons and a substantial cause of delay in the administration of justice. It means due to the pendency of cases, some of the cases fail to get adequate judicial attention or get very few amount of judicial time, thereby decision making in those cases gets delayed unnecessarily. Particularly those cases in which parties are not adequately represented by efficient advocates who are paying due attention and very keenly interested in the matter. Thereby inordinate delay in those matters results into the implied denial of justice, because of inability of party to pursue the case attentively in absence of

requisite financial or other resources for that purpose. In view of these facts and circumstances, the widely quoted phrase "justice delayed is justice denied" appears relevant.

I. DISSATISFACTION AMONG THE AGGRIEVED PARTY

When enormous delay occurs in deciding a case on account of huge pendency or otherwise, the party loses the hope of justice to him, thereby for that reason they feel aggrieved. The feeling of being aggrieved due to excessive delay is considered equivalent to implied denial of justice, which develops or promotes or results into dissatisfaction with respect to the working of the judicial system, among the party aggrieved thereby.

J. LOSS OF PUBLIC FAITH & CONFIDENCE

When the parties are aggrieved by the delay in deciding of cases, they are dissatisfied with the functioning of the justice delivery system. Therefore they often used to express their dissatisfaction as well as bitter experience about the judicial system and share it with the fellow members of the society. Due to which by and large population of that society appears to be losing faith in the system, thereby their confidence reposed on the system get frustrated.

K. BAD IMPRESSION OF JUDICIAL SYSTEM: NATIONAL & GLOBAL

Dissatisfaction among the aggrieved party on account of inordinate delay in disposal due to huge pendency is expressed in various modes through several means of social interaction in various walks of social life with the fellow members of the society at various platforms at national as well as global level. After listening about dissatisfaction and suffering of and by the aggrieved person, the other member of public gets wrong message and thereby form bad picture in their mind about the functioning and performance of judicial system. Thereby national and international community gets the bad impression about the performance and manner of functioning of the judicial or legal system.

L. HUGE PUBLIC CRITICISM

All these factors such as grievance of the aggrieved person, dissatisfaction among the parties and their relatives, loss of public faith and confidence in the system, and the bad impression thereabout at national and international level, cumulatively leads to the attraction of huge public criticism of the legal and judicial system on account their inability or implied failure to administer justice without unnecessary delay.

M. IMPACT ON CAREER PROSPECT OF THE ACCUSED

In case where a criminal case is pending against any person particularly those who are preparing for their career in public services, even after securing their final selection, they are either not allowed to join the service or terminated from the service during probation period. Thereby severe prejudice is caused to them in respect of his career prospect in terms of public employment as well as other opportunities beneficial to their career.

V. TECHNO-LEGAL APPROACH

A. SCIENTIFIC TEMPERAMENT

Scientific temperament refers to an individual's attitude of logical and rational thinking as well as application of logic and rationality in order to solve the problems before him. An individual is considered to have scientific temper if someone employs a scientific method of decision-making in everyday life. The term "Scientific temperament" was first coined by India's first Prime Minister, Jawaharlal Nehru, in his book *The Discovery of India*.[436]

A Statement on Scientific Temper prepared by a group of scholars and issued on behalf of the Nehru Centre, Bombay, in July 1981, mentions that "Scientific Temper" involves the acceptance, amongst others, on the following premises[437]:

(i) "The method of science provides a viable method of acquiring knowledge;[438]

(ii) The human problems can be understood and solved in terms of knowledge gained through the application of the method of science;[439]

(iii) The fullest use of the method of science in everyday life and in every aspect of human endeavour from ethics to politics and economics is essential for ensuring human survival and progress; and[440]

(iv) That one should accept knowledge gained through the application of the method of science as the closest approximation of truth at that time and question what is incompatible with such

[436] KAMP, Knowledge & Awareness Mapping Platform, available at: https://kamp.res.in/Info/Common?Page=ScientificTemper. (Accessed on 07.07.2021 at 06:14 p.m.).
[437] *Ibid.*
[438] *Ibid.*
[439] *Ibid.*
[440] *Ibid.*

knowledge; and that one should from time to time re-examine the basic foundations of contemporary knowledge."[441]

B. CONSTITUTIONAL VISION

The Indian constitution envisages the development of scientific temper, humanism, spirit of inquiry and reform which is incorporated by the Constitution (Forty Second Amendment) Act, 1976 under article 51A (h) as a part of fundamental duties.[442] India is the first and only country to explicitly adopt scientific temper in its constitution. The first major programme under the Government of India to popularise "scientific temper" among the people was the *Vigyan Mandir* (temple of knowledge/science) experiment in 1953.[443] It was created by S. S. Bhatnagar, at the time Head of the Council of Scientific and Industrial Research (CSIR), in Delhi and launched by Nehru on 15 August. Its purpose was to "disseminate scientific information of interest to the rural population" and the centres were furnished with scientific tools, films, and books.[444]

C. RELEVANCE IN PRESENT CONTEXT

Lord Denning gave a piece of advice to judges that they should never lose their temper. The reason is obvious that an angry and agitated mind cannot do justice evenly and fairly. According to him, judges must have scientific temper. It is important for a judge to discipline his mind and temper. Different and difficult situations arise in court from time to time. Therefore, a judge should be able to deal with such situations with a cool mind. Only then justice can flow equally and smoothly.[445] Judicial patience is also part of judicial temperament. Lawyers and Judges are part of the coparcenary and both must understand each other. Temperament is never one sided, therefore must inculcate scientific temper in order to ensure the smooth and efficient functioning of judicial system so as to administer justice without undue delay.

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[441] *Ibid.*
[442] INDIA CONSTI. art. 51A cl. (h).
[443] G. S. Rautela and Kanchan Chowdhury, "Science, Science Literacy and Communication". Indian Journal of History of Science. 51 (3) (Sep., 2016): 494–510, available at: https://insa.nic.in/writereaddata/UpLoadedFiles/IJHS/Vol51_2016_3_Art05.pdf.
[444] Rautela, G. S.; Chowdhury, Kanchan (1 September 2016). "Science, Science Literacy and Communication" (PDF). Indian Journal of History of Science. 51 (3): 494–510. doi: 10.16943/ijhs/2016/v51i3/48850. Available at: https://en.wikipedia.org/wiki/Scientific_temper#:~:text=The%20first%20major%20programme%20under%20the%20Government%20of,Delhi%20and%20launched%20by%20Nehru%20on%2015%20August.
[445] Balram K. Gupta, From The Desk of Chief Editor, CJA e- Newsletter of Chandigarh Judicial Academy, Vol. 3, Issue 2 (Feb., 2018).

D. APPLICATION OF TECHNOLOGY

There are various facets of technology in general and ever growing and dynamic arena of information and communication technology in particular, which is being widely used at a very scale across the world, for various purposes in daily life. Some of the facets of such technology can also be used to solve many socio-legal problems. Broadly speaking one of such issues or problems is the huge pendency in courts, which can be solved or reduced to a certain extent, with the help and the application of techno-legal approach in a diligent and sincere manner. Some of the instances of application of various facets of technology for the aforesaid purpose may be briefly discussed below as follows:

(1) SMS

The term "SMS" stands for the expression *Short Message* Service. It is a mode text messaging available over telephone, internet, and mobile as well as other electronic device. It can be used as a potential and efficient means to communicate to the parties, their advocates, witnesses and other person or authority concerned or required in the matter as the case may be, to whom and whenever it is necessary to inform. The SMS should contain the information regarding the next date of hearing, date of appearance, date for examination of witness, or other information including the case no., court or place and time of appearance, name of parties, person or witnesses required to appear, and any other information relevant thereto.

(2) Voice Call

Even after widespread use and application of technology there are some people belonging to a section of society who are still not acquainted or conversant or not use the mobile application or other similar technology, except for making or receiving a call. In such cases it becomes imperatively necessary to communicate them with some traditional means of communication to provide adequate information about the matter pending before court. For that purpose making a call to such person would avoid unnecessary delay caused because of their ignorance, and would enable him in order to get adequate opportunity of hearing.

(3) E-Mail

The term "e-mail" stands for the expression *electronic mail"*. It is a mode of exchanging messages which is referred to as "mail" between the people using electronic devices connected with internet. It can also be used to instantaneously serve a copy of notice or Summon or warrant or order or judgment to any person or authority or the concerned party or their advocate

or concerned police officer or investigating officer by the appropriate authority or by staff or officer of the court authorized in this behalf. It can also be used for the purpose of production of evidences or relevant document which are instantly necessary in course of the judicial proceeding.

(4) WhatsApp

WhatsApp Messenger is a mobile application. It allows users to send text messages and voice messages, make voice and video calls, and share images, documents, user locations, and other contents. It can also be used for the purpose of service or copy of a Summon or Warrant or Order or important document to any person or authority or the concerned party or their advocate or concerned police officer or investigating officer by the appropriate authority or by staff or officer of the court authorized in this behalf. One of such instances was witnessed, when the Delhi High Court[446] has approved the use of technology and social networks like WhatsApp, SMS, and email to serve a summons in judicial proceedings in the matter of *Tata Sons v. John Doe(s) and Ors*.[447] Taking a positive lesion form such de novo initiative, it is being widely used for the aforesaid and related purposes by various courts situated within the territory of India in furtherance of cause of the administration justice to avoid undue delay.

(5) Mobile Applications

A mobile application, most commonly referred to as an "app" is a type of application software. It is designed to run on a multimedia electronic device such as mobile, smartphone or tablet or computer, etc. Mobile applications frequently serve the purpose to provide its users with similar services as those who access on PCs. Mobile Apps are generally small, individual software units with limited function.[448] Thus it can also be useful for the purpose of facilitating requisite information about the status of pending cases.

One such instance of recognition and approval of the using a mobile application was witnessed, when the Hon'ble Chief Justice of India and Hon'ble Minister for Law & Justice, and, Electronics and Information Technology, Government of India in the presence of Hon'ble Chief Justices of all the High Courts launched a Mobile Application "e-Courts Services" on 22.07.2017. It is available for android and iOS users. Besides Mobile Application, National

[446] Speaking through Hon'ble Mr. Justice Rajiv Sahai Endlaw, Delhi High Court.
[447] CS(COMM) 1601/2016, vide Order dated 27 April, 2017.
[448] What does mobile Application mean? Techopedia, available at: https://www.techopedia.com/definition/2953/mobile-application-mobile-app (Accessed on 11.07.2021).

Judicial Data Grid for High Courts and e-filing application for District Courts and High Courts are also launched. With the launch of the app, all the data available on the National Judicial Data Grid (NJDG) for district and taluka courts is now available on mobile phone. The e-Courts Services app is available both on Google Play and Apple Store. It serves as a source of information both for the judicial delivery system and for lawyers, litigants, police, government agencies and other stakeholders as well.[449] In this regard Justice Madan B Lokur[450]said that this app is extremely helpful and beneficial to lawyers and litigants. The App provides information related to Cases filed in the Subordinate courts and most of the High Courts in the country. One can use this exclusively for District Courts or High Court or both. By default the app is set for District Courts however you can change to High Court or Both.

(6) Websites

It is a collection of web pages and related content that is identified by a common domain name and published on at least one web server. For example "google.com" is also a website. All the websites accessible to general public collectively constitute the World Wide Web. There are also private websites that can only be accessed on a private network, such as a company's internal website for its employees. Websites are generally dedicated for a particular purpose, such as news, education, commerce, entertainment, or social networking. Websites can be accessed users over a range of devices, such as desktops, laptops, tablets, and smartphones. The app used on these devices is called a web browser.

It can also be used for the purpose of uploading and retrieving relevant information relating to pending cases such as FIR, Police Report, Notice, and Order, judgment, and other information related thereto, in order to facilitate smooth functioning of the judicial system for reducing or cutting short the delay usually caused on the pretext of communicating such information. This approach would definitely help a lot in order to reduce the pendency in courts and administering justice without unnecessary and inordinate delay. Although there are several websites of various courts and a common website for all courts, but those websites are required to be functionally improved, properly and regularly maintained and updated with relevant information for the smooth functioning of the judicial system.

(7) Video-Conferencing

[449] E-Court Mission Mode Projects, available at: https://districts.ecourts.gov.in/download-e-court-services-app (Accessed on 20th Feb 2021 at 5:40 a.m.).
[450] Justice Madan B Lokur, Judge-in-Charge of the Supreme Court's e-Committee.

Video conferencing is an online meeting between two or more participants using a camera and a microphone so attendees can see and hear each other. Businesses and individuals can use video conferencing to communicate with each other quickly and easily and to collaborate on projects as a group. It can be used generally for the purpose of conducting the judicial proceeding and particularly for the trial of cases, appearance of parties or any person, examination of witnesses whose presence cannot be ensured without unreasonable delay or expenses or inconveniences. There are various platforms used in India for conducting judicial proceeding and virtual hearing of the cases such as *Webex, Zoom, Google meet*, etc. Like the aforementioned, there are many others platforms that can be used for virtual hearing of cases.

(8) Artificial Intelligence

In General terms as a common man, Artificial Intelligence can be defined as a branch of computer science that can simulate human intelligence. It is implemented or demonstrated in and by machines to perform such tasks that actually require the use of human intelligence. Some of the primary functions of artificial intelligence include reasoning, learning, problem-solving and quick decision making or other complicated task requiring the use of intelligence.[451] A well trained artificial intelligence algorithm would be a very useful and reliable tool in the hands of the judges in highlighting the facts of a case, summary of the documents and oral or documentary evidence. It would greatly enhance the capability of the judges in handling the complicated matters involving voluminous records smoothly and efficiently.[452] In the United States, artificial intelligence has already been used in the courtroom and data analytics at various points and stages within the justice delivery system. Another instances thereof such as predictive policing to the pre-trial risk assessment, sentencing, parole and probation are already utilizing various facets of artificial intelligence and data technology in course of the courtroom proceeding.[453] For the Indian courts artificial Intelligence can be helpful to a great extent in order to reduce the huge pendency of cases, and to increase efficiency of judiciary as well as effectiveness of judicial proceeding in many aspects. However

[451] Tathagata Das, What is Artificial Intelligence (AI)? Available at: https://tech4fresher.com/what-is-artificial-intelligence-ai/ (Accessed on 11.07.2021 at 01:35 p.m.).
[452] Tripaksha Litigation, Artificial Intelligence in Judiciary, Available at: https://tripakshalitigation.com/artificial-intelligence-in-judiciary/ (Accessed on 11.07.2021 at 02:00 p.m.).
[453] Staff Writer, Digital Justice: The use of Artificial Intelligence in the Courtroom, BOLD BUSINESS, And Available at: https://www.boldbusiness.com/digital/digital-justice/ (Accessed on 11.07.2021 at: 02:13 p.m.).

before adopting it into in the Indian legal system, some challenges related to privacy, data protection and other issues of ethical or legal importance need to be addressed.[454]

(9) Use Of Scientific Tools & Technique In Investigation

Even after the emergence of the era of advancement of science and technology, in most of the cases the investigation is generally conducted in a traditional and very casual manner without using appropriate scientific tools and adopting suitable scientific technique properly. Therefore it is the need of the hour that for the purpose of expeditious and fair investigation, suitable scientific techniques needs to be necessarily adopted using the appropriate scientific tools, so as to prepare a scientifically accurate report and complete the investigation within a reasonable time in order to expedite the process of trial. This would ultimately help to a great extent in reducing the pendency and administering justice by avoiding unnecessary delay in trial on account of delayed investigation.

(10) Technical Training To The Staffs

For the proper and efficient use of appropriate scientific tools and adoption of suitable scientific techniques the judicial officers, other auxiliary court staffs, investigating officers, and police officers or any other person or authority concerned with the administration of justice should be given proper technical training in order to yield desired positive result, in order to avoid the unnecessary consumption wastage of the time on account of non-application of technology, which could have been avoided if done so. It would be much helpful in the smooth functioning and increased efficiency of justice delivery system.

The above discussed instances of applications of various facets of technology are not the exhaustive because of ever-growing and dynamic ambit of science and technology. There are many others existing and growing facets of technology yet to be adopted for this purpose.

VI. CONCLUSION

In view of the above discussion on the various aspects of issue of pendency in courts including the contributing factors and impacts thereof in the society, in various sphere of individual as

[454] Kartik Pant, AI in the courts, The Indian Express, Available at: https://indianexpress.com/article/opinion/artificial-intelligence-in-the-courts-7399436/ (Accessed on 11.07.2021 at7:00 a.m.).

well as social life of the parties related to the matters pending before the courts, it may be concluded that huge pendency in court results into the grossly flagrant violation of right to fair and speedy trial in particular and relative deprivation of right to life and personal liberty in general. The scientific temper needs to be inculcated among the members of the justice delivery system, so as to efficiently utilize the existing as well as emerging technology in the forms of various scientific tools, techniques and their applications as above discussed briefly, in order to substantially reduce the huge pendency of cases in our courts and ultimately realize the constitution vision of access to justice fairly without unnecessary delay. Moreover it is humbly suggested that if the suggestions made in this paper is properly taken into consideration by the appropriate person or authority concerned with the justice delivery system, it would be definitely and necessarily much helpful in order to efficiently overcome the problem of pendency in courts in a very effective manner.

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MENTAL HEALTHCARE ACT 2017: ANALYSING THROUGH THE LENS OF EFFECTIVE IMPLEMENTATION

- Hani Dipti[*] & Kaustubh Kumar[**]

ABSTRACT

Mental health plays a crucial role along with physical health in the development of an individual. The WHO constitution shows that Mental Health is of the most extreme significance to have a quality life. Notwithstanding, there are people with mental inabilities who in specific conditions can't settle on choices all alone. The psychological sickness keeps going long and essentially affects the existence of the person, which at times continues disintegrating with an expansion on schedule and age.

Furthermore, the data suggest that more than 300 million individuals experience the ill effects of depression which is identical to 4.4 per cent of the absolute population of the world. As per a report led by the National Institute of Mental Health and Neurosciences, 1 of every 40 and 1 out of 20 individuals are experiencing past and current scenes of depression in India.

Thus, considering these data, the article attempts to elucidate mental health in simple terms. It also puts forth how the ancient philosophies consider it. Further, taking into account the contemporary scenario, it talks about the Mental Healthcare Act, 1987 and the irregularities that popped out of it with time.

The article talks about the provisions of the newly implemented Mental Healthcare Act, 2017 and attempts to analyse them critically. It not only talks about the issues that remained unaddressed in the act but viewpoints of the courts also discussed. There is no single study even after four years of implementation available anywhere about this Act. Thus, taking a holistic approach, the writers attempt to discuss how the Mental Healthcare Act, 2017 helped mentally ill persons.

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KEYWORDS:

Mental Health, Mental Healthcare Act 2017, Mentally Ill, Disabilities, Advanced Directives, Implementation Mechanisms

I. INTRODUCTION

"Just because no one else can heal or do your inner work for you, doesn't mean you can, should, or need to do it alone."

— Lisa Olivera

The times we are going through – the ongoing pandemic scenario made it important to again ponder over the issues and challenges posed by stress and anxiety on the mental health of an individual. The Constitution of the World Health Organization (hereinafter WHO) defines 'Health' as '*a state of complete physical, mental, spiritual and social well-being and not merely the absence of disease or infirmity*.'[455] WHO sees that mental wellbeing and prosperity are basic for assisting individuals with becoming creative and dynamic citizens in addition experience a meaningful and quality life.[456]

The definition provided by WHO depicts that Mental Health is of outrageous importance to have a quality life, nonetheless, there are individuals with mental insufficiencies who under specific conditions, do not have the capacity to settle on choices all alone. The psychological sickness continues to go and altogether affects the life (presence) of the person, which sometimes goes on with crumbling the expansion of time and age.

In Indian philosophy, mental health is primarily seen side by side with spiritual practices. In a recent scenario, mental health is considered as a tripartite system comprised of cognition, conation, and effect. The Gita was the first philosophy to disclose these three parts of mental health as dhyana, karma, and ichcha.[457] The mind is an unsettling battlefield that gives rise to enormous emotions by controlling all bodily functions. Gita is a reply to all those questions that the mind of one can possess. The Gita in just one image of a chariot (as a body) with five horses (of sensation) reined (mind) by charioteer (intellect) and a passenger sitting at the back

[455] CONSTI. The World Health Organisation. Preamble (1946).
[456] *Ibid.*
[457] Abhyankar, Ravi. Psychiatric thoughts in ancient India, MENS SANA MONOGRAPHS vol. 13, 1: 59-69 (2015).

(soul), provides the solution to all mental problems by showing that utmost importance should be given to the mental well-being.[458]

Further, a study led by the National Care of Medical Health (NCMH) revealed in WHO advances that at least 6.5 per cent of the Indian population encounters different genuine mental disorders, with no recognisable rural-urban contrasts. There are diverse successful medicines, therapies and other treatments accessible to help the patients, however, the number of mental health workers like psychologists, psychiatrists, and doctors required is extremely less in number. As per a 2014 report, it was pretty much as low as 'one in 100,000 people.'[459] Moreover, in recent times, as a consequence of COVID-19, the psychological well-being of individuals is getting exacerbated, day by day. As per a recent 2020 study, 43 per cent of Indians are suffering from 'clinical depression.'[460]

The Mental Healthcare Act, 1987 provisions are coming up short in adapting to such situations. In addition, India in like manner needs to address the worldwide responsibilities towards mentally ill people that it had due to the Convention on Rights of Persons with Disabilities, signed in 2007. Accordingly, the government enacted a new Mental Healthcare Act, 2017 (hereinafter MHA or the Act) to determine the unaddressed issues of earlier legislation and offer effect to the provisions of the Convention signed.

II. COVID-19 & ITS EFFECT ON THE MENTAL HEALTH OF THE PEOPLE

During the coronavirus lockdown, the suicide rates,[461] domestic violence cases,[462] et al. rose steadily. The sole reason behind this increase in crime rate was the mental health issues that individuals encountered as a result of the Covid-19 pandemic. The pandemic forced everyone to share the same space and confined them in a 'hostile' home environment, which resulted in anxiety, stress, lack of motivation, and similar situations. Moreover, the problem further got

[458] The meaning of the Chariot and charioteers in the Bhagavad Gita, Lallous' Lab (November 12, 2017), http://lallouslab.net/2017/11/12/the-meaning-of-the-chariot-and-charioteers-in-the-bhagavad-gita/.
[459] Kabir Garg, et al., Number of psychiatrists in India: Baby steps forward, but a long way to go, Indian Journal of Psychiatry, vol. 61,1: 104-105 (2019).
[460] 43% Indians suffering from depression: Study, The Times of India (Accessed on: July 28, 2020, 05:50 PM), available at: https://timesofindia.indiatimes.com/india/43-indians-suffering-from-depression study/articleshow/77220895.cms.
[461] Madhumitha Nanditale Sripad, et al. Suicide in the context of COVID-19 diagnosis in India: Insights and implications from online print media reports. Psychiatry Research, vol. 298: 113799 (2021).
[462] Nature-Wise Report of the Complaints Received by NCW in the Year: 2020, National Commission for Women, Government of India (2020), available at: https://164.100.58.238/frmReportNature.aspx?Year=2020.

aggravated with the lack of communication and interaction with friends and teachers. This can also be counted as one of the major reasons behind the increase in the suicide rate among students. Although there was an online medium to contact friends and teachers, yet the medium is not that comfortable during the initial days as well as even today meeting someone offline has a major psychological impact than online.

Studies reported that adolescents faced acute and chronic stress due to home confinement, having no access to sports/games/entertainment mechanisms except online mode, disruption of daily routine, excessive parental control and no access to friends, peer groups and teachers during the Covid-19 pandemic.[463] Further, the Covid-19 gave a push to Online mode as a result of which everything in the meantime migrated from offline to online. However, this further exacerbated the scenario as individuals started excessively using social media increasing their screen time.[464] There are a plethora of well-documented studies that showcase that excessive use of social media and/or the internet results in an increased level of psychological arousal causing an arbitrary release of hormones that further lead to little sleep, limited physical activity, depression, anxiety, stress, bad family/social relationships and other such mental problems.[465]

Thus, this showcased the importance of mental health in day to day life of an individual. This makes it necessary to deliberate, discuss and analyse the Mental Health regime followed by India so as to decipher its lacunas and make it more compassionate towards mentally ill individuals.

III. LACUNAS IN THE MENTAL HEALTHCARE ACT, 1987

MHA 1987 came into power in 1993, supplanting the Indian Lunacy Act, 1912. It was divided into ten chapters consisting of 98 sections. The Act was not sufficient to cope up with the conditions. As a consequence, it faced severe criticism, since its inception.[466]

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[463] Suravi Patra & Binod Kumar Patro, COVID-19 and adolescent mental health in India, The Lancet Psychiatry, vol. 07, 12: 1015 (2020).
[464] Jaffar Abbas, Dake Wang et al., The Role of Social Media in the Advent of COVID-19 Pandemic: Crisis Management, Mental Health Challenges and Implications, Risk Management and Healthcare Policy, vol. 14, 1917-32 (2021).
[465] Seyyed Salman Alavi, Mohammad Reza Maracy, et al., The effect of psychiatric symptoms on the internet addiction disorder in Isfahan's University students, Journal of research in medical sciences: the official journal of Isfahan University of Medical Sciences, vol. 16, 06: 793-800 (2011).
[466] Suresh Bada Math, Pratima Murthy & Channapatna R. Chandrashekar, Mental Health Act (1987): Need for a Paradigm Shift from Custodial to Community Care, The Indian Journal of Medical Research, vol. 133, 3: 246-9 (2011).

The rights of patients with mental illness to access medical healthcare were undermined in the Act. Moreover, it does not provide any proper equilibrium between the rights of the family and the state. With the inadequacy of resources for mental illness in the country, the sole weight for the treatment fell on the shoulders of the family of the patient. Definition of 'mental illness' does not contain mental retardation,[467] thus, large numbers of individuals with mental retardation requiring psychiatric intervention got no assistance under the provisions of the MHA 1987. The MHA 1987 also not include any provision for the emergency crisis intervention to help families caring for a mentally ill family member. Enrolment of strolling mentally ill patients also needed to be smoothened out. Under the act, the police personnel needed to be made more sharpened and responsible for working with confirmations of such patients to the hospital.

The serious loophole of the act was the assessment process for mentally retarded persons by the medical officers in the custodial care centres. The process was peremptory and unreasonable, which keeps the mentally ill persons into closed wards, amounting to the violation of the fundamental right to life and liberty of those persons.[468] Moreover, if this was not enshrined in the Act and made as a 'procedure established by law,' then it would have been considered as 'wrongful confinement,' punishable under Section 340, Section 342, Section 343, and Section 344 of Indian Penal Code (IPC).[469] Hence, the need of the hour was to have simple, fair, and effective legislation with easy access to medical facilities for patients suffering from mental illness. Consequently, to remove such intricacies, the government came up with the Mental Health Care Bill 2013 (enacted as MHA 2017).[470]

IV. THE MENTAL HEALTHCARE ACT, 2017

"*It is during the darkest moments that we must focus to see the light.*"

– *Aristotle*

In a unanimous decision, the Lok Sabha, after due deliberation over the Mental Healthcare Bill 2013, passed the bill on March 27, 2017, which further got carried out on April 07, 2017, subsequent to getting the consent of the President of India.[471] As referenced above, the Mental

[467] The Mental Healthcare Act, 1987 § 2(l).
[468] INDIA CONSTI. art. 21.
[469] Indian Penal Code, 1860 §§ 340, 342, 343, 344.
[470] The Mental Healthcare Bill, Ministry of Law and Justice, Government of India (2013).
[471] The Mental Healthcare Bill, 2013, PRS Legislative Research, available at: https://prsindia.org/billtrack/the-mental-health-care-bill-2013, (Accessed on June 10, 2021).

Healthcare Act (MHA), 1987 contained a limited meaning of 'mental illness.' MHA, 2017 described it in a more extensive way as "*a significant disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, ability to perceive reality or capacity to satisfy the conventional needs of life, psychological circumstances related to the abuse of alcohol and drugs, but does not include mental retardation which is a condition of captured or incomplete development of mind of a person, particularly characterized by sub-normality of intelligence.*"[472]

The MHA, 2017 defines itself as an "*Act to accommodate for mental healthcare and services for individuals with mental illness and to ensure, advance and fulfil the rights of such persons during delivery of mental healthcare and services and for issues connected therewith or incidental thereto.*"[473]

The definition seems apt when we give a cursory glance to the Act as, under Chapter V, it provides various rights that were not available before to the mentally ill persons. The Act renders the right to access mental healthcare services to every mentally ill person.[474] Moreover, the MHA does not leave this right ambiguous as under Section 18(2), it further defines the right as "*it shall mean mental health services of moderate expense, of good quality, accessible in adequate amount, accessible geographically, without segregation based on gender, sexual orientation, religion, culture, caste, social or political convictions, class, disability or any other basis and provided in a way that is worthy to persons with mental illness and their families and guardians.*"[475]

It additionally puts the right as an obligation to the appropriate government that such administrations must be helpful, affordable, available, and of good quality. This Act likewise endeavours to give mentally obstructed individuals protection from inhumane treatment by cherishing the right to free legal aid as well as the right to complain in the case of deficiencies in provisions.[476]

The MHA gives different rights which were not before accessible to mentally ill persons through 1987 law like under Section 20 of the Act, it lays down the right to live in a safe and

[472] The Mental Healthcare Act, 2017 § 2(s).
[473] The Mental Healthcare Act, 2017.
[474] The Mental Healthcare Act, 2017 § 18.
[475] The Mental Healthcare Act, 2017 § 18(2).
[476] The Mental Healthcare Act, 2017 §§ 27, 28.

hygienic environment, not getting subjected to shaving off their head if not compulsory, wear their own clothes, have adequate sanitary conditions, etc.[477]

Chapter III of the Act gives arrangements to "Advance Directives," through which an individual or the representative of that individual can make a development directive towards the way he/she needs to be dealt with or not wants to be treated during the treatment methodology.[478]

The Act further gives the option to get to access medical records, the right to confidentiality, the right to equality and no segregation, the right to information, and others.[479] Furthermore, taking a step of paramount importance, the Act decriminalizes the attempt to suicide by mentally ill persons, which is considered a crime and dealt with under Section 309 of the Indian Penal Code (IPC).[480] The Act empowers a commitment on the state to restore mentally ill individuals who attempt to do accordingly and ensure that he/she probably won't endeavour in the future again.[481]

The act likewise keeps up with that electroconvulsive theory (ECT) shall not be administered to minors. Besides, it expresses that the ECT ought not to be utilized without the utilization of muscle relaxants and sedation on others.[482] The Act has additionally established a central authority along with state authorities in every state. All mental wellness institutes, as well as practitioners (mental health nurses, clinical psychologists, and psychiatric social workers), need to enlist themselves with these authorities.[483] Further, Section 100 of the Act provides a position to the police officers that they can take any mental person under protection if they found them meandering or in danger. The person taken under assurance should not be confined or kept in lockup. He ought to be subjected to assessment under a medical officer, and afterwards based on the report of that assessment either conceded to any medical establishment or his/her residence or an establishment of destitute persons.[484]

The Act also imposes stringent penalties if someone commits any offence or acts in a contrary manner to the act. The act states that if someone establishes or maintains any mental health

[477] Raghav Tankha, Peace of Mind: An Examination of The Mental Healthcare Act Of 2017, Live Law (September 11, 2020, 04:39 AM), available at: https://www.livelaw.in/know-the-law/peace-of-mind-an-examination-of-the-mental-healthcare-act-of-2017-162746.
[478] The Mental Healthcare Act, 2017§ 5.
[479] The Mental Healthcare Act, 2017 §§ 21, 22, 23, 24, 25.
[480] Indian Penal Code, 1860 § 309.
[481] The Mental Healthcare Act, 2017 §§ 29, 115.
[482] The Mental Healthcare Act, 2017 § 95.
[483] The Mental Healthcare Act, 2017 §§ 65, 66.
[484] The Mental Healthcare Act, 2017 § 100.

establishment without registering it to the state authorities, then he/she shall be liable to pay at least five thousand rupees, which may extend to fifty thousand rupees for the first time. Further, for the second contravention, he/she would have to pay a penalty of fifty thousand to two lakh rupees, which increases with every subsequent violation.[485] The seriousness of the Act, to deal with any sort of violation, can be clearly determined from Section 107(4), which lays down that "*if an individual fails to pay the amount of penalty, the State Authority might advance the order to the Collector of the district in which such individual possesses any property or lives or carries on his business or profession or where the mental health establishment is situated, and the Collector shall recover from such people or mental health establishment the amount indicated thereunder as if it were an arrear of land revenue.*"[486]

Further, for the individuals violating the provisions, the Act states that if someone contravenes the sections, then he/she will be awarded a punishment of up to six months or ten thousand rupees or both. Repeat offenders can attract something very similar for up to two years or a fine between fifty thousand to five lakhs or both.[487] The Act specifically lays down the provisions for the companies acting contrary to the legislation to be made liable and punished accordingly.[488]

Thus, the provisions mentioned clearly depict a holistic approach taken by the government in formulating the legislation. The much-awaited Act came as a beacon of hope for mentally disabled persons in a similar manner as denoted by Aristotle (mentioned above). However, the implementation of this Act would be a herculean task as merely putting forth the sections is just a quarter of the work. The government has also not released any implementation guidelines for the states and districts, thus, leaving a void for the state governments to fill themselves in the best suitable way they can. However, even after four years of the enactment hardly all provisions of the Act are implemented in its true spirit, which is discussed later succinctly in the analysis part of the article.

V. INDIAN COURTS IN THE LAST FOUR YEARS

The claim stated above that implementation of the Act in a true sense is a herculean task gets bolstered if we take into account the subject matter of the petitions filed in different courts.

[485] The Mental Healthcare Act, 2017 § 107.
[486] The Mental Healthcare Act, 2017 § 107(4).
[487] The Mental Healthcare Act, 2017 § 108.
[488] The Mental Healthcare Act, 2017 § 109.

Recently in April 2021, a single-judge bench of the Hon'ble Delhi High Court sought status reports from the Delhi government on the functioning of the Mental Health Review Board (formulated under Section 73 of the Act) and the State Mental Health Authority (formulated under Section 45 of the Act).[489] The notice was issued on the petition filed by a 19 years old boy to reconstitute the State Mental Health Authority as per the directives laid down in MHA, 2017 r/w the Mental Healthcare (State Mental Health Authority) Rules, 2018. As per Section 45 of MHA, the state governments had to establish a State Mental Health Authority within nine months after the commencement of the legislation,[490] but the directives laid down neither got implemented, leading to the blatant violation of act as well as the rights of mentally ill persons. Moreover, he also sought direction for the constitution of the Mental Health Review Board, which is not yet established by the Delhi government, even after four years of the passage of the legislation.[491] This laziness of the governments to implement the act clearly demonstrate that without any behavioural change in the functioning of governments, it is hard to implement such appropriate legislation.

Further, in a majestic decision in September 2020, the Hon'ble Manipur High Court directed the state government of Manipur to implement the provisions of the act in letter and spirit.[492] The decision came out as a result of a PIL filed by a senior citizen stating that the state government has not implemented the act in a true sense, which is causing hardship to the mentally disabled persons of the state as they are neither able to enjoy the rights nor the facilities provided to them by the act. The state government also neither established a psychiatric hospital nor a nursing home for mentally ill persons, thus violating their right to access adequate mental healthcare services. The Hon'ble High Court, taking the cognizance of the judgment of the Hon'ble Apex Court in *In Re Vs. Union of India and Others*[493] and *Accused X vs. State of Maharashtra*,[494] laid down that "all the provisions of the new act have to be strictly implemented by the State Government. It is for the State Government to work out the

[489] Shreya Agarwal, Mental Healthcare Act: Delhi HC Seeks Status Reports on Plea Alleging Lack of Grievance Redressal Bodies, Live Law (April 10, 2021, 11:21 AM), available at: https://www.livelaw.in/news-updates/delhi-high-court-state-mental-health-authority-mental-health-review-board-172420.
[490] The Mental Healthcare Act, 2017 § 45.
[491] Agarwal, *Supra*, at 35.
[492] Sparsh Upadhyay, Implement Provisions of Mental Healthcare Act in Letter and Spirit within 6 Months: Manipur HC Directs State Government, Live Law (September 13, 2020, 06:33 AM), https://www.livelaw.in/news-updates/implement-provisions-of-mental-healthcare-act-in-letter-and-spirit-within-6-months-manipur-hc-directs-state-government-162862.
[493] In Re vs. Union of India and Others (2002) 3 SCC 31.
[494] Every Person with Mental Illness Shall Have a Right to Live with Dignity: SC, LIVE LAW (May 27, 2019, 11:46 AM), available at: https://www.livelaw.in/top-stories/right-to-dignity-of-mentally-disabled-persons-145304.

modality for financing the establishment of the psychiatric hospitals and nursing homes (i.e.) mental health establishments."[495] *(Emphasis supplied)*

The *Accused X vs. State of Maharashtra* is a recent case where a person was convicted for raping and murdering two minor girls. The accused became mentally ill after getting convicted. The courts have awarded the death penalty to the accused because of the heinous crime committed by him. However, the Apex Court, while considering the issue, taken the rights of mentally ill persons laid down in the MHA 2017 and stated that as per Section 20 (1) of the Mental Health Care Act 2017, 'every person with mental illness, shall have a right to live with dignity.' Further, the court observed that post-conviction mental illness would be given due diligence and shall act as a mitigating factor in the case.[496] Thus, the court following MHA commuted the death penalty of the convict.

The MHA has remained a burning issue in recent times, however, no study was conducted to date even after four years of the enactment to show whether the legislation helped in mitigating the problems of mentally disabled persons or not. Further, the instances stated above are enough to delineate that the court is acting as a linchpin in the implementation of the act. The need of the hour for the courts is to keep a check on the functioning of the appropriate implementing authorities so that the legislation may get implemented in a true sense as soon as possible.

VI. ANALYSIS OF THE ACT

The provisions of the Act show that it is outlined with the end goal of giving all-encompassing advancement to deranged people. In any case, the execution is a difficult task, which government needs to act in a genuine way. Albeit the Act contains different arrangements identified with the framework, the mental infrastructure in India isn't sufficient. As stated by WHO that India, India has a huge shortage of psychiatrists and psychologists in contrast to the number of people suffering from mental health issues. It further says that in India, there are only 0.3 psychiatrists, 0.12 nurses, 0.07 psychologists, and 0.07 social workers available (per

[495] Maibam Jatiswor Singh v. The State of Manipur & Ors, PIL No. 12 of 2018.
[496] Ashok Kini, Breaking: Post Conviction Mental Illness Is a Mitigating Factor to Commute Death Sentence: SC, Live Law (April 15, 2019, 11:47 AM), available at: https://www.livelaw.in/top-stories/post-conviction-severe-mental-illness-is-a-mitigating-factor-144301.

100,000 population), while anything above three psychiatrists and psychologists per 100,000 population is the advantageous number.[497]

About 7.5 per cent of Indians experience the ill effects of some psychological issue. Also, the WHO predicts that roughly 20 per cent of India will suffer from mental illnesses by end of 2020. As indicated by the numbers, around 56 million Indians experience the ill effects of clinical depression, and another 38 million Indians suffer from anxiety disorders.[498] Further, the Lancet contemplates suggesting that the contribution of India to worldwide suicide deaths increased from 25.3 per cent in 1990 to 36.6 per cent in 2016 among women and from 18.7 per cent to 24.3 per cent among men.

Accordingly, to curb such data, the provisions of MHA might play a crucial role if exposed to viable execution. The Act provides that every district and sub-district should have to constitute and avail the services to mentally ill persons. As already stated, the infrastructure is not of that level, and further, this provision might overburden the state's depository. Thus, it's the obligation of the central government to work with the states in establishing the same instead of leaving it in their hands or even if the government has left it on the states to implement the Act in a true sense with an intention that they might come up with much better plans, then it should at least keep a check on their working and provide them adequate required assistance time to time.

Mentally ill persons likewise face segregation in India. A study directed with the example of five metropolitan cities of India revealed that there is a critical presence of perceived shame of mental illness with more significant levels of disgrace among female members.[499] Further, mentally disabled people were also considered as 'lunatics' by society regardless of the problems from which they were suffering, which makes people shameful and introverted.[500] To curb such discrimination and stigmatization associated with it, the Act incorporates the provision to create awareness about psychological well-being and illness, which is a much-appreciated provision.[501] The state governments can also take the assistance of district legal

[497] Anisha Bhatia, World Mental Health Day 2020: In Numbers, The Burden of Mental Disorders in India, NDTV India (October 09, 2020, 08:30 PM), available at: https://swachhindia.ndtv.com/world-mental-health-day-2020-in-numbers-the-burden-of-mental-disorders-in-india-51627/.
[498] *Id.*
[499] Kerem Boge, Aron Zieger, Aditya Mungee, et al., Perceived stigmatization and discrimination of people with mental illness: A survey-based study of the general population in five metropolitan cities in India, INDIAN Journal of Psychiatry 60:24-31 (2018).
[500] Ramon Llamba, What India must do to solve its mental health crisis? The Economic Times (February 26, 2020, 01:10 PM), available at: https://health.economictimes.indiatimes.com/news/industry/what-india-must-do-to-solve-its-mental-health-crisis/74314862.
[501] The Mental Healthcare Act, 2017 § 30.

services authorities (DLSA), Accredited Social Health Activist (ASHA) workers, municipal corporations, panchayats, and other local bodies that can work door-to-door at ground level in raising awareness about the rights of mentally disabled persons and facilities that government provides to them.

The 2017 MHA formulates various provisions, but it fails to provide any guidelines or rules to implement them effectively. The Act delineates the duties to be rendered by the state within a specific time limit, but it does not provide what would be the consequences of any state government failing to perform those duties within provided stipulated time. For instance, Section 45 provides a span of nine months for the re-establishment of a new State Mental Health Authority as per the new law and rules, but what if the government does not work within that period, as demonstrated above how the Delhi government failed in doing so?

Furthermore, the Act lays down the duties of the police officers under Section 100 for the protection of mentally disabled persons, but it does not provide any cushion to the problem that if those police officers neglect or omit their duty or contravene with the procedure laid down, then what would be the remedy for those helpless persons. The government should at least lay down a procedure to duly investigate the complaints filed against police officials or any such authority that might act contrary to the provision of law. Thus, merely writing down and enacting the provisions won't serve the purpose unless checks and balances are duly maintained among the authorities.

VII. SUGGESTIONS AND RECOMMENDATIONS

Apart from the suggestions mentioned above to be inculcated in the Act to make it more effective, there are a lot more needs to be done at ground level. The stigmatisation of mentally disabled persons is a serious issue that needs to be dealt with concrete policy decisions. One of such decisions can be the rollout of mental health insurance plans at a mass level by the government as well as private insurance companies. Mental health insurance can be advertised on different media platforms extensively, side by side to the advertisements of life insurance and other health insurance. As a result of COVID-19, society has somehow become aware of this concealed issue. It is time for the government to strike the iron while it is hot. By extensively advertising the mental health problems and insurance for the same, the government can perform its eagerly anticipated task. It can change the outlook of society towards mental health issues, categorising them as a part of common health issues.

Another major problem is the lack of infrastructure and doctors in this field. The government has to encourage people to opt for this field by providing incentives or developing an intuition in them to serve society. Government should at least try to fill up to fifty per cent of the vacancies of mental health experts and workers. During the current scenario where the unemployment rate is all-time high (14.73% in May 2021),[502] jobs would be the best incentive for the people. Thus, the government should ponder over the recruitment of such workers. Moreover, if mental health students or experts won't be able to secure any job, then they can open their own clinics and NGOs to serve society as well as this would also help them in earning money as mental health infrastructure is the need of the hour.

The government of India in 1982 launched the National Mental Health Programme (NMHP) intending to ensure the availability of mental healthcare services, raise awareness about mental health issues, encourage community participation, and enhance mental healthcare infrastructure and human resources.[503] The district NMHP was added in 1996 to implement the program extensively. In community reach programs, improvement of services with increased budget allocations, the program remained partly successful. However, its impact remained restricted due to lack of community participation, financial and human resource support, inadequate training, limited private (NGO) partnership, and lack of robust monitoring and evaluation system.[504] The recent National Mental Health Policy,[505] along with its new objectives, has given a shot in the arm to the ongoing NMHP; however, there is no study yet performed evaluating the effectiveness and outcome of the same. The government should first study the outcome of the scheme; if the issues stated above still exist in the implementation of the policy, then with the help of experts, it should chalk them out and strive to remove them.

Further, there is a need to integrate mental health literacy in the school curriculum as children are the future of a nation, and whatever they learn would not only help them but in the development of society. For instance, the Kerala State government in 2007 launched UNARV,[506] an initiative for the students from class 8th to 12th. Under this model, students with academic and behavioural problems get counselled by teachers trained in psychology and

[502] Unemployment Rate in India, CMIE, available at: https://unemploymentinindia.cmie.com/ (Last Visited December 01, 2021).
[503] National Mental Health Programme, NATIONAL HEALTH PORTAL, available at: https://www.nhp.gov.in/national-mental-health-programme_pg (Accessed on July 07, 2021).
[504] Gupta, Snehil, and Rajesh Sagar, National Mental Health Programme-Optimism and Caution: A Narrative Review, Indian Journal of Psychological Medicine vol. 40, 6: 509-516 (2018).
[505] National Mental Health Policy, Ministry of Health & Family Welfare, Government of India (2014).
[506] Jayaprakash R, Sharija S. UNARV: A district model for adolescent school mental health programme in Kerala, India. Indian Journal of Social Psychiatry 33:233-9 (2017).

mental health disorders. Moreover, the students who face family problems such as alcoholism, domestic violence, abuse, etc., their parents provided counselling and family therapy.[507] Such methods need to be adopted by other states as well so that the mental issues faced by the students at small age get solved at an early stage, as if mental issues do not get diagnosed and treated early, they become a big concern at the adolescent stage. It is not only the onus of the Central government to rollout plans and deals with the issues, the state governments should also come at the forefront (like the Kerala government) and manage it in the best possible method.

VIII. CONCLUSION

The article endeavoured to delineate the lacunas present in the implementation mechanism of the Act and put forth some recommendations and suggestions necessary to be given due consideration for the effective implementation of the Act. Among various realms of health, mental health has been given the least consideration in India. Worldwide, around 8 lakh people die each year as a result of mental health issues, and nearly 264 million people of all ages still continue to suffer the same.[508] India, with the highest number of people suffering from mental health issues, serves as a home for at least 57 million mentally ill people, according to WHO.[509] The laziness in the functioning of government-backed with other external factors such as COVID-19 (+lockdown), etc., exacerbates the situation leaving mentally ill persons at the mercy of society, which presumes them as 'lunatics' or makes their fun instead of realising their pain.

Awareness campaigns to raise Mental Health Literacy are need of the hour, which has already been enshrined as a provision under the Act. The long-desired bill came into force in 2017 after its first introduction in 2013; let us hope the effective implementation of the Act, along with the deletion of its shortcomings, might not take such a long time as already four years have passed. Thus, ending the article with an optimistic note, the authors would like to quote Noam Shpancer, an Israeli professor of psychology –

[507] Nethra Palepu, Improving India's Mental Healthcare: A Case Study of Kerala, Observer Research Foundation (July 23, 2020) available at: https://www.orfonline.org/expert-speak/improving-indias-mental-healthcare-a-case-study-of-kerala/
[508] Mind over matter: India's mental health policy, The Hindu (November 30, 2020, 04:29 PM), available at: https://www.thehindu.com/brandhub/mind-over-matter-indias-mental-health-policy/article33212760.ece.
[509] *Id.*

“Mental health…is not a destination, but a process. It's about how you drive, not where you're going.”

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ASGHAR LEGHARI AND ENVIRONMENTAL JUSTICE: TRANSFORMATIVE CLIMATE CHANGE LITIGATION JUDGEMENTS ONE STEP AT A TIME

- Harsh Mahaseth[*] & Shubhi Goyal[**]

ABSTRACT

Climate Change is an urgent, defining crisis of our time. While International Law has responded to this challenge with ambitious texts including the Paris Agreement, *governments have been* slow in taking measures (Plumer and Popovich 2018)[510]. *Across the world, Courts are fast emerging as the recourse taken by citizens and not for-profit organizations to foster accountability for promised targets. An example of one such case is Asghar Leghari vs. Federation of Pakistan, where the Lahore High Court held that the failure of the National Government in carrying out the National Climate Change Policy of 2012 and the Framework for Implementation of Climate Change Policy (2014-2030) offended the fundamental rights of citizens.*

I. BACKGROUND:

Asghar Leghari vs. Federation of Pakistan ((2015) W.P. No. 25501/201)[511] is a public interest litigation filed by a Pakistani farmer, against the national government for failing to carry out the National Climate Change Policy of 2012 and the Framework for Implementation of Climate Change Policy (2014-2030). His submission was that food, water and energy security in Pakistan were gravely threatened by climate change and that if the government failed to take any action towards conserving water or making a shift to heat resilient crops, his livelihood

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[510] Brad Plumer & Nadja Popovich, The World Still Isn't Meeting It's Climate Goals, THE NEW YORK TIMES (Jul. 18, 2020, 11:56 PM), available at: https://www.nytimes.com/interactive/2018/12/07/climate/world-emissions-paris-goals-not-on-track.html?mtrref=www.google.com&assetType=REGIWALL.

[511] (2015) W.P. No. 25501/201.

would become unsustainable, violating his fundamental rights under Article 9 (right to life), Article 14 (right to dignity of person and privacy of home) and Article 23 (right to property).

As per the Lahore High Court, climate change as a "*defining challenge*" of our times and a "*clarion call for the protection of fundamental rights of the citizens of Pakistan, in particular, the vulnerable and weak segments of society who are unable to approach this Court*." The Court held that the Pakistani government, in failing to implement the climate change policy and framework violated the fundamental rights of its citizens. Various rights and principles were used by the Court to support its decision, including the fundamental right to life (Article 9), which comprises within it, the right to live in a healthy environment, pursuant to the Pakistan Supreme Court's decision in *Lahore Development Authority vs. Imrana Tiwana* (2015 SCMR 1739)[512], as well as the right to human dignity in Article 14. The Court also brought in the international environmental principles of sustainable development, precautionary principle, environmental impact assessment, public doctrine trust and inter-generational equity through the constitutional principles of democracy, equality, social, economic and political justice.

The Court designed a judicially administered machinery for remedying the breaches under the climate change policy and framework. It directed all relevant ministries and departments to nominate a climate focal person to act as a liason to the Ministry of Climate Change to ensure that the Framework was being implemented. Further, to assist in the monitoring of the department's progress in the implementation of the framework, the Court ordered the setting up of a climate change commission, which would have members from the relevant government ministries, technical experts and NGOs. The Court also retained for itself continuing mandamus jurisdiction to monitor the progress in the implementation of multiple, urgent, long-term actions.

II. NOTEWORTHY FEATURES OF THE JUDGMENT:

Firstly, the case follows the recent string of public interest litigations in Pakistan, starting from *Imrana Tiwana vs. Province of Punjab* (2015 Lahore 522)[513], in adopting an inquisitorial approach to the legal system in cases of public interest litigations, thereby completing the case

[512] Lahore Development Authority vs. Imrana Tiwana, 2015 SCMR 1739.
[513] Imrana Tiwana vs. Province of Punjab, 2015 Lahore 522.

within one month of the hearing of the case, reducing the litigation costs for the petitioners, belonging to the vulnerable sections of society (Mir 2020).[514]

Secondly, by adopting the Philippine jurisprudence of the writ of continuing mandamus from the *Manila Bay Clean-up case* (G.R. Nos. 171947-48, December 18, 2008, 574 SCRA 661)[515] and the writ of Kalikasan from the Rules of Procedures for Environmental Cases, 2009 (Bueta 2019)[516], Leghari has reinforced the commonality that exists between the Asian countries in terms of the way that climate change is going to impact these countries, the effects on the rights of the vulnerable groups, the inability of the government in protecting these rights, and the transformative approach to adjudication that the Courts and other tribunals can take, especially in matters of the fundamental rights of citizens (Peel and Osofsky 2018).[517]

Thirdly, in allowing the petition to be filed as a public interest litigation, the Court reinforced the exception in the requirements of locus standi under Pakistani jurisprudence, first propounded in the case of *Benazir Bhutto vs. Federation of Pakistan* (1988 SC PLD 461)[518], where, to enforce the fundamental rights guaranteed under Pakistan's Constitution to the poor and other vulnerable groups, public interest litigations are granted an exception to the locus standi rules of common law (Rehman 2017).[519]

Fourthly, Justice Mansoor, in treating the public interest litigation as a rolling review, appointing climate change focal personnel and establishing a climate change commission to monitor the implementation of adaptation measures, can be considered to have committed an act of judicial activism, violating the separation of powers. It can however, be argued that the Court had to step in to given the socio-political situation created by the inability of the government to carry out any meaningful actions to protect its vulnerable population from the effects of climate change.

[514] Waqqas Mir, Courts in Pakistan are Facilitating Climate Dialogue between State and Citizens, Open Global Rights (Aug. 8, 2020, 1:45 PM), available at: https://www.openglobalrights.org/courts-in-pakistan-are-facilitating-climate-dialogue-between-state-and-citizens/.

[515] Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay, G.R. Nos. 171947-48, December 18, 2008, 574 SCRA 661.

[516] Gregorio Rafael P. Bueta, Environmental Jurisprudence from the Philippines: Are Climate Litigation Cases Just Around the Corner?, IUCN (Aug. 29, 2020, 6:23 PM), available at: https://www.iucn.org/news/world-commission-environmental-law/201906/environmental-jurisprudence-philippines-are-climate-litigation-cases-just-around-corner.

[517] Jacqueline Peel & Hari M. Osofsky, A Rights Turn in Climate Change Litigation? 7 Transnational Environmental Law 37, (2018).

[518] Benazir Bhutto vs. Federation of Pakistan, 1988 SC PLD 461.

[519] Talha Rehman, Article 199 (Locus Standi) and Public Interest Litigation, Courting the Law (Sep. 4, 2020, 3:46 PM), available at: https://courtingthelaw.com/2017/08/31/commentary/article-199-locus-standi-and-public-interest-litigation/.

Fifthly, the eighteenth amendment to the Constitution of Pakistan made environment pollution and ecology provincial subjects, while climate concerns were added to the concurrent list. In practice, however, the federal government has largely abstained from legislating on these subjects, except in cases affecting international trade or national security. On the other hand, the only environmental regulation seen in the provinces has been that of giving clearances to projects and regulating industries causing pollution (Peel and Osofsky 2018).[520] According to a recent study conducted jointly between the WWF and the Lahore University of Management Science (LUMS) (Alam 2015)[521], climate change, mitigation and adaptation all remain foreign terms in the provinces and there are no climate adaptation policies in any of the provinces.

Sixthly, Leghari showcases a trend towards where rights based claims are increasingly being used in climate change lawsuits, and the increasing willingness of courts to such petitions. The Pakistan Constitution does not specifically protect environmental rights; the Courts have taken the existing fundamental rights protected under the Constitution, such as democracy and equality, and read environmental rights like intergenerational equity and the precautionary principle under those. This has helped to connect the commitments of the Pakistani government under international environmental treaties with their obligations under the Constitution in the protection of fundamental rights.

The Lahore court deployed specific interpretive techniques in interpretation of the fundamentals rights and acted as agents of both the domestic and international legal system, a sort of double role. Such interpretation of fundamental rights in the context of climate change is essential because of challenges in compliance with International Environmental Laws. We still do not possess the wherewithal to effectively implement international law norms and prevent the further deterioration of the climate. Given that there is no single enforcement system for international law norms, they are highly susceptible to being breached and when international law aspires to address apparently intractable global challenges, such as climate change, which are inherently spurred by the current system of production and consumption (Colombo 2017).[522]

[520] *Supra* note 8.

[521] Ahmad Rafay Alam, Pakistan Court Orders Government to Enforce Climate Law, Courting the Law (Aug. 17, 2020, 9:23 PM), available at: https://courtingthelaw.com/2015/09/28/commentary/pakistan-court-orders-government-to-enforce-climate-law/.

[522] Esmeralda Colombo, Enforcing International Climate Change Law in Domestic Courts: A New Trend of Cases for Boosting Principle 10 of the Rio Declaration? 35 Journal of Environmental Law 98, (2017).

Seventhly, according to Mansoor Ali Shah J, there is pressing need to interpret the existing environmental jurisprudence in a way that it can be used to combat the urgent and overpowering issues of our time. This would require a distinction to be made between environmental justice, which is more localized, and climate justice, which is a more complicated problem, with a more global effect. His sees the fundamental rights defined in Pakistan's Constitution as the answer to climate justice, rather than the Framework or the Policy, given that the Framework is seen more as a 'living document'. (Barritt and Sediti 2019).[523]

III. CONCLUSION:

Leghari is a bold decision which should be read alongside other landmark climate change litigation judgements such as the *State of the Netherlands v. Urgenda Foundation* ([2015] HAZA C/09/00456689)[524], where the District Court of the Hague ruled that the Dutch Government has a duty to cut its greenhouse gas emissions by at least 25% by the end of 2020, and *Juliana v. United States* (339 F. Supp. 3d 1062 (D. Or. 2018))[525], where the United States District Court of Oregon held that access to a clean environment was a fundamental right. However, the *Leghari* judgement has not garnered enough media attention (Peel and Osofsky 2018)[526], as compared to the *Urgenda* and *Juliana* decisions. Especially as a transformative judgement coming from the developing nations, this judgment requires far more scholarly attention (Barritt and Sediti, 2019)[527] from both the developed as well as developing nations.

Even among developing countries, Pakistan is highly vulnerable to climate change, with the Global Climate Risk Index for 2020 placing the country fifth on the list of countries most vulnerable to climate change in its annual report for 2020 (Dawn 2019)[528]. This vulnerability includes increased variability of monsoons, receding Himalayan glaciers, impacting the Indus water system and extreme events like floods and droughts (Faisal 2011)[529]. The Leghari judgment, with the establishment of the Climate Change Commission has ensured fast results

[523] Emily Barritt & Boitumelo Sediti, The Symbolic value of Leghari v. Federation of Pakistan: Climate Change Adjudication in the Global South, 30 King's Law Journal, 203 (2019).
[524] State of the Netherlands v. Urgenda Foundation [2015] HAZA C/09/00456689.
[525] Juliana v. United States, 339 F. Supp. 3d 1062 (D. Or. 2018).
[526] *Supra* note 8.
[527] *Supra* note 12.
[528] Pakistan Ranks Fifth on Global Climate Risk Index, Dawn, (Sep. 1, 2020, 5:12 PM), available at: https://www.dawn.com/news/1520535.
[529] Islam Faisal, Hilary Hove & Jo-Ellen Parry, Review of Current and Planned Adaptation Action: South Asia, International Institute for Sustainable Development 137, (2011).

with the government no longer responsible only for taking necessary precautions while carrying out its activities, but also having to take proactive steps to stabilize the situation due to climate change as a matter of rights of its citizens. According to a report submitted by the Climate Change Commission, more than half of the priority items in the Framework have been fulfilled since its establishment ((2015) W.P. No. 25501/201).[530]

Leghari then sets a precedent for developing nations as a transformative judgement. It uses a rights argument as a legal foundation of a climate change suit. This could point out to a potential rights-based model. While the government is struggling to meet expectations and several agencies and instrumentalities of the government have not been effectively prompt in their response, climate change litigation is seen as an effective alternative remedy (Peel and Osofsky 2018).[531]

[530] *Supra* note 2.
[531] *Supra* note 8.

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STATE ELECTION COMMISSIONS OF INDIA: THE DESIRABLE REFORMS THAT INDIA NEEDS TODAY

Joydip Ghosal[*]

ABSTRACT:

Free and fair elections are at the heart and soul of the representative form of democracy. Elections serve as a means of communications between the public and the Government. It is a process through which leaders are selected by vote for a political office. The event of elections provides the public an opportunity to choose between political alternatives. The Election Commissions has played a pivotal role in formation of India. State Election Commissions got the constitutional validity via the 73rd and 74th Amendments in 1993. The present study starts with the State Election Commission of Uttar Pradesh on various variables, including service conditions of commissioner, and so on. The study focuses on the challenge of evolving complexion of SECs in the changing environment. However, the role of various political parties and citizens and the sensitive issues of electoral reforms have to be simultaneously addressed for ensuring real democracy.

I. INTRODUCTION:

For consolidation of democratic politics in India, the Election Commission of India (ECI) has performed a vital role since the time of its inception. It has gained a public reputation as an independent institution and has maintained that reputation, with the highest ranking of public trust and confidence amongst a range of reputed political institutions, which ultimately has given it the authority to regulate the conduct of elections. Within a limited legal framework

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made up of broad constitutional precepts the Commission has conducted its regulation of the electoral process in effective and efficient ways.

While discussing on the role and importance of electoral administration in fostering the consolidation of democracy, the Indian Election Commission has always been recognized as a politically insulated electoral regulator. Rudolph and Rudolph pointed out that the Election Commission has a key position at the heart of the new regulatory centrism of the Indian State, as an institution (alongside the presidency and the Supreme Court) which acts as an enforcer of ''rules that safeguard the democratic legitimacy of the political system."[532] For Mozaffar and Schedler, ''good elections are impossible without effective electoral governance,'' and according to Robert A. Pastor, the significance of the institutional process for electoral management has been a much-neglected factor in explaining the success or failure of the democratization process.[533]

Whilst most of the duties of the Election Commission are technical, the process of electoral administration can have decisive partisan implications, and decisions have to be made where political bias, or the perception of bias, can undermine the legitimacy of electoral politics. The Election Commission of India (ECI) is constituted as an independent, centralized body, with wide ranging powers stemming from its constitutional remit that range over every level of government across the federal system of India.

Elections at regular intervals constitute the signpost of democracy. These are the medium through which the attitudes, beliefs and values of the people towards their political environment are reflected. Elections provide an opportunity to the people to express their faith in the government from time to time and change it when the need arises. As Elections provide legitimacy to the authority of the government therefore free and fair elections are indispensable for the success of democracy. A number of times, the Election Commission has expressed its concern for removing the obstacles in the way of free and fair polls and has made a number of recommendations that there is a necessity to change the relevant laws in order to check the electoral malpractices. The Tarkunde Committee Report (1975), the Goswami Committee Report (1990), and in 1998 the Election Commission's recommendations and the Indrajit Gupta Committee Report produced a comprehensive set of proposals regarding electoral reforms.

[532] Alistair McMillan, The Election Commission of India and the Regulation and Administration of Electoral Politics, 11 Election Law Journal: Rules, Politics, and Policy 187–201 (2012).
[533] *Id.*

Thereby few initiatives have been taken by the Election Commission to cleanse the electoral process in India.[534]

II. THE PROBLEM:

The way in the last few years the tenure and upper age limit of the Commissioner of State Election Commission (SEC) were repeatedly modified in Uttar Pradesh, without giving any justification, it creates a perception that it may be so to benefit the ruling political party in the States. There have been instances when scheduled elections were delayed or the order in which elections were to be held was modified. Election Commissions are independent, supra-governmental authorities and should not convey the impression of discharging role of an official department charged with the conduct of elections.

The Commissioner of the SEC is the pivotal post which has the most bearing on its functioning. But the qualifications for eligibility and the process of appointment for them may seem too simplistic as: "The person should be an officer of the level of joint secretary or above in the central government and must have held the post of district magistrate or divisional commissioner and a senior administrative post in the Secretariat". The commissioner shall hold office for a term of five years, subject to his not attaining the age of 65 years. The appointment shall be done by the Governor of that very State.

Interestingly, in December 2006, the rules of 1994 were amended to modify the tenure from 5 years to 7 years and the upper age limit from 65 years to 67 years. In June 2007, by another notification, the earlier order of tenure and upper age limit were again restored to 5 years and 65 years, respectively.[535] An analysis of the chronology indicates that the 2006 amendment was done by an outgoing government and the 2007 modification was issued by a newly elected government. Again, in June 2014, in the period of the successive government, tenure and upper age limit were again changed back to 5 years and 65 years, respectively. The ease and the frequency with which these conditions were modified again and again for the post of Commissioner can raise a question about the sanctity of the post and independence and neutrality of the Commission.

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[534] Electoral Reforms in India: Proactive Role of Election Commission - Mainstream Weekly, available at: https://www.mainstreamweekly.net/article1049.html (last visited Aug 31, 2020 at 06:14 a.m.).

[535] N. VAMSI SRINIVAS, How a judgement by Allahabad high court has become relevant in Jagan's SEC dispute, Deccan Chronicle (2020), available at: https://www.deccanchronicle.com/nation/politics/130420/why-a-2007-judgement-by-up-high-court-has-become-relevant-in-jagans.html (last visited Aug 31, 2020).

Recently, the Andhra Pradesh government brought an amendment in the AP Panchayat Raj Act, 1994, changing the tenure, eligibility and method of appointment of the State Election Body chief.[536] The government has now proposed the allotment of the job to a retired High Court judge. The government has also reduced the tenure to three years from five years. The ordinance which amended Section 200 of the AP Panchayat Raj Act, 1994, got the nod of the Governor and soon after, the government issued a confidential order retiring Ramesh Kumar from service. An official in the CMO said the ordinance sought to reduce the tenure of the SEC from five years to three years and also to appoint a judicial officer of a high court judge rank as the State Election Commissioner. The ordinance would be replaced by a bill in the next assembly session.

Qualifications for the Commissioner are not uniform for various States. In some States, a High Court judge and in others even an Indian Forest Service officer is appointed as the Commissioner of SEC. No specific or exceptional qualifications are prescribed for this critical post. However, the same is true for the eligibility conditions in the Election Commission of India (ECI), but the record of the appointed Commissioners has generally been illustrious. The post of the State Election Commissioner (SEC) is viewed by many as a parking slot for retired or about to be retired officers. As no specific qualification is prescribed, the candidates selected are often viewed as those who have been close to the appointing government.

III. IMPORTANCE OF ELECTION COMMISSION:

India, which enjoys the distinction of being the biggest democracy in the world, along with some other regulatory authorities, the Election Commission of India (ECI) found a place in the Constitution of India. The ECI enjoys the distinction of an independent constitutional authority created under Article 324. This regulatory authority, responsible for free and fair elections for the office of President, Vice President and to Parliament and State Legislatures, has the pivotal role in healthy survival of democracy. Local self-governing institutions, so far left entirely to State Legislations, were put on the Constitutional footing via the 73rd & 74th Constitutional Amendments of 1993, providing for novel features such as creating independent authorities of State Finance Commissions (SFCs) & State Election Commissions (SECs), one for each state. Subsequently, various states created the office of SECs, a regulatory body which by its functioning also aimed to promote public confidence in the democratic process and to ensure

[536] *Id.*

its integrity. Articles 243K & 243ZA provide for the elections to Panchayats & Municipalities respectively. These also provided that the legislature of a State may make the law for the elections, which is subjected to the provisions of the Constitution. The terms Rural Local Bodies (RLB) & Urban Local Bodies (ULB) are common parlance, even with various Election Commissions of States in diverse regions of the country.

The State Election Commission was set up in April 1994 under Article 243K. Various rules pertaining to diverse matters of Panchayat elections, such as appointment and conditions of service, registration of electors, election of members, Pradhans (elected head of village local body) and up-Pradhans, were made in UP in 1994. Similarly, for ULB elections, the UP Government made rules in regards to the preparation and revision of electoral rolls in 1994 and for four elections to various posts of ULB in 2010 & 2013. Considering the sanctity of the responsibility of SEC, it stands to reason that it should be a multi-member commission, so as to safeguard against the possibility of monopolistic, subjective decisions at times.

The Supreme Court in *SS Dhanoa v. Union of India*[537] case had observed: "When an institution like the Election Commission is entrusted with vital functions and is armed with exclusive and uncontrolled powers to execute them, it is both necessary and desirable that the powers are not exercised by one individual, however wise he may be. It also conforms to the tenets of democratic rule." The EC was made a multi-member body by the 1993 Constitutional Amendment Act in the wake of controversial decisions taken by the then Chief Election Commissioner TN Seshan. The Act provided that the decision of three members "shall, as far as possible, be unanimous". But in case of difference of opinion among three members, the matter "shall be decided according to the opinion of the majority". It was a significant step to remove a one-man show in such an important function as that of conducting elections. A single member EC would have no longer 'unbridled' powers. In view of the large size of the country and the huge electors, the Election Commission also made a proposal for the appointment of Regional Commissions to different zones to reduce its burden.

IV. CONDITIONS OF SERVICE:

According to Article 243K of the Constitution of India, "conditions of service cannot be varied to the disadvantage of the State Election Commissioner after his appointment". The Governor, and State Advocate-General S Sriram are said to be of the view that the Allahabad High Court

[537] 1991 SCC (3) 567

judgment categorically said that "prescription of tenure of office is not a condition of service". The Government further argues that the same judgment also made it clear that "once a disqualification is incurred" (due to change in tenure), there is an automatic cessation from holding office.

Yogesh, in his affidavit, referred to the same judgment, obviously, reflecting the observations of the second judge, who said, "in case the State Legislature is permitted to treat the State Election Commissioner like an ordinary Government servant and provisions contained in Article 243K is interpreted in manner of statutes covering the service conditions of government servants, then it shall defeat the very purpose of the Constitutional provisions."[538] Giving a ruling that tenure of service was a part of service conditions, the Judge said the State Election Commission shall not be able to discharge its constitutional obligations in case the tenure of service is not secured or protected.

The importance of independence of the Election Commissions can be gauged by the landmark judgment of the Supreme Court of India in which it recently described certain institutions as "the integrity institutions". Besides the Election Commission, the Indian judiciary, the Chief vigilance Commissioner, the Comptroller and Auditor General and the Chief Information Commissioner are included in these. Of all these, the CEC is organically connected to a democratic being and therein lies its exceptional importance.

When the Himachal Pradesh State Government has removed the State Electricity Board Chairman, for political reasons, the Supreme Court in *State of Himachal Pradesh and others v. Kailash Chand Mahajan and others*[539] held that reduction of tenure of service amounts to cessation and not removal. The protection granted by the statutory provisions shall cease to exist after amendment of the Act. But this conclusion was not accepted by the Supreme Court in *Aparmit Prasad Singh v. State of Uttar Pradesh,*[540] the Supreme Court pointed out the difference between State Electricity Board (SEB) and State Election Commission (SEC). SEC is expected to be an Independent institution while SEB is an executive officer which works under the Power Ministry. SEC has to conduct elections to local bodies independent of the Executive/the Government and there is special provision in the Constitution under Article 243K that was introduced by the 73rd Amendment to strengthen the third tier of federation of

[538] SRINIVAS, *Supra* note 4.
[539] AIR 1992 SC 1277
[540] C.A. 4624/2007

India, that is, the local bodies. The Supreme Court said: "No constitutional rider has been imposed (like Article 243K) on the power of the State Legislature to amend the service rule for the purpose of reduction of tenure."

In *Kailashchand Mahajan case,*[541] the term of Himachal State Electricity Board has been reduced. There was not Article 243K like condition or limitation on the power of State Legislature to reduce the term of office. Hence, the Supreme Court did not agree with the conclusion that cessation does not amount to removal. In *Kisansing Tomar's case*[542] the Supreme Court held that the powers of the State Election Commissions (SECs) and the Election Commission of India (ECI) are same and the provisions contained in Article 243K are Pari Materia and it is the duty of ECI & SECs to conduct election in a just and fair manner. The Election Commission have to discharge its constitutional obligation in an independent and effective manner as also it should not be influenced by political party in power or the executive.

The expression "conditions of service" is an expression of wide import. As pointed by this Court in *Pradyat Kumar Bose v. The Hon'ble Chief Justice of Calcutta High Court,*[543] (1955) the dismissal of an official is a matter which falls within "conditions of service" of public servants. The Judicial Committee of the Privy Council in *North West Frontier Province v. Suraj Narain Anand*[544], took the view that a right of dismissal is a condition of service within the meaning of the words under Section 243 of the Government of India Act, 1935.

Free and fair election is the basic structure of our constitution. According to the Supreme Court, the purpose of Article 243K is that both the Election Commission of India (ECI) as well as the State Election Commissions (SECs) should discharge its constitutional obligations independently without having any kind of fear or favour.

Provision of a Statute must be constructed so as to make it effective and operative, on the principle of UT RES MAJIS VALEAT QUAM PERIAPT. Though they denote different meaning, the "Service Conditions" used in Article 243K should be interpreted in the manner covering the tenure of office as well as the other service benefits. According to the Mischief rule of interpretation while construing Article 243K, the outcome will be the same that legislature lacks power to do anything including reduction of tenure of State Election

[541] State of Himachal Pradesh and Anr. v. Kailash Chand Mahajan and Ors. 1992 AIR 1277
[542] Kishansing Tomar v. Municipal Corporation of the City of Allahabad and Ors. Appeal (civil) 5756 of 2005
[543] 1955 SCR (2)1331
[544] (1948) LR 75 IA 343

Commission (SEC) which may directly or indirectly affected the performance of Election Commission for any reason whatsoever as an independent body (*Aparmita case*).

Once Article 243K of the Constitution provides that the SEC may be removed only in the manner as a Judge of the High Court is removed as provided in Article 217 of the Constitution of India, then the State Legislature lacks power to reduce the tenure by amending the rules in question. Removal co-relates with the reduction of tenure. Whether it is cessation or removal in pursuance to the power conferred in Article 217, the outcome of both the process is the same, i.e., SEC shall cease to hold office.

V. PUBLIC SUPPORT:

One indication that the Election Commission has maintained its role as a broadly impartial authority is evidence of broad public support. Elmendorf emphasizes the importance of public opinion in legitimizing bureaucratic intervention in a situation where there may be scepticism about the motives and strategies of more partisan actors, suggesting that ‘‘in the electoral law context…voters may well develop a presumptive preference for policy-making by a politically insulated body.”[545] Evidence of public perceptions of the performance of the Electoral Commission suggests that it has been successful in carrying out its duties while maintaining public trust.

Mishra and Singh report that the Election Commission has the highest level of public trust or confidence of the main political institutions: higher than the judiciary, government, political parties, and the police.[546] The State of Democracy in South Asia report showed 51 percent of respondents in India having a ‘‘great deal’’ or ‘‘some’’ trust in the Election Commission, compared to just 14% with ‘‘not very much’’ or ‘‘none at all.’’ More importantly, the view that elections are conducted in a free and fair manner is supported by over 80% of respondents to the 2004 National Election Study, across the political spectrum. This compares with an average of 71% who expressed broad confidence in the electoral process across 28 democracies covered by the Comparative Study of Electoral Systems Project. The Commission has maintained broad public recognition for maintaining high standards of free and fair elections.

[545] Christopher S. Elmendorf, Election Commissions and Electoral Reform: An Overview, 5 Election Law Journal: Rules, Politics, and Policy 425–446 (2006).
[546] S.S. Singh & Suresh Mishra, Powers of Election Commission: A Legal Perspective, 37 Indian Journal of Public Administration 361–372 (1991).

The very challenge that electoral mobilization offers to entrenched interests and government power provides an essential catalyst for political change, whereby ‘‘elections often appear as the only bridge between the people and power, as the only reality check in the political system’’. In this context, the Election Commission serves a key role as an independent arbiter of electoral disputes, enforces the rules that provide for open access to electoral politics, and ensures the effective functioning of the electoral arena. The successful performance of the Election Commission has been built on the effective implementation of the key functions which ensure that electoral politics is practiced in a way that enables all citizens to participate in free and fair elections.

VI. ELECTORAL REFORMS:

The Commissioner of SEC is appointed by the Governor on the recommendations of the Chief Minister. The Law Commission of India in its Report No. 255 on electoral reforms (March 2015) adopted some recommendations of Goswami Committee Report (1990) for electoral reforms with certain modifications.[547] The recommendation was that the appointment of the Election Commission of India (ECI) should be made by the President in consultation with a three-member collegium or selection committee, consisting of the Prime Minister, the leader of the opposition of the Lok Sabha (or the leader of the largest opposition party in the Lok Sabha in terms of numerical strength) and the Chief Justice of India. Likewise, for the selection of the State Election Commissioner, a three-member collegium or selection committee consisting of the Chief Minister, the leader of the opposition of the Vidhan Sabha (or the leader of the largest opposition party in the Vidhan Sabha in terms of numerical strength) and the chief justice of the High Court of the concerned State can be made.

The events of 2009 reawakened interest in the proposals from the Tarkunde Committee (1975) and the Goswami Committee (1990) that Election Commissioners should be selected by a committee, including a representative of opposition parties.[548] These recommendations sought to weaken the influence of government over the President’s choice of Election Commissioners. The relative weakness of tenure for Election Commissioners, who legally could be seen to be serving at the behest of the Chief Election Commissioner, had been raised by the Election

[547] Electoral Reforms in India: Proactive Role of Election Commission - Mainstream Weekly, *Supra* note 3.
[548] Id.

Commission in 2004, when a proposal was made to entrench the Election Commissioners in the same way as the Chief Election Commissioner.

VII. SEPARATION OF POWERS:

One of the most important elements in constitutional theory is the principle of separation of powers. Since we-the people, cannot exercise the entire collective decision-making power that is needed in a society, we have to deposit the governing power in the hands of representatives, namely, agents. One of the essential tools designed to prevent these agents from abusing this power is its division into different functions, to be exercised by different branches of government that can check and balance each other.

On one side of this debate we can find, among others, Richard Epstein, Jerry Mashaw, and Jonathan Macey endorsing the traditional 'de-monopolization' view of separation of powers and portraying the judiciary as one mechanism that operates to balance and control the legislative and executive branch, and hence as an obstacle to rent-seeking activity and interest-group legislation. On the other side, we may point to William Landes, Richard Posner, or Frank Easterbrook, Robert Tollison, and Mark Crain, who hold a 'revisionist' sceptical view of separation of powers, arguing that the structure of government, to including the independence of the judiciary, serves politicians and interest groups maximize their gains from legislative contracts.

Substantive independence can be defined as decision-making which is not dependent on the views of the other branches of government, that is, that judges do not decide individual cases according to the legislature's or government's will. Structural Independence can be defined as the institutional arrangements that aim at enabling the existence of this substantive independence (tenure, method of appointments, etc.)

On the one hand, there is no constitutional system in which a full structural independence has been created, and, on the other hand, there is always a gap between the degree of structural dependency and the degree of substantive independence, in favour of the latter. The first part of this observation indicates that there is no legal system that guarantees full structural independence. The second part implies that the legislature and executive do not fully exercise its powers to limit the substantive independence of its institutions even if they have the power of doing so. In a law and economics world, in which we assume that politicians, as other

individuals, are seeking to satisfy their own interests, this phenomenon demands an explanation.

VIII. SYSTEM:

In British legal system, the public institutions are generally structurally dependent upon the Parliament because the legislative powers of the Parliament have no restrictions. It is true that legislation, part of which dates back to the 1700 Act of Settlement, guarantees to some of the public officials some components of what can be termed as structural, judicial independence, such as tenure, fixed salaries, etc. But since there is no written Constitution and Parliament may do whatever it likes to do, these because of Arrangements can be changed from one day to the next.[549]

Hence, the Judiciary does not enjoy a structural judicial independence whose object is Parliament; its life and death are in the hands of the present Parliament. Moreover, the institutions are also structurally dependent upon the government as well as the executive through the powers of appointment and promotion, including pay raises and fixing the number of judges in the various courts.

The fact that the executive or the legislature is responsible for the appointment and promotion of public officials can have a significant effect on their substantive independence; but this time, we are referring to independence or dependence whose object is the government (the executive) rather than Parliament. That it seems much easier for the government to abolish or curtail independence of public institutions through appointment and promotion policies than for Parliament to achieve the same goals by amending the provisions of the Constitution.

English judiciary is structurally dependent upon Parliament and government, but this structural dependency is not exercised, or at least not fully exercised, by either the legislature or the executive. All this should be viewed in the light of some degree of substantive independence that is being exercised by the courts.

[549] T. Persson, G. Roland & G. Tabellini, Separation of Powers and Political Accountability, 112 The Quarterly Journal of Economics 1163–1202 (1997).

English case epitomizes the phenomenon of the independence of the public institutions defined above that is, the existence of a gap between the degree of structural dependency and the substantive independence expressed by the public officials.

IX. THE AMERICAN LEGAL SYSTEM:

The structural independence of the American federal judiciary is more solid than its British counterpart. The foundation of the Supreme Court is based on the Constitution, which also guarantees all federal judges tenure during good behaviour and immunity from salary cuts. However, this structural independence is not a complete one. In fact, the legislature has the powers to modify the judicial process as and when it thinks it is advisable to do so.

Madison's and Jefferson's 'Federalist', which reflects the constitutional debate of the Founding Fathers, teaches us that the structure of powers in the United States was so designed that it can create a system of checks and balances, which would not allow any abuse of powers.[550] Thus, independent public institutions were created to serve as an "excellent barrier to the encroachments and oppressions of the representative body". On the other hand, the framers realized that the powers of the public officials also ought to be controlled and balanced "to avoid an arbitrary discretion in the courts.

X. THE ELECTION COMMISSION AS AN INDEPENDENT INSTITUTION:

Free and fair elections require: (1) an independent electoral management body to conduct elections; (2) a set of rules governing electoral conduct; and (3) an effective electoral dispute resolution mechanism. The Indian Constitution provides for all three. Article 324 establishes an independent Election Commission; Article 327 empowers the Parliament to enact laws governing all aspects of elections; and Article 329 provides a mechanism for resolving electoral disputes through review by an independent judiciary. Therefore, the provisions of the Constitution clearly reflect the intention of the founding fathers to ensure the autonomy and independence of the Election Commission, protecting it from executive interference in particular.

[550] Eli M. Salzberger, A positive analysis of the doctrine of separation of powers, or: Why do we have an independent judiciary? 13 International Review of Law and Economics 349–379 (1993).

Despite executive dominance, the independence of the EC's office was protected for three reasons. First, it was constitutionally protected under Article 324. Second, after 1967, as Congress began to lose State-level elections, the executive therefore had little need to override Election Commission autonomy and third, the Model Code violations by the then Prime Minister Indira Gandhi and her judicial disqualification in 1975 made her wary of direct institutional clashes with the Election Commission.

Post-1989, when no party was in a position to win a majority, the Election Commission faced few structural constraints on its autonomy, and Chief Election Commissioners (CECs) began to assert authority over political actors during elections. The then chief Election Commissioner TN Seshan elevated the CEC's position, in the warrant of precedence, from that of a High Court judge to that of a Supreme Court judge. He also introduced certain initiatives like election observers for State Assembly Elections, introduction of voter ID cards, and refused to take executive instructions. His aggression and repeated executive clashes made him controversial. Sometimes he exceeded his authority and the Supreme Court stepped in to overrule his decisions.

XI. CREDIBILITY:

While some credibility was required in order to make the changes, like curtailment of electoral campaigns and longer election durations, they have also served to reinforce institutional credibility, which has, in turn, allowed the Election Commission to leverage public and sometimes judicial support to confront executive intrusion and to become the powerful public institution it is today.

The EC needs to be viewed as an impartial institution by two sets of actors: (a) politicians and political parties; and (b) voters. The EC has put in place a set of policies to ensure neutrality with respect to both sets. To ensure neutrality with respect to politicians and political parties, the Election Commission appoints a Chief Election Officer for each State who reports directly to the Election Commission. It also has the power to remove or suspend partisan State Government Officials. To secure polling stations and voting machines, the Election Commission always uses Central Armed Police Force (CRPF) to ensure that all security action is up to the mark. It also disqualifies candidates for violations of Model Code.

XII. CONCLUSION:

The Election Commission of India always tries its best to strengthen and improve the working of democracy through free and fair elections by using advanced scientific technologies for maintaining the high reputation of the Indian elections. A competitive party system that regularly transfers power from one party or coalition to another allows State institutions the space to both expand their mandate and remain apolitical. Such a party system also creates a demand for neutral institutions. A single-party or a single-coalition dominant system is likely to have the opposite effect.

In India, while a CEC enjoys substantial protections, his/her appointment is in the hands of the executive. A case in point may be at hand. In 2014, the coalition era of Indian politics was interrupted when the BJP came to power, winning a majority in parliament. By all accounts, the current Narendra Modi-led government represents a strong executive. Such an executive is more likely to curtail the EC's expanded mandate, especially when EC neutrality is likely to hurt the executive's interests. For instance, the current government has floated a proposal for holding the state and national elections simultaneously. If accepted, this will reverse some of the EC's mandate expansion.

Ironically, many of these parties have also demanded more autonomy for their states, or have emerged from sons-of-the-soil movements. Citing these requests, the EC acquired the power to monitor and replace state bureaucrats, bring in federal forces, and closely check the flow of money and alcohol during elections.

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GREENWASHING: A BY-PRODUCT OF INDIA'S FRAGILE CSR POLICIES

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ABSTRACT

Over the past decade, Corporate Social Responsibility (hereinafter referred to as CSR) has emerged as one of the top priorities for corporations. In order to integrate environmental protection with economic development, CSR trends have heavily favoured ecological preservation projects. The Schedule VII of the Companies Act, 2013 encourages companies to develop projects and allocate funding for ecological preservation, agroforestry among other environmental sustainability undertakings. To further encourage and regulate such undertakings, Charter on Corporate Responsibility for Environmental Protection (CREP) was implemented.

However, the applicability of both the aforementioned regulations is vague and lenient. The legislations lay down certain guidelines that corporations must adhere to while formulating their CSR plans but the real-life effectiveness and applicability fails the idea behind its inception. This was especially noted in the applicability of CREP, wherein the voluntary nature of the acts is its Achille's heel.

While India was once at the forefront at implementing efficacious CSR policies by prescribing mandatory CSR spending through enacting Section 135 of the Companies Act, the lack of stringent regulations specific to the changing times has left an irrecoverable damage to the environment. Owing to the ambiguous nature of the policies, recent environmental CSR projects are blatantly greenwashing consumers and stakeholders alike.

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Termed by New York environmentalist Jay Westervelt in 1986, greenwashing is a form of a deception to sway consumers to believe that the organisational policies of a corporation is ecologically sustainable. Over the last few years, various ecological CSR projects like "Revlon's Breast Cancer Fund" debacle and Asia Pulp and Paper's deforestation scandal have received criticism for the project's green-washing nature.

Through this manuscript, the authors take a microscopic look at India's CSR policies and its subsequent impact on the growth of greenwashing of the CSR projects by corporations. The manuscript places a special emphasis on the applicability of the Companies Act, 2013 and CREP on the steady increase in "green-washed" CSR projects. The immediate need for stringent, effective, and comprehensive legislation that is resultant in environmentally sustainable projects that aim to create a fine synergy between the economy and the bio-network, instead of fulfilling ulterior motives.

The dynamic nature of CSR demands operational legislation that is regularly amended to adapt to modern corporations and the ecosystem it exists in. This has been witnessed in European Union, Australia among other countries. Thus, the authors also analyse how India could devise more effective ecological CSR policies by keeping the aforementioned frameworks as model legislations.

These novel aspects of the manuscript have not been studied and analysed in the existing available literature. Further, the existing literature on the subject is primarily based in other countries, and the literature that focuses on India is extremely dated. Through this manuscript, the authors desire to bridge this gap.

KEYWORDS: Greenwashing, Corporate Social Responsibility (CSR), Sustainability, Corporate Governance, Corporation, Companies Act

I. INTRODUCTION

The only constant is change. This is especially true in the context of the business world. Customer preferences, evolving trends, and market needs are among the plethora of factors that lead to changes in products offered and have a direct impact on marketing. In a 2020 study conducted by Capgemini – "Consumer Products and Retail: How sustainability is

fundamentally changing consumer preferences."[551] Depicted that social responsibility, inclusiveness, or environment has had a severe impact on how consumers purchase.

Due to this change in customer preference combined with growing expectations of CSR, greenwashing emerged as one of the biggest marketing trends in the business industry, both domestic and abroad. Coined in 1986 by Westerveld, greenwashing is the act of an organisation to make a false claim about the environmental benefits of their product or services, thereby making them seem "greener" to consumers.

Businesses have long ceased to adopt the "profit only" model of operations. They are encouraged and awarded to analyse their social impact as well. Adopting environment-friendly practices not only attracts eco-conscious consumers, it also fulfils their CSR requirements as well. Failure to comply with the CSR requirements and environmental policies can cause grave consequences for corporations. This is also a significant factor for organisations to indulge in greenwashing.

There are various factors that further motivate a firm to do so, for instance, the nature of the firm. A consumer product-based firm such as firms in the cosmetic industry or the textile industry have the ability to appease their consumers by emphasising on the environmental claims of the products that they produce. Lack of internal communication is also, surprisingly, a significant contributor towards greenwashing. This is because the team responsible for communicating the environmental policies of the team might not be in complete sync with other teams in the company. This can lead to the spreading of falsified information. The marketing team might look to create an ecological and green marketing campaign, but these ideologies might not align with the actual production process of the corporation.

While some companies do not get called out for this practice, in most cases, it leads to a damaged reputation and an alienated customer base. In 2008, EasyJet falsely claimed that the company's planes emitted around 22% less carbon dioxide in comparison to other planes on the route. The company was subject to much humiliation and disdain on an international level after the Advertising Standards Agency debunked the claim.[552]

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[551] KEES JACOBS ET.AL., Consumer Products And Retail: How Sustainability Is Fundamentally Changing Consumer Preferences, CAPGEMINI RESEARCH INSTITUTE ANALYSIS (July, 2020), available at: https://www.capgemini.com/wp-content/uploads/2020/07/20-06_9880_Sustainability-in-CPR_Final_Web-1.pdf.

[552] Collin Marrs, Easyjet Ad Guilty Of Misleading Green Claims, Campaign (July 8, 2008), available at: https://www.campaignlive.com/article/easyjet-ad-guilty-misleading-green-claims/828377.

While this served as an example to some corporates, the majority of the green sheen marketers continued to walk on their treacherous path. In the case of Italy's Oil Giant- Eni, greenwashing landed the company with a 5 Million Euro fine. This fine was in retaliation against Eni's advertisements which falsely claimed that the company's diesel was "green". This was the first-ever fine inflicted against greenwashing in Italy. Italy's Competition and Market Authority imposed the highest possible fine on ENI.[553]

This was considered to be an important example for other corporations in Italy as well as other parts of the world to not indulge in greenwashing. Another similar case was when a private citizen sued Nike for misrepresentation and greenwashing in the case of Kasky v. Nike, Inc.[554], where Nike claimed to be in compliance with local laws but was found to be in violation. Regulators around the globe hoped that it would serve as deterrence to other companies who greenwash and help curb this practice. Francesco Luongo, the president of the consumers' association - Movimento Difesa del Cittadino, opined, "Today's Authority decision represents the first important sanction for 'greenwashing' over misleading advertising messages about how green a product really is."[555]

While the fine against Eni was a step in the right direction, it has in no way deterred greenwashing. Despite being called out innumerable times by consumers and activists alike, giant corporations like H&M continue to adopt greenwashing as one of its marketing techniques to give a "greener" brand image.[556]

It is abundantly clear that a carefully curated brand image is not the only motivation for these corporations. An exceedingly significant factor remains the need to comply with various regulatory requirements, CSR being the largest compliance requirement. In India, CSR emerged as a resource to make corporations "social actors" rather than mere profit building entities. The policies that would regulate CSR was built to ensure that businesses utilise resources judiciously while also concerning themselves with environmental-social aspects. Through implementing the CSR requirements, businesses are also encouraged to utilise

[553] Nico Muzi, ENI fined €5m for Deceiving Consumers Over Its 'Green' Diesel, Italian Watchdog Rules, Transport & Environment (Jan. 15, 2020, 1:13 PM), available at: https://www.transportenvironment.org/press/eni-fined-%E2%82%AC5m-deceiving-consumers-over-its-green%E2%80%99-diesel-italian-watchdog-rules.
[554] Kasky v. Nike, Inc., 45 P.3d 243 (Cal. 2002).
[555] *Id.*
[556] Zara Ramaniah, H&M's Greenwashing: Short-Sighted and Unethical, BRANDINGMAG (Dec. 12, 2019), Available at: https://www.brandingmag.com/2019/12/12/hms-greenwashing-short-sighted-and-unethical/.

resources in such a manner that they can meet their current needs while simultaneously preserving these resources for future needs.

CSR is considered to be a measure for an organisation's social progress. However, the growth of CSR trends also brought forward a rise in maligning practices like greenwashing. "Misleading information provided by companies"[557] became a significant concern for regulators and consumers alike. Instead of working to develop and follow substantial policies that would actively work to elevate the state of the environment, companies are seen working hard to build a purely "green and responsible" image. In case of Association for Protection of Democratic Rights & Anr vs. The State of West Bengal & Ors[558]. The bench discouraged projects that "not only gives a greenwash to corporate projects that destroy forests and cause irreparable damage to environment, but also directly hurts communities by erecting new enclosures, and extending and deepening the process of rights denial."

The equivocal nature of the CSR policies in India further paves the way for brands to indulge in greenwashing without focusing their resources on introducing formidable and fervent environmental policies. The current study austerely analyses the evolution of Indian CSR policies while scrutinising their inadequacies. Further, it studies the impact of these ineffectual CSR policies on the intensification of greenwashing in India. Examining foreign models of effective policies, the current study examines the need for a comprehensive CSR policy in India.

II. CURRENT CSR POLICY: EVOLUTION & INADEQUACIES

While CSR has recently gained momentum among corporations and is the new buzzword, the origin of CSR in India can be date back to pre-independence. Industry giants like TATA have had a strong interest in social welfare from the day of its inception. Prior to the introduction of any CSR rules, Indian Oil had inculcated social development since 1964 by setting its objective as 'to help enrich the quality of life of the community and preserve ecological balance and heritage through a strong environment conscience."[559]

[557] William S. Laufer, Social Accountability and Corporate Greenwashing, 43 J. BUS. ETHICS 253, 254(2003).
[558] Association for Protection of Democratic Rights & Anr. vs. The State of West Bengal & Ors, WP 12788(W) of 2017.
[559] Kasim Fernandes, Indian Oil CSR is Making India Future-Ready, THE CSR JOURNAL, (July 28, 2020), Available at: https://thecsrjournal.in/indian-oil-csr-report-india-ps.

Similarly, the TATA Group has had a long history of extensive and robust CSR projects. TATA even has its own Sustainability group that manages various CSR projects of one of the top players in the Indian economy. Elaborating on their philosophy, they state, "Our CSR programmes aim to be relevant to local, national and global contexts, keep disadvantaged communities as the focus, be based on globally-agreed sustainable development principles and be implemented in partnership with group companies, governments, NGOs and other relevant stakeholders."[560]

Their CSR activities are paramount and incomparable to any other industry or Corporation in the industry. "The Tata culture of giving back" dates back to the inception of the company by Jamsedji Tata, the founder of the Conglomerate. Their varied activities include "health, primary education, skills training and entrepreneurship, livelihoods, women empowerment and strengthening services for those that need it the most."[561]

These veteran companies have laid the foundation for strong CSR policies to be built in the country. With the passage of years, the government and the corporate world slowly started to realise sustainable development must be integrated with economic growth. Thus, in the late 90s, CSR became prevalent as a means of philanthropy. This was not particularly fruitful as the corporates greatly restricted their acts of CSR to be one-time grants or donations of limited resources. This drastically reduced the efficacy of these activities, often rendering them inept.

The ineffectual manner of conducting CSR gave way to the introduction of written policies that would govern the way corporates would engage in social development activities that would focus on areas like education, health, increased immersion of stakeholders. In 2014, India emerged as one of the first countries to introduce a written legislation for the regulation of CSR. At the time of inception of the Companies Bill, the Ministry of Corporate Affairs anticipated more than INR 10,000 crore from private companies.[562]

The codification of the legislation brought forward the era of viewing CSR as a management concept rather than a philanthropical concept. The CSR policies in India are encompassed in the Schedule VII of the Companies Act, 2013 (hereinafter referred to as Act). According to Section 135 of the Act, any company that has a "net worth of Rs. 500 Crore or more, turnover

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[560] TATA Sustainability Group, available at: https://www.tatasustainability.com/pdfs/Resources/Tata_CSR_Brochure.pdf,(last visited July 12, 2021).

[561] Id

[562] Reena Shyam, An Analysis Of Corporate Social Responsibility In India, 4 INT'L J. RES. GRANTHAALAYAH 56, 59(2019)

of Rs. 1000 crore or more, or net profit of Rs. 5 crore or more"[563] must engage in CSR activities. This also extends to any Foreign Company that operates in India and falls within the specified category. These CSR activities can fall under a plethora of thematic areas such as "hunger and poverty, education, health, gender equality and women empowerment, skills training, environment, social enterprise projects and promotion of rural and national sports."[564]

Another unique feature of the CSR policies in India is the mandate to form CSR Committees for every corporation. This Committee should have at least 3 Directors, one of which is an Independent Director. This Committee actively works to formulate a CSR Policy which guides all the CSR activities that the company is going to undertake. The operations of this cell ensure that a transparent monitoring mechanism can be built by the Company for the effective implementation of CSR.

Despite the codification of the CSR statutes, the implementation leaves much to be desired. Though mandatory for all Corporates that fall under its purview, India's CSR policies are weak and fragmented. The inclusion of various thematic areas has further posed a barrier towards any accomplishments the policy might have had.

Environmental and sustainable development is a mere suggestion among the plethora of thematic areas presented to the Corporates. This vague policy raises two major concerns. Firstly, it leads to a very narrow focus on environmental protection, with a very controlled reserve influx. While the policies and the Judiciary encourage CSR expenditure for environmental protection, it is not reflected in the actual activities in most cases. The bench in *Kapila Hingorani vs. State Of Bihar*[565] termed sustainable development as the means to protect "corporate governance policies like greenwashing"

In some cases, the limited funds are not enough to carry any significant activity that would lead to a long-term solution. CSR has been started to be viewed as a mere compliance requirement rather than a means to a long-term sustainable solution.

The second problem that arises because of these vague policies is unfair practices like greenwashing. The CSR policy has been reduced to an old, written mandate instead of a dynamic policy that adapts to the evolving needs of the Indian business world. This leads to Corporates trying to find quick and easy solutions to comply with their CSR requirements.

[563] The Companies Act, 2013, § 135
[564] *Id.*
[565] Kapila Hingorani vs State Of Bihar, Writ Petition (civil) 488 of 2002

The need for compliance to regulations quickly and without spending much money has been one of the biggest factors for the rampant rising greenwashing. In India, the regulators mandate CSR and Corporate spending, but this policy does not have stringent regulations for environmental protection or require detailed disclosure of their environmental practices of each aspect of the business. This loophole enables many corporates to seem "green" and carry on the facade of greenwashing.

While discussing this scenario in the USA, Magali A. Delmas & Vanessa Cuerel Burbano's research revel that "Mandatory disclosure of environmental practices and third-party auditing of such information would make it more difficult for brown firms to get away with greenwashing, even if greenwashing practices themselves were not regulated, since consumers, investors, and NGOs would be able to compare a firm's communications with reliable information about the firm's environmental practices."[566]

This translates to India as well. While India does require corporates to be transparent with their environmental policies to an extent, the majority of environmentally exploitative activities are covered by the curtain called greenwashing. This is observed in a multitude of industries like hospitality, fast fashion, FMCG etc. The application of the ambiguous policy continues to depreciating environmental practices and the steady rise in greenwashing tactics.

III. THE SHORTCOMINGS OF CREP: AN INEFFICACIOUS ATTEMPT FOR CORPORATE RESPONSIBILITY REGULATION

With the progress of the economy and the business sector, environmental protection became an area of major concern. A synergy of industrial development with environmental growth was always a significant area of concern. However, the current legislation did little to bring forth any actual change in the way the industry operated. The compulsory CSR policy is not the only step the Indian Government has taken to preserve the environment.

Before the introduction of the CSR mandate, the government initiated a series of industry-specific interaction meetings to formulate the Charter on Corporate Responsibility for Environmental Protection (hereinafter referred to as CREP). Introduced in 2003, CREP

[566] Magali A. Delmas & Vanessa Cuerel Burbano, The Drivers of Greenwashing, 54 CALIFORNIA MGMT. REV 64, 70(2011)

identified 17 categories of industries that had the potential of high pollution. It outlined its purpose as "Commitment and voluntary initiatives of the industry for responsible care of the environment will help in building a partnership for pollution control."[567]

The Charter sought to set up eight task forces that would be comprised of experts and members from institutions and industry associations. CREP also introduced provisions for these task forces to meet regularly to monitor and to provide guidance to the industries for adopting necessary pollution abatement measures. The introduction of CREP sought to introduce stricter pollution checks and compliance measures.

The popularity of CREP as a sustainable solution stemmed from the fact that it proposed to be a partnership between all relevant stakeholders to work together to comply with more evolved environmental practices. This was a relatively new concept in India. The execution of CREP attempted to focus on the problem from the roots. For instance, CREP imposed the following plan of action for the Medical Industry, "Waste streams should be segregated into high COD waste toxic waste, low COD waste, inorganic waste, etc., for the purpose of providing appropriate treatment. High COD streams should be detoxified and treated in XTP or thermally destroyed in incinerator"[568]

This plan of action was received well by the general public and economic activists. It was detailed and categorically spelt out the requisite changes that were to be implemented.

Through the implementation of CREP, the government wanted to introduce a "roadmap" that would not only restrict the pollutants but would also actively work for the preservation of the environment. The proposal of CREP also brought forward the implementation of task forces by the Central Pollution Control Board (CPCB) that would monitor the compliance of various industries. It even compiled reports on the matter to submit to the Steering Committee that was responsible for CREP's implementation.

While a progressive and excellent piece of legislation in theory, the execution of the legislation was highly ineffective. Much like most of its predecessors and its Western Counterparts, the greatest weakness of the environmental policy was its voluntary nature. The policy acted as a set of norms for corporates to take as guidelines to implement in their daily functioning. No

[567] Cent. Pollution Control Bd. Ministry of Envtl. & Forests, Charter on Corporate Responsibility for Environmental Protection, INDIAN SUGAR MILLS ASSOCIATION (Mar. 2003), available at: https://www.indiansugar.com/PDFS/CREP-2003-FullText.pdf.
[568] *Id.*

provision in the statute made it legally binding. These were "mutually agreed on" terms and lacked any compliance regulations.

Thus, even if the reports of the task forces were diligent and detailed, the results of such reports did not lead to any impact building. Instead, a severe lack of authority was observed to implement the Charter, especially from the Steering Committee. Furthermore, the norms were also not to the standards set by other Global Policies.

The policy has also been subjected to too much criticism for not taking into account the actual damage that certain industries have on the environment. One such example is the Paper and Pulp Industry. More than "7000 billion gallons of highly coloured and toxic waste effluents mainly containing high molecular weight, modified and chlorinated lignins"[569] is being dumped in water bodies every year. These water bodies such as canals and rivers often flow into patches of land, ultimately making it barren. These pollutants also caused a mammoth sewage fungus in the river beds. The industry has also caused many irrecoverable effects on land, such as increasing soil salinity and destroying the texture of the soil.[570]

Despite this pernicious aftermath, CREP did not impose any strict limitations on the industry, especially facing extreme condemnation for the Adsorbable Organic Halides limit. This leniency was also mirrored in other industries, such as in the Cement Industry. The Policy reads, "Cement Plants located in critically polluted or urban areas (including 5 km distance outside urban boundary) will meet 100 mg/ Nm3 limit or particulate matter by December 2004 and continue working to reduce the emission of particulate matter to 50 mg/Nm3."[571]

The inexplicit nature of the Policy has proven to be its downfall constantly. In addition to this, the limit of 100 mg/NM3 also had the scope to be further restricted, with targetable achievable emission levels being 5-25 mg/Nm3.

The idea of self-regulation by the Corporates as presented by the Charter, has only worked against it. For instance, the Dye Industry, one of the 17 industries CREP sought to regulate, is continuing to grow tremendously in India. Local to Gujarat, the Leheriya design, also known as the "Tie-Dye" pattern, has always been marketed as a natural dye textile. However, research reveals that the "dyeing industry is responsible for high amounts of lead emissions as well as

[569] Pratibha Singh et.al, Effect of Toxic Pollutants from Pulp & Paper Mill on Water and Soil Quality and its Remediation, 12 Int'l J. of LAKES AND RIVERS 1, 8 (2019)

[570] S. Sundari & P. Kanakarani, The Effect Of Pulp Unit Effluent On Agriculture, 17 J. of Indus. Pollution control (2001)

[571] Delmas & Burbano, *Supra*, 13.

PM10 and PM2.5 emissions" in Gujarat.[572] This is a classic example of Greenwashing. Consumers are duped into buying the Leheriya designs for their natural dyes and being affiliated with the "green movement."

CREP has proven to be highly ineffectual in controlling the 17 identified industries, let alone regulate the Indian Market as a whole. These equivocal policies coupled with a weak monitoring system have led to a rapid rise in greenwashing. With a lack of stringent policies holding corporations accountable, it becomes almost effortless for corporations to engage in unethical practices like greenwashing. CREP was introduced as an effective answer to regulating the major polluting industries, but its implementation has rendered it to be "toothless", as accurately described by an environmental blog.[573]

IV. THE IMPACT OF GRADUAL UPSURGE OF GREENWASHING: ASSESSING THE ROLE OF CSR POLICIES

The advancement of the domestic economy has brought forth a surfeit of benefits. One of the most significant changes in the economy was consumer changing habits. Consumers started to be more ecologically conscious and demanded green products. To align their brand image to be "green" and fit into the mould of an eco-conscious brand, corporations started to resort to greenwashing.

Assessing the impact of greenwashing can be complex. This is because the majority of the impact is socio-psychological. A greenwashed brand has a more adverse impact on the consumer's mind and confidence than on the economy. This makes the adverse impact challenging to quantify.

For instance, the colour of the logo of General Motors (GM) was switched from blue to green to portray a "gas-friendly to gas-free" image. Interestingly enough, the Motor giant has been notoriously observed to be among the top 10 most polluting car manufacturers in the world. More so, the only electric car of the range was "Chevrolet Volt" The green logo gave out the

[572] Neelam Jain et.al, Impacts of Harmful Emissions Nearby Chemical based Industries in Gujarat on Environment with Major Focus on Human Health and Methods to Scale down its Impacts A Review, 5 Int'l J. Engineering Res. & Tech. 1, 4 (2016).

[573] Radhika Krishnan, CREP: A Review, Down To Earth (May, 15, 2005), available at: https://www.downtoearth.org.in/blog/crep-a-review-9538.

message that the entire range of cars was electric. Thus, investing in a GM car would mean investing in a better future. This consumer manipulation is a classic case of greenwashing.[574]

Another instance was when Chevron's "We Agree" campaign was revealed for the sham it was. Their campaign focused on their ideologies on the key energy issues and their quick response on the subject. While the company "tooted its green horn", they were dealing with a lawsuit regarding their involvement in ruining the Amazon Rainforest. The plaintiffs demanded remedies for, "environmental remediation, excess cancer deaths, impacts on indigenous cultures, and unjust enrichment"[575]

Complying with CSR policies has a two-fold benefit. Firstly, it assists in evading any interference from the regulatory bodies. This helps the business to operate independently while keeping its goodwill in the market. A few of the environmental CSR activities and projects are mere attempts to comply with the mandate without any substantial expenditure.

Secondly, it invites enormous customer support and approval. The way consumers operate and make purchasing decisions has radically changed. Environmentally friendly practices invite positive consumer attention. Camera Company Canon introduced "Green Environment Together" as part of their CSR project in which "Canon India plants a tree on the purchase of every laser copier / multi-function Device (MFD) on behalf of its direct customers."[576] This initiative highly appealed to consumers, thereby boosting their sales.

There is absolutely no doubt that CSR has its benefits, and the spending has substantially increased after passing the CSR policy in India. It was recorded that there was a rise in charitable spending from INR 3.67 billion to around INR 25 billion[577] within a span of one year in 2014. However, while theoretically good on paper, there are various loopholes in the policy since its inception. "A survey by accountancy firm KPMG found that 52 of the country's largest 100 companies failed to spend the required 2% in 2014."[578]

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[574] Priyanka Aggarwal & Aarti Kadyan, Greenwashing: The Darker Side Of CSR, 4 Indian J. Of Applied Res. 61, 62 (2014)

[575] Miriam A. Cherry, The Law and Economics of Corporate Social Responsibility and Greenwashing, Davis Bus. L.J. 281 (2013).

[576] Canon India's 'Green Environment Together' CSR initiative plants 20,000 trees in 2 years, The CSR Journal (June 2, 2021)available at: https://thecsrjournal.in/canon-csr-green-environment-together-trees-20000/.

[577] Oliver Balch, Indian law requires companies to give 2% of profits to charity. Is it working?, The Guardian (Apr. 5, 2016) available at: https://www.theguardian.com/sustainable-business/2016/apr/05/india-csr-law-requires-companies-profits-to-charity-is-it-working.

[578] *Id.*

A significant aspect of a sustainable policy does not only mean that it has immediate environmental benefits but it also must be sourced ethically, produced with labourers being treated and paid responsibly. Thus, a firm would still commit greenwashing if they advertise a product to be sustainable and ethically sourced but use unfair means to produce it.

This was seen in the case of Hindustan Unilever (HUL) in 2019-2020, when it strongly advocated for sustainability and gradually marketed itself as a sustainable brand. Most of its CSR policies were also targeted towards it. The brand was also seen to work hard to end animal testing for their products. However, in a sad turn of events, research revealed that HUL continued to operate in countries that mandated animal testing, thus immediately tampering with their pristine image.

Similarly, Deepwater Horizon had an excellent image with its “beyond profit” campaign by focusing on alternative energy sources. However, it was soon revealed that the company’s green image was greenwashed as its risky extraction practices came to light. What followed was the horrific death of 11 workers and over a million gallons of oil being spilled into the gulf.[579]

The current Indian CSR policy has no provisions for dealing with this aspect of greenwashing. However, this comprises a major chunk of greenwashing. This can be for a multitude of reasons, the biggest being it's the road most travelled. In other words, it's the easy way out. Another significant aspect of this form of greenwashing is the inherent lack of knowledge about greenwashing among consumers.

While an average consumer might wish to support the ecological cause by purchasing a "green product", they might not be inclined to do ample research to find out the darkness behind their apparent green product. The above highlighted HUL case is the classic way of playing on consumer's emotions. A uniformed consumer might readily buy their product without realising the implications of the same.

Thus, it becomes abundantly clear that repeated cases of greenwashing have a negative impact on consumer attitudes and how they perceive a brand. When the consumers are introduced to the greenwashing tactics of these Corporates, they start to become sceptical and vary of all CSR activities and corporate communication. The result of this strange phenomenon is that consumers start believing firms that communicate economic motives over firms that

[579] Becky L. Jacobs & Brad Finney, Defining Sustainable Business - Beyond Greenwashing, 37 VA. ENVTL. L.J. 89 (2019).

communicate an economic motive for investment. This arises because, according to the consumer, the corporate is much likely to be spreading false information while undertaking a social initiative rather than an economic one. This response to CSR activities can be harmful to firms that are engaging in legitimate environmental protection activities.

Lack of consumer protection can be extremely demotivating to these corporates as well. Thus, there is a creation of "confusion about corporate CSR" and leads to consumers painting all corporates in the same colour and perceiving all their environmental policies to be fragmented and false. This has a very hard impact on firms that are legitimately "green", and have branded their ecological impact as their USP. For instance, beauty brands like Earth Rhythm or Juicy Chemistry have an aligned brand image that boasts of environmental protection and going green. All their practices and mottos are aimed at living up to their brand image. Thus, consumer scepticism, in this case, might prove harmful.

While most of the impacts of greenwashing are non-quantifiable, there are certain economic disadvantages as well. One major disadvantage is that consumers do not wish to purchase these green brands. Most of the new green brands stay true to their brand image, but consumer scepticism results in a low financial turnover. This negatively impacts corporate legitimacy, even when the communicated message is true.

The financial performance of a firm may also be deterred by greenwashing if it is detected. This is because firms might have to use their funds to divert attention from their greenwashing tactics, either by doing additional CSR activities or covering up the greenwashing by way of flashy PR antics. The modern consumer is observant enough to see through both these ploys. Thus, even the additional expenditure does not result in "fixing" the brand image.

On the surface, assessing the impact of greenwashing might be complex and an ordinary ethical dilemma. However, its after-effects are deep-rooted and prevalent in the society. The impact is not just observed in negative consumer behaviour but is mirrored in the domestic economy as well. Greenwashing deteriorates the environment while slowly chipping away at the domestic economy. The ambiguity of the CSR paradigm has had minimal effects on the rise of greenwashing. Consequentially, reports also show that the response to greenwashing has severely demotivated corporates from "going green" and taking excessive environmental protection initiatives. The lack of comprehensive CSR guidelines further alleviates this issue. While the mandatory dimensions of the Indian CSR policies provide a solid base to rectify greenwashing, the path ahead still looks rocky.

V. THE IMMINENT NEED FOR A REFORMED COMPREHENSIVE CSR POLICY

India's CSR Policy has received much acclaim around the world. As discussed before, it was one of the first countries to form a mandatory policy. While the 2% mandate has its benefits, some might argue that the "cons" outweigh the "pros" of the policy. With each passing day, India's economy is growing at a tremendous pace, with avenues for a "double digit growth"[580] in the fiscal year of 2021. This poses a serious question – When will India revisit its CSR policies?

With economic growth, the growth of greenwashing is rising steadily. There is an undeniable and permanent link between India's fragmented CSR policy and the horrifying growth in greenwashing. For consumer attitudes to evolve and for the promise of a "Green India", the CSR policies must also undergo a drastic change.

As highlighted before, one major area of concern pertaining to the Indian CSR policies is the ambiguous nature of the policy. Instead of mandating expenditure for environmental protection and preservation, the policy provides a multitude of thematic areas from which the Corporations can plan their CSR activities. While the option between these thematic areas does not directly impact the rise in greenwashing, it poses a grave threat to environmental CSR activities.

In addition to mere compliance, these firms are also on the lookout for flashy projects that will appease consumers. This leads them to search for permanent projects like building hospitals and schools under the thematic areas of medicine and education, respectively. Environment often comes as an afterthought. Firms try to inculcate environmental preservation through the way of additional activities that do not utilise a lot of funds. This is usually done by planting trees for every purchase or claims of using sustainable ingredients etc. More often than not, these claims are deemed to be false. For instance, Coca Cola declared that it is going to become "water-neutral". However, the soft drink market leader has a tarnished reputation for destroying India's water bodies. This indirectly results in greenwashing.

Thus, a new CSR policy that mandates a portion of profits to be devoted to environmental protection solely would be a strong deterrent to greenwashing. This portion shall be comprised

[580] Press Trust of India, Indian economy is poised for double-digit growth: Niti Aayog VC Rajiv Kumar, THE PRINT, (July, 11, 2021) available at: https://theprint.in/economy/indian-economy-is-poised-for-double-digit-growth-niti-aayog-vc-rajiv-kumar/693971/.

within the 2% of profits that the Corporations already give. This would bring a shift in the environmental CSR activities from the shadows to the light.

Furthermore, the current policy forms a portion of the Companies Act, 2013. There is no separate and unique policy to govern CSR in India. This absence is quite absurd, considering the sheer size of the Indian market and assessing its growth rate. At the same time, leaps and bounds ahead of other policies, the small section of the Companies Act do not have the requisite provisions to deal with the multi-faceted CSR industry in India. Thus, a new policy that studies and analyses the various aspects of the industry must be introduced.

Another area of concern is that there are neither preventive measures for untoward accidents nor a system of fines for the offenders. There is an inherent lack of acknowledgement of the rapidly rising greenwashing from the policy maker's side. A new policy that outlines and defines greenwashing as a punishable offence is the primary step the Indian legislators need to take. There is a big difference between falsely advertising a product and greenwashing. The latter is a part of the former but is much more varied.

Greenwashing is not simply limited to falsely communicating an “ecological” measure adopted by the firm. It is falsely communicating information to consumers about the brand to alter the perception of the brand image in the consumer’s mind. Thus, a definition that is applicable to the Indian economic scenario must be adopted by the Indian legislature.

In addition to this, there is a lack of incentive and retribution system in the Indian CSR policy. These policies list out the duties of the corporations. The current CSR policy provides for corporations to conduct activities with a CSR expenditure of 2% of their profits. This leads to some firms planning their activities in such a way that they do not spend a penny more than the mandated amount. This arises due to a lack of incentives provided by the CSR Policy.

These incentives could be either in the form of financial incentives, grants or favourable government schemes or a recognizant incentive by providing distinguishing credit to large or unique CSR projects.

Similar to the lack of incentives, there is a lack of a system of penalties. The only penalty provided by the Indian CSR Policy is the penalty for non-compliance to CSR. The legislation reads, "The company shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to twenty-five lakh rupees, and every officer of such company who is in default shall be punishable with imprisonment for a term which may extend to three

years or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees, or with both."[581]

While this penalty is effective in one way, the fear-mongering that this penalty brings often leads firms to haphazardly plan their activities in the fear of having to pay this fine. This panic and disquietude also lead to a rise in greenwashing. The penalty system must account for offences such as greenwashing and not just dis-compliance to the CSR policies. In a revolutionary move, France has introduced a penalty system for greenwashing in France which would lead the offending party to pay up to 80% of the expenditure of the false promotional campaign.

This is a severe deterrent to offenders of greenwashing. This kind of penalty system should be introduced in India as well. The Indian CSR policies fail to assess the needs of the Indian business environment and recognise greenwashing as a serious threat. There is a severe lack of modernisation in the policy that can handle the ever-growing and evolving Indian CSR industry. The introduction of a new CSR policy with the aforementioned guiding principles is India's most effective answer to curb the effects of greenwashing.

VI. EU'S CSR POLICY: AN INSPIRED MODEL FOR INDIA

At the heart of the research for CSR lies the question of what responsibility does a corporation hold towards society. In the 1970s, Milton Freidman made the argument that the corporation only holds the responsibility of increasing its profits[582]. Popularised in the early and late 90s, profit maximisation has always been seen as the primary objective of Corporates. However, with the passage of time, this theory began to evolve.

Davies argues that CSR should be a culmination of 'consideration of issues beyond the narrow economic, technical, and legal requirements of the firm.'[583] The International Instruments regulating CSR took the view that the corporations hold more responsibility than just increasing their profits.

[581] The Companies Act, 2013, § 135.
[582] Milton Freidman, A Friedman doctrine-- The Social Responsibility Of Business Is to Increase Its Profits, NY Times (Sept. 14, 1970), available at: https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html.
[583] Keith David, The Case for and against Business Assumption of Social Responsibilities, 16 Acad. of Mgmt. J. 312, 312-322 (1973).

OECD, ILO and the UN are some examples of organisations that have come up with guidelines for CSR at an international level. The UN Guiding Principles on Business and Human Rights were proposed by John Ruggie, a UN Special Representative on Business & Human Rights, and was endorsed by the UN Human Rights Council in June, 2011. OECD has provided the OECD Guidelines for Multinational Enterprises.

Various companies in India comply with and aspire to execute their CSR activities to meet these international standards set by these organisations.

These Guidelines are not legally non-binding but act as recommendations for Responsible Business Conduct by the governments of 49 adhering countries to the enterprises operating in or from those countries. ILO MNE declaration was another instrument that was adopted to encourage a positive contribution by MNE to economic and social progress. These instruments were meant to codify the expectations from the enterprises in the form of soft laws.[584]

Even though these guidelines and principles were established by reputable International Organisations, they were soft laws which mean that they are not legally binding. However, these guidelines have some strong and comprehensive policies that are severely lacking from India's CSR policies. There arises an imminent need for a new comprehensive CSR policy that finds its guiding principles from the International policies laid down but should be mandatory in nature.

The CSR policies implemented by the EU have been inspired by the above-mentioned guidelines. In addition, the EU has also played a vital role in endorsing a higher level of protection so as to ensure the effectiveness of the CSR policies. Public authorities are responsible for encouraging and supporting the companies to run their business responsibly. They are in charge of creating voluntary policy measures and complementary regulation wherever necessary. EU has taken various steps to modify its CSR policies for effective implementation and to curb practices like greenwashing.

The EU's policy is built on the 2011 renewed strategy for CSR, which was meant to mould CSR to that of the Global approach. The 2011 soft law document focused on improving the "visibility of CSE and disseminating good practices through integration of CSR into education,

[584] OCED, Promoting Sustainable Global Supply Chains: International Standards, Due Diligence And Grievance Mechanisms, OCED (Feb. 17, 2017), available at: https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst./documents/publication/wcms_559146.pdf

training and research."[585] The CSR policy covered the years from 2011 to 2014. The 2011 strategy relied on the enterprises voluntarily meeting their social responsibility[586], this view was later dismissed through the adoption of the Directive 2014/95/EU (Non-Financial Reporting Directive, NFRD). The commission called for both horizontal and sector-specific measures which would promote self and co-regulation; this showed the need for complementary regulation, which led to the adoption of Directive 2014/95/EU along with certain other sector-specific measures.

According to the Directive 2014/95/EU, certain large companies are required to disclose the manner in which the company operates and manages social and environmental challenges. The disclosure would help the stakeholders, including policymakers and consumers, evaluate the performance of the company and encourage them to be more socially responsible.

The NFRD requires public interest companies that employ more than 500 personnel to publish information regarding "environmental matters, social matters and treatment of employees, respect for human rights, anti-corruption & bribery and diversity on company boards"[587]. As of 2021, this definition covers over 11,700 companies and groups all over Europe which include listed companies, banks, insurance companies and other companies which are given the status of public-interest entities by the national authorities[588]. In 2016 European Union shifted their view from CSR to RBC or Responsible Business Conduct[589].

The European Consensus in June 2017 adopted the "5 Ps" as mentioned by the UN in its 2030 Agenda. It was mentioned in the consensus that "it promoted the integration of CSR in work with the private sector, including both employers' and workers' organisations, to ensure responsible, sustainable and effective approaches."[590]

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[585] Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions A Renewed EU Strategy 2011-14 For Corporate Social Responsibility, at 4, COM(2011)681 final(Oct. 25, 2011)

[586] *Id.*

[587] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance, 2014 O.J. (L 330)1, 6.

[588] Commission Proposal For a Directive Of The European Parliament And Of The Council As Regards Corporate Sustainability Reporting, COM(2021)189 final (Apr. 21, 2021).

[589] Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions Next Steps For a Sustainable European Future European Action For Sustainability, COM (2016) 739 final (Nov. 22, 2016).

[590] European Commission, Commission Staff Working Document On Implementing The UN Guiding Principles On Business And Human Rights - State Of Play, European Union (July, 14, 2015) available at: https://ec.europa.eu/anti-trafficking/sites/default/files/swd_2015_144_f1_staff_working_paper_en_v2_p1_818385.pdf.

In June 2017, the European Commission published guidelines that would "help disclose environmental and social information."[591] However, these guidelines were non-binding, and the companies were free to use any guideline that would match their own characteristics. In 2019 the need to improve compliance along with the due diligence mentioned under the NFRD[592] led to further clarification on reporting climate-related information[593]. The companies were required to report on climate-related information also under the new guidelines.

This policy would translate well in India. The biggest strength of India's policy is its mandatory nature. However, most companies get away with not disclosing ample information about their climate policy which is one of the biggest factors for greenwashing.

The Taxonomy Regulation, which came into force on July 12, 2020, creates a categorisation method of environmentally sustainable economic activities. It has provided six economic objectives under Article 9. It has also set four conditions that an economic activity has to meet for it to be considered an environmentally sustainable activity as per Article 3 [594] of the Regulation. The first condition is that the activity must contribute to the environmental objectives of the regulation provided under Article 9 that is to be read in line with Article 10 to 16. The activity must not contradict other environmental objectives as under Article 9 when read in line with Article 17.

The last two conditions are that the minimum safeguards as provided under Article 18 and the technical screening criteria as set by the European Commission must be complied with. The commission has to create an actual list of the activities that are to be considered environmentally sustainable by defining the technical screening criteria for each of the six environmental objectives of the Taxonomy Regulation through delegated acts. Technical Screening Criteria are characteristics used to determine whether an activity contributes to mitigation or adaption for each environmental objective.

A proposal was adopted by the European Commission on 21st April 2021 called the Corporate Sustainability Reporting Directive (CSRD), which would revise the NFRD and be complementary to the Taxonomy Regulation. The CSRD would amend the existing reporting

[591] European Commission Press Release IP/17/1702, Commission takes further steps to enhance business transparency on social and environmental matters (June 26, 2017).
[592] European Commission, Commission Staff Working document - Corporate Social Responsibility, Responsible Business Conduct, and Business and Human Rights: Overview of Progress, EUROPEAN UNION (Mar. 20, 2019) available at: https://ec.europa.eu/docsroom/documents/34482/attachments/1/translations/en/renditions/native.
[593] 2019 O.J. (C 209) 1.
[594] Regulation 2020/852 of June 22, 2020, On The Establishment Of a Framework To Facilitate Sustainable Investment, And Amending Regulation (Eu) 2019/2088, 2020 O.J.(L 198)3(EU).

requirements. The proposal seeks to broaden the meaning of companies that are to comply with the NFRD to include all the listed companies. The proposal calls for the audit of the information that has been reported by the companies.

The proposal seeks to provide a more comprehensive reporting requirements and a clause that will require the companies to maintain the standard set by the EU. The EU's sustainability reporting standards are set to be adopted by October 2022. Along with CSRD, the Commission also approved in principle the first delegated act, EU Taxonomy Climate Delegated Act which sets out the criteria to determine whether an activity contributes to climate change adaption or mitigation and was formally adopted on 4th June 2021. They are to come into force after its publication in the official journal. Technical Screening Criteria for the other four environmental objectives are to be adopted through a second delegated act by 31st December 2021[595].

Sustainable Finance Disclosure Regulation is another legislation that has come into effect on March, 10 2021. It "lays down harmonised rules for financial market participants and financial advisers on transparency with regards to the integration of sustainability risks and the consideration of adverse sustainability impacts in their processes and the provision of sustainability-related information with respect to financial products"[596]. This legislation was adopted to ensure financial services institutions make sustainability-reported disclosures. It applies to financial-market participants. "SFDR sets out rules on transparency and requires FMPs to disclose how they consider sustainability risks in their investment processes and products and how they deal with principal adverse impacts of their investment decisions on sustainability factors, "[597]

The Taxonomy Regulation and the CSRD was adopted in direct response to the rampant corporate greenwashing. On July 6th 2021, the EU adopted the EU Taxonomy Article 8 Disclosures Delegated Act, which is supplementary to the Taxonomy Regulation and to come into force after its publication in the official journal. The primary purpose of the delegated act was to create transparency and to stop greenwashing[598]. The Act defines in detail about the

[595] European Parliament, Taxonomy Regulation: Approved EU Taxonomy Climate Delegated Act under Art. 10(3) and 11(3) of the Taxonomy Regulation, EUROPEAN PARLIAMENT, (MAY 17, 2021) https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/648248/IPOL_BRI(2021)648248_EN.pdf (Accessed on 25th July 2021 at 6:30 a.m.).

[596] Council Regulation 2019/2088 of Dec. 9, 2019 O.J. (L 317) (EU)

[597] Rebecca Mace Balebs, SFDR - A Snapshot, KPMG, (Mar. 9, 2021), available at: https://assets.kpmg/content/dam/kpmg/ie/pdf/2021/03/ie-sustainable-finance-disclosure-reg-sfdr.pdf. (Accessed on 25th July 2021 at 6:43 a.m.)

[598] *Id.*

disclosure obligations under Article 8 of the Taxonomy Regulation; the rule calls for the companies to comply with the technical screening criteria by translating it into "quantitative economic indicators", which are to be disclosed to the public. This disclosure is to inform the public about the companies' path to sustainability by disclosing the Key Performance Indicators of their environmentally sustainable activities as defined under Article 3 of Taxonomy Regulation.

The EU has planned on creating an intricate system of rules with these three disclosure tools NFRD (CSRD after its adoption), Taxonomy Regulation and SFRD, to combat greenwashing. For an activity to be considered as an environmentally sustainable economic activity, the company has to ensure that it fulfils the objectives that are provided under Taxonomy Regulation. The Delegated Acts under the Taxonomy Regulation provides criteria to understand whether the activity contributes to these objectives. Article 8 delegated Act relied on the criteria under the Delegated Acts to instruct the companies to evaluate and report whether their activities align with EU Taxonomy. CSRD looks to provide a mandatory standard for sustainability reporting and audit of the information reported.

The adoption of a three-tier disclosure system would be exceptionally useful in India. There is a severe lack of a penalty system in the Indian scenario. While Indian laws do ask for a certain limit of disclosure from the firms, there could be a considerable increase in the transparency towards activities of firms, especially when it comes to environmental claims. Transparency can be the key when combatting greenwashing.

When a company in the EU claims that an activity was undertaken under the scope of NFRD (CSRD after adoption), Article 8(1) stipulates that it is mandatory that the company reports as to what extent the activity qualifies as environmentally sustainable under the Taxonomy Regulation. Article 8 creates a link between NFRD and Taxonomy Regulation.

The issue of greenwashing has not been dealt with in the Indian legislation. The EU laws can be used as a basis by the Indian legislative for creating rules to mitigate greenwashing. India can follow suit and adopt national standards according to which the companies are to report their CSR activities so that the investors and other stakeholders are able to compare and contrast between the companies and make an informed decision. By implementing these measures, India can reduce greenwashing.

VII. CONCLUSION & RECOMMENDATIONS

The most trusted and popular business mantra around the globe is – "Customer is King" This title of royalty ensures that the opinion and perception of the consumers matter the most to firms. After all, corporations work day and night to ideate, create, distribute, and market the perfect product in the market so as to effectively satisfy the needs of the consumers. Consumer attitudes and trends determine the demand of a particular product.

Thus, if consumer trends favour ecological products, corporations usually rush to imbibe certain ecological trends in their product or at least market them in a way that would appease the green audience. This has repeatedly led corporations to indulge in greenwashing. For instance, in USA, S.C. Johnson & Son, Inc. ("SCJ"), the manufacturer of Windex was sued for creating a "Greenlist" seal of approval for its products and falsely presenting it as a third-party seal of approval[599]

The lack of stringent CSR policies further enables this behaviour of corporations. Today, consumer, in addition to being king, has become aware. They are quick to spot greenwashing and immediately stop using such products and services.

In a recent study, it was concluded that "Consumers perceive usage of fluffy language' such as the use of words like 'eco- friendly', 'natural' as the most frequently used greenwashing communication tactic. It is followed by the use of 'scientific language', use of 'suggestive pictures' such as that of flowers blooming from an exhaust pipe or unnecessarily using the green background to falsely imply a green product or brand."[600]

This awareness and the ability to "call out" brands have placed the onus on the corporations to build thoughtful and original environmental CSR activities that do not toe the line of greenwashing. It is upon the organisations to put maximum effort to actually build programs that make a difference. A "green" brand is supposed to paint the image of a reliable firm that consumers can trust. So, greenwashing not only deters consumers from trusting the greenwashed bands but also makes them vary of other actual green brands.

In this regard, a policy can be the biggest changemaker. The current CSR policy, while leaps and bounds ahead of most countries, still does not manage to encompass and manage the Indian

[599] Koh v. S.C. Johnson & Son, Inc., C-09-00927 RMW, 2010 WL 94265, (N.D. Cal Jan. 6, 2010).
[600] Manvi Khandelwa et.al., greenwashing: A Study on the Effects of Greenwashing on Consumer Perception and Trust Build-Up, 4 res. Rev. Int'l j. Multidisciplinary 607, 608 (2019).

CSR industry. The policy is out-dated and does not serve the purpose for which it was built. The policy provides an extremely strong base. The concept of "mandating" CSR expenditure was revolutionary, even today. However, simply mandating a small portion of profits as CSR expenditure cannot serve the needs of the economy.

Thus, a complete change needs to be brought in the CSR regulations. This would not only optimise the CSR rules in India, encouraging corporations to do their social responsibility, but also curb the potential harm caused by greenwashing. Corporate Social Responsibility had gained traction at the turn of the century, calling for regulations for CSR not only at a national level but also at an international level. During the last two decades, CSR rose to prominence; however, it is still a new topic in respect to academic research. The scantiness of research also leads to a severe lack of awareness in what we consider greenwashing.

Consumers and corporations alike have a basic understanding of what comprises as greenwashing, but we have only uncovered the tip of the iceberg. There are a multitude of fraudulent activities that also comprise the offence of greenwashing. However, our lack of awareness results in consumers not being able to identify such malapropos activities and letting those remains undetected.

Therefore, it becomes extremely imminent to define greenwashing in the Indian context and make appropriate laws to deal with the same. Here, it becomes imperative to take a look at what greenwashing means in its entirety; there are various facets to the problem. Curbing greenwashing means bringing forth an honest and transparent method of communication from a corporation to its consumers. It also attempts at focusing on overall sustainability rather than concentrating on one sphere of environmental protection. Raising awareness for the same will enable the government to make a more comprehensive policy while also empowering consumers to raise their voices against green-sheened businesses.

While building a new policy is an excellent first step, the government has to take other steps as well. An important measure is the introduction of an Expert Committee that will look into the offence of greenwashing and assist in the formulation of the new policy. Through the publications of the Expert Committee, the government can ensure the proper dissemination of information for the general public.

It becomes exceedingly important that the composition of the Committee has an adequate representation of all the relevant stakeholders in the Industry. The composition of the committee must be paid great attention to. This is because while the interests of the corporations

must be represented, priority should be given to revamping the CSR Guidelines for environmental protection and curbing greenwashing. A delicate balance must be achieved between protecting the interests of industrialists and upholding environmental preservation and consumer interests.

A portion of the onus is also on the consumers. While there is an increased awareness in the 21st century, it is also common for a consumer to step into a supermarket and purchase a product because of an "organic sticker" or opt for a "green" brand because of their new ad that advocates for a sustainable life. Advertisements and marketing have a profound psychological impact on the way consumers perceive brands and make buying decisions. By using greenwashing tactics, brands tend to manipulate their consumers and influence these decisions. Each choice that a consumer makes matters! So, it is also the responsibility of a consumer to research a brand and make subsequent informed decisions. An informed decision of a consumer can prove to be the most effective tool to combat greenwashing effectively. While Policy and Compliance Checks are an effective deterrent against greenwashing, there is no bigger dissuasion than a consumer's rejection. After all, the customer truly is the king!

To put a stop to greenwashing, India must revisit and analyse the primary objective for creating India's CSR policy. The policy was enacted to move from an era of companies prioritising profit-building and destroying resources in the process to an era where companies realise their social responsibility towards the ecosystem that they exist in. The current CSR policy does not reflect that. It does not contain provisions that would protect the ecosystem the CSR policies were built for.

India had paved the way for revolutionising CSR in 2013 by introducing the mandatory policy. How India has dealt with CSR has been lauded globally. It's time for India to rise up to the challenge again and pave the way to suppress greenwashing.

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DEFENSIVE TACTICS VIS A VIS HOSTILE TAKEOVER: AN INDIAN PERSPECTIVE

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ABSTRACT

One of the most effective ways to accomplish corporate prosperity is through Mergers & Acquisitions. However, to ensure regulated advancement, in India these endeavours are monitored and regulated by the SEBI and the Takeover Code. While the legislative set-up in India for Takeovers has been amended over twenty times since its outset, however several noteworthy issues are yet to be addressed. Hostile takeover, an important strategy in the world of acquisitions is rather uncommon and unusual in India. However, the expanding global corporate world has opened doors to adverse antagonistic competition

This paper commences with the history of hostile bids in India, and examines how the laws pertaining to the corporate takeovers and hostile acquisitions have been defined and redefined over the years. Its transverses the process of evolution of the law and deliberates upon the array of defences deployed by the target firms which are endorsed by the laws prevalent in our country. Towards the end of the paper the authors have examined the takeover of Mindtree Limited by L&T Limited, and have scrutinized and assessed the modus operandi of the hostile bidders along with examination of the predicament of the target corporations. Furthermore, the authors have analysed the hostile bid undertaken by L&T, and evaluated the rationale behind an adverse and inimical takeover.

KEYWORDS

Hostile Takeover, Takeover Code, Defences, Corporate Governance, Mergers & Acquisition

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I. INTRODUCTION

In 2019, India saw its first ever-hostile takeover in the information technology sector. Larsen and Turbo, India's one of the biggest engineering giants made a hostile bid to acquire Bengaluru based IT company, Mindtree, and set the stage for a riveting drama in the Indian corporate sector.

It all started when V.G. Siddhartha, a shareholder in Mindtree, offered to sell his stake of 20.30% in the company. On 18 March 2019, a share purchase agreement was executed amongst L&T and Siddhartha through which L&T acquired 20.32% stake in the latter. The other promoters of Mindtree were not in favour of this merger. Hence, making the acquisition a hostile takeover. They tried all the defences possible to fend off the acquirer. However, L&T managed to acquire 60% stake in the company.[601]

The mergers and acquisitions ("***M&A***") market has certainly seen a boom in the past few years. There is much more competition in the economy, which stimulates a plethora of change in the structuring and management of the companies functioning in the present market. India has witnessed numerous takeovers in the past which have played a significant role in shaping the takeover law. Currently, the takeover in India is primarily regulated under by the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("***Takeover Code***"). A takeover is considered to be hostile when the company, which is being bought, does not intend to merge with the host company. Under these circumstances, the acquirer instead of negotiating with the target company goes directly to the shareholders and makes an open offer to buy their shares. In India, there have been only handful instances of hostile takeover. While the M&A market has prominently seen friendly takeovers. However, this does not imply that the companies are safe from hostile takeovers. The present market conditions, with the liberalisation policies that are being followed by the government have provided the much-required stimulus to the activities in the M&A market, but in turn the takeover regime does not create any unassailable impediments to protect the companies from such hostile takeovers. The Indian companies now face a real threat from hostile takeovers because most of the regulations make the use of takeover defences almost impossible, leaving the companies more vulnerable to acquisitions.

[601]Business Standard, 2019. L&T has 'acquired control' of the company with 60.06% stake: Mindtree. [online] Available at: https://www.business-standard.com/article/companies/l-t-has-acquired-control-of-the-company-with-60-06-stake-mindtree-119070301241_1.html.

In this paper, the authors will discuss the various defences that are available to prevent a hostile takeover and the legal position of these anti-takeover mechanisms in India. In the second half the paper, the authors will discuss the case study of the L&T- Mindtree takeover to illustrate as to how companies face a threat of hostile takeovers in present market conditions.

II. MAJOR HISTORICAL INCIDENTS PERTAINING TO HOSTILE BIDS

When the chronicles of hostile takeovers are narrated, they are unambiguously close to thrillers. The world has seen several heart racing hostile acquisitions of high-end corporations like Vodafone[602], Arcler[603] and Cadbury[604].

However, when it comes to India, it has not witnessed many hostile takeovers, as the pre liberalization era had stringent and anarchic laws which made hostile acquisitions impossible to achieve. In 1991, when the Narashima Rao Government opened Indian markets for foreign players, it also relaxed policies which exposed the Indian businesses to adverse foreign competition.

The first attempt of a hostile takeover in India was made by an England based NRI, Swaraj Paul, when he attempted to take over Delhi Cloth Mills (DCM) and Escorts Limited[605]in the year 1983 The DCM promoter, the Bharat Ram family owned about 10%of the stock, while the Nanda family, the promoters of Escorts Limited, had 5%of total shareholding in the corporation. The newly formed procedure by the Reserve Bank of India in 1982 restricted an NRI from purchasing more than one percent shareholding in any Indian company, and such purchases could be made only through a portfolio investment. Lord Paul overcame this hindrance by using thirteen different companies to a acquire 13% of stake of the DCM shares,

[602]The Hindu, Idea cellular took over Vodafone, Vodafone Idea embark on new journey, unveil brand identity VI**,** Lalatendu Mishra. [online] Available at: https://www.thehindu.com/business/Industry/vodafone-idea-embark-on-new-journey-unveil-brand-identity-vi/article32542515.ece.

[603]Mittal Steel took over Arcelor in 2006.

The Economic Times, 2016, Tale of two acquisitions: Mittal Steel's acquisition of Arcelor and Tata Steel's acquisition of Corus. [Online]. Available at: https://economictimes.indiatimes.com/industry/indl-goods/svs/steel/tale-of-two-acquisitions-mittal-steels-acquisition-of-arcelor-and-tata-steels-acquisition-of-corus/articleshow/51624431.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

[604] Independent, Kraft Foods took over Cadbury in 2010, In a final betrayal of the Cadbury brand, Kraft has quietly abandoned its promise to stick with Fairtrade, Hannah Fern, [online] Available at: https://www.independent.co.uk/voices/cadburys-chocolate-fairtrade-fair-trade-mark-farmers-kraft-american-brand-abandoned-promise-a7445826.html.

[605]Mathew, Shaun, Hostile Takeovers in India: New Prospects, Challenges and Regulatory Opportunities (November 12, 2007). Columbia Business Law Review, Vol. 2007, No. 3, Available at SSRN: https://ssrn.com/abstract=1693821.

and 7.5%of Escorts Limited[606]. This lead to a widespread panic among the Indian companies and the matter was taken up to the Supreme Court. The Supreme Court's verdict[607]was in favour of the promoters of the respective companies, following which extensive meditations took place between Lord Paul and the target companies which resulted in Swaraj Paul selling his share to respective promoters and pulling out of the Indian markets.[608]

Nearly two decades later, in 1997 another British Company, British Paints Major ICI PIC, bought 9.1% of Atul Choksey's shareholding in Asian Paints, much to the disapproval and disappointment of the other four promoters. The remaining three promoters held over 42%of share in the company and refused to approve the transfer of shares by citing clearance hurdle by the Foreign Investment Promotion Board (FIPB)[609]. The FIPB policies necessitated that all the board of directors of a company must approve the foreign acquisition. The British Paints Major didn't manage to get the board's approval, and had to give up its share to two of the promoters and to the Unit Trust of India (UTI), a mutual fund owned by the government, hence rendering the acquisition a blunder.

One of the first successful hostile takeovers in India was in 1998 by Indian Cements Limited when they made an open offer to buy the shares of Raasi Cements and Shri Vishnu Cements at INR 300 per share which was extremely high compared to the market value of the shares which were priced at INR 100 in stock exchange[610]. This led the market into a frenzy and the shares were frozen at INR 188.30 per share. The market mania came to end which ICL buying 85% of the holding in the company and resulted in a successful hostile takeover.

DEFENCES

Following are a few widely popular takeover defences available to public target companies

[606]Bhandari, 2018.Escorts -Fending off hostile takeover, surviving family split. Business Standard. [online] Available at: https://www.business-standard.com/article/companies/40-years-ago-and-now-escorts-fending-off-a-hostile-takeover-and-surviving-a-family-split-114110500008_1.html.
[607]Escorts Ltd. And Another vs. Union of India and Others, 1987 57 CompCas 241 Bom.
[608]Ninan, 1986. Supreme Court, RBI gives Swaraj Paul clean chit in Escorts, DCM share cases. [online]. Available at: https://www.indiatoday.in/magazine/economy/story/19860415-supreme-court-rbi-give-swraj-paul-clean-chit-in-escorts-dcm-share-cases-800784-1986-04-15.

[609]Foreign Investment Promotion Board (FIPB) was abolished on 24 May 2017, as announced by Finance Minister Arun Jaitley during 2017-2018 budget speech in Lok Sabha, and has been replaced by the Foreign Investment Facilitation Portal (FIFP).
[610]Supra note 5

STAGGERED BOARD

Staggered boards are extremely important elements of the modern corporate organization. A staggered board consists of three or five distinct classes or groups of directors[611]. These directors serve for different lengths of time and during the annual elections only one of these classes is open for appointment. Thus, implying that each class of directors has elections in different years and one third all the directors of the board retire annually.[612]A staggered board is distinct from a normal board as in the latter's case all the directors are appointed at once.

Such classification of directors makes it onerous for the hostile bidder to acquire the company. A bidder can acquire a corporation only if it manages to control the board of directors, and a staggered arrangement of the board makes it an extremely dreadful hurdle. An efficient staggered board defers the hostile bidder to gain control of the company by a substantial amount of time. Thus, if a bidder were to emerge it would take at least a year to gain control of the corporation, which is considered tedious in the world of hostile takeovers.[613]

Furthermore, staggered board is considered an efficient takeover defence as other than cost damage rendered by the bidder, he is also required to win at least 2 elections which are rather far apart in time[614]. The requirement of winning two elections loses itself as a hurdle for the bidder.

INDIAN LEGAL POSITION

Section 152[615] of the Companies Act, 2013("***Companies Act***") mirrors the elements of a staggered board as it states that out of the entirety of the board of directors in a public company (or of a private company which is a subsidiary of a public company),a minimum of 2/3rd must retire in rotation. Thus, only a one-third of the directors do not retire Clause (3) of the section 152 further goes on to substantiate that 1/3rd of the directors subjected to retirement by rotation are to retire each year.

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[611]Lucian, Bebchuk, John, Coates &Subramanian Journal of Financial Economics, 2006.Classified boards, firm value, and managerial entrenchment. Available at: https://web.cba.neu.edu/~ofaleye/doc/cboards.pdf.
[612] Ibid

[613]National Bureau of Economic Research. The Powerful Anti-takeover Force of Staggered Boards: Theory, Evidence, and Policy. Available at: https://www.nber.org/digest/oct02/w8974.html.
[614]Supra note 11
[615]Companies Act 2013. § 152(6) states as follows: "(a) Unless the articles provide for the retirement of all directors at every annual general meeting, not less than two- thirds of the total number of directors of a public company, or of a private company which is a subsidiary of a public company, shall-(i) be persons whose period of office is liable to determination by retirement of directors by rotation; and(ii) save as otherwise expressly provided in this Act, be appointed by the company in general meeting."

While the staggered board proves to be an efficient anti-takeover shield against hasty bidders, it turns out to be quite fruitless and ineffectual in the Indian corporate sector. Under section 169 of the Companies Act[616], the shareholders have the capacity and the right to remove all the directors in a single shareholders meeting. Thus, a hostile bidder who acquired majority of shares and balloting rights has the capacity to easily replace the board of directors and overpower the staggered board defence.

Furthermore, shareholders have a legal right to replace the directors, making it easy for the majority shareholder to subdue the staggered board.

C. WHITE KNIGHT

The white knight is another anti-takeover defence for companies exposed to hostile bidders. A white knight typically is an individual investor or a company that acquires the target company in order to rescue it from an unwanted hostile takeover. In other words, a white knight is an amiable and proffered acquirer, as against hostile competitors colloquially referred to as the black knight.[617]

The reason the target companies often prefer white knights as anti-takeover defence is because these friendly acquirers preserve the essence of the target company by retaining the existing management and board of directors. The white knight not only invests in the target company to save it from hostile bids but also conserves the core schema, the vision and the values of the company.[618] A white knight salvages a company at the brink of being taken over force fully by acquiring the corporation, buying out the corporate raider or simply by striking a deal with the management and the board of directors of the target company.[619]

[616]Companies Act 2013. § 169 on Removal of directors states as follows: "(1) A company may, by ordinary resolution, remove a director, not being a director appointed by the Tribunal under § 242, before the expiry of the period of his office after giving him a reasonable opportunity of being heard:
(2) A special notice shall be required of any resolution, to remove a director under this
§, or to appoint somebody in place of a director so removed, at the meeting at which he is removed.
(3) On receipt of notice of a resolution to remove a director under this § , the company shall forthwith send a copy thereof to the director concerned, and the director, whether or not he is a member of the company, shall be entitled to be heard on the resolution at the meeting."
[617]Barik, Nikhilesh, Takeover Defences and Corporate Governance (April 15, 2012) [Online]. Available at https://ssrn.com/abstract=2039844, or http://dx.doi.org/10.2139/ssrn.2039844.
[618]Eleftheriadou, I. 2018. Hostile Takeovers and Defence Strategies.
.International Hellenic University, [online], pp.20. Available at: https://repository.ihu.edu.gr/xmlui/bitstream/handle/11544/29128/Dissertation%20Final.pdf?sequence=1.
[619]The Guardian, White Knight. The Guardian. [Online]. Available at: https://www.theguardian.com/business/2007/apr/12/businessglossary159.

D. WHITE SQUIRE

A white squire is very similar to the white knight and is referred to a friendly investor or a company. The white squire buys a considerable stake in the company that prevents the hostile takeover; however, unlike the white knight it does not acquire the company and has no intention of owning it.[620] In case of the white squire the target company remains independent as the white squire buys only partial shares, just enough to hinder the corporate raider from taking over the target corporation.

One of the most remarkable examples of a white knight was when a consumer goods company tried to acquire Prithvi Raj Singh Oberoi's EIH Limited, and the Reliance Industries turned white knight by acquiring 14.12% shareholding in EIH Limited.[621]In 2001, cigarette company, ITC Limited played a white knight by making a counter offer to British American Tobacco Industries which was at the brim of a hostile takeover by Radha krishan Damini's ITC offered a better value to the shareholders and subsequently outbid Damini.[622]

E. POISON PILL

Poison pill, also known as the shareholders right plan, is a defence tactic used by Target Company to make its shares unappealing. Under this scheme, the shareholders of the target company are offered shares of the company at a discounted price in the event of a hostile takeover. This offer is made as soon as the acquirer makes an open offer or when a shareholder crosses the threshold of the percentage of ownership shares (i.e., 25%) without prior consent. All the shareholders are offered the shares at a discounted price except the hostile bidder. This dilutes the stake of the hostile bidder in the company thus increasing the cost of acquisition. This is known as the flip-in poison pill.[623]

Another kind of poison pill is the flip-over. Under the flip-over poison pill scheme, the shareholders of the company are given an option to buy the stocks of the company at a discounted price after the merger. This way the wealth of the acquirer is transferred to the shareholders of the target company.

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[620] *Supra* note 18.

[621]Business Standard, 2013, As M&A activity picks up, white knights are riding into India Inc. [online]. Available at: https://www.business-standard.com/article/companies/as-m-a-activity-picks-up-white-knights-are-riding-into-india-inc-110092800051_1.html.

[622]Business Standard, 2018, British American Tobacco proposal to buy back shares not an option: ITC. [online] Available at: https://www.business-standard.com/article/companies/british-american-tobacco-proposal-to-buy-back-shares-not-an-option-itc-118100700631_1.html.

[623] Dalal, 2020, Analysis of Takeover Defences and Hostile Takeover. NALSAR Law Review, 6(1), [online]. Available at: https://www.commonlii.org/in/journals/NALSARLawRw/2011/6.pdf.

INDIAN LEGAL POSITION

Poison pill doesn't have much use in the Indian context due to the Takeover Code and SEBI Disclosure & Investor Protection Guidelines 2000 ("***DIP Regulations***")

An Indian company can issue a warrant as soon as any shareholder crosses the threshold limit. However, the DIP regulations read with the Takeover Code prohibit the companies to use these warrants to sell shares at a sizeable discount, making the process of poison pill ineffective. According to Regulation 26 of the Takeover Code[624], the target company cannot issue any of its authorised and unissued shares during the course of the offer period. However, they can be issued with prior consent of the shareholders. Although, during the process of a hostile takeover the company needs to respond quickly, and seeking prior consent of the shareholders would be a time-consuming process, which would render the shareholders, right plan ineffective.

Also, as per the DIP guidelines, the shares and the warrants cannot be issued at discount, as the price has to be determined in accordance with price in the market on the date it has to be issued.

For this strategy to work, important amendments need to be made to maintain balance and give the target company a fair chance to get a fair buy out price or save the company from a hostile takeover. It is suggested that the guidelines should be relaxed and the companies should be allowed to sell securities at substantial discounted prices.

This being said, there are some advantages to the poison pill strategy. This tactic does not come in a straightjacket formula and can be altered to suit the circumstances. The guidelines do not prohibit issue of non-convertible securities like debentures, preference shares, etc. A poison pill can be structured in a way where the shareholders are backed with rights to exchange securities held for senior securities[625]. These securities are issued to the shareholders when a hostile takeover bid is in play. The use of this scheme shoots up the cost of acquisition due to increasing cost of interest in the borrowings.[626]

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[624] Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. Regulation 26(2) states as follows: "the target company by way of a special resolution by postal ballot is obtained, the board of directors of either the target company or any of its subsidiaries shall not, —(a) alienate any material assets whether by way of sale, lease, encumbrance or otherwise or enter into any agreement therefor outside the ordinary course of business; (b)effect any material borrowings outside the ordinary course of business;(c) issue or allot any authorised but unissued securities entitling the holder to voting rights…"

[625] Senior securities are those that ranks higher in terms of pay out ranking. The value of these securities is determined by the board of directors

[626] The Economic Times, 2020, Can India Inc. swallow the 'poison pill'? [online] Available at: https://economictimes.indiatimes.com/view-point/can-india-inc-swallow-the-poison-pill/articleshow/3051566.cms?from=mdr.

Further, a poison pill can also be structured in a way where the target company add certain clause in its articles of association, which prohibit the acquirer to use the brand name of the target company.

Another tactic that maybe used by the companies is that of issuing employee stock options. Under this scheme, the employees are offered shares of the company at a discounted price. Use of this technique during a hostile takeover would dilute the share of the acquirer in the company. Hence, saving it from a prospective hostile takeover.

F. GREENMAIL DEFENCE

Under this defence, the target company offers the acquirer to buy back the shares acquired by the acquirer at a premium price, which is above the market price of shares. The target company makes this offer after conducting a cost benefit analysis.

It is often considered as blackmail; the acquiring company buys the shares of the target company and then threatens them with a hostile bid. In response the target company offers to buy back these shares at premium in order to defend any further hostile behaviour.[627] Typically, after the target company buys its shares back, the acquiring company signs an agreement with the target company to not make another takeover attempt for an agreed period of time.

For instance, the Renaissance Estates Limited (REL) led by Abhishek Dalmia as he attempted to take over the GESCO Corporation (GESCO) made an attempt at a hostile acquisition. Abhishek Dalmia attempted to buy 45%of the stake in the company at a price of INR 23 which was only a fraction of the actual value shares priced at INR 54.50. REL later raised the offer to INR 27 for 55% of shareholding in the corporation. In ordered to avoid a hostile takeover, GESCO's promoter of Mahindra Reality and Infrastructure Developers (MRID) and made a counter offer to buy the company's shares at INR 36 per share. After extensive lobbying and counteroffers, REL bought 10.5% stake in GESCO for INR 45 per share only to sell it to MRID at INR 54 per share. Thus, the joint share of GESCO promoters went to a total of 30%.[628]In this case, Abhishek Dalmia instead of dislodging the promoters of the target company sold his

[627] McChesney, 1993. Transaction Costs and Corporate Greenmail: Theory, Empirics and a Mickey Mouse Case Study, Wiley, Managerial and Decision Economics. Special Issue: Transactions Costs Economics.

[628] *Supra* note 5

shares at a profit. This was a failed hostile takeover attempt and a successful use of the defence of greenmail defence tactic. [629]

Another example of the use of greenmail would be the case of Arjun Bajoria and Bombay Dyeing. In the year 2000, 5% of Bombay dyeing's shares were brought by Arjun Bajoria. It was only in June 2000, Bombay dyeing noticed Bajoria's attempt of a takeover. They filed a complaint with SEBI, Bombay Stock Exchange and Company Law Board. Bajoria claimed to have sent a notice to company. After, a lot of speculation relating to Bajoria's intentions with the target company, he finally sold his shares to Mr. Nusli Wadiaat a profit.[630]

G. GOLDEN PARACHUTE

A golden parachute is a relief or compensation payable to the top executives of a company in case of a takeover. This clause is part of the contractual agreement between the top executives and the company which results in a hefty payment that has to be made to the top executives in case of termination of their contract. This severance packages is opted by a lot of big and wealthy companies. The companies face a reduction in the amount of their assets when they make such payments. This makes the target company less attractive and also increases the cost of acquisition.

Moreover, this places the mangers and the shareholders of the target company on the same side and reduces the conflict between them as fulfilment of the clause of golden parachute has an impact on the premium that has to be paid by an acquirer. Therefore, they fight alongside the shareholders in order to get higher premiums. Various studies have been conducted to show a positive correlation between golden parachute and the amount of premium paid that is offered to the shareholders.[631]

INDIAN LEGAL POSITION

In India, Section 196 read with Schedule V of the Companies Act provides for payments and appointment of directors. Under this section, the permissible limit of remuneration that can be given to a director without the approval of the Central government is not much. Therefore, it

[629]Business Standard, 2019, Dalmia Firm & #39; S Stake In Gesco Up At 7.27%. [Online]. Available at: https://www.business-standard.com/article/companies/dalmia-firm-39-s-stake-in-gesco-up-at-7-27-101080401025_1.html.
[630]Business Standard, 2019.Arun Bajoria At It Again, Buys 5.14% Bombay Dyeing Stake. [online] Available at: https://www.business-standard.com/article/companies/arun-bajoria-at-it-again-buys-5-14-bombay-dyeing-stake-101081401003_1.html.
[631]Michael Jensen, Takeovers: Causes and Consequences, in Patrick A. Gaughan, ed. Readings in Mergers and Acquisitions, Oxford: Basil Blackwell, 1994

is not enough to defend a takeover even if the company is supposed to pay the maximum limit. According to section 197 of the Companies Act[632], a director can only aid 11% of the total profits.

However, the clauses relating to a golden parachute are administered by section 202[633]of the Companies Act, 2013. As per these provisions, only the whole-time directors[634] and an office manager[635] are eligible for severance packages. However, a director is not eligible to be paid in case he resigns from office when a company amalgamates with another entity or due to reconstruction. These provisions are not applicable to directors who are dismissed after a resolution has been passed in the board meeting. Further, Clause 3 of section 202 puts restriction on the amount of compensation that is payable to the director.[636]

H. CROWN JEWEL

A crown jewel refers to the most beneficial assets of a corporation. A crown jewel of a company can varies across an array of spheres both tangible and intangible as it could be a department that renders the most profits, a particular team in research and development or an extravagant chain of shares. The crown jewel is also used as an anti-takeover defence in case of hostile mergers and acquisitions[637]. When the target company faces a threat from a corporate raider, they may take the radical step of selling off their most profitable and valuable assets also known as the '*crown jewel*'. This dire step by the target company will render the company less attractive and invaluable in the eyes of the corporate raider which will impel them to withdraw

[632]Companies Act 2013- § 197 (1) The total managerial remuneration payable by a public company, to its directors, including managing director and whole-time director, and its manager in respect of any financial year shall not exceed eleven per cent. of the net profits of that company for that financial year computed in the manner laid down in § 198 except that the remuneration of the directors shall not be deducted from the gross profits:
[633]Companies Act 2013. § 202(1) for Compensation for loss of office of managing or whole-time director or manager states as follows: "(1) A company may make payment to a managing or whole-time director or manager, but not to any other director, by way of compensation for loss of office, or as consideration for retirement from office or in connection with such loss or retirement."
[634]Companies Act 2013. § 2(94) defines "whole-time director" to as follows: "includes a director in the whole-time employment of the company."
[635]Companies Act 2013. § 2 (53) defines "manager" to mean as follows: "an individual who, subject to the superintendence, control and direction of the Board of Directors, has the management of the whole, or substantially the whole, of the affairs of a company, and includes a director or any other person occupying the position of a manager, by whatever name called, whether under a contract of service or not"
[636]Companies Act 2013. § 202 on Compensation for loss of office of managing or whole-time director or manager states as follows: "(3) Any payment made to a managing or whole-time director or manager in pursuance of sub-§ (1) shall not exceed the remuneration which he would have earned if he had been in office for the remainder of his term or for three years, whichever is shorter, calculated on the basis of the average remuneration actually earned by him during a period of three years immediately preceding the date on which he ceased to hold office, or where he held the office for a lesser period than three years, during such period…"
[637]Supra note 23

the bid[638]. Once the most profitable assets of a firm a sold, the prospective acquirers foresee a disoriented business and tend to pull out of the deal. This self-preservation technique by a target company is mostly seen as a last resort as it dismantles and severs the most valuable assets of the target company. The sale of crown jewels leaves a business with grim prospects of growth which is why the target companies often look for a friendly third part to sell off its crown jewel to. The friendly third party also known as the *white knight* (*as discussed above*) is likely to sell back the crown jewel to the target company at a premeditated price once the corporate raider has disengaged itself from the bid.[639]

INDIAN LEGAL POSITION

Regulation 26[640]of the Takeover Code provides for requirements by the board of directors and managers of a target company. Under this said regulation, it is rather demanding and problematic for the target company to sell, transfer, trade, eject or enter into any contract to, transferor dispose of assets once the corporate raider has made a public bid. Thus, the crown jewel defence can only be employed prior the public announcement by the hostile bidder to take over the target company.

The Companies Acthas contrived constraints on the power of the board. As per Section 180[641] of the Companies Act, the board cannot sell the whole or substantially the whole of its undertakings without obtaining the authorization of the shareholders in a general meeting. However, there are no restrictions on the sale of a single immovable property, which does not form an undertaking. Hence, primarily there are no restrictions on the power of the board to deal with the properties of the company, unless they are opposed to the interests of the company.

[638] *Ibid*
[639]Mergers and Acquisitions, Alan Auerbach, Published in 1987 by University of Chicago Press by the National Bureau of Economic Research
[640]Supra note 24
[641]**Companies Act, 2013. § 180(1) states as follows "(1)** The Board of Directors of a company shall exercise the following powers only with the consent of the company by a special resolution, namely:**(a)** To sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company or where the company owns more than one undertaking, of the whole or substantially the whole of any of such undertakings."

III. THE CASE STUDY OF L&T INFOTECH AND MINDTREE

PARTIES TO THE TRANSACTION

- **THE ACQUIRER**

Larsen & Toubro Limited (L&T), a publicly listed company and a fragment of Larsen & Toubro Group, is a Mumbai based global IT Services Company. It is a company with miscellaneous services variegated across technology, engineering, construction, manufacturing and financial services, with global operations. L&T holds 74.58 % stake in **Larsen & Toubro Infotech Limited**, an IT company offering services across the globe. L&T's expansion in the information technology was perhaps one of the critical factors in its interest in the acquisition of the Target Company.

- **THE TARGET COMPANY**

Mindtree Limited (Mindtree) is a publicly listed corporation engaged in the business services related to Information Technology and distributing digital and transfiguration.

A Bangalore based software Service Company, it offers application development, and constitutes as one of the few companies to sense and seize opportunities by expanding their business through artificial intelligence, machine learning and automation.

RATIONALE OF L&T

According the statements given by L&T's top management personnel, it has a software services business under L&T Infotech and this acquisition was aimed at providing the best IT services to its clients worldwide which could take its technology portfolio among the top tier IT companies of the country.[642]. Mindtree was expected to expand client liaison and business ventures for L&T. Consolidation of these two entities was assumed to render $2.4 billion.[643] Since, there were no instances of overlap between the functioning of these two companies, as L&T Infotech primarily functions in BSFI (Banking, financial services and insurance) and manufacturing whereas Mindtree has a strong presence in hi-tech media, retail and consumer packaged goods.[644] This amalgamation was expected to help in expanding client base by

[642]Annual Report 2018-19, L&T Infotech. [Online]. Available at: https://www.lntinfotech.com/wp-content/uploads/2019/06/LTI-AR-2019_web-version.pdf?pdf=download.

[643]The Economic Times, 2019, How Mindtree became the object of a hostile takeover battle between its management and L&T. [online]. Available at: https://economictimes.indiatimes.com/tech/ites/how-mindtree-became-the-object-of-a-hostile-takeover-battle-between-its-management-and-lt/articleshow/68490409.cms.

[644]Annual Report 2018-19, L&T Infotech. [Online]. Available at: https://www.lntinfotech.com/wp-content/uploads/2019/06/LTI-AR-2019_web-version.pdf?pdf=download.

decreasing client concentration. However, post the acquisition their client concentration was predicted to be brought down to mere 8.5 %.[645]Hence, this amalgamation was a major step to expand the client base and uplift L&T's position in the IT sector.

Another aspect, which made the acquisition of Mindtree attractive to L&T, was the likelihood of increased return on equity. This acquisition would help increase the profits and expand sources of revenue in the information technology and technology service sector.

RATIONALE OF PROMOTERS OF MINDTREE

The promoters of Mindtree were averse to the idea of a takeover. According to Mindtree, there was no strategic advantage of this takeover and it was a threat to Mindtree's unique setup. Krishna kumar Natarajan, the chairman of Mindtree wrote a letter to L&T board to urge against a hostile takeover and he expressed his shock with regard to the attempts of a hostile acquisition. He also emphasized that management does not want to be part of an institution that is anthropologically different from Mindtree and that amalgamation of the two organizations will not render benefits for any of the two.

V.G SIDDHARTHA'S PART IN THE TAKEOVER DEVELOPMENTS

VG Siddhartha, the founder of Café Coffee Day (CCD) and one of the promoters of Mindtree disposed of his stake of 20.32% in Mindtree to Larson and Turbo Limited. The private equity firms including Baring PE Asia, Chrys Capital, and KKR refused to buy VG Siddhartha's share as these companies wanted to secure the controlling stake in the company just like L&T Infotech.

Siddhartha sold his share in Mindtree to pay off his debt of Coffee Day Enterprises (CDE – holding firm for CCD) and other ventures[646]. The total debt of CDE amounted to INR 6550 crores before the sale of its Mindtree stake. Siddhartha's stake in the company was pledged by to various banks and financial institutions. In order to release these shares Coffee Day Group entity, Tanglin Retail Developments Private Limited issued non-convertible debentures of INR 3000 Crore with tenure of a year and one month. This arrangement was made to ensure that the

[645]Supra note 43.

[646]The Economic Times. L&T confident of taking control of Mindtree: AM Naik, Available at: https://economictimes.indiatimes.com/tech/ites/lt-confident-of-taking-control-of-mindtreeamnaik/articleshow/69764776.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

share transfer materialized easily and the hassle of obtaining no-objection certificate from several lenders could be avoided.[647]

TRANSACTION

The acquisition took place in a three-fold process.

It all started when V.G Siddhartha offered to sell his 20.30% stake in Mindtree. The takeover was initiated when a share purchase agreement was signed between L&T and Siddhartha. Under this agreement, Siddhartha sold 33,360,229 equity shares of Mindtree aggregating to 20.15% of shareholding of Mindtree at INR 980 per share.[648]

Since this was below the threshold limit, the need for an open offer was not triggered. However, L&T further placed an order to buy 15% more shares in Mindtree through a broker. They bought 24,834,858 more shares, which accounted for 15% equity shares in the voting capital.

After acquiring 15% more equity shares, L&T exceeded the threshold limit and were required to make an open offer, as mandated by the Takeover Code. L&T made an open offer to purchase 51,325,371 Equity Shares amounting to 31.00% of the share capital. As per Regulation 19(1) of the Takeover Code, there were no conditions imposed on the offer as to the amount of minimum subscription. The open offer was however oversubscribed, following which the shares were allotted on proportionate basis. [649]

DEFENCES USED BY MINDTREE

The promoters of Mindtree opposed this acquisition from the very beginning. The promoters never wanted to sell their shares to a third party. The promoters had an emotional connect with the company and opposed the idea of a third party intervening and controlling the affairs and events of their company. The promoters believed that a third party would not lead this company in the right direction and were of the opinion that Mindtree and L&T are very different companies with remarkably distinctive goals and were therefore not compatible. The promoters also outlined the negative consequences of a takeover in the present market conditions. They believed that Mindtree would lose all the progress it had made because a

[647]Vora K. Hostile takeovers and case of L&T Infotech and Mindtree, VORA Corporate Finance. [Online]. Available at: https://vorafin.com/insights/lt-infotechs-hostile-takeover-of-mindtree-and-theory/.
[648]Nishith Desai Associates, 2020, Don't Mind: You've been acquired! [Online]. Available at: https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Don_t-Mind-You_ve-been-Acquired.pdf.
[649]Post Open Offer Report. SEBI, Available at: https://www.sebi.gov.in/sebi_data/commondocs/jul-2019/poadmindtreead_p.pdf.

takeover could potentially ruin client relationships. Therefore, it wasn't considered to be profitable deal for the shareholders.[650]

The promoters of Mindtree planned a board meeting and informed the stock exchange about the same. The meeting was particularly set to discuss the buyback of shares. The buyback of shares is a commonly used defence strategy to protect a target from a possible takeover as a buy back increases the cost of acquisition and dilutes the number of shares available for purchase (*buy back of shares as a defence strategy has been discussed in detail above*).

According to section 68 of the Companies Act, a special resolution needs to be passed in case of the buy back, however, under the exemption's clause, 10% of the shares can be issued for buy back without a special resolution. Further this section imposes a limit of 25% of shares that can be bought back but only after a special resolution is passed by the company.

However, in the present case, this defence rendered itself to be ineffective. Mindtree's worth was INR 27,414.00 million which implied that INR 2,741.40 million could be bought back without a special resolution and INR 6,853.50 million after a special resolution[651]. Even after this, there were 163,900,000 equity shares outstanding. This implied that even if the company passed a special resolution to buy back 25% shares, the outstanding share capital would only be reduced by 4.20%. This was not enough to save the company from takeover. Moreover, a buy back at such a later stage is discouraged.

Further, the company resorted to the defence of *white knight*. Underlying idea being that a third party enters the negotiation by making a competing offer, which provides a fair chance to shareholders to choose the better offer. The target company approached individuals with high net worth hoping for a friendly takeover. However, no competing offers were made.

Another tactic that could have been used by the target company was that of crown jewel. Since, the company is part of the IT sector most of its assets are intangible. The target company could have sold off major chunks of its assets to make the deal look unattractive. However, Mindtree could not use this defence since the promoters of the company held a very small percentage of shares and did not have the ultimate power.

[650]Business Standard, 2019. What message is being sent to start-ups: Mindtree promoters to L&T. [online].Available at: https://www.business-standard.com/article/pti-stories/what-message-is-being-sent-to-start-ups-mindtree-promoters-to-l-t-on-hostile-bid-119031900766_1.html.
[651]Annual Report 2018-19, Mindtree. [Online]. Available at: https://www.mindtree.com/sites/default/files/201904/Mindtree%20Q4FY19%20Press%20Release.pdf.

Since, these three defences were ineffective to protect the company. The promoters constituted an independent committee to review the open offer as mandated under Regulation 26(6) of the Takeover Code.

SEBI GUIDELINES ON AN OPEN OFFER

As per Regulation 3[652] of the Takeover Code, when a company is attempting to acquire another company, it is required to make an open offer to public when the stake of the acquirer rises to more than 25%. Furthermore, as per the provisions of the takeover code, one cannot take control of a corporation unless an open offer is made to the public to acquire shares.

WHETHER THE HOSTILE TAKEOVER OF MINDTREE IS WITHIN THE BRACKET OF LAW

Larson and Turbo made a public announcement as per the terms of Regulation 3[653] and Regulation 4[654] of the Takeover Regulations 2011 despite the offer being considered as unsolicited and hostile. An open offer is normally made on accounts when acquirer wants to takeover at least 25% of the stake in a company. However, in this case the offer was of at least 51%, hence there was no need to reach 25% holding before a public announcement as mandated under Regulation 6 (1)[655] for a voluntary offer.

OUTCOME OF THE HOSTILE BID

L&T ended up purchasing 31% additional shares than it had intended to acquire in Mindtree for INR 4,988.82 Crores via an open offer. The offer to acquire 50.9 million shares of Mindtree from its public shareholders was subscribed 1.2 times on 26 June 2019 and it closed on 28 June

[652]Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. Regulation 3(1) on Substantial acquisition of shares or voting rights states as follows: "No acquirer shall acquire shares or voting rights in a target company which taken together with shares or voting rights, if any, held by him and by persons acting in concert with him in such target company, entitle them to exercise twenty-five per cent or more of the voting rights in such target company unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations."

[653]Ibid

[654]Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. Regulation 4 on Acquisition of control states as follows: "Irrespective of acquisition or holding of shares or voting rights in a target company, no acquirer shall acquire, directly or indirectly, control over such target company unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations."

[655]Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. Regulation 6(1) states as follows: "An acquirer, who together with persons acting in concert with him, holds shares or voting rights in a target company entitling them to exercise twenty five per cent or more but less than the maximum permissible non-public shareholding, shall be entitled to voluntarily make a public announcement of an open offer for acquiring shares in accordance with these regulations, subject to their aggregate shareholding after completion of the open offer not exceeding the maximum permissible non-public shareholding."

2019. The shareholding of 60% in Mindtree gave L&T absolute control over the company's board of directors and its management. On 3 July 2019, L&T obtained the promoter status in the software company Mindtree by obtaining majority shares.[656]The Executive Chairman, the Executive Vice Chairman and Chief Operating Office and Managing Director of Mindtree resigned as the members of the board of directors and as employees of the company. They acted as board members and employees till 17 July 2019 as per their employment contracts. Promoters, Mr. Krishnakumar Natarajan, Mr. Subroto Bagchi, Mr. NS Parthasarathy and Mr. Rostow Ravanan together hold 13.32% of stake in Mindtree. 60% of shares are now owned by L&T, and domestic mutual funds and foreign portfolio investors hold the rest.[657]

RATIONALE BEHIND HOSTILE TAKEOVERS

When an acquirer sees a potential investment, it would first make an open offer. A takeover bid can either be friendly or hostile depending upon how it is received by the management of the company.

An acquirer can decide to make a hostile bid for the following reasons:

A hostile takeover is launched when the initial negotiations with the target companies do not follow through. More often than not, the parties involved are unable to land on a consensus to determine the offer price. This happens mostly because the management of the target company has access to insider information. The information available with them helps them understand the financial position of the company better and reject every offer they feel is inadequate. Furthermore, the management is likely to reject all offer in order to retain their job because post-acquisition there exists a high risk of the management losing their jobs.

An acquirer can also initiate a hostile bid without any negotiations. This way is opted to avoid the lengthy process of negotiation to determine the buyout price. This way the acquirer can set up a new management team without retaining any of the members of the management before. This would also give the target company an element of surprise and because of paucity of time the target company would fail to initiate any defence mechanism against the takeover.

[656]The Economic Times. L&T acquires 8.86 lakh shares of Mindtree. [Online]. Available at: https://economictimes.indiatimes.com/markets/stocks/news/lt-acquires-8-86-lakh-shares-of-mindtree/articleshow/69362228.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst.

[657]The Hindu, and so, after all the drama, L&T now owns Mindtree. [Online]. Available at: https://www.thehindu.com/business/and-so-after-all-the-drama-lt-now-owns Mindtree/article28191284.ece

IV. CONCLUSION

The pre-liberalisation era did not facilitate hostile takeovers and ever since the year 1991, a change has been observed in the manner our country's bidders operate. The numbers of hostile takeovers are increasing each day and the plight of the management of the target companies worsens by day. The employment of defence tactics reduces the playing field of the hostile bidder tremendously. However, not all defences can be actively deployed in our country because of legal restrictions. Anti-takeover defences however play a crucial role in corporate reconstruction once a hostile bid is made. SEBI has endeavoured to keep its governance in consonance with the market, as can be seen from the scope of its regulations. However, it is time for the other substantive laws such as the Companies Act to be a more accommodative towards anti-takeover defences. Furthermore, legislative steps must be taken to keep the interests of the shareholders abreast with the board of directors to ensure equitable growth.

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IT IS TIME FOR INDIA TO MAKE ACCESS TO THE INTERNET A FUNDAMENTAL RIGHT

Sayandeep Gupta and Rishi Saraf[*]

ABSTRACT

The post Covid-19 world is increasingly becoming virtual. Teachers and students are getting used to the idea of a virtual classroom while businesses are either offering their goods and services online or planning to do so, on a permanent basis. Internet access is now more of a necessity than a luxury. However, in the absence of a constitutionally guaranteed access to internet, India tops the list of countries having highest number of internet shutdowns. Government censorship of social media is rampant, while sites and applications are banned or blocked with vague arguments of national security. Contrary to popular belief, the Supreme Court judgement of Anuradha Bhasin v. Union of India does not make access to internet, a fundamental right. Since, none of the counsels had argued for it, the Supreme Court in fact, refrained from making any comment on the matter. It merely decided on the applicability of Article 19(1) (a) and Article 19(1) (g) over the virtual world. In this paper it is argued why we need to go the extra mile and declare access to internet as a fundamental right. The paper also introduces draft legislation after examining several international legislations and literature and calls for its introduction as article 21B. The proposed right addresses the issues of internet coverage and speed, keeping in mind the idea of net neutrality and right to privacy. It touches upon the provisions for reasonable restrictions as well, to ensure balance between national

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security and interests of the citizens. Finally the paper provides the rationale for introducing this right under article 21 of the Indian Constitution.

KEYWORDS: Right to Internet Access, Fundamental Rights, Human Rights, Positive Right.

I. INTRODUCTION

Internet plays a very important role in enabling communication as well as providing access to opportunities that were previously unthinkable to large sections of the population. In fact, the internet can be said to be the great leveller. Anybody with free access to internet has at their disposal the same resources and opportunities as anybody else with the same level of internet access. Social and economic barriers to practicing various trades and commercial activities or to education can be easily overcome with the click of a mouse or a touch on the mobile screen. The Covid-19 pandemic has created a situation where billions of people all over the world are forced to remain indoors. Their only means of accessing education; exercising free speech; carrying on their trade or occupation freely or exercising virtually any right is contingent on free access to internet. Therefore, internet is no longer just an enabler of rights; for quite a few it is the only way to exercise certain human rights and restricting access to internet is akin to restricting those rights. Needless to say, those without a reliable access to internet risk falling behind. Incidentally, it is the already marginalized sections of the society that is at the greatest risk. In this light right to access to internet can be considered an essential human right and the need of the hour.

The Indian Constitution came into force on January 26, 1950 while, January 1, 1983 is considered as the official birthday of the internet as we know it today. So, the fathers of our Constitution could never have imagined a right to access to internet, let alone make it a fundamental right. However, with the advancement of technology and the growing propensity of the government to restrict the free access to internet, it is time for India to make right to access to internet a fundamental right. Before proposing a right to internet, it is imperative to understand the current situation in India which will help in explaining why a separate right to access to internet is needed. The position of the judiciary in this regard will also have to be explored to understand the current legal position on the right in India. After that we can look at the various international positions on this topic before coming up with a suitable legislation.

II. RELATED LITERATURE

For the purpose of writing this paper we decided to take a look at relevant literature on the topic that was published in the last 10 years. Paul De Hert and Dariusz Kloza in their paper laid down three arguments against making right to internet access a fundamental right.[658] First, they argued internet is merely an enabler of rights and access to it is not a right in itself. Second, they argued that there is a threshold for something to qualify as a human right. Access to internet fails to reach that threshold as it does not qualify as the most essential element for human well-being. Third, they contend that there are existing rights that are flexible enough to protect access to internet. Adding a new right to the long list of rights will only inflate it without contributing much. The authors have also cited various existing policies in the European context which cover several aspects of the right to access to internet and are of the opinion that a rights-based approach is redundant in the face of the policy-based approach already in place.[659] Stephen Tully in his paper has explored the right to access the internet from a general international law and international human rights perspective, elaborating how the proposed right comes within their scope.[660] However, he sounds a cautionary note that free and ubiquitous access to internet could lead to the proliferation of hate speech, racially discriminatory content, child pornography, trafficking and prostitution, incitement to genocide as well as theft of intellectual property and hence the need for regulating such content.[661] Giovanna De Minico in her 2015 paper offers a very interesting perspective on the issue of right to access to internet.[662] She argues that unlike territorial jurisdictions that are clearly defined, the internet is amorphous. With each country exercising their own laws and regulations over the internet, legislation by any single country with respect to the internet may be insufficient in ensuring that the objectives of those legislations are achieved. Therefore, she calls for the organization of a supranational authority that will act as a nodal authority in all matters concerning internet. She also proposes the implementation of a Bill of Rights over the internet similar to the American Bill of Rights.[663]

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[658] Paul De Hert & Dariusz Kloza, Internet (Access) as a New Fundamental Right. Inflating the Current Rights Framework? 3 EUR. J. L. & TECH. 4-6 (2012).
[659] *Id.* at 8.
[660] Stephen Tully, A Human Right to Access the Internet? Problems and Prospects, 14 HUM. RTS. L. REV. 175 (2014).
[661] *Id.* at 191.
[662] Giovanna De Minico, Towards an Internet Bill of Rights, 37 LOY. L.A. INT'L & COMP. L. REV. 1 (2015).
[663] *Id.* at 19-23.

In the Indian context, Kartik Chawla has explored two dimensions of right to access to internet; one as a positive right and another as a negative right.[664] If right to access to internet is introduced as a negative right then it will ensure that the government is obligated to ensure access to internet without any interference except in the most extreme situations. While as a positive right, right to access to internet will ensure that the government is obligated to undertake all possible initiatives to make access to internet possible for all. Therefore, in the first approach the government is under no obligation to ensure internet access for all while the second approach makes things more egalitarian and can ensure universal internet penetration. Also, Directive Principles of State Policy (DPSP) can be a legal basis for the introduction of right to access to internet.[665] Even though DPSPs are not enforceable they are routinely used in judgments and also used to frame new laws. By those rationale articles 38, 39(b), 39(c) and 47 can be used as a basis for a right to access to internet.[666] Now, it might be argued that any ordinary legislation can be used to ensure access to internet. Why the need for access to internet to be declared a fundamental right? While, fundamental rights are very difficult to amend or repeal, the same cannot be said about ordinary legislation. The maxim of *lex posterior derogat legi priori* applies to them and leaves enough room for these laws to be diluted.[667]

III. THE SITUATION IN INDIA AS OF NOW AND THE POSSIBLE HURDLES TO THE IMPLEMENTATION OF THE RIGHT

When it comes to access to internet India holds several unflattering records. It has consistently topped the list of countries with the highest number of internet shutdowns. Since 2012, India has shutdown internet 531 times, as of now, at the time of writing this article.[668] Of these the internet was shut down some 517 times between now and 2015. India also holds the unenviable record of the longest Internet shutdown in a democracy in the erstwhile state of Jammu & Kashmir which has now been bifurcated into the Union Territories of Jammu & Kashmir and Ladakh, spanning a total of 551 days. Of this, there was total internet shutdown for 213 days

[664] Kartik Chawla, Right to Internet Access - A Constitutional Argument, 7 INDIAN J. CONST. L. 57, 60-65 (2017).

[665] Anamika Kundu & Anshul R. Dalima, A Case for Recognition of the Right to Internet Access in the Age of Information, 11 J. INDIAN L. & SOC'Y XIII, XXIV (2020).
[666] INDIA CONST. Art. 38, 39(b), 39(c), 47.
[667] Oreste Pollicino, The Right to Internet Access: Quid Iuris, in THE CAMBRIDGE HANDBOOK ON HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC 263 (Andreas von Arnauld et al. eds., 2020).
[668] Internet Shutdowns, https://internetshutdowns.in (last visited July 13, 2021).

between August 4, 2019 and March 4, 2020 and a partial shutdown with internet speed restricted to 2G for 338 days between March 5, 2020 and February 5, 2021.[669] Data shows that between January 1, 2012 and March 15, 2020, of the 385 internet shutdowns within India 237 were preventive or anticipatory in nature, imposed for the alleged preservation of law and order situation. While the remaining 148 recorded internet shutdowns were reactionary in nature meant to restore the breakdown of law and order situation.[670] Hence, we are of the opinion that the number of internet shutdowns is disproportionate to the situation on ground and a constitutionally guaranteed right to internet access can help in ensuring citizens of India are not arbitrarily deprived of their access to internet.

However, people can feel the effects of internet shutdowns only when they have access to internet. As of April, 2021, the internet penetration rate for India stands at 45%.[671] So, of the 1.37 billion people living in India more than half of them have no access to internet. When we look at the data provided by the 75th National Sample Survey, we find there is a clear divide between internet access in rural and urban areas. According to it only 24% of the households in India had internet access. The figures went down to 15% for rural households while it went up to 42% for urban households.[672] Needless to say, remote locations and mountainous regions of India have little to no access to internet. Which is why during the pandemic as education moved online many students had to drop out of schools and colleges or travel to distant places to gain access to classrooms and sit for examinations. In light of these facts when right to internet access is declared as a fundamental right the government will be obliged to provide internet to those who are suffering due to the lack of it.

Since, internet penetration is quite low in India; the government might make the contention that providing for internet connection for such a large country can be a huge burden on the state exchequer. It must be mentioned here that the government has already made significant plans and efforts to increase internet penetration in India. In 2018 the Indian government came up with the National Digital Communication Policy which replaced the National Telecom Policy, 2012. The aim of this policy is to provide universal access to broadband internet at speeds of

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[669] #KeepItOn update: who is shutting down the Internet in 2021, ACCESS NOW (June 7, 2021, 2:00 AM), available at: https://www.accessnow.org/who-is-shutting-down-the-internet-in-2021.
[670] *Supra* note 11.
[671] Internet penetration rate in India from 2007 to 2021, STATISTA, AVAILABLE AT: https://www.statista.com/statistics/792074/india-internet-penetration-rate (last visited July 13, 2021).
[672] NSS Report No. 585(75/25.2/1), Statement 7.1, vi, available at: https://mospi.nic.in/sites/default/files/publication_reports/Report_585_75th_round_Education_final_1507_0.pdf (last visited July 13, 2021)

50 Mbps within India; while, all Gram Panchayats were to be connected by 1 Gbps broadband internet by 2020 and 10 Gbps broadband internet by 2022. To achieve this lofty goal, the government has adopted the National Broadband Mission. Under this Mission, all Gram Panchayats are to be connected to the internet through BharatNet also called Bharat Broadband Network Limited. At the time of writing this article 01, 73,079 Gram Panchayats are connected with optical fibre cable while 1, 60,076 Gram Panchayats have operational internet connectivity.[673] To ensure that the village community also benefits from the internet connectivity these Gram Panchayats can install Wi-Fi hotspots at important centres within the community to enable free access to internet. People can connect to these hotspots using their own devices and access internet. RailTel, is already providing free Wi-Fi to major railway stations in India, in partnership with Google. A similar public private partnership model can be adopted to provide internet to the needy if the government alone cannot provide free internet to all.

Internet is an economic good in India as of now. There can be an apprehension from the private internet service providers that with the declaration of internet as a fundamental right their commercial interests might be hampered. They might also feel threatened by the notion that the government might nationalize the sector to fulfil their obligation to provide internet access to its citizens. We would like to point out that such fears might be unfounded, as evidenced by the right to food and right to education. Just as right to food ensures the marginalized sections of the society have access to food and nutrition through the public distribution system, the government can provide free or highly subsidized internet access to the marginalized sections of the society through the expansion of BharatNet. In the meanwhile, internet service providers can continue to provide their services to those that can afford them. The internet provided by the government can be of the minimum stipulated speeds fixed under the proposed right to access to internet. Additionally, the government can adopt a Fair Usage Policy where each user will have a fixed quota of high-speed data for internet access per day. For usage beyond the limit, internet speeds would be throttled. Private internet service providers can differentiate their services from that offered by the government by offering higher bandwidths with greater internet speeds, higher data limits per day or offer unlimited high speed internet services for those that can afford them. In this way internet can be provided by the government to a wider

[673] *Bharat Broadband Network Limited*, available at: https://bbnl.nic.in (last visited July 13, 2021).

population without requiring a lot of bandwidth and without being overly detrimental for the private internet service providers.

Therefore, in our opinion the government can realistically ensure access to internet for all. A right to access to internet as a fundamental right is completely feasible and is the need of the hour.

IV. POSITION OF THE JUDICIARY WITH REGARD TO RIGHT TO INTERNET

As of now, right to internet is not a recognized fundamental right in India. Two important judgments, one by the Supreme Court and the other by Kerala High Court, are pivotal in understanding the position of judiciary when it comes to right to access to internet.

First, we will refer to the Supreme Court case of Anuradha Bhasin v. Union of India[674] delivered by the bench of Justice N.V. Ramana, R. Subhash Reddy and Justice B.R. Gavai.

Following the abrogation of Article 370 of the Indian Constitution, which removed the special status to the erstwhile state of Jammu & Kashmir, internet access was restricted in the region, in anticipation of law and order breakdown. In response, the executive editor of Kashmir Times, Anuradha Bhasin filed a writ petition in the Supreme Court alleging that the internet shutdown is impeding her press activities as internet is essential to her trade. She contended that through the internet shutdown the government was essentially infringing on her right to freedom of speech and expression guaranteed under Article 19(1) (a) and her right to carry on any trade or business guaranteed under Article 19(1) (g), through the medium of internet.

Two of the main issues before the Court on which it decided was whether Article 19(1) (a) and Article 19(1) (g) is applicable over the internet and whether the government's act of restricting the internet was valid or not.

The Court ruled that as per the precedent laid down in the Supreme Court judgment of Indian Express v. Union of India[675], freedom of expression under Article 19(1) (a) also protects freedom of press. Since, internet has emerged as one of the primary medium of dissemination of news, Article 19(1) (a) applies over the internet as well. However, this is subject to the restrictions imposed by Article 19(2). Similarly, several businesses are now completely

[674] Anuradha Bhasin v. Union of India & Ors., (2020) 3 SCC 637.
[675] Indian Express Newspapers (Bombay) Pvt. Ltd. & Ors. v. Union of India & Ors., (1985) 1 SCC 641.

dependent on access to internet and it plays a very crucial role in many other businesses as well. Hence, internet is a vital medium of trade and commerce. Restricting access to internet is therefore akin to restricting freedom of trade or business under Article 19(1) (g). Thus, Article 19(1) (g) is also applicable over internet, subject to the restrictions laid down under Article 19(6).[676]

The Court then used the judgment delivered in Modern Dental College & Research Centre v. State of Madhya Pradesh[677] to reiterate that none of the fundamental rights are absolute in nature and proportionate restrictions apply to them just as insightful speech is not protected under the First Amendment of the U.S. Constitution. The Court then reviewed the proportionality tests of Indian, Canadian and German Courts and made a comparative analysis to come up with a set of proportionality tests which are as follows:

- The purpose of the restriction must be legitimate.
- The restrictions should be necessary.
- All possible alternatives to the restrictions must be considered.
- The measures adopted must be least restrictive in nature.
- The restrictions have to be open to judicial review.[678]

The Court further added that, degree of restriction and the scope of the same, both territorially and temporally, must stand in relation to what is actually necessary to combat an emergent situation… The concept of proportionality requires a restriction to be tailored in accordance with the territorial extent of the restriction, the stage of emergency, nature of urgency, duration of such restrictive measure and nature of such restriction.[679]

Therefore, the Court laid down a very clear and modern set of restrictions that apply to fundamental rights in general.

On the other issue of validity of the restriction on internet imposed by the government, the government's argument that they had to impose a total ban on internet because they lacked the technology to selectively ban content didn't pass muster with the Court. However, the Court did find merit in the government's claim that the sovereignty and integrity of India could be hampered by the terrorism propagated through internet. It therefore used the test of

[676] *Supra* note 17 at 666-67 ¶ 32-34.
[677] Modern Dental College & Research Centre and Ors. V. State of Madhya Pradesh & Ors. (2016) 7 SCC 353.
[678] *Supra* note 17 at 643.
[679] Id.

proportionality established earlier to determine the scope of the internet ban in restricting free speech.[680]

For the determination of the procedural aspect of the validity of the internet ban, the Court relied upon the provisions in the Information Technology Act, 2000, The Code of Criminal Procedure, 1973 and The Indian Telegraph Act, 1885. The Court heavily relied upon the Telegraph Act to determine that even though the government could restrict access to internet under section 7 of the Act, they had to first clearly establish that a public emergency was prevailing or the safety of general public was at stake and no other form of emergency existed. However, an indefinite restriction was contrary to the rules of proportionality and was therefore open to judicial review.[681]

The Court had not passed any remarks or judgment on the aspect of declaring access to internet as a fundamental right since none of the parties raised the issue before the Court.[682] Thus, *Anuradha Bhasin v. Union of India* did establish crucial limits on the power of the government to impose restrictions on internet and extended the applicability of Article 19(1) (a) and Article 19(1) (g) over the internet. However, it stopped far short of declaring access to internet as a fundamental right. Which is why, as of now Right to Internet is not a fundamental right in India.

The other important judgment that is important for understanding the position of judiciary on the right to internet in India is *Faheema Shirin v. State of Kerala*[683] delivered by Justice P.V. Asha.

A second-year undergraduate student of a college affiliated under the University of Calicut, Kerala Faheema Shirin was expelled from her college hostel due to non-compliance with the orders imposed by the hostel authorities which prohibited the usage of mobile phones by the hostel inmates within the designated hours of 6 PM and 10 PM. The hostel authorities reasoned that the orders were imposed upon the request of the parents of several hostel inmates during a meeting. However, Faheema alleged that her parents were not informed of any such meeting before the imposition of the restriction. She also contended that the orders were contrary to the Kerala Government's policy of Digital Kerala Vision where mobile based approach to e-governance was emphasized upon. The prohibition on the usage of mobile phones hampered

[680] *Supra* note 17 at 644.
[681] *Supra* note 17 at 685-691.
[682] *Supra* note 17 at 667 at ¶ 35.
[683] Faheema Shirin R.K. v. State of Kerala and Ors. AIR 2020 Ker 35.

her access to the digital learning programs undertaken by the State and education department. Faheema filed a petition before the Kerala High Court challenging the order imposed by the hostel authorities, on the grounds that her right to freedom of expression, right to privacy and right to education were infringed upon.

Faheema contended that the United Nations Human Rights Council recognized the fact that the human rights which apply in the real world must also be protected in the virtual world of internet.[684] Based on the Supreme Court judgment in *Vishaka v. State of Rajasthan*[685], the Kerala High Court recognized that under Article 51(c) and Article 253 of the Indian Constitution, in the absence of any related domestic laws, the international conventions and norms are to be read into the fundamental rights protected under Indian Constitution. Hence, the Kerala High Court declared that the right to access to internet was part of right to education as well as right to privacy under Article 21 of the Indian Constitution.

Thus, in the state of Kerala right to internet is recognized as a fundamental right. However, it must be noted that the Kerala High Court interpreted right to access to internet as a part of the right to education and right to privacy and not as a stand-alone right. Therefore, this right is limited in scope and other rights like freedom of expression, freedom to carry on any trade and business and freedom to assemble peacefully, over the internet may not be protected under this interpretation. Also, the judgment passed by the Kerala High Court is binding only within the jurisdiction of Kerala High Court; other State High Courts might pass a judgment contrary to it.

From the two judgments we can conclude that right to access to internet in India is far from being recognized as a fundamental right all over India in the true sense.

V. INTERNATIONAL POSITION ON THE RIGHT TO ACCESS INTERNET

Mr. Vinton G. Cerf, who is widely regarded as the "father of internet" has been a staunch critic of a right to internet. In his famous 2012 op-ed in The New York Times, he stated that internet

[684] Human Rights Council Res. 26/13, U.N. Doc. A/HRC/RES/26/13, (July 14, 2014) available at: https://www.article19.org/data/files/Internet_Statement_Adopted.pdf.
[685] Vishaka & Ors. V. State of Rajasthan & Ors., AIR 1997 SC 3011.

access cannot be a right in itself; it can merely be considered as an enabler of rights.[686] However, many others disagreed with his views including the authors of this article.

In July, 2014, the United Nations Human Rights Council adopted a non-binding resolution declaring those rights which people have offline must also be upheld online.[687] In June, 2016, the United Nations Human Rights Council adopted another non-binding resolution that condemned internet shutdowns by governments and deliberate disruption to internet access. It reiterated that those human rights that people enjoyed offline must be upheld online as well.[688] This UN Human Rights Council resolution effectively made free access to the internet a human right. However, this resolution is non-binding on its member and only holds persuasive value. Thus, the United Nations Human Rights Council has also recognized the importance of free internet access in upholding human rights and it can be argued that they talked of right to access to internet in the same manner they did for other freedoms and rights mentioned in the International Covenant on Civil and Political Rights (ICCPR). So in essence they de facto talked of a right to access to internet without mentioning it as a right per se.

France is the only other country in the world where the Constitutional Council, the highest constitutional court in the country declared access to internet as a basic human right or a fundamental right.[689] In 2008 the French government adopted a controversial law named HADOPI Law or Creation and Internet Law. Under this law users who shared unauthorized versions of copyrighted material would get three warnings for sharing such material. Upon fourth such violation the user would have their internet access revoked. The law was challenged before the Constitutional Council.[690] The Court ruled that access to internet is a fundamental right and can only be taken away by a court of law after it has established the guilt of the accused. The Court struck down majority of the law. It upheld the provisions for imposition of fine and other penalties for violations and made judicial review mandatory for the revocation of internet access.

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[686] Vinton G. Cerf, Internet Access is Not a Human Right, N. Y. TIMES, (Jan. 4, 2012) available at: https://www.nytimes.com/2012/01/05/opinion/internet-access-is-not-a-human-right.html?_r=1&ref=opinion.
[687] Supra note 27.
[688] Human Rights Council Res. 32/1, U.N. Doc. A/HRC/32/L.20, (June 27, 2016) available at: https://www.article19.org/data/files/Internet_Statement_Adopted.pdf.
[689] Ian Sparks, Internet Access is a Fundamental Human Right, Rules French Court, DAILY MAIL, (June 12, 2009) available at: https://www.dailymail.co.uk/news/article-1192359/Internet-access-fundamental-human-right-rules-French-court.html. (Page 71 Kartik Chawla paper for judgement)
[690] Conseil Constitutionnel [CC] [Constitutional Court] decision No. 2009-580 DC, June 10, 2009, Rec. 107 (Fr.).

Several countries in the European Union like Estonia, Spain and Finland have put in place legislation that enables access to internet under the Universal Service Directive, 2002. The aforementioned directive obligates the member states to implement universal access to telecommunication and internet subject to technological feasibility.[691] However, the Universal Service Directive has now been repealed and subsequently subsumed under the European Electronic Communications Code, 2018.[692] Thus, most of the European Union countries have adopted a policy-based approach to internet access rather than a rights-based approach.

It is our contention that the European countries have taken a policy-based route to free them from the obligation of providing internet access to all its citizens. As per the Universal Service Directive the signatories were obligated to provide internet to all its citizens through domestic legislation which in essence made internet access a fundamental right. This necessitated costly infrastructure investments and maintenance expenditure on the part of the respective governments. By adopting a policy-based approach they have freed themselves from that obligation and have weakened the right to access to internet. In our opinion this is a regressive step.

VI. RATIONALE FOR A SEPARATE RIGHT TO ACCESS TO INTERNET AS A FUNDAMENTAL RIGHT

These days' remote surgeries are being performed by doctors through advanced surgical robots. The whole process happens over the internet, which is as important as the surgeon in the whole procedure. It can be contended that restriction of internet can potentially deprive somebody of a chance to lead a healthy life as they cannot access such medical intervention otherwise. Such a person might approach the Courts seeking remedy for the violation of their right to life though restriction on internet access.

It is not uncommon for people to form groups over the internet nowadays. Such groups are run almost entirely online. They interact and keep in touch with each other over the internet as well as carry out important functions of the group over the medium. People also, hold protests online and have virtual assemblies to protest against perceived injustices or to express their solidarity towards an issue. Many religious congregations, sermons and preaching are being conducted online as it offers greater reach. So, depriving all these people of unrestricted access to internet

[691] Council Directive 2002/22, art. 39, 2002 O.J. (L 108) (EC).
[692] Council Directive 2018/1972, 2018 O.J. (L 321).

in effect deprives all these people of their right to freedom to form associations, freedom of peaceful assembly and even freedom of practicing their religion. Even, court hearings and filing of cases and PILs are being done online. Restricting access to internet can potentially deny people access to justice.

The Anuradha Bhasin judgment of the Supreme Court or the Faheema Shirin judgment of the Kerala High Court does not cover these scenarios. With more internet shutdowns we can sooner or later expect people to file petitions before the High Courts and Supreme Court seeking remedy for the violations of the aforementioned freedoms due to some restriction on access to internet. In all these scenarios the Courts will have to decide on these issues separately. It will be a time-consuming process and in the end the Courts might not rule in favour of the petitioners. This does not bode well for a democracy like India. To pre-empt such a situation, it is time for India to make right to access to internet as a fundamental right.

VII. PROPOSED RIGHT TO ACCESS TO INTERNET AS A FUNDAMENTAL RIGHT

For the proposed right to access to internet we have consulted the Charter of Human Rights and Principles for the Internet[693] by the Internet Rights and Principles Coalition. It is a network of several individuals and organizations that is based out of United Nations Internet Governance Forum and work towards upholding of human rights over the internet. For now, we are interested in the right to access to internet hence we shall consult the right to access to the internet given in the Charter. The relevant right reads as follows:

The right to access to, and make use of, the Internet shall be ensured for all and it shall not be subject to any restrictions except those which are provided by law, are necessary in a democratic society to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Charter. The right to access to, and make use of, the Internet includes:

(a) Quality of service

The quality of service to which people are entitled access shall evolve in line with advancing technological possibilities.

[693] Internet Rights and Principles Coalition, The Charter of Human Rights and Principles for the Internet 4th ed., 2014, available at: https://www.ohchr.org/Documents/Issues/Opinion/Communications/InternetPrinciplesAndRightsCoalition.pdf.

(b) Freedom of choice system and software use

Access includes freedom of choice of system, application and software use. To facilitate this and to maintain interconnectivity and innovation, communication infrastructures and protocols should be interoperable, and standards should be open.

(c) Ensuring digital inclusion

… Active support shall be available for self-managed and other community-based facilities and services. Public Internet access points shall be made available, such as at tele-centres, libraries, community centres, clinics and schools. Access to the Internet via mobile media must also be supported.

(d) Net neutrality and equality

The Internet … architecture must be protected and promoted for it to be a vehicle for free, open, equal and non-discriminating exchange of information, communication and culture. There should be no special privileges for, or obstacles against, any party or content on economic, social, cultural, or political grounds. This does not preclude positive discrimination to promote equity and diversity on and through the Internet.[694]

The right to access to internet as given in the Charter of Human Rights and Principles for the Internet is pretty self-explanatory. They can be adopted by the Indian Constitution easily with a few changes that make it more suitable for the Indian society.

Under the clause of quality of service, a minimum internet speed can be added for an internet connection to be considered broadband. Latency and internet downtime can also be fixed within reasonable parameters to ensure quality of service. The clause of net neutrality can ensure that any particular social media platform or media aggregator is not favoured or discriminated against on flimsy grounds. We do not feel that a separate clause for data protection or privacy needs to be included in this right as they will be extensively covered under the proposed Personal Data Protection Act.

Thus, the proposed right ensures that those with internet access can continue to access internet with minimum interference from the government and also ensures that those that don't have access to internet yet are also provided with the means of doing so. Therefore, the right proposed by us is a positive right that promises to be egalitarian and non-discriminatory in its approach.

[694] *Id.* at 13.

The Right to Access to Internet can therefore be included within the Indian Constitution as Article 21B with five clauses as opposed to the four clauses given in the charter. The fifth clause should include the proportionality tests as laid down in the case of *Anuradha Bhasin v. Union of India*. This will bring clarity to the restrictions that can be imposed by the government on the exercise of this right and prevent any arbitrary deprivation of this right.

VIII. NEED FOR INCLUDING THE PROPOSED RIGHT UNDER ARTICLE 21

As argued by Oreste Pollicino, if internet access is sought to be protected under ordinary legislation there remains a scope for such laws to be diluted by subsequent governments.[695] In the Indian context such a scenario is not too far-fetched given the frequent internet shutdowns and government censorships of sites and social media. Therefore, it is imperative that right to access to internet is introduced as a fundamental right. Hence, the proposal of inclusion of the right under article 21.

So, there might be a question as to why we should introduce the new right under 21 and not under article 19, which lays down the various freedoms. To answer this question, we will first refer to the Supreme Court judgement of *Maneka Gandhi v. Union of India*[696] delivered by a 7-judge bench of Chief Justice M. H. Beg, Justice Y. V. Chandrachud, Justice V. R. Krishna Iyer, Justice P. N. Bhagwati, Justice N. L. Untwalia, Justice S. Murtaza Fazal Ali and Justice P. S. Kailasam. The landmark judgement of Maneka Gandhi immensely widened the scope of right to life and personal liberty under Article 21. This judgement also distinguished Article 21 from Article 19. The first distinction that the Court made between Article 19 and 21 was that Article 19 was available only to the citizens of India while Article 21 applied to all people within the jurisdiction of India. The second important distinction was that, while article 19 provided for the various freedoms, the freedoms could be curtailed by the state. Whereas, Article 21 imposed limitations on what the state can do and, in a sense, prevents the state from arbitrarily curbing this right.[697] Thus, the proposed right introduced under Article 21 will cover the widest range of the population as well as make it much harder for the state to suspend even during an emergency. If it is absolutely necessary to curtail the proposed right the state can apply the test of proportionality laid down in Anuradha Bhasin which we propose to

[695] *Supra* note 10.
[696] Maneka Gandhi v. Union of India and Anr, (1978) 1 SCC 248.
[697] *Id.* at 363 at ¶ 139.

incorporate into clause 5. In this way, the people residing within India can be assured that their right to access to internet is truly secure without making any compromises with law and order or national security.

Further, in the Supreme Court case of *Francis Coralie Mullin v. Administrator*[698] delivered by *Justice P. N. Bhagwati* and *Justice S. Murtaza Fazal Ali*, it was stated that right to life isn't merely limited to protection of life and limb. Right to live with human dignity also comes within its ambit and hence involves the bare necessities that are involved with having a dignified existence.[699] Thus, internet being a basic necessity in today's day and age should come under Article 21.

A further question might arise with regards to the inclusion of the proposed right under 21B. In the *Bandhua Mukti Morcha v. Union of India*[700] the Supreme Court of India held that right to education comes under article 21. In *Mohini Jain v. State of Karnataka*[701] the Court elaborated on it and held that right to education was essential for enjoyment of the rights under Article 19.[702] Subsequently, right to education again came up in *Unni Krishnan v. State of Andhra Pradesh*[703] where the Court looked at the right through the lens of directive principles of state policy. All these judgements laid the foundation for the 86th Amendment Act, 2002 which introduced Article 21A into the Indian Constitution as right to education. In the same vein, it can be argued that right to access to internet is essential not just for the enjoyment of the rights under Article 19 but also other essential rights like right to equality. Moreover, the judgements of Anuradha Bhasin and Faheema Shirin have laid the foundation for right to access to internet just as the aforementioned judgements laid the same for right to education.

Considering all the above, in our opinion, the most appropriate way of introducing a separate right to access to internet is through Article 21B.

IX. CONCLUSION

India takes pride in being a modern democratic country with rule of law. A separate right to access to internet will only bolster that image. Citizens will be at ease knowing that they can

[698] Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors, (1981) 1 SCC 608.
[699] *Id.* at 618 at ¶ 8.
[700] Bandhua Mukti Morcha v. Union of India and Ors, (1984) 3 SCC 161.
[701] Mohini Jain (Miss) v. State of Karnataka and Ors, (1992) 3 SCC 666.
[702] Id. at 673.
[703] Unni Krishnan, J. P. and Ors. V. State of Andhra Pradesh and Ors, (1993) 1 SCC 645.

have an assured and reliable access to internet. This will not only make the citizens more productive but also attract businesses that require a reliable internet connection for its operations. Needless to say, a fundamental right to access to internet is not just socially beneficial but economically beneficial as well.

As it is, the National Digital Communication Policy can be said to be a policy-based approach taken by the government with regards to the access to internet. It just needs to walk the extra mile and bring in the legislation thus enshrining the right in the Indian Constitution. Judging from the Supreme Court and High Court verdicts it will not be long before they pass a judgment making right to access to internet a fundamental right. Therefore, legislation in this regard will not only win the government brownie points with its citizens but also endear it to other democracies which might have been questioning India's democratic credentials.

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GENDER INEQUALITY IN JUDICIAL APPOINTMENTS

Shantanu Dixit[*]

ABSTRACT

Gender bias in appointments at different judicial levels, regardless of whether in unequivocal or understood structures, has been a conspicuous reason for the skewed gender ratio in the higher Indian judiciary. These biases have affected the representation of women class in the judicial sector to the best of its ability. To guarantee diversity & proper representation of other classes in the country there is a requirement of changes in the appointment system of judges. Be that as it may, the burden & disadvantage experienced by women candidates to judicial office rooted in deeply entrenched structural discrimination and avoidance, imbricated in the constitution of the judge, judging, and legal authority as male, manly, white, heterosexual, and class-advantaged. Contentions for more extensive representation in judicial office need to address all the more effectively how the judge, judging, and legal authority are comprised.

The paper is concluded on a note that there are no provisions in the Constitution of India that guide the country to deal with the issue of gender inequality in the judicial arena. Also, there are no provisions for reservations in the higher judiciary, though the respective states can make laws for reserving seats in the lower judiciary & hence if the selection process is exposed & the selectors can claim for credit then there will be more women judges. However, if the process is sheltered & there is accountability, then the number of women judges is likely to be less.

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KEYWORDS: Gender bias, Constitution of India, judiciary, women representation.

I. INTRODUCTION:

The differences between men and women have always forced a woman to work harder and harder for anything that she is doing. She has had to work to do the same thing as the men and then work harder to prove that she is equal to men if not superior. This constant testing in a man's world creates hesitation for women and intolerance by people around them. The stereotype that a woman's place is inside the home acts as a major obstacle in the path of gender equality and justice. It's very apparent that in the trials of her development, even though there has been a success, that rate is strikingly low.

In the country of India, we have come so far from when we first promised and aimed that our independent nation will treat all classes of people equally and elevate them to an equal platform. The equality of status and opportunity was one of the objectives. However, in the present times, the situation, even with certain changes, is not satisfactory.

Women have always had to fight for their rights. From saying that they can own property to believing that they can work outside the homes; there have been strong attempts to make these a reality. Today, we do find the women class working in different workplaces, positions, taking up tasks, and putting their heart and soul into them. The question is if it is enough that they have their presence in these fields in small numbers. If it is enough that we have had only one female Prime Minister in India till date or that the female Members of Parliament don't even make the 20% of the Lower House[704]. And if we don't run away from the truth, then we'll say that it is not enough.

In India, male dominance in power positions is a frequent sight. The most important of the posts and jobs have always been entrusted with men. This existence of patriarchal influence has had the judiciary in its realm too for as long as we know it. There needs a simple fact stated for proving the orthodoxy of the previous statement *viz.* India has never had a female Chief Justice of India till date and we are currently observing the term of a male CJI for the 47th time since independence. The unfortunate part is that this isn't changing in the immediate future for

[704] Sruthi Radhakrishnan, "New Lok Sabha has highest number of women MPs", THE HINDU, https://www.thehindu.com/news/national/new-lok-sabha-has-highest-number-of-women-mps/article27260506.ece (last visited March 15, 2021).

at least the next five years.[705] This gap between genders in holding the important decision-making / adjudicatory position runs deeper than this. There have been only eight female judges in the Apex Court till date including the three justices serving their terms at the present.[706] This inequality is not a phenomenon just of the Top Court but of High Courts and other lower courts as well.

In this project, the researcher has tried to discuss the gravity of this situation. Gender inequality in judicial appointments is a serious issue and it needs to be addressed if we expect equal and diverse representation of all genders in the next 50 years.

II. GENDER INEQUALITY IN THE INDIAN JUDICIARY & JUDICIAL APPOINTMENTS:

Under Articles 124 and 217 of the Constitution of India, the President of India appoints the judges' of the Supreme Court and the High Courts, respectively, after consulting with the Chief Justice of India. In the case of the High Court, the Governor of the state and the Chief Justice of the High Court also have to be consulted. Further, Article 233 provides for the appointment of judges of the District Court by the Governor after consultation with the respective High Court. The provisions have ensured the independence of the judiciary. The word 'consultation' has been extensively discussed and interpreted in many cases. In the case of *S.P. Gupta v. Union of India*[707], the Court, with a majority opinion, had held that the opinions of the Chief Justice of India and Chief Justice of High Court were only consultative and that the actual decision of appointment rested solely with the Executive *i.e.* the President. The 'consultation' was said to not have a binding effect on the final decision of the President. In *Supreme Court Advocates-On-Record Association v. Union of India*[708], this interpretation in *SP Gupta* was overruled. The Court in this case held that the role of the CJI is primary while appointing and transferring judges. The Court intended to protect the integrity and to guard the independence of the judiciary. The meaning of 'consultation' was conferred upon and it was held that the President cannot make appointments or transfers of judges under Article 124 or Article 217

[705] Kiruba Munusamy, "Sexism in Indian Judiciary Runs So Deep its Unlikely We Will Get Our First Woman CJI", THE PRINT, https://theprint.in/opinion/sexism-in-indian-judiciary-runs-so-deep-its-unlikely-we-will-get-our-first-woman-cji/251727/ (last visited March 15, 2021).
[706] Kriti Dwivedi, "Indira Banerjee Appointed Judge of Supreme Court", SHETHEPEOPLE, https://www.shethepeople.tv/news/indira-banerjee-appointed-judge-supreme-court/ (last visited March 15, 2021).
[707] S.P. Gupta v. Union of India, 1981 Supp SCC 87.
[708] Supreme Court Advocates-On-Record Association v. Union of India, (1993) 4 SCC 441.

unless such decision confirmed with the opinion of the CJI considering that he is the superior judge. The 'opinion' of the CJI was narrowed down and sharpened in the case *Re Special Reference No. 1 of 1998* [709] and it was held that under the provisions of Article 217 (1) and 222 (1), the expression 'consultation with the Chief Justice of India' means that there should be a majority of judges during the formation of CJI's opinion and his individual and personal opinion would not constitute as a valid consultation.

However, one thing that the above provisions failed to do was bring gender balance into the system. The judiciary, unfortunately, is not immune or untouched to the issue of gender inequality in opportunities. Many reports have displayed this drastic disparity in the number of male and female judges. These numbers are only considering two genders; male and female. The official third gender *i.e.* the transgender is not even in discussions as of now and it seems that it will have to be a talk for another day.

The issue at hand, the underrepresentation of females, is something that has been talked about for many years now. This particular class of society has had to fight decades since independence to be treated equally as their male counterparts. There have been achievements so far but we still have a long way to go. A start in this is when women are given equal positions on the decision-making table. On a position that can bring about change on a substantial scale and degree. And this isn't about giving them power for the sake of quieting the complaints for the time being. We need to do this because equality is one of the aims of the Constitution and because it is necessary for the balanced working of society as a whole. That will not be possible till both see eye to eye while standing on the same platform.

The case of *Kesavananda Bharati v. State of Kerala*[710] is seen as a monumental judgment in the legal history of the country. It was said to have changed the law of the country overnight. The opinion of the judge, J. Khanna, is seen to have furthered this phenomenon when he gave his vote and the majority then stood at 7:6. When we read about such events of the past and many other such moments, we can easily observe how all of these were 'man'-made changes. On the Constitutional Bench consisting of 13 judges, there wasn't a single female judge. Even the cases which have brought important changes in the lives of Indian women or in general were deprived of female representation on the Coram. Cases like *Shah Bano Begum*[711],

[709] Re Special Reference No. 1 of 1998, (1998) 7 SCC 739.
[710] Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.
[711] Mohd. Ahmed Khan v. Shah Bano Begum AIR 1985 SC 945.

Chandrima Das[712], and *Lily Thomas*[713] are some of the common examples. The first woman judge in our Apex Court was J. M. Fathima Beevi appointed in 1989.[714] Furthermore, very recently, a landmark judgment was delivered in the case of *Vineeta Sharma v. Rakesh Sharma*[715] which has affirmed the rights of a Hindu daughter in the family property as that of the son in the family. Now, there is no question on the efficiency of the judgment or the judge who delivered it, but again, even on this Bench, there were only male judges. And this is a natural result of the fact that there aren't enough female judges in the Supreme Court of India. As of now, we have had three female judges, Indu Malhotra, R. Banumathi, and Indira Banerjee JJ at the same time.[716] Only three female judges in the strength of thirty-four judges. However, after the retirement of J. Banumathi, we are back at having only two female justices against their other male counterparts. Yes, this male-dominated Apex Court has brought the concept of gender equality in the patriarchal society into a reality but has also undeniably considered itself as the superior one to do so.

Today, when we analyse the changes that have taken place by the virtue of legislation and judgments, it is easy to say that we have come a long way crossing very many hurdles on the path. But, the situation currently is exactly what we aimed for or needed, is the question the answers and requirements to which are almost utopian. Utopian and too ideal even after various affirmative actions have been taken in the name of women empowerment. The Constituent Assembly, which led to the creation of the Grund norm of the country, had a membership of 389 people including 15 women.[717] This was 4% of women in the assembly. Now, in the 17th Lok Sabha, we have 78 elected women MPs out of 542 constituencies. This is just 14% of women's representation and the highest it has ever been.[718] So, from the time of independence, there isn't much elevation of the women class on these important authority positions. This is a mere display of how we haven't had that much transformation from the time the Constitution

[712] Chairman Railway Board v. Chandrima Das (2000) 2 SCC 465.
[713] Lily Thomas v. Union of India (2000) 6 SCC 224.
[714] "In a First, Three Women Judges in Supreme Court", ECONOMIC TIMES, available at: https://economictimes.indiatimes.com/news/politics-and-nation/in-a-first-three-women-judges-in-supreme-court/articleshow/65305504.cms (last visited March 19, 2021).
[715] Vineeta Sharma v. Rakesh Sharma, 2020 SCC OnLine SC 641.
[716] "In a First, Three Women Judges in Supreme Court", ECONOMIC TIMES, available at: https://economictimes.indiatimes.com/news/politics-and-nation/in-a-first-three-women-judges-in-supreme-court/articleshow/65305504.cms (last visited March 19, 2021).
[717] "Women's Day: 15 women who contributed in making the Indian Constitution", INDIA TODAY, available at: https://www.indiatoday.in/education-today/featurephilia/story/women-s-day-the-only-15-women-who-contributed-to-making-the-indian-constitution-1653496-2020-03-07 (last visited March 19, 2021).
[718] Sumant Sen, "17th LokSabha has the highest proportion of women", THE HINDU, available at: https://www.thehindu.com/news/national/representation-of-women-in-17th-lok-sabha/article28769003.ece (last visited March 19, 2021).

of India came into existence wherein equality of 'status' and 'opportunity' are constitutional goals. Other than this, the low elected representation of women also shows how little faith the public puts in female candidates.

This gender imbalance in representation has its imprints over the judicial section as well. We saw it is in the Supreme Court, but the High Courts and Subordinate Courts make this condition more visible. In the High Courts in India, we have 688 judges as of now and among them, only 80 are women.[719] This is just 11.6% of women among all the High Court judges. Further, there is only one of these, J. Gita Mittal who is currently holding the post of Chief Justice and it is of Jammu & Kashmir and Ladakh High Court.

The data for the higher judiciary is easily available but when it comes to the Subordinate Courts, where you have to dig much deeper, there wasn't any specific data till very recently. A study was conducted by Arijeet Ghosh and his co-researchers in the lower judiciary for finding out the state-wise and district-wise data on gender composition in these courts.[720]It was found out that women composed only 27.6% in all of the lower judiciary with just 4,409 judges.[721] This report later talk about the factors that contribute to this imbalance which is discussed in next heading.

When we think about the implications of this gender imbalance then the reality would look more practical for as of now men hold a superior position in this profession than their female counterparts. Because of less participation of women in the judiciary, the issue of lack of diversity in the courts gets highlighted which in turn shows how inequality is prevalent along with lack of opportunities in this democratic country?[722] All the benefits that could be brought about while deciding about a matter, for instance, diversity would mean different perspectives and experiences and that case might get deliberated upon differently. An example for this can be seen in the case of *Vishaka v. State of Rajasthan*[723] wherein the pathetic condition of sexual harassment faced by women at their workplaces was addressed efficiently when there was no

[719] Pallavi Saluja, "The next judges of the Supreme Court: Which High Court Chief Justices are most likely to be elevated? Will we see a woman CJI this decade?" BAR & BENCH, available at: https://www.barandbench.com/columns/the-next-judges-of-the-supreme-court-which-high-court-chief-justices-are-most-likely-to-be-elevated-will-we-see-a-woman-cji-this-decade (last visited March 20, 2021).
[720] Arijeet Ghosh et al., "Tilting the Scale: Gender Imbalance in the Lower Judiciary", Vidhi Centre for Legal Policy, February, 2018, p. 3.
[721] *Ibid* p. 5.
[722] Srichetha Chowdhury and Uday Shankar, "Representative Judiciary in India: An Argument for Gender Diversity in the Appointment of Judges in the Supreme Court", ILI L. Rev., Vol. 2, 2019, p. 206.
[723] Vishaka v. the State of Rajasthan, AIR 1997 SC 3011.

law as a reference, and this the presence of J. Sujata Manohar ensured such a move by bringing the view of gender sensitization to the Bench.[724]

Equal representation of women in the judicial department can bring many positive changes in the country starting with the part that a class of the society that was under oppression for a long time will finally have a stronger or persuasive voice. [725] Biases such as impartiality and inequality will be lessened from the judiciary thus making it a more approachable platform of dispute resolution. The equal presence of women in these significant positions will act as an inspiration for many other women in the country. The insensitive behaviour and approach towards female victims or even the female lawyers/judges will get remarkably reduced.[726]

III. REASONS FOR THE EXISTENCE OF GENDER INEQUALITY IN THE JUDICIARY:

One of the major reasons for the existence of gender imbalance in the higher judiciary has been gender bias in judicial appointments. This gender bias can be observed in two ways: "Structural bias" and "Discretionary bias".[727] The former is when the technicalities or policies of the selection process are inculcated with prejudice based on caste, gender, class, *etc*. Because of this, one group of candidates are preferred over another. At the high judicial lever *i.e.* the SC, the "seniority norm" affects the selection of women HC judges to the post of SC judges. This norm is the same for both males and females, but most of the time the social and cultural standing of a woman makes it disadvantageous for her to be able to stand in a similar position as that of her male counterparts. This isn't just theoretical but too practical to be neglected and stating that we have had just eight women judges in the Apex Court till date says it all.[728]At the lower judicial level, the "judicial transfer policy", according to which the appointment of a judge is prohibited to the place of their residence or that of their spouse, confines the chances of having more women judges from getting appointed. The fact that there are more male judges than female judges, if such a policy is in place, and then it is affecting the possibilities of having more women on the benches. More importantly, a transferable job is not feasible for a woman as it is for a man, and especially not for a married woman. Her household and motherly duties

[724] *Supra* note 20, p. 211.
[725] *Ibid* p. 208.
[726] *Supra* note 20, p. 208.
[727] Aishwarya Chouhan, "Structural and Discretionary Bias: Appointment of Female Judges in India", Geo. J. Gender & L., Vol. 21, 2020, p. 727.
[728] *Ibid* p. 735.

are considered above her career and her husband's career is of more significance irrespective of which position she would be in; these perceptions work against the career goals of the woman making her sacrifice in the way a man would never have too.[729]

The second bias, that is, discretionary bias, is when consciously or unconsciously a preference is exercised by people making a decision. The general consciousness of the "all-male collegium" affects frequent appointment of women.[730] The influence of sexism in the minds of people in the legal profession affects the eligibility and positioning of women in the competition of their male counterparts.[731]And so, this influence is present in the judicial appointments as well.

Furthermore, the reason why such biases have had an opportunity to impact is because of the "sheltered selection process" in the judiciary. This process is when the selectors are covered from electoral accountability and because of this, they are less likely to appoint women judges as against the "exposed selection process" where selectors are exposed and credit claiming takes place.[732] With regard to the selection of judicial offices in the higher judiciary, the matter has a good amount of visibility in comparison to the lower judiciary. For example, the elevation of a judge to the SC will be in the news and the public will be aware about the same. This point of visibility works positively in the countries with exposed selection but when it is sheltered, there is no incentive to come out of this and so it negatively impacts the appointment of women judges.[733] In the exposed one, it is the Executive or at times the Legislature making the appointments. Understandably, the application of this method is difficult in India amidst the rulings regarding judicial appointments and the importance given to the opinion of the CJI and the principle of separation of power.

The Presence of women in Legislature creates a spill over effect thus impacting positively on the number of women in the higher judiciary.[734] The participation of women in the Legislature and Judiciary may be two different things but are connected in a way that the low representation of women in one affects the other. As we have seen above, the representation of women in the

[729] *Supra* note 20, p. 745.
[730] *Ibid* p. 752.
[731] Kiruba Munusamy, "Sexism in Indian judiciary runs so deep it's unlikely we will get our first woman CJI", THEPRINT, available at: https://theprint.in/opinion/sexism-in-indian-judiciary-runs-so-deep-its-unlikely-we-will-get-our-first-woman-cji/251727/ (last visited March 23, 2021).
[732] Christopher Shortell and Melody E. Valdini, "Women's Representation in the Highest Court: A Comparative Analysis of the Appointment of Female Justices", Political Res. Q., Vol. 69 No. 4, December 2016, p. 865.
[733] *Ibid* p. 867.
[734] *Supra* note 25, p. 869.

Parliament is very low and accordingly, so is in the Judiciary. It is also said that this low number of women judges affects the participation of women in other governmental institutions.[735]

There are furthermore reasons for the existence of imbalance in the lower judiciary such as the number of women that participate in the various steps that are required for becoming a judge, the incentives, and the work environment that is provided to women by the judiciary.[736] If we see, as a whole in the judicial structure, then women have not been credited much for their work and their competency is not given a place in the courtrooms. Most of the time it is the male lawyers who are made to feel like they belong in the courtrooms while passing sexist comments on their female colleagues on trivial bases such as appearance.[737] This behaviour is displayed not just by the lawyers but the judges as well shows the general belief of how a woman does not belong in that part of men's world. This factor affects the number of women in the legal profession a lot. Upon entering this career, there are several hardships that a woman has to face such as lack of support from family, religion and caste, marital status, male favourability at courts and offices, sexual harassment or comments, *etc*.[738]And therefore, these all affect the number of women entering the legal profession altogether.

IV. RESERVATION FOR WOMEN JUDGES:

The previous year, the Law Ministry had given its opinion on reservations in judicial appointments. It said that the appointment of SC and HC judges takes place under Articles 124 and 217 of the Constitution and these provisions make no expression of having reservations for any gender, caste, or class.[739]Other than recommending the Chief Justice of HC to consider the candidates belonging to classes such as women, SC/ST and minorities, the Ministry made a clear point there was no intention of amending the provisions of Articles 124 and 217.[740]

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[735] Dinesh Kumar, et al., "Gender Discrimination in Indian Judicial System: Causes and Implications", Int. J. Recent Res. Asp., Special Issue, April 2018, p. 698.
[736]"Gender disparity in lower judiciary shows study", THE HINDU, available at: https://www.thehindu.com/news/cities/Delhi/gender-disparity-in-lower-judiciary-shows-study/article22766885.ece (last visited March 23, 2021).
[737] *Supra* note 24.
[738] Saurabh Kumar Mishra, "Women in Indian Courts of Law: A Study of Women Legal Profession in the District Courts of Lucknow, Uttar Pradesh, India", e-cadernos CES 24, 2015, p. 80.
[739] Soibam Rocky Singh, "No move to introduce quota for women judges: Law Ministry", THE HINDU, available at: https://www.thehindu.com/news/national/no-move-to-introduce-quota-for-women-judges-law-ministry/article25902537.ece (last visited April 1, 2021).
[740] *Ibid.*

There was a report by a Parliamentary Standing Committee released in 2018 under which the Panel displayed concern over the under representation of women in the legal profession and suggested that there should be seats reserved for women in law schools and the Subordinate judiciary for increasing the percentage of women judges to about 50%.[741]

The low representation of women is an issue that has to be dealt with sooner rather than later. It has taken decades for the Top Court of the country to have three female judges at a time. Therefore, reservations for women must be sought in the appointments made for the Higher Judiciary. A "ladies quota" must be created and it should not be an informal criterion like the seniority rule but it more substantial in implementation so that it does not remain like an empty shell.[742]

In the case of *Government of Andhra Pradesh v. P.B. Vijay Kumar*[743], the Court while dealing with a matter of women reservations in public employment drew a parallel from Article 16(4) saying that it talks about uplifting backward classes by taking certain affirmative actions and since women have stayed backward in the country for so long, taking the provisions of this article as an authority, a similar level of policies should be created under Article 15(3) for uplifting the position of women. The Court was correct in stating this considering the fact that we do have a provision for making special provisions for women under Article 15(3), and therefore, all we need to do is put it into application efficiently.

When we see the role of reservations in the judiciary, then many states have implemented reservations in their lower judiciary. States like Telangana, Rajasthan, Tamil Nadu, Karnataka, and more, have reserved seats for women in 30-35% range, and the recruitment here is done through direct appointment.[744]Some states have a better representation percentage of women with reservations but there are also states like Bihar and Jharkhand where the representation of women is very low (even though there are reservations provided).

There can be a positive change brought by reserving quotas for women in judicial appointments. With regard to higher judiciary, more women might get the opportunity to become a judge with such a kind of policy. Because of the competition, there are only a few that get in, but the number will surely increase with reserving seats for women. The presence

[741] Poorvi Gupta, "Parliamentary Panel Seeks 50% Quota for Women judges", SHETHEPEOPLE, available at: https://www.shethepeople.tv/news/parliamentary-panel-seeks-50-quota-women-judges/ (last visited April 1, 2021).
[742] *Supra* note 19, p. 209.
[743] Government of Andhra Pradesh v. P.B. Vijay Kumar, AIR 1995 SC 1648.
[744] *Supra* note 17, p. 7.

of women is important not just for the number to show but because it will help in addressing certain issues in a way to have positive socio-political results.[745] The lack of proper representation of women has already given space to biases to exist in the judiciary. Further, the courts address so many cases relating to women issues but a lot of times, there is no woman on the Bench itself and these questions the "legitimacy of the court". The presence of women gives an encouraging message to other females about joining the legal profession. Lastly, there is a possibility that the issues dealt by the Court in a way would be addressed differently was a woman been present for it. For instance, the case of sexual harassment complaint made against the then CJI could've been dealt with differently had it not been an "all-male Bench". [746]

A reference can be made to the UK's system of judicial appointments; the "Judicial Appointments Commission" (JAC). This is an independent body making the appointment for the judicial posts. The Executive has the last word in a decision but the existence of JAC addresses important concerns of eligibility criterion, transparency, and diversity on the Bench among others. The JAC has taken efforts to bring in applications from candidates from the under-represented groups by organizing "Candidate Seminars". It also made an attempt to address the institution gender biases which helped in increasing women appointments by 50%.[747] From this we can garner the importance of gender sensitization. The discretionary bias needs to be reduced for the overall improvement in the system.

V. CONCLUSION:

The reality of gender inequality is very shocking considering we have come a long way from the day the Constitution came into being, but it is not obvious because women have been oppressed for ages in the country. It has been in recent years that an attempt to equalize the rights of men and women has been made via legislation and judicial pronouncements. However, an inherent bias that has existed in the society against the women class remains and promptly gets reflected in the Judiciary as well. The doubt in the ability of women or more like in the inability has made sure that the participation of women in the legal profession remains

[745] "Why Indian Judiciary Needs More Women", HINDUSTAN TIMES, available at: https://www.hindustantimes.com/editorials/why-indian-judiciary-needs-more-women/story-uU4kDWi5Nd09N6GpgBmYgJ.html (last visited April 4, 2021).
[746] Deepika Kinhal, "Current Crisis in SC is an Opportunity to Address Serious Gender Disparity on the Bench", THE INDIAN EXPRESS, available at: https://indianexpress.com/article/opinion/columns/cji-ranjan-gogoi-clean-chit-sexual-harassment-case-supreme-court-5715766/ (last visited April 4, 2021).
[747] Job Michael Mathew, "Judicial Appointments in India: Towards Developing a More Holistic Definition of Judicial Independence", NSLR, Vol. 9-10, 2016, pp. 120-121.

as low as it could. The improper treatment in the courts from judges and fellow male lawyers has discouraged women from joining the legal world for a long time. At least today, we can say that we have certain (few but still there) examples to look up to in the higher judiciary. What needs to be done to increase the representation of women in the judiciary is either reserves seat for women judges or create a system with proper functioning for the selection process. Such a system should be efficient to deal with the transparency issue, separation of power, independence of the judiciary, and diversity in the courts. We have a referral point for this and all we need to do is step beyond the confinements provided by the Two-Judges case giving the ultimate power to the collegium lead by the CJI.

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A MORAL DIVERGENCE FROM INDIAN SEX WORK LAWS

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ABSTRACT

Sex workers are amongst the most marginalized and ostracized members of Indian society today. While some part of the ill-outlook towards them stems from the societal stigma surrounding sex, the laws also contribute significantly in shrouding them with a perception of criminality and reinforcing the ideas of immorality associated with the profession. This paper seeks to analyse the legal framework relating to sex work through morality and legal reasoning. It argues that while international law has come to slowly acknowledge sex workers' human rights, Indian laws have failed to do so.

The paper presents a comprehensive analysis of Indian law, depicting its friction with morality since its inception till the present date and shows that such an outdated framework is no more valid in light of new research and evolved legal understanding of various concepts. At the end, suggestions are made to tackle with the problems plaguing the extant as well as newly proposed laws.

KEYWORDS: sex work, morality, exploitation, prostitution, dignity, human rights

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I. INTRODUCTION

Sex workers are amongst the most marginalized and ostracized members of society today. This is a result of the traditional discourse around them, which has framed their existence as antithetical to the principles of human rights. As a corollary to this, laws aimed at sex workers are not only controversial, but oft-ignored and counterproductive. The law in India too, having been inspired from the dominant view, fails to be unequivocal in its objective and address the rights of sex workers. In between its continuing loyalty to a particular idea morality and its penchant for paternalism, it has injured the autonomy and interests of sex workers in multiple ways.

This paper seeks to view the topic of sex workers from the vantage point of their human rights. Part I deals with the moral and rights-related ideas of prostitution, which are often used to oppose sex work itself, or laws in favour of it. Part II analyses the traditional position of international law regarding sex work, and the changing trends within it. In Part III, the Indian response to sex work is evaluated. Beginning from a legal historical account and moving towards its gradual evolution, the picture depicts confusing and moralistic aims of the Act along with naïve efforts of the judiciary, both of which leave much to be desired. In Part IV, we present concluding remarks and suggestions, seeking a more humane outlook of Indian laws, which is compatible with the revered ideas of both rights and dignity, as well as in keeping with the global outlook on sex workers.

II. RECONCILING SEX WORK AND HUMAN RIGHTS

Sex work, along with being contentious morally and ethically for many, is also difficult to associate with rights. Traditionally, sex work has been conflated with sex trafficking[748] and even when viewed independently of trafficking, is often seen as inherently exploitative and a

[748] Sujata Gothoskar and Apoorva Kaiwar, "Who Says We Do Not Work?" Looking at Sex Work", 49 Economic & Political Weekly 55 (2014).

modern form of slavery.[749] However, there is a more rational view that is able to reconcile it with rights, and is a more principled and fair approach towards sex worker-related laws.

Sex Work is often seen as intrinsically linked with dignity and shame. This argument has two facets. In one sense, it assumes that the degradation of a woman prostitute's self-esteem and feeling of shame is due to her failure to live up to the ideal[750], which varies in cultural contexts, but most often and more so in India, tends to rest on a notion of chastity of women, and procreation and childbirth as motives for sexuality. Furthermore, it supposes that certain legal sanctions are justified to prevent the woman from going through such a ritual of shame and violation of dignity. These views are hardly tenable today; in fact, ideas like autonomy and self-determination now are included in the idea of an individual's dignity as opposed to dominant cultural notions, which has been recognized by the courts as well, such as in decriminalizing same-sex relationships.[751]

Seen from another angle, the idea of prostitution offending dignity is often associated not with individual women, who may find it empowering and even granting them the dignity of liberty,[752] but rather with collective virtues as dignity. This idea is similarly based on prevalent notions and practices which the society collectively views as symbolic of a civilized society, and the violation of which offends the conscience of the whole society and impacts it.[753] However, such ideas of dignity – which may even be referred to such "public morality" – are malleable and therefore not legally enforceable. Instead, constitutional morality should prevail over public morality, especially when public morality is dictated by external considerations rather than personal ones i.e. concerned more with assignment of opportunities to others rather than focusing on one's own enjoyment of opportunities.[754] Arguments such as those stating that this kind of work degrades the prostitute in some way by emotionally alienating her often fail to stand up too, as many similar kinds of work are widely prevalent and encouraged in other fields.[755]

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[749] Sameena Azhar, Satarupa Dasgupta, et al., "Diversity in Sex Work in India: Challenging Stereotypes Regarding Sex Workers", 24 Sexuality & Culture 1774-1797 (2020).
[750] David A. J. Richards, "Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution", 127 University of Pennsylvania Law Review 1195-1287 (1979).
[751] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.
[752] Leslie Meltzer Henry, "The Jurisprudence of Dignity", 160 University of Pennsylvania Law Review 169-223 (2011).
[753] *Ibid.*
[754] Rohit Sharma, the Public and Constitutional Morality Conundrum: A Case-Note on the Naz Foundation Judgment, (2009) 2 NUJS Law Review 445.
[755] *Supra* note 3 at 1258.

Since dignity cannot be a decisive factor, the issue of sex work is inevitably linked with choice. It is often argued that prostitution is either always coerced, or even if chosen voluntarily, it is still not a free choice. Right to choice is a defining part of a person's life and has even been protected by the Indian judiciary in many cases. More specifically, right to choose a profession is guaranteed by Article 19 (1) (g) of the Constitution and prostitution as a chosen profession is technically legal in India, and is exercised by many voluntarily.[756] The idea behind protecting these choices resonates with Dworkin's study of rights in the American context, from where we have borrowed the concept of fundamental rights. He refers to rights as "trumps" over all majoritarian and utilitarian considerations, which are to be weighed only against other rights. The human right to choice in such a sense presupposes the capacity of autonomy and equal respect for such autonomy, and trumps over other considerations of whether the choice is advisable or ethical.[757]

While this position is straightforward, it gets complicated when choice itself is dissected to determine if it is really "free". If choice isn't free, autonomy and right to choice are both restricted. For instance, Katherine MacKinnon questions: ""If prostitution is a free choice, why are the women with the fewest choices the ones most often found doing it?"[758] However, the equation of wealth with choice and poverty with coercion[759] suggests that only poverty constrains our ability to make choices, ignoring other social, familial and religious factors that often come into play. In fact, effective autonomy and correspondingly, effective freedom to choice, is difficult to be ensured in practice; however, the capacity of autonomy can be granted and "regulating our conduct and institutions accordingly can facilitate the moving vision of persons as equal and autonomous, with servility and non-consensual dependence reduced to a tolerable minimum".[760] The idea of choice means granting people the right to decide how they wish to live their own lives by abiding to their own notions of what is good for them. At times, the choices are irrational, unappeasable or quirky, but the autonomy "gives to persons the capacity to call their lives their own."[761]

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[756] We do it out of choice, not compulsion: Sex workers, available at: available at: https://timesofindia.indiatimes.com/city/bengaluru/We-do-it-out-of-choice-not-compulsion-Sex-workers/articleshow/52099867.cms (last visited on November 3, 2020).
[757] *Supra* note 3 at 1258.
[758] Views on the Legalisation of Prostitution Sociology Essay, available at: available at: https://www.ukessays.com/essays/sociology/views-on-the-legalization-of-prostitution-sociology-essay.php (last visited on November 4, 2020).
[759] *Supra* note 2 at 1774.
[760] *Supra* note 3 at 1227.
[761] *Id* at 1225.

Despite this, many feminists hold the notion that prostitution is inherently exploitative of the women's bodies and violates their human rights. One limb of the argument states that the work reduces women to objects, by making them sell their bodies. However, it is false to equate selling sexual services as selling of the body, when this is not said of any other profession where people are similarly involved in selling their talents or services.[762] Not only is this a sexist conception of sex where women are seen as surrendering and giving access to men, this view often fails to acknowledge the empowered roles that women often play in the profession by acting on their own terms.[763] Even arguing that such a profession – being the worst example of sexual objectification of women – should not be allowed and reformed as it violates the dignity of persons, is an incomprehensible argument. In other areas of life, objectification or stereotypical notions in professions, such as in aviation industry, film industry etc., are not so harshly criticised, and in fact, sometimes seen as "socially reproductive work".[764]

Therefore, the special moral claim against prostitution is that objectification here involves treating the prostitutes not as the grammatical 'object', such as of one's endeavours as we do in other relationships, but rather treating them as a non-person,[765] which has no concrete basis. Patrons of prostitutes engage the services for various motivations[766] and ends which may often be dictated by fair bargain and understanding,[767] and similarly prostitutes too are not passive recipients in the trade.[768] David Richards cheekily puts it in this way: "If one thinks of the prostitute as an unloved sex object, the alleged symbol of sexually exploited women carried to its immoral extreme, the crucial difference becomes clear: the prostitute demands and exacts a fair return, as an autonomous person should, for service rendered."[769]

A different form of this argument argues that prostitution itself is exploitation of the self. The idea behind such arguments is that while humans are free to do and choose as they wish to, their "body acts as an absolute and inexplicable limit on autonomous freedom", whose autonomy and rights they cannot surrender as is done in slavery, for instance.[770] This view presents false equivalence between slavery and voluntary services of sex engaged in by the

[762] *Supra* note 3 at 1257.
[763] *Supra* note 2.
[764] *Supra* note 1 at 57.
[765] *Supra* note 3 at 1261.
[766] *Supra* note 1 at 57.
[767] *Supra* note 3 at 1262.
[768] *Supra* note 2.
[769] *Supra* note 3 at 1262.
[770] *Id* at 1259.

prostitute, which no more harm the buyer or seller than any other services in the market.[771] Nevertheless, one of the reasons why this view has continued to survive despite its flaws is because it is often permeated through legal frameworks, both national and international.

III. INTERNATIONAL LAW: MOVING FROM TRADITIONAL TO RIGHTS-BASED APPROACH

At the very premise, the problem with the instruments of international law is of fusing and treating trafficking and prostitution within the same lines and still continuing with the same notion.[772] However, the abolitionist approach of international law to treat prostitution as trafficking and the non-compatibility of human rights with prostitution stands dated in the contemporary times. The international conventions relating to prostitution throw light on the changing outlook.

The very first convention which paved way for the abolitionist approach in international law was the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.[773] The preamble at the core reflects the objective that prostitution is incompatible with the human dignity and treats trafficking and prostitution equivalent to slavery-like practice.[774] Article 1 of the 1949 Convention further states that the consent is immaterial when exploitation of the prostitution is in question.[775] India also ratified this Convention on 9th January 1953 and subsequently brought in the legislation in 1956.[776] However, the 1949 Convention has faced backlash over the past few decades due to its poor implementation and ambiguous wordings, used without distinguishing enforced and voluntary forms of prostitution.[777]

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[771] *Supra* note 3.
[772] *Supra* note 1 at 54.
[773] Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, available at: https://www.ohchr.org/en/professionalinterest/pages/trafficinpersons.aspx (last visited on October 17, 2020).
[774] Laura Reanda, "Prostitution as a Human Rights Question: Problems and Prospects of United Nations Action", 13 Human Rights Quarterly 202 (1991).
[775] Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1949, art. 1.
[776] The Immoral Traffic (Prevention) Act, 1956 (Act 104 of 1956).
[777] *Supra* note 27 at 210.

The Convention also did not gain much international community support, as till date there are only 82 State Parties who have ratified it.[778] Moreover, one of the major drawbacks of this Convention is that it did not provide for any mechanism to deal with the human rights violations committed against the women and any supervisory body to look into the state of affairs. In toto, despite criminalizing all the related aspects of prostitution except for prostitution itself, it did not prove to be promising model and unjustly conflated trafficking with prostitution.[779]

Thereafter, the 1979 Convention on the Elimination of All Forms of Discrimination against Women extensively dealt with the human rights of women and called for equality between men and women both at political and public front. Not only this Convention has received a tremendous support from over 189 state members[780], but it also has a supervisory body (known as 'CEDAW Committee') to inquire into the implementation and compliance by the state members.

Article 6 of the Convention calls upon the State Parties to take appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.[781] The Article thus deals separately (Change) into "trafficking" and "exploitation of prostitution". While the CEDAW Committee has tried to address the issue of trafficking, the term "exploitation of prostitution of women" again finds no definition and remains in a state of ambiguity.[782] However, a notable distinction in language is evident through the deliberate usage of the term "exploitation of prostitution of women" instead of "suppression of all forms of prostitution", hinting at the purpose and differentiation in approach that the provision seeks.[783] On the flip side, it falls short of specifying the suggestive measures the state members should take to suppress trafficking and exploitation of prostitution.

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[778] Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VII-11-a&chapter=7&clang=_en (last visited on October 21, 2020).

[779] Annie George, U. Vindhya, et al., "Sex Trafficking and Sex Work: Definitions, Debates and Dynamics- A review of Literature", 45 Economic & Political Weekly 64 (2010).

[780] Convention on Elimination of All Forms of Discrimination against Women, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (last visited on October 22, 2020).

[781] Convention on Elimination of All Forms of Discrimination against Women, available at: https://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article6 (last visited on October 22, 2020).

[782] UNDOC. The Concept of 'Exploitation in the Trafficking in Persons Protocol, available at: https://www.unodc.org/documents/congress/background-information/Human_Trafficking/UNODC_2015_Issue_Paper_Exploitation.pdf (last visited on October 23, 2020).

[783] The Smart Sex Worker's Guide to the Convention on the Elimination of All forms of discrimination against women, available at: https://www.nswp.org/sites/nswp.org/files/smart_guide_to_cedaw_-_nswp_2018_0.pdf (last visited on October 23, 2020).

In the year 2002, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children or commonly known as the Palermo Protocol made a significant departure from the conservative view that was advocated for trafficking. The term "trafficking in persons" requires 3 elements i.e. actions (recruitment, transportation, etc.), means (coercion and fraud, etc.) and purpose (for exploitation of the prostitution of others or other forms of sexual exploitation, etc.).[784] This definition apparently tried to delink prostitution from trafficking, and for the purposes of trafficking only included exploitation of the prostitution of others, provided means and actions are also present.[785] However, the Palermo Protocol too, like other instruments, did not define the key terms such as sexual exploitation, forced labour, practices similar to slavery or servitude etc. and left it to the discretion of the state parties to assign definition to these terms.

The constant conflation of sex work with trafficking in international agreements has more often than not reflected in the local policy of state parties and their model to tackle trafficking and prostitution. The international law instruments treats prostitution as a violation provided it involves an element of coercion or exploitation. They remain silent when it comes to the human rights implications of voluntary sex workers or situations that do not fall under the defined umbrella of international law. The framework provided by the international law has not yet addressed the meaning of prostitution and its related problem from a human rights perspective.[786]

However, certain improvements can be witnessed when it comes to addressing the issues of sex workers and their human rights violations. Though the CEDAW Committee has not yet adopted a clear position on a woman's right to choose sex work, in 1992 it issued the General Recommendation No.19 which specifically recognized that the prostitutes are marginalized and vulnerable to violence because of their illegal status. It was for the first time the human rights abuses against sex workers were recognized.[787]

The CEDAW Committee in its concluding observations while reviewing Fiji's Report observed that it was concerned with the criminalization of sex work, as a result of which the

[784] *Supra* note 32 at 66.
[785] Framework on Rights of Sex Workers & CEDAW, available at: https://www.iwraw-ap.org/wp-content/uploads/2018/04/Framework-on-Rights-of-Sex-Workers-CEDAW-1.pdf (last visited on October 26, 2020).
[786] *Supra* note 27.
[787] Chi Adanna Mgbako, "The Mainstreaming of Sex Worker's Rights as Human Rights", 43 Harvard Journal of Law & Gender 120 (2020).

sex workers are victims of violence and vulnerable to ill-treatment by the police.[788] In its concluding observations at Hungary in 2013, the Committee expressed concerns over the discrimination against the women sex workers and recommended to take measures to prevent discrimination against sex workers and to pass legislation in respect to their right to safe working conditions being guaranteed at local and national level.[789] Moreover, in 2014 the Committee also reviewed India's report and stated the reason for persecution of women in prostitution is because of the measures taken to tackle trafficking such as raid and rescue operations.[790]

The change in approach of international law from the conservative view to a more progressive view is quite evident. The soft response was observed initially in the 1979 Convention (CEDAW) where not all forms of prostitution was suppressed; rather called for suppression of those who exploited the prostitution of other. Then the Palermo Protocol defining the term "trafficking in person" comprehensively delinked voluntary sex work from trafficking and was perhaps one of the significant positive changes. Moreover, the CEDAW Committee's continuing endeavours to appraise the plight of the sex workers and acknowledge their humans rights points to a change in outlook towards sex work.

IV. LAW IN INDIA REGARDING SEX WORKERS

A. HISTORY

The Indian law relating to prostitution was not the result of a mass movement, but stemmed mainly from its international commitments.[791] India had become a signatory to the first International Convention for the Suppression of Traffic in Women and Children of 1921, and decided to follow a general policy of abolition towards prostitution by passing various regional Acts to close down brothels.[792] In contrast to this, many dignitaries felt that India had taken a

[788] UN CEDAW, Concluding Observations of Fiji, and Forty-Sixth Session, 12-30 July 2010, available at: https://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-FJI-CO-4.pdf (last visited on November 2, 2020).
[789] UN CEDAW, Concluding Observations of Hungary, Fifty-Fourth Session, and 11 Feb-1 March 2013, available at: https://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW.C.HUN.CO.7-8.pdf (last visited on November 2, 2020).
[790] UN CEDAW, Concluding Observation of India, 1219th and 1220th Meeting, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/IND/CO/4-5&Lang=En (last visited on November 2, 2020).
[791] Jean D'Cunha, "Prostitution in a Patriarchal Society: A Critical Review of the SIT Act", 22 Economic & Political Weekly 1919-1925 (1987).
[792] Government of India, Report of the Advisory Committee on Social and Moral Hygiene 13 (Central Social Welfare Board, 1956).

wrong step; she needed to retract from her international commitments and move towards licensing of brothels and registration and medical check-ups of prostitutes, which would prevent the spread of prostitution from 'recognized streets' to the whole city, unchecked by police.[793] After India signed the United Nations International Convention of 1950[794], a national law addressing the issue was sought to be enacted. The 1950 Convention is against prostitution wholly along with the accompanying evil of trafficking. However, the word 'prostitution' is not defined in the Convention and the States were free to define offences and punishments in conformity with their domestic law.[795]

Tasked with ascertaining the societal realities and drafting a law on prostitution, the Report of the Advisory Committee on Social and Moral Hygiene was consulted which had studied the issue of prostitution in detail. There was a machinery of pimps, brothels and landlords operating in India who exploited and victimised women for their own gains and destroying it could limit opportunities for exploitation, but the Committee felt that prostitution per se could not be prohibited as it would infringe upon the right to practice any chosen profession.[796] However, this is not to say that the Committee viewed sex work favourably – it described it as an "evil" which is "degrading and debasing" and a "cause of serious injury to the social and moral health of the community". Commenting on the causes and growth of prostitution, the Report criticized the laws which were solely directed at the prostitute and not the client.[797] However in the same vein, it suggested economic upliftment, social education and modern ideas of morality and clean living as solutions to deal with the issue.[798] The language of the Report is confusing – it recognizes the right but looks down on the exercise of it, and similarly it criticizes the law but stops short of suggesting changes to it.

In the Lok Sabha too[799], there were varying and contradictory tones while debating the then-newly drafted Suppression of Immoral Traffic in Women and Girls Bill. For instance, Shri Datar while introducing the Bill downplayed the role of morality in determining the illegality of a profession. Along with this, it was largely acknowledged that harsh realities such as socio-

[793] *Supra* note 45.
[794] *Supra* note 26.
[795] Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949, art. 12.
[796] *Supra* note 45 at 11.
[797] *Supra* note 45 at 12.
[798] *Supra* note 45 at 14.
[799] Lok Sabha Debates on November 29, 1956, available at: https://eparlib.nic.in/bitstream/123456789/56072/1/lsd_01_14_29-11-1956.pdf#search=prostitution%20[1952%20TO%201959] (last visited on November 6, 2020).

economic conditions drove women to sell sex out of necessity. However, along with this rational analysis of the situation, there were also undercurrents hinting that "biological urges" were responsible for the "evil sin" of prostitution, which had existed for years and could never be eradicated.

Eventually, the UN Convention was largely followed; while sex work itself was preserved as a profession in theory, activities closely related to it such as procuring prostitutes, keeping brothels for prostitution, living on the earnings of prostitution or carrying prostitution near public places was penalized by the Suppression of Immoral Traffic in Women and Girls Act, 1956. Prostitution here was defined as the "act of a female offering her body for promiscuous sexual intercourse for hire, whether in money or in kind"[800]. Therefore, the three important ingredients were (i) sexual intercourse; (ii) promiscuity, which was interpreted as indiscriminately offering the body for sexual intercourse to anyone who desired it[801]; and (iii) doing so for hire.

Therefore, sex work was largely prohibited, albeit a narrow scope was left open for sex workers to operate from their own homes (as opposed to brothels and rented places), individually and voluntarily where they could receive men for the purpose of sex work (instead of themselves being procured or induced).[802] This ensured that the morality which denounced sex work as sinful as shameful trumped over other considerations, although a narrow scope was still left open for the fulfilment of "uncurtailable biological urges", and possibly as a token towards freedom of profession.

B. 1986: AMENDMENT WITHOUT A CHANGE

One of the important changes brought forward by the amendment in 1986, for the purposes of this issue, was the change in definition on prostitution, which now came to be known as 'the sexual exploitation or abuse of persons for commercial purposes'[803], thereby shifting the focus of the Act from sex work to commercialized exploitation.[804] The interpretation implies that those who sexually exploited persons for commercial purposes were to be punished[805], i.e., by taking unjust and unlawful advantage of trapped women for their own benefit.[806] Moreover,

[800] The Suppression of Immoral Traffic in Women and Girls Act, 1956 (Act No.104 of 1956), S. 2.
[801] State of Mysore v. Susheela, (1965) SCC Online Kar 119.
[802] *Supra* note 52.
[803] The Suppression of Immoral Traffic in Women and Girls (Amendment) Act, 1986 (Act 44 of 1986), s. 3.
[804] Poonam Pradhan Saxena, "Immoral Traffic in Women and Girls: Need for Tougher Laws and Sincere Implementation" 44 Journal of Indian Law Institute 508 (2002).
[805] Pramod Bhagwan Nayak v. State of Gujarat, 2006 SCC OnLine Guj 29.
[806] Gaurav Jain v. Union of India, (1997) 8 SCC 114, para. 19.

the commercial sexual exploitation of women seems more closely related to the titular aim of the Act to punish 'immoral trafficking'.

Still, the amended Act renamed as the Immoral Traffic (Prevention) Act, 1956 (hereinafter "ITPA") is not without its problems and contradictions. In the eyes of a simple observer, the Act thus seems to depart from its moralistic outlook and approve of voluntary sex work and couch itself around the human rights issue of trafficking and forced prostitution and exploitation. However, the reason for the change is certainly less revolutionary; it is to expand the definition to cover many forms of sexual exploitation and not just limit it to sexual intercourse, which may be difficult to prove.[807] In the light of this change and the otherwise intact Act, the purposes and aim of the amended Act are quite perplexing.

A case in point is Section 7 of the Act, which makes prostitution punishable if carried on in the vicinity of a public place. This meant sex work in the original Act, and prohibited such activity near public places in order to prevent a debasing effect.[808] After the amended definition, it now punishes commercial sexual exploitation near public places; this is nonsensical as such exploitation is prohibited without regard to places, by virtue of other sections which punish procuring for prostitution, living on earning from prostitution etc. Thus, in effect, due to the unsuitable wordings of Section 7, which are misfits amidst the scheme of the present Act, along with a lack of definition of the term "commercial sexual exploitation"[809], it is often the voluntary sex workers who are rounded up under this section for operating near public places, as they are seen as exploiting themselves for commerce.[810] This has created ambiguity whether sex work is itself an offence or whether trafficking /exploitation of others for the purpose of prostitution are an offence.[811] Apart from violating the principle of legality, the wordings make the voluntary sex workers bear the brunt of arbitrary arrests, police threats and violence.

Similarly, Section 8 which punishes seducing and solicitation for the purpose of commercial sexual exploitation, also applies to voluntary sex workers and is often used only to grossly harass them and extort money.[812] This has also led to stigma around sex work and reinforced

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[807] Lok Sabha Debates on August 22, 1986 available at: https://eparlib.nic.in/bitstream/123456789/3764/1/lsd_08_06_22-08-1986.pdf#search=Prostitution%20[1980%20TO%201989] (last visited on November 4, 2020)
[808] *Supra* note 52.
[809] Centre for Policy Research, "A Review of the Immoral Traffic Prevention Act, 1986" 3 (2017).
[810] Rajalaksmi RamPrakash, "Delinking Prostitution from Trafficking-A Look at India's Immoral Traffic Prevention Act 1956", 22 Canadian Women's Student Journal 111 (2003).
[811] *Supra* note 62.
[812] *Supra* note 63.

the perception of sex workers as criminals, which was characteristic of the older version of the Act. Quite in contrast to criminalization, there are provisions[813] for correction home facilities for prostitutes, which victimizes them at the behest of the state. While it is the duty of the State to provide relief for genuine trafficking victims and provide them with employment opportunities for protection, these provisions are much more notorious.

The provision of corrective institution for violations of the gender-neutral Sections 7 and 8 are only applicable on women, which merits the question whether the idea behind the provision is really to provide relief and protection from the supposed exploitation, or to "correct" women. The latter notion becomes even stronger when one considers the conditions for their admission and release – the various requirements are of considering the "character", "health" and "mental condition", and an order of release demands that the prostitute will lead a "useful" and "industrious" life – which are nowhere defined and tend to be as gender biased as the provision itself.[814] Moreover, these provisions are often invoked to forcefully "save" sex workers during raids and detain them in corrective institutions against their will,[815] at times for months.[816] This is highly restrictive of the principle of autonomous personality and freedom of profession and movement of these women, along with causing additional hardship instead of providing relief.

Section 20, too, is a section which grants power to the magistrate to evict a sex worker from his jurisdiction simply on the basis of her profession. Flavia Agnes notes regarding this provision that it is so vague that it is capable of putting any woman, prostitute or not, at the behest of the magistrate's court in order to prove her "moral righteousness" i.e., that she is not a prostitute.[817] In the challenge to the said section, the Supreme Court justified the provision as protecting the morality of certain localities while containing the 'evil' of prostitution.[818]

However, the SC's views cannot be said to be valid today. Firstly, the settled law was related to the pre-amended Act which looked with contempt and largely criminalized sex work in many settings. However, the amended Act seeks to address exploitation and trafficking, not the sale

[813] The Immoral Traffic (Prevention) Act, 1956 (Act 104 of 1956), s. 10A.
[814] *Supra* note 63.
[815]Rescued but not released: the 'protective custody' of sex workers in India, available at: https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/rescued-but-not-released-protective-custody-of-sex-workers-in-i/ (last visited on November 7, 2020).
[816] PTI Mumbai, "Bombay High Court orders release of three women sex workers detained in Mumbai", Deccan Herald, September 26, 2020, available at: https://www.deccanherald.com/national/west/bombay-high-court-orders-release-of-three-women-sex-workers-detained-in-mumbai-893303.html (last visited on November 7, 2020).
[817] *Supra* note 63.
[818] State of U.P. v. Kaushailiya, (1964) 4 SCR 1002.

of sexual services itself. Moreover, going by the Dworkinian view of rights, the right of profession can justly be restricted by balancing it against other rights of civilians, but cannot be done so on moralistic considerations alone through a vague and unbalanced provision to harass its practitioners, even if a remedy for such action is provided later on.[819] In light of the change in Act's philosophy, the balance of proportionality tilts against sex workers in present times.

C. JUDICIAL APPROACH

The judiciary too has not always clearly differentiated between trafficking and prostitution, and has almost moved parallel to the law. From earlier decisions condemning prostitution, in place of trafficking, as an 'evil' running sore on civilisation destroying all moral values, it has at the very least come to address it not through a moral-religious lens but instead acknowledge the socio-economic necessity behind it.

Even while it has reiterated that sex workers have a right to dignity of life under Article 21, the Supreme Court has stopped short of recognizing voluntary sex work as a valid, dignified profession on its own and has instead insisted on rehabilitation.[820] By assuming that sex work is and will always be undignified, and any work outside of it will ensure dignity, the court has oversimplified matters. On the contrary, research indicates that sex workers are aware of and experience commercial and sexual exploitation in other fields as well, and if anything, recognize prostitution as another form of such experience.[821]

Apart from that, the SC itself described its perception of sex work as animal existence of women surrendering their body [822], and engaging in sexual acts but not "out of love"[823]. However, it is a myth to say that all sex workers lead a lie of animal existence; many have multiple identities as mothers, sisters etc. and sustain their life and family through sex work.[824] Similarly, love is an all-too-important concept which the SC has strived to protect by decriminalizing same-sex relationships, for instance, and the lack of love is a decisive factor while looking down on prostitution. However, the expression of sexuality through love is not the only morally acceptable and enforceable ideal; many deem it a "narrow and parochial narcissism', including a certain category of feminists who criticize the special application of

[819] *Supra* note 3.
[820] Budhadev Karmaskar v. State of West Bengal, (2013) 1 SCC 294.
[821] *Supra* note 2.
[822] Budhadev Karmaskar (3) v. State of West Bengal, (2011) 10 SCC 277.
[823] *Ibid.*
[824] *Supra* note 2.

the idea of "loving self-sacrifice" to women to blind them to their other socio-economic inequalities.[825]

While these ideas may not be worth any weight, the other reason offered by the Court was a lack of employment choice, which pushed women into prostitution, thereby justifying the court's noble effort of rehabilitation.[826] As argued earlier, it is possible to reconcile choices – even those which are as unappetising and unethical to many – with autonomy of the person who makes the choice, and respect his capacity for choice. However, even if one assumes that the court wished to grant the ideal of 'effective freedom of choice' to sex workers, rehabilitation certainly did not ensure it, as it is almost impossible to do. This is evident from the court's orders itself, which gives evidences of voluntary sex workers – who are unwilling to leave the profession, who are unable to leave the profession and gain respect and dignity, and those who have been rehabilitated and still continue to engage in sex work.[827]

D. RECENT TRENDS

The Parliament in India has made multiple attempts recently to amend the law relating to trafficking, which impacts the sex workers as well. The first of these was the introduction of The Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018 which was passed in the Lok Sabha but never made its way to the Rajya Sabha, perhaps due to the criticisms it faced. The definition of "trafficking" provided in the Bill was vague and suffered from the same issue that had been plaguing Indian law since decades – the conflation of trafficking and voluntary sex work.[828] The Bill also failed at harmonizing local laws in lines with the international commitments of India. For instance, despite ratifying the Palermo Protocol of 2000, the incorporated definition of "trafficking" – which is same as that in S.370 of the Indian Penal Code, 1860 – contradicts Article 3 of the Protocol as it omits the essentials terms mentioned thereunder.[829] Moreover, the Bill was meant to be in addition to other laws such as the ITPA, and this would have certainly meant double jeopardy for the sex workers.[830]

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[825] *Supra* note 3 at 1249.
[826] *Supra* note 73.
[827] Budhadev Karmaskar (4) v. State of West Bengal, (2011) 10 SCC 283.
[828] Oxford Human Rights Hub, The Indian Anti-Trafficking Bill, 2018: A misguided Attempt to Resolve the Human Trafficking Crisis in India, available at: https://ohrh.law.ox.ac.uk/the-indian-anti-trafficking-bill-2018-a-misguided-attempt-to-resolve-the-human-trafficking-crisis-in-india/ (last visited on July 15, 2021).
[829] Dipa Dube, Ankita Chakraborty, et.al., "The Anti-Trafficking Bill, 2018: Does it Fulfill India's Commitment to the International Community" 7 Journal of Human Trafficking 29 (2021).
[830] Tripti Tandon, "India's Trafficking Bill 2018 is Neither Clear nor Comprehensive", available at: https://www.epw.in/engage/article/trafficking-of-persons-prevention-protection-and-rehabilitation-bill-2018-is-neither-clear-nor-

The Bill just like other laws on sex workers, focuses more on rescuing and rehabilitation rather than acknowledging that such strategies often backfire as the statistics present a contrasting reality when those who were voluntarily engaged in this return to sex work.[831] The prevalent presumption of State that the rescued sex workers are the 'victims' time and again seems to overweigh the interest of those who consent to sex work.[832]

More recently, the Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021 was opened to the public for their suggestions and comments and is scheduled to be introduced in the Parliament. Meant to resolve all the criticisms faced by the earlier Bill, the issue of conflation of trafficking and sex work still strikes at the core of this Bill which paves way for criminalisation of sex work and victimisation of those consenting to it.[833] The definition of trafficking in the Bill is vaguely worded wherein expressions such as "vulnerability" are not defined. Moreover, the term "exploitation" is worded problematically, and if applied loosely, brings into its ambit voluntary sex workers as well, who may be seen as exploiting their own selves through this trade. Reading the two together, trafficked victims could potentially include people who may choose to engage in sex work due to financial vulnerabilities.

The second Explanation to the provision of "Trafficking in Persons"[834] in this Bill states that *"The consent of the victim shall be irrelevant and immaterial in determination of the offence of trafficking in persons if any of the means mentioned at (b) above is used to commit the crime."* This creates a major impediment for the sex workers who are the risk of arbitrary rescue and rehabilitation operations by being identified as a victim of trafficking, in spite of having voluntarily entered into the profession.

E. NHRC ADVISORY

The National Human Rights Commission of India recently released an advisory on the human rights concerns relating to women during the Covid-19 pandemic, containing recommendations

comprehensive#:~:text=The%20bill%20is%20founded%20on,of%20laws%20against%20human%20trafficking (last visited on July 17, 2021).

[831] Aarthi Pal, Meena Saraswathi Seshu, et.al., "In its Haste to Rescue Sex Workers, 'Anti-Trafficking' is Increasing Their Vulnerability", available at: https://www.epw.in/engage/article/raid-and-rescue-how-anti-trafficking-strategies-increase-sex-workers-vulnerability-to-exploitative-practices (last visited on July 17, 2021).

[832] *Ibid.*

[833] Sensitive and precise: On anti-trafficking bill, The Hindu, available at: https://www.thehindu.com/opinion/editorial/sensitive-and-precise-the-hindu-editorial-on-anti-trafficking-bill/article35398372.ece (last visited on 19th July, 2021).

[834] The Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021, s.23.

for concerned Ministries and all States and Union Territories.[835] Regarding sex workers, the NHRC proposed their recognition and registration as informal workers in order to enable them to get worker benefits, and similarly the inclusion of migrant sex workers in the scheme meant for migrant workers.[836] It also advocated for issuance of temporary documents for easy access to schemes such as the Public Distribution Scheme as well as access to healthcare services and commodities.[837]

However, what was hailed as a "critical victory" by the sex workers[838] and had potential to create a more inclusive and accepting atmosphere for them, instead led to disagreements by certain stakeholders regarding the provision of recognizing sex workers as informal workers. This led to the NHRC issuing a modification in the notification, instead recommending that sex workers be provided benefits on "humanitarian grounds" as well as "for their survival".[839] Unsurprisingly, this backtrack by the NHRC has been fuelled by the outdated notions of morality and culture that the various stakeholders continue to value over basic human rights for sex workers. What is remarkable is that the most notable of these oppositions – dismissing sex work both as a profession and as a voluntarily made choice– was met with disapproval by sex workers themselves, as well as 255 organizations working towards their causes from all over India.[840]

V. SUGGESTIONS

A. DOING AWAY WITH THE CONFLATION OF TRAFFICKING WITH VOLUNTARY SEX WORK

The law relating to sex work has long been plagued by the problem of conflation of the crime of trafficking with the profession of sex work. In spite of bringing a change in the ITPA, the

[835] NHRC, Human Rights Advisory on Rights of Women in Context of Covid-19, available at: https://nhrc.nic.in/sites/default/files/Advisory%20on%20Rights%20of%20Women_0.pdf (last visited on July 20, 2021)
[836] *Id* at 6.
[837] *Ibid.*
[838] NSWP, NHRC, India backtrack on the recognition of sex workers as informal workers, available at: https://www.nswp.org/news/nhrc-india-backtrack-the-recognition-sex-workers-informal-workers (last visited on July 21, 2021).
[839] NHRC, Modification in the 'Advisory on Rights of Women in the context of COVID-19 Pandemic', available at: https://nhrc.nic.in/sites/default/files/Modification%20of%20Advisory%20on%20Women.pdf (last visited on July 21, 2021).
[840] Explained: Why a NHRC advisory on sex work has rights activists down the middle, available at: https://indianexpress.com/article/explained/nhrc-advisory-on-sex-workers-informal-sector-opposition-6834193/ (last visited on July 21, 2021).

vaguely worded provisions have adversely impacted sex workers who are often wrongly implicated and arrested by the police. To solve the confusion, the term 'exploitation for commercial purposes" in the ITPA needs to be defined comprehensively and clarified, in a way that voluntary sex work is not understood as a form of such exploitation.

Moreover, other provisions such as S.7 and S.8 need to be reanalysed in the view of the suggested clarification. Section 20 of the ITPA, being obsolete in the scheme of the amended Act as explained above, and disproportionately tilting against sex workers, needs to be removed from the ITPA.

Moreover, the present Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021 too suffers from the defect of conflating 'trafficking' with 'sex work' as explained in the preceding section. To tackle this problem, Section 23(b) needs to be tweaked a little. The use of term 'or vulnerability' needs to be properly defined owing to its ambiguity and unchecked scope, to leave out sex workers out of the ambit of trafficked victims.

As long as sex workers are freely consenting to such activity and voluntarily doing it for the means of livelihood, their right stands at a higher footing and therefore their consent should be taken into account before they are subject to rescue and rehabilitation operations by the respective authorities.

B. RETHINKING THE ARCHAIC APPROACH OF VICTIMIZATION

The law's approach of victimizing sex workers in spite of no compelling reason or veracity needs to be overhauled, as it is counter-productive and terribly dismissive of the sex workers' viewpoints and autonomy.

The provision of corrective institutional stay provided in the ITPA Act should be restricted to actual victims of trafficking, and not used as a way to incarcerate sex workers indiscriminately and against their will. While the clarification suggested above will surely aid in restricting the scope of this provision, sensitizing the authorities towards respecting the differentiation between trafficking victims and sex workers and monitoring mechanisms will ensure that the provision is correctly applied.

The Trafficking Bill of 2021 too stems from this very school of thought, and focuses on rescuing and rehabilitating sex workers by viewing them as 'victims'. As suggested above, a change in the language is required to ensure that voluntary sex workers remain out of the Bill meant to address the crime of trafficking.

C. THE ROLE OF THE WELFARE STATE

Despite being a welfare state, the State has done little to protect the interests of the sex workers till date. While some measures such as establishment of health centres has been undertaken mainly to advance HIV/AIDS programs and stop the spread of diseases in the general population, the sex worker community largely remains side-lined, or self-regulated at best.[841]

Recently, the Supreme Court was India was compelled to step in to ensure the supply of goods as basic as ration items and basic monetary relief to the sex workers amidst the pandemic, who were unable to avail them due to lack of documents.[842]

In doing so, the SC stressed on the responsibilities of a welfare state and highlighted its duties towards marginalized sections of society. On other occasions, the SC as well as the Parliament have acknowledged the role of socio-economic necessities which compel people to choose this profession. Thus, the state should ensure that sex workers are not incarcerated simply for earning their livelihood. Building up on this, the State should ensure that basic essentials are made available to the deprived and marginalized sex workers and their human rights are put on the same pedestal as that of other citizens of this country. Suggested changes in the law, focused policies directed at this community and issuance of basic documents to access the benefits of these policies can help in acceptance, rather than mere tolerance, of these citizens and removing the cloak of criminality that the sex workers always seem to be shrouded in. In doing all of this, the sex workers' viewpoints should be one of the guiding factors for state action and welfare measures.

VI. CONCLUSION

The unfair laws on sex work – in India as well as in many other countries – have long been justified through a range of arguments that depict sex work variously as coerced, exploitative and/or objectifying. However, these arguments are far from infallible; change in circumstances over the years, new researches documenting the sex workers' viewpoints and critically analysing these arguments exposes their loopholes and disproportionate use in relation to sex

[841] Why sex workers are opposing a bill that aims to protect them, available at: https://theprint.in/india/governance/why-sex-workers-are-opposing-a-bill-that-aims-to-protect-them/166087/ (last visited July 21, 2021).
[842] SC raps UP for delay in identifying sex workers for providing them rations amid pandemic, available at: https://m.economictimes.com/news/politics-and-nation/sc-raps-up-for-delay-in-identifying-sex-workers-for-providing-them-rations-amid-pandemic/articleshow/78914369.cms (last visited July 21, 2021).

work as compared to other services. The notions of dignity and choice, which are often invoked to censure sex work, themselves have undergone an overhaul in current times and are now understood in conjunction with other principles like that of autonomy, in order to honour the individual's right to live life in his or her own right. These trends weigh heavy on the idea that the law in its current form is outdated and not in consonance with the legal understanding and principles that we have come to adopt today.

The trends in international law depict a changed outlook on sex work and acknowledgement of the excesses meted out to them, which are unfair and against the idea of human rights. In contrast to this, the law in India has remained largely stagnant. Confused in its inception since the very beginning, the changes too have been inconsequential when it comes to safeguarding the rights of sex workers. The judicial response and recent trends are not impressive either and leave much to be desired. Implementation of the suggested changes to address sex workers' rights are not only desirable, but are long overdue.

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EIA- JUSTICE FOR ENVIRONMENT

-Dr Harish Kumar Sharma*

I. INTRODUCTION

Environment Impact Assessment (EIA) is still a challenging factor in developing nations like India. In the context of a developing country, EIA represents the ongoing battle to strike a balance between economic growth and ecological integrity[843].

The Environment Protection Act, 1986, which incorporates several section on assessment methodology and procedure, provides legal support for many draughts based on environmental impact in India. Till 1994, ecological freedom from the Central Government was a regulatory choice and needed administrative help. Be that as it may, On 27 January 1994, the then Union Ministry of Environment and Forests, under the Environmental (Protection) Act 1986, proclaimed an EIA notice making Environmental Clearance (EC) obligatory for development or modernization of any movement or for setting up new ventures recorded in Schedule 1 of the notice. The Ministry of Environment, Forests and Climate Change (MoEF&CC) told new EIA enactment in September 2006. The notice makes it compulsory for different activities like mining, nuclear energy stations, stream valley, foundations (streets, parkways, ports, harbours and air terminals) and ventures including tiny electroplating or foundry units to get climate freedom. Nonetheless, not at all like the EIA Notification of 1994, the new enactment has put the onus of clearing projects on the state government relying upon the size/limit of the task.

The Ministry of Environment, Forestry, and Climate Change (MoEF&CC) released the Draft EIA notification 2020 in March 2020, intending to replace the existing EIA notification, 2006,

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[843] Nupur Chowdhury, Environmental Impact Assessment in India: Reviewing two decades of jurisprudence, 5 IUCNAEL EJournal, available at: https://www.iucnael.org/en/documents/1140-environmental-impact-assessment-in-india-reviewing-two-decades-of-jurisprudence/file. (Last visited on 30th Aug. 2021).

under the Environment (Protection) Act, 1986[844]. Though there have been criticisms directed against EIA, 2020, and it has been accused of being "anti-environment" and pro-corporate lobbying, which rejected the notion of Environment as an original asset[845]. The EIA Draft 2020 not only makes it simpler for corporations to acquire environmental permits, but it also disregards many basic environmental management principles[846]. It is an attempt to undermine environmental legislation while also have a repressing effect on people. The proposal appears to benefit industry while ignoring the balance between sustainable growth and environmental preservation. The Union administration, on the other hand, claims that the revised draft would increase accountability and expedite the process[847]. The author through this article analyses the jurisprudential aspects and fundamental changes brought by EIA 2020 and focused to evaluate the efficacy/inefficacy of the same, whether it is mere a written law or living law.

II. POST-FACTO CLEARANCE

The EIA revised draft 2020 accepts ex-post-facto clearance under Clause 22. It implies that even if a project was developed without environmental safeguards or without obtaining environmental clearances, it could carry out operations under the provisions of the new draft EIA 2020, which is bad law in the Indian Legal system since the Supreme Court of India has ruled against similar conduct in several circumstances.

This is unfortunate because we already have several projects that are in operation lacking EIA clearances. An example is the LG Polymer Plant in Vishakhapatnam, where the styrene gas leak happened on May 7, 2020. It was discovered that the plant had been running for over two decades without clearances. A similar unpleasant occurrence occurred on May 27, 2020, when the natural gas of Oil India Limited in eastern Assam's Tinsukia district blew out and caught fire due to inadequate adherence to environmental standards. This wreaked havoc on the

[844] G. Ananthakrishnan, The Hindu Explains, What are the key changes in the Environment Impact Assessment Notification 2020? The Hindu, August 02, 2020. Available at: https://www.thehindu.com/sci-tech/energy-and-environment/the-hindu-explains-what-are-the-key-changes-in-the-environment-impact-assessment-notification-2020/article32249807.ece. (Last visited on 30th Aug. 2021).

[845] Soumya Shekhar, Draft Environmental Impact Assessment (E.I.A) Notification, 2020: Silver Linings and the Bottom Line, August 18, 2020. Available at: https: //rsrr.in/2020/08/18/environmental-impact-assessment-eia-notification-2020/. (Last visited on 30th Aug. 2021).

[846] Shripad Dharmadhikary, The EIA Draft 2020 needs to be restructured, idronline.org, May 15, 2020, https://idronline.org/the-eia-draft-2020-needs-to-be-restructured/.

[847] Abhijit Mohanty, why draft EIA 2020 needs a revaluation, Down to Earth, 06 July 2020. Available at: https://www.downtoearth.org.in/blog/environment/why-draft-eia-2020-needs-a-revaluation-72148. (Last visited on 30th Aug. 2021).

livelihoods of people living in a biodiverse zone. According to the Assam State Pollution Board, the oil factory has been functioning for more than 15 years without prior permission from the board. As per EIA (Notification) 2020, Projects can begin operations without an EC and subsequently pay a monetary fee to legitimize the project, i.e., get an EC after beginning work rather than before: this contradicts the core purpose of the legislation. As a result, it encourages projects to begin operations without an EIA, public hearing, or EMP, posing serious dangers to the environment as well as people's health and safety. Recently, in an order of April 1, 20205, in a matter unconnected to the EIA Draft 2020, the Supreme Court has laid down the same opinion of a post-facto EC, saying that it is in derogation of the fundamental principles of environmental jurisprudence, is detrimental to the environment, and could lead to irreparable degradation[848].

The system suggested by the EIA draft notification 2020 will not only support the "pollute and pay principle" but also gave the license to existing and new projects for setting up the entity without caring about the environmental law and regulations. We do understand the policy of balancing the environment and industrial growth, as to put an end to the long-run industry will cause large scale unemployment and development loss in the competitive market, but allowing it all at the cost of environmental degradation will not only against sustainable development it will violate the fundamental right of citizen i.e., "pollution free environment"[849].

In ***Sterlite Industries (India) Ltd. V. Union of India***[850] the SC discussed the specific grounds on which administrative action involving the grant of environmental approval can be challenged. An approval can be challenged on the grounds of unreasonableness, lack of procedure, suffers from **Wednesbury unreasonableness**[851], without any application of mind in granting such environmental approval as held in ***Gram Panchayat Navlakh Umbre v. Union of India and Ors***[852] under this context, application of mind indicates that the decision-making process of those authorities must be transparent and culminate in a reasoned conclusion that reflects proper application of mind and speaking order. EIA 2020 is supposed to be a modification over EIA 2006. If it is not rejected in practice by the judiciary as that of EIA 2006.

[848] Shripad Dharmadhikary, The EIA Draft 2020 needs to be restructured, idronline.org, May 15, 2020. Available at: https://idronline.org/the-eia-draft-2020-needs-to-be-restructured/. (Last visited on 30th Aug. 2021).
[849] SUPRA note 4.
[850] Sterlite Industries (India) Ltd. V. Union of India, Special Leave Petition (C) NOs.28116-28123 OF 2010.
[851] Wednesbury principle is a principle of administrative law where the court sits as a judicial authority over the local authority to see if the local authority has acted in a manner that exceeded its powers, and not as an appellate authority to override a decision of a local authority
[852] Gram Panchayat Navlakh Umbre v. Union of India and Ors, (High Court of Punjab And Haryana), Civil Writ Petition No. 8411 of 1990 | 13-11-2002.

III. PUBLIC PARTICIPATION/ PUBLIC CONSULTATION

The Rio Conference on Environment and Development in 1992 recognised public participation, stating that "environment issues are best handled with the participation of all concerned citizens at the relevant level"[853]. The current document also attempts to take authority away from communities in 2 major ways. For starters, it decreases the space available for public engagement, therefore undermining public trust i.e., in the 2020 draught, the notice period for public hearings is reduced from 30 days to 20 days. Given the rise of the internet and mobile telephony, Mr Prakash Javadekar stated that the reduced timeframe was "in sync with the times"[854], but the reduction in period is inadequate as such awareness takes time to spread and everyone is well experienced with its area ecology and the environment and not the internet and the mobile in India.

Secondly, there is no possibility for postponing public hearings. Public engagement has been critical in the EIA process, especially assisting communities to not only obtain information about projects being proposed in their regions but also to express their concerns about the projects. Clause 14 of the EIA (notice) 2020 provides a list of chosen projects that are excluded from public involvement. Modernization of irrigation projects (B1), all building construction and area development projects, national highway extension or widening projects, and all national defence and security programs, Furthermore, by categorizing several projects as A, B1 or B2 (in terms of environmental risk), the vast majority of projects are immune from public inspection. Category A and B1 projects are required to have obligatory EC. Central authorities assess Category A projects, whereas state agencies appraise Category B1 ones. Category B2 projects11, on the other hand, do not require obligatory EC[855]. Even the public consultation is limited to the district having National parks or Sanctuary etc. is located. The complete lack of participation of local communities and other interested organizations in EIA 2020 is a violation of citizens' fundamental rights under Articles 21, 14, and 19 of the Indian constitution. When the EIA is finished, their sole opportunity to respond is at the so-called public hearing, which directly impacts the survival of local ecosystems around project sites. Public hearings are

[853] **"**Report of the United Nations Conference on Environment and Development", United Nations, August 12, 1992.

[854] "Draft EIA in line with green rules, court rulings: Prakash Javadekar, Environment Minister", The Economic Times, August 17, 2020.

[855] Under the new draft, a list of 40 projects is included in Category B2. These include hydroelectric Projects up to 25 MW; irrigation projects between 2000 and 10,000 hectares; inland waterway projects. Expansion or widening of highways between 25 km and 100 km with defined parameters; micro small and medium enterprises (MSMEs) in dye intermediate, bulk drugs, among others.

usually ridiculous, are usually dominated by project promoters, and even in the best of circumstances, only provide a few hours for impacted people to voice their opinions on the EIA. People's engagement should always be encouraged because they are the most impacted communities and have the most in-depth knowledge of the local ecosystem and ecology[856].

In ***Ossie Fernandes v. Ministry of Environment & Forests***[857], the National Green Tribunal (NGT) stated: "If the project involves presentation / clarification requiring intrinsic science and technical knowledge, the environmentalist / scientist may be invited to speak on the occasion in the presence of the public and submit views, in writing, on the subject." In another case of ***Hanuman Laxman Aroskar v. Union of India***[858]**,** the Supreme Court states that 'local communities' knowledge is passed down through generations through auditory and visual traditions, which must be taken into account when these groups express concerns at a public hearing'. Thus, it is critical to transforming the EIA into a collaborative effort including professional consultants and local populations; and, once completed, to execute a process in which the EIA and EMP are presented to impacted communities in simple terms through camps and conversations. The public hearing(s) can be intertwined with such camps[859].

IV. EFFECTIVENESS OF EXPERT APPRAISAL COMMITTEE

The Expert Appraisal Committee (EAC) is one of the most central parts of the Environmental Clearance process. It reviews the EIA and other material to assess the project's implications and makes a final decision to approve or, in rare circumstances, deny the proposal. In the case of ***Rajula v. Union of India and Others***, it was stated that "appraisal is not a mere formality and requires detailed scrutiny by EAC and SEAC of the application as well as the documents filed, the final decision for either rejecting or granting an EC vest with the regulatory authority concerned, viz. SEIAA or MOEF, but the task of appraisal is vested with EAC rather than the regulatory authority"[860]. Every month, the EAC reviews a significant number of projects, around 10-12. However, no member of the EAC is a full-time member, as stated in clause 6

[856] Shripad Dharmadhikary, The EIA Draft 2020 needs to be restructured, idronline.org, May 15, 2020. Available at: https://idronline.org/the-eia-draft-2020-needs-to-be-restructured/. (Last visited on 30th Aug. 2021).
[857] Orissa Mining Corporation v. Ministry of Environment & Forest & Others, WP (Civil) No 180 of 2011.
[858] Hanuman Laxman Aroskar v. Union of India, (2019) SCC Online SC 441, 16 Jan 2020.
[859] Shripad Dharmadhikary, The EIA Draft 2020 needs to be restructured, idronline.org, May 15, 2020. Available at: https: //idronline.org/the-eia-draft-2020-needs-to-be-restructured/. (Last visited on 30th Aug. 2021).
[860] Rajula v. Union of India and Others, appeal No. 47/2012. Judgement of NGT on August 22, 2013.

paragraph 2 of the EIA 202015: the tenure of the EAC must not exceed three years. As to how EAC is justified in conducting project assessments, given that each project includes papers that extend into the hundreds of pages. EAC would require field visits as well as time for internal talks on an as-needed basis. The qualifying requirements in both the EIA Notification 2006 and the EIA 2020 (as per clause 6 Para (4) 16 specify that the Chairperson or Chairman might be a distinguished individual with experience in environmental policy problems, management, or public administration dealing with several developmental sectors. As a result, persons with no environmental competence can be selected as chairman. The National Green Tribunal itself has raised worry on such qualification measures. However, it proceeds. Probably, this is because the MoEFCC is keener on naming seats that acquire the ability to advance 'simplicity of working together, then ecological assurance. Specialists should be autonomous and even handed as the ability they are relied upon to bring to the table; they should be fair-minded and are led to evaluate the climate impacts for that no less than 50% of the individuals from the EAC ought to be full-time individuals. Furthermore, the EAC chairmen should be exceptional environmentalists or ecologists, or prominent environmental policy specialists who have made a significant contribution to environmental protection and sustainable development[861].

V. POST-CLEARANCE COMPLIANCE

The EIA (notification) 2020 is contrary to the EIA 2006 notification, which required the production of a compliance report every six months, or twice a year. In contrast, EIA 2020 recommends an annual report. It is a well-known fact that giving a longer-term for filling out the compliance report allows project proponents to conceal potentially devastating repercussions[862]. Post-clearance compliance means that once a project has been cleared by the relevant authorities, the proponent projects are obliged to follow specific regulations outlined in the EIA report to guarantee that no more environmental damage occurs. There have been many instances where the proponent projects have mostly failed to comply with the requirements[863]."Report of the Comptroller and Auditor General of India on Environmental Freedom and Post Freedom Monitoring"[864] The 2016 report by (CAG) on 'Natural Clearance

[861] Shripad Dharmadhikary, The EIA Draft 2020 needs to be restructured, idronline.org, May 15, 2020. Available at: https://idronline.org/the-eia-draft-2020-needs-to-be-restructured/. (Last visited on 31th Aug. 2021 at 6:10 a.m.).
[862] "How draft environmental impact assessment notification dilutes green clearance norms", Northeast Now, 5 June 2020
[863] Dukalu Ram & Ors V. Union of India & Ors "National Green Tribunal, Government of India, 2020.
[864] "Report of the Comptroller and Auditor General of India on Environmental clearance and post

and Post Freedom Monitoring' referred to several deficiencies in the EC's states. For example, not obtaining authorization from the competent authority before cutting trees; no different record and setting out of assets for Environment Management Plan (EMP); sporadic utilisation of groundwater; change of scope of work after acquiring the EC; non-development of rainwater harvesting structures and private offices for labourers; inconsistencies in help and recovery; Infringement in the management of hazardous waste items; and disappointment in the development of the green belt. In the case of ***"Sandeep Mittal V. Ministry of Environment, forest Climate change***[865]" Justice Adarsh K. Goel, Chairperson of the National Green Tribunal, presided over the hearing. In July 2020, noted that the method for monitoring environmental norms was insufficient and so ordered the MoEFCC to evaluate EC clearance circumstances "frequently, at least once a quarter."[866]

VI. CAN PUBLIC FILE COMPLAINTS OF VIOLATION CASES?

This EIA draft of 2020 leaves many ambiguities in various definitions and Clause 22 is one of them, under this clause, the draft outlines a procedure for post-hoc legalization. projects that begin construction and/or service before obtaining environmental approval as per Clause 22 Para (1) of EIA 2020, the cognizance of the violation shall be made on the suo-moto application of the Project Proponent; or Government Authority; or Appraisal Committee; or Regulating Authority[867]. The draft also outlined a procedure that violators would follow to continue operating lawfully. The Appraisal Committee will determine whether the project could be managed sustainably while adhering to environmental standards and providing sufficient environmental protections. If the response is no, it will demand that the project be terminated. If the response is yes, the project proponent would be required to determine the ecological harm and develop a remediation plan. It would require the project proponent to create a 'natural and community resource augmentation plan,' as well as an EIA survey. According to Clause 22, only the violators or an administrative or legislative body can bring the breach to the attention of the authorities. The warning does not state whether any other parties, such as interested

clearance monitoring", Comptroller and Auditor General of India, Government of India Report No.39, 2016.

[865] Sandeep Mittal V. Ministry of Environment, forest Climate change, Original Application No. 837/2018 (M.A. No. 1549/2019).

[866] Opangmeren Jamir, India's Environment Impact Assessment Draft 2020: Issues and Challenges, Manohar Parrikar Idsa issue brief, February 08, 2021.

[867] MoEFCC, Environmental Impact Assessment Draft 2020, March 23rd, 2020.

persons, have a legal right to investigate violations[868]. This appears to be in contradiction with section 19 of the Environmental Protection Act of 1986, which allows anybody to register a complaint after 60 days' notice[869]. This clause should be clarified, as the two are unclear and do not complement and supplant one another.

A. INDIA AND INTERNATIONAL COMMITMENTS

Many nations have made EIA a formal procedure, and it is now used in over a hundred countries. The story of global environmental conservation efforts began with the Stockholm declaration. India became a signatory to the Stockholm declaration in 1972, UN organized a meeting in Stockholm in Sweden as the first Global effort for environmental conservation as a signatory to the declaration, India enacted the Water (prevention and control of pollution) Act, 1974 and also the Air (prevention and control of pollution) Act, 1981, but later, the Bhopal gas leak disaster of 1984 forced the government into action to enact an umbrella act on environmental protection called as Environmental Protection Act, 1986. Since there was no explicit provision of Environmental Impact Assessment in the Environmental Protection Act of 1986. However, there were general provisions for environmental protection, and EIA is regarded as one of the tools for environmental conservation. So, EIA in India has statutory backing but no explicit provision back then. The concept of EIA finally was materialized at the global level in 1992, Rio Declaration, which says that environmental issue is best handled through the participation of all concerned citizen and states must provide an opportunity to citizens to participate in the decision-making process.

Besides, our nation is a signatory of worldwide settlements/conventions, for example, the Bonn Challenge, the Kyoto Protocol, and the Paris Agreement. In a general sense, the EIA draft is not just contrary to the rules and responsibilities endorsed by the international associations yet, in addition, it subverting the essential protected methods of reasoning of law and order and co-employable federalism which were set somewhere around the Supreme Court of India and the National Green Tribunal (NGT) in their past point of reference cases. It also puts the fundamental right to a clean environment in jeopardy under Article 21, which deals with the Right to Life. Rather than the suggested changes, environmental legislation has to be strengthened by increasing baseline survey accuracy, building a better system of checks and

[868] Rama Mohana R Turaga, EIA Draft needs a comprehensive relook, Business Lines, The Hindu, August 7, 2020.
[869] Soumya Shekhar, Draft Environmental Impact Assessment (E.I.A) Notification, 2020: Silver Linings and The Bottom Line, August 18, 2020. Available at: http://rsrr.in/2020/08/18/environmental-impact-assessment-eia-notification-2020/. (Last visited on 31th Aug. 2021 at 6:50 a.m.).

balances, and making the mechanism more open and equitable for all stakeholders[870].

International initiatives foster the principle of "Environmental Democracy" by ensuring careful and open consideration of the effects of their decision-making. EIA mechanisms, by educating and encouraging citizen participation in government policies affecting their communities, will facilitate the collective interaction and support required to ensure that planning decisions are politically and environmentally sustainable. We should adhere to what international initiatives stand for because only conservation of the environment would lead to a good future. Progress is important for a nation's development, but development just for the sake of expansion without regard for the consequences would lead to cancer cell ideology. It should not be our country's ideology.

VII. CONCLUSION − JUSTICE FOR ENVIRONMENT

The very first draft of EIA in 1994, was very much in favour of the Environment. The 2nd draft EIA 2006 was a blend of Industrial and Environmental policies. But EIA 2020 is more "Industrial Friendly" than the Environment. Several provisions in the latest draft seem to tilt the scale in favour of '***easing the norm***' for doing business. India has improved its ranking by 79 positions in five years (2014-19). According to the World Bank's recent Ease of Doing Business 2020 report, the country rose to 63rd place out of 190 nations. However, its ranking on the Environment Performance Index has progressively decreased, from 141st in 2016 to 168th out of 180 nations in 2020[871]. The government must assure that it will strive to strike a balance between environmental and developmental concerns. EIA 2020 is expected to bring several changes to the environmental governance in the country, which potentially compromise environmental safeguards while pro-industry[872]. The EIA 2020 goes against the guidelines laid down by the Supreme Court of India and the National Green Tribunal, undermining the basic constitutional philosophies of the rule of law and cooperative federalism. The best way to address EIA, climate change, economic development, biodiversity, and other problems is for

[870] Down to Earth blogs, Environmental Impact Assessment 2020, available at: https://www.downtoearth.org.in/blog/environmental%20Impact%20Assessment (Last visited on 31th Aug. 2021 at 07:00 a.m.).

[871] Arshad Khan, Eyebrows raised over India's ease of doing business ranking by world bank, Indian Express, Business page, 29th August 2020, available at: https://www.newindianexpress.com/business/2020/aug/29/eyebrows-raised-over-indias-ease-of-doing-business-ranking-by-world-bank-2189787.html. (Last visited on 31th Aug. 2021 at 7:30 a.m.).

[872] Opangmeren Jamir, India's Environment Impact Assessment Draft 2020: Issues and Challenges, Manohar Parrikar Idsa issue brief, February 08, 2021.

policymakers and people worldwide to collaborate, with the European Union acting as a blueprint by combining the environment and human rights. In India, Articles 48A and 51A (g) of the Indian Constitution, respectively, include the DPSP and the fundamental duty of every individual to protect and conserve the environment, but these provisions are merely symbolic. We need to move beyond just declaring that growth has an environmental cost and find new and inventive methods to develop with less negative environmental impact. The economic slowdown caused by the current coronavirus disease pandemic may appear to be a good reason to violate environmental rules, but the long-term effects of degrading natural ecosystems will only exacerbate our economic difficulties. We need to go beyond just proclaiming that growth has an environmental cost and instead create innovative and imaginative ways to expand that have a lower negative environmental effect. The economic slowdown caused by the current coronavirus disease pandemic may appear to be a good reason to violate environmental rules, but the long-term effects of degrading natural ecosystems will only exacerbate our economic difficulties.

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STRENGTHENING THE UNIVERSALITY OF HUMAN RIGHTS IN PRAXIS

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ABSTRACT

In conceptual terms, human rights laws are universal in nature but whether they are really universal in practice is a question of research. A small portion of this paper covers the historical debates on the understanding and implementation of universalism in western philosophical order and the fundamental problems associated with Asian discursive practices. In the case of the latter, due to regional relativism, the western version of universalism cannot be put to practice, as evident in the critique from several Asian countries of what they regarded as Western values expressed in the Universal Declaration of human rights, 1948. When it comes to India, it is a known fact that it is a country rich with diversity, deep cultural values and multitudinous ethnicities. Against this diversity, the concept of universalism loses firm ground and other factors overpower. All these cultural differences, historical developments and evolving conceptualisations of human rights gradually lead to an Indian interpretation and understanding in the expanse of human rights. An overview of the shaping of human rights as a concept and praxis would reveal how momentous changes have been taking place through judicial intervention and global world watch. This paper captures the trajectory of expansion in the field of human rights and implementation mechanisms through judicial intervention and activism to attain the values of universalism in the national and International legal framework.

KEYWORDS: Universalism, human rights, discourse, tradition, cultural practices, cultural relativism

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I. INTRODUCTION

Certain postulates have ushered into our consciousness that human rights are universal, indivisible and not definite. Article 1 of the Universal Declaration of Human Rights (UDHR) states that "[a]ll human beings are born free and equal in dignity and rights,"[873] and Article 2 states that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[874] The real assessment arises in context of implementation, where every country has its own value system and cultural integration. Against this diversity, the concept of universalism fades and other factors overpower. This provides a broad rubric, wherein gets juxtaposed a nuanced spectrum of rights, in all its complexity and variety.

The UDHR's principles are accepted by almost every state, and the six core international human rights treaties that elaborate the rights enshrined in UDHR have a ratification rate of over 86 percent. The universality of fundamental human rights is now accepted widely,[875] with the primary exception of strict cultural relativists.[876] Addressing the question of universality, former UN High Commissioner for Human Rights Navanethem Pillay stated in 2009, "While the promotion and implementation of human rights standards demand an awareness of context, the universality of the essential values and aspirations embodied in these commitments is beyond doubt." She also said, "The truth is that the Declaration is not merely congruent with some customs and foreign to other cultures; speaking to our common humanity, it drew its principles from many diverse traditions and made them more robust through a uniform codification."[877] The values underlying human rights are recognised in nearly all societies, in the form of moral aspirations.

Universalism has been faced with several criticisms, including that it "completely denies that the existing universal standards may be themselves culturally specific and allied to dominant regimes of power."[878] Some cultural relativists state that to allow international human rights

[873] Universal Declaration of Human Rights, Dec. 10, 1948, GA Res 217A (III).
[874] *Id.* Article 2.
[875] Jack Donnelly, Cultural Relativism and Universal Human Rights, 6(4) HUM. RTS. Q. 400, at 414-415 (1984).
[876] István Lakatos, Thoughts on Universalism versus Cultural Relativism, with Special Attention to Women's Rights, 1 PÉCS J. INT. EUR. LAW 6, 16 (2018).
[877] Navanethem Pillay, Are Human Rights Universal? 45(3) UN CHRONICLE 4, 5 (2009).
[878] Dianne Otto, Rethinking the 'Universality' of Human Rights Law, 29 COLUM. HUM. RTS. L. REV. 1, 8 (1997).

norms to supersede cultural and other forms of relativism is to violate state sovereignty[879] (even though state sovereignty is itself a universal principle),[880] autonomy and local self-determination, and that they impose absolutism and are ethnocentric, even posing fears of neo-imperialism.

However, these views are not only misinformed, but also dangerous, as political leaders often use the relativism defence against external interference where human rights violations are occurring, in order to preserve the status quo for promoting their own interests.[881] Cultural relativists assert that there are no universal rules, and yet insist on universal tolerance of cultural practices. The term "culture" is used broadly by relativists. Practices with no importance or valid purpose are often enabled by the use of relativism. Universalist scholars reject the idea that something rooted in tradition justifies its acceptance as desirable or ethically valid.[882] The UN Human Rights Commission stated in 1989 that culture-based violence must be combatted by States, more so where it is being disguised as religious or cultural practice.[883] Persistence of customs does not mean they are consented to by a majority of the adherents, who might simply be tolerating certain cultural norms and traditions. Moreover, culture is not a static concept; it evolves with the level of socioeconomic development.

At the 73rd session of the UN General Assembly, the Special Rapporteur in the field of cultural rights said that States are not absolved from their human rights obligations by invoking relativist arguments and "sensitivities." She laid emphasis on the danger of a relativist approach, in that it does not use culture to reinforce rights but to the contrary stifles them. She

[879] Karen Musalo, When Rights and Cultures Collide, SANTA CLARA UNIVERSITY (Nov. 12, 2015), available at: https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/when-rights-and-cultures-collide/. (Last visited on 3oth July. 2021 at 2:15 a.m.).
[880] MICHAEL FREEMAN, HUMAN RIGHTS 126 (Polity Press 2010).
[881] REIN MÜLLERSON, HUMAN RIGHTS DIPLOMACY 84-85 (Routledge 1997).
[882] Fred Halliday, Relativism and Universalism in Human Rights: The Case of the Islamic Middle East, 43(1) POL. STUD. 152, 162 (1995).
[883] United Nations Human Rights Commission, 1989, Consideration of Report Submitted by State Parties under Article 40 of the Covenant. Second Periodic Report 1985. U.N. Doc. CCPR/C/37/Add. 13.

made an important point: cultural diversity is distinct from cultural relativism. Cultural diversity and universal human rights are in fact compatible[884] and mutually reinforcing.[885]

Besides relativists, religious fundamentalists and postmodernists oppose the idea of universality.[886] One of the reasons of the emergence of such opposition was cultural evolutionism, which posits that human society's progress from primitiveness to modernity, a standard based on Western values.[887] However, universalism, per se, is not a concept exclusive to the West. In fact, many Western States themselves rejected the legal concept of international human rights as it contradicted a principle of more importance to them, that of the sovereignty of the state,[888] a good case in point being the US, which has not ratified the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) on this ground.[889]

Radical forms of both universalism and relativism are harmful to the cause. Former Secretary General of the UN Kofi Annan stated in 1997, "No single model of human rights, Western or other, represents a blueprint for all states."[890] When we say that human rights are universal, we mean that most societies and cultures around the world have practiced them for most of their history, and that they exist independent of practices, morality, or law. World War II brought the realisation that people needed to be protected from the state, and even in the modern state and economy, threats to human dignity are universal. Human rights are the tool of preference to limit excessive state power.

The idea of universality does not propose homogeneity and cannot be equated with conformity; it promotes diversity in cultural practices.[891] Although universalism implies a commonality of

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[884] Martha C. Nussbaum, Human Functioning and Social Justice, In Defence of Aristotelian Essentialism, 20(2) POL. THEORY 202, 224 (1992); Michael J. Perry, Are Human Rights Universal? The Relativist Challenge and Related Matters, 19(3) HUM. RTS. Q. 461, 471–75 (1997); ELVIN HATCH, CULTURE AND MORALITY: THE RELATIVITY OF VALUES IN ANTHROPOLOGY chap. 7 (Columbia University Press 1983); and KWASI WIREDU, CULTURAL UNIVERSALS AND PARTICULARS chaps. 3, 6 (Indiana University Press 1996).

[885] General Assembly Third Committee Seventy-Third Session, 29th and 30th Meetings (AM & PM) Relativist Claims on Culture Do Not Absolve States from Human Rights Obligations, Third Committee Expert Says as Delegates Denounce Country-Specific Mandates.

[886] Elizabeth M. Zechenter, In the Name of Culture: Cultural Relativism and the Abuse of the Individual, 53(3) J. ANTHROPOL. RES. 319, 322 (1997).

[887] Andreas Kronenberg, Where are the Barbarians? Ethnocentrism versus the Illusion of Cultural Universalism: The Answer of an Anthropologist to a Philosopher, 7(3) ULTIMATE REAL MEAN 233, 233 (1984).

[888] Fernand de Varennes, The Fallacies in the "Universalism Versus Cultural Relativism" Debate in Human Rights Law, 7(1) ASIA PAC. J. HUM. RTS. & L. 67, 70 (2006).

[889] Liane Schalatek, CEDAW and the USA: When Belief in Exceptionalism Becomes Exemptionalism, HEINRICH BÖLL STIFTUNG (Dec. 10, 2019), https://www.boell.de/en/2019/12/10/cedaw-and-usa-when-belief-exceptionalism-becomes-exemptionalism.

[890] Nhina Le, Are Human Rights Universal or Culturally Relative? 28 PEACE REV. 203, 209 (2016).

[891] FREEMAN, *Supra* note 10, at 132.

some moral requirements for everyone, it does not imply that all of us have a moral requirement to "be" the same, or to discourage cultural diversity and integrity. It does not rule out tolerance, but posits just the opposite.[892] Respect for the individual is not automatically at the expense of the group.[893] Additionally, universal human rights standards' interpretation and application can vary according to cultural norms and standards. The first operative paragraph of the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in 1993, states that "the universal nature of [human] rights and freedoms is beyond question." However, in paragraph 5, it states that "the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind," leaving up to the State to interpret and secure compliance with rights.[894] Relativists' argument that human rights are not observed worldwide as they only incorporate Western ideas is hence rendered untenable.[895]

By arguing that universalists are ethnocentric in the sense that the principles they propound are bound to be culturally biased, relativists project their own cultural determinism, according to which all of our perceptions and beliefs are culturally conditioned so much so that it is impossible for us to have any unbiased thoughts, choices and inferences.[896] It can be said that even the leaders in Africa and the Middle East are perpetuating ethnocentrism, by perpetuating the idea that female genital mutilation is a necessary, and even ethical, practice.

Relativism can be equated to nihilism in the sense that it does not believe in fundamental values and principles. Consider this: how can an individual deny the universality of beliefs and values such as the unacceptability of torture and slavery?

People have been adapting and assimilating into different cultures for time immemorial, so no culture is as unintelligible to others as it is made out to be.[897] As mentioned earlier, relativism is based on a static conception of culture. It tries to justify dysfunctional beliefs and customs, overemphasises group rights over that of the individual (disregarding and repressing

[892] John J. Tilley, Cultural Relativism, 22(2) HUM. RTS. Q. 501, 543 (2000).
[893] Lakatos, *Supra* note 6, at 14.
[894] 5 NIGEL RODLEY, INTERNATIONAL HUMAN RIGHTS LAW INTERNATIONAL LAW 774 (Oxford University Press 2018).
[895] Lakatos, *Supra* note 6, at 17.
[896] WILLIAM GRAHAM SUMNER, FOLKWAYS 232 (Ginn 1906); RUTH BENEDICT, PATTERNS OF CULTURE 2f (Houghton Mifflin 1934); MELVILLE J. HERSKOVITS, CULTURAL RELATIVISM: PERSPECTIVES IN CULTURAL PLURALISM 15-20, 56, 58, 84f (Vintage 1973).
[897] Zechenter, *Supra* note 16, at 327.

marginalised members of the group, like women), and presents a siloed view (forces to abandon meaningful discussions about other cultures).[898]

II. CULTURAL INTEGRATION AND ASIAN VALUES

To dive deep into this discourse of regional integration and the principle of universality, one has to go back in time and examine, as an illustration, Indian history, which reveals that many political leaders and prominent scholars, such as Emperor Ashoka (304 BC), who accepted Buddhism in the later part of his life, and Mughal Emperor Akbar (1542), who advocated for equality and tolerance towards different religious philosophies, allowed free dialogue over such issues. Similar notions are debated in the Mahabharata, an ancient Hindu epic.[899] On reflection, however, and without the slightest intention of challenging the aspiration of universality, which is characteristic of human rights philosophy, the question asked does raise certain doubts: is not the literature,[900] Vedic text and philosophies of modern jurists reshape the concept of universality and which also slowly and steadily is moving towards universal acceptance but in its own course. Also, are not all these cultural differences, historical texts and modern conceptualisation of human rights leading to Indian enlightenment in the area of human rights and gradually changes are being made through judicial intervention and global world watch?

India is a country of diversity and culture is in sync with the day-to-day activities. If we call for the notion of universalism to be mandated, it has to be looked from the lenses of ethnicity and cultural practices. The international human rights movement has tried to escape its culture-specific origin by basing its morality on universal claims,[901] from the apparent definition of human rights in the UDHR, the International Covenant on Civil and Political Rights (ICCPR)[902] and the International Covenant on Economic, Social and Cultural Rights (ICESCR),[903] which came in to support the underlying philosophy, but the notion of universality has still been a matter of contemporary debate.

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[898] *Id.* at 328.
[899] Amartya Sen, Human Rights and the Western Illusion, HARV. INT. REV., 20. 3, pp10.
[900] 1 LEBEN CHARLES, THE ADVANCEMENT OF INTERNATIONAL LAW 288 (Hart Publishing 2010).
[901] Randall Peereboom, Human Rights and Asian Values: The Limits of Universalism, 7(2) CHINA REV. INT. 295, 296 (2000).
[902] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171 and 1057 UNTS 407, entered into force 23 March 1976.
[903] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 UNTS 3, entered into force 3 January 1976.

In 1947, a number of scholars expected that a generalised human rights regime could run into difficulties involving cultural differences. The American Anthropological Society presented this concern to the UN Commission on Human Rights while the foundational international legal instrument, the UDHR, was being drafted,[904] and argued for the relativity of values and standards to the culture that they derive from.[905] The society asserted that the UDHR could not be framed with only Western European and American values in view.[906] It stated, "Man is free only when he lives as his society defines freedom."[907]

Some disagreements on universality come from the fact that Allied powers and their allies adopted international human rights instruments in 1948, with Asian, African and Latin American countries "represented" by colonial powers.[908] As these States were not involved in drafting most of the international bill of rights,[909] they viewed it as ethnocentric and alien to their cultures. This is also the reason behind the emergence of regional human rights mechanisms.[910]

In 1948, in the process of drawing up of the UDHR, UNESCO prepared lists of basic rights and values representing diverse cultures. Representing China, Chung Shu-Lo said that "[t]he basic ethical concept of Chinese social political relations is the fulfilment of the duty to one's neighbour, rather than the claiming of rights."[911] The 1982 Chinese Constitution also affirmed the principle of subordination of individual rights in favour of societal interests. Mahatma Gandhi also laid emphasis on the need to view rights in relation to duties,[912] besides several Latin American and continental European thinkers. UNESCO found that the lists were largely

[904] Roger Lloret Blackburn, Cultural Relativism in the Universal Periodic Review of the Human Rights Council, UPR INFO (Sep. 2011), https://www.upr-info.org/sites/default/files/general-document/pdf/-blackburn_upr_cultural_relativism.09.2011.pdf.
[905] FREEMAN, *Supra* note 10, at 120.
[906] Le, *Supra* note 20, at 203.
[907] Exec. Comm., Am. Anthropological Ass'n, Statement on Human Rights, 49 AM. ANTHROPOLOGIST 539, 543 (1947).
[908] Vaibhav Goel et al., Some Cultural Aspects Behind the Legacy of Homosexuality: A Human Rights Study, 73(1) INDIAN J. POL. SCI. 29, 37 (2012).
[909] 3 HENRY J. STEINER, ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS AND MORALS, 517-518 (Oxford University Press 2008).
[910] Shveta Dhaliwal, Cultural Relativism: Relevance to Universal and Regional Human Rights Monitoring, 72(3) INDIAN J. POL. SCI. 635, 635 (2011).
[911] Chung-Shu Lo, Human Rights in the Chinese Tradition, in Human Rights: Comments and Interpretations, at 187.
[912] Gandhi's Letter Addressed to the Director-General of UNESCO, the Committee's report, the questionnaire, and the responses are collected in UNESCO, Human Rights: Comments and Interpretations, Appendix I, Appendix II, U.N. Doc. UNESCO/PHS/3(rev.) (1984).

similar.[913] It concluded that certain rights can be viewed by all cultures as inherent in the human nature.[914]

At the World Conference on Human Rights in Vienna in June 1993 (hereinafter, "the World Conference"), a critique emerged from several Asian countries of what they regarded as Western values expressed in the 1948 Declaration.[915] The Declaration stated that "all human rights are universal, indivisible, interdependent and interrelated." Consequently, it becomes the responsibility of States, irrespective of their political, economic and cultural systems, to encourage and defend all human rights and fundamental freedoms. However, the Asian countries were concerned that the significance of national and regional particularities and numerous historic, cultural and religious norms would be subsumed in universalism.

The Asian values approach generally represents the view that "Asian value do not regard Individual freedom to be an important aspect of human life in the way it is regarded in the west.[916] The effect of culture on human rights, where culture acts as a shield against the application of human rights, was mainly discussed in the World Conference by several East Asian nations. Mr. Wong Kan Sang, representing Singapore as foreign minister, stated:

"Human rights do not exist in abstract and morally pristine universe. The ideals of human rights are compelling because this is an imperfect world and we must strive to make it better. There are no human rights for heaven, but precisely because this is an imperfect world making progress on human rights will be marked by ambiguity, compromise and contradiction."[917]

It was not just Singapore that realised the influence of diversity on the implementation of human rights. China also laid stress upon the notion on regional differences in values, including the concept that in China and elsewhere one difference surely exists, that "individuals must put state first before their own."[918] This interpretation of human rights is surely influenced by the Confucian philosophy of duties before rights prevailing in China since long. Many thinkers also believe that the collective admiration of Asian values among governments in Asia is an

[913] Human Rights: Comments and Interpretations, Supra note 41, at 10.
[914] Human Rights: Comments and Interpretations, Supra note 41, at 47.
[915] Vienna Declaration and Programme of Action, July 12, 1993, A/CONF.157/23.
[916] HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW, the Jurisprudence of Human Rights, OUP. 5 (2008).
[917] WORLD CONFERENCE ON HUMAN RIGHTS, VIENNA, (1993) - THE REAL WORLD OF HUMAN RIGHTS, Singapore government press release, 20/Jun/09/01/93, Media division, ministry of Information and Arts Statement by Mr. Wong Kan Sang, Foreign affair minister, Singapore, https://www.nas.gov.sg/archivesonline/data/pdfdoc/19930616-MFA.pdf.
[918] GENERAL ASSEMBLY DOCUMENT A/CONE157/ASRM/8 (1993), report of the regional meeting for Asia of the world conference on human rights.

artificial construct, because Asia, after all, is simply an earthly appearance, and a poorly demarcated one as well. Growing debate suggests that there is an array of cultural beliefs existing in Asia and the values within that sphere of geography differ from each other, as much as with any Western value structure.

Looking at it from a practical angle the argument in favour of Asian values inclines to be as much about development as about cultural integration and sovereignty. A major point in support states that developing countries often cannot afford to implement norms of human rights, since the major task which comes in the way is of nation-building and boosting economic development. Former Prime Minister of India Indira Gandhi, in her speech at the 1972 UN Conference on the Environment,[919] underlined the importance of economic growth over attempting to secure the environment, and to reach those sustainable development goals, a country like India had to straighten up its priorities on many fronts due to its burgeoning population and low economic growth.

There is also the argument that authoritarianism is more effective in sponsoring development and financial growth compared to countries that have liberal regimes.[920] This notion is affirmed by China's model of stupendous growth in the last ten years. This is the basis behind the Asian values logic which attributes the trade and industrial growth of Southeast Asia to the Confucian principle of respect, command and reverence for authority.[921] The real dispute is slightly more obscure than that, because the partial postponement of human rights values is also depicted as the loss of few for the benefit of many, where it has been projected as the actions which are majorly for the betterment of the State and eventually for individuals.

III. BREAKING THE THEORIES OF UNIVERSALITY

Jack Donnelly stated that the level of development and political history of a State imposes priorities on it.[922] For example, China, due to its history, has given greater attention to duties than to rights and to the group than to the individual. The Asian values conception focuses on duties to State, rather than rights, as rights are dependent on the fulfilment of duties,[923] an ideology also shared by Soviet bloc countries. While the West focused on civil and political

[919] Pamela Chasek, Stockholm and the Birth of Environmental Diplomacy, IISD (Sep. 10, 2020), https://www.iisd.org/articles/stockholm-and-birth-environmental-diplomacy.
[920] Shashi Tharoor, Are Human Rights Universal, 16(4) WORLD POL'Y J. 1 (1999).
[921] Id.
[922] Jack Donnelly, The Relative Universality of Human Rights, 29(2) HUM. RTS. Q. 281, 295 (2007).
[923] BERTRAND G. RAMCHARAN, CONTEMPORARY HUMAN RIGHTS IDEAS 5-16 (Routledge 2008).

rights (as seen by the US having ratified the ICCPR and not the ICESCR), the socialist world focused on economic, social and cultural rights (as seen by China having ratified only the ICESCR and not the ICCPR).

We can always attempt to multi-culturalism the body of human rights by, for instance, balancing individual and group rights, relating rights to duties, giving more importance to economic and social rights as well as addressing the role of economic systems in the human rights corpus.[924] After all, human rights arose and continue to develop with socio-economic progress.

The extent to which variability in implementing human rights standards occurs, and the resulting effect, is to be seen in order to determine whether we should be tolerant of a practice.[925] In determining defensibility, it is also to be seen whether the particular practice is actually rooted in culture. If traditions are "unusually objectionable," they do not deserve to be accepted by outsiders. Donnelly cites anti-Semitism and untouchability as examples.[926] Gender-based violence, for instance, is also indefensible, as it is not rooted in culture, even though it continues. Cultural arguments against basic personal rights, which are enshrined in Article 3 to 11 of the UDHR and are connected to basic human dignity, are indefensible.[927] The "inherent dignity of the human person" is also recognised in the ICCPR and the ICESCR. This protects from claims of moral imperialism and neo-colonial concerns, and also ensures that egregious violations of human rights are not tolerated.

We can simply not allow a radical relativist approach to prevail, as status-based, or stratified, societies do not have a concept of being "human," and consequently do not consider that certain rights are afforded to everyone simply by virtue of being human.

Donnelly also posed the question of whether individual self-determination should prevail over community (or local) self-determination in the matter of universal rights. To this, Rhoda Howard's suggestions include a choice to "opt out" of traditional practices,[928] and when that choice threatens the traditional system, such as in the case of individual ownership in a society

[924] Donnelly, *Supra* note 52, at 296.
[925] Id. at 304.
[926] Id.
[927] Donnelly, *Supra* note 5, at 417.
[928] Rhoda Howard, Human Rights and Personal Law: Women in Sub-Saharan Africa, 12(1/2) AFR. REFUG. HUM. RTS. 45, 45 (1982).

that values group ownership, adherents of new and old values must be separated.[929] However, such a solution is not feasible where harmful practices are being continued.

There are multiple groups posing challenges to the universality of human rights, including Asian and Islamic governments, which reject universalism especially when it relates to women's rights: many of the so-called Third World countries wishing to avoid scrutiny of their treatment of citizens; newly organised indigenous groups' organisers seeking legitimacy; social scientists and philosophers looking for a sounder justification of universalism; persons who see human rights as nothing more than an extension of the Western sphere of influence, and value human "diversity"; and, those who fear that universalism encourages unwarranted interference with other cultures.[930] They fail to note that cultures do not collapse by taking down harmful practices, and that there is no single culture in a country.

These groups seek the subordination of universal rights to local cultures and religions.[931] They maintain their own perceptions of cultural values and norms supporting their interests, deeming them to be the only valid views (pick and choose from views, and discarding those not supporting their interests).[932] As an example, it is observed by ethnographers that men, dominating the power structure of most stratified, or hierarchical, societies, have picked and chosen from ancient customs, based on their convenience and to maintain the status quo of the subordination of women.[933]

On the subject of harmful practices that are justified by groups in the name of culture, it is to be asked whether a member of the group is adhering to such a practice voluntarily, and if so, does that make the practice justifiable? If consented to, is that consent legitimate, voluntary and informed? Are they only following a custom because they have no other option? Could such a practice be rejected, or are the adherents bound? Is a practice justifiable if it is supported by most members of the group? Is the invocation of an ancient custom sufficient to legitimise the practice? [934] These are all important questions that must be raised.

In judging another culture there is the risk of appearing ethnocentric, but it is to be done anyway in the face of brutality so as to not condone abuses, as relativists end up doing. The authors are

[929] Donnelly, *Supra* note 5, at 419.
[930] Zechenter, *Supra* note 16, at 323.
[931] *Id.*
[932] Zechenter, *Supra* note 16, at 333, 338.
[933] FLORENCE BUTEGWA, THE CHALLENGES OF PROMOTING WOMEN'S RIGHTS IN AFRICAN COUNTRIES in OURS BY RIGHT: WOMEN'S RIGHTS AS HUMAN RIGHTS 40-42 (Zed Books 1993).
[934] Zechenter, *Supra* note 16, at 328-329.

in support of the dialogical approach, as it advances universal human rights while also preserving cultural differences, as long as they do not cause any harm to individuals. It allows for a wider applicability of human rights laws in differing cultures, going beyond mere tolerance.[935] This is also the idea forwarded by Donnelly in his intermediate concept of relative universalism.

I. CULTURAL RELATIVISM AND GENDER-BASED VIOLENCE

Worldwide, while some States are taking measures to eliminate harmful practices perpetuated in the name of culture, others continue to justify such abuses. This is the reason we must seek to achieve the universality of human rights.

Gender-based violence is pervasive in many parts of the world, and some forms are unfortunately culturally tolerated and defended. While domestic violence is unfortunately still common around the world, it continues to be defended in some places in the name of culture. In Nigeria, wife battering, or violence against a wife or partner, is accepted as a constituent of the culture.[936]

Turkey recently withdrew from the Council of Europe Convention on preventing and combating violence against women and domestic violence, or Istanbul Convention, even as it has a high rate of femicide. As a justification of the withdrawal, the Directorate of Communications communicated that the convention's original objective had been side-tracked as it was "hijacked by a group of people attempting to normalize homosexuality – which is incompatible with Türkiye's social and family values."[937]

Kenya, one of the 31 countries where FGM is concentrated, but which has criminalised the practice, the High Court recently ruled against allowing female genital mutilation (FGM) for consenting adults. One of the petitioner's arguments was that women in communities that practice FGM are subjected to state-sanctioned harassment, arguing that the Act outlawing the

[935] Paul Healy, Human rights and intercultural relations: a hermeneutico-dialogical approach, 32(4) PHIL. & SOC. CRIT. 513, 514, 518 (2006).
[936] Adewale Rotimi, Violence in the family: A Preliminary Investigation and Overview of Wife Battering in Africa, 9(1) J. INT'L WOMEN'S STUD. 234, 234 (2007).
[937] Statement regarding Türkiye's withdrawal from the Istanbul Convention (Mar. 21, 2021), DIRECTORATE OF COMMUNICATIONS, https://www.iletisim.gov.tr/english/haberler/detay/statement-regarding-turkeys-withdrawal-from-the-istanbul-convention.

harmful practice violated the constitution "by limiting women's choice and right to uphold and respect their culture…" While the court admitted that FGM was a central part of some cultures in Kenya, it weighed this against medical evidence pointing to serious ill effects on women's health. The court ultimately found that the right related to culture can be limited. Importantly, it also stated that women are "as vulnerable as children due to social pressure and still be subjected to the practice without their valid consent."[938] FGM is carried out on girls as young as in their infancy. How can a person consent at that age, and how can a person who has not consented to a harmful practice be forced to undergo it in the name of culture? Even in the case of women, we will never know if women consent to such a practice, because the existence of these practices as cultural norms mean it is severely underreported. It is to protect such individuals that we argue for the universality of human rights.

Research in Nigeria's Upper Nile state found that there is a deeply-rooted and internalised individual acceptance by women and girls of sexual violence, with its presence in their life as a cultural practice.[939] Even while accepting that violence has been committed against her, a woman may not perceive herself to be a victim of such violence,[940] and "people will not report it, [if] people don't look at it as a crime."[941]

The Istanbul Convention requires its State parties to ensure that justifications of "culture, custom, religion, tradition or so-called 'honour'" cannot be used to defend in criminal proceedings.[942] Additionally, to prevent and protect, State parties must promote "changes in the social and cultural patterns of behaviour of women and men with a view to eradicating customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men."[943] More States, including those outside Europe, should sign and ratify the convention.

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[938] Muskan Yadav, Kenya court dismisses petition to allow female genital mutilation for consenting adults, JURIST (Mar. 19, 2021, 08:47 AM), available at: https://www.jurist.org/news/2021/03/kenya-court-dismisses-petition-to-allow-female-genital-mutilation-for-consenting-adults/. (Last visited on 30th July 2021 at 6:09 a.m.).
[939] Francesca Rivelli, South Sudan/Gender-Based Violence Research on Sexual Assault: Maban County, South Sudan. DANISH REFUGEE COUNCIL (August 2015), available at: https://reliefweb.int/sites/reliefweb.int/files/resources/GBV%20Report%20Maban%2C%20August%202015.pdf. (Last visited on 31st July 2021 at 6:10 a.m.).
[940] Gender-based Violence Knowledge, Attitudes and Practices Survey in South Sudan, IOM (2020), available at: https://publications.iom.int/system/files/pdf/south-sudan-gender-based-kap.pdf. (Last visited on 31st July 2021 at 6:15. a.m.).
[941] *Id.*
[942] The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence art 42, May 11, 2011.
[943] *Id.* art 12.

CEDAW is subject to a number of reservations based on cultural relativism.[944] As most countries have ratified CEDAW, even as it is subject to the largest number of reservations among human rights treaties, with a number of reservations based on cultural relativism, it should be amended to include violence against women and girls.[945]

II. CONCLUSION

It is, first and foremost, imperative to underline the universality of human rights, but it is not to suggest that our understanding of human rights should surpass all thinkable logical, religious or cultural differences to represent a magical amalgamation of the world's moral and philosophical systems. Relatively, it is sufficient that they do not principally challenge the ideologies and aspirations of any society, and that they reflect our shared humanity. As we consider our differences, we must also look at similarities. Most essentially, human rights are derived from the sheer fact of being born as a human and they are not the gift of a specific regime or legislative statute. But the standards of such universal principles trickling from Western countries can become the reality only when applied by countries within their own legal systems through efforts by government and legislative bodies. The major task is to work towards the "indigenization" of human rights, and their proclamation should be within the purview of each country's traditions and history.

[944] *Supra* note 19.
[945] Lisa Baldez, Why Not Amend CEDAW? THE GENDER POLICY REPORT (Nov. 28, 2018), available at: https://genderpolicyreport.umn.edu/why-not-amend-cedaw/. (Last visited on 31st July 2021 at 6:30 a.m.).

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BOOK REVIEW: BONDAGE: HUMAN RIGHTS AND DEVELOPMENT

Prof Dr. S.C. Roy[*]

BOOK REVIEW

Title of the BOOK: BONDAGE: Human Rights and Development

Name of the Author: Sri Lakshmidhar Mishra, IAS (Retd.)

Published By: Renu Kaul Verma, Vistasta Publishing Pvt. Ltd., 2/15 Ansari Road,

Darya Ganj,New Delhi - 110002.

ISBN- 978-93-86473-981-2.

First Publication: 2020.

The Book titled: BONDAGE: Human Rights & Development; Authored by Sri Lakshmidhar Mishra, IAS (Retd.), is an excellent piece of work. The cover page of the book is highly attractive which suggests the title of the book. This book deals with the bonded labour system. In India-its genesis, Legislative history, remedies available in the statute, role of NHRC, various cases, case studies with defence to abolition of bonded labour system in India.

The author of the book is a seasoned administrator who joined IAS service in 1964, holds doctorate in educational planning from Inter Cultural Open University, Amsterdam. He has long experience of working with the government of Odhisa (1964-78 and 1994- 95), and central Government (1979-2000), during this period he was appointed as socio- Legal investigating commissioner in to bonded labour. After voluntary retirement in 2000, he joined ILO (International Labour Organisation). He has several Articles and books to his credit, including prestigious Mother Teresa International Award for his outstanding contribution to Promotion of Human rights.

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The book has been forwarded by honourable justice MN Venkata Chaliah (e.g.) introducing the nature of discussion in the book as ‘harrowing condition of the Poor, unexploited section of our society'. This adjective observation to the author is an inference that 'he was made to rotate from revenue and land reform to labour at nascent stage of his career'. In the middle of his career he moved to different departments, back to labour at the ‘pinnacle’ of his civil services carrier.

The author mentions about the director-general (labour welfare) in August 1982, as ‘it was the best of times; it was the worst of times; quoted from- A tale of two cities by Charles Dickens. This shows the author’s interest in literature to understand the real situations of life.

The author has described the background of the bonded labour system (abolition) Act 1976 in a story telling mode, the national emergency which was proclaimed on 25th June 1975, under Article 352 of the constitution. In this period, a twenty point economic programme was launched which among the one, the listed aim, was 'elimination of bonded labour.

In 1975 to 77, were memorable years as far as deliverance from the bondage, indebtedness, and landlessness and deprivation are concerned. The BLS was fourth of the twenty point programme announced by the then Prime Minister Smt. Indira Gandhi to the nation on 1st July 1975. This followed Labour Minister’s conference to discuss abolition of BLS and through ordinance on 25th October 1975 BLS (A) Act came into existence. The author has discussed the Bonded Labour System (BLS) Abolition Act in its introductory chapter.

The genesis of the legislation and its characteristics with reference to sectional provisions. The author has started discussion comparing with contract Labour (Regulation and Abolition) Act, the BLS (A) has an intention for total abolition. The author has explained the bonded labour system under the heading individual aberration. Here, the author has explained who is bonded labour? He has discussed the fate of bonded labour despite International, constitutional and legal provisions, policy and programs of government under the heading institutional infirmities. The enforcement mechanism has been discussed with reference to vigilance committee (VCs) which is not constituted timely, nor in- conformity with Section 13 of BLS (A) Act. The apathy of the members from field visit as required u/s 14(e), and investigation into complaints. hence their transactions are ceremonial character. The VC lacks any logistic support to enable them to discharge their statutory function. The sections 10, 11 and 12 of BLS(A) have conferred wide power on DM with an objective that the provision of the act are properly carried out promoting welfare of the freed bonded labourers by securing economic

interest, stringent actions against those who are the perpetrator of BLS. But BLS has not received priority attention. The result is lack of proper identification of bonded labour, no proper survey, nor involvement of NGO or voluntary social action groups are available in the identification of victims.

The author has discussed in the second chapter, 'what is development' here author cited development with various dimensions and connotations, i.e. is in relation to the mind and spirit access to facilities and opportunities, treatment of citizen and human freedom. The author has explained each connotation vividly. The author explains the consequences of loss of freedom-poverty, hunger, starvation, malnutrition and disease. These reference seems very appropriate with reference to the title of the book. The author has objectively cited who are poor in Indian context and how are they deprived of their human rights. The author has also raised the issue of pro-gender, pro-children, dimension of development.

The third chapter deals with 'what is Human Rights?' The author has uniquely put definition as- 'balancing the inalienable right of us all as the human beings within the community, society or body politic regardless of differences in birth, social origin, caste, class, sect, gender, physical difference, faith and belief political ideology and so on'. Here the poem of Rabindranath Tagore 'Pran' in the anthology of poems 'Kadi and Komal' has been cited which reflects sixth dimension of human right. The author has discussed landmark cases i.e. DK Basu vs State of West Bengal (AIR 1977 SC 610), Nandini satpathy vs PL Dani (1978 SC 1025), Prem Shankar vs Delhi administration (AIR 1980 SC 1534), ADM Jabalpur vs Shrikant Shukla, Sunil Batra vs Delhi administration, in this chapter, in order to highlight 'what is human right?'. Finally the author looks the concept of human right in dignity, well-being of a human being and respect accorded by the society. Hence, it is true that life liberty and dignity go together. Here the discussion of Maneka Gandhi Vs Union of India (AIR 1978 597) is appropriate and convincing.

Section II of this book deals with issue of FAQs (frequently asked questions). It has been drafted in question answer mode. It seems it is a notes but it is very-appropriate and objective covering 70 questions. The framing of question are just like Research question which are framed in doctoral research. The author first questions discusses about law and legal framework with respect to article 13 of the Indian constitution. Question number 3 deals with bonded labour with reference to article 23, law on abolition of BLS with reference to article 35(a) (ii), which has been discussed critically. The question 7 of the section deals with begar with

reference to ILO (international Labour Organisation). Question number 8 deals with forced labour. The 9th question deals with community of vision, purpose and goals of human right and human development. The question number 12 deals with forms of bonded labour-customary bondage, inter-generational bondage, inter-state distress migration and bondage, bondage arising out of trafficking etc. The victims of agricultural system- share-croppers have been discussed in the question number 13, where as a central causatives have been discussed under question 14, and assessment 'to what extent such objectives have been fulfilled',in question number 15. The author has taken up the issue of normal migration and distress migration with migration and trafficking.

Form question 16 to 23 &24, deal with Bachpan Bachao Andolan, whereas question number 25 deals with role of NHRC in prevention of separation of trafficking in human being. Further, the questionnaire discussed about the victims of BLA and rescue measures stepwise up-to question 32. The author has analysed rehabilitation measures in different part of countries read with question number 40. The question number 45 deals with various causes related to BLS, outcome of initiatives under question 50 in different states of India. Question number 52 deals with various rehabilitation mechanism- Pradhamantri Kaushal Vikas Yojana Pradhamantri Aawas Yojana, National rural livelihood mission, Pradhamantri Jan dhan Yojana, Balika sammrudhi Yojana, etc. the recommendations of various National commissions and committees on elimination of BLS have been discussed under question 54. The contribution of various institutions- Lal Bahadur Shastri National academy of Admin, Mussoorie, V.V.Giri national labour institute, voluntary organisations, social action groups representative of people, bureaucracy, the Panchayat have been discussed elaborately..

The question number 61 deals with gaps, omissions, ambiguities, and deficiencies in the framework of BLS (A) Act, chapter wise. Here the author has discussed the problems, constraints and challenges in elimination of BLS in India.

The author does not stop here and moves ahead by raising issues 'What needs to be done to prevent recurrence and reoccurrence of BLS?'

This Book deals with the current issue related to wage code Vis-a-Vis the provision of BLS (Abolition) Act under question 64, comprehensive and integrated law covering trafficking under question 65, constraints and limitation in conducting effective social investigation, effective solution to the long and costing human malady, critical awareness and consciousness.

The author has illustrated a real life event in question number 69 and summing up with question number 70 ending with the same poem of Rabindranath Tagore in ‘kadi and Komal’:

Into the mouth of these

Dumped, pale and meek

We have to infuse the language of the soul

Into the hearts of these

Weary and Worn, withered and forlorn

We have to minstrel the language of humanity.

Third section of the book is titled; ‘endnote’. In reality it is not the ‘endnotes’ like ‘footnotes’ in the research paper or book. It is in fact the chapter titled- in retrospect and prospect- which contains the summary and concluding remarks. The book has reference at the end- along with list which will help the readers and researchers in their research followed by abbreviations and index. The publisher Dinu Kaul Verma for Vitasta publishing Private limited 2/15 Ansari Road, Dariaganj, New Delhi, also deserve to be praised for the proper shape, composition of the material and meaningful getup.

Hence, this monograph is submitted before the reader researcher, academicians, policy maker for thorough reading of the book. The author Mr Lakshmi Dhār Mishra deserves thanks for his great contribution to the society. CNLU library is proud of having a collection of this book, BONDAGE: Human Rights & Development.

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