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Law And Public Policy

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PREFACE

The study of Law and Public policy requires a multidisciplinary approach which draws on various sources and perspectives to enable a clear understanding of the similarities and differences between the two principles. On the one hand, each of the issues need to be critically analyzed and informed recommendations need to be provided, which can profoundly contribute to the debate on whether the Government of the day should focus itself on law and legal issues or public policy and social needs.

Law and public policy are essential elements for the functioning of society. Although law on the one hand and public policy on the other have an organic and dynamic relationship, there is a fundamental difference between the two.

Law, on the one hand, is a set of rules and regulations that are enforced by the Government of the day on its people and are designed to protect the residents of a country, to ensure their safety, their rights and freedoms, and further ensure that the residents perform their duties towards each other and to the Government. The rules and regulations are enforced to maintain peace, order and stability in society. On the other hand, public policies are a set of decisions leading to actions taken by a Government and the administration for the time being in place to achieve a defined goal in relation to various social issues, healthcare, education, environment and social welfare. Public policies are often political in nature and are determined by the thinking of the Government in place. Laws once formulated are agnostic to the change in Government. Public policy, although are often designed to be in line with the law, may change depending upon the thinking of the Government in place and its views. Thus, when there is a change in Government, the incumbent Government may change public policy framed by the previous Government, but they generally will not normally tamper with the law.

It can be said that the laws provide a framework for regulating the behavior of individuals and institutions in a defined society, and public policy determines the decisions taken by the Governments to address the needs of the residents.

Public policy and law are also intertwined and interconnected. It can be stated that public policies are created to ensure that laws are properly implemented and followed, and are therefore practical, but at the same time address the needs of the residents of a country. On the other hand, laws are often influenced by public policy decisions. We can see that changes in

public policy have led to the creation of new laws or to the amendment of old ones. See for example the amendment in the law relating to LGBTQ+ rights, when public policy changed the law was amended.

It is difficult to determine what is more important, public policy or law, but it can be said that they work together to ensure a fair and just society for all its members. Without one element, either law or public policy, the other loses its efficacy. To this end, one element of the pair influences the other in a profound way.

Dr. Mohan Dewan
Principal
R.K. Dewan & Co.

MESSAGE FROM THE PRINCIPAL

Law and public policy are a dynamic, interdisciplinary area of study that has broad appeal to scholars, policymakers, and stakeholders. Public policy in law refers to the principles and guidelines that guide government decision-making and actions, particularly in relation to matters of public interest. Public policy is based on the common good and seeks to address issues affecting the welfare of the general public.

In recent years, governments of most developing countries have expressed renewed concern about improving the performance of their services in the view of the important and increasing role played by them in the strategies for national development. The rise in the expectation of the people has compelled them to adopt policies for alleviating poverty and improving the quality of life of all section of society. The basic needs of the people are needed to be met on an urgent basis. To realize these objectives, the Government of developing countries have to struggle to balance their economy, effect sustained improvement in their social system and increase the capacity of their political system.

The present conference is an effort to study the innate relationship of law and public policy. It undertakes to make a serious enquiry as to how the interface could be better utilized to usher in societal changes that are long overdue. For this purpose, the conference focused on series of themes and subthemes dedicated towards understanding the relationship between law and public policy.

This conference created a platform for law scholars, academician, students, and practitioners to come up with their perspectives in which law could be formed or reformed to respond very effectively to all the challenges.

We received the papers from all over the India and there were several participants from industry, academia and practicing professionals, who share their views at the conference. This book is a compilation of all these papers and will give holistic approach to the readers. It offers readers an opportunity to understand how various law and policies are playing their role in shaping our society.

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We are grateful to the management of Navrachana University for backing us up at all the right times. Our thanks are also due to Dr. Jaydeepkumar Mehta for helping us acquire the ISBN. Without his timely intervention the whole process would have collapsed. Our thanks are also due to the design team at Navrachana University who helped us immensely in the compilation chapters and working their magic through various software as a part of the publication process. The days leading to the publication were often complicated sometimes frustrating. It was during those days that we had the guidance of several people including Prof. Pratyush Shankar, Provost, Navrachana University, Dr. Hitesh Bhatia, Associate Dean, School of Business and Law and Dr. Sujatha Patil, Principal Law Program. School of Business and Law. We are indeed grateful for their guidance and support throughout those hard times. We would also like to thank Dr. Mohan Dewan who addressed the Conference as one of the keynote speakers and very kindly helping us in writing the preface of the Book. Finally, we would also like to express our gratitude to all the nameless forces that was directly or indirectly connected with the publication process.

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A CASE STUDY OF CONSTITUTIONAL ASPECTS OF INTELLECTUAL PROPERTY RIGHTS IN INDIA

Dr. Deevanshu Shrivastava*

ABSTRACT

In recent years, the intellectual property regime has undergone numerous improvements. The invention and innovation era of the 21st century coincides with the IP revolution. Ideas and knowledge can be turned into wealth for the benefit of society in this era. The enormous contrast that IPR has brought, which is fundamental as of late legitimizes what Victor Hugo said in discourse that "no power on earth can stop a thought whose opportunity has arrived." New intellectual property rights are being introduced in the fields of technology, medicine, investments, and literary works in this era. Innovation today is the response to every one of the inquiries. Not only does it help us stay in touch with people all over the world, but it also makesit possible to access an infinite amount of information with just a single fingertip. However, agreat deal of power comes with a lot of responsibility, which is exactly what the laws of todaylack. Law is the solution to all social and political problems, and IPR is the perfect answer.

Thus, due to the presence of these Articles, it became possible for the pre-constitutional Intellectual Property Rights laws to be in force in India and for the adoption of various international treaties on Intellectual Property laws by the Indian legislation. For example, the repealing of the 1911 Patent Act and the passage of the new Patent Act, in 1970 was due to Article 372 (1) of the Indian Constitution which authorizes the legislature or any competent body to repeal, alter or amend the pre-constitutional laws. Also, most of the present Intellectual Property laws are influenced by international laws, such as the present patent laws are the result of various international instruments like the Budapest treaty, TRIPS agreement, UN Convention on Biodiversity, and others.

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OVERVIEW

Being inextricably linked to the nature and operation of the constitution, intellectual property rights are the most integral part of the observance and enforcement of these laws. Using Indian constitutional rights as a framework for the balanced creation of copyrights, patents, trademarks and other intellectual property rights is how intellectual property rights, like other laws, were created. and began to protect these rights in the form of products, logos and designs,including human rights and intellectual property rights with few exceptions and limitations.

The following rights can be considered to affect the application of intellectual property rights: Freedom of expression, property, land and privacy are all defined as fundamental rights in the constitution. The question is whether intellectual property rights are protected by the Indian Ordinance as a fundamental right of India or something else.

The inclusion of intellectual property rights in intellectual property treaties and constitutions,as well as its definition and implementation within constitutional rights, demonstrate cooperation and harmonization. Intellectual property rights encourage creativity that cannot beachieved without financial incentives and rewards.

In a dispute, the rights under the Constitution of India should prevail, but the legitimate interests of the creator or owner should be protected. Intellectual property rights indirectly protect rights under the Constitution of India by interpreting and enforcing them.

intellectual property rights disagree on economic grounds despite the fact that rights under the Indian constitution are primarily social in nature. Despite this, they still manage to come to an agreement; In fact, achieving a balance between cultural, social and environmental dimensionsis part of a new paradigm called sustainable growth.

EMPOWERMENT UNDER THE CONSTITUTION OF INDIA

The Constitution of India also describes and specifies the powers of the parliament to enact provisions relating to intellectual property rights. Because it originates in the United States, it gives Congress the power to pass a law giving authors and inventors, for a limited time, exclusive rights to their works for the advancement of science and the useful arts.

- Writing under Article 19 (f) The first Article 19 (1) (f) of the Constitution of India listed the right to property as a constitutional right.

- To ensure that the State could not deprive a person without law, Article 31 and Article 19(1)(f) of the Constitution of India had to be read together.
- Scheduled property is compensated according to the law.
- List the minimum and maximum damages required.

REFLECTIONS ON THE CONSTITUTION OF INDIA

❖ Universal Declaration of Human Rights

Article 27 of the Universal Declaration of Human Rights says: "Everyone has the right to the protection of his moral and material interests" against all scientific agents, literary and artistic work.

The General Declaration is a resolution adopted by the UN General Assembly in 1948. It does not have clear requirements to fill out the declaration, so it does not bind member states.

However, the International Covenant on Economic, Social and Cultural Rights, ratified in 1966, binds the member states of the United Nations. Article 15 of the International Covenant on Economic, Social and Cultural Rights repeats theclause of the Universal Declaration mentioned before. Just as the International Covenant on Civil and Political Rights of 1966 recognizes the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, so do intellectual property rights.

Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms The right to property is protected by one of the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Article 1 1 of the Protocol has three rules:

- The first is the right to protect one's property. This is found in the first sentence of the first paragraph of Protocol 1. 1 The Declaration says: "Every natural or legal person hasthe right to the peaceful enjoyment of his property."
- Taking property is covered by the second point. The second sentence of the first paragraph of Protocol No. 1 reads: 1: "According to the Convention, no one can be deprived of his property, except for the public interest and in accordance with the law and the general principles of international law.
- The third law deals with the regulation of land use "Constitutionalism" is already

happening at the EU level Through the Charter of Fundamental Rights of the EU, whichis the basis of the new "constitutional" power, duties such as taxes can. somehow be linked to assets.

This explains that obligations related to real estates, such as taxes, can be attached to interest. Freedom of expression and the protection of intellectual property rights are basic assumptions of society. As a result of the constitutional amendment process, it is reasonable to expect that stories about intellectual property rights will be told and interpreted differently.

The purpose of the constitutional framework is to protect human dignity from inviolability andto ensure the understanding of intellectual property rights. In addition, the framework would help ensure full recognition of the fundamental principles of intellectual property rights. It is now more difficult for the European Union to implement legislative changes.

- **Intellectual property rights under the Constitution**

Common law can only be used to deprive certain people of property and no law can authorize arbitrary deprivation of property. Expropriation of property for public purposes or public interests is permitted by general law;and compensation, the size, payment date and method of payment have been agreed upon bythe parties or the court.

In relation to that section:

(a) Agrarian reform and ensuring equal access to all natural resources in South Africa is in the public interest, and

(b) ownership is not limited to land.

Reading the episode, it becomes abundantly clear that its main focus is on immovable property (land), especially its exploitation or expropriation.

The addition of paragraph

(b) as a general requirement appears to have been a last minute addition.

The Constitutional Court undoubtedly considered this provision when it declared that Article25 covers intellectual property rights. As a result, the protection of the section of intellectual property is very limited and consists mainly of stopping the removal of existing assets. The state is not obliged to continue to supportthe possible growth of intellectual property rights. The current extent of protection is very unsatisfactory.

It is based on the claim that the rights of intellectual property are protected by a clause of the legislation and stipulated in the Constitution.

The Constitutional Court ruled in Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Institute for Freedom of Expression Amicus Curiae)[1] that freedom of expression and intellectual property rights are equal. protection according to § 16 (1) of the Constitution.

According to Article 25 of the Constitution, intellectual property rights are categorized underthe term "real estate". It is important to note that this acceptance is supported by the decision of the Constitutional Court, that the decision of the Supreme Court was made and in this case there was an appeal against this decision.

- **Trademarks are tangible or intangible property.**

It is not known whether the asset is intangible or not. Our law has always accepted the immaterial as a class of goods, despite theoretical objections. The dictation was not contested, so the Constitutional Court accepts it. Thus, the legal argument was considered that trademarks and other protected innovation freedoms like copyright are property within the meaning of Article 25 of the Constitution of India. Therefore, some people argued that the owner of a registered trademark would violate Article 25 of the Constitution of India and the law would be unconstitutional if used in an illegal manner.

Following in the footsteps of both the Supreme Court and the Constitutional Court, the LaughIt Off Court held that the relevant provisions of the Copyright Act should be consistent with the Constitution of India and should not unduly infringe on the accused's right to free speech and expression. Copyright law needs to be changed to reduce the damage caused to freedom of speech. In the Laugh It Off case, the Constitutional Court used this definition to state that "trademark law was viewed and applied through a constitutional prism."

- **Gidan's case**

The court accepted the concepts proposed in Laugh it Off regarding contractual rights in

[1] 2006 (1) SA 144 (CC)

trademarks as property under the Constitution of India in National Soccer League Vs. Gidani (Private) Ltd.[2] Gidani claimed that he violated the terms of the Bill of Rights of the right to receive or broadcast content using the copyrighted works (football tables) that are the subject of the suit without permission. In Gidan, the court found that the defendant waived constitutional protection. The actions of the accused cannot be used as a defense against the freedom of speech guaranteed by the Constitution. The commercial use of the intellectual property rights of another person for commercial purposes cannot be interpreted as public education accordingto § 16 (1) point a or b of the Constitution.

As a result of this amendment, the right to property is no longer a fundamental right, but a constitutional right. Legislation that violates the right to property guaranteed by the Indian Constitution can now only be challenged in the High Courts and not specifically the Supreme Court. The regulations of the Parliament did not oblige the state to pay compensation to the people who bought the land due to the removal of section 31.

It remained legal especially in light of the Supreme Court judgment and the Maneka Gandhi case. In other words, deprivation of property without compensation said that every provision of the constitution must be interpreted to be fair, reasonable and logical.

Therefore, any law that takes someone's property must do so in a just manner. Giving a person adequate compensation would be the only appropriate way to take away their property. However, this topic is not entirely relevant for this purpose. The only thing to note is that the Constitution of India prohibits anyone from taking their property away from them without the permission of the law. Since the states are obliged to take care of the poor and marginalized sections of the society through appropriate welfare measures, the requested right has its own meaning in today's state law.

All legal rights are property rights in the broadest sense. In turn, personal legal rights can be divided into property rights and property rights. A person's property rights are regulated by the Obligations Act.

- **Patent rights:**

According to general law, property includes the exclusive right to an invention. However,

[2] [2014] 2 All SA 461 (GJ)

because the common law system was ineffective, the legislature intervened and launched its own system of rights protection in the form of patent rights. Rights granted in Chapter VIII, etc. The provisions of the Patent Act 1970 are similar to freedom, liberty and privilege to use inventions. The United States Supreme Court has classified patent law as a public idea, which is a propertyright in the broadest sense. This is because everything comes from regulation.

❖ **Greene's Energy Group, LLC v. Oil States Energy Services, LLC[3]:**

- Inter parte summary judgment does not violate Article III or the Seventh Amendment in thiscase.
- Judge Thomas explained that the granting of a patent entails a public right.
- The doctrine of public rights applies to the study of intellectual property rights, which coversthe same subject as the granting of patents.
- The Indian Constitution does not prevent the Patent Office from pursuing post-granteligibility issues outside of an Article III court.
- The court concluded that the constitutionality of intellectual property rights was the sole focus of its decision. "The oil states do not challenge the retroactive application of inter partesreview even though that process was not in place at the time the patent was issued," the court noted, for example. The patents originate from the America Invents Act (AIA), which will almost certainly lead to ongoing constitutional challenges.
- Considering the issues raised during oral argument by the expanded panel, the court acknowledged that it had not determined whether the IP proceeding raised due process.
- "Inter partes revision falls directly within the public rights doctrine", according to the conclusion of the majority.
- Judge Thomas states that "inter partes review is simply a reexamination of the award" over which "Congress permissively abandoned the PTO jurisdiction" and that "the decision to granta patent is a question of public rights, especially the granting of a public franchise."

[3] 2000 Led 2d 671

- The precedents applying the doctrine of public rights "were not entirely clear" and the Courtdid not "clarify" the distinction between public and private rights.
- Oil states did not specify or endorse the term "franchise," although they cited numerous Supreme Court cases that called patents public franchises.
- Seventh Amendment right to jury trial barred by Court's Article III decision.

The two main definitions to consider are:

- Real property
- Legal authority

"Property" as defined in section 300A. This appears to be sufficient facts to support the "property" argument. The question of whether"intellectual property" such as "clinical trial data" falls within the definition of "property" in section 300A is straightforward. The judgment of the Supreme Court in Entertainment NetworkIndia Ltd. (ENIL) v. Super Cassette Industries Ltd. (SCIL)[4].

Court held on a related party that: Constitution of India to be considered when considering copyright management addition to human rights of property. Property right no longer constitutional under privilege of judgment. It has to exert more and more pressure. It must fulfill the requirements defined in § 300 A of the Constitution, which stipulates that it must be fully or partially acquired according to public interests and for equal consideration.

❖ **"Authority of law" as defined in section 300A**

In section 300A, the expression "law" refers only to a statute or a mandatory rule or regulation. That the Supreme Court agrees that "copyright" falls within the scope of Article 300A indicates that even "clinical trial data" obtained after extensive testing probably falls under Article 300A "property." Under Article 300A, the term "policy" does not include national administrative currencies. Inevitably, an act of the legislature must be the source of a "rule" that deprives an individual of property. The next question is whether the Drugs and Cosmetics Rules, 1945 are considered to be "regulations" within the meaning of Article 300A or whether the statute deems them irrelevant.

[4] CIVIL APPEAL NO. 5114 OF 2005

Do the "relevant provisions" of the DandC Rules, 1945 come within the definition of "law" in Article 300A? The contention that laws and regulations fall within the definition of "law" in Article 300A is well supported. For example, for the purposes of section 300A, an order made under the Land Acquisition Act is deemed to be an "Act" because it is carried out under that Act. Since, in my view, such delegated legislation does not come within the purview of the Act, the "relevant provisions" of the DandC Rules, 195, is not a "rule".

The Seven Judges Bench of the Supreme Court does not require delegation of an important legislative purpose which shows that it cannot delegate a political matter, so that the delegated legislation is relevant to the Delhi Act, 1912. Delegated actions are relevant. Public good can only be realized through action prescribed by law, if one decides to obtain useful information through expensive scientific research.

The government would also have difficulties justifying these laws on the basis of Article 300Aof the Constitution. However, I would like to point out that Parliament can also limit the rightsunder Article 300A and since the inventor has been properly compensated for sharing it, it would also make perfect sense for Parliament to pass an amendment specifically allowing thegeneric trade. rely on innovative commercial clinical data.

- **Rights of Patent Owner**

On the other hand, the right of patent owner is also protected under Article 14 and citizens holding patent rights are further protected by Article 19 (1) (g) of the Constitution of India and so are others. infringement of the patent owner's rights was prohibited. acceptable restrictions under Article 19 (6).

- **Right of the Author and the copyright owner**

In State of Maharashtra v. Prabhakar Pandurang[5], the Supreme Court said that a detainee in custody also has the right to write a book and the right to publish a book and any prohibition without legal sanction would violate the personal right enshrined in Article 21 of the Constitutional right freedom.

[5] AIR 1966 SC 424

❖ **Right to know and right to information against compulsory license.**

Right to know and right to information is an integral part of freedom of speech and expression and right to know has now been recognized as a fundamental right for which the citizens of a free country like India should strive for a wider horizon. India should aspire to the broader horizon of Article 21. [6] participatory democracy component. The RTI paves the way for compulsory licensing by citizens of the country when copyrighted work is not available in India[7].

❖ **Protection of Plant Varieties and Fundamental Rights**

Article 43 of the Constitution of India states that the State shall implement appropriate legislation to ensure better working conditions for all agricultural workers to ensure a decent standard of living. Based on these directives, the Indian states enacted a series of laws to organize agriculture according to modern and scientific principles and initiatives to preserve and improve breeds, just as Sue generated laws for the protection of plant varieties and the protection of farmers' rights. In addition, Article 19(1)(g) also provides for the right to agriculture as a profession and the protection of one's rights. Protection of plant varieties hasbeen granted sue generis under Part IV of the Constitution of India.

❖ **Geographical Indications and Fundamental Rights**

The Geographical Indications for Goods (Registration and Protection Act) Act 1999 also protects business, trade and products based on geographical origin, such as trademark protection. Geographical indications also allow consumers to distinguish goods from one another by allowing customers to assume positive trust in the standard of goods based on geographical origin, listed as a right to know in Article 19(1)(a), and consequently the producer of goods. or products based on geographical origin protected by Article 19(1)(g), and GI violators were restricted under Article 19(6) of the Constitution of India.

❖ **Traditional Knowledge of the Constitution**

The Constitution of India obliges[8] the State to promote the economic interests of the Scheduled

[6] Reliance Petrochemicals Ltd vs Proprietors Of Indian Express 1988 SCR Supp. (3) 212
[7] Section 31 of Copyright Act, 1957
[8] Article 46 of the Indian Constitution

Tribes and further obliges the State to protect the tribal peoples against social influences.

injustice and any kind of exploitation. To protect the economic use of this traditional knowledge and to protect the flora and fauna and all other natural resources from exploitation, the Biodiversity Law was passed. The traditional knowledge of indigenous peoples was also protected by the Biodiversity Law where their interests were. protected by the Constitutionof India.

CONCLUSION

The innovative securing of the country's growth cycle and emerging economy requiresprotecting intellectual property rights and trade secrets against piracy. The challenge for the developed world is to figure out how to protect valuable intellectual property rights from ruthless abuse and global theft while preserving their use. Intellectual property rights in their basic economic state cannot promote innovation when Indian laws and constitution areviolated.

Although there is no express provision for intellectual property rights in the Constitution of India, the Constitution of India implicitly provides protection to property, including intellectual property rights, and also protects fundamental rights under Part III and IV of the Constitution of India. According to India's international agreements and TRIPS obligations. In the coming years, the "constitutionality" of intellectual property rights will be fully realized, and the process itself will influence the practice of both the courts and the parliament itself, especiallyin terms of how the existing interpretations of the rules and principles of intellectual property.property rights are interpreted.

A CRITICAL ANALYSIS OF CHILD RIGHTS IN INDIA IN MATTERS OF CUSTODIANSHIP AND SEXUAL OFFENCES

Vrinda Pradeep & Lorah Susan Paul*

ABSTRACT

Our society has long since struggled with ensuring human rights to children. Many children are victims of wrongs; child marriage, sexual abuse, and child labour being some of the most prominent ones. The very people entrusted with the protection and well-being of children often blatantly and grossly violate child rights. Every child has the right to protection and care. For such a purpose, the United Nations Convention on the Rights of the Child (UNCRC) 1989 was constructed. In India, child rights are enforced through multiple legislations such as the Indian Penal Code 1860, The Guardians and Wards Act 1890, Protection of Children from Sexual Offenders Act 2012, and even judgments which have included children under the ambit of Articles 14, 21 and 23 of the Indian Constitution. Legal systems can provide solutions, but cannot solve a social problem without a simultaneous change in societal mannerisms. Society needs to be aware of and awake to the prevailing flagrant violations of the rights of its children. Naturally, there are difficulties in achieving the required change to enforce legal institutions, foremost of which is the position of minors as 'children' which often renders their voice irrelevant. The conservative approach of society remains, with respect to the human rights of children, a challenge. This paper analyses the provisions of certain acts and judgments which have laid down the rights available to a child. Once the barriers faced in the socio-legal spectrum are overcome, every minor should have access to education, health, knowledge and other resources to achieve growth and development to become responsible individuals.

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INTRODUCTION

"The only international language in the world is a child's cry."- Eglantyne Jebb

According to Article 1 of the United Nations Convention on the Rights of the Child, 1989[9] (hereafter referred to as UNCRC 1989), a child is any human being below the age of eighteen, unless, under the particular law applicable to the child, majority is attained earlier. India is a signatory to this convention, which laid the foundation for the National Commission for the Protection of Child Rights Act, 2005.[10] This paper refers to 'child' in the same sense as UNCRC 1989, except when otherwise specified. Child rights in India began developing and have many facets like child marriage prohibition, child labour prohibition, protection from sexual offences, and guardianship. This paper discusses the issues with the legal system of child rights with regard to custodianship and sexual offences in India. The Guardians and Ward Act, 1890[11] (hereafter referred to as GWA), the Protection of Children from Sexual Offences Act, 2012[12] (hereafter referred to as POCSO), and the Indian Penal Code, 1860[13] (hereafter referred to as IPC) are analysed in the research.

'Guardianship' and 'Custody' are terms that are often used interchangeably. But in reality, they do not mean the same. Guardianship refers to a bundle of rights and powers that an adult has in relation to the person and property of a minor, while custody is a narrower concept relating to the upbringing and day-to-day care and control of the minor.[14] The position of a guardian is more onerous than that of a mere custodian.[15] The term 'custody' is not defined in any Indian family law, whether secular or religious[16] whereas the term 'guardian' is defined in the GWA. Apart from the GWA Act, guardianship and custodianship are guided by various religious personal laws. However, presently cases of custodianship are decided according to the 'welfare of the minor', overriding personal laws. As a set of provisions to decide the 'welfare of the minor' are not prescribed currently, courts are awarded with wide discretionary powers which is a cause of great concern. The enactment of POCSO was, on one hand, celebrated and on the other, abused. The Act deals with child sexual abuse. The UNCRC 1989[17] kickstarted the cycle

[9] Convention on the Rights of the Child, art.1, Nov. 20, 1989 (entered into force Sep. 02, 1990).
[10] Commission for Protection of Child Rights Act, 2005, No. 4, Acts of Parliament, 2005 (India).
[11] The Guardians and Wards Act, 1890, No. 8, Acts of Parliament, 1890 (India).
[12] Protection of Children from Sexual Offenders Act, 2012, No. 32, Acts of Parliament, 2012 (India).
[13] Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860.
[14] *Reforms in Guardianship & Custody Laws in India*, Report No. 257, Laws Commission of India, May 2015.
[15] Ramesh Tukaram Gadhwe v. Sumanbai Wamanrao Gondkar, 2008 (1) BomCR 634.
[16] *Supra* note 10.
[17] Convention on the Rights of the Child, art.34, Nov. 20, 1989 (entered into force Sep. 02, 1990).

that recognised sexual offences against children. The POCSO Act was a step forward in the protection of children from sexual abuse after the Commission for Protection of Child Rights, 2005[18] was enacted. While the Act was detailed and well-intended, it, like IPC had major lacunae, allowing its abuse. These include the illogical age of consent, violation of the rights of a minor caused by the same, and lack of definitions for the words 'child' and 'minor'. The child's rights to expression of desires and self-determination through the pursuance of sexual activity needs realisation and recognition. This paper aims to discuss these existing 'holes' in the Indian legal system for child care and protection in the areas of custodianship and sexual abuse and provide solutions for the same. This, the authors seek to do by analysing the legislations GWA, POCSO, and IPC and also specific cases. Relevant parts of other Acts such as the Penal Code of Norway, the UNCRC, the Constitution of India and such have also been looked into.

RESEARCH METHODOLOGY

This paper seeks to examine the laws in India relating to child rights concerning matters of custodianship and sexual offences committed against children through a doctrinal approach. The paper analyzes The Guardianship and Wards Act, 1890, the Indian Penal Code, 1860, and the Protection of Children from Sexual Offences Act, 2012 and the various interpretations thereof. Relevant sections of the Penal Code of Norway, 1902 has also been cited. The paper refers to the Indian Constitution, legal reports, Commissions, several high court and supreme court cases, international conventions (UNCRC 1989), comments by bodies of the UN, and several secondary materials like journal articles related to the concerned aspects of child rights to arrive at the conclusion.

LITERATURE REVIEW

1. Custody and Guardianship of Children in India by Asha Bajpai[19]

In the article, the author begins by introducing The Guardians and Wards Act (GWA) of 1890 as the primary legislation along with various other personal laws that directed guardianship and custodianship in ancient times, while also distinguishing between the two terms. The author

[18] Commission for Protection of Child Rights Act, 2005, No. 4, Acts of Parliament, 2005 (India).
[19] Asha Bajpai, *Custody and Guardianship of Children in India*, Vol. 39 FAMILY LAW QUARTERLY 441, (2005).

goes on to briefly explain the present legal framework on the topic which includes The Guardians and Wards Act, 1890, The Hindu Minority and Guardianship Act (HMGA), 1956, and marriage and divorce laws of Hindus, Muslims, Christians, and Parsis. The article elucidates the role of family courts and the 'welfare of minor' principle that is applied in cases of custodianship. The author then states that there are no guidelines or standards for the principle and goes on to list some of the parameters that the court has taken into account like the financial well-being of parents, child sexual abuse by either parent, working mothers, or remarried parents to name a few. The article concludes by stating the problems associated with the 'welfare of minor' principle and suggests solutions. The article perfectly condenses all the relevant information regarding custody and guardianship laws in the country and proves a helpful tool for further extensive research on the topic. The case laws mentioned in the article provide a more comprehensive understanding of the matter at hand. The article clearly highlights all the existing problems with the custody and guardianship of minors in India but does not provide solutions for all of them; the only solution provided being the training of counsellors to determine the best interests of the children. The author while mentioning that there is no set standard or guideline for judging the best interest of the child shies away from coming up with a standard for the same. The article mentions cases where a certain parameter was used, like the economic capacity of both parents but it does not substantiate why that parameter was used in the particular case and not in another case of the same standing, further necessitating the need for proper guidelines. The consequential assumption of the arbitrary discretionary power in the hands of the judges which is the main focus of this paper is not a topic that is raised when the issues regarding the 'welfare of minor' principle are discussed in the article.

2. Implementing the Rights of the Child: Six Reasons why the Human Rights of Children Remain a Constant Challenge by Paulo David[20]

The article highlights the issues regarding the United Nations Convention on the Rights of the Child (UNCRC), a decade after it was passed in 1989. The author regards these issues as the prime reasons why the development of child rights suffers a huge block worldwide. The article states six reasons why child rights still remain a challenge, even after a universal convention was adopted for the same. The article perfectly encapsulates all the issues regarding the

[20] Paulo David, *Implementing the Rights of the Child: Six Reasons why the Human Rights of Children Remain a Constant Challenge*, Vol. 48 INTERNATIONAL REVIEW OF EDUCATION 259, (2002).

convention like the over-indulgence in the welfare-based approach over the rights-based approach, practice of a multidisciplinary approach, the overlooking of civil rights of the child, traditional conceptions of child rights, hysterical debates over the convention with respect to its negative implications, and the reservations or declarations made by states while ratifying the Convention. These issues are significant to address in order to improve the welfare of the child. The article questions the legal enforcement of the UNCRC 1989 but does not take into account that many of the child rights legislations passed in countries are in consonance with the treaty. While the article has clearly highlighted the issues arising from the adoption of the international treaty, it does not put forward any suggestion to either replace the legislation or introduce new provisions in place of the existing one. This paper uses the article for reference only and does not address the issues of child rights in the international forum.

CUSTODIANSHIP

The judiciary does not provide any information regarding the factors or reasons that they consider for awarding custody. The orders just mention to whom custody will be awarded in a particular case. Usually, we can derive these factors or reasons from the decrees passed. The most common parameters are — physical and mental condition of the child and both the parents, the needs of the child regarding other important people in their life like friends or extended family, financial standing of each parent, behavioural history and more. Courts usually employ the positive test i.e., custody will be awarded because the person is capable of providing care and comfort to the child; not a negative test which involves proving that they are unfit or incapable of raising the child.[21] Considering the fact that there are no established standards to judge the welfare principle in a particular case, judges are vested with wide discretionary powers. While this has helped in relaxing the rigidity of statute law and uprooted the patriarchal notion of the 'natural guardian' being the father; it has had its share of problems. Certain issues that are considered paramount to the case may be brushed aside if the judge feels that it is improbable. Allegations of sexual abuse by female children against their fathers or any male relatives, physical or mental abuse inflicted by one parent on another or on the child, and substance abuse are all issues that could be disregarded if deemed improbable. The absence of a uniform set of guidelines poses the risk of wide and varied interpretations by courts that

[21] *Nil Ratan Kundu* v. *Abhijit Kundu*, (2008) 9 SCC 413 (India).

are dictated by their own personal ideas or notions about parenthood. In many cases, the more financially stable parent is given custody as economic standing is regarded as in consonance with the 'welfare of the minor', disregarding various other essential factors. Second marriages are usually considered to be helpful in gaining custody as many judges believe that it is more suitable than single parenting. Mothers who are homemakers get the ruling in their favour as they have more time on their hands to look after the child. A mother is considered a 'good mother' i.e., meets the requirements of the judge's vision of an ideal mother; the chances of gaining custody are high.

In order to curb the arbitrary discretionary power in the hands of the judges, the authors have devised a set of parameters to determine the welfare of the minor. Some parameters are more important than others and the hierarchy is clearly denoted below.

1. Voice/Wishes of the Child

The wishes of the child to stay with the mother or the father should be of paramount consideration in a child custody case, but is often disregarded as children do not have legal representation in divorce proceedings (divorce and custody proceeding often happen concurrently). In order to determine the best interest of the child, the voice of the child is to be heard. The UNCRC 1989[22] also supports this claim. This parameter does have its exceptions as the mental and physical condition of the child is to be taken into consideration while determining custody. Also, in the case of younger children or disabled children who cannot express their opinions, the necessity of the parent in the child's life is to be taken as the parameter. In most cases the younger child requires the mother and a disabled child requires the economically better off parent. This parameter is closely linked to the parameter concerning the relationship of the parent with the child as a healthy and favorable relationship often times coincides with the wishes of the child.

2. Relationship between the child and the parent

A good relationship with parents filled with love and care is essential for a child's overall development. So, it goes without saying, that the child should be handed to the parent who has a better relationship with the child and is considered to provide utmost unconditional love and

[22] Convention on the Rights of the Child, art.12, Nov. 20, 1989 (entered into force Sep. 02, 1990).

care. This parameter is essential in determining the best interest of the child. The parameter also shuts down many patriarchal prejudices like the remarriage of a parent, natural guardianship of the father and working mothers as it deems the relationship of the parent with the child above all. Usually, the love and care of a parent over a child can be determined through the amount of time spend with them despite busy schedules, the awareness of important events in the child's life and many other factors. In a particular case, the Supreme Court questioned the love and care of the father when he had failed in complying with the maintenance award that the court had awarded to his wife and child and held that this was proof enough not to hand custody.[23] This parameter ranks above the economic well-being of the parent and is closely related to the parameter concerning the behavior of the parent.

3. Behavioral history of the parent

If it is found out that a parent is abusive — mentally, physically, or sexually or has an abusive past, they will be devoid of the minor's custody. The abuse may not only be directed towards the child for this parameter to come into consideration; even abuse inflicted on the other parent i.e., domestic abuse can render them out of the child's custody. Addiction of substances like alcohol and drugs are also taken to be a part of the behavioral history of the parent and proves them incapable of providing care to the minor. This provision exists to ensure that the child is in the care of a person who is behaviorally and mentally capable of raising the child and not just economically well-off. The reason this parameter does not rank above the other two is because the behavioral history is to be taken into consideration, only if the divorce or custody proceedings spurred due to the abusive behavior of a parent. This parameter is very important when determining the custody of the child as the consequence suffered through inept decisions in this area can lead to long-lasting trauma and pain to the child.

4. Economic well-being of the parent

This parameter provides that the child is handed over to the parent with better financial capacity so that the child is able to live a life of comfort and luxury. Handing over custody to the better-off parent has been universally accepted and a popular trend in many judgments over the years.[24] Usually, in the case of older kids, ruling in favor of the financially superior parent

[23] Mohd. Ayub Khan v. Saira Begum, 2001 SCC OnLine Chh 19.
[24] Rosy Jacob v. Jacob A Chakramakkak, AIR 1973 SC 2090; Bhagya Lakshmi v. Narayan Rao, AIR 1983 Mad 9.

is taken to be in the best interest of the child. This parameter is also helpful in bashing down the patriarchal notion of considering working mothers as unfit as they cannot devote their 'full-time' towards the care of the child; mothers being employed with a stable income gives them a fair chance of custody under this parameter. While this parameter is important; it is not essential. The wishes of the child, the relationship between the child and the parent, behavioral history of the parent are all factors that override material wealth as they are more consequential and deterrent to the child's welfare which is the reason why it is not higher up in the list of parameters.

While it is not possible to meet all the parameters in every case, if the parameters higher up in the order are met even when the lower ones are not, we can still conclude that it is in the best interest of the child. Regardless of the law or principle applied, a custody case is normally a bitter battle between both parents who throw spiteful accusations at each other, where eventually the child is made to choose between the two. Usually, the eventual agreement about custody reached is a reflection of the parent's interests, rather than the children.[25] The children are not true participants in the child custody process; they are the victims. Though the court does make ample efforts to give access to the child to both parents in view of the better development of the child; it is usually in vain as the custody battle itself drains them out, because, in the sad battle between two adults, the child suffers the most.[26]

SEXUAL "OFFENCES"

In India, IPC and POCSO protect children from sexual offences, POCSO being the primary Act. These Acts do not, however, differentiate between an 'age of majority' and 'age of consent' both being 18 years.[27] Therefore, any consent given by a minor would be irrelevant and invalid. However, a minor under 18 can be said to have the required mental maturity to understand the nature of sexual acts and consequences thereof.[28] The level of knowledge and understanding needed to make certain decisions need not be the same as the level required for certain other activities. While it is true that minors are not as capable as adults in making certain decisions (relating to finance, housing, voting), minors are capable of making a decision related

[25] Tejaswi Pandit, *Custody of Children*, SCC Online Blog (November 25, 2019), https://www.scconline.com/blog/post/2019/11/25/custody-of-children/#_ftn1.

[26] Aparna Bhat, SUPREME COURT ON CHILDREN 81 (1st ed., 2005).

[27] Protection of Children from Sexual Offenders Act, 2012, §2, No. 32, Acts of Parliament, 2012 (India).

[28] Sabari v. Inspector of Police, 2019 SCC OnLine Mad 18850 (para 27). *Contra* Laurence Steinberg et al., *Are adolescents less mature than adults?: Minors' access to abortion, the juvenile death penalty, and the alleged APA "flip-flop.,"* 64 AM. PSYCHOL. 583 (2009), http://doi.apa.org/getdoi.cfm?doi=10.1037/a0014763 (last visited Mar 6, 2023).

to their bodies as sensibly as an adult. This is especially true in the present era, where health guides and counselling are more available and accessible to the youth. Many countries have this distinction in the age of consent and age of majority, such as Norway.[29] Even in India, until the POCSO Act came into force, the existing laws recognised age of consent to be 16 years.

The Indian Legislature must take into consideration the psychological factor, and also the societal and the legal aspects when making or amending laws. In a detailed investigation carried out by The Hindu in 2013,[30] it was found that the families of the minor girl file a case of rape, if they do not approve of a sexual relationship, though consensual, between minors or minor and young adult. Around 189 of 600 rape cases were between consenting partners, and 174 of these were filed by the girl's family because they did not approve of the relationship between the two. In such cases, the boy is also often a minor, but since the consent of the girl becomes irrelevant, and since there is greater emphasis on the protection of females, the minor boy is made to undergo trial. Here, the lack of provisions for allowing consensual sexual relationship of minors, has a double impact in that it strips the girl of her sexuality, and the boy of his fundamental right to equality and against discrimination.[31]

Besides, the reality of the situation, as highlighted previously, is that minors do engage in sexual relationships despite there being a legal provision prohibiting the same. When there is a change in societal systems, there must be a corresponding change in the legal system as well. The judiciary— judges from High Courts and even the Supreme Court— have made recommendations to lower the age of consent from 18 to 16. Chief Justice of India D. Y. Chandrachud,[32] Justice Jasmeet Singh of Delhi High Court,[33] Justices Suraj Govindaraj and G. Basavaraja of Karnataka High Court,[34] **Justice Anand Venkatesh**[35] **and** former Justice **V**

[29] Norway | Factsheets | Youthpolicy.org, https://www.youthpolicy.org/factsheets/country/norway/ (last visited Jan 30, 2023).
[30] The many shades of rape cases in Delhi - The Hindu, https://www.thehindu.com/news/cities/Delhi/the-many-shades-of-rape-cases-in-delhi/article6262476.ece (last visited Jan 22, 2023).
[31] INDIA CONST. arts. 14, 15.
[32] Jagriti Chandra, *Parliament must examine age of consent issue, says Chief Justice of India*, THE HINDU, Dec. 10, 2022, https://www.thehindu.com/news/national/parliament-must-examine-age-of-consent-issue-says-chief-justice-of-india/article66248216.ece (last visited Jan 15, 2023).
[33] Ajay Kumar v. State (NCT of Delhi), (2022) 6 HCC (Del) 530.
[34] criminal appeal 515.2021.pdf., available at https://karnatakajudiciary.kar.nic.in/karjud/case_details_hck.php?params=WEhGUHdETHJBZTB4d3RrdnQ5YXN5WVFkVDNneFV1VGhZZjBUcnhrUUlYbDJ0YWFoVkcwQlIySno3Rmo0QlN6ZnNGa3BZODhDU0NEaWFBNldmRWJ0cnc9PQ==
[35] Vijayalakshmi v. State, 2021 SCC OnLine Mad 317. *See also Act of mutual affection between young boyfriend and girlfriend cannot equate with 'Sexual Assault' under POCSO Act; Meghalaya High quashes FIR*, SCC BLOG (2022), https://www.scconline.com/blog/post/2022/11/03/act-of-mutual-affection-between-young-boyfriend-and-girlfriend-cannot-equate-with-sexual-assault-under-pocso-act-meghalaya-high-quashes-fir/ (last visited Mar

Parthiban[36] **of Madras High Court,** opined so in lieu of the substantial number of 'rape' cases where minors or young adults had consensual sex.

Justice V Parthiban recommended that the definition of 'child' in Section 2(d) of the POCSO Act should be amended to be 16 years rather than 18.[37] This paper proposes that there must be a clear distinction of the terms 'child' and 'minor' for specifying age of consent and age of majority respectively.

'Child' must be defined under Section 2(d) of POCSO Act as a person under 16 years of age, and 'Minor' must be defined under the same as a person under 18 years. This specification is necessary to ensure that as a minor, one is able to exercise their full rights in terms of sexual identification and bodily self-determination, but as a child, is also protected from exploitation thus enabling them to grow by developing the maturity and analytical thinking needed to make responsible choices in terms of 'adult decisions' like finance and voting. In the Indian legal sphere, Age of Consent and Age of Majority can be clearly distinguished following examples set by other countries which have such a contrast. One of such nations is Norway, wherein difference in age of consent and age of majority can be observed in the Norwegian law.

Norway is considered to be well-advanced as a nation in terms of child rights, considering its consistent high ranks in global indices. Norway ranked first on the Child Flourishing Index conducted by WHO-UNICEF-Lancet Commission in 2020.[38] It ranked tenth on the KidsRights Index 2022 conducted by international children's rights aid organisation KidsRights Foundation with the Erasmus University Rotterdam.[39] The country also showed excellent standing in the State of the World's Children 2021 report.[40]

The Penal Code of Norway defines the age of consent to be 16 years,[41] as against 18 in India. Section 304 criminalises sexual acts done by any person with a child under 16 years, providing for imprisonment up to 3 years of such person. However, the age of majority in Norway is 18,

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3, 2023).

[36] Sabari v. Inspector of Police, 2019 SCC OnLine Mad 18850.

[37] *Id.*

[38] Helen Clark et al., *A future for the world's children? A WHO–UNICEF–Lancet Commission*, 395 THE LANCET 605 (2020), https://linkinghub.elsevier.com/retrieve/pii/S0140673619325401 (last visited Feb 3, 2023).

[39] Prof. Karin Arts, Prof. Dinand Webbink, Chandrima Chattopadhyay, KidsRights Index 2022 Report, https://files.kidsrights.org/wp-content/uploads/2022/10/18212510/KidsRights-Index-2022-Report.pdf (last visited Jan 30, 2023).

[40] ON MY MIND: PROMOTING, PROTECTING AND CARING FOR CHILDREN'S MENTAL HEALTH, (UNICEF ed., 2021).

[41] The Penal Code, 1902, §304, No. 10, Acts of Parliament, 1902 (Norway).

since the UNCRC 1989 applies over Norwegian legislations on this matter.[42] The same Penal Code, although not directly, protects children under 18 in various provisions, considering that they are minors who have not gained enough experience or knowledge to completely understand the consequences of their actions, and that they are still in the developing phase where they too require protection. Such protective measures have been encompassed in the Code, Section 33 (limited imprisonment for 'minor'), Section 40 (prohibits preventive detention of a 'minor'), Section 78 (mitigating factors), Section 103 (war crimes against 'minor'), and Section 258 (aggravated human trafficking involving 'minor') being some of many such provisions. As such, the Penal Code within itself has a distinction between Age of Majority and Age of Consent. Using Norway's laws as a template, Indian legislations, particularly IPC and POCSO, should be amended to include definitions of child and minor as similar but different — one being for the protection of all children to ensure their healthy growth and development into mature adults, and the other being for the fulfilment of children's rights to sexual development.

Even the United Nations Human Rights Office of the High Commissioner, in General Comment No. 20 (2016)[43] on implementation of the rights of the child during adolescence, has stated that it is important to recognise and respect the dignity and agency of adolescents and ensure that children take active participation in their own lives. In the same comment, the Committee for the Rights of the Child (CRC) asked that "states should avoid criminalizing adolescents of similar ages for factually consensual and non-exploitative sexual activity."[44] India, being a member of the international community has a responsibility and duty to ensure that the child's right to expression of desires and right to self-determination through the reasonable pursuance of sexual activity are not violated. As such, the age of consent should be lowered to make certain that the opinion of a minor carries legal weight in accordance with Article 12 (right to express views on all matters related to the child) and Article 13 (right to freedom of expression) of the UNCRC 1989.[45]

[42] Protection of children against sexual exploitation and abuse, https://www.regjeringen.no/contentassets/f8802f1e89c64db2a23b603d2be49829/rapport-lanzarote-konvensjon-en.pdf (last visited Jan 25, 2023).
[43] U.N. OHCHR, General Comment CRC/C/GC/20 (Dec. 06, 2016), available at https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-20-2016-implementation-rights.
[44] *Id.*
[45] Convention on the Rights of the Child, arts.12, 13, Nov. 20, 1989 (entered into force Sep. 02, 1990).

An argument that is often raised is that minors are not mature enough to engage in unprotected sex, which could lead to unplanned pregnancy.[46] Before raising such an argument, it is crucial to take into account that sex education is not majorly practiced in India, leaving minors ignorant of how to have protected sex, symptoms of pregnancy and the like. This cannot be a reason to deny an individual who has the mental maturity to make sexual decisions the right to have sex. Instead, the government must take steps like widespread awareness of sex and protection like condoms made easily accessible for public's utility.

There is thus, the need to recognise the difference between decisions to make with regards to sexual matters and adult matters, which themselves are of diverse natures. It is only to be expected that there would be a variance in the level and the sort of thinking, understanding, maturity and experience required for an individual to be able to make 'valid' choices. India needs to see and realise that these factors are further more supported by the fact that many other countries follow such differentiation in the ages, underpinned by the United Nations bodies' resolutions on Child Rights.

CONCLUSION

Child rights is an issue of immense importance in every part of the world and grotesque violation of these rights demand immediate action on every front. The overall improvement of child rights starts with betterment of individual legislations and legal standpoints. For one, the arbitrary discretionary power in the hands of the courts to decide custody cases should be replaced with a system of a set of fixed parameters must be used, as expressed earlier. The lack of distinction between ages of consent and majority and the consequent ill-provision for consensual sex involving a minor needs to be addressed. The authors have put forward the solutions for the same. Through this paper, the authors hope to bring attention to these issues surrounding child rights so that remedial action can be taken. It is of extreme gravity that child rights be strengthened in India to guarantee the children of today and tomorrow, safe and happy lives.

[46] *See* Laurence Steinberg et al., *supra* note 40.

CHILD RIGHTS AND CHILD PROTECTION-ISSUES AND CHALLENGES

Dr. Manisha*

ABSTRACT

The right to protection includes freedom from all forms of exploitation, violence, abuse, and inhuman or degrading treatment. The twenty-first century has seen a number of important policy and legislative initiatives as well as significant court interventions and there are some important bills pending before the parliament of India, some major strides witnessed recently, include the landmark laws- right to education and the protection of children against sexual offences. But there is still more to be done. Poor implementation of laws and lack of resources are major concerns. Violent juvenile crimes are global phenomenon and are on the increase at an alarming rate in India. Laws on trafficking, corporal punishment, surrogacy, adoption, cybercrimes against children, education and child labour, need to be reformed. India is moving towards the standards set by international laws. Monitoring and enforcing the laws is the next important step so that children get justice. The proposed research paper is a comprehensive compendium on child rights in India from a child development perspective. It will discuss the challenges that Indian children face for survival, development and education, especially if they are marginalized through disability, lack of care, and poverty. The major issues expounded by the author in relation to rights are infant and child survival, early child development, street and working children, children in conflict with law, children with disabilities, child trafficking and child sexual abuse. The author would go further to delve into the causes, among which are high population, poverty, migration, illiteracy, poor legislation and deep-rooted social norms and behaviour. The author will present the existing policy and legal framework in India for each of these issues. The broad purpose of the research paper is to comprehensively discuss the roadblocks that the marginalized child in India faces, to understand the causes of these roadblocks and to evaluate government and civil society action for children in India.

Keywords: Child Rights, Juvenile, legislatives framework, protection, development, Care

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INTRODUCTION:

"We all must work to ensure the realization of children's rights to grow up in a family environment, protected from violence, abuse and exploitation"

India has a wide range of laws to protect children and child protection is increasingly accepted as a core component of social development. The challenge is in implementing the laws due to inadequate human resource capacity on the ground and quality prevention and rehabilitation services. As a result, millions of children are prone to violence, abuse and exploitation. **Violence takes place in all settings: at home, school, childcare institutions, work and in the community. Often violence is perpetrated by someone known to the child.**

India has a fairly comprehensive policy and legal framework addressing rights and protection for children, providing opportunities to ensure that all children have equal access to quality protection services. The core child protection legislation for children is enshrined in four main laws: The Juvenile Justice (Care and Protection) Act (2000, amended in 2015); The Prohibition of Child Marriage Act (2006); The Protection of Children from Sexual Offences Act (2012), and The Child Labour (Prohibition and Regulation) Act (1986, amended in 2016).

Over the past five years, notable efforts have been made to set up fast track courts and deal with cybercrime against children and women. In 2019, the Protection of Children from Sexual Offences Bill was amended, stipulating stricter punishment for sexual crimes against children. Violence against children is widespread and remains a harsh reality for millions of children from all socio-economic groups in India. Both girls and boys in India face early marriage, domestic abuse, sexual violence, violence at home and in school, trafficking, online violence, child labour and bullying. All forms of violence, abuse and exploitation have lifelong consequences on children's lives.

The present research paper deals with the constitutional provisions related to children rights and protection for the same. The researcher has divided the paper into five parts. The first part is discussing the present constitutional provisions related to children. The second part would be dealing with issues and challenges faced by children in India. In third part, the researcher is analyzing the legal framework existing in India to protect children from all sorts of injustice, violence, offences against children, and sexual offences against children, child marriage and child labour. The fourth part is giving the solutions for the protection of children in terms of development, education and rehabilitation of children who is need of care and protection and child in conflict of law. At last the researcher would be giving her concluding remarks.

CONSTITUTIONAL PROVISIONS RELATED TO CHILDREN IN INDIA:

The constitution ensures the rights and protection of children through its various provisions. Children on the account of their sensitive age and immature age need special care and protection. They have specific rights and legal entitlements that are being recognized nationally and internationally. The constitution has recognized the rights of children to a great extent and included many articles dealing with the compulsory and free education, liberty and development in childhood, non-discrimination in educational spheres and prohibition of their employment in factories, mines and hazardous conditions. The constitution of India has following provisions which are applicable for children. These are constitutional mandate which the state has to deliver.

Citizen of India including children must be treated equally before the law and must be given equal protection by law without any discrimination or arbitrariness.[47] This right which is provided in the Indian Constitution protects the rights of children so that their dignity and integrity as a child is not exploited. Children being vulnerable have more chance to be treated unequally in the Indian society. Article 15 of the Indian Constitution prohibits discrimination. In Article 15(3), nothing in this Article shall prevent the State from making any special provision for women and children.[48] It is very clear from Article 15(3) that "special provision" does not mean unequal treatment but it is established for the well being and development of the children in India.[49]

The amendment had many new codes and decrees to be followed by the state in favour of children belonging to economically weaker sections. Certain fundamental rights and duties were amended to ensure that education reached every corner of the nation. In layman's terms, According to Article 21A, the state must provide free and compulsory education to all children between the ages of 6 and 14. This was done to make education a right and to ensure that youngsters are moulded toward it rather than being compelled to work or engage in behaviours like begging and child trafficking.

The other provision is provided for early childhood care and education to children below six years. This change ensured that the state would support all children with early childhood care

[47] INDIA CONST. art. 14 of the Constitution of India: The state shall not deny any person equality before the law or the equal protection of the laws within the territory of India.
[48] INDIA CONST. art. 15(3): Nothing in this article shall prevent the state from making any special provision for women and children.
[49] INDIA CONST. art. 15: The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, Place of birth or any of them.

and education until they reached the age of six.[50] No matter how the condition of the child is, even if they are not protected by their own parents or they are denied with their rights by their own parents. The State has to take strict measures for the well being of the child.

The Indian Constitution initially did not include essential obligations. The 42nd Amendment Act of 1976 added ten necessary commitments, and the 86th CAA added one more responsibility. "All citizens who are parents or guardians may give educational opportunities for children or wards between the ages of 6 and 14," the 86th CAA included as an essential requirement. These are non-justiciable moral obligations owed by national citizens.[51]

Therefore, the Constitution of India is consider as the fundamental law of India. Constitution provides rights and duties of citizens. It also provides provision for the working of the government machineries. Constitution in Part III has provided Fundamental Rights for its citizens in the same manner in its Part IV it has provided *Directive Principles of State Policies (DPSP)* which acts as general guidelines in framing government policies. Constitution has provided some basic rights and provisions especially for the welfare of children. Like: –

1. Right to free and compulsory elementary education for all the children under the age of 6 to 14 years.[52]
2. Right to be protected from any hazardous employment under the age of fourteen age.[53]
3. Right to be protected from being abused in any form by an adult.[54]
4. Right to be protected from human trafficking and forced bonded labour system.[55]
5. Right to be provided with good nutrition and proper standard of living.[56]
6. Article 15(3) of the Constitution of India provides special powers to State to make any special laws for the upliftment and the betterment of children and women.[57]

[50] INDIA CONST. art. 45 of Indian Constitution, this provision is for early childhood care and education children below the age of six years.
[51] INDIA CONST. art. 51, there was an addition after Clause (j), and the added clause that "who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years." This was named clause (k).
[52] INDIA CONST. art. 21 of Indian Constitution of India
[53] INDIA CONST. art. 24 of Indian Constitution of India
[54] INDIA CONST. art. 39(e) of Indian Constitution of India
[55] INDIA CONST. art. 39 of Indian Constitution of India
[56] INDIA CONST. art..47 of Indian Constitution of India
[57] INDIA CONST. art. 15(3) of Indian Constitution of India

7. Article 23 of the Constitution of India states that every person (including children) has the right to be protected from trafficking, begging and other similar forms of bonded labour.[58]
8. Under Article 24 of the Constitution of India, every child below the age of 14 has the right to be protected from employment in factories or mines or be engaged in any other precarious employment conditions.[59]
9. Article 39(e) of the Constitution of India states that the health and strength of workers and the young age of children are not violated, and that, there is a right to be protected from being abused and not forced by economic necessity to enter avocations or minor occupations that do not suit their age or energy.[60]
10. Article 39(f) of the Constitution of India states that children must be provided with just opportunities and facilities to progress in a healthy way and conditions of liberty and dignity. Also, children and youngsters are given protection against ill-treatment and moral and material abandonment.[61]
11. Article 46 of the Constitution discusses the rights of the weaker sections of the society and that they should be safeguarded from social injustice and all forms of exploitation.[62]
12. Another important factor for child rights is their right to identity and registration. Only 41% of births in India are registered. Having an identity is a fundamental human right that gives an individual the liberty to enjoy all of their other rights. Identity consists of a family name, surname, and date of birth, gender and nationality of the individual. By identification of such identities, an individual will hold rights and obligations specific to their status (woman, man, child, etc).

Therefore, the law makers while drafting the Juvenile Act, 2015 has considered all the necessary provisions laid down by the Constitution so that child's rights are protected in all the possible ways. This is for the same reason that Chapter IV of the Act lays down the provisions for betterment of the juveniles and has focused on the Reformation and Rehabilitation of Juveniles in all the possible circumstances.[63]

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[58] INDIA CONST. art. 23 of Indian Constitution of India
[59] INDIA CONST. art. 24 of Indian Constitution of India
[60] Supra note 58
[61] INDIA CONST. art. 39(f) of Indian Constitution of India
[62] INDIA CONST. art. 46 of Indian Constitution of India
[63] Ved Kumari, Juvenile Justice System in India: from Welfare to Rights, (Oxford University Press, USA, 2004).

ISSUES AND CHALLENGES FACED BY CHILDREN:

Children have to face many problems and challenges such as poverty, illiteracy, underdevelopment, begging and exploitation, sexual offences against children, and child labour, infanticide, child marriage, kidnapping and abduction. In the above-mentioned part, the researcher has discussed various rights of child; there are different types of transgression against the child which violate the children rights.

Poverty: Poverty is the root cause for the underdevelopment of children. Poverty is considered as bane in childhood. Poverty whether, it is absolute or relative, destroys the different aspects of childhood. If a child faces poverty in the formative years of life, he/she is deprived of developing capabilities which would be helpful in utilizing the potentialities in later stage of life. Children are dependent of adults and immediate community regarding care and protection. An impoverished family is not expected to fulfill the needs of a child and therefore the human rights are either ignored or trampled. Absence of goods and basic services which the children need jeopardize the growth, development and poses a threat to the survival. Poverty in the childhood often ensures poverty in the adulthood. It also gives birth to circumstances where the issues of deprivation breed. Severe deprivation also gives birth to gender discrimination. Thousands of children in India face the problem of malnutrition, sanitation, safe drinking water, shelter, quality education and information because of poverty.

Child Trafficking – The slavery has returned to the modern society in the form of trafficking. Children are the worst victim of this social evil. This is generally because of their inability to protect themselves and dependency of the adults. It is most unfortunate fact that the stakeholders e.g., family members, relatives, community, teachers, security personnel, elected representatives, personnel from noble professions like law and medicine, government machinery have collective failed to protect and ensure a secured place for children in Indian society. Child trafficking is considered as one of the worst form of human exploitation and often leads to exploitative labour, prostitution or involuntary involvement in the sex trade. In India, large numbers of children are trafficked for forced labour, begging in the big cities. Sexual services, child pornography etc. There is always demand and no child irrespective of their age is safe from the predators operating in the field of trafficking. Recent raid conducted by the Criminal Investigation Department, West Bengal which claimed to have exposed a baby

trafficking racket highlights the plight of children. The government of India has also installed Central Adoption Resource Authority (CARA) as the apex authority in the country and in order to support CARA, State Adoption Resource Agency (SARA) has come up in every states.[64] Yet there are parents who would take illegal rote of obtaining a baby. The corrupt elements are present in every sphere of our public life. Social Workers, doctors, law clerks in the courts, management of nursing homes –all are involved in this illicit trade which involves huge money. The recent baby trafficking case which has been highlighted in the print and electronic media only points towards the collective failure of the machinery which is supposed to protect the children in India. The involvement of doctors who enjoyed high social status because of integrity and service to the mankind, only reveals the decaying morality in the contemporary state. The lure of money has blinded them.[65]

Issues of Exclusion in the Educational System

India has inherited elitist system of education from colonial rulers. There is also an attempt that after independence major thrust is given to transforming the system and gives access to common people the right to education based on the principle of equality and social justice The Constitution has been amended to make education a fundamental right. The Right to Education Act, 2009 lays down free and compulsory education from six years to fourteen years of age. It is nowadays claimed that India has nearly achieved universal enrolment of children in the elementary level. There is no doubt that Indian children have been benefited by the enormous expansion but that does not prevent a sensible person from raising some uncomfortable questions to the policy makers and administrators.[66]

The problem of child labour is a difficult problem and it is purely on account of economic reasons that parents often want their children to be employed in order to be able to make two ends meet. The possibility of augmenting their meagre earnings through employment of children is very often the reasons why parents do not send their children to schools and there are large dropouts from the school. Poverty and low earning of the family force a child to neglect his health and care and engage in institution as child labour. Children are most vulnerable to labour as they are available easily with low cost of employment or wages. Child labour lack the bargaining power and are easily replaceable making them susceptible to be

[64] The juvenile justice (Care and Protection of the children) Amendment Act, 2015

[65] Dr Aoife Daly, Sandy Ruxton and Mieke Schuurman, *Challenges To Children's Rights Today: What Do Children Think?,* ((Jan. 29, 20023, 10:04 AM) *https://rm.coe.int/1680643ded*

[66] *Id*

employed in conditions that are hazardous to their health, development and well-being.[67] Children are tender and easily manageable and can be employed at a lower cost as compared to adults, this drives the whole concept of child labour. In the urge of avoiding the cost of production the factories, industries and various other institutions, the employers induce the child labourer to hazardous and exploitative conditions at exorbitantly low wages. Migration from rural area to urban places or to another state in search of employment also drives the child into the clutches of child labour. Lack of opportunity and sustenance induces a child to work even for meagre wages for exploitative hours and condition of work. Lack of formal education is also a cause for child labour. School drop-out owing to lack of funds or improper schooling conditions even induces a child to enter working establishments to provide bread for themselves and their family.[68]

Child Marriage: Child marriage in India has been practiced for centuries, with children married off before their physical and mental maturity. The problem of child marriage in India remains rooted in a complex matrix of religious traditions, social practices, economic factors and deeply rooted prejudices. Regardless of its roots, child marriage constitutes a gross violation of human rights, leaving physical, psychological and emotional scars for life. Sexual activity starts soon after marriage, and pregnancy and childbirth at an early age can lead to maternal as well as infant mortality. Moreover, women who marry younger are more likely to experience domestic violence within the home. Women's work in the house hold involves a wide range of activities such as processing and pounding new grains, tending live stock, cooking and looking after children and elderly persons. They have to put several hours of strenuous efforts to collect firewood and water from distant places. They also engage in household production for supplementing family income, involve in increasing household asserts by raising livestock, produce vegetables for household consumption. Child marriage naturally leads to early pregnancy resulting into many health complications. Without proper knowledge about physiological condition, she cannot cope with changes in her body during pregnancy. Elderly women are too not in a position to guide her properly. In the olden days elderly women used to monitor the situation perfectly during pregnancy, during delivery and post delivery times. When a female is married below the age of 16 years normally tend to have more children, unwanted pregnancy. Lack of access to modern medical facilities to avoid/post phone pregnancy, women are forced to have pregnancy and carry the child. Young girls can face

[67] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1497776/
[68] https://www.nature.com/articles/pr201575

considerable physical pain associated with sexual intercourse as a result of the physiological immaturity of their sexual organs. Complications due to pregnancy at a young age frequently include obstetric fistula (perforation of the bladder or bowel, due to prolonged labour).[69]

United Nations Convention on the Rights of the Child (UNCRC)

"They are abandoned. They do not get a chance to step in a school. They are left to fend for themselves on the streets. They suffer from many forms of violence. They do not have access to even primary healthcare. They are subjected to cruel and inhumane treatments every day. They are children – innocent, young and beautiful – who are deprived of their rights."

In the history of human rights, the rights of children are the most ratified. The United Nations Convention on the Rights of the Child (UNCRC) defines Child Rights as the minimum entitlements and freedoms that should be afforded to every citizen below the age of 18 regardless of race, national origin, colour, gender, language, religion, opinions, origin, wealth, birth status, disability, or other characteristics'

These rights encompass freedom of children and their civil rights, family environment, necessary healthcare and welfare, education, leisure and cultural activities and special protection measures. The UNCRC outlines the fundamental human rights that should be afforded to children in four broad classifications that suitably cover all civil, political, social, economic and cultural rights of every child:

Impact of the Convention of the Child Rights

A milestone in the international human rights legislation, the 'Convention on the Rights of the Child' has been instrumental in putting all the issues pertaining to children issues on the global as well as national agenda. In addition to this, it has extensively mobilized actions for the realization of the rights and development of children worldwide.

It was not an overnight initiative that resulted in the adoption of the Child Rights. It took several years of movements and activism on shaping favourable, positive and constructive attitudes toward children, and also inciting actions to improve their well-being. The enormous efforts involved toward the implementation of the Convention, the significant amount of resources committed to this cause, and the overall effectiveness of the systems put in place for the execution process have a bearing on the success of child well-being outcomes.

[69] *Id*

Over the last 20 or so years, implementation of the Convention and its effect on child well-being varied from country to country and from one region of the world to the other. Based on analysis, there has been outstanding progress at a global level in addressing the issues related to children. These include progress in access to services, reaching their fullest potential through education, enactment of laws that upholds the principle of the best interests of child, and child survival.

Though a noteworthy progress has been achieved, yet in developing countries, particularly India, there is still a long way to go in realising the rights of children. Though all the relevant rules and policies are in place, there is a lack in enforcement initiatives. As barriers, there are several factors that forbid effective implementation of the laws. Due to relatively low success in achieving concrete child development outcomes in India, the condition of underprivileged kids and underprivileged youth is harsh and needs urgent attention. There is a need to intensify efforts for children welfare at all levels to implement the rules and provisions of the Convention and contribute to create a world suitable for children

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CONCLUSION:

The Constitution of India recognizes the vulnerable position of children and their right to protection. Article 15 suggests special attention to children through necessary and special laws and policies that safeguard their rights. The right to equality, protection of life and personal liberty and the right against exploitation enshrined in Articles 14, 15, 16, 17, 21, 23 and 24 further reiterate India's commitment to the protection, safety, security and well-being of all its people, including children. Article 39(e) and (f) provide that the State shall, in particular, direct its policy towards securing to ensure that the health and strength of workers, men and women and the tender age of children are not abused and that the citizens are not forced by economic necessity to enter avocations unsuited to their age or strength and that the children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that the childhood and youth are protected against exploitation and against moral and material abandonment. Article 45 envisages that the State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.

Let's have a look on some of the initiatives which can be in acted- • Develop self-awareness and acceptance regarding issues related with children and need of child protection. • To

generate an awareness and sensitivity among family and society with different methods like puppet show, films, talk show etc. on various occasions and festivals. • Established networking with voluntary and Government Organizations working in the field to exchange information and action plan. • Intervention if you found any child in conflicting situation or in stressful situation. • Educate the masses regarding policies and programmes on child protection. So continue educating yourself and others because education is the only tool to protect our future generation from exploitation, and injustice.

COLLEGIUM SYSTEM AND JUDICIAL REFORMS

Drishti Arora*

ABSTRACT

Court of law is an essential body in a democracy. In India, a unique system known as collegium is used for appointing judges for higher judiciary. The collegium system has faced harsh criticism in recent years for being private, unknown to the public, and denying deserving applicants the chance to sit on the bench for unstated reasons. The National Judicial Appointment Commission (NJAC Act 2014) to appoint judges in High Courts and the Supreme Court, was introduced by the Parliament to resolve this problem in hand. As it infringes with the autonomy of the judiciary, which is the fundamental tenet of the Constitution, the NJAC Act of 2014 has been ruled unconstitutional. Reforms must be implemented in other areas as well, though, considering the past performance of the collegium system. More significant is how the collegium system functions and the process it uses. Reforms must work to eliminate the possibility of arbitrary appointment decisions without undermining judicial independence.

Introduction

The issue of choosing judges has long been contested, and tensions between the executive and judicial branches have always been a source of friction. Articles 124 and 217 of the Constitution of India are provisions for the appointment of the High Court and Supreme Court judges. After independence, in India, the president selected the judges after consulting with the Chief Justice of India and the law minister. For the first few years, the system operated smoothly, but with time, there began to be inconsistencies in the selection of judges.

In S.P. Gupta v. Union of India[70], the matter concerning the appointment of the judges started being discussed. Following which, the Supreme Court adopted the concept of the collegium system for the selection of judges in the higher judiciary. Chief Justice of India and the 2 judges of the Supreme Court

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[70] S.P. Gupta v. Union of India 1982(2) SCR 365

will throne the bench of the collegium. In SCAOR v. Union of India[71], the Supreme Court changed their stance and held to increase the strength of the bench of the collegium system to five senior judges. In the case of Re Presidential Reference 1993[72], the Supreme Court defined the true meaning of the term 'consultation' stated in Article 124 and 217 of the constitution to settle the issue in hand.

These three cases of the Supreme Court of India's own decision -also known as Three Judges Cases— serve as the foundation for the collegium system, which the court uses to select judges for the country's constitutional courts. Supreme Court Bar Association stated that the Collegium system was the reason for the division caused in the rich and poor individuals as it resulted in making 'a culture of reciprocity'. While politicians and celebrities receive immediate remedy from the courts, the average person still needs to fight for justice over many years.

The National Judicial Appointment Commission

A constitutional body called the National Judicial Appointment Commission was established to take the place of the Collegium System of Judge Appointment. On August 13, 2014, the Lok Sabha and the Rajya Sabha passed the Ninety-Ninth Amendment Act, 2014, which amended the Indian Constitution to create the National Judicial Appointment Commission.

Mr. Ravi Shankar Prasad who is the Minister of Law and Justice, presented the National Judicial Appointments Commission Bill, 2014[73]. The NJAC states the procedure that must be followed by NJAC when suggesting nominations for the positions of Chief Justice of India, judges of High Courts and the Supreme Court. Modifications to Articles 124 (2) and 217 (1), which concerned with the selection of judges to the Supreme Court and the High Courts, are included in the 121st constitutional bill. The President will appoint every judge according to the 121st Amendment following extensive consultation with the National Judicial Appointment Commission. The Union Minister of Law and Justice, the Chief Justice of India, two additional senior Supreme Court judges, and two noteworthy individuals will make

[71] Writ Petition (Civil) No. 13 of 2015

[72] AIR 1999 SC 1

[73] Ministry: Law and Justice, The National Judicial Appointments Commission Bill, 2014, PSR India, https://prsindia.org/billtrack/the-national-judicial-appointments-commission-bill-2014

up the six-member NJAC (six members will be nominated for three years by the Chief Justice, Prime Minister and the opposition leader in the Lok Sabha)[74]

However, the Supreme Court has invalidated the National Judicial Appointment Commission Act, 2014 and the 99th Constitutional Amendment Act, 2014 and has held Collegium System will be used to appointment the judges of the Supreme Court and High Courts.

Collegium System in India

The Collegiums System in India (Judges selecting Judges method) is a system wherein the judges appoint other judges for the higher judiciary. This system of the appointment and reassignment of judges has come into place due to the decisions made by the Supreme Court Judgments instead of any law that or a clause mentioned in the Constitution of India. The Chief Justice of India presides over the bench that serves for the existing Collegium System. After receiving the CJI and Supreme Court collegium's confirmation do names suggested for selection by a High Court collegium reach the government.

Only the collegium system is used to nominate judges of the higher judiciary, and the government will only become involved once the collegium has chosen names. If a lawyer is decided to be appointed as a judge in a High Court or the Supreme Court, the government can only start an investigation on the nominee by approaching the Intelligence Bureau (IB). Moreover, the government can complain and ask for more information on the candidate, however, if the collegium urges to make the candidate the judge, the government is obligated to abide by the Collegium's decision.[75]

The Genesis of Collegium System

Collegium system has evolved through the series of judgement of " Judges case".

In S. P. Gupta v. Union of India, established that the Chief Justice of India lacks primacy. The Constitution Bench ruled that although the President will confer with these officials, his decision does not need to be in accordance with all of them. This is because the phrase "consultation" used in Articles

[74] Department of Justice, Memorundum of procedure of appointment of High Court Judges, Ministry of Law and Justice, https://doj.gov.in/memorandum-of-procedure-of-appointment-of-high-court-judges/

[75] Collegium System – The Unveiled Darkness, IJARIIE, 2017, http://ijariie.com/AdminUploadPdf/Collegium_System_%E2%80%93_The_Unveiled_Darkness_ijariie5835.pdf

124 and 217 does not denote "concurrence." in Supreme Court Advocates-on Record Association v. Union of India, a nine-judge Constitution Bench overturned the ruling in S P Gupta and created a specialised process known as the "Collegium System" for the recruitment and reassignment of judges in the higher judiciary. The majority decision upheld the CJI's primary position in judicial appointments while also holding that the phrase "consultation" would not lessen the CJI's position in cases of appointment and transfers. The court established the collegium system by stating that the CJI should make the recommendation after consulting with his two senior most colleagues and that the executive should typically act on the recommendation.

In re Special Reference 1 of 1998, The Supreme Court received a Presidential Reference from President K R Narayanan in 1998 about the definition of "consultation" as it relates to Article 143 of the Constitution (advisory jurisdiction). The issue was whether or not the CJI's lone opinion could qualify as a "consultation" in and of itself, or whether "consultation" required consultation with a number of justices in order to form the CJI's judgement. The Supreme Court responded by establishing nine criteria that became the current version of the collegium and have been in use ever since. These principles govern how the coram functions for appointments and transfers. According to this opinion, four of the CJI's most senior colleagues should make the suggestion rather than just two. Additionally, it was decided that Supreme Court justices with ties to the High Court from which the proposed name was derived ought to be consulted. Additionally, it was decided that the CJI should refrain from recommending something to the government if two judges had a differing view.[76]

Loopholes In The Collegium System

It is a truth that the collegium system has faced harsh condemnation over the years due to the lack of transparency concerning the selection and reassignment of judges in the higher judiciary. Transparency is also necessary because of the judiciary's rising levels of corruption and nepotism. It is also criticised because the collegium system's consultation procedure is private and hidden to the general public, and deserving individuals are not given the chance to sit on the bench for uncertain grounds. The Indian justice system is the only democratic nation in which judges choose judges.

[76] Imran, Mohd, Judicial Reform for the Appointment of Judges: Need of the Hour (July 27, 2021). Available at SSRN: https://ssrn.com/abstract=3894130 or http://dx.doi.org/10.2139/ssrn.3894130

The issue in the existing appointment process is that it can be lacking in accountability, distinct merit-based standards, and diversity in composition. The selection process is secretive, and seniority norms are now used as a stand-in for merit evaluation. Judges are appointed without any input from the executive or the legislature. [77]The collegium has a lot of flaws. Justice Ruma Pal, a retired Supreme Court justice, has called the selection process for judges to the High Court and the Supreme Court "*one of the greatest guarded secrets in this nation*." Additionally, Justice P. Sathasivam acknowledged that "*there is malpractice in the legal system. He acknowledged the flaw in the current method and stated that it would be better to alter it so that the bad eggs are eradicated.*" [78]

Despite acknowledging that there is room for reform, former Chief Justice of India and former Justice VN Khare claims that there is hardly anything wrong with the current system. However, none of them addressed how or when the judicial system will get rid of injustice within its own system. What the judiciary is doing since many years following the collegium system's formation is a question that must be addressed.

During the petition, the attorney general made a submission of a list which mentioned bad appointments to the five judge bench. Moreover, to counter the petitioner's argument wherein it was stated how the executives' involvement in the appointment of judges would result in lack of autonomy in the jury, Senior advocate TR Andhyarujina questioned, "*Nowhere in the world judges appoint judges. Does it mean that no other country has an independent judiciary*?'[79]. It should be remembered that the Indian Constitution's underlying basis is the autonomy of the judiciary, not the selection of judges to the Supreme Court and the High Court. Therefore, if the government enacts a novel law to nominate judges to the higher judiciary, legislation should be upheld unless it undermines the foundation of the constitution. The collegium system's confidentiality, opacity, and lack of engagement by the Sovereign, or the Indian people, is its poorest attribute. The preceding collegium system is therefore unfair, unaccountable, and authoritarian.[80]

Is the NJAC Better Than The Collegium System?

[77] Centre for Law and Policy Research, Debate Recasting the Judicial Appointments, working Paper No. 1, page no.4, 2014, Available at: https://clpr.org.in/wp-content/uploads/2014/02/Judicial-Appointments-Debate.pdf
[78] No need to change collegium system, Available at: http://www.business-standard.com/article/pti-stories/no-needto-change-collegium-system-justice-sathasivam-113070300348_1.html

[80] Anwar, T., Collegium system not perfect but superior to NAJC, First Post, 2021, http://www.firstpost.com/india/collegiumsystem-not-perfect-superior-njac-says-former-cji-2242812.html

To replace the collegium system, the National Judicial Appointments Commission was established. The process for appointing judges to the High Court and Supreme Court of India has been improved in an effort to resolve the concerns. While the fundamental problems with the collegium system were openness and the judges' continued control over judge appointments, the NJAC adopted a far more pragmatic strategy. The statute served to strengthen the connection between the executive and judicial branches. It gave the President the authority to go back and review the commission's suggestions. One of the biggest improvements from the collegium system, which was secretive and offered no openness or responsibility, was the commission's assurance of greater clarity and responsibility. Another significant advantage that the NJAC promised to offer was that it would eliminate any instances of favouritism and nepotism and only select applicants on the basis of qualifications and experience. The collegium system did not always pick judges based on merit, but some nominations were based on issues like nepotism, favouritism, bribery, etc., this was seen as a significant step in the interest of justice.[81] The NJAC statute had a number of advantages, including as preventing corruption and ensuring that judges for India's High Court and the Supreme Court were not appointed arbitrarily. The members' right to reject the nominees ensured that the decision was non-arbitrary. According to the act, a person will not be considered if two members oppose his selection. [82]

NJAC Judgement and way forward:

In Advocates-on Record Association v. Union of India[83], the Supreme Court of India handed down a precedent-setting decision (NJAC Judgment) wherein the National Judicial Appointments Commission was declared illegal in the verdict.

After considering the petitions submitted by the Supreme Court Advocates on Record Association (SCAORA) and others, the Supreme Court affirmed the collegium system and declared the NJAC to be unconstitutional on October 16, 2015. Earlier, through Writ Petitions, certain lawyers, lawyer organisations, and groups contested the constitutional amendment act's and the NJAC Act's legality before the Supreme Court of India. The Supreme Court declined a few Writ Petitions challenging the legality of NJAC in August 2014 on the grounds that the case was preliminary because the NJAC Act and the constitutional change had not yet been made known at the time. A three-judge Supreme Court bench referred the case to a Constitution Bench in 2015 after a new challenge was made following the

[81] Centre for Law and Policy Research, Debate Recasting the Judicial Appointments, working Paper No. 1, page no.4, 2014, Available at: https://clpr.org.in/wp-content/uploads/2014/02/Judicial-Appointments-Debate.pdf
[82] Section 5 of the National Judicial Appointment Commission Act, 2014

[83] Writ Petition (C) No.13 of 2015

notification of the statutes. The "*insularity and independence of the judiciary*" has also been mentioned as a fundamental aspect of the Constitution's "*basic structure*."

Justice Chelameswar, noted that the there are several safeguards to protect the independence of the judiciary such as, *"…Certainty of tenure, protection from removal from office except by a stringent process in the cases of the Judges found unfit to continue as members of the judiciary, protection of salaries and other privileges from interference by the Executive and the Legislature, immunity from scrutiny either by the Executive or the Legislature of the conduct of the Judges with respect to the discharge of judicial functions except in cases of alleged misbehavior, immunity from civil and criminal liability for acts committed in discharge of duties, protection against criticism to a great degree…*"[84]

According to the court, judicial independence would be jeopardised if the executive had any say in who is appointed as a judge. The 99th Amendment was declared invalid by the Court with a 4-1 vote. The NJAC "*did not offer a suitable representation, to the judicial component*," according to Justice Kehar's ruling, and "clauses (a) and (b) of Article 124A(1) are inadequate to safeguard the primacy of the judiciary in the question of selection and appointment of Judges." As a result of the Union Minister for Law and Justice's involvement as an ex official member of the NJAC, it was further ruled that "*Article 124A(1) is ultra vires the requirements of the Constitution*." It was determined that the clause violated the "*separation of powers*" and "*independence of the judiciary*" norms.[85]

For a number of reasons, it was determined that the provision allowing for the appointment of two "eminent people" as Members of the NJAC violated the Constitution. The majority's four rulings have once again established judicial independence, together with the appointment-related autonomy that comes with it, as a fundamental tenet of the Constitution. The 99th Amendment failed constitutional scrutiny because no legislative majority can amend the Constitution to change its fundamental structure. The collegium has once again been designated by the court as the central location for all judicial nominations.

[84] Supreme Court's 'dissenting voice' Justice Chelameswar, Bar and Bench, https://www.barandbench.com/news/supreme-court-dissenting-voice-justice-chelameswar

[85] Centre for Law and Policy Research, Debate Recasting the Judicial Appointments, working Paper No. 1, page no.4, 2014, Available at: https://clpr.org.in/wp-content/uploads/2014/02/Judicial-Appointments-Debate.pdf

Making any future correspondence on the Memorandum of the Procedure public is the best approach to end this deadlock. This would aggressively establish a culture of transparency in the judicial appointments and publicly demonstrate if substantive reform is occurring (or not). Otherwise, India will continue to be mired in a terrible power war in which the cause of justice will undoubtedly lose, whether the executive or the judiciary emerges victorious.

Suggestions To Enhance the mechanism Of Judges Appointment

In an effort to address the issues, the NDA government twice attempted to replace the collegium system with the National Judicial Appointments Commission (NJAC). However, these attempts were unsuccessful, and the collegium system is still in place. However, the parliament has slowed down the appointment process and is currently drafting the MoP (Memorandum of Procedure) to guide future appointments in order to address issues like the lack of qualifying requirements and clarity.

The Collegium Secretariat shall comply with the Right to Information Act and make the documents and audio recordings of the collegiums and candidates available to the public in order to maintain the system's transparency. These documents must regularly be posted on the website of the relevant Supreme Court or High Court and be easily searchable online.[86] A group of senior officials who are adequately shielded from the demands and pulls exerted by judges, attorneys, ministers, etc. should lead the collegium Secretariat. They should provide the Collegium with all the candidate background information it needs to make decisions, as well as an unbiased comparison and analysis of the data along a number of parameters.

The secretariat is responsible for maintaining the eligibility records of all applicants for the position of judge in the higher judiciary, including senior lawyers.[87]

It should be explicitly illegal to make quick promotions to the position of Chief Justice of multiple High Courts only to make a candidate less qualified to be elevated to the Supreme Court. The Collegium of Supreme Court must provide the necessary standards, which must then be meticulously executed by the Collegium Secretariat and Ministry of Justice after becoming an enactment and going through both houses of Parliament. Making the standards a legal requirement would prevent "shifting goal-posts" in favour of a select few applicants. It is possible to create appropriate formats and rules for receiving

[86] Collegium System – The Unveiled Darkness, IJARIIE, 2017, http://ijariie.com/AdminUploadPdf/Collegium_System_%E2%80%93_The_Unveiled_Darkness_ijariie5835.pdf

[87] Rishika Singh & Akanksha Tiwari, The Debate around NJAC and Collegium System, 3 Supremo Amicus 480 (2018)

complaints against certain judges and incorporating them into the eligibility requirements. Laws that are appropriate may also be established to protect judges against baseless complaints made against them by parties with personal agendas, as well as to make it easier for an independent investigation of complaints that are determined to have merit.[88]

Constitutional Provisions And Judicial Interpretation:

Article 124 of the Indian Constitution provides for the appointment and removal of the Supreme Court Judges. Article 217 of the Indian Constitution provides for the appointment and removal of the High Court Judges. Articles 125 to 129, Articles218 to 221 and 223 to 224(A) provide for certain incidental matters. Article 222 is a provision that states in detail regarding the transfer of judges from one high court to another. [89]As per the language used in Articlw 124 and 217, the president must consult an expert in legal field, however, before the Supreme Court held in Supreme Court on S.C. Advocate-on Record Association, one always inferred president is not compelled to conduct himself as per the consultation.

Till the year 1973, the most senior judge of the Supreme Court of India wad appointed as the Chief Justice of India. However, on 25th April 1973, Mr. A.N. Ray was decided to be appointed as the Chief Justice of India, foregoing three senior most colleagues, namely, Justice Shelat, Justice Hegde and Justice Grover. This action provoked great controversies. The action was perceived as "*blatant and outrageous attempt which undermined the independence and bias of the judiciary and indeed reduced the dignity of Supreme Court*."[90]

In Sankal chand Sheth's case[91], 'consultation' was considered, and it was held that it meant '*full and effective consultation and not concurrence that is the President is not bound by it*' In S.P. Gupta v. Union of India[92], the Supreme Court stated that the meaning of the word 'consultation' in Art. 124(2) have the same meaning in Article 212 and Article 222. It further added, "*The only ground on which the decision of the Government can be challenged is that it is based on mala fide and irrelevant consideration*".

[88] Imran, Mohd, Judicial Reform for the Appointment of Judges: Need of the Hour (July 27, 2021). Available at SSRN: https://ssrn.com/abstract=3894130 or http://dx.doi.org/10.2139/ssrn.3894130
[89] Rishika Singh & Akanksha Tiwari, The Debate around NJAC and Collegium System, 3 Supremo Amicus 480 (2018)
[90] M P Jain, Indian Constitutional Law, (7thEdn., Lexis Nexis, 2016) 193.
[91] AIR 1977 SC 2328.
[92] S.P. Gupta v. Union of India 1982(2) SCR 365

In S.C. Advocate-on-Record Association v. Union of India[93], a historic judgment of the Supreme Court wherein it decided to overrule its earlier judgment in S.P. Gupta v. Union of India and further ruled that, "*in the matter of appointment of the judges of the Supreme Court and the High Court the Chief Justice of India should have primacy*". Chief Justice of India must be appointed as per their seniority.

In Appointment and Transfer of Judges Case[94], the Supreme Court decided that, "*sole opinion of the Chief Justice of India without following consultation process is not binding on the Government*". This judgement is in resonance with Father of the Indian Constitution. Dr. B.R. Ambedkar in a debate of the Constituent Assembly mentioned that, "*with regard to the question of the concurrence of Chief Justice, it seems to me that those who advocate that proposition seem to rely implicitly both on the impartiality of Chief Justice and the soundness of his judgment. But after all, the Chief Justice is a man with all the fallings, all the sentiments and all the prejudices which we as a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day.*" [95]

Conclusion:

In a democratic nation like India, the appointment of judges is a crucial process that requires the utmost attention and consideration. Judges shouldn't be influenced by politics in a country like India where the state is the greatest litigant and the judiciary is the only branch that can give justice to individuals sans fear. Articles 124 and 217 of the Indian Constitution specifically address the appointment of judges, these provisions alone have not been sufficient to meet the needs of appointments due to the executive's random actions in making some incompetent appointments in accordance with their own preferences. The judiciary has resolved the conflict by unequivocally applying these clauses and creating the collegium. But right now, there are a number of complaints against the collegium as well, and individuals are constantly questioning how the collegium operates. Complaints of corruption have been brought against the Collegium because it has been accused of lacking transparency and accountability. This demonstrates unequivocally the government's goal to dominate the judiciary and subject it to political influence. Using this measure, Parliament attempted to undermine the judiciary's

[93] (1993) 4 SCC 441
[94]AIR 1999 SC 1
[95] Rishika Singh & Akanksha Tiwari, The Debate around NJAC and Collegium System, 3 Supremo Amicus 480 (2018)

independence. The judiciary should always be given importance when making appointments, but this bill went against that rule, and as a result, the honourable Supreme Court invalidated it. Despite having fewer shortcomings than the NJAC, Collegium is currently the greatest alternative for the nomination of judges. Instead of adopting a completely new system for selecting judges that has flaws that are obvious on their face, it would be preferable to identify the issues within the collegium and address them by taking all necessary steps.

DECODING GENDER JUSTICE FOR SCHEDULE CASTE WOMEN IN INDIA

Dr. Karuna Machhan and Ms. Shweta Katoch[96*]

ABSTRACT

Human dignity is the most supreme attributes of the society. Every human being at the end of the day strives for that dignity to which he/she is entitled to. Gender equality is fundamentally related to sustainable development and globally accepted as a necessity for the promotion of human right. In India, access to justice largely depends upon the intersectionality of gender, caste & class. Individual's social identity shapes his/her experiences and choices in living a dignified life as enshrined under Article 21 of the Indian Constitution. Social stratification is invisible and inseparable form of division which exists in the society. Many ancient texts suggest the creation of the universe, of the man and the varna system. This system strengthened the division of the society into four classes. The term 'women' is not a homogenous group and thus it becomes important to unearth the Brahmanical hegemony that casted discriminations on the marginalised sections of the society i.e., 'the women'. The intersectionality of gender, caste and class have affected the differential achievements in their lives. In the world's largest democracies, marginalised women have been facing economic, political, social and cultural discriminations which exist in visible or not-so visible forms. Women belonging to Schedule Caste have been subjected to violence, deprivation of rights, socially excluded, have to face evil practices of untouchability, devadasi system as evident in the earlier times. Thus, this paper shall focus on various factors which shapes enforcement of rights of Schedule Caste Women(s), their access justice delivery system and the various legislation(s) enacted nationally and internationally to safeguard their interests.

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INCEPTION OF CASTE-

India has an age-old legacy of social injustice where individuals were discriminated on the bases of sex, race, colour etc. Even in the 21st century, one witnesses the effects of intersectionality in different forms. Indian society is profoundly a hierarchical society, where emphasises has been laid on the religious ideology.[97] This ideology encompasses the notions of *'purity'* and *'pollution'*. One of the primary attributes of the caste system was that, those whose who exercised control over means of production also made an attempt to control the means of symbolic of production with the view to supress the lower castes.[98]

The hierarchical social order and social stratification divided the society where one caste overpowered the other. The word 'stratification' finds its place in Brahminical texts in the form of 'Varna' and 'Jati'. 'Varna' primarily referred to 'social order' where the society was divided into four varnas namely, *brahmana, kshatriya, Vaishya, shudra* and the fifth caste was known by the name '*Untouchables*', who were considered outside the race of caste society. Whereas the term 'Jati' implied close-knit of people or members of same kinship or lineage. Every caste had its distinctive traditional practices along with specific occupational activities meant for that particular caste only. These practices and activities had to be performed within a hierarchical order which was created on the basis of control over means of production.[99] This social order was entrenched in the religious textbooks such as the Dharmashastras and the other religious-legal texts. Thus, due to the notions of purity and pollution on one side and the kind of occupational status, every caste resisted their association with each other which further created inequalities towards the access to resources and knowledge.

There have been instances such as *Ekalavya's* quest to become best archer, which made him lose his thumb; *Shambuka* attempt to attain penance which made him lose his life through the hands of Lord Rama exemplifies Brahmanical monopoly over the 'scared knowledge' as well as 'intellectual knowledge' which was only meant for upper castes.[100] Every injunction codified in the religious text books have been made applicable on the members of a particular varna or a community.

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[97] Dumont Louis, *Homo Hierarchius* (London: Paladin, 1972)
[98] Kapadia Karin, *Siva and Her Sisters* (Delhi: Oxford University Press, 1996, pg-3)
[99] Chakravarti Uma, *Gendering Caste: Through a Feminist Lens*, First Edition, (SAGE Publications-2018 pg-9)
[100] Ambedkarite Today, The Legend Ekalavya – Adivasi warrior archer, https://www.ambedkaritetoday.com/2019/04/the-story-of-eklavaya-about-eklavaya.html(Last Visited 14-01-23)

The caste system had thus, divided the society and had intensified inequalities which have been carried forward from generations to generations. Violence between the upper and the lower caste(s) have been rampant today, although the Indian Constitution secures to all its citizens formal equality but there have been serious lacunas in eliminating social inequalities. Violence has been seen as vital for the continuance of the caste order.[101] Any attempt(s) by the members of Scheduled Caste to bring about equality of status etc has been often rebutted by means of violence extended to committing of gender-violence against that particular community.

'Woman' in India falls under a heterogenous category, where the differences are multiple ranging from health status, access to education, economic productivity varies, particularly in the case of women of Scheduled Castes (Dalits). Her body has remained a prominent site for power struggles. One can trace such power struggles through the practices of devadasi system, adabapa, dola, cidid etc in the yesteryears. Thus, to keep her body under the control of caste patriarchy several measures were adopted as her body was considered as a 'means of reproducing caste' and also a 'site for the purity of the caste'.

Dr. B.R. Ambedkar's advocacy for the rights of the women have made him acquire the higher pedestal amongst the other liberal feminists. Babasaheb have worked fervently towards bringing a change in their position in the Indian society as well as to provide them with legal & constitutional rights. To ensure women participation, he made a sincere effort to include women in all-important decision-making policies & programmes. Caste system and endogamy had given rise to various evil practices such as practice of sati, widowhood, child marriage etc. He has critically speculated by way of numerous writings one such is '*Castes in India: their mechanisms, genesis and development',* that how endogamy has been the root cause of caste order, still prevailing today. It is important to unearth the effects intersectionality of gender and caste which has assisted in maintaining the status quo and how the Brahmanical social order placed, Scheduled Caste women at the lowest of the hierarchical order. It is this intersectionality, which helps to raise questions on the multiple systems of owners that interact and interlock to shape narratives and experiences of Scheduled Caste women.

We are living in 21st century and we have spent about more than seventy years of independence where equal status and equal opportunity along with liberty of thought and expression are provided to the people of India without any discrimination on basis of caste by the supreme

[101] Tabassum Henna, *Dalit Women: Caste, Class and Gender Violence in India,* First Edition (Innovative Imprint-2018 pg-44).

law of the country, yet many atrocities are committed against the member(s) of Scheduled Caste. Domestic violence inside the household remains concealed but violence against women of Scheduled caste have been out for public discourse.

INTERSECTING FACTORS

This concept can be understood has an approach to identify and analyse the different forms of discriminations. *Interactions of two or more forms of discriminations*, that culminate into multiple forms of discriminations, inequalities among men and women. Thus, it is this '*Intersectionality'* which identifies marginalised women as experiencing multiple *forms of visible, not so visible discriminations.*

Women are observed as the carriers of honour and the carriers of caste inheritance, to which they belong. Thus, an attack on the women's honour is symbolic of an attack onto the dignity & honour of the caste to which the women belonged. There have been several instances from the past where women of scheduled caste have been targeted to tarnish their dignity and caste honour. A recent example is that of gangrape of a teenage girl by members of upper caste in Hathras (Uttar Pradesh)[102]. Many more incidents have been reported[103] where women of lower caste have been made to walk naked on the streets, such public orchestration of the naked body of a female tends to spread a message amongst all those who make an attempt to raise their voices against patriarchal norms governing the society, is a mode of punishing them and the message of 'easy accessibility' of scheduled caste women's body and control by upper caste men.

As per the Census Report of 2011, the total female population in India is 58.7 crore out of which Dalit Women constitutes 9.7 crore of the total female population in the whole of India.[104] The intersectionality of caste and gender, have made women easy targets and major victims of caste-based gender violence in India. They have been oppressed for belonging to the scheduled caste by the upper castes, and patriarchal domination from men of all communities both at the public as well as in the private sphere, including their own, for being a woman. They are also subjected to brutality at the hands of so-known as upper caste and class women, converting them into a defenceless segment of the social organisation. It is a measure of power struggle and the strengthening of social divisions or hierarchies and the dynamism of

[102] Satyam Dubey and Ors v. Union of India (Criminal Writ Pet. 296/2020)
[103] *Ibid*
[104] https://www.india.gov.in/my-government/documents/census-report (Last Visited:12-01-23)

Indian society. Sexual assault against women of Scheduled caste often encompasses other forms of violence such as gang rapes, murders, assaults, kidnappings, social boycotts, attacks by the mobs.

PAST ACCOUNT(S)

After the abolition of the sati in the year 1829, the Britishers followed the policy of non-intervention in the religious matters of the Indians and left it, to be governed by the personal laws. The matters pertaining to caste, questions on the recognition of customary rules or the personal laws, were always negotiated. Vasudha Dhagamwar pens down and says that 'Manu's order of punishment, were still being applied in the matters surrounding sexuality of women. In understanding the notions of chastity, different rules were applied on the upper and lower caste women. Assault on the lower caste women was normalised and made part of natural factor governing caste norms.[105] After the abolition of sati, another major advancement bought in the gender laws, was the enactment of the Act of 1856[106] which gave widows the right to remarry and also allowed marriage to be re-consummated in case of child marriages. The remarriage laws differed from state to state such as in the State of Punjab, 'Levirate marriages' was prevalent in the entire state. In such marriages, widow had to marry within the same caste i.e. the women had to marry the brother-in-law in case of husband's death, indicative of the fact that, legislations were also drafted on caste lines.[107]

Case of Bhanwari Devi [108]

In the State of Rajasthan, a woman of lower caste was gang-raped when she tried to prevent a child marriage been conducted in her village. This case clearly exemplifies the caste biasness which overpowers the legal system and brings to light the powerlessness of a women of lower caste to seek redressal. The trial court in the said case remarked that 'it is impossible to imagine the upper caste men raping a woman of lower caste, upper caste men would never fall so low to rape a lower caste woman'[109]. This statement of the court indicates that the credibility of evidence in such cases, also rests upon the personal views of the judge(s) with respect to caste and gender.

[105] Dhagamwar Vasudha, *Law, Power and Justice*, SAGE publication pg- 115
[106] Widow Remarriage Act, 1856
[107] Chowdhary Prem, The Veiled Women-Shifting Gender Equations, (Delhi-Oxford University Press, 1994 pg 318)
[108] Poonam Kathuria & Abha Bhaiya, *Indian Feminism*, University of Chicago Press, 2019, pg- 59
[109] *Ibid*, 3

The *case of Bhanwari Devi* had led to the drafting of guidelines on harassment at workplace based on the principles of CEDAW by way of judicial pronouncement in the celebrated case, universally referred as '*Vishaka judgement'*.

Case of Phoolan Devi [110]

The 'Bandit Queen' as universally known as, Phoolan Devi's life was no less than a movie in which she had lived as a 'protagonist' i.e., leader of dacoits and has also served politics. She was known to having killed all her rapists. Her assassination in the year 2001, was opined by some as 'destined death' and is a case which demonstrates the outcomes when the caste and gender intersect and leads to violence against the women of lower caste at the hands of upper caste men.

These cases reveal the use of power and normalization of all the atrocities meted out against the women of lower caste. It further demonstrates how the intersectionality of caste, class and gender makes the women vulnerable.

DYNAMIC FORCES AND THE INDIAN CONSTITUTION

It is undeniable fact that, the caste system was the sole basis for the organisation of the society into hierarchical units based on the upper and lower castes. It had always bestowed the upper caste with the vested interests for the continuation of the said system. By way of religious books, rituals etc, the clergy had exercised control over the means of production and the reproduction. These religious textbooks have always authorized and have restricted, the equality and equity to prevail equally on all. The 'caste system' was able to survive all ages and its capacity to endure all the challenges that came from the worthy leaders such as Dr. B.R. Ambedkar, Mahatma Gandhi and from the other religions such as the Buddhism and Jainism[111].

Soon after the country got independence, the major aim of the leaders was to establish an just and classless society where every human being has equality of rights. In furtherance of this intention, several laws were enacted to keep discrimination at bay. During that times, the societal structure was such that varna system was still existing and the patriarchal forces failed all attempts to establish an egalitarian society. In the initial years, only some rights were enforced while the others lack enforcement.

[110] Phoolan Devi vs State of M.P. & Ors, Decided on 27 November, 1996
[111] Indian Bar Review, *Reservation Crises in India*, Vol. 17(3&4): 1990 & Vol 18(1): 1991

Our country has opted democratic form of government through a 'secular', 'socialist' and 'sovereign' framework as explicitly stated in the Preamble to the Indian Constitution democracy by the Constitution[112] . It has been observed by all the thinkers such as Durkeim, Max Weber, Laski and Green that social justice can be achieved only if the disabilities are removed from the society and where community interest prevails over the individual interest. The Constitution of India means the essential principles and rules of governance on the basis of which an organised and a well-regulated society can be created in India. It secures the rights and freedom to all its citizens, to provide social, economic and political justice, liberty to express , follow any religion. In Indian society, since there are both minority and majority religious communities, a minority community in a particular locality or at the State or National level may develop the feeling that may be side-lined simply because they are in minority.

The state has a positive role to play in these circumstances and the state can take special measures to give that assurance and that protection to the minorities. So as to develop their faith in the country and the society to promote fraternity. Such measures taken by the state, cannot be said to be unconstitutional as the larger purpose of these measures is to promote fraternity.[113] The positive duty of the state binds the state to take positive and proactive measures to cause upliftment and to give special protection to the backward classes and to the vulnerable groups. This is what is termed as 'protective or positive discrimination' in favour of the said classes. The said action of the state is justified on the grounds of social justice and therefore, even it leads to 'class legislation' it would not be unconstitutional. There is no doubts that a discrimination in favour of one group of persons vis-à-vis the other groups, it is still constitutionally justified and expected from the state to act in this direction to bring equality in the society and for the upliftment of the backward and vulnerable groups.[114]

The preamble to the Constitution of India expressly secures 'equality of status and opportunity' to all its citizens. Consequently, it prohibits the state from making any discrimination on the grounds of religion, race, caste etc[115.] For the purposes of equality, the constitution casts duty on the state to ensure equal employment opportunity[116], abolishes and forbids the practice of any form of 'untouchability'[117].

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[112] https://www.india.gov.in/my-government/constitution-india (Last Visited 25-01-23)
[113] Aruna Roy v. Union of India (2002 SC)
[114] Constitution of India, art 14
[115] Constitution of India, art 15
[116] Constitution of India, art 16
[117] Constitution of India, art 17

The Part IV of the Indian Constitution[118] sets forth the socialist goals of the constitution and they are at equal par with the fundamental rights. These principles are fundamental in governance[119] of the country and thus it is the duty of the state to implement these directive principles by way of legislations. Both the Fundamental Rights and the Directive Principles of State Policy are the two sides of the same coin as both are 'rights of the people'.[120]

LEGAL CODE

In the words of Frederick Douglass:

"*Where there is denial of justice, where there is enforcement of poverty, where the veil of ignorance is prevalent and where one class of people/community feel that the entire society conspires to rob them and become reason of their oppression, in such society the welfare of all is at risk*"

Article 17 of the Indian Constitution abolishes untouchability and its varied forms. To further strengthen this provision, the Untouchability Act, 1955 was passed with the intend to abolish untouchability. Due to the shortcomings in the Act of 1955, the act underwent a change and a new act was passed, which was known as the Protection of Civic Rights Act, 1955 was enacted for the upliftment of the members of the scheduled caste and to abolish discriminations and to eradicate inequalities. Inequalities still persisted and thus the Act failed to provide justice to the marginalised sections of the society, it failed to bridge the gap between the upper and the lower caste due to which the lower caste remained victims of an oppression with discriminations and violence committed against them. The laws that were existing at that time such as the Indian Penal Code also failed to address the crimes that were committed against them.

Caste, class and Gender have made women of Scheduled Caste defenceless and more susceptible towards multiple kinds of discrimination. Thus, it implies that the state has failed to provide protection to its peoples and in particular protection to women of scheduled caste who have been oppressed since ages. The main aim of the criminal jurisprudence, is to punish the wrongdoer(s) and to rehabilitate or redress the grievances of victims of crime. This necessitated the enactment of new legislation that would specially create new and a separate class of offence committed specially against the Scheduled Caste(s). In the year 1989,

[118] Directive Principles of State Policy Art 36- 51
[119] Directive Principles of State Policy, Art 37
[120] I.R. Coelho (dead through LR's) v. State of Tamil Nadu, 2007 SC

Parliament passed the Schedule Castes and the Scheduled Tribes (Prevention of Atrocities) Act and the Schedule Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995 with the major objective to prevent all forms of discrimination and to provide justice against the crimes committed against them. Nevertheless, in the cases of sexual violence against women of lower caste the socio-economic factors and the caste network influences the justice delivery system. Besides having strict laws in force, one can find interference from the politics, control by the upper caste male members of the society, casteist slurs by the people at power etc. Thus, justice is further denied or delayed to the women of lower caste who has been victim of crime committed against her mainly due to the delay in registering of the first information report; to shield the perpetrators ,failure to invoke the right sections under the Schedule Caste and Schedule Tribe(Prevention of Atrocities) Act; An incomplete and influenced investigation proceedings[121] which is highly motivated by caste and gender biasness, thus leading to the miscarriage of justice for the victim of crime; intentional delays in arresting the culprits with the intend to induce or coercion the victims and her family members.[122] While interpreting the 'Rehabilitation'[123] provision in the said Act, it implies that there is no specific provision it deals with; no proper procedure has been dealt to rehabilitate the victim and victim's family who face insecurity and social evasion.

The United Nations have also played a significant role in reaffirming faith in fundamental human rights, equality of rights amongst men and women by adopting various international treaties and conventions on the rights of the women. It is the first international document which embraces all the human rights and makes the provisions for the equality amongst women more explicit. The article of the UDHR clearly envisages that 'no human being shall be subjected to any form of discrimination on the grounds of religion, race, language, birth etc'. Further it prohibits any differential treatment towards any member state on the basis of either the jurisdiction or the status of the country at the international front. Further the Article 16 of the UDHR recognises the right to marry between two consenting adults. The parties to the marriage have equal rights to marriage, during and post marriage. The article prohibits any discrimination on the basis of nationality, religion or race for the purposes of marriage.

[121] https://thelogicalindian.com/humaninterest/from-up-polices-delay-in-filing-fir-to-forced-cremation-of-victim-timeline-of-hathras-horror-24091 (Last Visited:25-01-23)
[122] https://www.ohchr.org/sites/default/files/Documents/Issues/Women/SR/RapeReport/CSOs/162-india-2.pdf (Last Visited:25-01-23)
[123] Section 22(2)(iii), Act of 1989

In the whole world March 8th is celebrated as International Women's Day in form of seminars, lectures delivered to create awareness on the equality of rights of women. But still in some part of world, even today women are roped of their equal rights specially women of marginalised society.

Thus, for the reformed and a transformed society, it is important that people who don't belong to the marginalised section, educate themselves on the age -old ideas on caste and its affects on the women of schedule caste, their experiences, their fight for justice. It is only then, a revolution or a shift from 'genesis of their cause' can become 'our cause or our fight' against any form of humiliation or harassment or injustice meted out to them.

On the words of Dr. B.R. Ambedkar:

"CASTE is a perception or a mindset and thus capable of destruction, it is not a physical object which prevents other(s) to co-mingle in the society"

CRITICAL ANALYSIS OF GENDER JUSTICE UNDER THE 21ST CENTURY INDIA

Pragyta Gupta and Abha Gupta*

ABSTRACT

The importance of women in a society can never be overstated. The originator of life since the beginning of human race has been considered inferior, menial, and a subordinate to the stronger gender of the society. As over time nobody questioned these complex set of shared images and conceptions, they became social norms and got passed down from generation to generation.

Gender inequality has been a contentious issue in India since the later Vedic era, when it first became apparent that women face a variety of challenges throughout their lives. One of the root causes of gender inequality in India is the country's long history of patriarchy, where men hold a disproportionate amount of power and women are expected to conform to traditional gender roles.

In more recent times, there has been a growing recognition of the importance of gender equality, and many efforts have been made to address this problem. Among the many aspects introduced to achieve gender equality is the concepts of gender justice. Gender justice is the pursuit of fair treatment and equal rights for all people, regardless of their gender identity or expression.

In this paper authors will use qualitative as well as quantitative method. The paper would critically analyse the laws made for making the idea of gender justice a reality, the impact of these laws in the lives of women living in the urban area, and how different age groups of women get affected differently or are discriminated within the same provisions in the society.

Thus, gender justice in India in the 21st century remains a significant issue, as women and girls continue to face discrimination and inequality in many areas of life, which needs to be addressed properly as soon as possible.

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INTRODUCTION

"*To awaken the people, it is the woman who must be awakened, once she is on the move, the family moves, the village moves, the nation moves*."

- Jawaharlal Nehru

Gender refers to a social categorization established on one's identification, representation of self, behavior, and connection with others, rather than any physiological or biological segmentation of the organs. Gender, according to sociologists, can be defined as acquired conduct and socially created identity.

During the Vedic period women's entitlements were mixed with absolute rights and corrupt practices. Then coming towards the medieval period, during the reign of the British and royals such as Raja Ram Mohan Roy, the legislature granted legal status to Indian women and children and many legislations were repealed by the British government in order to enhance women's legal, societal, and financial standing. Post-independence, it was believed that such abolition was insufficient to safeguard, thus the Principle of Gender Equality was formed under the headings of Preamble, Fundamental Rights, Fundamental Duties, and Directive Principles, with enabling rights and legislation. Despite receiving a significant amount of international recognition for the comprehensive notion of equality, India has been stuck with stereotypical traditions and beliefs for millennia.[124]This stereotyping is the reason why there has always been inequality between men and women, and they are compelled to execute specific tasks and conduct in a specific way in accordance with the cultural framework.

Gender Justice means similar treatment of men and women, as well as justice to the more equitable sex. No community can grow without gender justice, which is especially important in organizations and households and serves as a steppingstone to liberalization, fairness, and freedom for all genders and personalities, eventually contributing to social reform.

Many legislation and governmental programs have been enacted by the state to empower women. Nonetheless, many women still appear to be disgruntled (Ministry of Education and Social Welfare, Government of India, 1974)[125]. Thus, many academicians believe that gender justice is still a fantasy.

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[124] Corner L, "All About Gender Justice" (Law Corner, August 31, 2021) https://lawcorner.in/all-about-gender-justice/ accessed January 16, 2023

[125] Towards Equality, Report of the Committee on the status of women in India, Ministry of Education and Social Welfare, Government of India, New Delhi December 1974, available at http://pldindia.org/wp-

Female empowerment, equality of the sexes, and gender justice go beyond the well-known issues of child marriage, domestic abuse, rapes, and dowry. The existing world system must also tackle wage disparities, occupational harassment, societal and cultural inequality, and the legal freedom to work and possess property.

According to the World Economic Forum, 33,000 girls are married before the age of 18 worldwide; women are 47% more probable to be gravely injured in a car accident because vehicle safety characteristics are crafted for men; women devote 40 billion hours on uncompensated employment doing household tasks; and 85 countries have not had a female head of state in the last 50 years. This showcases that even the modern society is distant from being a women-friendly environment.[126]

In India, women are compensated as little as one-third of what men are paid for the identical or more work; more than 23 million girls abandon their education each year because of shortage of restrooms and an inadequate understanding about menstruation; girls from the top 20% of households obtain an aggregate of 9 years of education, while most girls from the lowest class never enter a classroom.[127]

The legislature has made several initiatives to create women's welfare laws in order to safeguard women and provide them with the essential respect and significance in community and Indian politics. However, legislative action is insufficient; a fundamental change in society is required. So that the cultural system, particularly the opposing gender, views women as an active participant rather than an inferior segment. Women must be given their rightful role in society as an equivalent individual, not as a subsidiary or accidental person.

Although we are still a long way from attaining full gender equality, the Indian Constitution establishes a solid structure for the concept of gender justice in India.

Article 14- *Equality before the law, which states that every citizen is equal in the eyes of the law and that equal protection under the law allows the state to engage in constructive segregation in order to put everyone on an equal basis.*

content/uploads/2013/04/Towards-Equality-1974-Part-1.pdf

[126] Foundation S, "Women Empowerment and Gender Justice in India" (Smile Foundation, March 6, 2020) https://www.smilefoundationindia.org/blog/women-empowerment-and-gender-justice-in-india/ accessed January 16, 2023

[127] Supra

Article 15 (1) - *Prevents discrimination based on gender and sex. This, however, does not preclude the state from adopting positive discrimination.*

Article 39 - *Similar means of subsistence for men and women, as well as equal remuneration for equal effort for men and women.*

Despite the legal protections afforded to women, justice remains elusive.

PERSONAL LAWS AND GENDER JUSTICE

1. GENDER INEQUALITIES IN HINDU PERSONAL LAW

1.1 *Succession and inheritance rights*- Previously, women were not acknowledged as family heirs. Only a male could be a coparcener and have birthright to the property. However, after implementing Amendment[128], a deceased's daughter was allowed to be a coparcener by birth and have the same interest and responsibility as a son or other male coparceners. In the case of *Danamma vs. Amar*[129], the court ruled that daughters have the similar rights to succession and inherited property as sons.

1.2 *Widow's right in property* - Prior to the Hindu Women's Right to Property Act of 1937, women had no entitlement to their husband's property. Under this Act, a widow of a dead spouse from a Mitakshara undivided family will be granted the equal status as her living husband.[130] The widow inherits the husband's interests.[131] This improvement was acquired to improve the widow's condition and status. The Hindu Succession Act of 1956 was established, which stated that the widow mother is eligible to one part of the property along with other class I heirs.

1.3 *Adoptions*- Before the Hindu Adoption and Maintenance Act of 1956, women had no authority to adopt a child even if her husband agreed. But without her wife's approval, a husband had the adoption rights. A widow could also adopt a child, but only with the husband's prior consent. However, after the Act,[132] any sound and major individual who is capable can adopt a male or female child. Widows can also adopt a child without husband's prior consent.

[128] Hindu Succession Amendment Act, 2005.
[129] (2018) 3 SCC 343
[130] Section 3, The Hindu women's right to property act, 1937
[131] Nishitha jain, Gender inequality in Hindu and Muslim personal laws in India, (2018) IJLMH, https://www.ijlmh.com/wp-content/uploads/2019/03/gender-inequality-in-hindu-and-muslim-personal-laws-in-india.pdf
[132] Section 7 and 8, The Hindu adoption and maintenance act, 1956.

Even an unmarried woman can adopt a child if certain qualifications are met, such as being a major, of sound mind, not married (or if married, the marriage must be dissolved), widow or her spouse becoming a convert, and so on.

1.4 *Guardianship* - In the case of a legitimate child, Section 6(a) of the Hindu Minority and Guardianship Act grants the father the designation of natural guardian. The requirement for equivalent natural guardianship duties for both parents is overlooked.

1.5 *Dowry* - According to National Crime Record Bureau, New Delhi, one-third of all offences against women are registered under Section 498-A, yet convictions under section 498-A and Dowry Prohibition Act are lowest among crimes against women.[133] An average of 21 dowry related deaths occur per day. 95% of weddings involve dowry, despite the ban on it. The culture allows thousands of women to be harassed, subjugated, and killed. This can only be stopped via gender equality and holistic women development.

2. GENDER INEQUALITIES IN MUSLIM PERSONAL LAW

2.1 *Marriages* - The age of getting married is the age of majority or puberty, which is normally fifteen years, but can vary between twelve years for a male and nine years for a girl. A girl's consent is also not required when she is below the age of majority or puberty. She can marry with the permission of her guardian. In addition, a man can marry four women but not more than that, whereas a woman can only have one husband. If she marries again, she will be held responsible for the polygamy and the kids will be illegitimate.[134]

2.2 *Inheritance* - There is no rule in Muslim law that excludes women from the ability to inherit property, yet men get more, and women get very little. For example, if a man is eligible to 1/4th of the asset shares, the woman will only be eligible to 1/8th.

2.3 *Divorce* - The marriage can be ended by the demise of one of the spouses or by divorce. When the husband dies, the wife cannot remarry without first following an *iddat* period, whereas the husband can remarry instantly. According to Muslim law, men have more grounds for divorce than women. A husband can divorce his wife at any time without giving her any

[133] Dubbudu R (2017) Conviction rate of Sec 498-A cases isamong the lowest of all IPC crimes. https://factly.in/conviction-rate-for-cases-registered-under-sec-498a-ipc-is-among-the-lowest-for-all-ipc-crimes/. Accessed 18 January 2023.

[134] Corner L, "Gender Inequality And The Various Personal Laws In India" (Law Corner, January 20, 2021) https://lawcorner.in/gender-inequality-and-the-various-personal-laws-in-india/ accessed January 19, 2023

justification. However, a woman cannot divorce her spouse unless he consents or there is an arrangement in which the husband delegated his right to divorce to the wife.

3. GENDER INEQUALITY IN INDIAN CHRISTIAN PERSONAL LAW

3.1 The Indian Divorce Act of 1869 governs the divorce of an Indian Christian. The husband is only required to demonstrate adultery to procure a divorce, whereas the wife must justify many grounds such as bigamy, cruelty, desertion, sodomy, adultery, and so on. However, after the Act[135] was modified in 2001, it introduced reasonable grounds for divorce by either spouse, man or woman, such as adultery, bigamy, refusing to consummate the marriage, cruelty, and so on.

4. GENDER INEQUALITY IN PARSI PERSONAL LAW

4.1 If a Parsi lady marries a person who is not a Parsi, their offspring are not considered Parsi. This does not pertain to a Parsi man who marries outside of the Parsi community.[136]

4.2 A non-Parsi woman married to or widowed by a Parsi man cannot inherit on her husband's death, although their children can.

In numerous of its decisions, the Indian judiciary has plainly stated the damaging effect of personal laws on women and gender equality. The 1985 case of *Mohd. Ahmed Khan vs. Shah Bano Begum & Ors*.[137] raised public awareness of the necessity for a UCC to eliminate dispute in personal and civil laws, promoting community integration, and gender equality. A recent decision, *Prakash & Ors. vs. Phulavati & Ors*.[138], finds gender discrimination under personal laws to be an infringement of fundamental rights protected by the Constitution in Articles 14, 15, and 21, which deal with the right to life with dignity and equality. While certain decisions have clearly struck down several discriminatory practices in personal laws over the ages, it is still necessary to legislate it in order to make the law explicit on such matters and the judicial procedures easier for women to access.

WORK LAWS AND GENDER JUSTICE

1. THE MATERNITY BENEFIT ACT

The Maternity Benefit Act is a law that provides certain benefits to women who are pregnant or have recently given birth. The act, which was first passed in 1961 and has been amended

[135] Section 5, The Indian divorce (amendment) bill, 2001.
[136] "Personal Laws and Gender Justice" (India Foundation, May 1, 2017) https://indiafoundation.in/articles-and-commentaries/personal-laws-and-gender-justice/ accessed January 19, 2023
[137] 1985 (2) SCC 556
[138] Civil Appeal No.7217 of 2013

several times since then, requires employers to provide paid leave to pregnant women, as well as certain other benefits such as crèche facilities.[139]

The Act applies to every facility, whether it be a factory, mine, or plantation, including any such facility owned by the government, as well as to every facility where people are hired to conduct equestrian, acrobatic, or other displays for the public. Maternity leave pay is calculated based on the average daily earnings for the time off worked prior to and including the day of childbirth. It further stipulates that no employer may knowingly employ a woman within the six-week period beginning on the day after her delivery, miscarriage, or medical termination of pregnancy.[140] The Maternity Benefit Act, 2017 provides for paid maternity leave for working women. The act increases the amount of paid maternity leave available to women from 12 weeks to 26 weeks for the first two children, and 12 weeks for any subsequent children, and even for women who have adopted a child. The Act also makes it mandatory for employers to provide crèche facilities for children up to the age of six years for working mothers. Additionally, the Act requires employers to permit women employees to work from home, if feasible, and to provide breaks for breastfeeding during working hours.[141]

- *Municipal Corporation of Delhi vs Female Workers*[142]

The Supreme Court ruled that the Maternity Benefit Act does not limit maternity leave to regular female employees. Women who work part-time or on a muster register for daily wage are equally entitled for the benefits too.

2. ***EQUAL RENUMERATION ACT***

Every employer is required by law to pay the same salaries to men and women if they perform the same labor or employment that is comparable in nature, as stated in Article 39 of the Constitution, which also provides that the state shall regulate its policies in order to provide same wages for same occupation.[143] The pay must remain the same even if it is done at various locations. Unless hiring women is outlawed or restricted by law, employers cannot discriminate

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[139] "India Code: Maternity Benefit Act, 1961" (India Code: Maternity Benefit Act, 1961, December 12, 1961) https://www.indiacode.nic.in/handle/123456789/1681?sam_handle=123456789/1362 accessed January 28, 2023.
[140] Kartikaeya, "The Maternity Benefit Act, 1961 and Maternity Benefit (Amendment) Act, 2017 and Creche Facility" (iPleaders, October 26, 2022) https://blog.ipleaders.in/the-maternity-benefit-act/ accessed January 28, 2023.
[141] T K, "Maternity Benefits (Amendment) Act, 2017 – All You Need To Know" (*Vakilsearch | Blog*, November 25, 2022) https://vakilsearch.com/blog/maternity-benefits-amendment-act-2017-all-you-need-to-know/ accessed January 28, 2023
[142] AIR 2000 SC1275
[143] Avni Sharma, "Equal Remuneration Act, 1976 : Details You Must Know - iPleaders" (iPleaders, November 18, 2019) https://blog.ipleaders.in/equal-remuneration-act-1976/ accessed January 28, 2023.

against women when hiring. The employer is thus forbidden from discriminating against women in issues of hiring, promotions, training, or transfer.

- *Sanjit Roy vs State of Rajasthan*[144]

The Supreme Court ordered the State government to pay men and women working in famine relief the minimum wage and equal compensation for equal effort.

3. ***THE PROHIBITION OF SEXUAL HARRASEMENT OF WOMEN AT WORKPLACE ACT***

The Prevention of Workplace Sexual Harassment Act and the Prevention of Workplace Sexual Harassment Rules were enacted 16 years after the landmark judgement of *Vishaka and others v. State of Rajasthan*[145]. In the said Judgment, the Supreme Court issued rules mandating that every employer must establish a system to address sexual harassment in the workplace and protect the right to gender equality of working women.[146]

The purpose of this Act is to prevent and protect women from sexual harassment in the workplace and to provide appropriate remedy for sexual harassment complaints. It aims to replace the legislative void on the subject and offer every woman, regardless of age or employment status, with a safe and secure workplace free from all forms of harassment.[147] In 2013, the Criminal Law (Amendment) Act, 2013 was passed, which criminalized offences such as sexual harassment, stalking, and voyeurism.

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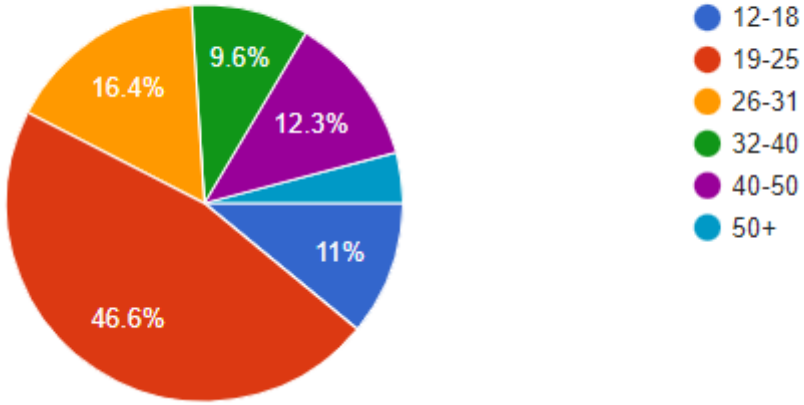
[144] AIR 1988 SC 238
[145] AIR 1997 SC 3011
[146] Ishika, "Prevention Of Sexual Harassment Act" (Prevention Of Sexual Harassment Act, 2018) https://legalserviceindia.com/legal/article-9193-prevention-of-sexual-harassment-act.html accessed January 28, 2023.
[147] Pattnaik, "Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act, 2013" (Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act, 2013, August 19, 2016) https://www.indianbarassociation.org/sexual-harassment-of-women-at-workplace-prevention-prohibition-redressal-act-2013/ accessed January 18, 2023.

ANALYSIS

Age:

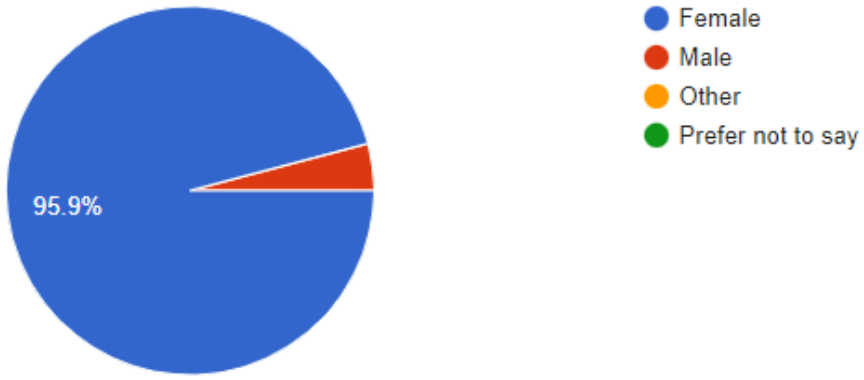


This question was related to age group. Out of 73 people:

- 46.6%, i.e. 34 people lie in the age group of 19-25
- 16.4%, i.e. 12 people lie in the group of 26-31
- 12.3%, i.e. 9 people lie in the age group of 40-50
- 11% i.e. 8 people lie in the group of 12-18
- 9.6% i.e. 7 people lie in the group of 32-40
- 4.1% .e. 3 people lie in the age group of 50+

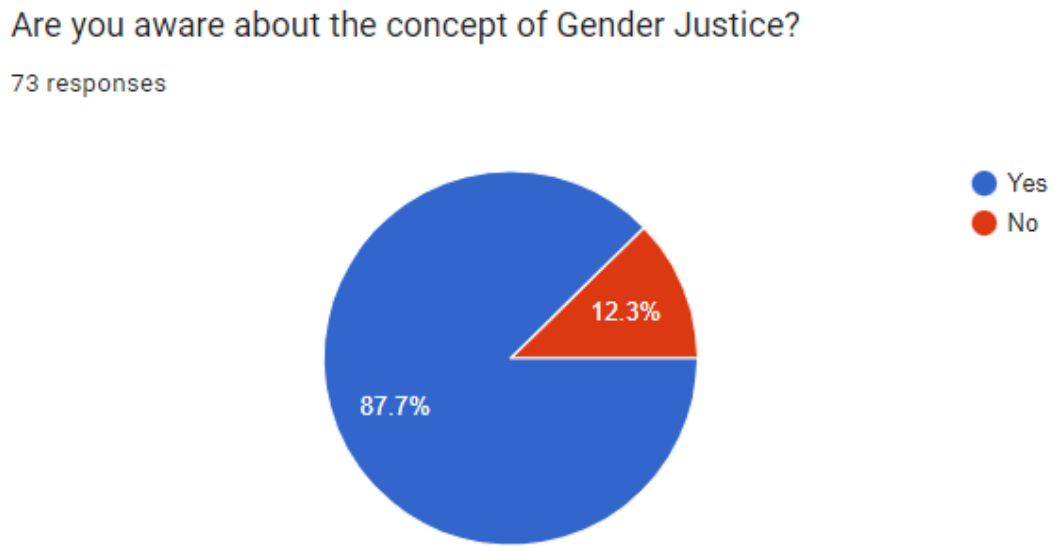
Gender

73 responses



This question is related to the gender of people that have taken part in the research. Out of 73, 95.9% were female, while 4.1% were male.

Authors wanted it to be a gender specific study, thus the research was mainly targeted on women.



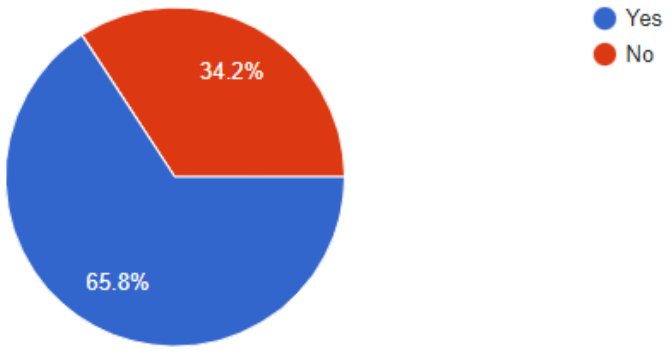
The purpose of this question is to determine whether or not the general public is familiar with the idea of gender justice. Out of 73 responses, 87.7%, i.e. 64 people are aware about this concept.

Analysis revealed that the notion has wide exposure among those aged 19 to 40. The people aged above 40 has the lowest level of awareness.

National Commission for Women is a statutory body of the government generally concerned with advising the government agencies on all political matters affecting women.

Are you aware about this Commission?

73 responses

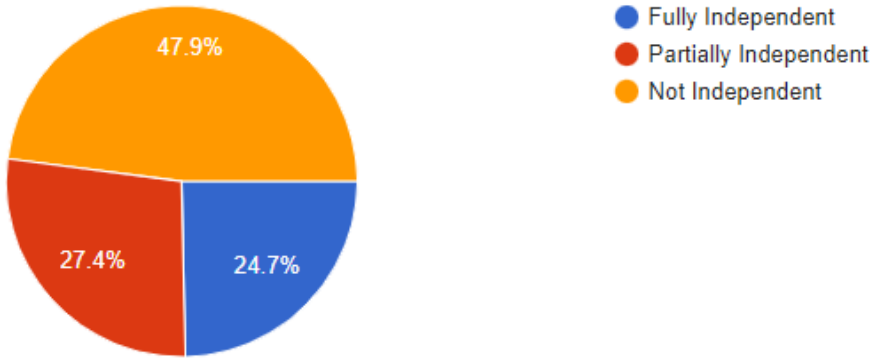


The purpose of this question is to determine whether or not the general public has knowledge about National Commission for Women.

Out of 73 responses, 65.8%, i.e. 48 responses were in favour of the answer, while 34.2%, i.e. 25 people are not aware about this Commission. The least awareness about the Commission is among the people aged above 19.

Are you financially independent?

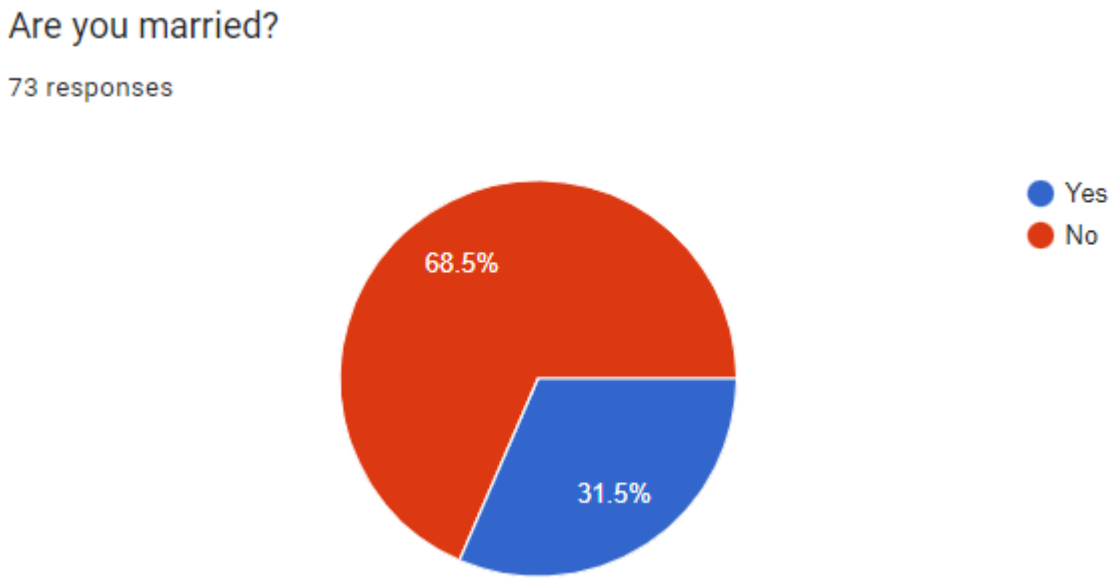
73 responses



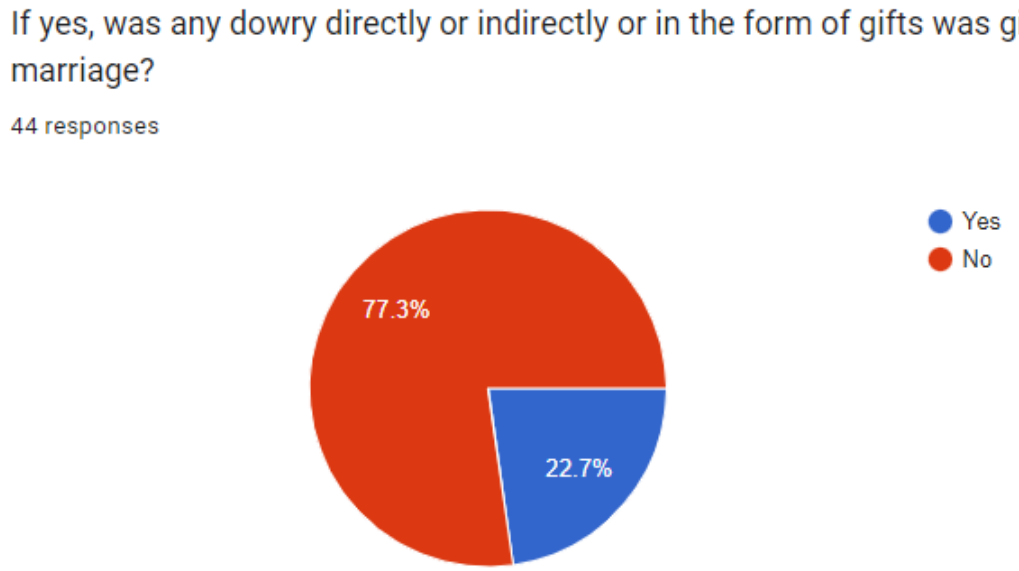
The question was to understand the financial independency of the public.

Out of 73 responses:

- 47.9%, i.e. 35 people are completely dependent on another person. The major non-independent chunk lies in the age group of 19-25, and then from 32 and above.
- 27.4%, i.e. 20 people are partially independent.
- 24.7%, i.e. 18 people are fully independent. The most independent people lie in the age group of 26-31.

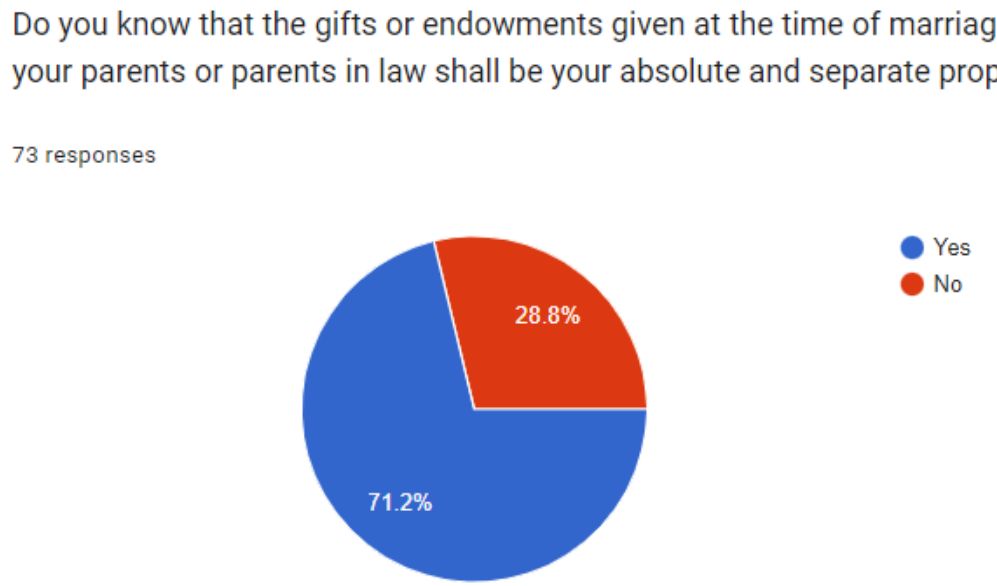


The question relates to the marital status of the general public. Out of 73 responses, 68.5%, i.e. 50 were unmarried, rest 31.5%, i.e. 23 were married.



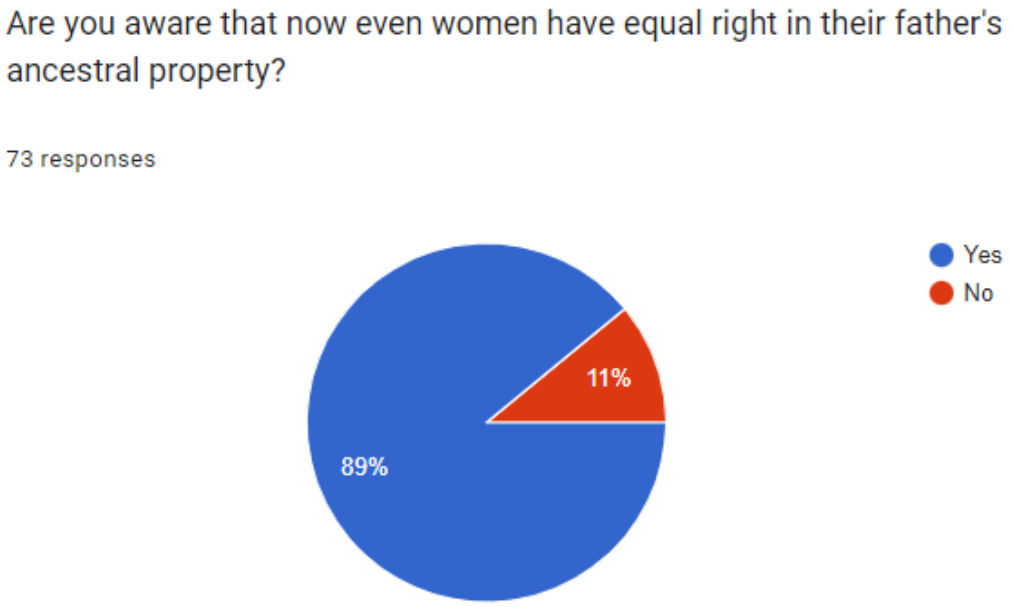
The dowry system that is practiced in marriages was the topic of the question. 22.7% of respondents, or 10 persons, agreed with the response. Because no one willingly accepts the

practice of either receiving or giving dowry, the response to this question may have been slightly misleading or even incorrect.



The purpose of this question is to determine whether or not the general public has knowledge about the ownership gifts or endowments given at the time of marriage. Out of 73 responses:

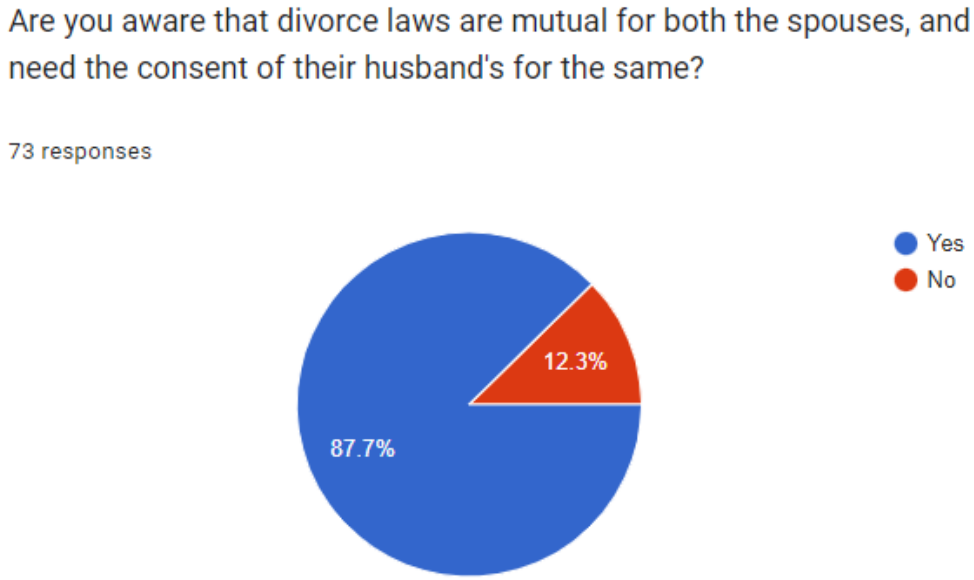
- 71.2%, i.e. 52 people had awareness about it.
- 28.8%, i.e. 21 people were not aware about it. The least awareness can be seen among the people aged 26 and above.



The purpose of this question is to determine whether or not the general public has knowledge about the rights of women in her ancestral property:

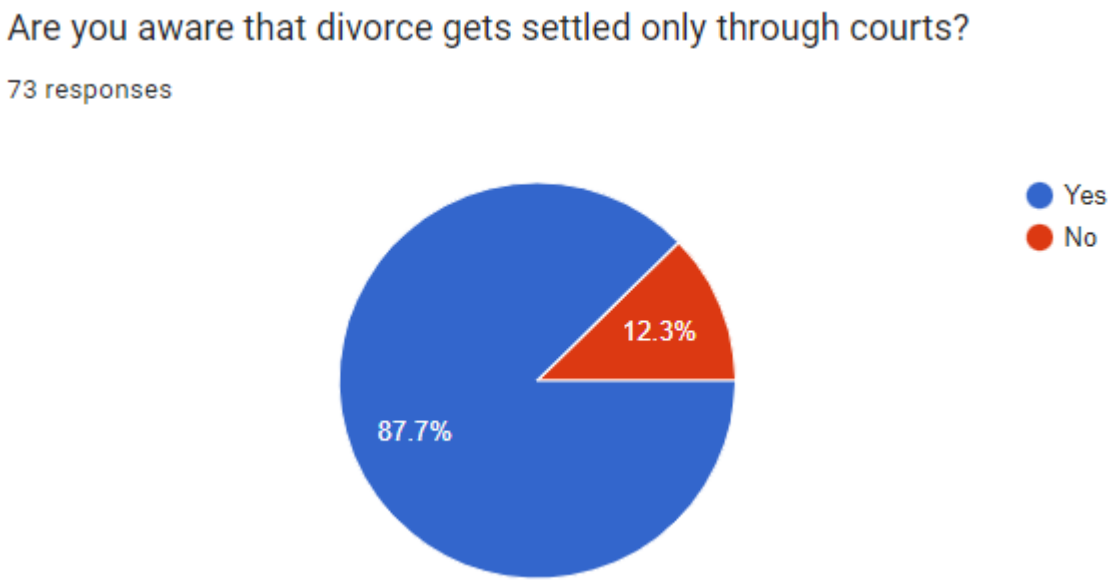
Out of 73 responses:

- 89%, i.e. 65 people were aware about this right. Among these, the age group from 19 and above are the most aware.
- 11%, i.e. 8 people were unaware about this right. People aged 40 and above are the least aware.



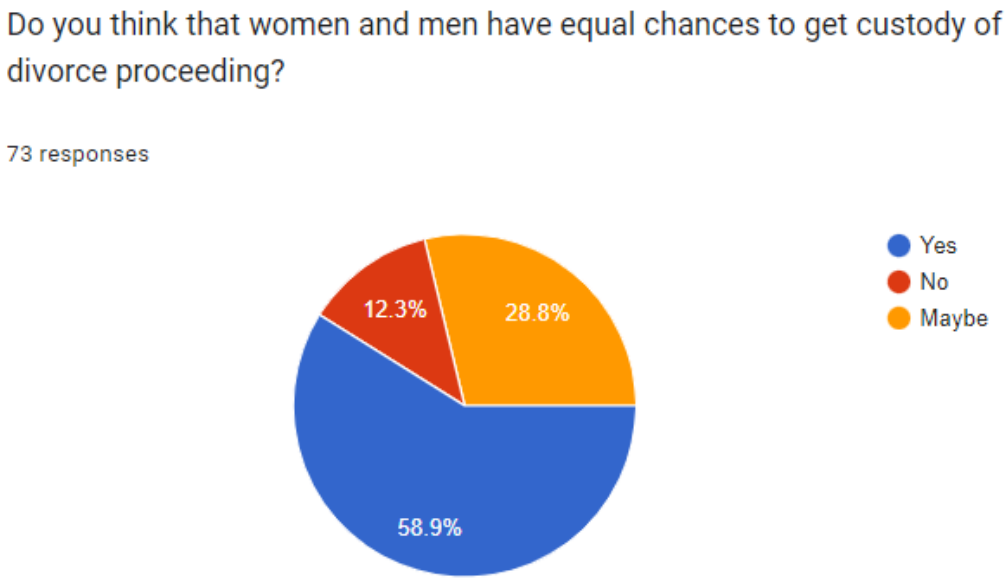
The question was to check the awareness quotient among the general public regarding divorce laws. Out of 73 responses:

- 87.7%, i.e. 64 people are aware that divorce laws are mutual for both the spouses.
- 12.3%, i.e. 9 people are not aware about the mutual nature of divorce laws. People aged from 40 and above are the least aware.



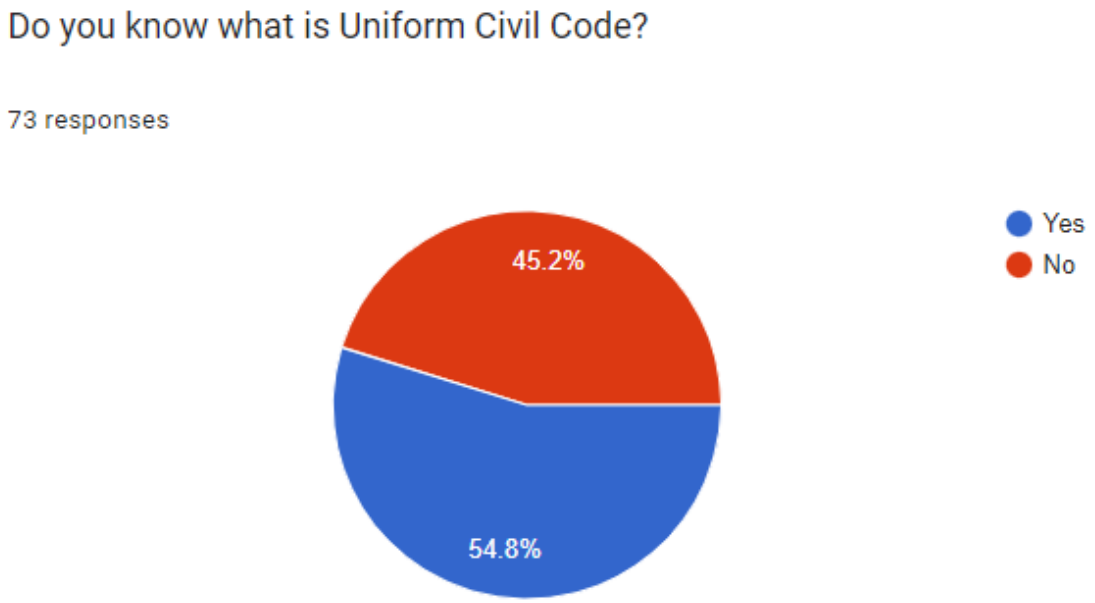
The question was to check the awareness quotient among the general public regarding divorce laws. Out of 73:

- 87.7%, i.e. 64 people are aware that divorce gets settled only through Courts.
- 12.3%, i.e. 9 people are not aware that divorce gets settled through Courts.



The question was to check the awareness among the general public regarding the custodial rights between men and women. Out of 73 responses:

- 58.9%, i.e. 43 people are aware that both men and women have equal chances of custody.
- 28.8%, i.e. 21 people do not have complete awareness about the same.
- 12.3%, i.e. 9 people do not have any awareness about the fact men and women have equal chances about custodial rights. The age group with the least awareness ranges from 30 and above.



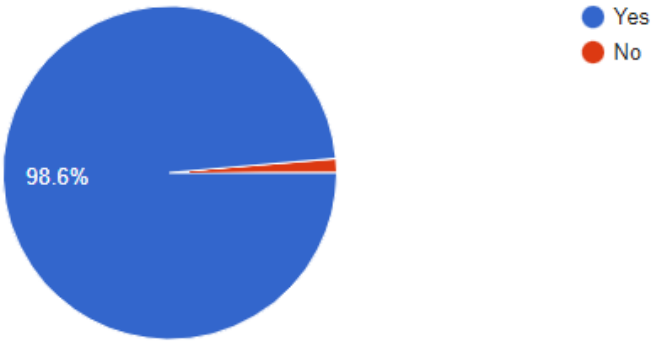
The purpose of this question is to determine whether or not the general public is familiar with the concept of Uniform Civil Code. Out of 73 responses:

- 54.8%, i.e. 40 people know about the idea of Uniform Civil Code.
- 45.2%, i.e. 33 people do not know about the Uniform Civil Code. Among these, the least awareness is among the people aged above 40.

If no, then Uniform Civil Code refers to a single law, applicable to every citizen of India in their personal matters such as marriage, divorce, inheritance etc. regardless of their religion.

Do you think that Uniform Civil Code is the need of the hour, as rights of women are usually limited under religious law, be it Hindu or Muslim.

73 responses

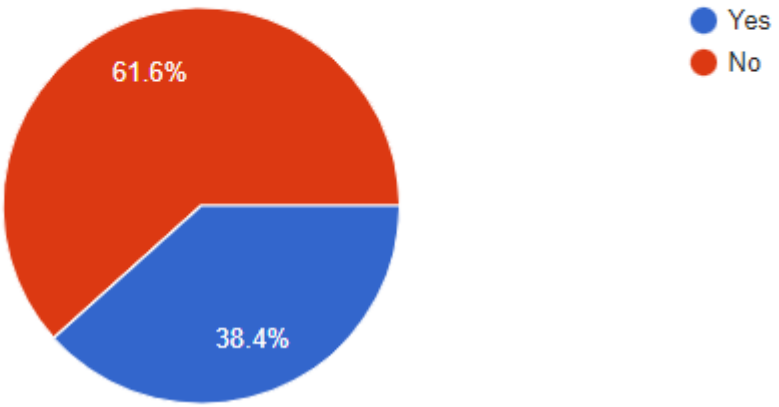


This question asked people's opinion on the need of Uniform Civil Code in the present times. Out of 73 responses:

- 98.6%, i.e. 72 people believe that Uniform Civil Code is indeed the need of the hour.
- 1.4%, i.e. 1 person believes that Uniform Civil Code is not needed presently.

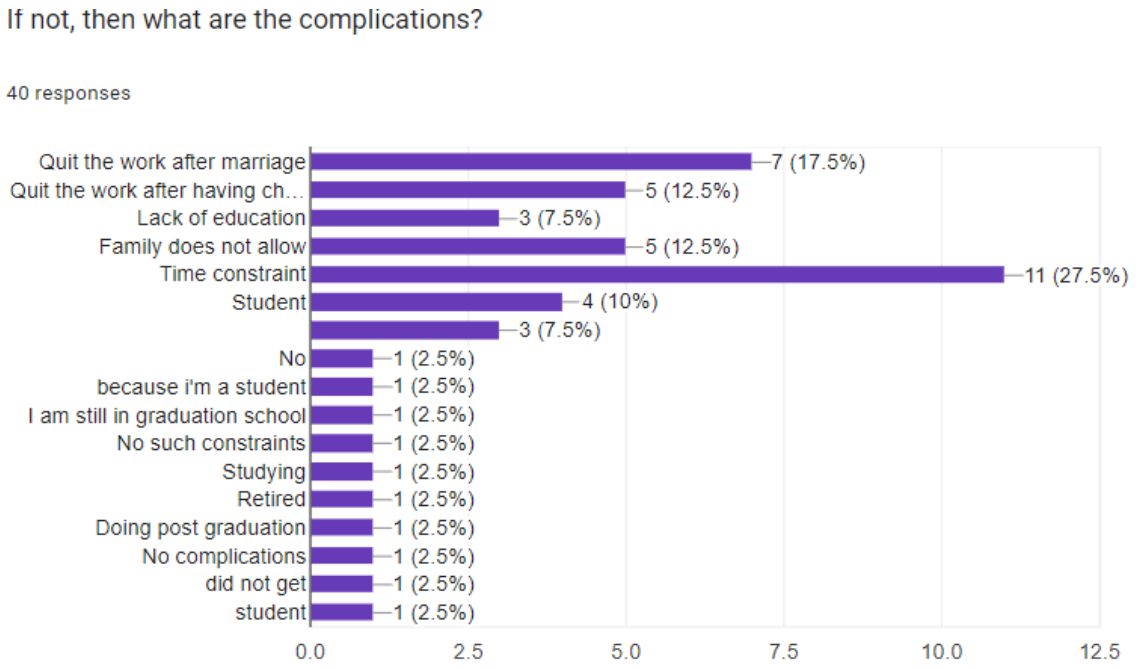
Are you employed?

73 responses



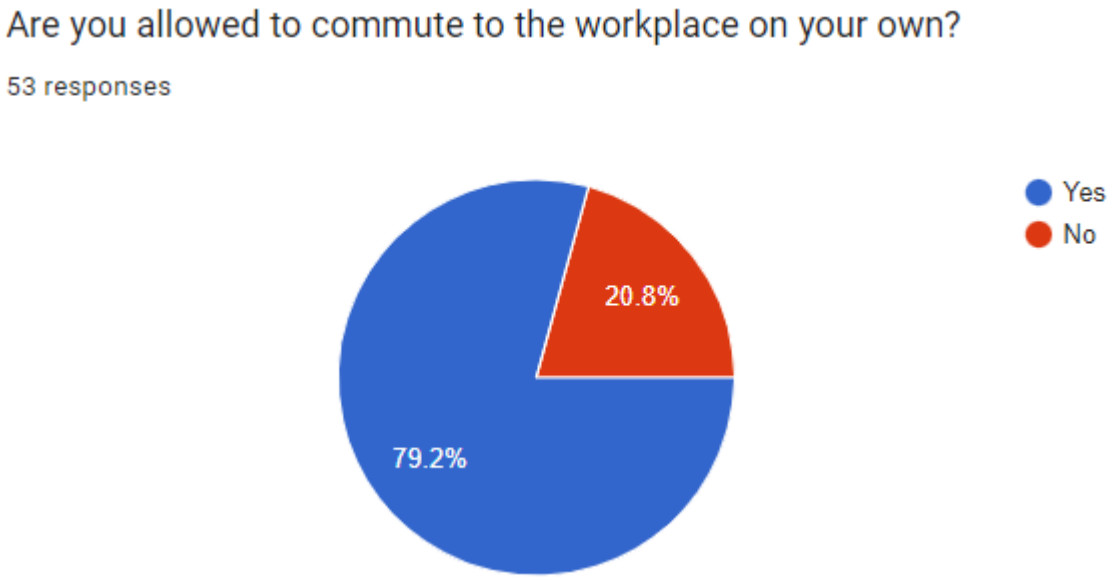
The question relates to the employment status of the people taking part in the research. Out of 73 responses:

- 61.6%, i.e. 45 people are unemployed. People aged from 12-18, and 32 above mostly lie in the unemployed sector.
- 38.4%, i.e. 28 people are employed.



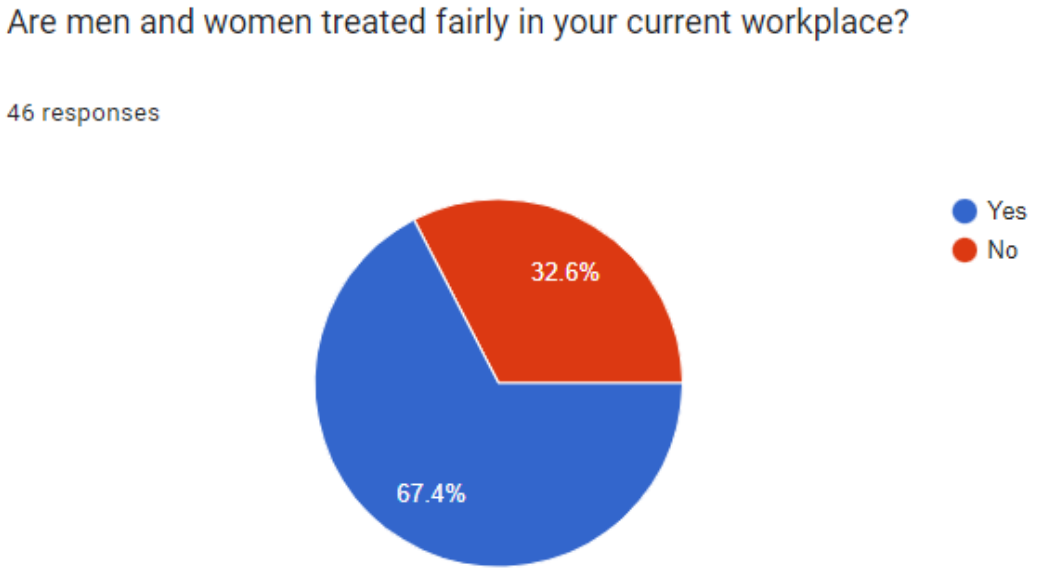
This question asks reason for unemployment to the general public. Out of 40 responses:

- 27.5%, i.e. 11 people quit working due to time constraint.
- 17.5%, i.e. 7 people quit working after their marriage.
- 12.5%, i.e. 5 people quit working after having children.
- 12.5%, i.e. 5 people quit working as their family does not allow for the same.
- 7.5%, i.e. 3 people quit working due to lack of education.



The question asks whether people are allowed to commute to workplace on their own or not. Out of 53 responses:

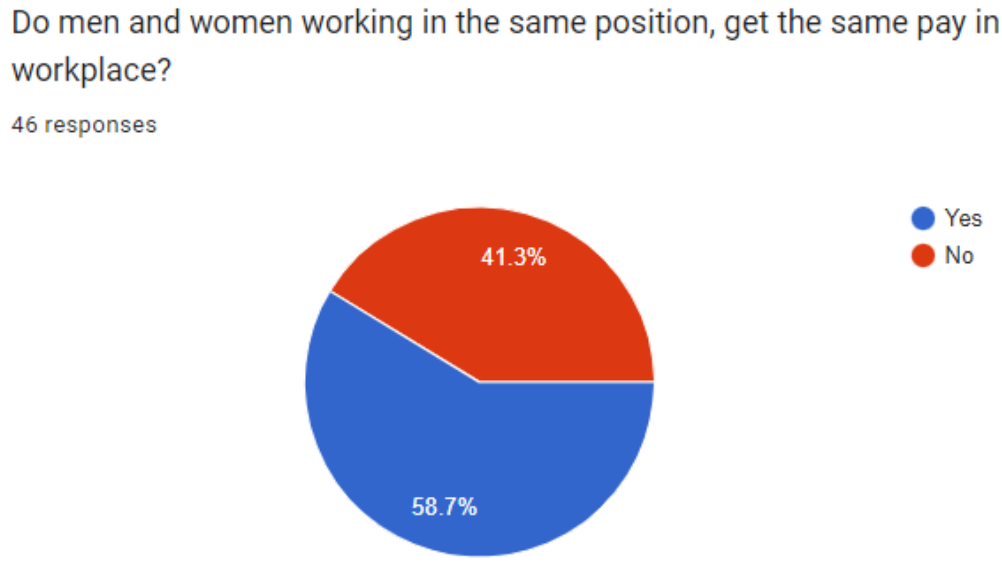
- 79.2%, i.e. 42 people are allowed to commute on their own.
- 20.8%, i.e. 11 people are not allowed to commute on their own. Among these, it is people aged 31 and above that lie in the unemployed sector and have quit working after getting married, or children, or the family does not allow.



The question relates to the working environment, and whether men and women are treated fairly in the workplace. Out of 46 responses:

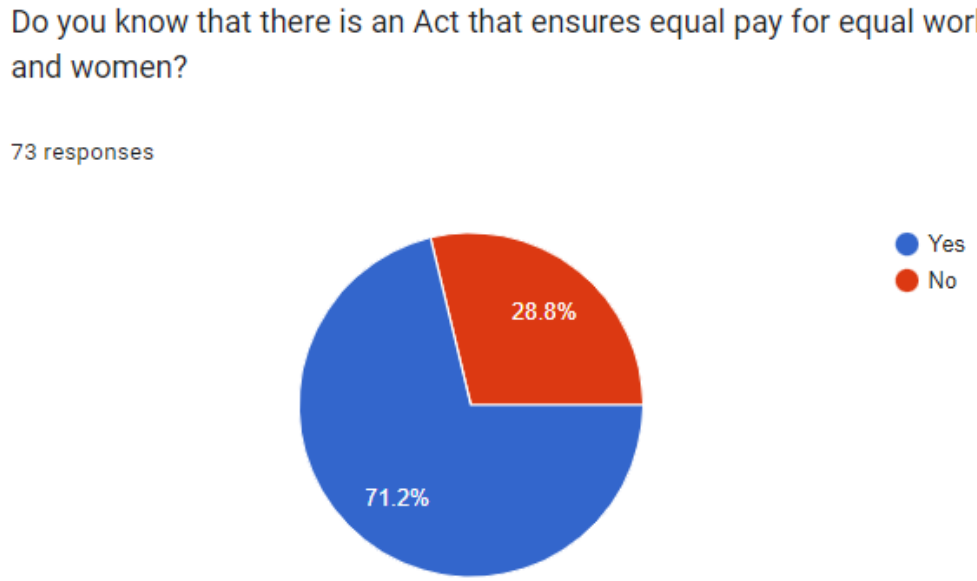
- In 67.4%, i.e. people's workplace men and women are treated fairly.

- In 32.6%, i.e. people's workplace men and women are not treated fairly.



The question relates to the pay check given to men and women in the same environment and position. Out of 46 responses:

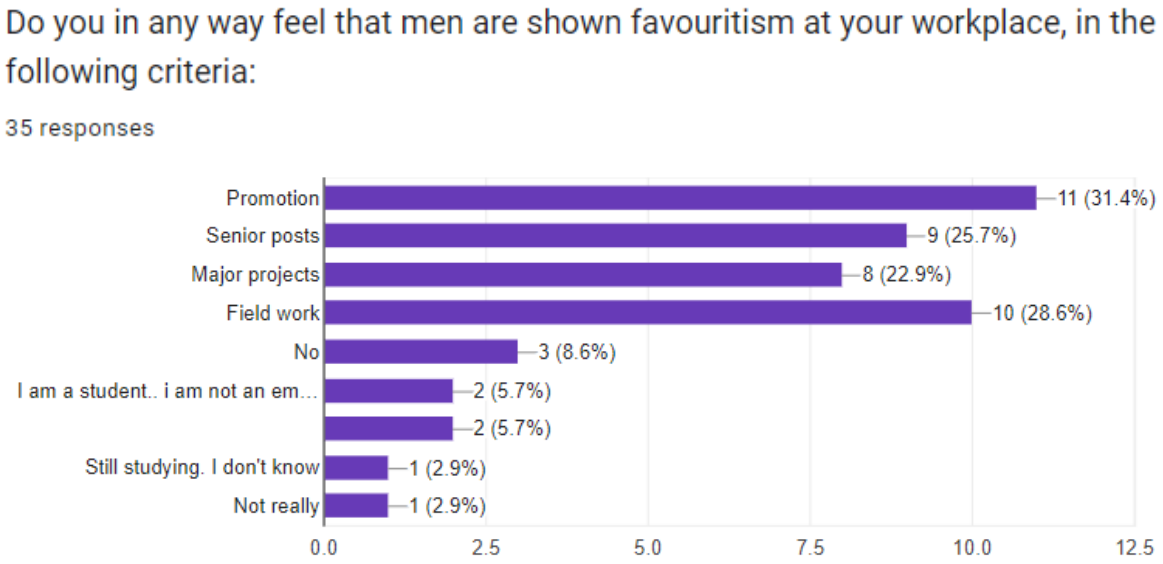
- In 58.7%, i.e. people's work place men and women working on the same position are given the same pay.
- In 41.3%, i.e. people's work place, men and women working on the same position are not given the same pay.



The question relates to awareness quotient among the general public regarding the Equal Remuneration Act. Out of 73 responses:

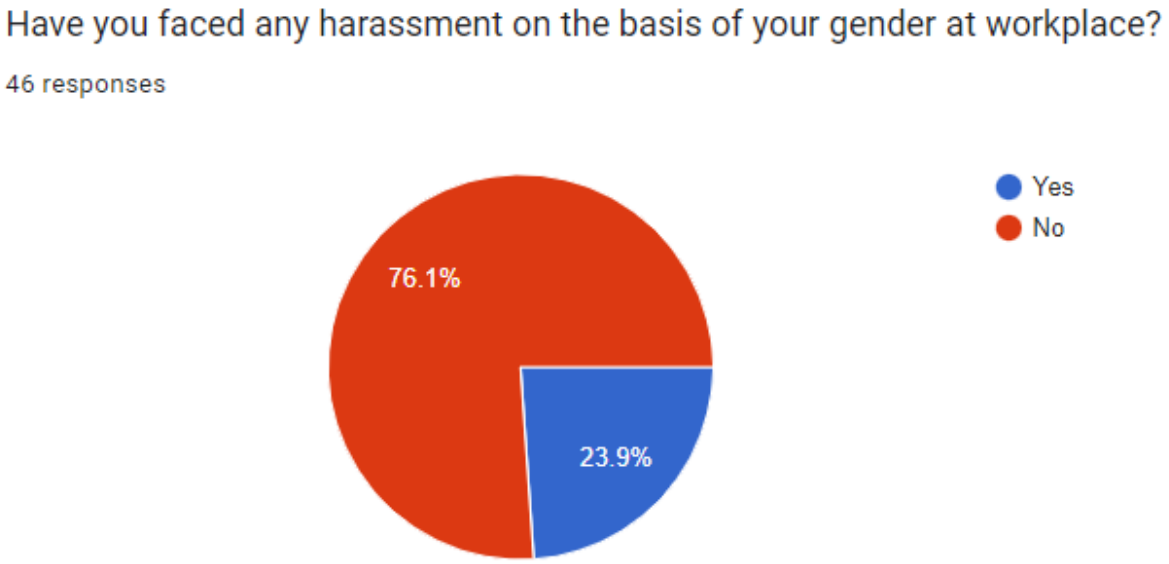
- 71.2%, i.e. 52 people are aware about the Act of equal pay for equal work.

- 28.8%, i.e. 21 people are not aware about the equal work, equal pay Act. People aged 40 and above have the least awareness about this Act.



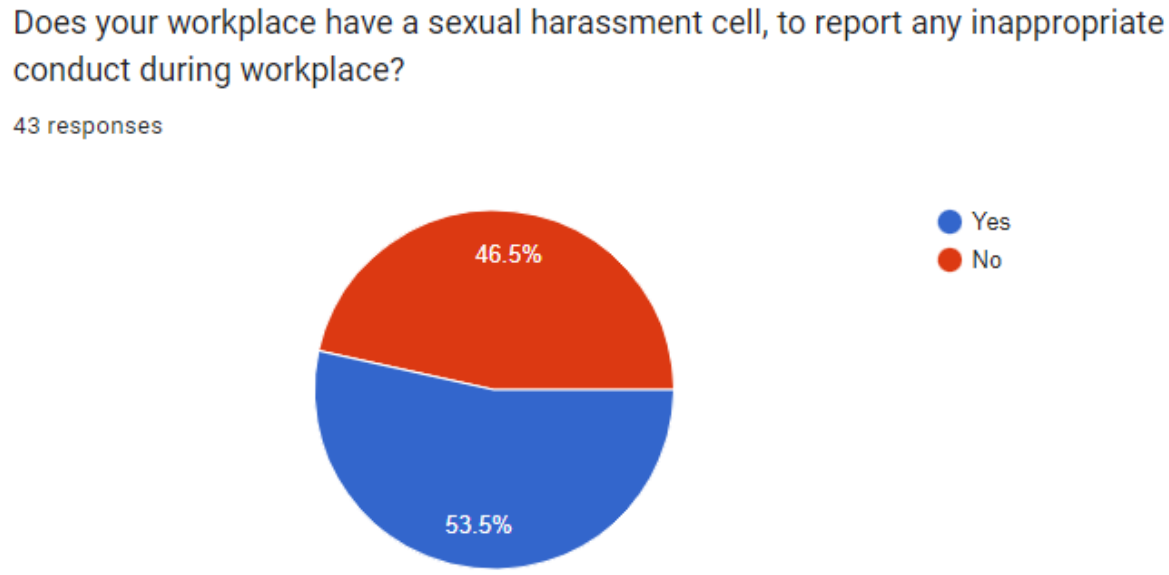
The question relates to favouritism seen in the work place. Out of 35 responses:

- 31.4%, i.e. 11 people say that men are shown favouritism during promotion in their work place.
- 28.6%, i.e. 10 people say that men are shown favouritism in field work.
- 25.7%, i.e. 9 people say that men are shown favouritism while senior positions are allotted.
- 22.9%, i.e. 8 people say that men are shown favouritism while major projects are allotted at their work place.



The question asks the general public if they have faced any harassment on the basis of gender in their workplace. Out of 46 responses:

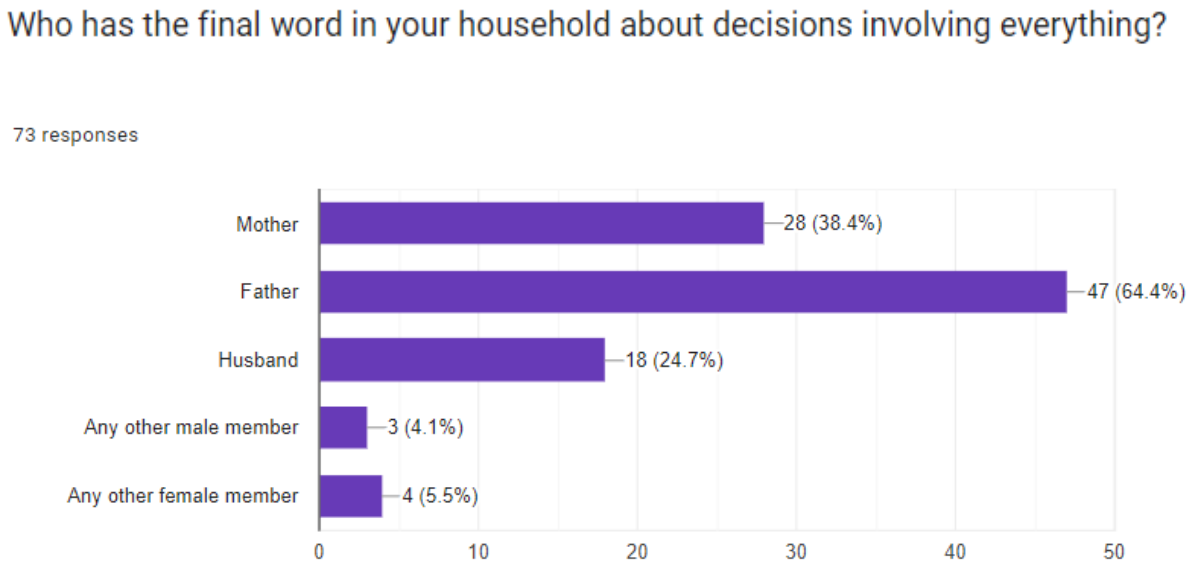
- 76.1%, i.e. 35 people have not faced any sexual harassment on the basis of gender at their work place.
- 23.9%, i.e. 11 people have faced harassment in their workplace based on their gender. The most affected age group being 26 and above



This question collects data regarding the presence of a sexual harassment cell in the general public's workplace. Out of 43 responses:

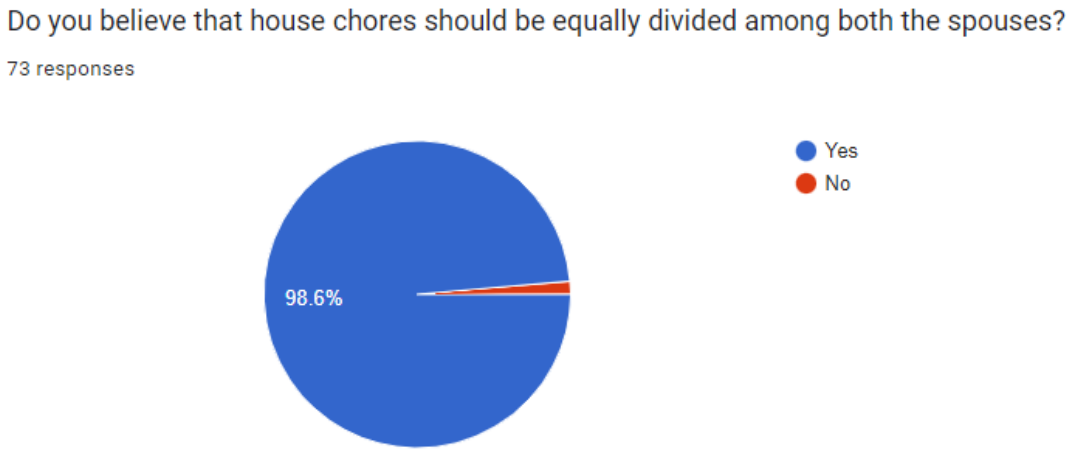
- 53.5%, i.e. 23 people have a sexual harassment cell at their workplace.

- 46.5%, i.e. 20 people do not have any sexual harassment cell at their workplace.



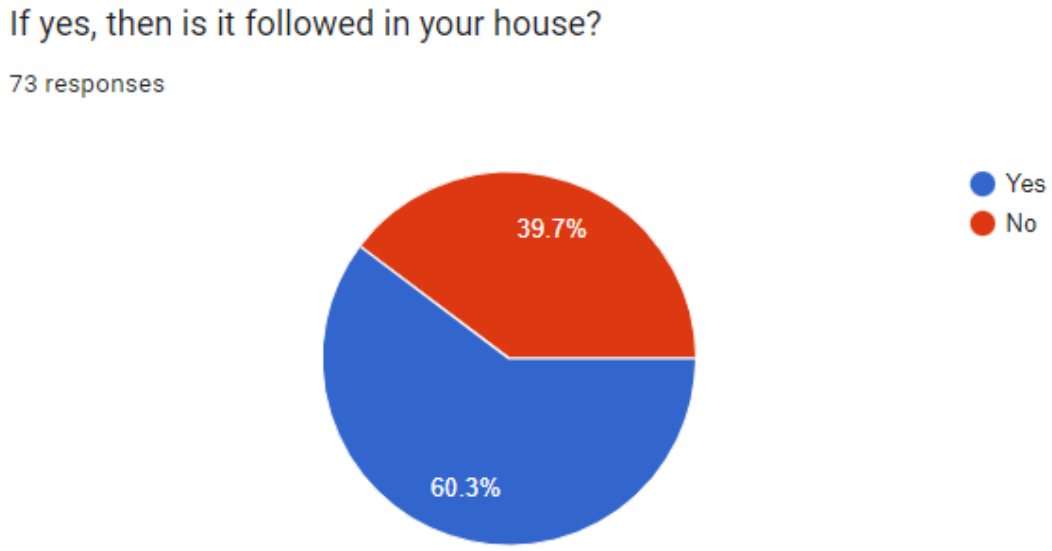
The public is asked about household decision-making. Out of 73 responses:

- 64.4%, i.e. 47 people say that their father have the final say.
- 38.4%, i.e. 28 people say that their mother have the final say.
- 24.7%, i.e. 18 people say that their husband have the final say.
- 5.5%, i.e. 4 people say that any other female member has the final say in their household.
- 4.1%, i.e. 3 people say that any other male member has the final say in their household.



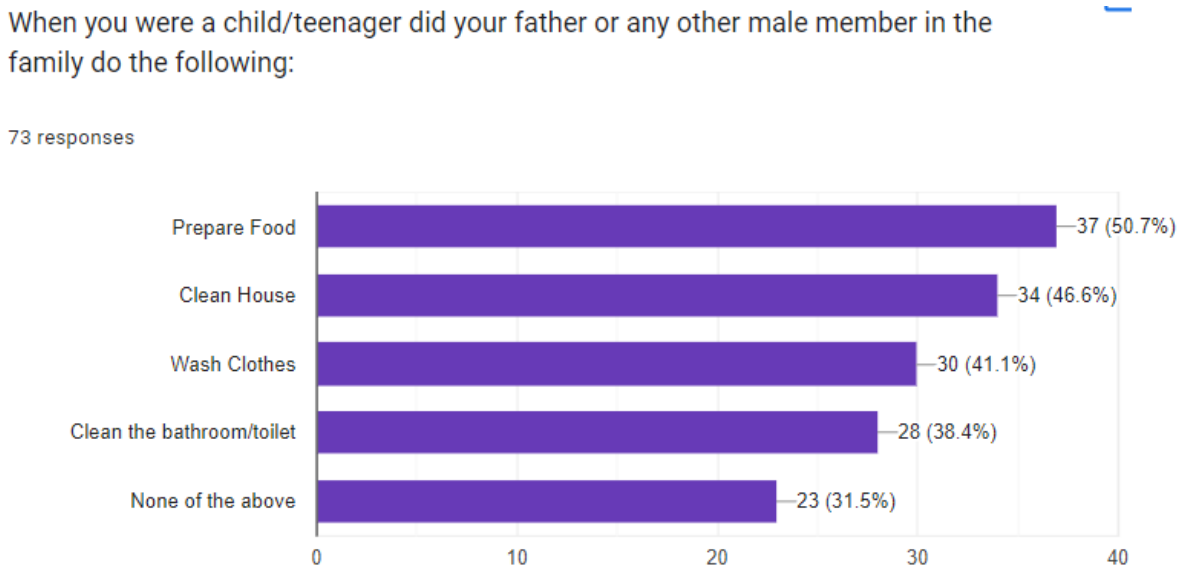
The question asks people's opinion regarding house chores being equally divided among both the spouses. Out of 73 responses:

- 98.6%, i.e. 72 people that house chores should be equally divided among both the spouses.
- 1.4%, i.e. 1 person does not agree that household chores should be equally divided among both the spouses.



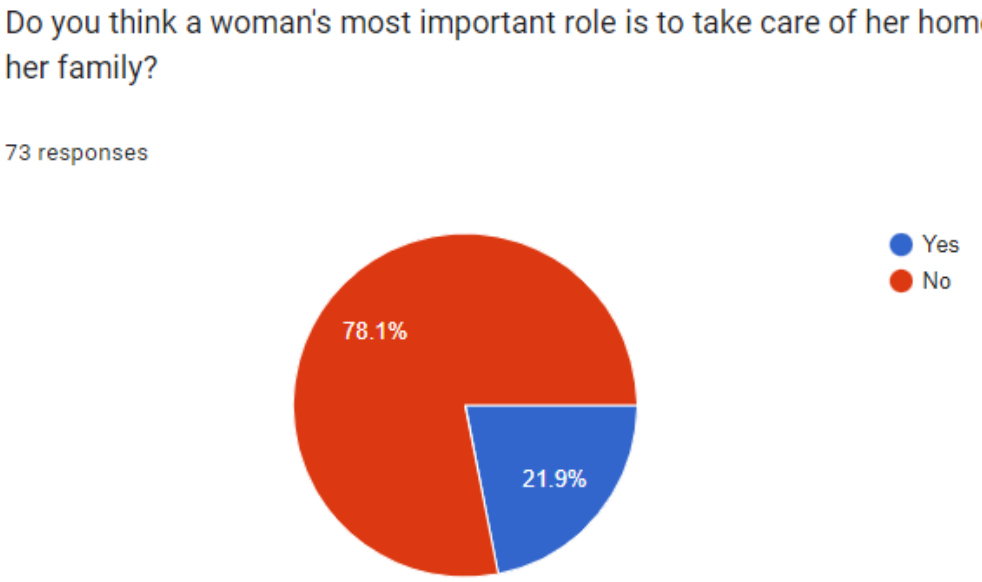
The question asks whether household chores are actually divided in the general public's house. Out of 73 responses:

- 60.3%, i.e. 44 people say that household chores are divided in their house.
- 39.7%, i.e. 29 people say that household chores are not divided in their house.



The question asks the general public whether in their childhood/teenage they have seen their father or any other male member do the following things as given in the options. Out of 73 responses:

- 50.7%, i.e. 30 people say that they have seen their father or other male members preparing food.
- 46.6%, i.e. 34 people say that they have seen their father or other male members cleaning the house.
- 41.1%, i.e. 30 people say that they have seen their father or other male members wash clothes.
- 38.4%, i.e. 28 people say that they have seen their father or other male member clean the bathroom/toilet.
- 31.5%, i.e. 23 people say that they haven't seen their father or any other male member do any of the above mentioned thing.



The question asks people's opinion regarding the most important role of a woman. Out of 73 responses:

- 29.1%, 16 i.e. people say that a woman's most important role is to take care of her family. This opinion is highly seen among people aged 32 and above.
- 78.1%, i.e. 57 people say that a woman's most important role is not to take care of her family.

RESULT

The paper can be analyzed on the following four grounds:

1. **GENERAL INFORMATION**: According to the findings of the research, more than fifty percent of the sample population is familiar with the concept of gender justice. Persons aged 40 and older tend to have a lower level of awareness than younger people. The population that is most financially dependent on another also falls into this category. It is unexpected that those aged 19 and older had the least awareness of the National Commission for Women. It's possible that this is due to a lack of education, but it might also be the result of lack of marketing and awareness campaigns led by women.
2. **PERSONAL LAW**: It is evident from the analysis that people are far more conscious of personal laws now than they were in the past few decades. The trend of giving dowry is decreasing now. Women are aware that they do not need their husband's approval before filing for divorce, as divorce-related laws are considerably more widely known. On the topic of custody, however, the same level of information is lacking, and there is a great deal of confusion over the odds of both couples obtaining custody of their child.

In spite of the fact that 48.6% of the sample population was unaware of the Uniform Civil Code, practically the whole population today believes that the Uniform Civil Code is urgently needed and would be a significant step toward attaining gender justice.

3. **WORK AND LABOUR LAWS**: Despite the fact that working women are now gravitating more toward the service industry, no industry is currently exempt from gender inequality.

The response on labour laws indicate that there is still a significant gender disparity in this subject. Many women still lack the family support, education, and skills required for the job profile. After marriage or having children, a large number of highly educated women quit their jobs and become financially dependent on their husbands.

Even after seven decades of freedom, women are not permitted to leave the house or travel alone. Almost half of the women in the sample are not permitted to commute to work alone; only male family members are permitted to accompany them. Though it is required by law that all companies have a sexual harassment cell, nearly half of the women surveyed reported that their workplace lacked such a cell

4. **HOUSEHOLD**: In Indian households, patriarchy still reigns. More than half of the households in the sample are headed by the father or any other male member. The

majority of the public feels that domestic responsibilities should be shared between partners, yet only half of the population actually does so.

Thus, the data collected above proves that null hypothesis is correct and the alternate hypothesis is incorrect.

CONCLUSION

Although the term "gender justice" is not defined or addressed in the Constitution of India, the preceding analysis makes clear that the Constitution has widened the understanding of this concept. However, the bowl of Gender Injustice is quite large, and only some strict measures against the people who instigate it will cure or prevent it.[148]

Despite the fact that there are various laws safeguarding women and Supreme Court decisions addressing the matter, women have not yet attained the status in society that they deserve or are entitled to. Devoid of public opinion, law is merely a collection of papers. Social engineering laws are different from penal laws, and hence the gender gap cannot be closed by simply enacting them without public support and opinion. In India, the majority of laws were not effective because they were ahead of public opinion, and the willingness of the people to change the society and give women the status of equality in society was lacking as well. Therefore, in order to give women their respective position in the society, a strong public opinion should be created through education, seminars, and by taking the help of various other instruments of the society such as the media, etc., so that the people of the society should get educated.

The need of the hour is for laws is not to be enacted, but the awareness among masses for them, also they should be backed by strong public willingness and public opinion. This is because as long as conservative social thinking remains deeply rooted in the society, laws will not be able to achieve their ends. It is necessary to state that in order for social reforms in areas such as social thought, behaviour, and the law to be successful, they require support from a significant portion of the population. In the words of the great legal thinker Wendell Phillips: "*Law is meaningless unless close behind it stands a warm living public opinion*."[149]

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[148] Himangshu Ranjan Nath, "Gender Justice in India: A Critical Appraisal" (Gender Justice in India: A Critical Appraisal by Himangshu Ranjan Nath :: SSRN, February 20, 2016) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2734685 accessed January 15, 2023.

[149] Vijaypal Singh, "Gender Justice in India" (Gender justice in India, 2019) https://www.legalserviceindia.com/articles/gen_j.htm accessed January 17, 2023.

STATUS OF CONTRACTS WITH REBEL GROUPS DURING A CIVIL WAR

Ahan Gadkari*

ABSTRACT

Within the context of a civil war, this article analyses the legal implications of contracts between foreign investors and insurgents or rebels. This article focuses on a more contentious topic: what happens to contracts made by international investors with rebels when a civil war ends? If the rebels are victorious, the state will be held responsible for their actions during the insurgency under Article 10 of the Articles on Responsibility of States for Internationally Wrongful Acts issued by the International Law Commission in 2001 (the "ILC Articles"). In this piece, I will make the case that the norm set out in Article 10 ought to extend to agreements made by a de facto government, such as the rebels, during an insurrection. After the rebels' triumph, the state is still bound by these agreements.

What if the rebels are unsuccessful in forming a new government or a new state? This is another issue this article attempts to answer. According to Article 10 of the ILC Articles, the state is not responsible for any actions perpetrated by insurgents. Therefore, whatever contracts the rebels made during their unsuccessful insurrection will be null and void if the uprising fails. This article considers several potential scenarios to determine whether there are any situations when the non-attribution rule should not be applicable. Additionally, it will be argued that a state should be bound by a contract signed by the rebels where the fulfilment of the contract was not intended to aid the rebels and their revolutionary war. When an uprising ends, the same result should apply to contracts that are in the state's and its people's best interests.

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Introduction

This article looks at the legalities of contracts made between international investors and insurgents or rebels during a civil war.[150] This article will first discuss why, with a few exceptions, international law does not generally prohibit foreign investors from doing business with rebels. The rebels are liable for any contract violations that occur during the insurrection. Of course, the government the rebels are fighting against has no obligation to honour such contracts. Because the rebels are regarded to be criminals under their own laws, their actions are not acknowledged.[151]

What happens to contracts made by foreign investors with rebels after the end of the civil war is the major focus of this article. If the rebels win, the state will be held responsible for their actions during the insurgency[152] under Article 10 of the Articles on Responsibility of States for Internationally Wrongful Acts issued by the International Law Commission in 2001 ("ILC Articles").[153] Therefore, after the civil war is finished and the rebels have established a new government or a new state, that state will be responsible for compensating foreign investors for losses sustained as a result of wrongdoing (such as expropriation, destruction, or damage to property) committed by the rebels.[154] Further, this paper will make the case that the norm stated in Article 10 ought to be extended to contracts made by the rebels when they create a de facto government during an insurrection. Even when the rebels win, the state must honour these contracts.

What if the rebels are unsuccessful in forming a new administration or a new state? This is another issue this article attempts to answer. According to Article 10 of the ILC Articles, rebels cannot blame the state for their actions.[155] If the uprising fails, all contracts the rebels made during that time would be null and void as far as the government is concerned. It is essential to note that "unless and until the movement emerges as a government, its actions are not likely to bind the nation', and that 'an investor that chooses to do business with insurgents assumes the risk of its enterprise – it cannot expect the

[150] ILC, *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the ILC at Its Fifty-Third Session*, Nov. 2001, UN Doc. A/56/10, *ILC Yearbook* vol. II(2), 51 (2001), para. 9.
[151] O. Corten, *La rébellion et le droit international: le principe de neutralité en tension* 18– 19, 20ff (Pocket Books of The Hague Academy of International Law, Brill 2016).
[152] Patrick Dumberry, *Rebellions and Civil Wars: State Responsibility for the Conduct of Insurgents* 65ff (Cambridge UP 2021).
[153] Draft Articles on Responsibility of States for Internationally Wrongful Acts, Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10).
[154] *Ibid.*
[155] Dumberry, *supra* n. 151, at 135.

nation to be responsible for its improvidence".[156] Doing business with rebels is fraught with danger. This article discusses whether there are any exceptional cases where non-attribution should be disregarded. Not surprisingly, this is an issue that has not received much academic attention. Further, this article argues that a contract signed by rebels should bind the state even if its fulfilment was not intended to aid the rebels in their revolutionary war. It seems to reason that the same result should hold true anytime a contract was eventually advantageous to the state and its inhabitants after the revolt ended.

International Law does not Prohibit Foreign Investors from Entering into Contracts with Rebel Groups

For a long time, there has been debate about the legal standing of insurgent movements like rebels. According to Ago, the ILC Special Rapporteur, insurrectional groups engaged in civil war have the status of international legal personality under international law.[157] However, the idea was scrapped in the 1975 version of the Draft Articles.[158] With regards to the notion of possessing an international legal personality, ILC Special Rapporteur Crawford found this notion to be irrelevant to Article 10's purposes.[159] However, it is now generally accepted that insurgents have legal duties to adhere to some norms, including those enshrined in international humanitarian law and international human rights law.[160] To add to that, insurgents have "little law-making power."[161] As noted by the ILC,[162]

[156] M. Al-Rashid, U. Bardyn & L. Golendukhin, *Investment Claims amid Civil Unrest: Questions of Attribution and Responsibility*, 3(2) BCDR Int'l Arb. Rev. 187–188 (2016).
[157] ILC, *Fourth Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur – The Internationally Wrongful Act of the State, Source of International Responsibility*, 30 Jun. 1972 and 9 Apr. 1973, UN Doc. A/CN.4/264 and Add. l, *ILC Yearbook* vol. II, 129 (1972), paras 153, 132, paras 160, 139, para. 180.
[158] ILC, *Report of the International Law Commission on the Work of Its Twenty-Seventh Session*, 5 May–25 Jul. 1975, UN Doc. A/10010/Rev. l, *ILC Yearbook* vol. II, 91ff (1975).
[159] ILC, *First Report on State Responsibility, by Mr. James Crawford, Special Rapporteur*, 24 Apr., 1, 5, 11 and 26 May 2022 and 24 Jul. 2012, Aug. 1998, UN Doc. A/CN.4/490 and Add. 1–7, *ILC Yearbook* vol. II(1), 53 (1998), paras 270–271. *See also* J. Crawford, *State Responsibility: The General Part* 171 (Cambridge UP 2013).
[160] *Responsibilities of the Non-state Actor in Armed Conflict and the Market Place* (N. Gal-Or, C. Ryngaert & M. Noortmann eds, Brill Nijhoff 2015); K. Fortin, *The Accountability of Armed Groups Under Human Rights Law* (Oxford UP 2017); Tilman Rodenhäuser, *Organizing Rebellion: Non-state Armed Groups Under International Humanitarian Law, Human Rights Law, and International Criminal Law* (Oxford UP 2018); E. Zegveld, *Armed Opposition Groups in International Law: The Quest for Accountability* (Cambridge UP 2002).
[161] S. I. Verhoeven, *International Responsibility of Armed Opposition Groups. Lessons from State Responsibility for Actions of Armed Opposition Groups*, in *Responsibilities of the Non-state Actor in Armed Conflict and the Market Place. Theoretical Considerations and Empirical Findings* 296 (N. Gal-Or, C. Ryngaert & M. Noortmann eds, Brill Nijhoff 2015).
[162] ILC, *Reports of the International Law Commission on the Second Part of Its Seventeenth Session and on Its Eighteenth Session*, *ILC Yearbook* vol. II, 189 (1966), discussing the definition of the term 'treaty' in Art. 2 of the Draft articles on the law of treaties.

international tribunals,[163] and commentators,[164] insurgents may reach treaties with governments during wars that establish their rights and responsibilities.[165]

The international accountability of the movement for its breaches of international law appears only reasonable, as Verhoeven put it: "[s]ince those movements have their own rights and obligations under international law and may conclude international agreements with other international subjects, the international responsibility of the movement for its violations of international law seems only logical".[166] The ILC has observed for a long time that insurgent groups are "perfectly capable of committing internationally wrongful acts"[167] and that it "may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces".[168]

Consequently, during the battle, the victim of a wrong done by the rebels may file a claim with that group and ask for compensation.[169] Special Rapporteur Ago provided numerous such instances in his 1972 Report,[170] one of which being the situation of the United Kingdom in relation to the American Civil War.[171] Dumberry has asserted that such claims are rare and unlikely to be successful.[172] As the disagreement progresses, the damaged party will often decide it is best to wait until it is over before seeking compensation.

Contracts made by rebels with foreigners during uprisings are often cited in older studies on civil wars.[173] They never appear to dispute rebels' ability to make such contracts.[174] It is assumed that they

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[163] *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, paras 143–144.
[164] O. Corten & P. Klein, *Are Agreements Between States and Non-state Entities Rooted in the International Legal Order?*, in *The Law of Treaties Beyond the Vienna Convention* 3– 24 (E. Cannizzaro ed., Oxford UP 2011); E. Roucounas, *Peace Agreements as Instruments for the Resolution of Intrastate Conflicts*, in *Conflict Resolution: New Approaches and Methods* 113–140 (UNESCO 2000).
[165] Verhoeven, *supra* n. 160, at 296.
[166] *Ibid*. at 303.
[167] ILC, *supra* n. 163, at 129, para. 153.
[168] ILC, *supra* n. 157, at 53, para. 15. *See also* ILC, *supra* n. 9, at 92, para. 4; Crawford, *supra* n. 10, at 180; G. Cahin, *Attribution of Conduct to the State: Insurrectional Movements*, in *The Law of International Responsibility* 339 (J. Crawford, A. Pellet, S. Olleson & K. Parlett eds, Oxford UP 2010).
[169] Crawford, *supra* n. 10, at 180.
[170] ILC, *supra* n. 8, at 139, paras 180–181.
[171] Letter of Earl Russel to Mr Adams, 26 Nov. 1861, in J. B. Moore, *A Digest of International Law* vol. 1, 209 (GPO 1906).
[172] Dumberry, *supra* n. 155, at 204.
[173] N. D. Houghton, *Validity of the Acts of Unrecognized* De Facto *Governments in the Courts of Non-recognizing States*, 13 Minn. L.R. 230 (1929); H. Silvanie, *Responsibility of States for Acts of Insurgent Governments*, 33(1) AJIL 60ff, 89–90 (1939); G. de Beus, *The Jurisprudence of the General Claims Commission United States and Mexico Under the Convention of September 8, 1923* 103 (Nijhoff 1938).
[174] Ezequiel Heffes, *The Responsibility of Armed Opposition Groups for Violations of International Humanitarian Law: Challenging the State-Centric System of International Law*, 4 J. Int'l Humanitarian Legal Stud. 95–98 (2013); Verhoeven, *supra* n. 164, at 299.

may enter into contracts since they effectively rule some region during an insurrection.[175] This is a well-known reality in situations when insurgents have set up a de facto government.[176] For Borchard, this means that, "a general government de facto, having completely taken the place of the regularly constituted authorities in the state, binds the nation", adding that "so far as its international obligations are concerned, it represents the state".[177] According to Frowein, groups which control territories for a certain period of time without being formally recognised by other states, such as the Confederates during the US civil war, will be treated as partial subjects of international law, and will have responsibilities under international law,[178] and reparation may be claimed from them, with "agreements of a different nature" being able to be concluded with such groups.[179] If a government loses control of an area and can no longer provide security, it is the responsibility of rebels to safeguard the assets of foreign investors there.[180]

Foreign investors may apparently get into contracts with rebels without running afoul of any international law. However, and this is crucial, there may be penalty regimes for certain rebel groups when commerce of a certain kind with such parties is banned under international (and local) law. For example, in the context of the civil war in Angola, the United Nations Security Council imposed a series of sanctions, including a ban on diamond purchases from the National Union for the Total Independence of Angola (UNITA) and other restrictive trade measures for weapons, mining equipment and services, and oil products.[181]

Several terrorist organisations have been active in Syria and Iraq's civil conflict, and the Security Council has " condemned any engagement in direct or indirect trade, in particular of oil and oil products, and modular refineries and related material, with" them.[182] In the context of a civil conflict, foreign investors should make sure that their interactions with rebels do not violate international human rights law or humanitarian law.[183] There is no protection under international law for a businessperson who

[175] *See* N. Tsagourias, *Responsibility of Non-state Rulers in Areas of Limited Statehood*, in *Rule of Law and Areas of Limited Statehood* 1769–1770 (Linda Hamid & Jan Wouters eds, Edgar Publ. 2021).
[176] *Stuckle v. Mexico*, 19 Jul. 1871, in J. B. Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party* vol. 3, 2936–2937 (GPO 1898).
[177] E. M. Borchard, *International Pecuniary Claims Against Mexico*, 26 Yale L.J. 342 (1917).
[178] J. A. Frowein, De Facto *Regime*, in *Max Planck Encyclopedias of International Law* (Oxford UP 2013) paras 6–7.
[179] *Ibid.* para. 1,3.
[180] S. Mantilla Blanco, *Full Protection and Security in International Investment Law* 190– 191 (Springer 2019).
[181] Security Council Res. 864, 15 Sep. 1993; Res. 1127, 28 Aug. 1997; Res. 1173, Jun. 1998; Res. 1295, 18 Apr. 2000.
[182] Security Council Res. 2199 (2015).
[183] Jure Zrilič, *Investor Obligations Amid Armed Conflict*, in Investors' International Law 235–262 (J. Ho & M. Sattorova eds, Hart Publ. 2021).

makes a deal with rebels who are assisting a foreign power in an unlawful intervention to overturn a government.[184] Contracts that violate neutrality rules preventing enmity by a national of one state against another state at peace with each other, such as giving arms to rebels, are also invalid.[185] Finally, it is worth noting that domestic legislation in the state where the revolt is taking place may not recognise contracts made with rebels as lawful and binding.[186]

Status of the Contract After the end of the Civil War

At the outset, it must be noted that contracts signed by rebels are not binding on the central government, which no longer exerts control over them throughout the time of insurrection and until the conclusion is known (i.e., whether the rebels are successful or not). To maintain power, a government cannot be held liable for contract contracts performed by rebels.[187] The events that follow the conclusion of the rebellion are the subject of this section. It is often held that the result of a struggle determines who is responsible for what following an uprising.[188] A foreign investor has valid motives to wish the rebel's victory. To the extent that they achieve their goals, the state will be held responsible for any atrocities committed during the insurgency. In sub-section A, this article argues that the new administration founded by the rebels should be bound by contracts made by the insurgents with international investors. If the rebels fail, the opposite principle ought to take hold. As a result, the state is no longer bound by any contracts or deeds the rebels may have signed during the insurrection. In sub-section B, this paper discusses the topic of whether this general rule ought to be universally applied. Further, it shall propose an unusual circumstance in which a government that has crushed an insurrection should be held to contracts made by the rebels before they were overthrown.

If the Rebels Win

If the rebels are ultimately successful in their quest to instal a new government, then the state is held responsible for the insurgents' actions during the uprising, under Article 10(1) of the ILC Articles.[189] This notion is founded on the "organic" or "structural" continuity[190] between the 'new structure of the

[184] *Stuckle*, *supra* n. 177.
[185] K. Greenman, *State Responsibility and Rebel: The History and Legacy of Protecting Investment Against Revolution* 75–76 (Cambridge UP 2021).
[186] *See* High Court of Uganda in *44123 Ontario Ltd v. Crispus Kiyonga and others*, High Court, Uganda (1992) 11 Kampala LR 14, at 20–21; ILR 103, 259, 266.
[187] Al-Rashid, Bardyn & Golendukhin, *supra* n. 173, at 188.
[188] N. D. Houghton, *The Responsibility of the State for the Acts and Obligations of Local* De Facto *Governments and Revolutionists*, 14(3) Minn. L.R. 255 (1930).
[189] Dumberry, *supra* n. 175, at 65ff.
[190] Crawford, *supra* n. 188, at 175, referring to P. Dumberry, *New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement*, 17 EJIL 611–612 (2006).

State and that of the insurrectional movement. Despite the fact that the concept of attribution is well-established[191] and has been routinely used by tribunals in the context of new administrations,[192] the theoretical justification behind it is, perhaps unexpectedly, not as strong as one would think.[193]

The word "conduct" is used in a broad sense to describe the actions of the rebels in Article 10(1). Some have proposed that “conduct” include all actions taken by them during the uprising that resulted in harm to a third party.[194] There is no question that the clause applies to wrongful activities.[195] The norm established in Article 10 should also apply to contracts signed by rebels whenever they constitute a de facto government during an insurrection,[196] in the author’s opinion (and that of many academics),[197] and as stated in the 1961 Harvard Draft Convention.[198] For example, in regard to Article 10(1), Frowein states, "according to a rule frequently confirmed in the practice of claims commissions, treaties and *other acts* of a successful de facto regime will bind the finally recognized State or the State as whose government the former de facto regime is now recognized”.[199]

Several awards have interpreted Article 10(1) as applying to contracts made by foreigners with rebels who create a de facto government.[200] An important decision in this area is the *United Dredging Company award* issued by the United States-Mexico General Claims Commission. The rebels (General Carranza and the "Constitutionalist" army) had asked a US business to do salvage operations on a yacht without a formal contract.[201] Later, the project was put on hold, and the business was not paid in full. The so-called "Constitutionalists" managed to topple the old administration and instal themselves in power. The United States claimed Mexico owed money because the revolutionary group led by General Carranza, the "Constitutionalists," had successfully taken control in Mexico. There was reportedly no

[191] ILC, *supra* n. 1, at 50, para. 5. For a detailed analysis, *see* Dumberry, *supra* n. 4, at 83ff.
[192] *See* Dumberry, *supra* n. 3, at 65ff.
[193] P. Dumberry, *Why Are Wrongful Acts Committed by Rebels During a Civil War Attributable to the State When They Are Successful? A Critical Analysis of Theory and Practice*, 6 Eur. Inv. L. & Arb. Rev. 189–213 (2021).
[194] C. Piguet, *La Guerre civile en droit international. Contribution à l’étude de la responsabilité internationale de l’Etat à raison des dommages éprouvés sur son territoire par des étrangers, du fait du mouvement insurrectionnel* (Université de Lausanne, Ph.D. thesis, 133 (1982).
[195] ILC, *supra* n. 9, at 91, para. 3.
[196] Silvanie, *supra* n. 24, at 80; E. M. Borchard, *International Responsibility of the State for Injuries Sustained by Aliens During Civil War*, 8(1) Am. Pol. Sci. Rev. 122 (1914); Borchard, *supra* n. 28, at 342; D. P. O’Connell, *International Law* vol. II, 974 (2nd ed., Stevens & Sons 1970).
[197] Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, 15 Apr. 1961, by reporters Louis B. Sohn & Richard Baxter, in 55 AJIL 576 (1961). *See also* Art. XIII (b) of the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, AJIL Spec. Supp. 23 (1929), at 131ff.
[198] Greenman, *supra* n. 36, at 71ff.
[199] Frowein, *supra* n. 29, para. 11.
[200] Silvanie, *supra* n. 24, at 83.
[201] *United Dredging Company (US) v. Mexico*, United States-Mexico General Claims Commission, 15 Jul. 1927, UNRIAA 4, at 264.

pushback from Mexico[202] on this line of reasoning.[203] The Commission found Mexico to be at fault for the insurgents' breach of contract.

Similar provisions are included in Article 10(2) of the ILC Articles, which addresses the situation whereby insurgents have successfully established a new state.[204] The ILC and its 2015 Resolution on State succession in cases of State Responsibility[205] have acknowledged this idea.[206]

In the wake of Mexico's independence from Spain in 1821, the United States and Mexico each created a Claims Commission between 1839 and 1849 to rule on a number of claims. Silvanie analysed these awards and observed that "in favor of certain persons, citizens of the United States, who had furnished money and various military supplies to the leaders of the revolutionary government in Mexico while it was engaged in its revolt against Spain and before its independence had been recognized by any foreign Power." That is to say, the contracts in question were signed by American citizens and rebels during the conflict itself.[207] All of the claimants in Silvanie's sample were American citizens, and they all had:

> *"furnished goods and military supplies for "the promotion of the general object" of the independence and self-government of Mexico and by express contract with agents duly appointed and sent by the leaders of the Mexican revolution to the United States to procure aid, with a promise that all obligations contracted by such agents should be ratified by the revolutionary government."*[208]

According to these rulings, the new state must fulfil the terms of any contracts made by the rebels.[209] That conclusion was accepted by the Mexican Commissioner. This result was to be expected, since Mexico "recognized and sanctioned the acts of these agents and assumed liability for their contracts" after achieving independence.[210] The United States-Venezuela Claims Commission of 1885 made a few

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[202] *Ibid.*
[203] *Ibid.*
[204] Dumberry, *supra* n. 3, at 303.
[205] ILC, *Second Report on Succession of States in Respect of State Responsibility*, by Pavel Šturma, Special Rapporteur, 70th session, A/CN.4/719 (6 Apr. 2018), paras 107ff, Draft Art. 7(4).
[206] Article 12(6), Institute of International Law, 'State Succession in Matters of State Responsibility', Rap. M. G. Kohen, *Resolution of 2015*, 76 Annuaire IDI 703 (2015). *See* Marcelo G. Kohen & Patrick Dumberry, *The Institute of International Law's Resolution on State Succession and State Responsibility: Introduction, Text and Commentaries* 106ff (Cambridge UP 2019).
[207] Silvanie, *supra* n. 24, at 89.
[208] *Ibid.*, at 90, citing Moore, *supra* n. 27, vol. 4, at 3427.
[209] Moore, *supra* n. 27, vol. 4, at 3426–3427, 3427, 3427–3428, 3430–3432.
[210] Silvanie, *supra* n. 24, at 90; *Id.*, at 3429–3430; Greenman, *supra* n. 36, at 75.

more pertinent rulings in the context of Venezuela's independence from Spain in 1821.[211] The *Idler case* concerned an American who, in 1817, during Venezuela's battle of independence from Spain, supplied a huge quantity of guns and army materials to authorised agents of Simon Bolivar's rebels. The complainant was awarded compensation by the Commission.[212] For Silvanie, this case demonstrated the "principle that a new state is bound by acts and contracts of insurgents," which he first articulated in 1961.[213]

One single award that reached the opposite outcome should be mentioned as well. An American citizen supplied the revolutionary de facto administration of General Carrera in 1816, and the United States filed a claim against Chile for payment on that contract. In a significant historical context, Spain still had official control over Chile at the time. In 1818, Chilean independence was proclaimed. An American-Chilean Commission was established in 1892 to rule on the claim, but it was not until much later that they did. The United States claimed that claims against the revolutionary administration of José M. Carrera should be brought against the new government that was created on the victorious revolution.[214] Chile said that the Commission lacked authority to hear the claim since Chile was still a Spanish province when the contract was made and the United States did not formally acknowledge Chilean independence until 1822. Most members of the Commission agreed with Chile's position.[215] Scholars have pointed out certain problems with this case,[216] including the fact that it goes against the notion that "de facto government binds a succeeding government, whether the de facto government was revolutionary or not".[217]

Finally, the unusual circumstance where the central government and the rebels have signed a peace accord allowing a de facto independent administration to execute contracts with foreign investors during a transition phase before independence. *Active Partners Group v. South Sudan* is a case in which this exact problem occurred. A corporation with its headquarters in Sudan filed suit against its southern neighbour. After having "invited interested qualified parties to participate in a tendering process for the construction of electric power infrastructure,"[218] the "Government of South Sudan" signed the documents[219] at issue in the arbitration proceedings in 2008.[220] Most significantly at the time the contracts were signed, South Sudan was not a sovereign nation.[221] It was an "autonomous

[211] Moore, *supra* n. 27, vol. 4, at 3491–3544.
[212] Silvanie, *supra* n. 24, at 90.
[213] *Ibid.*
[214] *Didier (US) v. Chile*, 7 Aug. 1892, Shield's Rep., Washington, 1894, at 41, 45.
[215] R. Floyd Clarke, *A Permanent Tribunal of International Arbitration: Its Necessity and Value,* 1(2) AJIL 377 (1907).
[216] E. M. Borchard, *Diplomatic Protection of Citizens Abroad or the Law of International Claims* 241 (Banks Law Pub. 1919).
[217] Clarke, *supra* n. 66, at 377.
[218] *Active Partners Group Ltd v. Republic of South Sudan,* PCA Case No. 2013/4, Award, 27 Jan. 2016.
[219] *Ibid.*, paras 5, 122–123.
[220] *Ibid.*, para. 114.
[221] United Nations on 9 Jul. 2011: GA Res. 65/308, 9 Jul. 2011.

government"[222] that had the capacity to execute contracts with foreign businesses to build an electric power infrastructure[223] prior to independence under a peace accord struck in 2005.[224] Once the government in question gained full independence, the terms of these contracts were deemed legally enforceable on the newly formed state.[225] The tribunal likely found this argument to be so 'clear' that it provided no explanation at all in the award on these issues.

If the Rebels do not Win

What occurs if the rebels do not win and cannot establish a new government, or the formation of a new nation. As per Article 10(3),[226] actions undertaken by rebels during the civil war are not attributable to the government.[227] It was umpire Ralston who provided the rationale for this rule in the *Sambiaggio case*.[228] It is impossible to attribute the actions of the rebels to the government since they are two separate groups. The activities of the former cannot be attributed to the later[229] due to the independence of "structure" and "organisation".[230] Thereby, the government "will not be in a position to exercise effective control" over the rebels' actions.[231] The government at the time was actively opposing the rebels, thus their actions cannot be blamed on the state either. According to Crawford, "by definition, such a [rebel] movement cannot be considered to be aligned to the interests of the state against which it is fighting".[232] Several international courts have already embraced this concept and nations have consistently used it in practise.[233]

Any government that has effectively put down a revolt cannot be held "responsible" for the actions of its rebels. However, this paper proposed that there should be an exception to this rule: when rebels set up a local or national de facto government, the state should be obliged by the authorised "routine

[222] *Active Partners*, *supra* n. 69, para. 114.
[223] In 2005 the 'Government of the Republic of the Sudan' and 'The Sudan People's Liberation Movement/Sudan People's Liberation Army' signed a Comprehensive Peace Agreement (CPA). The CPA consisted of a series of six agreements, among which was the Power Sharing Agreement (PSA), indicating that in accordance with the 2002 Machakos Protocol, during the 'Interim Period' (i.e., from 9 Jan. 2005 to 9 Jan. 2011) the 'Southern Sudan level of Government' (i.e., the autonomous government of South Sudan before its independence) 'shall exercise authority in respect of the people and States in the South' (PSA, Art. 1.3.2.).
[224] *See* PSA, Arts 3.3 and 3.4.4.
[225] P. Dumberry, *A Guide to State Succession in International Investment Law* 376ff (Elgar Publ. 2018).
[226] *See* Dumberry, *supra* n. 3, at 135ff.
[227] ILC, *supra* n. 1, at 50, para. 2.
[228] *Sambiaggio* case, Italy-Venezuela Mixed Claims Commission, 1903, UNRIAA 10, at 513.
[229] H. Silvanie, *Responsibility of States for Acts of Unsuccessful Insurgent Governments* 145, 146ff (Columbia UP 1939).
[230] ILC, *supra* n. 1, at 50, para. 4. *See also* Cahin, *supra* n. 19, at 253.
[231] ILC, *supra* n. 1, at 50, para. 2. *See also* ILC, *supra* n. 8, at 132, para. 161.
[232] Crawford, *supra* n. 10, at 170.
[233] Dumberry, *supra* n. 3, at 150ff.

activities" of the new government. The fate of contracts signed by rebels with foreign investors during an insurgency will be discussed below, demonstrating that the difference between "personal" and "impersonal" activities is crucial. As such, this paper asserts that a state must honour any contract made by rebels that is in the state's best interest and was not done specifically to aid the revolution.

Article 9 of the ILC Articles warrants a few words of introduction before we get into these inquiries. A "person or group of persons" are the focus of this article because they are "exercising elements of the governmental authority in the absence or default of the official authorities" when the situation calls for it.[234] The ILC Commentaries stressed the "exceptional nature of the circumstances envisaged"[235] of this article, noting that such occurrences arise relatively infrequently. The Revolutionary Guards "exercised elements of governmental authority in the absence of official authorities, in operations of which the new Government must have had knowledge and to which it did not specifically object" as stated by the Iran-United States Claims Tribunal in the *Yeager case*, which is cited in the ILC Commentaries.[236] "Unsuccessful insurrectional movements" may be ascribed to a state "in the special circumstances envisaged by Article 9", according to the ILC Commentaries, however this is only mentioned in a somewhat vague sentence (in the part dealing with Article 10).[237] It is debatable whether armed organisations may be included by Article 9 during civil conflicts.[238] Despite the possible relevance of Article 9 to armed organisations, the ILC Commentary on the Article makes no reference to this possibility. Although answering this question is outside the scope of this article, the author holds the opinion (shared by Crawford)[239] that Article 9 does not apply in the specific case of an insurgent movement that is actively fighting against the general government in order to establish a new government.[240]

When Rebels set up a de facto government, the State is bound by the de facto government's "Routine Activities" and "Impersonal" Acts

[234] Olivier de Frouville, *Attribution of Conduct to the State: Private Individuals*, in *The Law of International Responsibility* 271ff (James Crawford, Alain Pellet, Simon Olleson & Kate Parlett eds, Oxford UP 2010).
[235] ILC, *supra* n. 1, at 49, para. 1; *Id.* para. 4; Crawford, *supra* n. 10, at 168.
[236] *Kenneth P. Yeager, a claim of less than US$250,000 presented by the United States of America v. Islamic Republic of Iran*, Iran-United States Claims Tribunal, Case No. 10199 (324-10199-l), Partial Award, 2 Nov. 1987, para. 43.
[237] ILC, *supra* n. 1, at 50, para. 2.
[238] K. Fortin, *The Relevance of Article 9 of the Articles on State Responsibility for the Internationally Wrongful Acts of Armed Groups*, in *Non- state Actors and International Obligations* 383 (J. Summers & A. Gough eds, Brill Nijhoff 2018).
[239] Crawford, *supra* n. 10, at 168.
[240] Cahin, *supra* n. 19, at 335; *also* Veronika Bílková, *Establishing Direct Responsibility of Armed Opposition Groups for Violations of International Humanitarian Law?*, in Gal-Or et al., *supra* n. 11, at 269; Fortin, *supra* n. 89, at 378.

The US Supreme Court made a distinction between activities that were in assistance of the insurrection and those that were done in the usual course of governmental routine regarding the failed secession effort by the Confederate States.[241] Academics acknowledge the difference between "personal" and "impersonal" crimes committed by rebels.[242] Acts that are "personal" are those that the rebels do for their own advantage or in the name of furthering the revolution. After the rebels have been vanquished, it is widely agreed that these "personal" activities cannot be attributed to the state. "Impersonal" actions, on the other hand, are those that the rebels carry out as part of the "regular" administration of the region they de facto govern.[243] These 'impersonal' actions are often carried out by governments and are referred to as 'routine activities'.[244] As a consequence of the rebels' effective control, these actions are attributed to the legitimate government.[245]

An excellent example is the *Central and South American Telegraph award*.[246] In this case, concession contract stated, "the Government reserves the right of suspending the service or use of the cable in case of danger to the security of the state," hence the claimant asked Chile to pay damages because of this clause. During the civil war, the corporation claimed that it was unable to use its cable inside the rebels controlled by the insurgents (the Congressionalists). The corporation claimed that the suspension of service by the Congressionalists constituted a breach of contract since only the normal administration of President Balmaceda had the power to do so. As a result of their efforts, the Congressionalists were able to topple President Balmaceda and instal a new administration. According to the Commission's majority opinion, the rebels were entitled to cease cable service under the terms of the agreement without being held liable. A majority of the Commission decided that the contract's reference to "the government" included both the legitimate government and the rebels who were de facto in control of the territory.[247] Therefore, the insurgents had the character of a de facto government, holding throughout the region subject to its domination the authority to exercise jurisdiction pursuant to the laws passed

[241] *Thorington v. Smith*, 75 US 1, 9 (8 Wall 1868), cited in Silvanie, *supra* n. 80, at 98. He examined several other US cases. *See also* Houghton, *supra* n. 39, at 265; Houghton, *supra* n. 24, at 216–217; Borchard, *supra* n. 28, at 343–344.
[242] Piguet, *supra* n. 45, at 94, 145; A. A. Al-Ganzory, *International Claims and Insurgence*, 33 REDI 85–86 (1977); C. de Visscher, *Théories et réalités en droit international public* 348–349 (2nd ed., Pedone 1955); Al-Rashid, Bardyn & Golendukhin, *supra* n. 7, at 188ff; D. Morris, *Revolutionary Movements and* De Facto *Governments – Implications of the 'Arab Spring' for International Investors*, 28(4) Arb. Int'l 732ff (2012). For a critical analysis of this distinction *see* O'Connell, *supra* n. 47, at 970. *See also Restatement (Third), Foreign Relations Law of the United States* vol. I (St. Paul, American Law Institute Publ. 1987), § 207, comment (b), at 97.
[243] de Visscher, *supra* n. 93, at 348; Morris, *supra* n. 93, at 732; Fortin, *supra* n. 89, at 383.
[244] Silvanie, *supra* n. 80, at 84ff.
[245] de Visscher, *supra* n. 93, at 349.
[246] *Central and South American Telegraph Company* case, in Moore, *supra* n. 27, vol. 3, at 2933–2944.
[247] Silvanie, *supra* n. 24, at 84.

and agreements accepted by and for the country.[248] Since the rebels were effectively in charge, they were recognised as having the authority to carry out official government contracts. As a result, their actions were sanctioned by the state.

Scholars agree[249] that a state is obligated to pay for taxes and customs fees that rebels collect since doing so is a "valid use of sovereign authority."[250] The government "may not require aliens who have already satisfied these obligations to pay the new government a second time." after it has retaken the region formerly administered by the rebels.[251] This *Guastini case* is an excellent example of this in action.[252]

On the other hand, a de facto rebel government's debts are not regarded to be part of the state's responsibility.[253] This is due to the perception that a foreign investor's funding to rebels is a 'personal' act done for the benefit of the rebels and their pursuit of the revolution. This is hardly what you would call a "regular action" on the part of the government.[254] Moore points out, “those who lend money to insurgents take the risk of their failure”, adding that “whether prompted by the hope of gain or by sympathy with the cause [it] is [in] the nature of a bet that the insurrection will succeed” and “if the cause is lost, equally so is the stake; and neither victor nor vanquished can be reproached”.[255] Several tribunals awards attest to the validity of this overarching idea.[256]

Considerations to Make When Judging the Validity of Rebels' Signed Contracts

Many commentators find it unclear or 'ambiguous' what happens to contracts insurgents made with foreign investors once the uprising has been crushed.[257] Among other examples, Morris states “[s]ome jurisprudence suggests that [the local de facto government] may also wield the authority of the State with respect to contracts concerning State property within their control”.[258] She cautions, however, that this right is far from assured and that investors should proceed with care when negotiating contracts

[248] *Central and South American*, *supra* n. 97, at 2942.
[249] Morris, *supra* n. 93, at 731; Silvanie, *supra* n. 24, at 93; Borchard, *supra* n. 28, at 344; Al-Rashid, Bardyn & Golendukhin, *supra* n. 7, at 188; Ganzory, *supra* n. 93, at 86; de Beus, *supra* n. 24, at 106; Frowein, *supra* n. 29, para. 11; ILC, *supra* n. 8, at 130, para. 156.
[250] O’Connell, *supra* n. 47, at 970; Silvanie, *supra* n. 24, at 95. *See also Socony Vacuum Oil Co. Claim*, US Foreign Claims Settlement Commission, Award, 1954, in *Settlements of Claims*, 1949-1955, at 77; ILR (1954), at 55, 61.
[251] Morris, *supra* n. 93, at 730. O’Connell, *supra* n. 47, at 970; Silvanie, *supra* n. 80, at 104ff.
[252] *Guastini* case, Italy-Venezuela Claims Commission, UNRIAA 10, at 580, 561; *Santa Clara Estates Case (Supplementary Claim)*, United Kingdom-Venezuela Mixed Commission, UNRIAA 9, at 455.
[253] Morris, *supra* n. 93, at 731; Houghton, *supra* n. 39, at 257.
[254] Silvanie, *supra* n. 24, at 100–101; Silvanie, *supra* n. 80, at 19ff.
[255] Letter of John Bassett Moore to the New York Times, 25 Jul. 1932, dealing with Confederate debts, quoted in Silvanie, *supra* n. 80, at 11, 12; Borchard, *supra* n. 28, at 345.
[256] Silvanie, *supra* n. 24, at 90ff. *SeeBarrett v. United States*, UNRIAA 29, at 137, 138; *Henriquez* case, Netherlands-Venezuela Claims Commission, 1903, Opinion of the Umpire, UNRIAA 10, at 713, 714; *Jarvis* case, United States-Venezuela Claims Commission, in Ralston, *Venezuelan Arbitrations of 1903*, 150; *Acquatella, Bianchi* et al. case, France- Venezuela Mixed Claims Commission, Commissioner Paul, UNRIAA 10, at 7.
[257] Morris, *supra* n. 93, at 750; Verhoeven, *supra* n. 12, at 295.
[258] Morris, *supra* n. 93, at 750.

with a local de facto government. Some have questioned the veracity of these claims, however, until the revolutionary cause has been successful in its revolt, all contracts are "suspensive"[259] until further notice.[260] If the rebels fail, this indicates that in the eyes of the state, contracts have no weight.[261] This is due to the presumption that such contracts amounted to "material support for the violent overthrow of an existing government".[262] In the next paragraphs, I shall test whether or not this generalisation holds true.

The examination begins by recalling the widely held but long-disproven idea that "a local de facto government may not legally alienate or dispose of any part of the public domain of the state, which may be temporarily within its jurisdiction".[263] In his in-depth analysis of the topic, Silvanie does provide a few instances in which the state was not deemed bound by "concessions and alienations of state property made by unsuccessful insurgents" with foreign nationals during an insurrection.[264] However, he also noted that the tribunals had ruled in favour of the plaintiffs primarily because the contracts at issue had been executed in defiance of local law.[265] While he agrees that "concession contracts and alienations involving the public domain and other propriety of the State" are not binding on the state in general,[266] he also thinks that "exceptional treatment" should be given to contracts that are "not done in aid of rebellion and are not detrimental to the State, especially when the concessionaire or the purchaser has acted in good faith and has involved himself in heavy expenditures and improvements encumbered with the property".[267] In such a situation, in Silvanie's view, a state ought to be bound by such a contract. This idea of Silvanie's is sound. In what follows, I will outline the three criteria that should be used to determine the legal force of agreements reached with insurgents.

It Is Not the Purpose of the Agreement to Encourage Rebellion

A state should be obligated by "all contractual obligations which can be considered as routine administrative transactions," as described above, according to several experts.[268] This is because these

[259] Borchard, *supra* n. 28, at 343.
[260] R. Mohtashami, *Protecting the Legitimacy of the Arbitral Process: Jurisdictional and Procedural Challenges in Public-Private Disputes*, in *Evolution and Adaptation: The Future of International Arbitration* 623 (J. Kalicki & M. A. Raouf eds, ICCA Congress Series, Kluwer Law International 2019).
[261] Al-Rashid, Bardyn & Golendukhin, *supra* n. 7, at 188.
[262] B. Coggins, *Rebel Governance in Civil War: Rebel Diplomacy: Theorizing Violent Non- state Actors' Strategic Use of Talk*, in *Rebel Governance in Civil War* 101 (Nelson Kasfir & Zachariah Mampilly eds, Cambridge UP 2016).
[263] Houghton, *supra* n. 39, at 259; Borchard, *supra* n. 28, at 344.
[264] Silvanie, *supra* n. 24, at 90, 93. *See also* Silvanie, *supra* n. 80, at 62ff; *Beales, Nobles and Garrison,* United States- Venezuela Claims Commission of 1885, in Moore, *supra* n. 27, vol. 4, at 3548–3564.
[265] Silvanie, *supra* n. 80, at 61.
[266] *Ibid.* at 61.
[267] *Ibid.* at 80.
[268] de Beus, *supra* n. 24, at 113.

actions represent the will of the State as a whole rather than any one government.[269] The above discussion of taxes and customs charges should be applied more widely to contracts.[270] Only contracts that are "in some way detrimental to the interests of the State" or that were signed by rebels "in direct aid of the rebellion"[271] or in pursuit of their political goals are exempt from this rule. The *Hopkins award*,[272] for instance, exemplifies the significance of such a distinction.

In the *Hopkins case*, the claimant bought postal money orders from the Mexican government and then presented them to the Mexican authorities for payment.

Because the postal money orders had been issued by the so-called "Huerta Government," payment was denied.[273] Since the Huerta government was never in power, the General Claims Commission saw them as failed insurgents. That is why the Mexican government did not recognise anything done by the Huerta administration since it was against the law. In other words, the Commission said that the "greater part of governmental machinery of every modern country is not affected by changes in the higher administrative officers".[274] Thus, many activities,[275] such as the acceptance of money orders, "must go on, without being affected by new elections, government crises, dissolutions of parliament and even state strokes".[276] The Commission separated these actions as having a "personal character in support of the particular agencies administering the government for the time being," i.e., the rebels. The Commission gave a specific example of the latter, saying that "voluntary undertakings" by a person or a company "to provide a revolutionary administration with money or guns or munitions and the like" fall under this category.[277] Buying guns and ammunition, as well as taking out loans to fund the uprising, are clearly "personal" activities that the state is not obligated to reimburse after the rebels have been vanquished.[278]

The Commission applied the principle to the facts of the case and determined that "[i]t is clear that the sale by the Mexican Government to and the purchase by the claimant Hopkins of postal money orders falls within the category of *purely government routine* having no connection with or relation to the individuals administering the Government for the time being."[279] The contracts were "binding upon the United Mexican States as such"[280] and "unaffected by the character of the Huerta government." This

[269] Silvanie, *supra* n. 24, at 102.
[270] Silvanie, *supra* n. 80, at 61.
[271] Houghton, *supra* n. 24, at 231. *See also* O'Connell, *supra* n. 47, at 975.
[272] Silvanie, *supra* n. 80, at 61.
[273] *George W. Hopkins v. United Mexican States*, United States-Mexico Claims Commission, Award of 31 Mar. 1926, UNRIAA 5, at 41ff.
[274] *Ibid.* at 43.
[275] *Ibid.*
[276] *Ibid.* at 43.
[277] *Ibid.*
[278] Silvanie, *supra* n. 24, at 103.
[279] *Hopkins* case, *supra* n. 124, at 43–44.
[280] *Ibid.* at 43.

Commission reached the same conclusion in several other cases involving ordinary commercial contracts for the purchase and sale of goods and merchandise between different departments and bureaus of the Huerta Administration (the unsuccessful insurgent authorities) and foreign citizens, ruling that these agreements were contracts of government routine and therefore binding on Mexico.[281]

The *Standard-Vacuum Oil Company decision*, adjudicated by the US Foreign Claims Settlement Commission, is another fascinating instance of this dichotomy between "personal" and "impersonal" contracts. The claimant's ancestor entered a contract with the Ministry of Ways and Communications of the so-called "Kolchak administration," an insurgent organisation that de facto ruled the Siberian region of the Russian Empire following the Bolshevik Revolution of 1917, to sell oil and kerosene in 1919. There was a civil war going on between the rebels and the newly formed Soviet government. The Trans-Siberian Railway, described as "the main, if not the sole, artery for the transport of troops and military supplies in Siberia" at the time, was under the de facto government's authority, as stated in the award.[282] By the end of the war, the rebels in Siberia had been crushed, and the Soviet government had full control of the region. Soon after that, the government took the company's kerosene without paying fair value for it. At some point, the claimant really put in a claim the Soviet authorities before the Commission. The argument involves a contract with defeated rebels, therefore the Commission ruled that "in voluntary contractual dealings of a *personal nature*, the unsuccessful revolutionist government cannot bind the government which it sought to overthrow."[283] The sale of oil and kerosene to the rebels for the upkeep and functioning of the Trans-Siberian Railway, which at the time was a highly strategic assets for their military struggle, was seen by the Commission as a 'personal' act of support for the rebellion and, as such, was not binding on the state. That is why the Commission ruled against that part of the claim:

Only Legally Binding Contracts Should Be Enforced by the State

As was previously discussed, the state is only obligated to honour contracts that do not provide legitimacy to the insurrection. In determining whether or whether a contract was entered into in good faith, it is necessary to consider the investor's actual and reasonable level of information at the time it entered into the agreement with the rebels. A foreign investor working with insurgents may not always know with confidence if the fulfilment of a contract will be utilised by rebels to promote the revolution, save in the extremely clear situation of providing guns and tanks.

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[281] Silvanie, *supra* n. 24, at 98. These cases are examined in Silvanie, *supra* n. 80, at 92ff.
[282] *In the Matter of the Claim of Standard-Vacuum Oil Company*, US Foreign Claims Settlement Commission, Claim No. SOV-l789, Decision No. SOV-2977, Proposed Decision, 26 Jan. 1959, Final Decision, 30 Mar. 1959, MS Department of State, in M. M. Whiteman, *Digest of International Law* vol. 8, 824 (Dept. of State 1973).
[283] *Ibid.* at 824, citing this passage from the *Sambiaggio* case, *supra* n. 79, at 513

For example, in the case of *Peerless Motor Car Co.*, the Chief of the Military Services of the Department of War and Navy of the Huerta "government," who were widely seen as insurgents and eventually defeated, contracted with an American business to acquire two vehicle ambulances.[284] According to US Commissioner Nielsen, Mexico was required to abide by the contract since it was a typical government transaction conducted by the Huerta administration.[285] Although the President Commissioner did not view the purchase of ambulances as "part of the ordinary routine of government business," he did view it as much "more akin to a transaction of government routine (the one extreme) than to any kind of voluntary undertaking "having for its object the support of an individual or group of individuals seeking to maintain themselves in office" (the other extreme)"[286] (the other extreme). Buying ambulances was not the same as buying guns, to put it another way.

The prize has been criticised for being 'too wide' in terms of the boundaries of the idea of actions of government routine, which is a little unexpected.[287] According to Silvanie, the rebel government's army buying ambulances "may be considered as particularly useful from a military point of view" when fighting against the legitimate government and could, therefore, be regarded as "war material" in their struggle against the legitimate government and might therefore be seen as "war materiel" rather than a normal government action.[288] Even if such is the case, what really counts is how a seller acting in good faith would have understood the deal at the time it was made. There was nothing wrong with the vendor supposing that the rebels would utilise the ambulances for nonmilitary objectives like public health. Most likely, the merchant has no idea that the items they are selling may be utilised by the rebels to help in an uprising. It would be difficult to cast doubt on the contractor's honesty under these circumstances.

According to Houghton, "bona fide contracts, made in the ordinary course of business transaction, were held to be valid, even though it appeared that the indirect result of such contracts was to aid the rebellion".[289] This was in reference to an investment in Confederate bonds made during the American Civil War. The idea is that a government should not have to honour contracts that were signed to help a revolt. As an illustration of how a contract may have been used to indirectly support a revolt, examine the case of rebels employing ambulances for military purposes. Therefore, the state should be bound by such lawful contracts.

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[284] *Peerless Motor Car Co.* case, United States-Mexico Claims Commission, 13 May 1927, in *Opinions*, 1927, at 303–305 (also in 22 AJIL (1928), at 180–181).
[285] *Ibid.*
[286] *Ibid.*, Opinions of Commissioners, 1927, at 304–305.
[287] Silvanie, *supra* n. 80, at 96.
[288] *Ibid.* at 96.
[289] Houghton, *supra* n. 24, at 232, referring to *Baldy v. Hunter*, US Supreme Court, 171 US 388, 18 Sup. Ct 890, 43 L. Ed. 208 (1897).

Whether a Contract is in the Best Interests of the State is an Important ConsiderationIn judging the destiny of contracts made by failed rebels, Silvanie alludes to one extremely crucial consideration. Thus, "when the other party to the contract acted in good faith and made expenditures for permanent improvement accruing to the benefit of the State",[290] a state 'may be exceptionally bound' by such a contract.[291] This is a reasonable proposal. Any agreement struck by rebels during an uprising that may be seen as beneficial to the state should be honoured. Contrarily,[292] activities of a 'personal nature' undertaken by the rebels are not obligatory since they serve no purpose for the state. Instead, actions like this help the insurgents and their revolutionary cause.[293] Consequently, as Silvanie explains, "the granting of concessions and the forcible taking of property the proceeds of which were actually used to support the revolutionary movement, were held to fall in the category of acts not benefiting the state and therefore not binding on the state".[294]

The question of whether or whether a contract is in the state's best interest must be evaluated considering all relevant factors, rather than being settled in the abstract. Consider the case of a foreign investor who, during an insurgency, signs a contract with the rebels to construct infrastructure like a road, dam, bridge, tunnel, etc. Most of the time, these facilities will be underutilised.

Rebels for the sake of a cause larger than themselves or to further their own agendas. Like a de facto government, the insurgents will utilise the infrastructures as any other administration would have in a peacetime setting. Then the roads, bridges, and tunnels would not be exploited as a strategic advantage by the rebels, but rather by the general populace. It is possible that rebels would prefer to invest in public services like healthcare, education, and infrastructure maintenance and repair with the money they get by charging tolls on roads, bridges, and tunnels than stock up on weapons. The rebels might utilise an investor-funded building or factory for lawful public objectives like a school or a hospital instead of a weapons factory or a training facility. The 'personal character' of these deeds seems quite unlikely to me. There are cases when the state, its territory, and its people all gain from the deal. If the facilities are not damaged by the fighting, they will help the government and the people after the rebels are vanquished.

When the uprising ends and the rebels are crushed, it might cause problems if certain contractual duties are not fully met. The worst case is if the insurgents failed to make all the required payments under a contract for the construction of essential infrastructure. The government need to be obligated by such a contract after the war and fulfil any outstanding payment commitments if the infrastructure developed

[290] Silvanie, *supra* n. 80, at 61.
[291] *Ibid.* at 61.
[292] Silvanie, *supra* n. 24, at 102–103.
[293] Silvanie, *supra* n. 80, at 61.
[294] Silvanie, *supra* n. 24, at 103.

resulted in any advantages for the state. If not, the government would acquire the infrastructure "for free" once it defeats the rebels (or at a great discount). Unjust enrichment, a cornerstone of legal theory, would be violated in this scenario.[295] Commentators have discussed how this theory applies to the unique circumstance of what happens to state contracts after a state succession.[296] Although the topic is beyond the focus of this article, it is important to note that both commentators[297] and courts[298] have underlined the importance of considering whether or not the new state has profited from the fulfilment of the contract prior to the date of succession.

whether or whether a certain piece of infrastructure was beneficial to the state is a question that, can only be answered after the war has ended. What important is not how the infrastructure was used during the insurgency, but rather how it may be utilised after the battle has ended and normalcy has returned. As an illustration of this in action, consider the hypothetical situation of the *Standard-Vacuum Oil Company* mentioned above. So, let us pretend the Trans-Siberian Railway was genuinely constructed and maintained by the foreign investor throughout the civil war, and that the rebels did not pay for it in full. Only a portion of the research focuses on the possibility that the "Kolchak administration" exploited the railway for revolutionary military reasons during the rebellion when they de facto ruled Siberia. What matters more is how the Soviet Union, if victorious, may put this infrastructure to use in the future. The state would benefit greatly from investing in this vital infrastructure even after the uprising has ended. If one applies the concept of unjust enrichment, there seems to be no reason why the state should not pay for this asset. To put it another way, the Soviet government acquiring a railway for "free" means enriching one entity at "the expense of the other" (the investor not getting paid).

This is indeed a situation where the enrichment of one entity (the Soviet government getting a railway for 'free') is to 'the detriment of the other' party (the investor not getting paid).[299] Here, the enrichment is "directly linked with and result in an impoverishment on the other side".[300] Since the state was not a signatory to the initial contract, it may choose not to assume responsibility for paying off any debts that have accrued as a result of the agreement. However, a company might be seen to have profited from a contract even if it is not a legal participant to the agreement.

[295] P. Dumberry, *A Guide to General Principles of Law in International Investment Law* 232 (Oxford UP 2020).
[296] P. Dumberry, *State Succession to State Contracts: A New Framework of Analysis for an Unexplored Question*, 19 J. World Inv. & Trade 1–32 (2018).
[297] D. P. O'Connell, *State Succession in Municipal Law and International Law* vol. I, 298 (Cambridge UP 1967).
[298] *Yemen v. Compagnie d'Enterprises CFE SA*, Cyprus Supreme Court, No. 10717, 8 Jun. 2002, Oxford RIL, case analysis [H1-H3], referring to paras 12–14.
[299] *Flexi-Van Leasing, Inc. v. Iran*, Iran-United States Claims Tribunal, Award No. 259-36- 1, 13 Oct. 1986, 12 Iran-US CTR 353.
[300] Charles M. Fombad, *The Principle of Unjustified Enrichment in International Law*, 30 Comp. & Int'l L.J. S. Afr. 123 (1997).

Unjust enrichment is "designed to redress undesirable shifts of control over assets which are not covered by other areas of the law," as stated by two commentators[301] adding that "typically, a situation giving rise to liability for unjust enrichment would therefore be covered neither by responsibility for a wrongful act nor by an underlying valid agreement".[302] An enrichment's illegality under international law is of primary importance.[303]

Conclusion

In the context of foreign investments in nations beset by civil conflicts, when one or many insurgent group(s) may be de facto dominating part(s) of the country, the conclusions of this article regarding the fate of contracts signed by rebels during insurrections are particularly pertinent. From 2012 until very recently, this was the reality in Syria. This was also the case in Libya and Yemen as of this writing (early 2022). First and foremost, the result of the conflict will determine the fate of contracts signed by international businessmen and rebels. If the rebels succeed, the state will be obligated to honour the contracts. Contrarily, the state will not be bound by any contracts made by rebels who fail in their effort to topple the government. This article argues that this is incorrect in certain scenarios. In cases when a contract signed by rebels does not directly aid the revolution but where the fulfilment of the contract does result in advantages for the state, the author argues that the state should be obligated by the contract.

[301] Christoph H. Schreuer, *Unjustified Enrichment*, in *Encyclopedia of Public International Law* vol. 9, 290 (R. Bernhardt ed., North Holland 1986).
[302] Christina Binder & Christophe Schreuer, *Unjust Enrichment*, in *Max Planck Encyclopedia of Public International Law* (Oxford UP, online ed. 2006), para. 2.
[303] Fombad, *supra* n. 151, at 123.

Environmental Justice and The Tribes of North East: A Public Policy Catastrophe

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ABSTRACT

The megaprojects that have sprouted up in North Eastern India are said to have spearheaded development. However, the notions of development held by the Tribes of North East do not align with the Government's approach to development of the largely agrarian and rural region. The approach to establishment of energy megaprojects in the region is lopsided, with negligent impact assessments and poor public policy to counter displacement of local communities. Given that the region is largely agrarian and rural, such development at the cost of the resources and local lifestyle, endangers human security and raises environmental justice concerns.

The paper lays down the constitutional basis in which the concept of environmental justice is rooted and underlines the conflict between policy and welfare in the region. The paper makes an inquiry into why the mechanisms and policy measures as applicable in the region are inefficient in tackling the problem of dissensus upon the megaprojects and their execution. Based on statistics and case studies, the paper finds that the projects being undertaken in the northeast region eliminate the aspect of sustainability central to the local lifestyle, and the justice discourses fail to offer an adequate redressal mechanism due to following of the dependency model of development. The paper proposes the capability approach to move towards community-based resource management and cites the works and ideas of economists such as Amartya Sen and Adam Smith to prove its point with use of statistics and conjectures.

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I. INTRODUCTION

There exist conflicting notions of what development is for the rest of the country and what development is for the tribal indigenous communities living in the north-east and often this difference leads to them coming at cross roads with the government or private sectors having an upper hand due to their monetary and political clout. Development in the north-east is characterized by hydroelectric megaprojects and energy plants that displace communities, disturb the downstream flow and thereby have detrimental effects on the resource and food distribution in the area, and encroach upon the resource autonomy of the tribal communities that the North-eastern states of India house. The policies and mechanisms intended to aid stakeholder analysis, relocation and compensation of the affected communities and ensure justiciable execution of the megaprojects are inefficient, and skewed to work against the victims of unsustainable development. This ultimately leads to the indigenous communities being wronged and their human rights being violated. Particularly such policies and development encroach upon the environmental autonomy and rights of the communities.

Environmental Justice is a movement that emerged towards the end of the last century and demanded that environmentalism be justiciable. It was argued that environmental problems cannot be solved without bringing systematic changes in the way they are planned, implemented and monitored. Peter Wenz has stated that Environmental Justice addresses the problem of distributive justice[304]. It has been observed that development-oriented projects largely benefit certain groups more than others, while other groups disproportionately bear the adverse consequences.

In the 1980s, the call for justice in environmental matters arose in North Carolina during a local dispute over toxic waste dumping near a low income African-American neighbourhood.[305] Civil rights groups highlighted that disproportionate burden was being felt by the most vulnerable sections of the society. This movement slowly expanded and covered disaster preparedness inequity, access to healthy and affordable food, environmental federalism among tribal communities[306] and procedural inequality in environmental decision making. The

[304] Wenz Peter, The Importance of Environmental Justice (Merchant Carolyn Ecology Rawat Publications 1996).
[305] L. Cole and S. Foster, From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement, 19-33 (New York University Press, 2001); R.D. Bullard, Environmental Justice in the Twenty-First Century, 19-33 (Sierra Club Books, 2005).
[306] D.N. Suagee, *Tribal Self-Determination and Environmental Federalism: Cultural Values as a Force for Sustainability* ,3 WIDENER LAW SYMPOSIUM, 236-39 (1998).

protests and movements in Asia, Latin America and African countries regarding food scarcity, pollution and health concerns were soon categorized as environmental injustices.

The global movement against climate change and towards sustainable energy has given rise to a new host of environmental injustices; prime example is Winova Laduke's work on effect of energy projects on Native Americans, and shift from nuclear power to hydroelectric power on Canadian tribes.[307] The tribes in India's north-easter states are a victim of this very trend of injustice arising from sustainability projects. The fact that the sustainable energy projects popularized as development and modernization of the region have failed to benefit the natives of the states is a classic example of the systematic injustice arising from colonial tendencies in the environmentalism movement. Keeping in mind the tenets of environmental justice, a new model for sustainable development of the north-east states, complemented by efficient policies to counter internal displacement and detrimental impact on resources should be implemented.

II. CONSTITUTIONAL MANDATE FOR ENVIRONMENTAL JUSTICE IN INDIA

India has seen its fair share of environmental justice struggles. The Chipko movement is one of the first such successful instances. Historian Ramachandra Guha and economist Joan Martinez-Alier have coined the phrase "the environmentalism of the poor"[308], to refer to such grassroot social movements, highlighting the inherent inequality in the disposition of environmental quality from which these movements arise.

India's legal framework, her leaders and judicial position on matters of environmental concern have paid due attention to issues of the environment. India's judiciary is recognized as environmentally progressive internationally owing to the bold judgements as well as timely establishment of the National Green Tribunal[309].

The Constitution of India, in its preamble enshrines the principles of Social Justice and Equality, which are at the heart of the philosophy of environmental justice. Although environmental justice is nowhere explicitly secured in the Indian Constitution, it can hardly be said that the constitution is silent on the matter.

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[307]Winova Laduke, From Resistance to Regeneration (Merchant Carolyn Ecology Rawat Publications, 1996).
[308] R. Guha and J. Martinez-Alier, Varieties of Environmentalism: Essays North and South, London: Earthscan, 3-21 (Routledge Taylor and Francis Group, 1997)
[309]Peiris, G.L., *Public Interest Litigation in the Indian Subcontinent: Current Dimensions,* 40(1) ICLQ 66–90, (1991).

One of the prime sanctions of the constitution on environmentalism is the Protection of the Environment under Articles 51A (g) and 48A added in 1976 by the 42nd Constitutional Amendment placing a duty to protect and nourish the environment on the state and on the citizens. The Apex Court declared the Right to Clean and Decent Environment, within the ambit of the actionable Right of Sustainable Development, and also declared pollution of the environment a violation of the Right to Life under Article 21 of the Constitution in Damodar Rao v. S.O. Municipal Corporation[310]. These Articles and Apex Court pronouncements form the "Golden Triangle"[311] of Constitutional Protection of the environment in India. The Fundamental Rights and Duties, and Directive Principles of State Policy are based on principles of welfare society, equity and justice, and by associating environmental concerns with these Articles, the virtues enshrined therein and the obligation to uphold them are attached to environmental matters and policy framing. By exercising their writ jurisdiction, the High Courts and the hon'ble Supreme Court of India have developed environmental jurisprudence in India to be one of the most progressive internationally. The courts in India have interpreted environmental rights and fundamental rights harmoniously to expand the ambit of both and offer a holistic protection to all citizens. Right to livelihood and Right to living atmosphere congenial to human existence has been pronounced to be part of Right to life under Article 21[312].

These provisions extend a force to the legislations passed to protect the environment, and in conformity with International treaties and conventions that India is signatory to. India's Protection of Environment Act of 1986 refers to the Stockholm Conference of 1972 in its preamble and this was the first international conference to pose the environment and associated concerns a major issue for the world. At the conference, 26 principles were adopted by the participants to start a dialogue between the industrialized nations (Global North) and developing nations (Global South), which focused on the link between economic growth, environmental pollution and the well-being of people[313]. The National Green Tribunals Act reflects and implements India's obligations under the 1972 Stockholm conference and the Rio Conference of 1992; the fact that the tribunal was established under Article 253 of the

[310] Damodar Rao v. S.O. Municipal Corporation AIR 1987 AP 171.
[311] Address by Justice Swatanter Kumar(Retd.) Former Judge, Supreme Court of India, Environmental Law and Justice: The History and Future.
[312] Kharak Singh v. State of U.P AIR 1963 SC 1295.
[313] United Nations, *United Nations Conference on the Human Environment, Stockholm 1972*, (United Nations), https://www.un.org/en/conferences/environment/stockholm1972 (accessed Jan 27, 2023)

Constitution rather than Articles 323A and 323B reflects the intent to channel the environmental justice movement into India.

In reference to the tribal communities of the North-east (particularly Assam), the Constitution contains the VI Schedule which sought to balance the tribal demand for political space and the civil-political groups' aspiration for integration of tribal communities with mainland Assam. Autonomy and freedom from imposition was also granted by empowering the Autonomous District Council to legislate on matters of allotment, occupation and use of land, and management of forests among others. Further, by the 22nd Constitutional Amendment, Article 244 empowered the Parliament to create an autonomous state within Assam comprising of the tribal regions covered under Schedule VI. Thus, Meghalaya was created within Assam. To further the autonomy of the tribal communities, the 73rd and 74th Constitutional Amendments' provisions regarding grassroots level democratic institutions (panchayats and municipalities) was made inoperable in tribal areas under Schedule VI. The sixth schedule of the constitution included by the policy makers recognize the special needs of the people living in such terrains by facilitating local governance. Article 371 A includes special provisions of Nagaland, 371B for Assam, 371C for Manipur, 371 G for Mizoram and 371 H for Arunachal Pradesh. The goal of these provisions is to protect the customary practices of the people living here and not impose the parliamentary legislations upon them by giving local authorities powers for administration of their respective areas[314].

In the 1996 Supreme Court case of T.N. Godavaram Thirumulpad v. Union of India & Ors, the rights of tribal population of the northeast were upheld by bestowing the prerogative upon the state government to include any unclassified land within the definition of forest[315].

Constitutionally, India has extended legal grounds for the tribes' democratic freedom, thereby allowing them to exercise their environmental democracy as well. However, in terms of environmental justice, the outcome has been disappointing.

314 Maotoshi Ao, *Environmental Legislative Governance and Issues of North East India*, 8 LEX WITNESS (2017).

315 *supra* note 1129

ENVIRONMENTAL INJUSTICE IN NORTH-EAST INDIA

A. Nature of Development in the North East

Historical Root of Injustice

Indian policy framing on environmental and developmental matters has failed minority groups and vulnerable communities. The approach to development in north east is inevitably top down, with the assumption of trickledown effect. Considering the unique characteristics of the Nort-eastern fabric geographically, culturally, politically and historically, this model has failed to achieve the desired results, and instead led to some grave injustices.

Colonial resource extraction and militarization defines North-eastern history. The landscape was developed and transformed in the mid-19th century by clearing forest and partitioning land based on use such as coal mining, oil mining, opium plantations etc[316]. As such subsequent governments and their development models were also based on exploitation of the region's resources and labour forces rather than the wellbeing of the communities and nurturing their cultures and lifestyles. Hydel power projects and coal mining[317] are two such instances where, under the garb of development and employment creation, the local communities have been deprived of their land, resources and social stability.

Open coal mines in Assam, specifically in the Tiklok and Ledo-Tirap region of upper Assam, requires removal of top soil including fertile vegetation and dumping of the coal debris near the extraction site. In the process, there is no revitalization of the land and a "barren artificial hillock consisting of rock debris is created in place of natural green hillocks"[318].

Former Prime Minister Jawaharlal Nehru advocated building of dams as one of the cornerstones of modernization. It came as a bitter lesson however that dams come at an ecological and social cost. This was followed by mass protests, expressing dissatisfaction with the mass eviction of people for the purpose of building dams[319]. Indira Gandhi[320] advocated

[316] Arupjyoti Saikia, A.. *Forest land and peasant struggles in Assam, 2002–2007*. J. PEASANT STUD. 35, 39–59.(2008).
[317] McDuie-Ra, D., Kikon, D., *Tribal communities and coal in Northeast India: The politics of imposing and resisting mining bans.* ENERGY POLICY 99, 261(2016), http://dx.doi.org/10.1016/j.enpol.2016.05.021
[318] Pandey K.M., Debbarma Ajoy, Das Hirakjyoti, Roy Amitava and Nath Writuparna, *Environmental Impact Assessment and Management: Protecting Ecology in North-East India*, J. ENVIRON. RES. DEVELOP. 7, 4 (2013)
[319] KHAGRAM, SANJEEV. *Dams and Development: Transnational Struggles for Water and Power*. CORNELL UNIVERSITY PRESS 4,3 (2004). http://www.jstor.org/stable/10.7591/j.ctv3mtbqn.
[320] Gandhi, Indira. 1972b. ''Man and Environment. Plenary Session of the United Nations Conference on Human

for qualitative development centred on the principles of equality. This grand gesture on the international stage turned out to be a mere rhetoric domestically when the Indira Gandhi government came out with development policies that had undue consequences upon tribal people, their lands and their lifestyles.[321] This can be attributed to the conundrum of "capital accumulation and the extraordinary asymmetric of money and political power that are embedded in the process"[322]. The history of environmental injustice is linked inherently to colonial tendencies. The poverty of developing and underdeveloped nations, is the consequence of colonial legacy and by the same logic, the socially disadvantageous status of tribes and minorities, not only in India but across the world is a result of their historical subjugation by the majority population.[323]

Approach to Development

As discussed in previous sections, the region of north east has a problem of integration with the rest of the country. While there might be instances of unity amongst the tribes of north east, there is a threat of fragmentation from the rest of the country[324]. Post-independence, integrated development was a priority for the Indian government. While the North-east had been integrated politically and administratively by means of various legislations and military assistance, the development was skewed away from social, cultural or economic aspects, leaving the region largely isolated and neglected. The north-eastern states continued to be a buffer region up until mid-1980s when a need was felt not only to increase energy production to meet the needs of the nation but also to assert political influence in the neglected north-eastern states. Underdevelopment breeds threats to security[325], and the north-east had remained underdeveloped for too long and the government came to realize that the security buffer approach would soon be obsolete. Unrest and agitation in the North-eastern states, especially Assam due to displacement of farmland, land acquisition for resource extraction and underdevelopment was becoming more frequent. With the Brahmaputra river being shared by

Environment at Stockholm,"(1972).

[321] Gandhi, Indira.. ''Legislators and Environment.'' First National Conference for Legislators on Environment, New Delhi 30 April (1982)

[322] DAVID HARVEY, JUSTICE, NATURE, AND THE GEOGRAPHY OF DIFFERENCE 401 (1996) .

[323] Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVTL. L. REP. 10681, 10681-82, 10688 (2000). Kuehn has linked the social justice component to racial disparities however, the authors draw a similar conclusion in terms of social disparities between tribal communities and mainland Indian population based on his arguments and findings.

[324] N. Somorendro Singh, *Integration and Development in North-East India: An Assessment*, 330 IJPS 67, 2 (2006).

[325]Maria Stern and Joakim Öjendal, 'Mapping the Security—Development Nexus: Conflict, Complexity, Cacophony, Convergence?' (2010) 41 Security Dialogue 5 <http://journals.sagepub.com/doi/10.1177/0967010609357041> accessed 15 March 2022.

Indian states in the north-east as well as China and Bangladesh, water sharing concerns became a front for diplomatic feats and it was convenient for the Indian government to use dams to not only assert it's presence but also serve the mainland's purposes. The development was now driven by security concerns disguised as an integration approach, and thus remained exploitative of the resources.

The dam projects were also marketed as schemes to develop the economy of the north-eastern states. Employment generation, energy availability and private capital flow were expected to be the direct benefit the north-eastern states would reap from these projects. Dams became synonymous with development and state governments encouraged these projects.

B. Dams, Development and Injustice

In the 1990s, when the privatization and liberalization movement took over, the governments of the North-eastern states, especially that of Arunachal Pradesh and Assam signed MOUs in the hundreds with private power developers. In May 2008, the then Union Minister of State for Power, Jairam Ramesh, raised concern about the signing of MOUs at such alarming rates. Till October 2010, the government of Arunachal Pradesh had allotted 120 projects to companies in the private sector and 12 to the public sector for an approximate total installed capacity of 40,140.5 MW[326]. These MOUs were signed without any public consultations, project design plans and involved huge monetary advancements[327]. Such initiation of hydel power projects threw a wrench into the development planning process and interrupt clearance receipts. A large number of these hydel projects were therefore ill planned and adversely affected communities living downstream from these projects and those residing in surrounding land, not to mention the capital and resource expenditure that never met it's potential.

In a bid to award sites and initiate level playing field amongst the private player, the government notified a policy on Hydro Power Development in 2008[328]. The national water policy introduced by the government in the north east region stipulates the planning and operation of the system, water allocation with drinking water, irrigation, agriculture and hydro

[326]Neeraj Vagholikar and Partha J Das, 'Juggernaut of Hydropower Projects Threatens Social and Environmental Security of Region' 20.
[327] ibid.
[328] *Hydropower Projects under Construction in NER and Sikkim*, MINISTRY OF DEVELOPMENT OF NORTH EASTERN REGION https://mdoner.gov.in/hydro-power-projects. (accessed Jan 20, 2023)

power as priority sectors[329]. In 2009, an inter-ministerial group was formed which identified the obstacles of Environment and forest clearance, displacement of masses and issues of compensatory forestation. The present model of development encompasses the monitoring of the hydro power projects by the government through establishment of Advisory group, Special Monitoring group under the chairmanship of secretary (power), a power project Monitoring Panel (PPMP) and lastly a task force under the chairmanship of Ministry of Power to review the status of future hydro power projects allocated to private enterprises.

With respect to the Brahmaputra basin, India has the second largest catchment area after china which is close to 293,000 km^2 and the basin population in India is 30.4million[330]. The watershed of such catchments is extremely important in the sense that hydrological flows to some of the world's most densely populated agricultural lands and cities are regulated through them[331]. Apart from this the export of timber to countries such as Bangladesh due to heavy demand becomes a problem. The forest cover in the north eastern states is 1,69,521 sq. km which constitutes 64.66% of the total geographical area of northeast while it lost 1020 sq. km of its total forest cover over the course of 3 years from 2019 to 2021[332]. The forests under all the projects undertaken in this region create pressure on the landscape. The north-eastern population, especially the tribal population, owing to the under development of the region and the social and cultural standing of the communities, is more vulnerable than that of any other state. It is estimated that, of all the tribals who make up 10% of the national population, 40% account for all the project-related displacements in India[333]. Often, these tribal territories have overlapped land marked for mega projects. To this day, development in the Brahmaputra strip is undertaken with little to no regard for the fact that the said development is evidently unbalanced and uninformed of the concerns unique to the North-eastern region.

These events have primarily led to the three major problems of deforestation, watershed deterioration and creation of barren land in a vegetative terrain.

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[329] ibid

[330] Chandan Mahanta, *Water Resources in the Northeast: State of the Knowledge Base*, WORLD BANK BACKGROUND PAPERS 2, (2006)https://web.worldbank.org/archive/website01062/WEB/IMAGES/PAPER_2_.PDF (last visited Jan, 20, 2023)

[331] Mark Poffenberger, *Communities and Forest Management in Northeast India*, 5 WORLD BANK BACKGROUND PAPER NO. 12, (2006).

[332] *India State of Forest Report (2021),* FOREST SURVEY OF INDIA *https://fsi.nic.in/isfr-2021/chapter-2.pdf*

333 *Development and Displacement India Water Portal*, INDIA WATER PORTAL https://www.indiawaterportal.org/topics/developmentand-displacement (last accessed Jan. 15 2023)

There are more than 220 ethnic communities in the entire north east region[334]. According to a 2001 census, the following is the population of Major Scheduled Tribes in the north east region.[335]

According to the numbers, the economy of the north eastern states in terms of real growth is continuously expanding and that the share of primary sector in the Gross State Domestic product is declining and that of secondary and tertiary sectors is increasing[336]. The number of people employed in the agricultural sector is high. There has been a lack of growth in the primary sector. The private sector is growing but the fruits of development are not reaching the masses[337] because there is no proportionate reduction in the population of people employed in the agricultural sector. This in turn reflects how the nature of development which sought to alleviate unemployment and poverty amongst the masses in the north east region has not worked in a way it was intended to.

C. Environmental Injustice

India has recorded and alarming number of environmental conflicts. Most of these conflicts are on matters of water and mining, both of which affect the most vulnerable and marginalised communities.[338] Owing to the tribal lifestyles and culture, which is closely integrated with natural resources and their sustainable use, such environmentally exploitative schemes expose them to grave environmental injustices.

Distributive Injustice, Procedural injustice, Corrective injustice and social injustice altogether cause a case of environmental injustice. In North-east India, all of these 4 justices have been denied to the tribes.

Distributive injustice is the component that is most easily identified in a case of environmental injustice; it is the disproportionate allocation of benefits and adverse consequences of environmental exploitation among communities and nations.[339] As warmer temperatures cause

[334] *Basic Statistics of North Eastern Region 2015*, NORTH EASTERN COUNCIL SECRETARIAT 14 https://necouncil.gov.in/sites/default/files/uploadfiles/BasicStatistic2015-min.pdf
[335] Sailajananda Saikia, Bishmita Medhi, Bidyum Kr Medhi, *Spatial Distribution of Tribal Population and Inter Tribal Differences in Population Growth: A Critical Review on Demography and Immigration in Assam*, 25 JHSS 3, 3 (2012)
[336] *supra* note 1, at 552
[337] *supra* note 1, at 554
[338] 'India and Its Adivasis: Time to Reframe Environmental Justice' <https://www.sociolegalreview.com/post/india-and-its-adivasis-time-to-reframe-environmental-justice> accessed 15 March 2022.
[339] D. French, *Sustainable Development and the Instinctive Imperative of Justice in the Global Order*, GLOBAL JUSTICE AND SUSTAINABLE DEVELOPMENT 8, (Martinius Nijhoff Publishers, 2010).

changes to the Brahmaputra River flood regime and monsoon precipitation, the people of the Brahmaputra river strip will bear a disproportionate burden of climate change impacts. The evidence of such disproportionate distribution of costs and benefits has been highlighted in earlier sections. The north-eastern population, especially the tribal population, owing to the under development of the region and the social and cultural standing of the communities, is more vulnerable than that of any other state. It is estimated that, of all the tribals who make up 10% of the national population, 40% account for all the project-related displacements in India[340]. Often, these tribal territories have overlapped land marked for mega projects.

In 2001, a nation wide study to rank the potential of hydroelectric schemes was conducted by the Central Electric Authority (CEA), wherein the Brahmaputra river was ranked the highest. The CEA considered 168 energy projects and schemes with an installed capacity of 63,328 MW. However, most of the energy generated from this area was to be channelled to mainland India and mini and micro hydel projects were identified to serve the local power requirements. So while the local populace suffered from the consequences of the large dam projects, they could not reap the benefits of the project, a classic case of distributive justice. The energy was not offered to them at a subsidized rate to nourish the local industries and farms to promote the development of the area in the long run, which could have rectified the distributive injustice to some extent and contributed to corrective justice as well. Such a policy to distribute the power would have aided the development of the region in a more sustainable manner and offered a way to promote local produce and trade without uprooting the communities and their customary way of life.

Procedural justice entails open, involved and inclusive approach to decision making for all stakeholders. It imposes an obligation to ensure meaningful involvement of all groups involved. As highlighted earlier, the MOUs signed in the late 2000s and the earliest dam projects were undertaken with inefficient stakeholder consultation. In general, community consultation has been given little regard in NER as can be seen from the negotiations between community leaders and government representatives in coal mining disputes. Three clearances from Ministry of Environment and Forest, Forest Advisory Committee and National Board of Wildlife is required. However, most of the power projects are started with partial clearance[341].

[340] 'Development and Displacement | India Water Portal' <https://www.indiawaterportal.org/topics/development-and-displacement> accessed 15 March 2022.

341Jaya Thakur, *Exploring the Hydropower Potential in India's Northeast*. ORF, March 9 2020, orfonline.org/research/exploring-the-hydropower-potential-in-indias-northeast-61853 accessed January 2023

The Tipaimukh hydroelectric project is another case in point. The project was projected to submerge 275.50 sq. km of land surface. It was anticipated that the project would submerge the national highway no. 53, the only alternative to Imphal Dimapur lifeline. The communities affected had voiced their dissatisfaction with the project, warning that the benefits would outweigh the adversities. The communities had also warned that the dam would submerge historically significant sites and sacred groves, and further that it would drown rich biodiversity and resources that people rely on for their livelihood, violating their right to life and livelihood. The group that bore the most part of the adverse consequences proved to be the Zeliangrong tribe, a constituent of three Naga tribes and the Hmar tribe. For resettlement, the government drew up a Resettlement and Rehabilitation (R&R) package at the cost of Rs. 47.89 crores, with the goal of resettling 18 ,473 people and 3, 271 families. The victim groups, however, argued that the plan was understating the figures and the actual figure comes to around 50,000 people belonging to 5,000 families. This is a case of procedural injustice because the tribes were not heard or given an opportunity to contribute meaningfully to the project plans or R&R plan. The Union Ministry of Environment & Forests (MoEF) fixed a 10 km distance from the power house for evaluating the downstream impacts of large hydel projects, discounting the concerns of the communities in the Brahmaputra valley.

The IEA reports are inadequate and have been heavily criticised. They do not account for public opinion or social impact of the mega projects thus effectively eliminating and excluding a key factor to be considered in sustainability and justice discourses. The injustice is therefore rooted in the legislation and legal mechanisms governing the impugned issues.

Corrective Justice requires establishing avenues to seek justice in case of distributive or procedural injustice and imposes an obligation to compensate for past inequities.[342] The National Green Tribunal, though equipped with limited powers, offers one such platform to raise indigenous and environmental concerns. However, taking a legal course of action has proven to be less than fruitful for the affected communities in the past. The environmental justice mechanisms, specialized or not in India are poorly developed, worsening the situation of the affected communities. Another issue is the non-compliance with orders, which also roots from a poor justice mechanism. Several violations of environment and forest laws have been

[342] K. Mickelson, *Competing narratives of justice in North-South environmental relations: the case of ozone layer depletion*, ENVIRONMENTAL LAW AND JUSTICE IN CONTEXT, 299-300, (Cambridge University Press, 2009).

reported in the subsequent years pertaining to the construction of the Lower Subansiri Hydel Project. The LSHP was one of the most apprehended and opposed hydel projects of the NER[25]. In an order dated 19 April 2004, the SC held that 'the NHPC would also ensure that "there was no siltation down the Subansiri during the construction phase...'. and that under no circumstances should the excavated material be dumped either in the river or any other part of the surrounding forest or protected natural sanctuary". Yet, local communities have reported 'indiscriminate dumping of muck and debris in the river' since 2004.[343]

Social Exclusion

Social injustice in North-east is as story of social exclusion. social justice highlights that environmental concerns are inevitably linked to social injustices and the two cannot be addressed in isolation[344]. Internal self-determination is a radical idea which has been contemplated several times and have been exhibited as well by the tribes living in the north east region. The history of the north east is replete with uprisings when the local Tribes people resisted colonial interference. During the latter part of 19th century, precisely in 1860 and 1862, the Jaintia and Garo Tribes participated in the uprising against imposition of taxes[345]. The Lushai-Kuki, Manipuri and Assam Tribes raided the British posts during the end of 19th century. The Naga Resistance[346], the agrarian movement (1893-94), The Sonaram (1902), The Kuki (1917) and Jadonang-Gaidinliu movement are some of the earliest ethnic struggles associated with resource autonomy and the cultural connection of the tribes with the environment. Historically the strategy adopted by the British to deal with the so called semi-nude junglees of North-east was more of appeasement and assuage by adoption of an "exclusive discriminatory/ Protective Regime"[347]. This exclusion had strategic considerations rather than the development of north-east in mind. The purpose of boosting development is to promote exclusion and remove threats of lost identities. However, despite a great share of money apportioned to development in the north east with the region having its own

343 Vagholikar and Das (n 7).

344 C. G. Gonzalez, *An Environmental Justice Critique of Comparative Advantage: Indigenous Peoples, Trade Policy, and the Mexican Neoliberal Economic Reforms*, vol. 32, p. 728, University of Pennsylvania (2011) ; R. Guha, *Environmentalism: A Global History*, JOURNAL OF INTERNATIONAL LAW, Longman (2000).

345 Nava Kishor Das, *Identity Politics and Social Exclusion in India's Northeast: A Critique of Nation Building and Redistributive Justice*, 550 NOMOS 104, 2(2009) https://www.jstor.org/stable/40467193 (accessed Jan 20, 2023).

346 Maling Gombu, Julie Buragohain, *Internal Self Determination: An Alternative to the secessionist Movements in India's North East*, 10 STUDENT ADVOC 81 (1998).

347 Anjan Chakraborty and Anup Shekhar Chakraborty, *Emergent Development Approach: A Critique of 'Money-bags' Centre directed 'Dole-Development' in North-East India*, 548 IJPS 71, 2(2010) https://www.jstor.org/stable/42753717 *(accessed Jan 20, 2023).*

development minister, poor economic policy framework has created, in the words of NK Das, "an unbalanced and unsustainable economy and destroyed the basis of social-economic transactions in the region, the very policy needs to be reviewed"[348].

Fernandes and Bharali point out that landlessness in Assam grew from "15.56 percent to 24.38 percent, the average area cultivated declined from 3.04 acres to 1.45 acres and the proportion of cultivators from 72.58 percent to 40.24 percent". The development projects have therefore uprooted the local occupations, resources, villages and commutation routes, disabling the affected people, most of whom are tribes, on multiple levels including occupationally and culturally.

III. NEW DEVELOPMENT MODEL

D. The Capability Approach for Social Inclusion and Community Led Development

The current situation of northeast India imitates the dependency model of development on a smaller scale. Here, the Central governmental efforts and the interplay of private enterprises can be considered core and the north east Indian region can be considered the peripheral economy. The core depends upon the periphery for exploitation of its resources to pursue its own development with the belief that the speed of capitalism will bring industrial development to poorer lesser developed regions[349] as there will be a mutual exchange of resources and ideas. However, this is not true for the region. As suggested by the evidence, the inherent nature and capabilities of the nature and the northeast region has been overlooked to a large extent. The flow of resources has been unilateral and there has been a one-way extraction of the resources the region had to offer. It was expected that this wave of development and modernization would free the north eastern states from the under-development situation and help the escape the impending cycle of low development and conflict. Rather the scheme of events in the northeast exacerbated conflict and did very little to provide employment, alleviate poverty and expand the existing employment opportunities. The growth of primary sector became significantly slow while the secondary and tertiary sector grew. The impact of this growth was not seen in

[348] NK Das, *Social Exclusion, Misgovernance and Autonomy Movements in Northeast India,*37 HUMANKIND 7, (2011) HTTPS://PAPERS.SSRN.COM/SOL3/PAPERS.CFM?ABSTRACT_ID=3417033
[349] ANDREW LINKLATER, THEORIES OF INTERNATIONAL RELATIONS, 123 (3d ed. 2005)

the region as majority of the population continue to be employed in the primary sectors of the north eastern economy.

The indiscriminate modernization approach tried to weed out the traditional subsistent components of the north-eastern fabric. The development the region needed was not purely economic, but assisted by regard for its indigenous communities that were dependent on the rivers and their ecosystems. The under-planned execution of these projects further contributed to the damage borne by the north-eastern states.

E. New Development Model to Serve Environmental Justice

In Schlosberg's model of environmental justice[350], one must recognize groups, such as the indigenous communities, whose relation to the environment is distinct, making them more vulnerable to environmental damage. Addressing justice must involve participation of the affected communities and involving their notions of justice as well. India has taken steps to accommodate these concerns. Free Prior Informed Consent (FPIC) of the indigenous groups has not been employed during execution of most of these projects. The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) adopted in 2007 laid down that all indigenous peoples have the right to control, manage and develop their land, territories and resources for their survival and for their future generations.

Hence, there is a clear need to adopt a model that promotes community-based resource management techniques with an emphasis on the capability approach. The capability approach proposes that firstly, well-being and the freedom to achieve well-being is a moral priority, and secondly, the well-being must be understood in context of one's capabilities and functionality. This is essentially what was missing from the Indian approach to development in the North-east. Policies for energy security more times than not work on an exclusion principle. When development models exclude social and cultural constructs of a community, the results over time cannot generate sustainability, which requires alignment of ecosystems as well as human communities with their economic fabric. The four key components of capability approach include "equity, efficiency, participation/empowerment and sustainability"[351]. This approach aligns very well with the concept of environmental justice as it promotes agency of an

350David Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature*, OXFORD UNIVERSITY PRESS (online edn 2007) doi: 10.1093/acprof:oso/9780199286294.001.0001 (last visited Jan. 20,2023)
[25] Baruah, S., *Lower Subansiri and the politics of expertise*, THE ASSAM TRIBUNE (2012).
[351] *SABINA ALKIRE AND SEVERINE DENEULIN, AN INTRODUCTION TO THE HUMAN DEVELOPMENT AND CAPABILITY APPROACH*, ch. 2, (1st ed. 2009).

individual to achieve the goals one values. In this context, it becomes imperative to bring in the concept of Amartya Sen's capability approach.

Capability approach states that "people have different abilities to covert the same resources into valuable functioning and therefore, an evaluation that focuses only on means, without considering what particular people can do with them, is insufficient."[352] In the words of Nobel laureate Amartya Sen, "the key if to let people make decision about their own lives so they can choose the kind of life they value." In this manner, the focus is placed on identity. This model of development is very relevant for the north eastern region strife with conflicts of disparate identities.

This development model envisages the elements of the social choice theory and envisions the creation of an economy which is self-sustaining and self-regenerating in nature due to terrain of north east and the population of north east which makes interference in the region onerous and undesirable.

While it may be argued that tackling all these problems would create a paradoxical situation where at one hand more collective ownership of resources would mean lesser government interference which would in turn make it difficult to tackle the problems of integration and border threats which require a full-fledged involvement of the centre, state and bureaucracy in several respects. The answer to this problem lies in the fact that economic exchange and economic interrelation grow with freedom of opportunity. In the north east, the freedom created by the markets are only there for the actors directly involved in the processes undertaken by the private sector and the government intervention which happen in the economy with not much opportunities created for the tribal people. The proposed model of development will create social opportunities for people and empower them to in turn create their own opportunities which they would trust. This trust is necessary because in the presence of capitalistic market conditions in the north eastern region, a feeling of distrust amongst the people especially the tribes of north east would impede the efforts of their integration. As Adam Smith opines that self-interest gives people the reason to enter the markets, but without trust, the markets won't function properly."[353]

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[352] Laura Wallace, *Freedom as Progress: People in Economics Nobel Prize-winner Amartya Sen*, FINANCE AND DEVELOPMENT 7, (2004).

[353] Solomon, Robert C. *Review of Beyond Selfishness: Adam Smith and the Limits of the Market by Patricia Werhane*, BUSINESS ETHICS QUARTERLY 3, 4 (1993): 453–60. https://doi.org/10.2307/3857290 (last visited Jan. 20, 2023)

Environmental Justice includes "meaningful involvement" and "fair treatment" in the process of development. To effectuate a positive change in the distribution model, it is necessary to improve the mechanism that ensure corrective and procedural injustice. Social justice on the other hand cannot be served by "simple policy measures alone; a shift in the values of the policies and the government with the aim to establish a trust and community-based development framework is proposed by the authors". For this reason, to develop the model the authors suggest, this reciprocity and value of the tribes would have to be at the core of reformed policies in the region. Reforms in the procedural and judicial aspects should also be along the community centric values of the local population who is the major stakeholder. Some recommendations are as follows:

- Rethinking the Environmental Impact Assessment and calibrating the parameters to the unique requirements and practices of the region would be a landmark step in improving the state of procedural justice.
- Establishment of specialized benches in the National Green Tribunal (NGT) to address disputes arising from megaprojects in the North-eastern states with representation from the local tribes, and their opinion should be admitted as expert evidence or otherwise to guide the tribunal's decision and understanding of the gravity of injustice to the tribes.
- Special guidelines must be issued to project management authorities, including ESG compliances, to be strictly complied with, defaulting which a proceeding can be initiated in the NGT.
- The Tripura draft Stakeholder Engagement Plan should be made to comply with the OECD "Due diligence guidance for meaningful stakeholder consultation" guidelines and made the standard for all north-eastern states. Changes to the plan should be allowed in each state specific to it's requirements, in consultation with a committee with representation from the local tribes, female members of the tribes and government officials. The Oklahoma tobacco policy stakeholder engagement policy[354] for tribal communities in Oklahoma approach may be used as a guide.

[354] Jessica W. Blanchard, J. T. Petherick, and Heather Basara, *Stakeholder Engagement: A Model for Tobacco Policy Planning in Oklahoma Tribal Communities*, AMERICAN JOURNAL OF PREVENTIVE MEDICINE, SCIENCE DIRECT, (January 26, 2023) https://www.sciencedirect.com/science/article/pii/S0749379714005625

IV. CONCLUSION

Economic development in a region is inevitably one of the major evictors of poverty in the region and infrastructural development sets the stage for long term developmental opportunities for the people availing those facilities. However, the case of north east has proven to be a unique one. The ethnic minorities that are based in geographically excluded regions and have been historically subjugated and socially excluded, very often are the sufferers of such projects. This can be attributed to the conundrum of "capital accumulation and the extraordinary asymmetric of money and political power that are embedded in the process"[355].

It is imperative to keep a check on the development models the government chooses to implement the regions with disparate indigenous communities and very different histories, cultural identities and ethnic consciousness reside. In this case, thinking purely in terms of money incomes and wealth is a very superficial approach to the development model. Encouraging community-based resource management techniques and incorporating economic theories of development which cater to the specific needs of the region is the way to proceed with the sensitive issue of development in the north east region. The current development model has left the region in a state more dire post "development" than before. There is a need to replace the colonial roots of policies in the North-east and replace them with capability-based approaches to promote development that nourishes the cultural and ethnic practices of the region.

[355] ROGERS, A., CASTREE, N., & KITCHIN, R. JUSTICE, NATURE AND THE GEOGRAPHY OF DIFFERENCE, A DICTIONARY OF HUMAN GEOGRAPHY, (Oxford University Press 2013).

IMPACT OF FREEBIES ON ELECTIONS AND SOCIETY: A CONSTITUTIONAL PERSPECTIVE

Smriti Panjwani*

ABSTRACT

The government runs welfare schemes for the economically weaker section of the society to get easy access to basic amenities. These welfare schemes provide basic goods and services at a subsidized rate for the protection and promotion of the economic and social well-being of its citizens upholding the spirit of the constitution. However, in recent years, there is a trend being witnessed of governments offering freebies to the people. The political parties even in their manifesto during the election campaigns try to use freebies to attract the public for their valuable votes but what they tend to forget is the cost to be incurred will be from the exchequer. A sectionof society pays for the freebies offered to the other section.

Any goods or services provided for free can be referred to as 'Freebie'. In politics, it is seen as a popular measure to win elections. Free electricity up to 100 units, free rations, free medical healthcare and education, free bus rides for women and children, etc. are few examples that dawnthe cap of Article 38 of the Indian Constitution. But when the list of freebies is open to include products like liquor it is merely done to win the election and to gain the power and not for any purpose which in close symmetry can be linked to the concept of social justice or the principles ofstate policy. The state machinery shall also disclose the financial aspects involved in the freebies or an impact assessment of the same shall be presented to ensure transparency by the government.

In addition, it can have other short and long term impacts on society. It may take the shape of financial burden on the government's exchequer or it may give birth to a norm of negative competitive federalism.

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Introduction:

India has the second-most elevated populace on the planet, after China. On the planet's biggest majority rules system, contenders for government, state, and nearby authorities come from various ideological groups. Every delegate is chosen by individuals straightforwardly through the All-inclusive Grown-up Establishment. Accordingly, they are responsible to the general society. To prevail upon citizens, ideological groups are presently taking on a recent fad known as "Gifts."

As per Webster's Word reference, a gift is characterized as a gift given without remuneration. "Whatever is given to you without charge, particularly to arouse your curiosity in or support for something" is the manner by which the Cambridge Word reference characterizes gifts.

Things that are given at no expense are alluded to as gifts. Ladies, individuals with inabilities, BPL individuals, Planned Standings and Clans, Other in reverse Classes, and Booked Clans were undeniably designated by these promises.

Today, all ideological groups use gifts to get votes[356]. They vow to dispose of credits, give free power and water, give ladies, the impaired, and those without occupations month-to-month recompenses, control the utilization of provisional laborers, give free transport administration to young ladies, and offer free feasts and chambers. By furnishing electors with free items, even the ongoing organization endeavoured to allure them. Since this exhibit how severely the public authority functions, it utilizes "gifts" to prevail upon electors. It is deplorable that, even following 75 years of freedom, ideological groups keep on tempting electors with gifts instead of declaring improvement strategies that would furnish youngsters with occupations, and great training, destroy neediness, shield ladies, and grow the economy while likewise giving their residents a stage on which they could rival those from created countries. All things considered; ideological groups keep on doing this instead of reporting improvement strategies.

This gift culture was begun by Jayalalithaa, the late boss pastor of Tamil Nadu. She guaranteed a free bike, TV, cooker, cell phone, clothes washer, and saree. She began Amma Bottle to furnish inhabitants of Tamil Nadu with free food. Then, gifts are utilized to get votes from

[356] Arun N.K, 2013, First define a freebie, Indian Express, last accessed on 29th December, 2022.

every single ideological group. During the 2015 Gathering political race in north India, Arvind Kejriwal, the pioneer behind the Aam Admi Party and the ebb and flow boss priest of Delhi, made a guarantee to give free water, power, and transportation to ladies, in addition to other things, to prevail upon citizens. The High Court expressed that Parliament probably won't have the option to determine the issue of nonsensical motivating forces given to electors to inspire them to cast a ballot[357]. The court recommended that ideas on the most proficient method to control ideological group gifts ought to come from a pinnacle body with individuals from NITI Aayog, the Money Commission, the RBI, and administering and resistance groups.

Historical Background of the Freebies Culture in India

• Somewhere in the range of 1954 and 1963, the late CM K Kamraj proposed furnishing schoolchildren with free food and training to increment enrolment.

• In 1967, D.M.K. organizer C.N. Annadurai offered 4.5 kilograms of rice for one rupee through the Public Appropriation Framework. He set the strategy in motion in the wake of winning, yet he in the long run surrendered due to the expense.

• Other than the free rice and free TV, 2 for every kilogram, free gas ovens, 2 sections of land of land for the destitute, support for pregnant ladies. During the 2006 Gathering races, Rs. 1000 were given to all distraught ladies.

• The AIADMK additionally said it would give needy individuals free chappals, bikes, saris, and dhotis. Various states, including Punjab, Chhattisgarh, Andhra Pradesh, Karnataka, and others, duplicated the plans from Tamil Nadu.

Gifts like the free dissemination of workstations, cell phones, and bikes to understudies, the waiver of advances, the free appropriation of power and water, the instalment of month to month payments to the oppressed, ladies, ranchers, the incapacitated, and the jobless, the guideline of legally binding representatives, the free conveyance of chambers, and the arrangement of free transport rides for ladies are right now utilized by public and territorial gatherings to tempt citizens in front of races.

[357] Imranullah Mohammad, April 2021, Freebie culture makes people of Tamil Nadu lazy, laments HC, the Hindu.

The country's residents manage a few issues. Be that as it may, our ideological groups are continually utilizing gift vows to captivate electors. The significant issues confronting India include:

1. India has the second most noteworthy populace of any country on the planet. India as of now has 140 million individuals, as per information from the Unified Countries' Reality Meter Elaboration. 17% of the total populace lives in India. Overpopulation is liable for destitution, contamination, abuse of normal assets, and an absence of better medical services choices. HIV, tuberculosis, and jungle fever spread all the more rapidly in places with a many individual.

2. Coronavirus fundamentally affects numerous youngsters because of insufficient training. The two-year conclusion of schools made it feasible for understudies to learn on the web. Nonetheless, the "Computerized Separation" has prompted a critical number of understudies exiting school. Likewise, there is no responsibility for understudies during test time, and even educators come up short on specialized skill important to teach understudies on the web. The understudies' professions were demolished thus.

Understudies are moving a great deal from non-public schools to public ones. The quantity of understudies signed up for non-public schools between the ages of 6 and 14 has diminished from 32.5% in 2018 to 24.4% in 2021. 66% of all enlisted understudies have phones, however different understudies don't approach them, as per the Yearly Status of Training report.

3. An individual is in a condition of joblessness on the off chance that they effectively look for work however are fruitless. India's joblessness rate is projected to be 8.10 percent in February 2022, as per the Middle for Checking the Indian Economy (CMIE). In light of Coronavirus, a large number of individuals have lost their positions. Wrongdoing and self- destruction rates expanded therefore. A huge number of individuals can't meet their fundamental necessities and the high expansion rates are because of Coronavirus.

4. Defilement, which hinders India's advancement toward flourishing, is one of the nation's significant issues. The Straightforwardness Global Defilement List places India 85th out of 180 nations. As per a Straightforwardness Global review, India has the most noteworthy paces of debasement and the utilization of special interactions to procure public administrations in Asia. 46% of individuals in India get public administrations through special interactions, while the pace of pay off is 39%. Indicator of worldwide defilement.

5. India has the world's second-most elevated destitution rate. North of 66% of the country's occupants were in destitution. The pandemic has dramatically increased India's unfortunate populace in a solitary year, from 60 million to 134 million, as per the World Bank. There is a critical abundance hole between the well of f and poor people. Because of unreasonable expansion, destitute individuals can't meet their essential requirements.

6. Arrangement of Medical Services The majority rule country with the second most elevated populace on the planet can't give essential clinical consideration. India is presently a well-known objective for clinical travelers from the Center East, Africa, South America, and Europe searching for reasonable, great consideration. In any case, these administrations are inaccessible to occupants of humble communities and provincial regions. An absence of assets is the base of most issues in country India, which is a main issue at the present time.

A great many individuals passed on because of the absence of worked on clinical of fices in the Coronavirus administered towns, towns, and urban communities.

7. Ladies' Wellbeing In India, where ladies are viewed as divinities, ladies' security is a significant issue. Brutality against ladies has expanded because of additional ladies being presented to each pitch. The way of life that is overwhelmed by men shows its predominance over ladies in various ways.

Most of violations perpetrated against ladies were classified as "brutality by spouse or his loved ones," "assault on ladies with the point of shock her unobtrusiveness," "seizing and snatching of ladies," and "assault," as indicated by a Public Wrongdoing Record Department report.

Constitutionality of Freebie

As indicated by Article 266(3) of the Indian Constitution, cash taken from combined assets must be utilized by the law and by the constitution's expressed objectives and methods. Furthermore, Article 282 states that awards can be made by legislatures for "any" public reason. The drafters of the constitution had the option to all the more unequivocally characterize the expansive targets of every one of these arrangements by characterizing "reason" as a "public reason." In light of the fact that the Association and the State are at last responsible for putting the "Order Standards of State Strategies" right into it, the first part of the plan makes obviously it was expected to do as such. The state's job is by and large recognized to be one of "social,

financial, and political equity" for its residents. Consequently, the state is on good footing to give all-inclusive medical services, admittance to drinking water, and other key conveniences to accomplish monetary majority rule government.

Comparative arrangements can be tracked down in the constitutions of different countries also. For instance, the primary proviso of Article I, Segment 8 of the US Constitution expresses that "the Congress will have the influence to lay and gather charges, obligations, imports, and extracts to pay the obligations and benefit for the normal progression and general government assistance of the US." Comparably, to this, the Australian Constitution's Part 81 specifies that the District Government's pay and assets should be utilized for the Region's objectives.

These gifts or financed offices might be helpful essentially. However, do they sub-serve the goal of the government assistance state as visualized by the designers of the Constitution? Or on the other hand would they say they are basically focused on at electing gains? Or on the other hand does it advance the picture of the party in power or is focused on the advancement of the character faction of the forerunner in office? Do the allotment of assets on the squeezing inquiries of changes in police, legal executive, common organization, training, and wellbeing get side-lined as legislative issues advances 'gifts'/'sponsorships'? The prerequisite is to spend public cash well so that accomplish our goal and for that, we require a reasonable vision.

The splitting line between the government assistance state and populism is getting obscured.

There is a basic necessity for the enunciation of the idea of the government assistance state by the two chiefs and researchers. In the early long stretches of the Republic senior heads of the public authority connected with people in general in their gatherings and through different Media channels to explain the vision of the government assistance state. Head of the state Modi, on his part, is, doing that in his public gatherings and radio projects. This, nonetheless, should be made wide based so open talk happens at the degree of states and panchayats also. My researcher companions need to share their viewpoints howsoever different they might be from each other to direct the chiefs concerning how a government assistance state in a creating economy like India ought to work to understand the fantasies of heads of the pioneers behind the Republic and how to meet desires of the youthful and the destitute in the 21st hundred years.

Two sides of the Same Coin

While advocates contend that gifts are important to accommodate the government assistance of poor people and will add to the country's general turn of events, doubters battle that gifts of any sort empower apathy and weight the state spending plan. The gifts have been separated into two sections by this discussion. Arrangements that are either free or paid for, similar to food or wellbeing grain, fall into the principal class. Thus, these are the uses that emphatically affect monetary wellbeing. The underserved would prof it from these administrations' positive externalities, which would help financial development. Despite the fact that these are the obligations of different states, as recently referenced, no significant examination has been led to decide if the expressed starting targets were met by the more prominent monetary expense. In any case, the Hold Bank of India (RBI) expresses that "possibly sabotage credit culture, mutilate costs through cross-sponsorship, dissolving motivations for private speculation, and disincentive work at the ebb and flow wage rate, prompting a drop in workforce support[358]" apply to gifts like public transportation, free power, water, and advance pardon for ranchers. The issue here is with the second class of gifts, and ideological groups in India every now and again break the arrangements of the Indian Constitution and use them for their potential benefit and vote bank. since the gifts that have been guaranteed

[358] The Times of India, 'Explained: What are 'freebies' and how they may burden state' https://timesofindia.indiatimes.com/business/india-business/explained-what-are-freebies-and-how-they-may-burden-state-finances/articleshow/93306455.cms

to the overall population fall into the second classification of gifts. providing citizens with month to month monetary motivating forces. The guarantee to disperse electronic gadgets without differentiation is another. Moreover, the party's aim to expand its elector base as opposed to satisfy a social commitment is made unmistakably clear by widening the extent of the gifts to "everybody," in addition to the hindered ladies.

Ladies' governmental policy regarding minorities in society, as well as immediate advantages for employability, scholarly achievement, sports, and social exercises, are not gifts. Free nourishment for the individuals who can't uphold themselves or free clinical consideration for the poor is neither choice. "Free power, free PDAs, free PCs, and so forth," as indicated by Overpowered Rawat, the previous boss political decision official. fall under the domain of giveaways." In this way, the inquiry isn't how much the expense of the gift is, yet the amount they wind up costing the economy, personal satisfaction, and social cohesiveness.

To Conclude:

Albeit the issue is intense, the arrangement is testing. Jason Brennan stated in his book The Morals of Casting a ballot that despite the fact that individuals are not constrained to cast a ballot on the of f chance that they do, they should cast a ballot shrewdly. For a government assistance state to keep working, the generally financial improvement of the country is fundamental. There should be a breaking point on gifts since they are an avoidable channel on the spending plan. The FCI is a sacred body entrusted with exhorting the President on the strategies that ought to direct awards in-help of State incomes from the Merged Asset of India and deciding the extent of the separable pool that ought to be distributed to the States, as expressed in Articles 270 and 280(1)(b) of the Indian Constitution. Article 275 of the Constitution accommodates the installment of pay to states that the Parliament decides to need support.

For a state to have the option to pay for improvement projects that have been supported by the Focal Government or for the state's funds, it should get awards under the principal stipulation of Article 275. The latest report from the commission calls for 41% state support in Focal expenses from 2021 to 26. FCI suggests either contingent or genuine awards in-help

to help states in giving equivalent duty rates while keeping a financial plan balance in the income account. There are three principal sorts of awards in-help. Explicit reason awards, which ensure specific fundamental administrations at the very least, are one of them. This should be thought about by the Money Commission while dispensing assets to different states. The guides will add to a more level battleground for essential social administrations. Subsequently, states with essentially lower levels of social administrations might be qualified for more elevated levels of help. A state's populace thickness, financial backwardness, and different elements may likewise be considered by FCI. Monetary advantages like diminished or free educational cost, test charges postponed, food appropriations, and different advantages are unquestionable. ought to be made accessible to those living in neediness, individuals from Planned Standings, Booked Clans, and socially and instructively in reverse classes of residents.

The Constitution doesn't characterize the expression "award in-help of the incomes." There would be no point in affirming that this expression ought to be deciphered extensively to incorporate any gifts expected to build the beneficiary state's pay regardless of their planned use. The issue should be seen as far as guaranteeing an impartial circulation of assets among the units. Considering that awards in-help are not characterized, it is judicious to consider the extent of Article 275 to be unaffected; It is sensible to accept that awards for wide yet obviously characterized purposes fall under their domain. Throughout the last half-decade, different legislatures have endeavored to decide the framework or mix of frameworks that best suit their political, financial, and regulatory conditions since there is no authoritative definition. At the point when FCI sets the aggregate sum of state consumption, which could be utilized for a rush to productivity through labs of demonstrating agencies and enthusiastic majority rules government, where states will be permitted to give gifts yet just to the government assistance of the general population overall, where FCI will actually want to tackle their power, assets, and skill, various states contend to underbid each other in bringing down expenses, use, and guideline. Specifically, the state of not imperiling the focal government's dissolvability requires the finish of certain states' determined shortfalls, and each state ought to be prepared to have a sensible possibility keeping up with monetary equilibrium. Moreover, both authoritative and parliamentary investigation should be applied to the awards.

Since India is a creating government assistance express, each state needs some help. Before, the need to give a restorative component to make up for market variations was the main

impetus behind India's government assistance state's foundation. Subsequently, awards in-help should be founded on an evaluation of a definitive proportion of need, which is the aggregates that are believed to be adequate to bring the state's funds into balance in the wake of considering any remaining types of help like obligation change and income devolution. By restricting the characterizing and restricting public government assistance to the primary classification of gifts as characterized and talked about above, it is recommended that the rules that ought to administer awards in-help of the incomes of the States ought to restrict awards in-help for the more prominent government assistance.

Notwithstanding, the intense craving to win using all means is seemingly the main consideration gifts governmental issues in India, and this want has been at the front of the personalities of some party chiefs. It is hostile to liberals to want to expose others to one's self- safeguarding. Such craving is joined by a tireless longing to manage essentially through the concealment and denigration of the Indian Constitution's certifications of free and fair races. It very well may be contended that the phenomenal setting of gifts could introduce a chance for ground breaking thoughts that could help with smoothing out the awards in-help cash given to the states to decipher the soul of a majority rules government into the free and fair lead of races by creating techniques that will be straightforward and human cordial and forestalling political races from turning into a demonstration of solidarity as gifts. This could be achieved by forestalling political races from turning into a demonstration of solidarity as gifts. The gatherings are spurred to try and dismissal the expenses of real advancement when there are no rules, which places their state in the red[359]. The standards of shared regard, which must be polished through pondering, discussion, and conversation as the standardizing establishments around which our governmental issues should be coordinated, ought to be the ideal establishment whereupon governmental issues ought to be coordinated.

[359] Muley Sathya, Oct 2022, Understanding the freebie politics in India, financial express. Last accessed on 30th December, 2022.

CHANGING DIMENSIONS OF MEDIA LAW

Pooran Chandra Pande*

ABSTRACT

Media laws in India have a long history and deeply rooted in the experience under British rule and considered to be amongst the upcoming fields of law. The paper aims to address to whether Media Laws governing is it necessary to maintain the standards of morality in the country. Recent social media and Cinema controversies take us to discussing the interrelationship between the Indian Constitution and Laws. The legislative and administrative intention behind the media law standards in India will be a topic of discussion. The role of media in mobilizing public opinion and how the media endorses the opinion of the public through press and the unofficial trials of matters of national and public importance. The freedom of information can be enjoyed only if there are sources from which information can flow and source would be available where there is a right to speech and expression. They societies play multiple roles and perform important research to help Governments understand and respond to problems and needs on the ground. Today civil society is very important term and any discussion on democracy and Media laws is incomplete without taking into consideration the concept of civil society. A democracy needs a strong civil society to ensure that all organs of the government functions within the parameters of the constitution. The various acts, which have to be taken in to consideration when dealing with the regulations imposed upon the print media by the constitution. The freedom of media and the freedom of expression can be regarded as the very basis of a democratic form of government. The media world has expanded its dimensions by encompassing within its orbit, the widening vistas of social media. Media laws important legislations affecting the various branches of media the cause of freedom of speech and expression.

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Introduction

Generally, media is the agency for inter-personal communication. There are two types of communication. Personal communication is one type of media, while the other is electronic and print media. They can also be classified into traditional and modern media. Personal media systems are essential elements of communication media. These mechanisms include many aspects of social media. They are like advocacy, traditional media such as drama, public meetings, surveys, seminars, workshops, social justice advocacy, public interest litigation, lawyer groups, social action, coordination with civil societies, government agencies, agitations, demonstrations etc. Second as mechanical media like print and electronic media (Newspaper, Radio, Films and Documentaries, news photographs, pamphlets, books, photographs and photo exhibitions) etc.

Information seeking, on the other hand, is preceded by the formation of an opinion by the person seeking information, and consequently its expression. But freedom of expression and information run parallel to each other as far as the press is concerned. While the press may be the medium of expression, anyone else may have the information. Unless these two freedoms are used together, both will be useless. In the case of information, the only person who has the right to free distribution of that information is the party who is the author, originator or otherwise intellectual owner of the relevant information. However, in the case of the press, the press may also express the opinion of others, of course, in good faith and believed to be true. In relation to print media as well as audio-visual media, the press has a responsibility to provide information and ideas which the public has a right to receive. Otherwise, the press will not be able to fulfill its role of watchdog of the people. Freedom of the press is provided on the basis of Article 19(1)(a).

In the newly developed scenario this constitutional provision is becoming obsolete and hence needs to be amended. Thus to exercise freedom of expression there must be freedom of information. In this regard, the approval of the Freedom of Information Bill, 2000 (Information Bill) by the Parliament of India would be a welcome step. It is necessary to mention here that this freedom under Article 19(1)(a) is not limited, restricted and limited only to newspapers and periodicals but also includes pamphlets, leaflets, handbills, circulars and every kind of publication which Provides a vehicle. Information and opinion. Freedom of the press is considered one of the most important rights that must be protected in a democratic society.

The role of civil society in building and strengthening democracy. By civil society, I mean the whole range of organized groups and institutions that are independent of the state, voluntary, and at least to some extent self-productive and self-sustaining. This certainly includes non-governmental organizations such as those in this room, but also independent mass media, think tanks, universities, and social and religious groups. In a democracy, civil society groups have respect for the law, the rights of individuals and the rights of other groups to express their interests and views. The word "civil" implies tolerance and accommodation of pluralism and diversity. You are all civil society leaders engaged in this effort in various ways, so it gives me great pleasure to share these thoughts with you. Civil society groups may establish links with political parties and the state, but must maintain their independence, and do not seek political power for themselves. To be part of civil society, groups must also meet certain other conditions.

This freedom can be available only in a society where there is a right to free speech and expression. Similarly, freedom of information can be enjoyed only when there are sources from which information can flow. These sources will again be available where there is a right to speech and expression. Freedom of expression and freedom to receive and impart information are corollaries of each other. In fact, there is an overlap between freedom of expression and freedom to provide or receive information. Freedom to provide information can be considered as an expression of opinion of the informant or any third person.

Article 19(1) (a) of the Indian Constitution clearly states that all citizens shall have the right to freedom of speech and expression. The Subsidiary Article, Article 19(2) provides that the State may impose reasonable restrictions on its exercise in the interest of integrity and sovereignty of India, security of the State, friendly relations with foreign states, public order. In relation to decency or morality or contempt of court, defamation or incitement to an offence. Article 19(1)(a) does not specifically refer to freedom of the press, as the corresponding provision in the US Constitution says, but judicial decisions have repeatedly confirmed that the article is intended to include freedom of the press. Is sufficiently detailed and, by extension, the freedom of other mass media **[1]**. Strict and narrow limits have been placed on the legislative powers to curtail the rights conferred by Article 19(1) (a).

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[1]. Romesh Thapar Vs. State of Madras, AIR 1950 SC 124

Any restriction under Article 19(1) (a) can be valid only if three conditions are satisfied: - It is supported by the authority of law; the law in question relates to one or more

of the permitted heads of restrictions prescribed under section 19(2); and the ban is justified. It is also necessary that the process and manner in which the ban is imposed should be just, fair and reasonable [2].

Although the constitutional validity of censorship itself has not been subject to any judicial decision (except in respect of cinematograph films), the overwhelming weight of judicial opinion has been against interference with freedom of the press through censorship. This is illustrated by a set of judgments handed down during the Emergency of 1975–76, when a censorship order of comprehensive character was issued for the first time in the history of independent India, requiring editors and publishers to submit all material for publication. Officially designated official censor for approval before publication. Under the Censorship Order, the censor is appointed as the nurse-maid of democracy and not its gravedigger. Disagreement with majority-held opinions and views and criticism and disapproval of a measure initiated by a party in power makes for a healthy political climate, and it is not for the censor to inject into it the lifelessness of forced conformity.

Merely because disagreement, disapproval or criticism is expressed in strong language is no basis for banning its publication [3]. It is clear, on the basis of this and other judgments, that though C support cannot be said to be unconstitutional, any attempt to impose a prior ban on publication cannot be violated under Article 19(1) (a) and 19(2) have to meet the stringent standards prescribed. The Government of India had a complete monopoly on the broadcast media. Private organizations were only involved in commercial advertising and sponsorship of events. In Secretary, Ministry of I&B v. CAB [4]. The Supreme Court clearly differed from the above monopoly view and emphasized that Every citizen has the right to transmit and broadcast any important event to an audience/listeners through electronic media, be it television or radio and provided further that there was no monopoly of the Government on such electronic media as such of the Government The monopoly power was not mentioned anywhere in the constitution or any other law prevailing in the country.

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[2]. Express Newspapers Limited Vs. Union of India, AIR 1958 SC 578 at 621
[3] Binod Rao Vs. M.R.Masani, (1976) 78 Bom.L.R.125 at 169
[4]. in Secretary, Ministry of I&B v. CAB (1995) 2 SCC 161

Changing scenario of civil society

Media has some responsibility towards the society. On the freedom of the press, the media has to follow certain specific obligations towards the society. These obligations are truthfulness, in formativeness, objectivity, accuracy and balance. The media establishes itself as being pluralistic, reflecting diversity in society and having access to a variety of viewpoints, and therefore has a social responsibility. Civil society and nongovernmental organizations promote political participation. Civil society can do this by educating people about their rights and obligations as democratic citizens and encouraging them to vote in elections. NGOs can also help develop the skills of citizens to work with each another to solve common problems, debate public issues, and express their views. There are excellent examples from other countries of civil society specially women's groups who have inculcated these values in young people and adults through a variety of programs that practice participation and debate. Civil society can also help develop programs for democratic civic education in the schools. Civil society is an arena for the expression of diverse interests and involved as a constructive partner and advocate for democracy and human rights training.

Civil society interest groups can communicate with relevant government ministries and agencies by contacting individual members of parliament and provincial councils to present their views and advocate their interests and concern. Civil society is a check, a watch, but also an important partner in the search for such a positive relationship between a democratic state and its citizens. It is very difficult to conduct credible and fair elections in a new democracy unless civil society groups play this role. In conclusion, I would like to emphasize that the fact that civil society is independent of the state does not mean that it should always criticize and oppose the state. In fact, by making the state more accountable, responsive, inclusive and effective at all levels and hence more legitimate, a strong civil society strengthens citizens' respect for the state and promotes their positive engagement with it.

Civil society can also help develop programs for democratic civic education in schools. There is a need for comprehensive reforms regarding their rights and obligations as democratic citizens so that the youth can be educated about the crimes of the past and they can be taught the principles and values of democracy. Civil society and non-governmental organizations promote political participation. Civil society can do this by educating people about their rights and obligations as democratic citizens and encouraging them to vote in election.

NGOs can also help develop the skills of citizens to work with each other to solve common problems, debate public issues, and express their views. One role for civil society organizations is to advocate for the needs and concerns of their members, such as women, students, farmers, environmentalists, trade unions, lawyers, doctors, etc. Civil society should be involved as a constructive partner and advocate for democracy and human rights training. Civil society interest groups can communicate with relevant government ministries and agencies by contacting individual members of parliament and provincial councils to present their views and advocate their interests and concern.

Civil society can help inform the public about important public issues. It is not only the role of the mass media, but also of non-governmental organizations that can provide a forum for debating public policies and disseminating information about issues before Parliament that concern various groups or society at large. Affect the interests of Civil society organizations can play an important role in mediating and helping to resolve conflicts. Civil society organizations have an important role in monitoring the conduct of elections. Civil society can strengthen democracy When people of different religions and ethnic identities come together on the basis of common interests like women, artists, students, workers, farmers, human rights activists, environmentalists etc., civic life becomes more prosperous, Is. more tolerant. Civil society provides a training platform for future political leaders.

Censorship and Media

It is pertinent to mention about the case of Sakal Papers v/s Union of India [5] AIR 1962 SC 305. The Daily Newspapers (Prices and Control) Order, 1960, which prescribed a minimum price and number of pages that a newspaper was entitled to publish, was challenged as unconstitutional. The state justified the law as a reasonable restriction on the professional activity of a citizen. The Supreme Court quashed the order, rejecting the state's argument. The Court held that the right to freedom of speech and expression cannot be taken away for the purpose of imposing restrictions on the commercial activity of citizens. Freedom of speech can be restricted only on the grounds mentioned in clause (2) of Article 19 of constitution of India.

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[5]. Sakal Papers Vs Union of India [5] AIR 1962 SC 305.

While the Constitution provides for a fundamental right to freedom of the press, Article 105(2) provides for certain restrictions on the publication of proceedings in

Parliament. Notable Searchlight Case [6] In , the Supreme Court held that, publication by a newspaper of parts of speech of members in the House, which were ordered to be expunged by the Speaker, is a breach of privilege. Due to the restrictive scope of this article, it is not possible for us to delve into all the other statutes; although, some legislation that are worth mentioning are the Contempt of Courts Act, 1971 and the Official Secrets Act, 1923.

A. Abbas v. Union of India[7], the petitioner for the first time challenged the legality of censorship as a violation of his fundamental right to speech and expression. The Supreme Court, however, held that pre-censorship of films under the Cinematograph Act was justified under Article 19(2) on the ground that hat films should be considered separate from other forms of art and expression because a motion picture was capable of causing a stir.

In Bobby Art International Vs Om Pal Singh Hoon[8] the Supreme Court reaffirmed the above view and upheld the order of the Appellate Tribunal (under the Cinematograph Act) , which followed the guidelines under the Cinematograph Act. And gave 'A' certificate to a film. Hamdard Dawakhana Vs. Union of India [9]. The Supreme Court was faced with the question whether the Drug and Magic Remedies Act, which prohibits advertisements of drugs in certain cases and Diseases prohibiting advertisements of drugs with magical properties, were valid because it curbed a person's freedom of speech and expression by banning advertisements. The Supreme Court held that, an advertisement is undoubtedly a form of speech and expression, but every advertisement is not a matter relating to the expression of ideas and therefore advertisement of commercial nature cannot fall within the concept of Article 19(1) (a).

In Tata Press Ltd. v. MTNL. [10] In 1977, a three judge bench of the Supreme Court held that 'commercial advertisement' was definitely a part of Article 19(1). Because its purpose was to disseminate information about the product. The Court, however, made it clear that the government can regulate commercial advertisements which are misleading, unfair, deceptive and untrue. Freedom of speech, freedom of the press guarantees democratic participation in the decisions and actions of the government, and democratic participation is the essence of our democracy, the right to freedom of expression and speech is perhaps the most global accepted human right. It is necessary to mention here that this freedom under Article 19(1) (a) is not limited, restricted and limited only to newspapers and periodicals but also includes pamphlets, leaflets, handbills, circulars and every kind of publication which provides a vehicle. [11] It is also necessary that the process and manner in which the ban is imposed should be just, fair and reasonable. [12]

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[6]. Searchlight Case AIR 1959 SC 395
[7] A. Abbas vs. Union of India AIR 1971 SC 481,
[8]] AIR 1996 SC 1846,
[9] Hamdard Dawakhana vs. Union of India [6] [6] AIR 1960 SC 554.

Although the constitutional validity of censorship itself has not been subject to any judicial decision (except in respect of cinematograph films), the overwhelming weight of judicial opinion has been against interference with freedom of the press through censorship. This is illustrated by a set of judgments handed down during the Emergency of 1975–76, when a censorship order of comprehensive character was issued for the first time in the history of independent India, requiring editors and publishers to submit all material for publication. Officially designated official censor for approval before publication. The Bombay High Court came down heavily on the censors" and asserted that: It is not the function of the censors acting under censorship orders to trim their sails in a breeze or two with all the newspapers and periodicals in a single file Do it. One voice speaks in chorus. It is not for them to use statutory powers to mold public opinion or to turn the press into an instrument of brainwashing the public. Under the Censorship Order, the censor is appointed as the nurse-maid of democracy and not its gravedigger. Disagreement with majority-held opinions and views and criticism and disapproval of a measure initiated by a party in power makes for a healthy political climate, and it is not for the censor to inject into it the lifelessness of forced conformity.

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[10]. (1995) 5 SCC 139
[11] Sakal Papers Ltd. Vs Union of India, AIR 1962 SC 305.
[12]. Express Newspapers Limited Vs. Union of India, AIR 1958 SC 578 at 621.

Scope and Dimensions of media

Article 19(1)(a) of the Indian Constitution clearly said that all citizens shall have the right to freedom of speech and expression. Subsidiary Article, Article 19(2) provides that the State may impose reasonable restrictions on its exercise in the interests of sovereignty and integrity of India, security of the State, friendly relations with foreign states, public order. in relation to decency or morality or contempt of court, defamation or incitement to an offence. Article 19(1)(a) does not specifically refer to freedom of the press, as the corresponding

provision in the US Constitution says, but judicial decisions have repeatedly confirmed that the article is intended to include freedom of the press. is sufficiently detailed. [13].

Merely because disagreement, disapproval or criticism is expressed in strong language is no basis for banning its publication. [14] It is clear, on the basis of this and other judgments, that though C support cannot be said to be unconstitutional, any attempt to impose a prior ban on publication cannot be violated under Article 19(1) (a) and 19(2) have to meet the stringent standards prescribed. The Government of India had a complete monopoly on the broadcast media. Private organizations were only involved in commercial advertising and sponsorship of events. In Secretary, Ministry of I&B Vs. CAB, [15] The Supreme Court clearly differed from the above monopoly view and emphasized that Every citizen has the right to transmit and broadcast any important event to an audience/listeners through electronic media, be it television or radio and provided further that there was no monopoly of the Government on such electronic media as such of the Government The monopoly power was not mentioned anywhere in the constitution or any other law prevailing in the country. In one of the earliest decisions, pre-censorship of the press was held to be unconstitutional in Ramesh Thapar Vs State of Madras, [16] Brij Bhushan Vs. State of Delhi [17] was considered.

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[13]. Romesh Thapar Vs. State of Madras, AIR 1950 SC 124
[14] Binod Rao Vs. M.R.Masani, (1976) 78 Bom.L.R.125 at 169
[15] In Secretary, Ministry of I&B Vs. CAB (1995) 2 SCC 161.
[16] (1950) S.C.R. 594,
[17] (Brij Bhushan Vs. State of Delhi 1950 S.C.R, 605

Similarly, the law of sedition under section 124A of I.P.C. It was also the subject of controversy in Kedarnath v. State of Bihar, [18] when the Supreme Court upheld the validity of this provision. Under freedom of speech and expression, there is no separate guarantee of freedom of the press and the same is included in freedom of expression which all citizens

Virendra v. State of Punjab [19] this judgment also showed that the freedom of the press under the Indian Constitution is not above the freedom of an ordinary citizen.

Includes the right to seek and import ideas and information regarding matters of general interest and to respond to any criticism against it. his views through any media [LIC v. Union of India] [20]. This freedom also includes the right to impart and receive information by means of broadcast [Ministry of Information v. Cricket Association] [21] It also includes publication of advertisement and commercial speech Tata Press v MTNL [22]. It also includes the right to have a telephone conversation in privacy PUCL v. Union of India [23]. Thus it is quite clear that the right to seek and receive information is a fundamental right under the Indian Constitution.

In a recent case of Vineet Narayan v. Union of India [24] the Supreme Court held that considering the widespread illiteracy of the electorate as well as the overall culture and character of the candidate need to be well informed. Contesting as MP or MLA so that they are in a position to decide independently to cast their vote in favor of more efficient candidates. In a democracy, the right to get information is recognized in all countries. In an early decision in the case of State of U.P. vs. Rajnarayan & Ors [25], the Supreme Court of India considered a question whether under Section 123 of the Evidence Act in respect of Blue Privilege can be claimed by the government.

Conclusion

Democracy is balanced by the three pillars of democracy namely executive, legislative and judiciary but now in this era democracy stands towards the fourth pillar which is media. The Indian Constitution does not provide for any separate freedom for the media but there is an indirect provision for media freedom. The freedom of social media is derived indirectly from this Article 19(1) (a). These provisions are important and vital, going down to the very root of liberty. Media law covers an area of law that involves all form of media (TV, film, music, publishing, advertising, internet & new media, etc.). Media laws is a legal field that refers to the following like Advertising, Broadcasting, Censorship, Confidentiality, Contempt, Copyright, Defamation, Entertainment, Freedom of information, Internet,

Information technology, Privacy and Telecommunications. There are several laws governing media exposure in India. The people of this country have a right to know every public act, everything that is done publicly by their public officials.

Any democracy needs a well-functioning and authoritative state. The first and most fundamental role of civil society is to limit and control the power of the state, so it also needs to find ways to contain monitor and control the power of political leaders and state officials. Civil society leaders should watch how state officials use their powers. He should raise public concern about any abuse of power. He should raise public concern about any abuse of power. They should advocate for access to information. Social media and function of civil society to expose the corrupt conduct of public officials and lobby for good governance reforms.

OVERVIEW OF SOCIAL TRANSFORMATION IN THE LGBTQ COMMUNITY

Abraham S.[*]

ABSTRACT

The independence of the judiciary is one of the many components of constitutionalism, and it is this independence that gives rise to judicial activism. One such instance of judicial activism is from Navtej Johar Singh v. UOI[360]. This article will later discuss numerous other important rulings pertaining to the judiciary's role in society. India's LGBTQ lesbian, gay, bisexual, transgender, and queer rights have progressed. However, when compared to non-members of the LGBTQ community, LGBTQ residents still suffer social and legal challenges. It is the court's responsibility to provide just and reasonable orders, the government's responsibility to guarantee that the judgement reaches the general public, and the public's responsibility to enthusiastically accept the court's decision. However, Case of LGBTQ+ persons, SC in India the case of Navtej Johar Singh vs. UOI, 2018, took a step forward by repealing the component of Section 377 of the India penal code that criminalised homosexuality. The federal and state governments failed to provide any specific arrangements for LGBTQ people's elevation, and the LGBTQ community failed to gain societal acceptability from the country's residents. The article examines the LGBTQ community's and adoption right of transgender and LGBTQ+ community lengthy struggle for basic fundamental rights and the discrimination they encounter in various aspects of life, with a focus on transgender persons and judicial decisions. Finally, the study examines the road ahead for the LGBT community, as well as what more legal and social changes are required for LGBT people to achieve full acceptance and equality in traditional Indian society.

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[360] Dr. Renu &Pawan, *Homosexuality with Special Reference Case: Navtej Singh Johar V. Union of India*, 3 (IJTSRD), (2019).

Introduction

The British colonial government enacted Section 377 of the Indian Penal Code, which made all kinds of non-procreative sexual intercourse unlawful. In addition to punishing gays, the strict regulation also targeted heterosexual partnerships and all other non-traditional sexual behaviours. Therefore, this rule was nothing more than a holdover from Victorian ideology and had no place in a democratic country like India. To abolish this outdated law, which had been used to harass and take advantage of anyone who didn't fit into the binary expectations of sexuality and gender, it took more than 70 years and nearly two decades of legal battles. But, let's look at how present laws in India, even after Section 377 was repealed, are insufficient in protecting the LGBTQ+ communities of basic human rights. Let us begin by reviewing the history of the LGBTQ rights movement in India, followed by a discussion of key major judgments and their impact on the LGBTQ rights movement.

LGBTQ rights activists are fighting two-hundred-year-old British legislation that criminalised homosexual relations as being against nature's order. 1860 is categorised as an unnatural offence under section 377 of the Indian Penal Code. In 1977, the first book, "The World of Homosexuality," was published, based on their entire acceptance rather than tolerance and sympathy. The first all-India hijra conference was conducted in Agra in 1981, with fifty thousand participants from throughout the country. As a third gender, hijras were granted voting rights in 1994. The first petition challenging section 377, filed by AIDS Bhedbhav Andolan, was dismissed the same year[361].

Impact of decriminalising homosexuality

The abolition of Section 377 and subsequent decriminalisation of homosexuality in India is a significant step forward for India's LGBTQ community. It also moves India closer to reaching equality for all classes of human beings and making life simpler for sexual minorities, even though social acceptability is still lacking. Nonetheless, the fact that everyone is legally on an equal footing is a significant success. People in the LGBTQ community used to complain about harassment by law enforcement authorities because of the Section before it was repealed. Since homosexuality is no longer a criminal in India, this will come to an end. While decriminalising homosexuality, the Supreme Court accepted citizens' basic human demands.

[361] Shambhu Prasad Chakrabarty, 'L*GBTQ Rights in India: The Legal Fallacy'*, IHRLR, Vol 8 No 2 at p 284.

This will assist the community in claiming constitutional equality with other citizens.[362] It also affirms their freedom to adopt, marry, and start a family. The court ruling that it was not a mental disease may also avoid social rejection. However, there is something inherent in a human being. It will take some time for society to accept it openly. It will catalyse other countries, particularly those in the Commonwealth of Nations, to repeal similar rules that make normal sexual intercourse illegal.

Rights of the LGBTQ Community

Human rights are the most often discussed issue that encapsulates human dignity around the world. Human rights are based on the belief that "people should be treated equally, and anything that weakens this value is a breach of the principle of equality." Articles 14 and 21 of the Indian constitution accurately refer to equality before the law and equal protection of the law for all. The constitution's preamble also demands justice, including social, economic, and political equality for all. The Supreme Court had previously declared in 2014 that the Constitution protected the rights and freedoms of transgender people in India. In the Section 377 verdict, the court also decriminalised adult consensual same-sex partnerships[363]. These rulings are historic in terms of their broad interpretation of constitutional rights and their empowerment of LGBT people. Both decisions are significant in terms of LGBT rights. However, according to critics, there is a significant vacuum in executing a programme for the LGBT community in India, which allows bigotry to flourish. As a result, in recent years, the LGBT community's human rights have become a priority for the implementation of legislative protections for the community.

LGBTQ Community Challenges:

The LGBTQ community has numerous challenges in a society where heterosexuality is the only recognised orientation and homosexuality is considered deviant. Heterosexuality: They are more likely than heterosexuals to face intolerance, discrimination, harassment, and the threat of violence as a result of their sexual orientation. Inequality and Violence: They are subjected to inequality and violence in every country. They are subjected to torment by individuals who mock them and make them recognise that they are unique. They are deprived

[362] Stephan J Hunt, "*Conservative Hindu Reactions to non-heterosexual rights in India"*, Int. J. Sociol. Anthropol Vol. 3(9), 2011.

[363] Bryony Lloyd, *A Comparison of LGBT rights globally and in India*, CPPR, (March 23, 2019, 13:24) http://www.academia.edu/5383065/A_comparison_LGBT_rights_globally_and_in_India.

of rights in many countries, opposite-sex couples not having the same rights as same-sex couples. They are not allowed to use those rights. Isolation from society are they develop low self-esteem and confidence over time, isolating themselves from friends and family. Lack of communication between parents of LGBTQ children and the youngsters themselves sometimes causes family strife. Most of LGBTQ children end up on the streets, in juvenile detention centres, or in foster care. They are Racism in Lesbians, gays, bisexuals, and transgender people also experience poverty and racism daily[364]. They are subjected to social and economic inequities as a result of job discrimination. Addiction Tape: These people are primarily addicted to drugs, alcohol, and tobacco to relieve stress, rejection, and discrimination. They too have been the victims of hate attacks. Some countries view homosexuality as a crime. It is against the law, and it is routinely sanctioned with jail time and penalties. Exclusion and discrimination have a greater impact on LGBT people's lives. As a result, it has occurred: Early school dismissal, Departure from home and family, Ignorance in the community, Lack of family support, Suicide attempt.

Constitutionalism and Judicial Activism

The main four corners of our Constitution are the ideas of individual autonomy and liberty, equality for all, acknowledgement of identity with dignity, and personal privacy. Article 21 of the Constitution guarantees that if a person's right to privacy is violated, his right to a dignified existence is jeopardised. It is against the principle of equality before the law and Discrimination based on religion, ethnicity, caste, sex, is prohibited under article 14 and 15 of constitution of India. Petitioners allege that Section 377 violates Article 19 (1) of the Constitution's Freedom of Expression Clause (a). In 2016, a UN report suggested the decriminalisation of consensual gay encounters, and the 172nd Law Commission Report recommended that Section 377 be repealed. Constitutionalism is a theory of an ideology that elaborates the idea that the power of the government arises from and is constrained by a fundamental body of law. It is a complex ideology made up of ideas, attitudes, and behavioural patterns[365].

The Constitution is this foundational body of law. The independence of the judiciary is one of the many components of constitutionalism, and it is this independence that gives rise to judicial activism. One such instance of judicial activism is the case of Navtej Johar Singh vs.

[364] India court recognizes transgender people as the third gender", BBC NEWS (April 15th,2020),https://www.bbc.com/news/world-asia-india-27031180, [Last accessed 31st May 2022]
[365] Poonam Verma, *Sorrows of Trans genders, Judiciary, and our Society – A Study*, 52(3) IBR 147 (2015).

UOI. This article will later discuss numerous other important rulings pertaining to the judiciary's role in society[366]. It is also crucial to comprehend how judicial activism specifically developed. It is crucial to realise that the Indian Constitution is a lengthy text, and the preamble outlines the document's goals and objectives. One of the principles expressed in the prologue is liberty, which has a broad definition that encompasses, among other things, the independence of the judiciary. The preamble's purpose even directly or indirectly contributes to the fundamental framework of the Constitution, which cannot be changed. Understanding the basic structure doctrine's concept and background is crucial because the doctrine itself is a result of judicial activism[367].

Role of Judicial and Parliamentary Supremacy in Earlier LGBTQ Rights

In the case of Suresh Kumar Koushal[368] v. Naz Foundation, The constitutionality of Section 377 was upheld by a Division Bench of the Indian Supreme Court made up of Justices Singhvi and Mukhopadhyaya, highlighting the issue of judicial deference to Parliament in social values conflicts. The offence of "carnal intercourse against the order of nature" was punishable by a life sentence or a minimum of ten years in jail, according to Section 377. Koushal poor legal interpretation drew heavy criticism. The judges concluded that Section 377 only criminalised sexual acts, not LGBTQ people as a whole, that pre-constitutional statutes were protected by the presumption of constitutionality, and that since only 200 cases had been brought in the previous 150 or so years, the harmed parties represented a "minuscule minority" that impliedly did not warrant constitutional protection due to their small numbers.

Concerns over LGBTQ rights had previously been assigned by the judiciary to Parliament. Koushal showed an unusual degree of judicial deference, in contrast to the judicial activism Justice Singhvi had embraced in other cases, most notably the 2G spectrum scam, where the Court used extraordinary oversight powers over a criminal investigation and revoked 122 telecom licences. Following it, corruption turned into a major election issue in 2014, finally leading to the overthrow of the then-Congress administration. To be clear, this Court has simply upheld the Delhi High Court's judgement regarding the constitutionality of Section 377 IPC

[366] Shilpa Khatri Babbar, *the Socio-Legal Exploitation of the Third Gender in India,* ISOR-JHSS, Vol. 21 Issue. 5, (2016).
[367] Robert Wintemute(ed) and Mads Andenes(ed), '*The Legal Recognition of Same-sex Partnership- A study of National European and International Law', Same-sex Partnership and Indian Law: A Climate for a Change,* Hart Publisher, 2001.
[368] Suresh Kumar Koushal v. Naz Foundation (1992) 2 SCC 343.

and established that the aforementioned section is devoid of any constitutional defects, the Court observed in Koushal[369].

Despite this ruling, the competent legislature is allowed to evaluate whether it would be appropriate and desirable to repeal Section 377 IPC or to change it in accordance with the Attorney General's recommendation. I want to be clear that I have nothing against groups like gays using democratic channels to advance their goals. Justice Scalia's 2003 opinion in Lawrence v. Texas, which recommended judicial deference to concerns about LGBT rights, appeared to be Koushal inspiration. The Supreme Court was given the opportunity to prove its constitutional authority five years later, in a fundamentally different political climate, thanks to Koushal judicial respect.

Adoption Right of Transgenders and LGBTQ Community:

Every Indian citizen has the right to equality under Article 14 of the Indian Constitution. It mandates that everyone living on Indian soil receives equal protection under the law and equality before the law from both state and federal governments. It is one of the fundamental rights that the Indian people are guaranteed. The basis for each right a person may have is this one. Every person is equal before the law, according to the principle of equality before the law. This idea is unfavourable. The prevention of discrimination is also aided by this principle. According to the equal protection of the laws principle, the state or government should always treat different people differently depending on the scenario in order to create equality for everyone. The Indian Supreme Court has built a basic structure theory through numerous pieces of law. This fundamental idea of the constitution emphasises features of the constitution that cannot be altered. Therefore, denying transgender people the opportunity to adopt is a violation of their equality. According to Indian Constitution the article 15 deals with no citizen of India may be subjected to discrimination on the based upon the religion, caste, sex, any combination of these. This rule ensures that the government cannot discriminate against its citizens by showing unjustifiable favour to those belonging to a particular sex, gender, religion, or geographic group. Nevertheless, the constitution permits fair classification, which will aid them in improving the position of this group of individuals. In India, any law that infringes against a fundamental right is invalid. If one reads the Supreme Court's rules in the NLSA v. Union of India case, they can be found in the court judgement. It is made very plain that the state must

[369] Nirnimesh Kumar, Delhi High Court Strikes Down Section 377 of the IPC, THE HINDU, 2nd July 2009

uphold the rights granted to them under Part III of the Indian Constitution by acknowledging them as members of the third gender. However, withholding the right to adopt, which is against Articles 14 and 15 of the Indian Constitution, is against social norms. In India, homosexual couples confront significant issues. In India, it is illegal to adopt a child. One who is homosexual or bisexual can adopt a child by themselves. This can be accomplished by filling out the adoption paperwork as either a single man or single female. Indian courts have not yet accepted same-sex unions. This does not grant them the authority to live together formally or legally. This is what prevents a gay couple from using their adoption services. Being a homosexual was no longer a crime, despite the Supreme Court's refusal to criminalise Section 377 of the IPC, 1890.

Case Law

- **Naz Foundation Govt. v. NCT of Delhi[370]**

Luck now in July 2001, police entered a park with the intention of filing charges under Section 377 of the Indian Criminal Code, and they held a few men on the grounds that they could be homosexuals. Nine more men were arrested in connection with the "Bharosa Trust," an NGO that works to inform the public about STDs and safe sexual practises. They were then charged with conducting a prostitution ring, and their bail petitions were turned down. A legal aid agency called The Lawyers Collective then got involved and found that the accusations levelled against these people were untrue, which ultimately led to their release. In response to the Luck now event, the Naz Foundation and Lawyers Collective filed a petition with the Delhi High Court in 2001. Following that, questioning the constitutionality of Section 377 of the IPC.

The petitioner said that the IPC's Section 377 violated his fundamental rights to life, liberty, and the pursuit of happiness as well as his right to privacy, health, equality, and freedom of expression. It was also asserted that the law hindered public health initiatives intended to lower the risk of HIV/AIDS transmission since individuals were reluctant to freely discuss their sexual orientation and lifestyle for fear of facing legal repercussions under Section 377.

Finally, Section 377 of the IPC was declared to be an unjustifiable prohibition on two adults engaging in consensual sexual activity in private by the Delhi High Court in the 2009 case of Naz Foundation Government v. NCT of Delhi. It was a clear violation of their basic human rights, which are protected by Articles 14, 15, and 21 of the Indian Constitution.

[370] Naz Foundation v. Government of NCT of Delhi and Others, WP(C)7455/2001

- **National Legal Services Authority v.UOI** [371]

In this case due to their degraded social, educational, and economic standing, all the LGBT+ community, the transgender minority in India has suffered the most from exploitation. These individuals have never been seen as contributing members of society and have consistently been the targets of violence, abuse, exploitation, and rejection, whether at the hands of the general public or the government. These people frequently turn to beggary or prostitution due to recurrent rejection and a lack of resources, which exposes them to prejudice, STDs, and criminal activity including human trafficking. But in 2014, the Supreme Court gave these transgender people a new reason to be happy and hopeful after officially recognising them as the third gender.

In National Legal Services Authority v. Union of India, the Supreme Court had to decide whether it was necessary to recognise transgender communities as a third gender for the benefit of transgender people's public health, their education and employment, their right to a reservation, and other welfare programmes for the transgender community.

In a significant ruling, the Supreme Court recognised transgender people as belonging to the "third gender," or hijras. Before the judgement, transgender people had to choose between identifying as male or female; now, however, they are free to do so. In addition, what made this ruling so important was that it created a framework for guaranteeing the transgender population a wide variety of fundamental human rights, which can be summed up as follows: According to the court, failure to recognise their identities violated Articles 14, 15, and 21 of the Indian Constitution. Additionally, the Supreme Court mandated that "Third Gender" individuals be treated as economically and socially backward. It was further mandated that, in light of Articles 15(2) and 16(4), the government shall develop appropriate measures for the transgender population to promote equality of opportunity in education and work. According to the third gender would be classified into "OBC" and will be given preference in government and educational institutions. The court also acknowledged that a discrepancy between a person's gender at birth and gender identity need not represent a pathological condition. The emphasis should be on "resolving anguish over a mismatch" rather than "treating the anomaly." It simply means that the court acknowledged the distinction between biological sex components and gender. The court defined gender attributes as an individual's deep emotional or psychological sense of sexual identity and character, which is not limited to the binary sense

[371] National Legal Service Authority v. Union of India, AIR 2014 SC 1863

of male and female but can span a wide range. The court defined biological characteristics as genital, secondary sexual features, chromosomes, and other factors.[372]

Conclusion and Suggestion

Apart from that, why are LGBTQ people encountering a slew of issues stemming solely from their gender identification, such as discrimination and physical and emotional harassment not only at work, but also in higher education, schooling, and vocational training. However, LGBTQ people in India are not treated equally and do not have the same rights as straight people, despite the historic 2018 court ruling and the 2014 NALSA judgement being huge milestones forward in the expansion of LGBT+ rights organisations in India. Additionally, they still experience violence and discrimination in many facets of their lives.

Public education regarding LGBTQ rights is essential. Everyone is born with certain unalienable, unchangeable, and unalienable rights known as human rights. People must understand that homosexuals are not sick, that they are not aliens, and that their sexual orientation is completely natural. It will promote more inclusion and help to integrate LGBTQIA+ people into society, and it will go a long way toward 'transforming our nation sustainably into an equal and dynamic knowledge society. In this essay, we've come to the conclusion that the LGBTQ community is becoming more independent with time and social acceptance, and that society has now established specific rights for the community that protect its independence. However, despite all the advancements, LGBT people continue to face discrimination in society. A Supreme Court decision can only issue a resolution; nonetheless, it is the responsibility of society to ensure that LGBTQ people are not subjected to discrimination and are treated with respect.

By limiting the use of adoption rights to heterosexual couples and single people, the Juvenile Justice Act and Adoption Regulations passed in 2015 and 2017 fell behind the development of the law and society. These regulations are in contravention of Article 14, which ensures equality for all, Article 15, which forbids discrimination on the basis of race, gender, or sexual orientation, and Article 19, which protects the right to free speech. The state should change current law to recognise same-sex couples' adoptions in addition to allowing same-sex marriages.

[372] Geetanjali Misra, *Decriminalising homosexuality in India*, 17 (SRHM), (2009).

Government legalisation of same-sex marriage and parenting would have a significant positive impact on the children who suffer from this pervasive ambivalence. Finally, I will conclude this paper by stating that the legitimate and fair quest for societal recognition by LGBTQ+ persons in India will continue until and unless the government grants them equal status.

PERSPECTIVE ON SAME SEX MARRIAGE IN INDIA

Khyati Kanoje* and Priya Choudhary*

ABSTRACT

'Marriage' is a term associated with the legal and cultural union of couple as spouses for a lifetime. This term, however, is not equal for all genders. While a traditional male and female wedding is considered legal; marriages of same sex are not legalized everywhere. While the gender discrimination in love and marriage continues in major parts of the world, few countries have taken the huge step in legalizing these marriages. So far, 33 countries in the world have given legal status to same-sex marriages and civil union, but India, even though actively running in this race after decriminalization of homosexuality is far from reaching the finish line. While petitions on legalizing same-sex marriages in India are still pending before the Supreme Court, the question that lies is whether the courts should interfere in right to marriage or leave it to the wisdom of the Parliament. The Special Marriage Act, originally passed to legalize inter-faith marriages is now argued to be recognizing couples of the same-sex as well. The demand from the government does not stop only at granting equal rights to married couples but also right in adoption and inheritance. The idea of equality of marriage holds that all unions, regardless of whether they are heterosexual, gay, or Sapphic, are equal and ought to have the same privileges and position in society. As a society, it is our collectively responsibility to give the members of the LGBTQ community the same human, fundamental, constitutional rights as other citizens and make them feel equal in the truest sense. Unfortunately, this topic regulated by law and religion sparks heavy resistance and stigma from people in accepting these marriages.

Introduction

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The institution of marriage is present in every society. It is practically found at all stages of development as a customary practice. It may be a religious or civil union in nature. Marriage is a socially accepted union of two persons with a legal sanction to it.

The definition of marriage differs from person to person. Even sociologists were not able to agree on a single definition. Westermarck in his book 'History of Human Marriage' defines marriage as more or less durable connection between male and female lasting beyond the mere act of propagation till after the birth of offspring. While some sociologists have restricted their definition of marriage to a legal relationship between man and woman for off-springs, Sociologists like Robert H. Lowie defines marriage as, "Marriage is a relatively permanent bond between permissible mates"[373]. This definition does not confine this relationship to a man and women but to other kinds of marriages as well.

For the longest time, the traditional concept of marriage and procreation revolved around a man and a woman which is why same-sex marriage has very little recognition. Same-sex marriage is the practice of marriage between two men or between two women. Social responses regarding such marriages have ranged from celebration to criminalization in different parts of the world.

Some cultures have chosen to ignore the issue of same-sex marriage by simply not discussing it. Several of these states and countries have laws against same-sex marriage because they believe homosexuality and lesbianism to be mental disorders. By labelling same-sex desire as a mental illness, these societies moved the issue of same-sex intimacy and marriage from the realm of civil norms (the area of contract law) to the realm of public safety (the domain of criminal law). Same-sex relationships and dialogues were typically forced underground because of the fear of persecution in these societies.

Homosexuality in Ancient India

The current laws prevalent in India against homosexuality have found their roots from the colonial laws. These were majorly based on the Abrahamic mythology which saw homosexuality as act against God.

The idea that when a man and woman have intercourse, the gender and sexuality rely on the ratio of the male white seed to the female red seed is supported by medical books like the Shushruta Samhita. When the red seed of the female is stronger, heterosexual females are produced; when the white seed of the male is stronger, heterosexual men are created. The infant develops into queerness when both seeds are

[373] "Marriage Definition Sociology, Best Definition of Marriage, Definition of Marriage by Different Authors." *Sociology Guide*, www.sociologyguide.com/marriage-family-kinship/Marriage.php#:~:text=According%20to%20Malinowski%20marriage%20is,Types%20and%20Norms%20of%20Marriage. Accessed 29 Jan. 2023.

equally powerful (kliba, napunsaka, kinnara). The three genders mentioned in Sanskrit works on astrology, architecture, and music are male, female, and queer.

According to the Manusmriti, homosexual acts include having sex with a woman who is menstruating or having sex during the day, and the punishment entails purification rites that include bathing while wearing clothes, going without food for a night, and consuming certain cow milk and urine-related products. Loss of caste may occur if purification is not completed. The penalties for rape, heterosexual adultery, and deflowering virgins are substantially harsher, as are the purifying rites.

Meanwhile, Dharmashastras were speculative writings that discussed moral behaviour. They paid greater attention to "high" castes and showed little regard for "lower" ones. The Ramayana and Mahabharata were written by Brahmins at the same time period, and they show a relaxed attitude regarding non-vaginal (ayoni) sex. This might even apply to anal/oral sex between consenting adult males and females, rather than only males and females. The heterosexual union of two people and sexual activity that produces sons are clearly valued in the Dharmashastras[374]. They do, however, reluctantly admit the presence of other types of non-vaginal sex, both heterosexual and gay, and attempt to control them through fines and penance, without outright denouncing them in terms of religion or morality.

[374] Pattanaik, Devdutt. "What Do Manusmriti and Dharmashastra Have to Say About Homosexuality? | Qrius." *Qrius*, 9 Aug. 2018, qrius.com/what-do-manusmriti-and-dharmashastra-have-to-say-about-homosexuality.

Religion and Homosexuality

In many religions, scriptures and doctrine- homosexual relationships are disregarded. Fear of punishment from the divine, lack of societal acceptance, frequent exposure with religious texts encourages such anti-homosexual behavior. Research suggests that 3 out of 4 LGBTQ individuals feel that coming from a religious background impacts their journey to self-acceptance and support from their family[375]. Also, being themselves makes them feel like a sin which adds up to making them feel alone. Parents in such situation refuse to accept the reality of their child and instead seek help to cure their child.

- **Hinduism**

Hinduism, one of the oldest religions of the world has frequent mention of homosexuality in their ancient texts, inscriptions and wall paintings on temples acknowledging their existence. The interesting story of the transgender warrior Shikhandi raised as a prince to take revenge from Bhishma or Arjuna cursed to live a eunuch for a year of his life through which became Brihannala, music and dance teacher[376].

According to a research paper based on homosexuality titled *Transsexualism in Hindu Mythology,* published in the National Center for Biotechnology Information, a story mentioned the time when Lord Rama proceeded to take Jal Samadhi and "His followers followed him to the forest but he requested all the "men and women" to return back to the city of Ayodhya. The transgendered individuals (*hijras*) stayed back with Lord Rama. Lord Rama was greatly moved by their love and loyalty and sanctioned them the power to confer blessing on auspicious occasions like marriage, child birth, and inaugural functions"[377].

- **Islam**

Surat al-Nur (Qur'an 24:31-24:33) specifically mentions "men who are not in need of women." These "men who are not in need of women" might have been gay or asexual, but by definition they were not heterosexual men. They are not judged or condemned anywhere in the Qur'an.

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[375] Adamczyk, Amy. "Shaping Attitudes About Homosexuality: The Role of Religion and Cultural Context." *ScienceDirect,* 20 Jan. 2009, www.sciencedirect.com/science/article/abs/pii/S0049089X09000039.
[376] Dutta, Prabhash K. "Homosexuality in Ancient India: 10 Instances." *India Today*, 10 July 2018, www.indiatoday.in/india/story/10-instances-of-homosexuality-among-lgbts-in-ancient-india-1281446-2018-07-10.
[377] Sharma, Vipasha. "Ramayana, Mahabharata Through Queer Lens - Media India Group." *Media India Group,* 27 Oct. 2021, mediaindia.eu/culture/ramayana-mahabharata-lgbtq.

Some academics make the connection between homosexuality, fahisha, and fisq. However, the Qur'an does not make this relationship apparent. Some scholars have attempted to compare homosexuality to adultery. The issue is that the Qur'an does not explicitly mention this relationship elsewhere in the text. The ones who claim there is a relationship are human jurists[378].

When the Prophet Muhammad (PBUH) lived in Arab civilization, there were men who embodied the Qur'anic definition of "men who are not in need of women." A thorough examination of early Islamic literature revealed that the Prophet was aware of males known as Mukhanath. Mukhanath were males who were perceived as "acting like women"; they could now be classified as transgender people or they might have been homosexual men who were perceived as "acting like women" due to their sexual orientation.

Hit was a mukhanath buddy of his wife Umm Salama. Since Muhammad trusted the mukhanath enough to grant him access to the Prophet's household's exclusive women's area, Hit was permitted to visit both the men's and women's spaces unlike other males.

Muhammad later, did "punish" Hit, but not because of his sexual orientation. Muhammad learned that Hit explained a woman's body to a man because he had access to both the female and male realms. Muhammad then instructed his wife to stop letting Hit inside the women's quarters. Muhammad solely attacked Hit for disrespecting the privacy of ladies and not for his sexuality.

- **Christianity**

According to the Bible, marriage is heterosexual *by definition*. Jesus, when expressing his understanding of the scriptural foundation for the divine purpose and design in marriage, referred to its origins in the Creation account: “From the beginning of creation, God made them male and female. For this cause a man shall leave his father and mother, and shall cleave to his wife, and the two shall become one flesh…” (Mark 10:6-8, quoting Genesis 2:24)

Throughout Christianity's history, the vast majority of theologians and churches have condemned homosexual behavior as sinful. Even within today's Christian community, there is a range of perspectives regarding homosexuality and sexual orientation. Even within the same religious tradition, there might be varying viewpoints, and not all adherents will undoubtedly have the same position on homosexuality. The Catholic Church and the Orthodox Church both teach that homosexuality is a sin.

[378] Kugle, Scott Siraj al-Haqq. “SEXUAL DIVERSITY &Mdash; Muslims for Progressive Values.” *Muslims for Progressive Values*, 20 Jan. 2010, www.mpvusa.org/sexual-diversity.

There is division within the Mainline Protestant church on the issue of whether or not to approve of gay clergy or same-sex marriage[379].

Acceptance of Same-sex relations in other parts of the World

If an overview of the countries around the world who criminalize same sex unions is done, nearly half of those countries are African. "Across much of Africa, gay people face discrimination, persecution, and potentially even death," Newsweek said. Countries that criminalize same-sex relations also have criminal penalties which are as severe as prison sentence to death penalty in some countries. It is the legally prescribed punishment for sexual acts performed by same-sex in Brunei, Iran, Mauritania, Saudi Arabia, Yemen and in the northern states in Nigeria[380]. These laws which criminalize homosexual relations are seen to have been originated from colonial times. While majority countries criminalizing homosexuality penalize man having sexual relations with other man but a number of 45 countries also have laws penalizing relationships between women[381].

Conflicts of feeling and politics arise often between those who support and those who oppose same-sex marriage. At the turn of the 21st century, a number of countries and regions had established laws recognizing same-sex marriage, while others had constitutional protections in place or had passed laws that did not recognize marriages conducted in other regions. The fact that many communities had such radically diverse views on the same conduct reflects both the significance of cultural diversity within and across countries in the early 21st century and the importance of that act to society.[382].

Some countries portray liberal stand over homosexuality by not openly punishing individuals indulging in such relationships but by banning the promotion or portrayal of homosexuality among under 18. These countries include developed countries like Russia and countries like Hungary who do not recognize same-sex marriage and also prevent legally changing of gender by passing a law[383].

Conversion camps

Many nations still are of the view that LGBTQ+ community is a disease which can be cured and hence, they try different measure to provide a cure for it, be in directly or indirectly, conversion therapy being

[379] "Religious Landscape Study." *Pew Research Center's Religion & Public Life Project*, www.pewresearch.org/religion/religious-landscape-study.
[380] "Gay Relationships Are Still Criminalized in 72 Countries, Report Finds." *The Guardian*, 27 July 2017, www.theguardian.com/world/2017/jul/27/gay-relationships-still-criminalised-countries-report.
[381] BBC Team. "Homosexuality: The Countries Where It Is Illegal to Be Gay." *BBC News*, 12 May 2021, www.bbc.com/news/world-43822234.
[382] "Same-Sex Marriage Around the World." *Pew Research Center's Religion & Public Life Project*, 28 Oct. 2019, www.pewresearch.org/religion/fact-sheet/gay-marriage-around-the-world.
[383] "The Countries Where Homosexuality Is Still Illegal | the Week UK." *The Week UK*, 14 Nov. 2022, www.theweek.co.uk/96298/the-countries-where-homosexuality-is-still-illegal.

one of them. "Conversion therapy" refers to interventions that claim to change a person's sexual orientation or gender identity. These interventions are said to change gay, lesbian, bisexual, and transgender people into heterosexuals as well as cisgender people, or people whose gender identity matches the sex they were assigned at birth.[384] Mr. Madrigal-Borloz,[385] in his report to the General council,[386] has identified broadly three approach being practiced in these camps: psychotherapeutic interventions based on the belief that sexual or gender diversity steams from an abnormal upbringing or experience; medical practices rooted in the theory that sexual or gender diversity is an inherent biological dysfunction; and faith-based interventions that act on the premise that there is something inherently evil in diverse sexual orientations and gender identities.

In 2012, the Pan American Health Organization noted that 'conversion therapies' had no medical justification and represented a severe threat to the health and human rights of victims. In 2020, the Independent Forensic Expert Group declared that offering 'conversion therapy' is a form of deception, false advertising and fraud. Also, recently, conversion therapy was made illegal in Canada[387] and Albania.[388] Nine nations[389] have proposed legislation addressing the issue, while Malta, Brazil, and Ecuador currently have national bans in place.

Decriminalizing homosexuality was merely the first step in India toward LGBTQ+ equality and acceptance. Conversion therapy is still used even when international organizations like the American Psychological Association and the Indian Psychiatric Society have explicitly denounced it. If such practices are not condemned by the people where they are done, it will hamper the rights of many people.

Position of Homosexuals in India

[384] "Conversion Therapy Amounts to Torture and Should Be Banned" (United Nation Human Rights. July, 13, 2020) https://www.ohchr.org/en/stories/2020/07/conversion-therapy-can-amount-torture-and-should-be-banned-says-un-expert;

[385] United Nations Independent Expert on Protection against violence and discrimination based on sexual orientation and gender identity.

[386] Madrigal Borloz, 'Practices of so-called "conversion therapy"' (United Nations, General Assembly, 1 May 2020) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/108/68/PDF/G2010868.pdf?OpenElement > accessed 5 January 2023; Human Rights Council; Forty-fourth session;15 June–3 July 2020; Agenda (item 3) - Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development.

[387] 'Canada moves to criminalize LGBTQ+ 'conversion therapy" [2020] <https://www.theguardian.com/world/2020/mar/09/canada-lgbtq-conversion-therapy-criminalize >

[388] 'Albanian Psychologists Prohibit Anti-LGBT "Conversion Therapy"' [May 20, 2020] <https://www.hrw.org/news/2020/05/20/albanian-psychologists-prohibit-anti-lgbt-conversion-therapy >

[389] Gay 'conversion therapy' may be banned in nine countries including US and Canada <https://www.independent.co.uk/news/world/gay-conversion-therapy-ban-lgbt-rights-us-canada-germany-a9359701.html >

Rights in the Constitution

The Preamble of our constitution provides for the idea of Justice in the nature of social, economic and political; Liberty of thoughts, expression, belief, faith and religion; as well as equality of status and opportunity. All these are further included in our constitution. Article 14 of the Indian constitution states that the state shall not deny to any person before the law or the equal protection of law within the territory of India. To interpretate this section emphasis on the phrase 'any person' should be done. Article 14 does not specifically mention men or women.[390] The same interpretation goes for Article 15 which prohibits discrimination in any form, other than a positive discrimination, and Article 19 which provides for freedom of speech and expression. With the advent of time, interpretations of the constitution are also undertaken, for instance, by the case of K. Puttuswamy,[391] where right to privacy provided under article 21 was declared as a fundamental right. It states that a person has a right of life and personal liberty.

Additionally, the Universal Declaration of Human Rights states that everyone has the right to the protections afforded by international human rights law, including the rights to life, security of person, and privacy, freedom from torture, and freedom from arbitrary detention, regardless of sex, sexual orientation, or gender identity.[392]

However, if we look at the current scenario, this is barely being followed. Despite the fact that transgender people have numerous rights to protect their human rights, both globally and in the Indian Constitution, they are still not upheld. The laws do not discriminate with LGBTQ individuals for either homosexual relations or same-sex marriage but the said is not accepted or appreciated in the society.

Misrepresentation in Media

Today's media enjoys a superior position and is capable of influencing a person's way of thinking, their thoughts, their opinions. Hence, how homosexuals are portrayed by them becomes an important issue to cover. It is seen that they are often portrayed in a stereotypical manner, which is mostly poorly researched. This misrepresentation further leads to the feeling of isolation, and shame for the LGBTQ community. Additionally, the actors playing such character are mostly cisgender. This gets worsen when the myth that trans women are not women is promoted by casting men to play the role of transwomen. This gives the viewers an implication that transwomen are just the male members who are playing a part.

[390] Article 14 of The Indian Constitution, 1950.
[391] K.S. Puttaswamy and Anr. vs. Union of India ((2017) 10 SCC 1).

[392] Universal Declaration of Human Rights, https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf

In India, the movie "Laxmii" and the series, "Pati Patni aur Panga" are the few examples of such representation. The goal was to speak for an underrepresented group of people and while their intension was laudable, its poorly based research and basic sense lead the trans society to file for a petition claiming it to be, "transphobic, misogynistic, defamatory and malicious content about members of the transgender community."

However, there also have been movies like, "Subh Mangal Jyada Savdhan, Chandigardh Kare Ashiqui or Ek Ladki ko Dekha toh Aisa Laga" where the struggles of LGBTQ communities have been highlighted which are not only restricted to their acceptance in the society but also same-sex marriage and adoption using light humor which is a step in the right direction. These are changes observed in the recent years and has also shown public interest due to the right representation of such people and their issues.

What needs to be understood is that how important media representation is to the issue of same-sex marriage. India is a country where literary level[393] is 77.7% Hence, to make people aware about a particular concept, help from all sources are required, Media being one the easiest and strongest modes to influence. While there are pictures that are trying to portray the real picture and the struggles faced by LGBTQ communities, we still need more representation of transgender actors coming out and speaking and others supporting them.

Evolution of LGBTQ Rights through Judiciary

The first and major reform as to the recognition of a third gender came in 2009 wherein, the election commission laid down the instructions to edit the registration form and include "others" as an option. This resulted in enabling the LGBTQ people to choose that option if they preferred not to be classified as either male or female.

To look into the current status of the LGBTQ+ community landmark ruling of the case Navtej Singh Johar[394] needs to be studied carefully. The Apex Court judgment in this case decriminalized consensual sexual relationships between two adults, regardless of their gender or sexual orientation. However, bestiality, sex with minors and non-consensual sexual activity that fall within the ambit of section 377, still amounts to punishable offences in IPC. Hence, the court overruled Suresh Kumar Koushal[395] decision, which upheld the validity of section 377 which criminalized homosexuality.

[393] 'Literacy Rate in India' [2022] Vol 12 (Issue 08) Academia, an International Multidisciplinary Research.
[394] Navtej Singh Johar v. Union of India, AIR 2018 SC 4321.
[395] Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1.

The next major step was the case of NALSA v. UOI,[396] where, they were recognized as a third gender. In this precedent setting judgement, it was said by Justice K.S. Radhakrishnan that the acknowledgment of transgender people as a third gender is not a social or medical matter, but a human rights issue.

Again, the ruling to be looked at is of Navtej Signh Johar v. UOI.[397] Section 377 of IPC was challenged in the case, which talks about Unnatural offences stating, "Whoever voluntarily has carnal inter-course against the order of nature with any man, woman or animal, shall be punishable."

It can be said that having suffered at the hands of society as well as family and being termed as 'untouchables', it was high time that our Supreme Court adopted a progressive and open mind and accepted the LGBT community as a part of the Indian society. This is how Indian Judiciary has addressed the issue of homosexuality in the recent years which is welcoming and gives a ray of hope for their future development in other issues faced by them.

Current legislations governing marriages in India

Currently, the legislations which deal with marriage law in India are, "Special Marriage Act, 1954,"[398] "Christian Marriage Act, 1872,"[399] "The Hindu Marriage Act, 1955,"[400] and "The Parsi Marriage and Divorce Act, 1936."[401] There is no codified law which governs marriages of Muslims, they are mostly governed by their personal customs given by the authorities provided in Shariat. While the later three acts are personal laws, SMA is a secular marriage law that is not specifically designed for any religion.

In these current laws governing marriage, none of them specifically state that a marriage can only be between a man and a woman. The laws themselves also don't define what a man or a woman is. To determine the legal requirements for marriage, we can refer to Sections 4 of the SMA, 60 of the ICMA, Section 5 of the HMA, and Section 3 of the PMDA. These sections outline the necessary conditions for a marriage to be considered lawful, including the minimum age of consent, which is 18 for females and 21 for males. However, there is no additional information provided beyond this on the subject.

Owing to the same concept, if a reading through section 7 of the act is done, one can come to a conclusion that the premise would not exist in the legislation if it were not for section 7 which deals with the validity of marriages though customs. This also applies to other practices that are listed in the act itself, but the point is that the act is powerless to stop a custom from establishing a premise.

[396] NALSA v. UOI, AIR 2014 SC 1863.

[397] Ibid, supra no. 13.
[398] The Special Marriage Act, 1954, No. 43, Acts of Parliament, 1954 (hereinafter SMA).
[399] The Indian Christian Marriage Act, 1872, No. 15, Acts of Parliament, 1872 (hereinafter ICMA).
[400] The Hindu Marriage Act, 1955, No. 25, Acts of Parliament, 1955 (hereinafter HMA).
[401] The Parsi Marriage and Divorce Act, 1936, No. 3, Acts of Parliament, 1936 (hereinafter PMDA).

Interpretation of Section 5 of HMA

According to section 5 of the Hindu Marriage Act,[402] conditions precedent for constituting a Hindu marriage include the presence of "groom" and "bride" without mentioning any specific gender. It states: "A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely-

(i) neither party has a spouse living at the time of the marriage;
(ii) at the time of the marriage, neither party-
    a. is incapable of giving a valid consent to it in consequence of unsoundness of mind; or
    b. though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
    c. has been subject to recurrent attacks of insanity;
(iii) the bridegroom has completed the age of twenty-one years and the bride, the age of eighteen years at the time of the marriage;
(iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;
(v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;"

The Hon'ble court exercised their right to apply and interpret the laws as according to the current circumstances. Hence, this case amounts to be a landmark case where it has established that, Section 5 of the Hindu Marriage Act shall include a transgender woman under its definition of "bride." Also, any person identifying themselves as intersex or transgender will also be included. The only condition precedent is as to how a person identifies themselves.

The Court's decision in the HMA case clarified that the term "bride" cannot have a fixed definition and must be interpreted according to current legal norms. This decision was influenced by the Shafin Jahan v. Asokan K.M. case,[403] which upheld the right to choose a partner as a fundamental aspect of Article 21 of the Indian Constitution, including the right to marry as a human right. The Court also cited Justice K. Puttaswamy's argument that it would be contradictory to recognize a right to privacy in other aspects of family life but not in the choice to enter into a relationship that is the foundation of family life. The US Supreme Court's ruling in Obergefell v. Hodges,[404] which states that there is no constitutional right

[402] Section 5, Hindu Marriage Act, 1955.
[403] Shafin Jahan v. Asokan K.M. and Ors., (2018) 16 SCC 368.
[404] 576 U.S. 644 (2015).

to privacy regarding marriage, was also mentioned. As the Indian Constitution encourages transgender people to integrate into society, they should not be deprived of the benefits of the institutions already accepted in society.

Analysis

The Aim of this paper is to bring light to the often-underrepresented issues with regards to transgender/ same sex marriages. While researching and making of this paper, we believe that there is a need for more empirical as well as doctoral research which needs to be undertaken as to develop a comprehensive knowledge regarding the subject matter. The acceptance sought in same-sex marriage is just one of the issues that needs to be addressed after the decriminalization of Homosexuality. divorce, adoption, maintenance, succession, custody, etc. are other issues which come hand-in-hand when we discuss same-sex marriages. So, while making laws for the same, the legislators also needs to throw some light on the above issues and they simply cannot go ignored.

More significant than the act of legalizing marriages is the implementation of regulations that determine the rights and relationship between partners. This topic is not easily resolved in countries where there is no consensus on the issue, and the urgency of same-sex marriage varies depending on the country's circumstances. In some places, such as those affected by war or natural disasters, it is not a priority. However, in other areas, a mix of religious and secular beliefs leads to a broad range of views on sexuality and the definition of marriage.

Conclusion

Laws and their interpretation are not always clear-cut. It would be simple for us to state that all transgender and homosexual people should be free to marry whoever they choose. For the immediate future, a more conservative reform would be more likely to be effective (taking smaller and more calculated steps to achieve a freer society).

Transgender representation can only improve if more transgender people are actively involved in the voicing their opinions. Also, through writing, producing, and acting process of a film or series. Trans people know best what type of representation is offensive and can harm the trans community in the long

run. Ignoring constructive criticism while insisting that the film/series is progressive and groundbreaking for their transgender representation can prove to be unfruitful.

As countries move towards industrialization and modernization, attitudes and values of people shift. People are less concerned with how to meet fundamental requirements like food, housing, and safety and more concerned with things like subjective well-being, quality of life, and self-expression. With this new attitude, individuals may more readily accept novel concepts and unconventional behaviors like homosexuality.

Conversely, when a nation is regularly faced with political and economic uncertainty and insecurity, people are more likely to support values and norms that emphasize the familiar[405]. As a result, people in nations that are characterized by a strong survivalist orientation may be less tolerant of non-traditional ideas and lifestyles.

Numerous studies have indicated that, as opposed to attitudes and behaviours (like theft), which are universally condemned, personal religion tends to have a higher influence on attitudes and actions that are characterised by ethical ambiguity. These concepts form the foundation which contends that the impact of religion on a behaviour relies on whether it enjoys widespread acceptance. Personal religious beliefs are more likely to serve as a guide for attitudes in situations where there are not obvious social sanctions or widespread agreement about their negative social costs.

Applying these concepts to international attitudes toward homosexuality, we would speculate that in nations with strong self-expression value systems (such as the United States), individual religious convictions may have a greater influence on negative attitudes toward homosexuality because religion is one of the few institutions that provides unambiguous guidelines on homosexuality[406]. Therefore, those who identify as religious should be more likely to exhibit attitudes that are consistent with religious prohibitions against homosexuality in nations with a high level of self-expression.

The Madras High Court's Judgement gives a ray of hope in legalizing same-sex marriages sometime soon in the country but the battle is long and has to be fought with full active participation from the community. The society is still hesitant to accept such unions with political debates constantly fueling the issue, with proper representation and education this aim can be achieved. The heterosexuals in the society need to look beyond religion and their notions for the upliftment of the country and to further improve the quality of living, safety and acceptance of the LGBTQ individuals in the society.

[405] Inglehart et al., 2002

[406] Adamczyk, Amy. "Shaping Attitudes About Homosexuality: The Role of Religion and Cultural Context." *ScienceDirect*, 20 Jan. 2009, www.sciencedirect.com/science/article/abs/pii/S0049089X09000039.

WORKPLACE SEXUAL HARASSMENT: AN AFFORNT TO GENDER JUSTICE

Parmar Mittal Jashvantsinh*

Country or nations which do not respect women have never become great nor will ever be in future.

-Swamy Vivekanand

ABSTRACT

Treating women in par with men is gender equality. In India Women are worshipped as goddesses. However, it is a harsh reality that women have been ill-treated in every place. We also claim that all are equal before the law and claim for gender justice but it always has been part of the argument that rule of law has not fulfilled its promise of equality in true sense. The purpose of this paper is to identify that argument, to analyse sexual harassment (at work place) as violation of gender justice and to evaluate the legislative frame work in India. Research has also demonstrated the judicial views and some suggestive steps to achieve the mile stone of gender justice at work place.

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Introduction:

Men and women are like two wheels of chariot of life. Just like a house needs a beam as well as a pillar, the world needs men and women. About half of the population of the world contains of women, and neglect of women implies the humanity is deprived of about half of its energy and creativity. For this reason, the progress of any country is unthinkable unless women move forward in all fields. So, there is a need of empowerment of women through treating them equal as men. But there are so many evils which affect the need of gender justice like Sexual harassment at working place, sexual abuse etc.

In India, for the first time in the year 1997 one petition (Vishakha case) was filed in Hon'ble Supreme Court to enforce the fundamental right of working women and as an outcome of this "Sexual Harassment of Women at Workplace (Prevention, Protection and Redressal) Act, 2013" was enacted. Now, it is mandatory for every employer to provide mechanism to solve the grievance related to workplace sexual harassment and enforce the right to life with gender equality. The Hon'ble Supreme Court in this case has declared sexual harassment to be unlawful under constitutional guarantee of the right to life and right of a woman to gender equality under Articles 14 and 15 of the Constitution of India and her right to life and live with dignity under Article 21 of the Constitution which includes a right to a safe environment free from sexual harassment.

The objective of this paper is to explore the context of sexual harassment of women at work place and its effect to gender justice. The study also investigates the nature of action taken to seek redress, and the steps by which working women are aware of the complaint mechanism outlined by the Supreme Court and legislature.

Issue of Sexual Harassment in India:

In the Indian context, sexual harassment at the workplace has been one of the central concerns of the women's movement from the 1980, when militant action was taken by the Forum Against Harassment of Women (Mumbai) against the sexual harassment of nurses in public and private hospitals by patients and their male relatives, ward-boys and other hospital staff, air-hostesses by their colleagues and passengers, teachers by their colleagues, principals and management representatives, students by their guides, this list is endless. However, this received a cool response from the trade unions.

Then after in Rajasthan, where Bhawari Devi, a voluntary worker who tried to stop a child marriage in the high caste Gujjar community was gang raped by community. Bhawari Devi's case was taken up in court by an NGO leading to the passage of the Supreme Court guidelines on prevention of sexual harassment of women. These guidelines were termed as Vishakha Guidelines[407] and the Supreme Court of India passed this historic judgment on 13 August 1998. As an outcome of this "Sexual Harassment of Women at Workplace (Prevention, Protection and Redressal) Act, 2013" was enacted. It states that all institutions, private as well as government should institute certain rules of conduct and preventive measures to stop sexual harassment at the workplace. It laid particular emphasis on the need to have an appropriate complaints mechanism with a complaints committee, special counsellor or other support services for the protection of sexual harassment.

WHAT IS SEXUAL HARASSMENT?

Sexual harassment has been recognised as the most intimidating, degrading and violating form of violence against women within the workplace, it creates a hostile work environment and reinforces the perception of subjugation and suppression of women by men in all areas of their lives.

The Supreme Court has defined sexual harassment as "unwelcome sexually determined behaviour such as:[408]

(1) Physical contact
(2) A demand or request for sexual favours
(3) Sexually coloured remarks
(4) Showing pornography
(5) Any other unwelcome physical, verbal or non-verbal conduct of a sexual nature."

The Sexual Harassment of Women (Prevention, Prohibition and Redressal) Act 2013 defines sexual harassment to include any one or more of the following unwelcome acts or behaviour (whether directly or by implication) namely:

i. physical contact and advances
ii. a demand or request for sexual favours
iii. making sexually coloured remarks

[407] Vishakha and others V. State of Rajasthan and others, AIR 1997 SUPREME COURT 3011
[408] *id*

iv. showing pornography

v. any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

According to CEDAW (UN Convention on the Elimination of All Forms of Discrimination against Women) "Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment."[409]According to Kathleen Gallivan "Any type of unwelcome sexual or gender oriented behavior that has adverse job related effects."[410]

On the study of the above definition the researcher fined that the word unwelcome use in each definition is as a key part of that definition.

Sexual Harassment: Constitutional Protection and International Commitment

The Constitution of India ensures gender equality by making it a fundamental right.

i. Article 14: ensures equality before law and equal protection of laws to every person. It not only prohibits discrimination but also makes various provisions for the protection of women.[411]

ii. Article 15(1): provides that the state shall not discriminate against any citizen on ground only of religion, race, caste, sex, place of birth or any of them. **Article 15(3)** empowers the state to make special provision for women.

iii. Article 16: guarantees equality of opportunity for all citizens on matters relating to employment or opportunity to any office under the state and forbids discrimination on the grounds only of *inter alia* sex.

iv. Article 19(1)(g): ensures, freedom to practice any profession or to carry out any occupation, trade or business.

[409] Regulation 19 of CEDAW www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm visited on 10/3/2012

[410] *ibid* 8

[411] Article 14 of the Constitution of India

v. Article 21: stipulates that no person shall be deprived of his life or personal liberty except according to procedure established by law. Women workers have a right to lead a dignified and honorable life with liberty.

vi. Article 23 guarantees the right against exploitation. It prohibits traffic in human beings and other similar forms of forced labor and makes contravention of this provision to be an offence punishable under law.

vii. Such violations, therefore, attract the remedy under Article 32 for the enforcement of these above mentioned fundamental rights of women.

In addition to these Fundamental Rights, Part IV of the Constitution which incorporates Directive Principles of State Policy also ensures dignified life to working women.

Article 39 (a)	ensures that the citizens, men and women equally have the right to an adequate means of livelihood.
Article 39 (d)	states that there will be equal pay for equal work for both men and women.
Article 39 (e)	states that the health and strength of workers, men and women should not be abused.
Article 42	ensures that the State shall make provision for securing just and humane conditions of work and for maternity relief.
Article 51 A (e)	makes it a fundamental duty of every citizen to renounce practices derogatory to the dignity of women.

International Commitment:

- **Universal Declaration of Human Right 1948**

S.H. is also considered to be a violation of HR decided in the UDHR, 1948 in Article 1, 2 and 7 which define "All human beings are born free and equal in dignity and rights and free dooms and equal protection against any discrimination.

- International Convention On Economic, Social And Cultural Rights, 1966.

This deals with the discrimination of any kind and equal right of men and women[412] and the state parties to convention undertake to ensure equal right of men and women to the enjoyment of all economic, social and Cultural rights set forth in the present convert.[413]

- **International Labour Organization:**

International Labour Organization, one of the specialized agencies of the United Nations, has been in the forefront to highlight the issue of sexual harassment by adopting the Discrimination (Employment and Occupation) Convention 1958, and also adopt Resolution on Equal Opportunity and Equal Treatment for Men and women in Employment.[414]

- **CEDAW**

In 1992, the Committee issued General Recommendation 19, which addresses violence against women and sexual harassment in employment. It observes that equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the work place .The Committee recommends that State parties should take all legal and other measures necessary, including preventive measures and penal provisions to protect women against sexual harassment in the work place.[415]

The Indian Penal Code:

- **Section 294**

Whoever, to the annoyance of others, (a) does any obscene act in any public place, or (b) sings, recites and utters any obscene songs, ballads or words, in or near any public space, shall be punished with imprisonment of either description for a term that may extend to three months, or with fine, or with both.' This provision is included in Chapter XVI entitled 'Of Offences Affecting Public Health, Safety, Convenience and Morals' and is cognizable, bailable and triable by any magistrate.

[412] Art. 2(2) of the International Convention on Economic, Social and Cultural Rights, 1966.
[413] Art. 3 of the International Convention on Economic, Social and Cultural Rights, 1966.
[414] ILO"s, Discrimination (Employment and Occupation) Convention, 1958
[415] General Recommendation 19, of CEDAW.

- **Section 354**

Whoever assaults or uses criminal force on any woman, intending to outrage her modesty or knowing it likely that he will thereby outrage her modesty, shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both.

- **Section 354A**

Sexual Harassment and Punishment for sexual Harassment:

1. A man committing any of the following acts—
    i. physical contact and advances involving unwelcome and explicit sexual overtures; or
    ii. a demand or request for sexual favours; or
    iii. showing pornography against the will of a woman; or
    iv. making sexually colored remarks, shall be guilty of the offence of sexual harassment.
2. Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.
3. Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

- Section 354B

Assault or use of criminal force to woman with intent to disrobe:

Any man who assaults or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to seven years, and shall also be liable to fine.

- Section 354C

Any man who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image shall be punished on first conviction with imprisonment of either description for a term which shall not be less than one year, but which may extend to three years, and shall also be liable to fine, and be punished on a second or subsequent conviction, with

imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine.

Explanations

1. For the purpose of this section, "private act" includes an act of watching carried out in a place which, in the circumstances, would reasonably be expected to provide privacy and where the victim's genitals, posterior or breasts are exposed or covered only in underwear; or the victim is using a lavatory; or the victim is doing a sexual act that is not of a kind ordinarily done in public.
2. Where the victim consents to the capture of the images or any act, but not to their dissemination to third persons and where such image or act is disseminated, such dissemination shall be considered an offence under this section.

- Section 354D

(1) Any man who—

1. follows a woman and contacts, or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or
2. monitors the use by a woman of the internet, email or any other form of electronic communication,

commits the offence of stalking;

Provided that such conduct shall not amount to stalking if the man who pursued it proves that—

1. it was pursued for the purpose of preventing or detecting crime and the man accused of stalking had been entrusted with the responsibility of prevention and detection of crime by the State; or
2. it was pursued under any law or to comply with any condition or requirement imposed by any person under any law; or
3. in the particular circumstances such conduct was reasonable and justified.

(2) Whoever commits the offence of stalking shall be punished on first conviction with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and be punished on a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

- Section 509

This is included in Chapter 22 entitled 'Of Criminal Intimidation, Insult and Annoyance', and is cognizable, bailable and triable by any magistrate. It holds: 'Whoever, intending to insult the modesty of a woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture is seen by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.'

Judicial Trend

The researcher presents some of the case laws.

- Apparel export promotion council V. A. Chopra [416]

In the present case the resp. who was working as a private Secretary to the Chairman of the AEPC, tries to molest a women employee of the council. The departmental authorities, keeping in view the fact that the actions of the respondent were considered to be subversive of good discipline and not conductive to proper working in the appellant organization. Where there were a number of female employees took action against the respondent to remove him from service. Aggrieved by the order of removal from services, the respondent field a departmental appeal before the staff committee and thereafter a writ partition to the H.C.

The single and division bench held that the respondent did not actually molested Miss X and had only tried to assault her not male any physical contact with her, a case of his removal from service was not made out. The **Supreme Court** held that it is means of SH of women at the work place and added that it violate article 12, 14, and 19 of the constitutions i.e right to gender equality and right to life and liberty guaranteed by the Constitutions. The Supreme Court held that the order of the High Court is set aside.

- Y. R. Midha v. Union of India and others[417]

It is a case in which a married lady X, working as stenographer in the office of the petitioner who was posted as principal of Director of Audit, filed complaints of sexual harassment against the petitioner. The preliminary inquiry committee unanimously recommended in its report as '…the committee is of the considered view that a ***prima facie*** case of sexual harassment of Smt. X stands established against. The Committee should also like to observe that whereas it was duty as Head of office to prevent sexual and other kinds of harassment to any woman

[416] (1999) 1 SCC 759
[417] ILR (2009) 1 Delhi 501

employee in his office, he was himself indulging in it with subordinate staff to have no recourse to protection. Such conduct on the part of the highest social in an office is reprehensible. Consequently, the Petitioner was dismissed from the service. In this case, the Court held that the writ petition by the petitioner being devoid of merit is dismissed.

- Rupan Deol Bajaj vs. K.P.S. Gill [418]

A senior IAS officer, Rupan Bajaj was slapped on the posterior by the then Chief of Police in Punjab, Mr. K.P.S Gill at a dinner party in July 1988. Despite the general public opinion that she was "blowing it out of proportion", and attempts by all the top officials in the state to suppress the case. In January 1998, the Supreme Court fined Mr.K.P.S Gill Rs.2.5 lakhs in lieu of 3 months rigorous imprisonment, for offenses under Sections 294 and 509.

- Radhabai vs. D. Ramachandran[419]

In 1973, when Radhabai, secretary to D.Ramachandran, the then State Social Welfare Minister protested against his abuse of girls in welfare institutions, he attempted to molest her; and followed by dismissing her. In 1995, the Supreme Court passed a judgement in her favour, with back pay and perks from the date of dismissal.

- M.S. University at Baroda[420]

a student was sexually harassed by her professor. Her protests led to victimization and certain women's' organizations wrote protest letters to the Chief Justice of India. The letters were converted into a Writ Petition and the Court started supervising the implementation of Vishaka's guidelines. Notices were issued to the Central Government, all State Governments and the Union Territories asking them to report to the Supreme Court the measures taken by them for complying with the Vishakha Guidelines. The Governments filed Affidavits which bordered on the pathetic. Many of the service rules were amended to bring in sexual harassment as a specific head of misconduct. In many states the Employment Standing Orders Act which apply to private employers were similarly amended. Committees were set up in various public sector organizations. University Grants

[418] 1995 (6) SCC 0194
[419] Aruna Goel, Violence & Protective Measures for women Development & Empowerment, Deep &Deep Publication, 2004-editit.
[420] www.indiatogether.org Mihir Desai Combat Law, Volume 4, Issue 1 January-February 2005 (published March 2005 in India Together) [visited on 11th /3/2012

Commission sent a letter to the Universities asking them to set up committees. The Supreme Court on the other hand continued monitoring the progress and now issued notices to even professional bodies. Though things were moving the changes were essentially cosmetic. Most of the private employers had not set up any committees and those public sector organizations where committees were set up they did not function effectively.

The Sexual Harassment of Women at Workplace (prevention, prohibition and redressal) Act, 2013:

Highlights of the Act:

i. The Act defines sexual harassment in the workplace. The Act creates a mechanism for redressal of complaints. It also provides safeguards against false or malicious charges.

ii. Every workplace is required to constitute an Internal Complaints Committee (ICC). The ICC is mandatory at each office or branch with 10 or more employees.

iii. These Internal Complaints Committees have the powers of civil courts for gathering evidence.

iv. The Act provides for setting up of Local Complaints Committee (LCC) to be constituted by the designated District Officer at the district or sub-district levels, depending upon the need. This twin mechanism would ensure that women in any workplace, irrespective of its size or nature, have access to a redressal mechanism**.** The LCCs will enquire into the complaints of sexual harassment and recommend action to the employer or District Officer.

v. Penalties have been prescribed for employers. Non-compliance with the provisions of the Act shall be punishable with a fine.

vi. Higher penalties and cancellation of license or registration to conduct business is also mentioned if violations are repeated.

vii. Act provides protection not only to women who are employed but also to any woman who enters the workplace as a client, customer, apprentice, and daily wageworker or in ad-hoc capacity. Students, research scholars in colleges/university and patients in hospitals have also been covered. Further, the Bill seeks to cover workplaces in the unorganized sectors.

viii. Since there is a possibility that during the pendency of the enquiry the woman may be subject to threat and aggression, she has been given the option to seek interim relief in the form of transfer either of her own or the respondent or seek leave from work.

ix. The Complaint Committees are required to complete the enquiry within 90 days and a period of 60 days has been given to the employer/District Officer for implementation of recommendations of the Committee.

x. It provides for safeguards in case of false or malicious complaint of sexual harassment. However, mere inability to substantiate the complaint or provide adequate proof would not make the complainant liable for punishment.[421]

Conclusion

SH is an effort to gender justice. Therefore, there is a need for effective implementation of the act. Because on one hand there is an increase in the employment of women due to empowerment of the women and on the other hand still women are facing issue related to gender justice and SH at workplace.

By making research study on the SH at work place the researcher come into conclusion that the SH is one of the most worst and endemic from of violence against women and girls today. All the guide lines and legislation in the world will not stamp out SH at work place. Despite of wide spread prohibition of SH around the world the unwanted sexual attention is an unavoidable condition of work, for women and girls.

Today on the one hand we talk about the empowerment of women and on the other hand after passing more than 14th years of the vishaka's guide line regard to the prevention of sexual harassment at work place and after the formation of the 2013 act still we don't have appropriate implementation of the act to cope up with this criminal offence. Our MLAs found to look pornography in the Vidhansabha's session now we have to think that what the future of nation. And on the above research study the researcher also come to conclusion that there is a lack of awareness related to vishaka's guide line on the prevention of SH at work place. If today you ask about vishaka's guide line to the working women or girls other than law field then you fined that no women or girls are know about it and if they don't know about the guide line then there is a no questions raise about the complain of SH at work place by the women or girls. Every woman have to adopt zero tolerance against such offences.

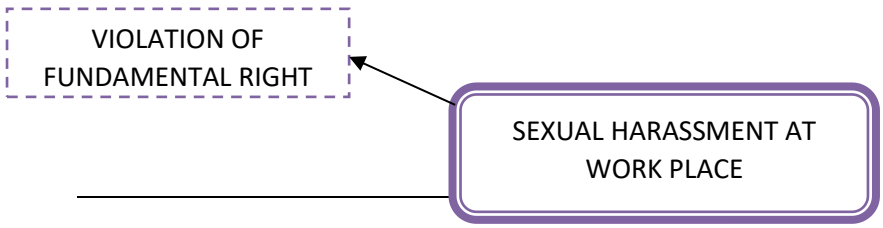
Here the researcher would like to give some suggestion**:**

[421] Article on Cabinet clears Sexual Harassment Bill www.ibnlive.in.com/news visited on 12th /3/2012

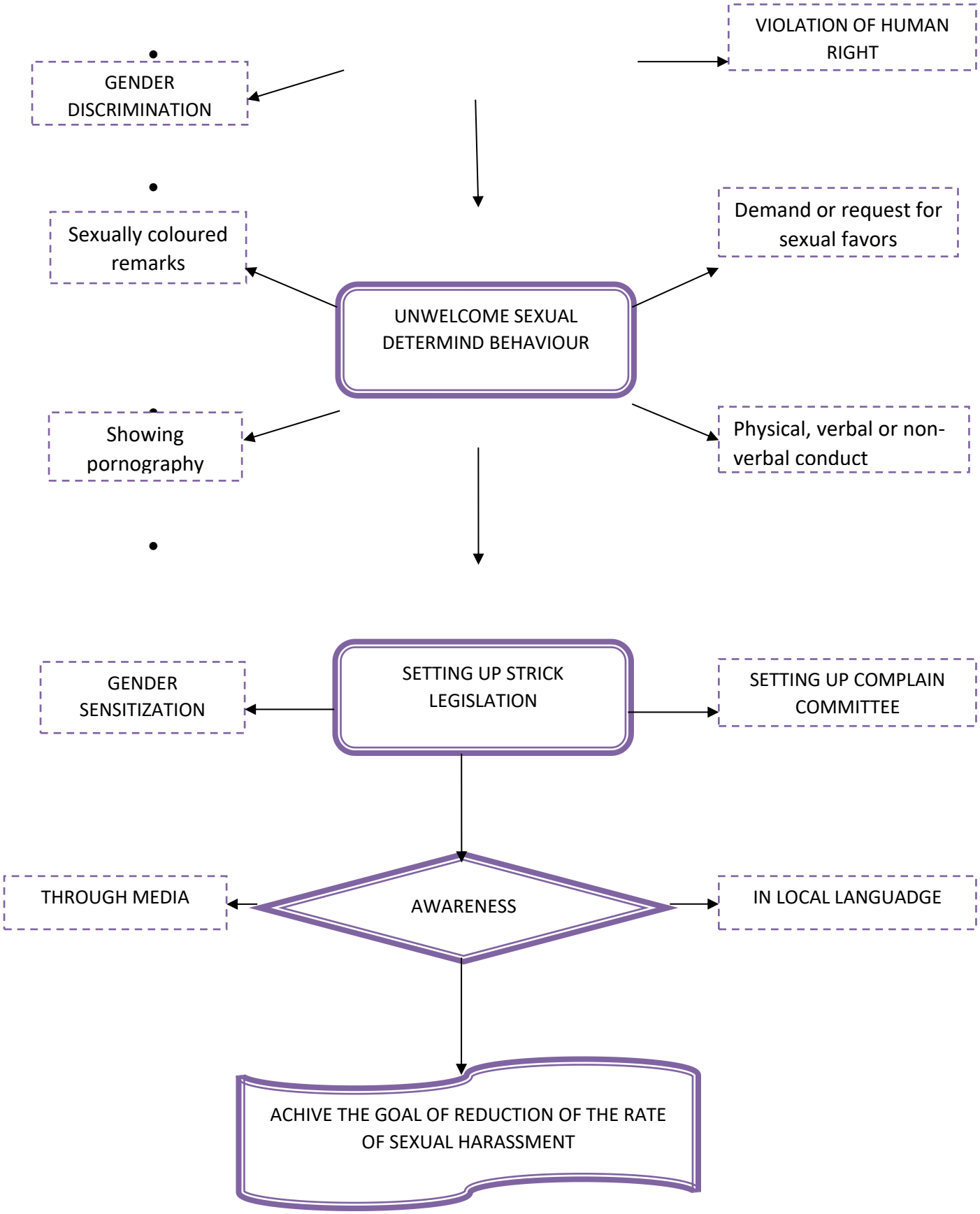
i. There should be awareness campaigns related to protection against sexual harassment at work place institutions, cooperate firm, school, industries etc.
ii. And the media should give a full support to awareness of prevention of SH at work place. "We need to create an awareness against this menace and women should adopt zero tolerance against it," NCW Chairperson Mamta Sharma said.[422]
iii. The employers should bear responsibility for workplace SH. The employers must strictly implement the SH act, 2013, organize and conduct worker's meetings, employer-employee meeting about sexual harassment periodically, and provide procedures for quick resolution, settlement, and prosecution of such cases. The complaint procedure should be time bound and done confidentially and the committee members should be accessible, approachable, committed, sensitive and understanding.
iv. There should be a strict implementation of the anti SH guideline given by SC and SH act, 213 and d also effective monitoring for the same.
v. The national human right commission, NCW and NGOs have to participate in awareness campaigns.

We can achieve the goal of gender justice with women empowerment only with the proper implementation of this act.

SEXUAL HARASSMENT AT WORK PLACE: How to tackle?



[422] News on Adopt zero tolerance to sexual harassment at workplace: NCW Published on Tue, Nov 29, 2011 http://www.moneycontrol.com/news/


VIOLATION OF HUMAN RIGHT
GENDER DISCRIMINATION
Sexually coloured remarks
Demand or request for sexual favors
UNWELCOME SEXUAL DETERMIND BEHAVIOUR
Showing pornography
Physical, verbal or non-verbal conduct
GENDER SENSITIZATION
SETTING UP STRICK LEGISLATION
SETTING UP COMPLAIN COMMITTEE
THROUGH MEDIA
AWARENESS
IN LOCAL LANGUADGE
ACHIVE THE GOAL OF REDUCTION OF THE RATE OF SEXUAL HARASSMENT

REFORMS IN THE JUSTICE DELIVERY SYSTEM

-Nem Singh*

ABSTRACT

The court service system is an important dimension of judicial reforms. Reforming the Justice System, The Chief Justice of India said that the seriousness of the cases is the main problem and the problem is escalating very quickly. Judicial reform is not only a political matter, and human sensibility should remain at the center of all deliberations on the issue. The National Justice and Legal Reform Mission was established in August 2011 with the dual objective of increasing access by reducing delays and arrears in the system and strengthening accountability through structural changes and setting performance standards and capacities. The mission promotes a coordinated approach to the gradual liquidation of arrears and foreclosures in the judicial administration.

1. Inefficient planning in functioning of courts with more outdated laws like Section 124A IPC
2. No time frame was set for the court to dispose of the cases.
3. Population explosion leading to explosion of litigation
4. Hasty and imperfect creation of legislation Plurality and accumulation of appeals as well as the inadequacy of judge strength
5. Failure to provide adequate forums of appeal against quasi-judicial order.

CJI stated to set up National Judicial Infrastructure Corporation (NJIC) to advance judicial infrastructure in trial court. The ordinary trial in our Indian courtroom at such an exceptional time was once both adjourned or carried out truly thru video conferencing. The e-Court Portal is a complete answer for all stakeholders such as litigants, advocates, authorities' agencies, police and the frequent citizen. The portal has a multilingual system

INTRODUCTION

The search for justice has been a perfect that humanity has strived for generations. Our Constitution displays this aspiration in the preamble itself, which speaks of justice in all its

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forms: social, monetary and political. Justice is a constitutional mandate[423]

Approximately half of a century of operation of the charter introduced many troubles associated to the functioning of the judiciary; from the tough issues of appointments to the most effective judiciary to the issues of court docket congestion and judicial delays. A range of troubles arose. Who ought to appoint judges? Should they be "judges" or "people's judges"? Should the composition of the judiciary mirror the plurality of society? Of specific difficulty was once the continual and habitual theme of the near-collapse of the judicial justice system, its delays and rising costs. Here, the law's wonderful uncertainty thwarts aspirations for equal, predictable, and cheap justice. This is additionally a query that frequently arises in people's minds.

We should preserve in idea that judicial reforms have two necessary aspects: qualitative justice and rapid justice. Our united states of America desires great growth in each aspect. International trip honestly argues that criminal establishments have a vital and unbiased function in development. A current article through the World Bank, the usage of empirical evidence, absolutely indicates the relationship between the functioning of the criminal gadget and the financial improvement of a country. The focus and enforcement of more than a few types of contractual and property rights performs an essential position in attracting funding (both home and foreign) and for that reason leads to financial growth. A positive criminal. Machine is the basis of a market economy. The essential query is: How do we plan and shape a criminal device which can render justice to a billion people? The opportunity of a justice-delivery mechanism in the Indian context and the impediments for meting out justice in India is, thus, required to be examined.

I would like to tackle this theme at the structural and the operational level. At the structural level, one is difficult the very framework itself and analyzing the viability of the choice frameworks for meting out justice. It would possibly require a change of the Constitution or the laws. At the operational level, one is working inside the framework attempting to discover more than a few methods of enhancing the effectiveness of the felony system.

[423] Allan. (n.d.). The constitution Foundation of Judicial Review: Conceptual Conundrum or Interpretative Inquiry (Vol. Cambridge Law Journal). London: 2002.

A preliminary commentary is warranted earlier than I proceed further. Legal reform is a hard process. There are various competing hobbies concerned which ought to be reconciled. This used to be clear when sure initiatives in felony reform have been taken in India over the remaining three years. Reform can't be completed overnight; it is long-drawn-out process. Passing new legal guidelines is simply one stage of the entire process. International trip has proven that prison reform

STRUCTURAL LEVEL

The effectiveness of justice-prevention equipment sooner or later relies upon on how we conceive of justice. A World Bank document titled Comprehensive Legal and Judicial Development asserts:

"The elements of a well-functioning justice device subsequently rely on the cultural context in which it operates—justice is described by using the society it serves." Does our thinking of justice serve Indian society? Even these days the colonial have an impact on is evident in the way we outline justice in the Indian context. Have we developed a thought of justice that is regular with the aspirations of the framers of the Constitution as mirrored in the Preamble? Does our notion of justice correspond to the Indian reality? Should we substitute it with the idea of Indian justice? This leads us to a higher question: Is there an Indian thinking of justice? These are uncomfortable questions, questions that can also now not yield prepared answers, however questions that we should tackle if we are to graph a justice gadget that serves our society. Here I would like to advocate precise structural changes:

SHIFT FROM A CONFLICT RESOLUTION TO JUSTICE DISPENSATION

Indian courts are in the addiction of settling disputes between parties on the foundation of pleadings filed via the parties. Supreme judicial institutions, especially the Supreme Court, whilst exercising their jurisdiction, have devised numerous equipment to dispense justice. Several progressive prison tactics are used that act as catalysts for regulation reform. This used to be evident in the introduction and improvement of the PIL jurisdiction. In the identical way, justice-oriented judicial endeavor ought to be decentralized to the lowest courts of the country.

SOME IMPORTANT MEASURES

Many measures are being taken to test this deficiency and inefficiency in our judicial machine and many reforms are being proposed through a variety of committees constituted via the government. Under the auspices of eminent judges like Justice Malimath Committee (2000), Justice SR Das Committee (1949) and Justice GC Rankin Committee (1925). One of the most apparent shortcomings of the justice device is the terrible variety of judges in the country. In the United States of America, there are 108 judges per million citizens, in contrast to solely 12 judges per million in India. As of 2012, there had been 273 vacancies in the High Court and 3670 vacancies in the subordinate courts. There are three vacancies in the Supreme Court itself. The method can be assisted with the aid of measures such as consideration of Parliament to beautify the process Retirement age of High Court Judges from sixty-two to sixty-five Constitution of All India Judicial Service is additionally a welcome step in this direction. As the National Legal Mission suggests, senior regulation college students and skilled regulation graduates can be appointed as court docket managers to enhance the effectivity of the gadget and overcome the woeful inadequacy of judicial staff. Some legal guidelines like Penal Code, Civil Procedure Code, Criminal Procedure Code, Transfer of Property Act, Contract Act, Sale of Goods Act, Negotiable Instruments Act etc., which make a contribution extra than 50%. With 60% of litigations in trial courts being central laws, one of the first-rate methods to fight the stagnant tempo of courts is to undertake facts and conversation science (ICT) at each and every degree of the judiciary. At present, most of the statistics structures in the subordinate courts, the place 90% of the whole litigation takes place, are nevertheless managed manually. will proceed to grow.

REASONS FOR SLUGGISH JUSTICE DELIVERY SYSTEM[2]

- Absence of Time Limit: No time body has been prescribed for the Courts for the disposal of cases.
- Rising Backlog: NITI Aayog in 2018 Strategy Paper (New India @75) had mentioned that at the modern fee of disposal of cases, it will take greater than 324 years to clear

the backlog. The COVID-19 Pandemic has solely made it worse.[424]

- Slow Digital Migration: Almost the complete three-tier justice shipping device has been computerized and outfitted with present day technology. However, the opposition of a area of the lawyers' fraternity has resulted in a slow-paced migration to the digital format.

MEASURES NEEDED

- Improving infrastructure for exceptional justice: The Standing Committee of the National Council, which submitted its record on enhancing and strengthening the infrastructure of the decrease courts, suggested:
- The authorities have to furnish appropriate land for building such as court docket buildings. Vertical development needs to be accomplished maintaining in idea the shortage of land.
- The timeline for the computerization of all courts has been set as a quintessential step toward the introduction of digital courts.
- Handling Vacancies: Ensures that choose appointments are made in an environment friendly manner by means of acquiring the first-class on hand choose authority to manage pending instances in the system. The one hundred and twentieth Law Commission Report of India proposed for the first time a constant system for the powers of judges.
- The Supreme Court and excessive courts are obliged to appoint in a position and skilled judges as extra judges in accordance to the constitution.
- All India Judicial Services. This benefits the decrease judiciary as it helps improve the exceptional of judges and limit the backlog.
- Establish clear time frames for coping with instances with the aid of putting annual ambitions and motion plans for subordinate jurisdictions and excessive courts. Judges can difficulty strict regulations of habits to make certain that obligations are good carried out with the aid of officials.
- Strict rules of postponement and imposition of exemplary charges for its inquiry for susceptible reasons, mainly in the trial stage and now not weakening the cut-off dates

[424]Faundez. (2001). Lagal Reform in developing and transition Countries: Making Haste Slowly. world bank.

set in the civil system law.

- Better court docket administration structures and dependable information collection: This requires case classification and case categorization based totally on urgency and priority.
- Use of data technological know-how (IT) solutions: use of science to music and reveal incidents and to supply applicable records for the advantage of prison proceedings. It needs to supply greater motivation
- Process Reengineering: Dramatically improves productiveness and exceptional by means of incorporating the use of science into court docket rules, which includes redesigning core enterprise processes. includes:

ROLE OF LAWYERS

We can't deny the reality that reforming the judicial machine is not possible barring the full cooperation and lively assist of lawyers. It is unusual that benches and bars are two facets of the equal coin. What contribution can attorneys have in reforms? First, it is quintessential to reform the academic system. We should prioritize competence and inspire regulation college students and new graduates to actively take part in the administration of law. This can be done through encouraging them to actively take part in dispute decision via Lok Adalat or mediation.

Second, there is a lack of lookup articles on a number components of law. Students and newly registered legal professionals ought to be stimulated to learn about the device as a whole, factor out its shortcomings and propose reforms. There is a lot of intelligence in this us of a and they are successful of doing extraordinary lookup work. Third, a skilled legal professional ought to habits interactive sessions. Senior attorneys need to train junior legal professionals a range of elements of criminal exercise such as court methods and ethics. A pilot undertaking has been launched by using the British Council and has been nicely obtained through a number of bar associations. Lawyers are taught the strategies of witness examination, how to put together and existing the case. The software runs on weekends, at some stage in which senior legal professionals spend time with the youth.

Taking the time to enhance the satisfactory of our gurus will significantly beautify our justice system. The reputation of legal professionals in the society will upward push and the recognize that noble professions had earlier than will return. Some time ago, Times of India and Aditya Birla Group performed a survey. The outcomes of this survey have been very disappointing. Of the sixteen fields/professions voted on, members rated the felony career as the least honest, and advocates had been stated to make contributions the least to the betterment of society. This attitude needs to trade if our occupation is to acquire respect. It is acknowledged that being a choose has no monetary benefits. For this reason, many rich legal professionals are now not inclined to supply up their profits.

CONCLUSION

The failure of the judiciary to supply justice inside the time body has created a feel of frustration amongst legal professionals and litigants. The swelling dockets of the courts are now not a signal of gadget failure however a signal of belief in the administration of justice. Public recourse to the courts to curb public mischief is an affront to the justice system. However, the hassle of extend in disposal of instances is an actual problem. That is additionally a challenge. If modifications are made, India's justice device can rank amongst the pinnacle nations in the world. These modifications will make India a state of desire for worldwide funding and additionally fulfill citizens' crucial proper to fast justice.

AN ANALYSIS OF THE POPULATION CONTROL BILL, IN INDIA VIS. A VIS. CHINA AND INDONESIA*

ABSTRACT

According to the United Nations 'World Population Prospects 2019' study, India's population will surpass the population of the most populated country China within a decade. Even at today's time with the population of 140.76 Crores in the year 2021, it creates a huge difficulty. All the citizens would have given though of introducing a law regulating the population of the country but it has never been done until the Population Control bill was introduced in the Rajya Sabha in July 2019 by Rakesh Sinha. As per the last census conducted in 2011, almost 41% of the total population is under 18 years of age which is beneficial to the nation as it will add to the nation-building but for the same some measures need to be taken to control the growing population by education and implementing laws regarding the same. W. Keeping in mind the scarcity of resources such as clean drinking water, affordable food, adequate housing, quality education the population regulation bill calls for penal actions against those who conceive more than two children, other action that have been described under this bill is preventing them from becoming a legal representative, dismissal of financial benefits such as pensions and dismissal of benefits under the public distribution system. Although a lot contentions were made against the bill as it is violative of the fundamental rights of citizens to keep the family size to bare minimum but it is necessary for the development of nation as well as citizens to introduced a law regarding Population control. While focusing on a comparative study between the Population control bill introduced in India with other countries, the requirement for the introduction of such law, meaning of the control bill and the problems it is facing against the constitution and its basic structure will be covered with the conclusion.

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Introduction

The research paper focuses on the Population Control Bill which has been matter of debate since independence of the nation. In today's time the total population in India is around 1,415, 607,278 which was measured on February 18, 2023 by the United Nations.[425] And this statistic has put India in the chase for the top position as the most populus country taking over China which has a current population of 1,426,000,000 by July 1, 2023.[426]

As per data recorded by the United Nations, India stands to be the 5th largest economy of the world standing just below, USA, China, Japan and Germany contributing round about $2.651 trillion in 2017 which was 3.28% of the total world GDP. As on 2022, the GDP of Indian Economy is estimated to be $3.469 trillion which is about 3.5% of the total world GDP showing a rise of 0.22%.[427]

The population of India can be broadly classified into 3 categories bifurcated by their age which are, 0-14 years which consists of 25.69% of the total population, 15-64 years which consists of 67.51% of the population, and finally 65+ years which amounts to a meagre 6.8% of the total population.[428] From the given statistics, one can derive that the majority of India's population is between 15-64 years which also can be considered as the working class of our Nation greatly contributing to the increase in our economy and GDP contributions, and it is closely followed by 25% of our population which falls under the age bracket of 0-14 years which would climb up to become the working class further contributing to the growth of our economy.

Thus, from the aforementioned statistics presented one can presume that the growing population of our country can be a beneficial factor to our developing economy as the income that can be generated by our population can significantly increase with the growth of indigenous minds within our economy, but with the rising population, a major question that remains unanswered is whether there is a proper need for legislation regulating the population growth occurring within the Nation.

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[425] India Population (2023) - Worldometer, https://www.worldometers.info/world-population/india-population/ (last visited May 31, 2023).
[426]Nicholas Gordon, *China's historic population decline raises the possibility that India has already overtaken China in size*, FORTUNE (Jan. 17, 2023, 5:50AM), https://fortune.com/2023/01/17/india-china-population-decline-worlds-most-populous-country/amp/.
[427]Shashi, *World Economy Ranking 2022, 22 Biggest Economies in the World*, URBANAFFAIRSKERALA.ORG, (Mar. 22, 2023), https://urbanaffairskerala.org/world-economy-ranking/.
[428]Aaron O'Neill, *Age distribution in India 2011-2021,* STATISTA, (May16,2023)https://www.statista.com/statistics/271315/age-distribution-in-india/.

What is Population Control Bill?

Now that we have understood the basis of the paper, and the foremost contention being whether the growing population would be beneficial or detrimental to our economy looming over the law makers of our country, we must first understand about the Population Control Bill. There have been several bills introduced with respect to controlling population in the past however, the understanding of the policies and its implementations have been majorly inadequate.

India was one of the first major nations to have adopted the population control policies with the objective of controlling its ever-growing population with the earliest ideas being presented as early as 1952. Since then, there have been around 36 private members bills which have introduced in the parliament, of which 15 were moved by the MP's belonging to the Congress Party.[429]

The ideology of controlling the vast population have been formulating for a period even before the Independence of our Nation. The earliest known formation of the idea to control the population was proposed in 1947 by Nehru and Gandhi as they were concerned about the growing population and its potential impact on the future development.

The approach taken by Gandhi was inspired by philosophies of the Jain traditions namely The Doctrine of Non-possession (Aparigraha) which focuses on the concept that *"No one or anything possess anything"* and the Doctrine of Trusteeship which focuses on the concept that *"A person voluntarily gives up or renounces his right on the money earned by him and dedicates it for the welfare of the poor section of the Society."* And thus Gandhi was not concerned about the growing population affecting the growth of our economy.

The leading politician like Nehru set out to address the population growth issue as early as in the 1940's the National Planning Committee under the chairmanship of Nehru set up a "Sub-committee on population" which recommended the gradual increasing of Marriage age, the teaching of contraception in medical colleges, a special training for doctors, nurse, and health visitors, the establishment of birth control clinics, provision of free contraceptive supply, local manufacture of contraceptives, a vigorous mass publicity campaign, the education of people

[429] Navtan Kumar, *Many population control bills since '47*, THE SUNDAY GUARDIAN, (Aug. 17, 2019), https://www.sundayguardianlive.com/news/many-population-control-bills-since-47.

on the population problem, and the introduction of the Eugenic program for sterilization of persons suffering from communicable diseases.

The current scenario with respect to the population control bill was brought about a day after findings revealed by the United Nations which indicated that India can surpass China as the world's most populous country by 2020.

The bill was proposed in 2019, and aims at disincentivizing couples from giving birth to more than 2 children. It says that couples with more than 2 children policy be made ineligible for Govt. jobs and subsidies on various facilities and goods provided by the Govt.

The bill also proposed to Incentivize the adoption of the policy through educational benefits, home loans, better employment opportunities, free healthcare and tax cuts.

On July 22, 2022, a statement was released by renowned politician and member of the Bharatiya Janta Party (BJP) Ravi Kishan, stating that he will be introducing a private members population control bill in the Lok Sabha. This statement has gone ahead and rekindled the debates as to whether the law will be implemented and what will be the effects of the same.[430]

History of population control in India

Even after 30 years, the Emergency period remains the one episode in the History of family planning in India that would appear to require no introduction.[431] It has become emblematic of everything that can go wrong in a program focused on population control rather than on reproductive rights and health.

Overpopulation has always been a point of apprehensiveness for India as the population seems to be ever growing. As a result, India has been using sterilization as a method for population control from 1951. According to the United Nations, India's contribution towards sterilization of 37% of the entire female sterilizations, UN also noted the reason for this could possibly be because Female Sterilization is more common in developing countries whereas Contraceptive is common in developed countries.[432] A contributing factor towards this being a famous

[430]Shailaja Tripathi, *what is Population Control Bill? Know its legal challenges and constitutional roots*, JAGRAN JOSH, (Jul. 23, 2022), https://www.jagranjosh.com/general-knowledge/what-is-population-control-bill-its-legal-challenges-and-constitutional-roots-1658572340-1.

431 Matthew Connelly, *Population Control in India: Prologue to the Emergency Period*, 32 PP 629, 629-667 (2006). https://www.jstor.org/stable/20058922.

[432]Charlotte Alfred, Deaths After Mass Sterilization Put India's Top Contraception Method Under Scrutiny, HUFF

ideology could be the regressive mindset of the Indian population which till date considers sex education and education on reproductive health to be a topic of taboo and thus resulting on very little knowledge of the population about the use of contraceptives as an alternative to sterilization.

The greatest campaign of Population Control was conducted by the Indian Government under the tutelage of Former Prime Minister Indira Gandhi during her regime between 1951 to 1977. This campaign also received major international recognition and aid, the greatest of which being the aid provided by the World Bank in the form of a Loan extended for the amount of $66 million between 1972 and 1980.

Furthermore, Indira Gandhi was coerced by several western democracies to introduce and implement a crash sterilization program concerning India's rapid growing population.[433] This included time-bound performance targets, a preference for methods that minimized the need for sustained motivation, disregard for basic medical standards, incentive payments which for the poor class of the population acted as a form of coercion, disincentives that punished non-participation, and official consideration of compulsory sterilization which even though not backed by a legislation, signalled that achieving national population targets may override individual dignity and welfare.

On June 26, 1975, the former Prime Minister Indira Gandhi announced a National Emergency the reason for which being the growing economic crisis and the rising population. As a result of the Emergency, an authoritarian government was established which developed and imposed a repressive population control program of forced sterilization. As a result, the two years of Emergency under Indira Gandhi's regime have become synonymous with the forceful sterilization. It has been estimated that in 1876 alone, around 6.2 million men were sterilized as a result of which around 2000 men died due to botched operations.

The larger damage had been done to the country considering the fear that was created in the minds of the Indian population which also resulted in the failure of the Congress Party in the subsequent election as a result of which other political parties feared picking the population control bill for little over a decade.[434]

POST, (Nov. 12, 2104), https://www.huffpost.com/entry/female-sterilization-contraception_n_6145278.

[433]Ahshwaq Masoodi, When sterlization wasn't a matter of choice, LIVE MINT, (22 Jun, 2015), https://www.livemint.com/Politics/VPJHHyhQm3t8Rd1YcOfeRO/When-sterlization-wasnt-a-matter-of-choice.html.

[434] Prajakta R. Gupte, India: "The Emergency" and the Politics of Mass Sterilization, Association of Asian studies,

Population control bill reciprocity with fundamental rights

In India the population control bill has been in debate and for 35 time atleast tried to be implemented as a law but it got always rejected due to the implications it set on the public at large have always been against their basic fundamental rights.

Reproduction and family planning are considered as private matters of an individual where implementing a law which takes authority over it will be in direct violation of their fundamental rights. Although at the same time the current position of the country cannot be neglected as factors such as poverty and over-crowdedness is at it's peak and it requires immediate action to curb it.

In the case of Suchita Srivastava v Chandigarh Administration the Supreme court recognised the right to procreate and reproduce under the Article 21 of the constitution of India and the words of the apex court were –

"There is no doubt that a woman's right to make reproductive choices is also a dimension of `personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected[435]."

The Article 21 is one of the most prevalent fundamental rights provided under the constitution of India, although in its literal interpretation it does not cover the right and freedom to procreate but in its constructive interpretation it covers the right to procreate. A law that affects the right to reproduce or family planning will be a straight violation of the public's fundamental right due to which it becomes necessary to adopt other means to curb the problem of population such as focusing on the health awareness and financial burdens especially on the poor section of the society.

In India it has been noticed that the poor section has misconception such as High child mortality rates, Limited access to education, Early marriage and gender roles, Limited access to contraception and need for extra labour[436], such factors always lead the society to have more children to fulfil such factors.

(2017), https://www.asianstudies.org/publications/eaa/archives/india-the-emergency-and-the-politics-of-mass-sterilization/

[435] Suchita Srivastava & Anr vs Chandigarh Administration, (2009) CIVIL APPEAL NO.5845 OF 2009 (India).

[436]Zoe Noakes, Why Do the Poor Have Large Families, Compassion, (27 DEC, 2019), https://www.compassion.com.au/blog/why-do-the-poor-have-large-families

Also, the Article 22 of the 1969 Declaration on Social Progress and Development[437], which adopted through a resolution in the UN General Assembly, provides couples with right to choose freely and responsibly regarding the number of children they plan and want to have. Also, under this bill the power to control and regulate such choice is a direct violation of the Article 16 and Article 21.

Current Scenario

If we look at the demographic profile of India, the current fertility rate is around 2.3, while the replacement fertility rate is 2.1, with Bihar (3.3), Uttar Pradesh (3.1), Madhya Pradesh (2.8), Jharkhand (2.6), and Chhattisgarh (2.5) in the lead. Concerns about equitable resource distribution, access to essential services and healthcare, the influence on the economy, and quality of life are urgently needed as the population grows. More recently, the pandemic has made it urgently necessary to change the densely crowded demographic profile that is typical of Indian metropolises. The health facilities are already exhausted and depleted due to the enormous population's growing demands. Numerous people have thought about population control strategies in light of these grave estimates.[438]

The draft of the proposed population control bill by the Government of the most populous state of Uttar Pradesh (UP) On the one hand, it is commendable that this measure places an emphasis on improving reproductive health while also making contraceptive and safe abortion services more accessible. On the other side, it suggests providing incentives to couples who follow the 2-child or 1-child norms, such as pay raises, alluring subsidies, numerous benefits for the child who is the only child, and free access to medical facilities. Additionally, it discourages people who defy the 2-child rule by limiting their opportunities for promotion or consideration for government positions or benefit programmes and preventing them from running for local office.[439] The UP Government overlooked the impact of the epidemic on the population profile among all of its other advantages. If we look at the statistics, the majority of COVID-related deaths in India occurred among the elderly, keeping the workforce size almost steady.[440]

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[437] Declaration on Social Progress and Development, OHCHR, https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-social-progress-and-development (last visited May 31, 2023).

[438]Nagabhushana Prerana and Sarkar Avir, The Population Control Bill, 2021: Exploring newer perspectives, Journal of Family Medicine and Primary Care, (July 2022), https://journals.lww.com/jfmpc/Fulltext/2022/07000/The_Population_Control_Bill,_2021__Exploring_newer.133.aspx

[439]*id*

[440] Sarah Harper, The Impact of the Covid-19 Pandemic on Global Population Ageing, Springer Link, (May 22 2021), https://link.springer.com/article/10.1007/s12062-021-09330-w

On the other hand, the disability related to the disease has left the younger crowd less productive. Hence there is a need for a young, skilled workforce in the future. Unlike the previous pandemics, the so-called baby boom is not likely to happen since the impact is going to be prolonged; there is no role of replacement conception. Also, economic anxiety is likely to reduce fertility rates.[441] In concordance, China has seen a decline in growth rate post-pandemic and has jumped from 1-child norm to 3-child norm!

Comparison with China

With the founding of the People's Republic in 1949, China started pushing the use of birth control and family planning, however such initiatives remained intermittent and voluntary until after Mao Zedong's passing in 1976. China's population was rapidly approaching one billion by the late 1970s, and the nation's new pragmatist leadership, led by Deng Xiaoping, was starting to give the issue of slowing the population growth rate some serious thought.

In late 1978, a voluntary initiative encouraging families to have no more than two children—with one being preferred—was unveiled. Demand for raising the cap to one child per family in 1979 increased. However, the provinces around the nation applied that tighter rule inconsistently, and by 1980, the national government was attempting to standardise the one-child rule across the board.[442]

In late 1978, a voluntary initiative encouraging families to have no more than two children with one being preferred was unveiled. Demand for raising the cap to one child per family in 1979 increased. However, the provinces around the nation applied that tighter rule inconsistently, and by 1980, the national government was attempting to standardise the one-child rule across the board.[443] The lifting of the one-child rule worked at first. The number of new born in 2016 was 17.9 million, a jump of more than 1 million from the year before. However, births dropped each year after that, to 14.6 million in 2019, the lowest since 1961. The average number of births per woman over a lifetime, at 1.7, was still below the 2.1 needed for a steady population, excluding migration.

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[441] Sarbajit Sengupta, Coronavirus, Population and the Economy: A long-term Perspective, Sagepub, https://journals.sagepub.com/doi/pdf/10.1177/0019466220968025

[442] Kenneth Pletcher, One-child Policy, Britannica, (March 28 2023), https://www.britannica.com/topic/one-child-policy

[443] Bloomberg News, China's two-child Policy, Bloomberg, (January 22, 2020 at 3:16 PM GMT+5:30), https://www.bloomberg.com/quicktake/china-s-two-child-policy

Later on, 31st May 2021, China introduced the Three-child policy whereby a couple living in China can plan on having three child which was decided in a meeting which was instituted on the topic of population aging by CCP (Chinese communist Party) General Secretary, Xi Jinping.

To sum it all up, China's population was 1.41 billion in 2020, an increase of 72 million since the last census in 2010, the census recorded 264 million in the age group of 60 and over, up 5.5% since 2010 and accounting for 18.7% of the population. Those in the age 15-59 were 894 million persons, down by 6.8% since 2010 and accounting for 63.3% of the population. China's workforce in the 15-59 age bracket peaked at 925 million in 2011 the ministry of Human Resources and social security said:[444]

> *"The number was down to 894 million in the last census and was predicted to be dropped to 700 million by 2050."*

In January 2023, the government of Sichuan province announced that it had abolished the 3-child policy completely therefore parents in Sichuan can legally have as many children as the want.

Comparison with Indonesia

Indonesia is one of the most robust and thriving National Family Planning initiatives in the world, with the aid of Muslim leaders, the country doubled its contraceptive ubiquity rate to nearly 60% between 1976 to 2002. It halved its fertility rate from 5.6 to 2.6 children per woman, this unquestionably helped lay the foundation for Indonesia's rapid and effective annual economic growth of at least 5% since 1980.

This situation changed as the new order government came to power particularly after President Suharto joined other heads of State in signing the declaration of the world leaders in 1967. In this Declaration rapid population growth was considered an obstacle to socio economic development, a total policy reversal was signalled when the President established a government agency, called the National Family Planning Co-ordinating Board which is responsible for Co-ordinating family planning programs in the country. The twin goals of the

[444] Ananth Krishnan, China passes three-child policy into law, thehindu, (August 21, 2021 12:05 pm IST – Beijing), https://www.thehindu.com/news/international/china-approves-three-child-policy-with-sops-to-encourage-couples-to-have-more-children/article36010916.ece

programs were to promote the norm of the “Small, Happy, and Prosperous Family” and to reduce Fertility through the promotion of Contraceptive use. The quantitative aim of the government population policy has been to achieve replacement level fertility, by vigorously promoting the 2-child norm by the year 2010-2015, and to reach 0 population growth by the year 2050.

Conclusion

In conclusion, the Population Amendment Bill 2019 represents a significant step towards addressing the complex challenges associated with population growth. The bill aims to strike a delicate balance between managing population dynamics, ensuring sustainable development, and safeguarding the well-being of citizens. But by implementing penal actions those with more than two children such as debarment from being an elected representative, dismissal of financial benefits under the public distribution system.

The bill acknowledges the need to address both the economic and social implications of population growth. It emphasizes the importance of maintaining a workforce that can sustain economic growth while also recognizing the strain on resources and infrastructure that unchecked population growth can cause. But taking into consideration the fertility rate India has in today’s time, it is 2.05 as in 2020 and this rate is considered as the replacement ratio where the coming generation will replace the existing generation.

However, it is important to note that the success of the Population Amendment Bill 2019 will heavily depend on effective implementation and continuous evaluation of its outcomes. Regular monitoring and adaptation of policies will be necessary to address emerging challenges and to ensure that the bill's objectives are met. And in place of imposing penal actions in needs to take into consideration other subsidiary methods to control the population.

THE CONSTUTIONALITY OF CAPITAL PUNISHMENT

Jahnavi Bhuptani & Dev Shroff*

ABSTRACT

International human rights treaties have prohibited the death penalty as a part of the right to life. The International Covenant on Civil and Political Rights places emphasis on this (ICCPR). Even though Article 6(1) clearly states that "Every human being has the intrinsic right to life," [445]the ICCPR does not directly forbid the application of the death sentence. There ought to be a legislation protecting this right. "No one shall have his life taken in an arbitrary manner." The need to regulate the criminal justice systems in every nation is essential in a world where crime rates are rising at an alarming rate. It is no longer possible to govern crime and punishment by precedents and customs since they have grown to be such a significant and delicate aspect of society. The subjective component must be as little as possible and a predetermined regime must be used. However, because they are overly severe and ignorant of the accused's rights, no predetermined penalties may be applied to the accused. The accused is entitled to a number of fundamental human rights, which the fixed penalty regime violates.

Given that it is a form of society's embodiment of the collective conscience's admonition of the crime, as defined by Durkheim, the practise of meted out penalties is a crucial component of the criminal justice system. "Punishment regulates all humans; punishment alone maintains them; punishment awakens while their guards are sleeping; the wise see punishment (danda) as the perfection of justice,"[446] according to Manu, who also defines the goal of punishment. Punishment is the harm done to the offender's person or property that is authorised by the law. Criminal law is awe-inspiring and deterrent because it punishes the perpetrator for the offence they have done.

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* Students of Gujarat National Law University

[445] The Extrajudicial Killing of General Soleimani, and the Right to Life under International Law

[446] Administration of Justice: Theories of Punishment

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INTRODUCTION

The need to regulate the criminal justice systems in every nation is essential in a world where crime rates are rising at an alarming rate. It is no longer possible to govern crime and punishment by precedents and customs since they have grown to be such a significant and delicate aspect of society. The subjective component must be as little as possible and a predetermined regime must be used. However, because they are overly severe and ignorant of the accused's rights, no predetermined penalties may be applied to the accused. International human rights treaties have prohibited the death penalty as a part of the right to life. The International Covenant on Civil and Political Rights places emphasis on this (ICCPR). Even though Article 6(1) clearly states that "Every human being has the intrinsic right to life," [448]the ICCPR does not directly forbid the application of the death sentence. There ought to be a legislation protecting this right. "No one shall have his life taken in an arbitrary manner." The article demands the implementation of the death sentence only for the most serious offences and stipulates certain precautions that signatories who preserve the death penalty must adhere to “Amnesty, pardon, and commutation of the sentence of death may be granted in all cases.” The UN Human Rights Committee, which oversees the ICCPR and whose interpretations of it are considered authoritative, stated in its General Comment on the ICCPR from 1982 that the death sentence should be abolished and that any move would constitute "progress of the right to life."[449]

OBJECTIVES OF THE PAPER/RESEARCH QUESTION

- Can capital punishment facilitate justice, or can it become a tool for discrimination?
- Should capital punishment be used in the rarest of rare cases only?
- Are the laws on capital punishment biased towards the citizens?

[447] Administration of Justice: Theories of Punishment
[448] The Extrajudicial Killing of General Soleimani, and the Right to Life under International Law
[449] Human Rights Committee - OHCHR

- Understanding the procedural and social aspects of how capital punishment is construed to be.

RAREST OF RARE CASES

The Apex Court has laid down the rule for sentencing of murder cases, which is that the court should award the death sentence only in the "rarest of rare cases". However, the application of this doctrine has not been uniform. The principle was laid down in Bachan Singh v. State of Punjab[450] and further developed in terms of mitigating and aggravating factors in the subsequent Machchi Singh v. State of Punjab[451]. It has been applied by various courts across India. However, the sentencing pattern is not only arbitrary but also unequal.

The Criminal Procedure Code, 1973 [452]provides for wide discretionary power in the hands of a judge once the conviction is determined. The power of conviction and acquittal has been provided under Sections 235, 248 and 325. The code requires judges to note "special reasons" when imposing the death penalty and also requires a pre-sentencing hearing to be held in the court. This pre-sentence hearing allows the judge to ensure that the convict is given a chance to speak and to get an idea of the social and personal details surrounding the "special reason" for awarding a death sentence.

The death penalty under the IPC[453] and sentencing procedure under 354(3), Cr.PC were held to be constitutionally valid by the Supreme Court in the Bachan Singh case, with the following guidelines:

1) Only the most serious crimes with the highest degree of guilt should result in the death punishment.

2) The accused's circumstances must be taken into account before the death penalty is handed out.

3) "Living in prison for the rest of one's days is the norm, and dying is the exception." Only when it seems that life in prison would be an entirely insufficient punishment should the death penalty be applied.

[450] *Bachan Singh vs State Of Punjab* [1980] AIR 1980 SC 898, 1980 CriLJ 636, 1982 (1) SCALE 713, (1980) 2 SCC 684, 1983 1 SCR 145.
[451] *Machhi Singh And Others vs State Of Punjab* [1983] 1983 AIR 957, 1983 SCR (3) 413.
[452] THE CODE OF CRIMINAL PROCEDURE, 1973. ACT NO. 2 OF 1974. [25th January, 1974.]
[453] Indian Penal Code, 1860 Act ID: 186045. Act Number: 45. Enactment Date: 1860-10-06. Act Year: 1860.

4) A fair balance between the aggravating and mitigating conditions must be found on a balance sheet of the circumstances prior to the option being exercised.

To conclude, it has been noticed that in many cases, although the relevant facts are similar, the sentencing is done differently. Many cases don't follow the guidelines laid down in the Machchi Singh case of a balance sheet of aggravating and mitigating factors. In some instances, the decision to award or not award the death penalty is influenced by political or social factors. The uncertainty of the life and death of the offender is dependent upon the coram of the bench. Different sets of judges might find an offence to be the rarest of rare cases, while the other set of judges might not.

BACHAN SINGH
VS
STATE OF PUNJAB

Citation: AIR 1980 SC 898, 1980
Bench: Justice Y. V. Chandrachud, Justice A. Gupta, Justice N. Untwalia, Justice P. N. Bhagwati, Justice R Sarkaria and Justice A.C. Gupta

A COMPARATIVE STUDY OF THE CAPITAL PUNISHMENT LAWS

Capital Punishment in the UK

One of the 140 nations without a death penalty law is the UK. In India, things were different even though Britain had a policy of only applying the death sentence as a last resort. The 1957 Homicide Act, which set a cap on the number of people who may be executed each year, made British law more tolerant of the death penalty. Later, the Murder (Abolition of Death Sentence) Act of 1965 replaced it and restricted the application of the death penalty to four offences: treason, espionage, violent piracy, and arson in a dockyard. Not a single individual was given the death penalty following the last execution in 1964, which is significant. Even though the death sentence was legal in the UK, it was not actually used there. Peter Anthony Allen was

the last person put to death for the murder of John Alan West. The House of Commons supported the Human Rights Protocol published by the European Commission, which resulted in its abolition in the UK, save for situations involving war or the prospect of war. The Human Rights Act of 1998 specifically outlaws the death penalty while generally defending the right to life. It must be noted that the Sixth Protocol proliferated the abolition of capital punishment except in cases of war. However, through the 2004 amendment, it was substituted by the Thirteenth Protocol, which completely ruled out the capital punishment system from the British system.

- Capital Punishment in the USA

In a country like the USA, which prides itself on its libertarian concepts, the concept of deprivation of life itself can be considered contradictory. But while being governed by noble libertarian ideals, the USA is a country that has not yet abolished the death penalty. Treason, extensive drug trafficking, murder, attempted murder of a member of the judiciary, etc., occur. frequently in the USA. The specific legislation which deals with the implementation of the death penalty is Chapter 228 of Title 18 of the United States Code. This relates to the imposition of the death penalty for any offence under sections 794 (collecting or providing defence information to a foreign government) or 2381 (treason), or an offence under section 3593 if the defendant killed the victim on purpose, caused serious bodily harm that resulted in death, actively took part in the act that caused the victim's death, or engaged in violent behaviour.

- Capital Punishment as per Indian Constitution and IPC

Section 53 of the Indian Penal Code, 1860 in Chapter III deals with the kinds of punishments which can be inflicted on offenders. The types of punishment are as follows: the death penalty, imprisonment for life, imprisonment, forfeiture of property; and fine.

Capital punishment is another name for punishment via death. A person who receives this sentence is hung till death. The government has approved and the court has mandated this penalty. It is only offered in the rarest of instances. Only significant offences are eligible for this penalty. The death penalty, which is the worst punishment permitted by the IPC, has long been a contentious issue. There are arguments both for and against continuing to use the death penalty as a form of punishment. In Jagmohan Singh v. the State of Uttar Pradesh, [454]it was contended that the death sentence is illegal as a punishment since it is in violation of the

[454] *Jagmohan Singh vs The State Of U. P* [1972] 1973 AIR 947, 1973 SCR (2) 541.

constitution. The death sentence was upheld by the Supreme Court as legal. It was decided that if life is taken from a person in accordance with legal protocol, it is constitutionally legal. For crimes covered under sections 121, 132, 194, 302, 303, 305, 307, 364A, 376E, 396, and others of the Indian Penal Code, the death penalty or capital punishment may be imposed. The court is not required to impose the death penalty in these clauses. Previously, the death penalty was required for the offence listed in section 303, which is murder by a person serving a life sentence.

The death sentence was declared illegal in Mithu v. State of Punjab [455](AIR 1983 SC 473) because it contravened Articles 14 and 21 of the Constitution. The death sentence was affirmed by the Supreme Court in Bachan Singh v. the State of Punjab [456](MANU/SC/0055/1982), however the court only authorised its use in the rarest of situations. If the case fits this theory, then the death penalty could be applied. The court made no specific mention of what is included in the group. Nevertheless, the court has occasionally ruled that situations including honour murders, assassinations, genocide, horrific murder, etc. fit within the category of "rarest of the rare occurrences." According to section 54 of the Indian Penal Code, the relevant government may substitute any other penalty for the death penalty. There is no proof that the death penalty deters crime, and jurisdictions without the death penalty continue to have murder rates that are much lower than those in those with the death penalty. The sole defence for the death penalty is retributive justice since it has no deterrence effect and cannot change the criminal (as a dead person cannot be changed). However, keeping this principle in view, the offender in cases involving the murder of a large number of people needs to be definitely awarded the death penalty. The legal process through which a state uses its authority to end human life is known as capital punishment. Since the founding of the state itself, it has existed. During the British era, many Indians were hanged, sometimes even without trials. With the signing of the independence declaration, a new era in Indian law began. It was in stark contrast to the British system, which limited Indians' access to justice, as well as to earlier empires and kingdoms, where the ruler of a given state or kingdom served as that state or kingdom's supreme authority and the source of all justice, and his decrees were adopted verbatim as the law of the land. After India attained democracy in 1947, the methodology for imposing death sentences underwent a significant transformation. In line with the rules of the Indian Constitution, the IPC mandates the imposition of the death penalty for a select number of crimes.

[455] *Mithu, Etc., Etc vs State Of Punjab Etc. Etc* [1983] 1983 AIR 473, 1983 SCR (2) 690.
[456] supra

The Constitution's Article 21 explicitly declares that "no individual shall be deprived of his life or personal liberty unless in accordance with the method prescribed by law" and protects every citizen the fundamental right to life. This means that the state may take your life through the specified legal process if it sees fit, but it will never be taken away from you without following the proper mechanism set by law. The Supreme Court decided that the death sentence should only be applied in the "rarest of rare" instances in the Bachan Singh decision from 1980.

By bringing up the UK and USA along with the Indian stance on capital punishment, it is a way to demonstrate how different nations have reacted to the severity of a resource, which is essentially equal to taking away a person's life. As discussed, the UK has completely abolished the death penalty as a capital punishment and is one of the many countries to do so. With a position that the "death penalty undermines human dignity; any miscarriage of justice leading to its imposition is irreversible and irreparable, and there is no conclusive evidence of it working as a deterrent to crime" as stated by the UK International Ambassador on Human Rights, the constitutionality of capital punishment was held invalid.

However, the retention of capital punishment in India has been defended on various grounds. The first reason can be "Salus Populis est Lex Populis," meaning that the welfare of the people or the public is the supreme law. As already mentioned before, the death penalty as a punishment is implemented in the rarest of rare cases. Hence, it can be logically assumed that such cases are so violative and so drastic that they would shock and aggravate the public conscience. Therefore, giving a capital sentence is left to be the only way to mitigate that offence. An example of such a case is the hanging of Ajmal Kasab. The act of Kasab was a terrorist attack that caused domestic strife. It also emphasised the gravity of the offence and his participation in waging war against the state, and the citizens demanded Kasab's execution. The court in this case saw public outrage and fear focused primarily on the terrorist organisation; what distinguishes this case and marks a shift in the court's policy is the sheer horror of the acts committed in comparison to previous terrorist acts. Another reason for the retention of capital punishment is the deterrence theory. It is assumed that humans fear death. And hence, by keeping the death penalty as one of the punishments, the number of offences pertaining to implementing this type of punishment would decrease because it would create fear in their minds and deter them from committing such heinous acts. Furthermore, the legislative trends towards capital punishment in India must also be noted. Since there are provisions of pardon and mercy petition on the side of the President and Governor, the retention of capital punishment remains plausible because there are checkpoints to prevent its misuse.

When it comes to USA, Even though it has been abolished in more than half of the states, the death penalty is still regarded as legal in the USA. In a 2020 poll, more Americans supported the death penalty than opposed it. 60% of American adults, including 27% who strongly support it, support the death sentence for murderers. According to a recent Pew Research Center study, around four out of ten (39%) people oppose the death sentence, with 15% being vehemently opposed[457]. Capital punishment was put on hold following the *Furman v. Georgia* judgement of 1972, but it was reinstituted following the *Gregg v. Georgia* judgement. One way to understand why America continues to execute people is to consider the Fifth Amendment, which states that no one shall be "deprived of life...without due process of law." How could the framers of the constitution have prohibited capital punishment in the Eighth Amendment when they specifically contemplated it in the Fifth? The court in Gregg cited two reasons for the death penalty: retributive justice and deterrence. Justice Stewart wrote that retribution is "an expression of society's moral outrage at particularly offensive conduct" and is "essential in an ordered society that asks its citizens to rely on legal processes, rather than self-help, to vindicate their wrongs." In other words, a heinous crime deserves a heinous punishment. The death penalty, hence, still continues to be one of the "greatest expected deterrents" for committing a crime[458].

A CASE LAW ON CAPITAL PUNISHMENT AND RAREST OF RARE CASES

"The object of sentencing policy should be to see that crime does not go unpunished and that the victim of crime as well as society have satisfaction that justice has been done to it." - Purushottam Dashrath Borate Vs. State of Maharashtra[459]

Citation-(2015) 6 SCC 652 (Three-Judge Bench)

This historic case and ruling acts as a deterrence to all horrific criminals, including those who commit rape and murder. This will demonstrate that the government and the law do not remain silent and that those who commit such crimes will face punishment. People frequently believe they can get away with committing crimes. This verdict demonstrates that society and the government will not pardon offenders. All of India will be given justice.

[457] Most Americans Favor the Death Penalty Despite Concerns About Its Administration
[458] Why America still executes people
[459] *Purushottam Dashrath Borate & Anr vs State Of Maharashtra* [2015] CRIMINAL APPEAL No. 1439 OF 2013.

Issue: When can the heinous crime of rape be awarded the death penalty instead of life imprisonment?

Held: The current case qualifies as one of the "rarest of rare," according to the High Court of Mumbai, which took note of the well-established law established by this Court. The accused-appellants perpetrated the atrocious actions in a cunning and cold-blooded way without any remorse and without being deterred by the consequences, according to the High Court. As a result, the High Court upheld the Sessions Court's decision to execute the defendant.

The HC panel determined that the death penalty is appropriate in light of the extremely unusual circumstances surrounding the execution of their plan to kidnap, rape, and brutally kill Chaudhary. Kokade's position in the taxi, their disregard for human life and mistreatment of women, and the fact that they picked up another employee after committing this heinous crime all plainly show that this case is in the rarest of rare categories.

According to the Supreme Court, "the heinous offence of gang-rape of an innocent and helpless young woman by those in whom she had reposed trust, followed by a cold-blooded murder and a calculated attempt to cover-up is one such instance of a crime which shocks and repulses the collective conscience of the community and the court." The court also dismissed the appeal and upheld the HC's ruling. This Court does not hesitate to decide that this case is one of the "rarest of rare," deserving only the death penalty, in light of the aforementioned established threshold. The society as a whole is so horrified by this act that imposing alternative punishments, such as a life term for the accused, would not serve the interests of justice. Instead, it would entice further potential criminals to commit the same acts and escape with the lighter/lesser penalty of life in jail.

CONCLUSION

The key problem when it comes to the implementation of capital punishment is its validity. It should be understood that human life must always be given the greatest importance in any legal system- for the legal system revolves around regulating those human lives itself. But by dealing with death penalties, there is a clear attack to the ideals of freedom of life and a based view of deprivation of life. As discussed above and elucidated by taking comparative examples vis-a-vis different nations, there are varying stances when it comes to the validity of capital punishment. Countries like the UK have completely abolished it while countries like the USA

and India have still kept it as a form of punishment- albeit my eschewing it for the rarest or the rarest cases. The issues brought up concerned its unreliability, arbitrariness, unconscious delays, and pervasive abandonment. Bias, accompanying problems, and incorrect convictions and exonerations were the causes of the concerns about unreliability. Another reason was the executioner's inordinate delay, which defeats the goal of it. Due to the court-imposed requirement for capital jurors, there is bias in the verdict. A case can undoubtedly be impacted by one's opinion towards the death penalty. Despite its short comings, some nations do consider capital punishment a valid mode of punishment.

SUGGESTIONS

In all formulations, the possibility of error leading to injustice is always there. This is evident from the concept of criminal jurisprudence that India follows, which is “innocent until proven guilty beyond reasonable doubt”. The principle is to save one innocent person even if a hundred guilty escape. The guidelines laid down by the apex court in the Bachan Singh case are a significant tool to control the death penalty. Without these guidelines, the imposition of the death penalty would otherwise have definitely been higher. The only possible safeguard lies in the procedural law and adherence to the guidelines, along with pre-sentence hearing, unanimous decisions of the judges might also be one of the safeguards. According to the 187th Law Commission report of 2003, it can be strengthened by providing a mandatory appeal to the apex court.

The course of Alternate Dispute Resolution: Necessity of time

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Introduction

The concept of alternative dispute resolution (ADR) has gained popularity due to its ability to reduce the likelihood of conflicts arising in court. Although a lawsuit is typically a "lis inter parte," India's legal system has developed a mechanism known as the ADR Mechanism that can be used to settle disputes.

Through the use of mediation or arbitration, the parties involved can save a lot of money and time by resolving their disagreements. These procedures also help them get along better and come to terms with their decisions.

Most disputes can be resolved in private settings, which are more practical and cost-effective. There are at least four types of ADR: mediation, negotiation, arbitration, and collaborative law. Conciliation, on the other hand, is sometimes referred to as a fifth kind.

Due to the heavy caseload in Indian courts, the need for more effective mediation and arbitration techniques has been acknowledged. In response to this issue, a conference was organized on December 4, 1993, in New Delhi. The Chief Justices of India and the Prime Minister of India participated in the meeting.

According to the report, the leaders of the country's judiciary and government agreed that courts cannot handle all disputes. Instead, they suggested that parties resolve their disagreements through mediation, negotiation, or arbitration. These procedures can help them get along better and reduce the stress of going to trial.

There is no better way to resolve disputes than by establishing facilities that provide various types of dispute resolution, such as mediation, conciliation, and arbitration. This process can be carried out in developing countries such as India, which are experiencing rapid economic reforms.

The concept of alternative dispute resolution aims to create a more equitable and effective alternative to the traditional judicial system. It involves faster and more cost-effective ways of

delivering justice. Some of the different types of dispute resolution that are available include mediation, conciliation, arbitration, private judging, and summary jury trials.

The scientific method used in developing these procedures has been utilized in various countries, such as the US, UK, China, Japan, Australia, South Africa, and Singapore. Because of its advantages, alternative dispute resolution has become very popular in these regions. It allows parties to resolve their disagreements quickly and easily, and it creates a more informal and relaxed setting for doing so.

In response to the growing popularity of alternative dispute resolution in developing countries, a law was enacted in 1996 to provide guidelines for the use of conciliation and arbitration. This new legislation also aims to protect the impartiality of the arbitrators.

Changes were made to the arbitration procedure in response to the 1996 Act. This legislation has made foreign businesses and investors more comfortable doing business in India. It also helped in the transfer of technology and other innovations.

Compared to going to court, alternative dispute resolution is more flexible and can be used by both parties. It allows them to reach a settlement that is both cost-effective and time efficient. It does not cause tension between the parties and helps them work together to resolve their disagreements.[460]

One of the main goals of ADR techniques is to avoid going to court. However, courts are also involved in certain cases, which can help keep the process going. This practice is widely recognized globally.

Although most governments give the judiciary the power to review arbitration cases, some of these end up in the Supreme Court. In India, the lower courts handle many of these cases. Because parties have agreed to settle disputes through arbitration, the concept of party autonomy is the foundation of any agreement.

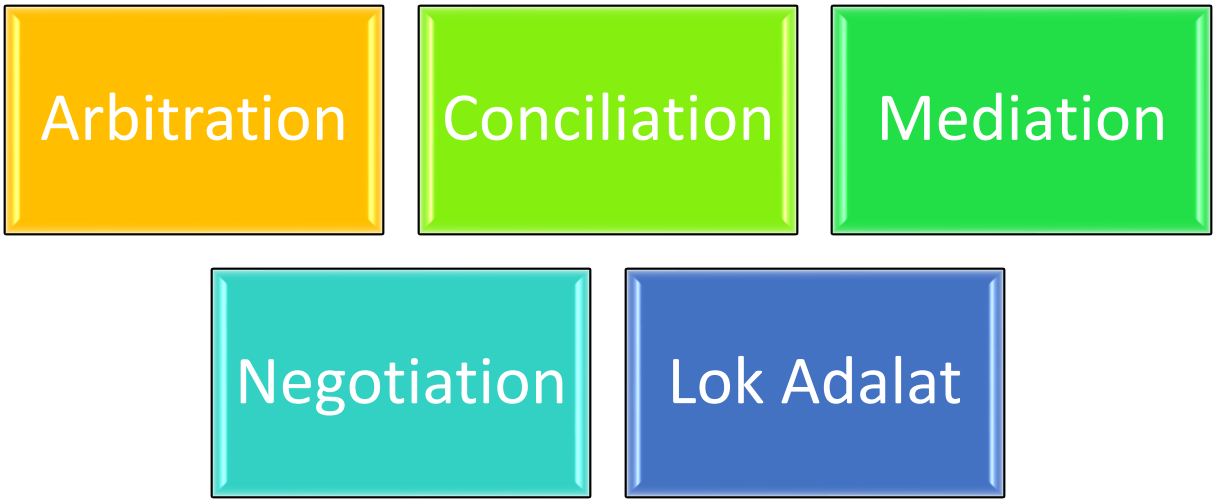
This concept can be limited by the laws and policies that are made in response to the situation. For instance, the norms of international organizations can restrict the parties' freedom of speech and expression.

[460] Justice S.B.Sinha, “ADR and Access to Justice: Issues and Perspectives”, SCR, 2008

Sometimes, courts can also get involved in the award process. This can help maintain the status of the agreement. However, it is generally considered inappropriate for parties to have complete independence in an arbitration.

Law Regarding Arbitration and Conciliation, 1996

The legislation establishes the three phases of the process: the first is for establishing an arbitration procedure, the second is for enforcing foreign judgments, and the third is for conciliation.



Arbitration:

The parties involved in a case must first enter into an arbitration agreement in order to start the procedure. This type of agreement should be included in the contract that the parties sign.

An arbitration agreement can be established from the letters, telegrams, or telex sent by the parties. A written agreement can also be obtained from a statement of defense or claim, which both parties can claim to have established.

If one of the parties refuses to participate in the process, the other party can ask the Chief Justice's office to appoint an arbitrator. Certain grounds can be used to challenge the selection of an arbitrator. These include the impartiality of the arbitrator and the lack of qualification required by the agreement.[461]

[461] D. M. Popat, —Adr And India: An Overview", The Chartered Accountant, Dec 2004 8

The arbitration process provides the parties with limited opportunity for court intervention. Although the tribunal can only hear challenges to its jurisdiction, it can still decide to uphold or overturn the award. If the request for a review is denied, the other party has little choice but to appeal the decision to a higher tribunal.

If the deadline for filing an appeal has passed, the award becomes final.

Conciliation

This process, known as conciliation, is a less formal alternative to arbitration. It does not require an existing agreement to start. Although one conciliator is usually recommended, two or three can be used depending on the number of parties involved.

Each of the parties involved in the dispute can also send a statement to the mediator, which provides an overview of the issues and the context of the conflict. The conciliator can then request a meeting or other forms of interaction with the parties.

After the mediator has determined that the conditions for a settlement are favorable, he can then draft the terms of the agreement. Once both parties sign the document, it becomes legally binding. This process is similar to mediation in the US. In India, however, mediation is a completely informal method of resolving disputes.

Mediation

A type of dispute resolution known as mediation is a process that aims to facilitate the settlement of disputes between two or more parties. Unlike traditional mediation, which involves agreeing to terms set by a third party, parties in this type of settlement decide on their own terms. This type of mediation also allows various groups and individuals to participate in the process.

Through mediation, both parties can reach an agreement that has a tangible effect on the disputed issue. Usually, a mediator uses relevant skills and tactics to help facilitate the discussion between the opposing parties.

For parties involved in various disputes, including those involving business, diplomatic, and family matters, mediation can be an effective way to resolve their disagreements.

If a business and a union need to reach an agreement, then a third-party mediator can help them do so, as a union representing its members may go on strike. The mediator would then try and help both parties reach a settlement on the terms of any pending agreements or contracts.[462]

Negotiation

Negotiating is a process that aims to create outcomes that are beneficial for both parties and their respective interests. It is commonly used to resolve conflicts outside of court.

Different types of settings, such as divorce, parenting, and marriage, require a certain level of negotiation. Negotiating is also referred to as a field of academic study, and professional mediators are typically involved in various specialized roles.

The Lok Adalat:

In India, village elders have long been known to play a significant role in helping resolve conflicts. The country's Lok Adalat system, which was inspired by Mahatma Gandhi's teachings, is an improved version of the traditional mediation process. To ensure that the courts are equipped with the necessary resources to handle cases, various government agencies and legal organizations, such as the Supreme Court, hold mock courts regularly.

Usually, the people who are involved in mediation have backgrounds in law or social activism. They do not have the authority to resolve criminal cases. Unlike traditional courts, which can take a long time to resolve, mediation can be completed in a relatively short amount of time. This is because the parties involved do not have to pay court fees.[463]

LEGAL PROVISIONS

Constitutional Background of ADR

The concept of ADR is a constitutional provision of the Indian Constitution that provides free legal aid to the poor. This allows them to defend themselves in court. The campaign to preserve this provision started after a committee report by two justices was published.

[462] Christine Cervenak, David Fairman and Elizabeth McClintock, ―Leaping the Bar: Overcoming Legal Opposition To ADR in the Developing World", Dispute Resolution Magazine 1998
[463] V. Karthyaeni ; Bhatt Vidhi, "Lok Adalat And Permanent Lok Adalats- A Scope For Judicial Review: A Critical Study"

According to the study, the poor will be able to access all courts, including those in the Hon. Supreme Court. The committee that was set up to implement the concept of legal aid services has also created various programs and courts that are designed to help the poor.

To ensure that the poor get justice, a modern and efficient legal framework is needed. This can be achieved through the development of a variety of human resources and judicial technology.

The concept of providing the people with justice is a core component of the Indian Constitution. It also includes provisions for different types of justice, such as political and economic justice.

The development of a legal framework that is modern and efficient is also needed to ensure that the people get justice. This can be done through the use of various technological tools and models.

Legislative Recognition of ADR

Nyaya Panch or the People's Court Decision is a type of mediation or arbitration that's commonly used to resolve conflicts. It's considered to be a part of the lok adalat philosophical framework. The concept of the court involves the people who are indirectly or directly involved in the disputes.

Although lok adalat is commonly associated with mediation or conciliation, it's also used for other types of dispute resolution. The legislation governing the use of dispute resolution has changed over time to encourage quick resolution of disputes. To alleviate the burden of courts, various organizations such as the International Center for Alternative Dispute Resolution (ICADR), the Indian Consumers' Association, and the Lok Adalats were established.

The elimination of the UN Convention on International Commercial Arbitration (UNCITRAL) model legislation was also a major factor that led to the development of lok adalat. In 1996, two laws were also introduced to encourage quick resolution of disputes: the Arbitration Act

of 1996 and the Civil Procedure Code's Section 89. These laws demonstrate the legislative intention to ensure that justice is delivered quickly.[464]

Important ADR-Related Provisions

People have this chance thanks to Section 89 of the Civil Procedure Code of 1908, which allows the court to formulate the parameters of a potential settlement and refer it to Lok Adalat, Arbitration, Conciliation, or Mediation if it appears that there are elements of settlement outside the court.[465]

The Legal Services Authority Act of 1987 and The Arbitration and Conciliation Act of 1996 are the statutes that address alternative dispute resolution.

Factors Limiting Arbitration's Growth in India

The objective of the Constitution of India is to provide justice to all individuals who have been wronged. One of the most important reliefs that the country has provided is the process of arbitration. However, due to various factors, this procedure has not grown as it should.

Typical thinking of Indians

Despite the country's progress in becoming a modern nation, many people still believe that courts are the best option when it comes to resolving disputes. This is not a good thing, as it shows that they are not ready to accept changes. This type of thinking can actually harm the people of a country.

Absence of Proper Laws

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[464] Dr. Avtar Singh; Law of Arbitration And Conciliation (Including Adr System), Eastern Book Company, Lucknow, 7 th Edition (2006)

[465] Ashwinie K Bansal, Arbitration: Procedure and Practice, LexisNexis India.

In 1996, the Arbitration Act was enacted in India. However, since it has not been updated on lot of issues, it is important that the country's law makers take a look at the various issues related to the arbitration process.

The laws should be made more strict in order to increase the number of people who are willing to participate in arbitration. This is because many people are not ready to take risks when it comes to dealing with complex issues.

Intrusion of Courts in Arbitration Proceeding

The court should not intervene in the arbitration proceedings. This is because it can influence the decisions of the arbitral tribunal and encourage people to approach the courts instead of settling disputes through mediation.

This also means that there should be a limit on the scope of challenge that can be made under Section 34 of the Act. Two issues arose during the White Industries Vs. the Republic of India[466] case: the intervention of the judiciary and the delay in the arbitration process.

Lack of Knowledge

One of the main factors that has not helped the growth of the arbitration process in India is the lack of awareness about its various aspects. This is because many people are not aware of the procedures involved in the arbitration process. This is why many small businesses and individuals are not able to participate in the proceedings.

Another issue that has not helped the growth of the arbitration process in India is the lack of awareness about its various aspects. This is why many small businesses and individuals are not able to participate in the proceedings. We must now discuss how we can improve the country's image as an arbitration destination.[467]

[466] White Industries Australia Ltd v India, Final award, IIC 529 (2011)
[467] N V Paranjape, Arbitration and Alternate Dispute Resolution, 2006

The other factors mentioned above are the main reasons why the arbitration process in the country has not been growing faster. This is why we must now discuss how to improve the country' s image as an arbitral destination.

Why ADR is the way ahead ?

The rapid emergence and growth of international trade has resulted in a significant increase in the volume of commercial disputes. Although the number of disputes has increased, the growth rate of dispute resolution procedures has not been fast enough to catch up with the other factors that have contributed to the development of the country's economy.

In India, the use of alternative dispute resolution (ADR) has become more prevalent for businesses operating in the country. There are various reasons why this type of process is preferred over the traditional method of resolving disputes.

The procedures of courts are designed to follow strict rules when it comes to resolving disputes. This ensures that the outcome of the case is based on the truth. The Court also provides legal answers to questions related to rights and entitlements.

Through the use of alternative dispute resolution (ADR), people can participate in the process of resolving disputes, which promotes self-reliance and legal awareness. It can also help parties to regain a sense of control and respect for their rights. This process is usually conducted in private and is more cost-effective.[468]

One of the main advantages of ADR is that it allows parties to resolve their disputes without having to resort to external influences. This process does not require them to follow a set of rules and regulations and allows them to reach a settlement that is their own. The involvement of the other parties in the process also helps to improve the chances of reaching a settlement.

Amicable settlement of disputes

A good dispute resolution process can be achieved through the use of ADR. It is very important for businesses to have a competitive environment as it can help them improve their efficiency and reduce their costs.

[468] Aloke Ray, Dipen Sabharwal, “What Next for Indian Arbitration?”, The Economic Times, 2006

Speedy disposal of trial

Unlike in the traditional court system, ADR provides for a fast and simple way to dispose of trials. It does not have the scope of adjournment and stay orders.

Economical settlement of disputes

In contrast to the traditional court system, ADR does not involve the expenditure of huge amounts of money to pay the various individuals involved in the trial.

Legal recognition

Indian Statutes have recognized the use of ADR. For instance, the Civil Procedure Code of 1908 provides for the possibility of compromise, but it does not allow appeals. Similarly, the Industrial Disputes Act, 1947 provides for the pre-requisite of conciliation in collective bargaining and pressure tactics.

Advent of multinational corporations

Due to the dynamic nature of the business activities of multinational corporations, they need to have a dispute resolution mechanism that can quickly resolve their disputes.

Conclusion

Alternative dispute resolution (ADR) is a great way to get justice. It can be used for any dispute, and it's very cost-effective. There are many reasons why it's successful, such as its ability to resolve disputes quickly and easily, its lack of formality, and its low cost.

Since the various methods of dispute resolution have not yielded a lot of practical solutions, it is recommended to adopt an ADR approach instead. This method allows both parties to ask a third party to mediate the dispute. It is also important that both parties agree to follow this judgment.

Instead of going to court, parties can utilize ADR to resolve their disputes through negotiation and compromise. This method can help them avoid escalating their tensions.

ADR utilizes a more forceful approach, which is why it is often referred to as a "forceful mediation." This method also offers suggestions on how to resolve disagreements. With that in mind, it is simple to understand why it is a great choice for settling disputes.

The ADR system in India is faced with various issues, including economic, social, and legal problems. The country's diverse population and the lack of government benevolence are some of the factors that contribute to these issues.

The government should take immediate action to address these issues, and this can be done through the adoption of the 176th report of the Law Commission. In addition, the Union and State governments should develop effective educational programs for the public and arbitrators.

One of the most important issues that the government should address is the acceptance of the concept of legal literacy among the general public. This can be done through the establishment of a comprehensive program that aims to teach the public about the various aspects of ADR.

The general public is also responsible for the inaccurate use of the ADR system. People should consider using this system to resolve their legal problems instead of resorting to litigation. The objective of the system is to provide them with quick and affordable justice. In addition, law education in India should take seriously the procedures related to ADR.

Nowadays, these procedures are only taught as part of certain courses, which mainly deal with the application of these in relation to mergers and acquisitions.

India embodies the ideals of the old and the contemporary. The people of this country are expected to maintain the same spirit of the country while taking advantage of its various conflict resolution procedures. The welfare of its regular citizens is the driving force behind all legislation and amendments.

The concept of alternative dispute resolution is not a replacement for litigation. It is intended to help improve the efficiency and effectiveness of our judicial system. Various steps must be taken to reduce the load on the judiciary.

The number of cases that are currently on the backlog is growing, yet the judiciary is not being held accountable for its actions. This is because the country's judicial system is not equipped with the necessary infrastructure to handle the increasing number of cases.

The advantages of ADR are numerous, such as its ability to resolve disputes in a cost-effective manner and without the need for court intervention. The courts in India are also supporting the system, and a recent Supreme Court decision Salem Advocate Bar Association v. Union of India showed that they are taking a pro-mediation stance. People in the country are becoming more aware of its benefits, and parties are eager to adopt it.

Towards a Transformative Feminist Jurisprudence

-Jay Rathod and Daksha Solanki*

ABSTRACT

The concept of Transformative Feminist Jurisprudence attempts at understanding diverse intersections of Gender Justice along with our understanding of law and how it shapes Gender Justice for all of us, moreover, its impact on our fragmented society. It tries to comprehend the fragile and intricate details of how our society has navigated its way through the idea of Gender and its legitimacy. Legitimacy does create a space of acceptance for many but it needs the core understanding of socio-cultural biases towards any aspect which deals with the public, because "public policy" should have "public" at its core.

The need to delve into the complex entanglements of gender justice, which comprises our domestic space, our workplace, our sexualities and inevitably, the regions of legitimacy/illegitimacy is almost unavoidable. To look at it is to crack open possibilities of looking at it, in newer and more novel ways. It is to expand and inquire into our pre-ordained and preconceived notions of what the law can or could cover.

This 'transformative' feminist jurisprudence is something that this paper would not only gesture towards and make it a case in point but also view 'justice' through that lens. And moreover, it would try to give space to those who are deemed unacceptable, illegitimate, those who are excluded and interpreted out of existence.

It would explore the ways of relating and 'being' that are policed and coerced and also the reasons why legal remedies and legal accountability is not a reality for gender and sexual minorities.

It will critically assess the 'harm' that continues to remain unnoticed, not talked about, the harm that is hidden, and how this harm is not only in the head, that it's a concrete, even palpable reality.

Keywords: Transformative Feminist Jurisprudence, Gender Minority, Legitimacy, Public Policy.

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INTRODUCTION

The notion of transformative feminist jurisprudence is something that came to us from Ambedkar's idea of constitutional morality whose essence, whose being is ‘transformative’ and the other idea which shaped our paper is intersectionality (Crenshaw, 1991) i.e. recognising that the social-categories of age, gender, race, sexuality, class, caste and ability produces us as marginalised-subjects and the exclusion and marginality that comes with them are multifaceted and multi-layered, that one Identity-marker tends to privilege or disadvantage our lives.

And that is the reason why we should be attentive to the multitude of differences and pluralities in the 'self' and the 'other'. Our understandings and thinkingof law and the different forms of oppression really reflects how we want to see the individuals in our society to live, as divergent and non-normative lifestyles are the thoughts that the present society believes to be harmful, what follows is, these non-normative lifestyles are made subject to debates and discussion by those who live by normative rules.

People of any gender and sexuality should be entitled to the dignity of their personhood, they shouldn't be made to feel as if living a divergent and non/anti-normative life is something they should hide and that a hidden life is all they can live out. That should change. As Catherine MacKinnon says [469]'Sexuality is to feminism what work is to Marxism, that which is most one's own yet most taken away.' And as [470]Johann Wolfgang von Goethe, had said, 'I am what I am, so take me as I am' Bluntly put, we should make people what they make of themselves. And only that. Moreover, a legal reiteration of the same sentiment would only help the life of the 'other' or help the 'other' live.

This is broadly an extension of feminist legal theory/jurisprudence which seeks to delineate the ways in which the unseen lives are harmed through the present legal regularities and why it's important to inculcate an intersectional sensibility to create an inclusive society. And for that, the 'constitutional morality' would work as a liberator force.

[469] Catharine A. MacKinnon,Feminism,Method,and state:An Agenda for Theory,Vol.7.3,Feminist Theory, JSTOR,pp.515,515,1982.

[470] Navtej Singh Johar & ors. v. Union of India the. Secretary Ministry of Law and Justice (2018)

LEGAL OPPRESSION (NON-FICTION)

The position of Gender and Sexual Minorities in India has been devoid of humane value and are struggling to be seen, heard and respected. During the freedom movement and after it their right to self-determination, to affirm their gender and sexual identity was and is carelessly ignored. If not ignored then their recognition, representation and our responsibility as a society is majorly distorted when it comes to their gender affirmation and acceptance. This is of great value when we move towards making our justice system based on the principles of "gender just society'' and viewing it through a Transformative Feminist Jurisprudence lens.

The attributes and concerns related to Gender Laws in India have not reached a stage where we can say that our judicial, executive and legislative bodies have strengthened us in a way which matters and there are certain ideologies and socially burdened thought processes which restrict us. Most of our understanding of core concepts can be seen in the language we use to communicate daily which means that the presence of 'public' is significant in the law making procedure, in fact each step towards making a law should be closer to the reality which surrounds us, the culture and its biases which circumscribes us. For instance, gender centric slurs and queerphobic language is a barrier or a stereotype which should be dealt with seriously because they are the reflection of our beings and society. From our household spaces to educational institutions there are none to extremely limited dialogues on just the existence of gender and sexual minorities forget about their affirmation and that is vividly reflected in Trans Bill 2019, where the law upholds the value of medical certification from state machinery to verify and validate someone's being. This provision is not only insulting but unfair to the extent that a law is made to certify themselves from another human being as someone they want to be, who they feel they should be seen and accepted as. It again, instead of breaking and diverging from binaries, is limiting gender and sexual expression in two striking, socially accepted choices. We need to analyse a larger spectrum of what is problematic, what is the problem, how it can be dealt with by placing the "who" at the core of it, who suffers matters, their position falls naturally at the core and we mostly tend to look outwards.

The process of earning a certification is practically not possible for many and majorly it goes against the virtues of the intersectional approach of law making procedures.

In National Legal Services Authority v. Union of India,2014(NALSA)[471] The supreme court made a significant advance by creating a protected legal category of the 'third gender'. It asked the government to take corrective measures in favour of the transgender community by providing reservations in education and access to healthcare institutions. At the heart of its judgement is the pronouncement that gender is an integral feature of a person's identity and that the right to self-determination of one's gender is a part of the fundamental right to dignity. And unlike Transgender Persons(Protection Of Rights) Act (2019)[472] it gave the right to self-identify, as either male, female or third gender without taking any refuge under the medical apparatus.

Under NALSA, the supreme court courageously declared that 'Any insistence on SRS (sex reassignment surgery) for declaring one's gender is immoral and illegal'. However, this right to self-identification has been grossly ignored in practice. Meanwhile, the 2019 Act reversed this completely by making the transgender bodies subject to medical and even administrative scrutiny.

Though, NALSA clubbed persons with intersex variations with the transgender community at large which is a gross oversimplification of the intersex community and whether their actual-identity is affirmed or not they are legal subjects now. They have a stake now. Now, let's come to the problematic of 'third gender'

The terminology is only a part of an emerging legal language, however it must be pointed out how there could be a first or second gender, and if so, which one is the first, is it male as the society sanctions? Or is there any other societal-justification behind this. Because the language reeks of a hierarchy, a hierarchy of genders.

[471] National Legal Services Authority v. Union of India,No.604 of 2013

[472] The Transgender Persons(Protection of Rights)Act,2019,No.40, Acts of Parliament,2019(India)

NALSA quotes Yogyakarta principles as guidelines for state to ensure non-discrimination, enjoyment of human rights of transgender persons but the bill is violative of NALSA judgement.

It discriminates against the people to whom it promises to protect. The act is discriminative in sexual abuse and its criminal position in the law is way lesser than that of rape against women under IPC. Furthermore, it provides no set of legal actions and punishments while dealing with "protection of rights" of the transgender persons. A law which deals with human rights mandatorily has or should have measures to take against the people who are violative of it, the law should have laws for those who harm and that's when we can try to claim that justice would be served.

Can we say that we are scared of diverse identities freely accessing their fundamental rights or can they rely on our judicial system for their safety? The legitimization of rigid socio-cultural biases can be the most dangerous act to validate the harm. One reason why these laws exist is because those who made them were not the one's for whom they are made. By emphasising on who makes laws for whom is a matter of question as it echoes the untuned-band of patriarchs and that isn't very soothing right? It upholds the traditional and modern forms of inequalities, later legitimising for us to dance in tune. The vulnerabilities of gender minorities are not important for the law makers. For instance before the question of what transness is, who is counted under it, we at least could have made public spaces accessible for them. What consists of the major problem is this categorisation of people, limiting their existence to something which they aren't even comfortable being called or treated as.

GENDER JUSTICE, AN (IM) POSSIBILITY?

It is no surprise that the law of our land has relentlessly shamed, censored and even criminalised sexual and gender minorities and that they have been minoritized by the cis-hetero-allo-normative casteist order. Cisnormativity is a social construct that says that the gender-identity assigned, some would even say, enforced at birth, is the norm. Heteronormativity is a social

construct where heterosexuality is the norm, so everybody is presumed to be an heterosexual, any alternate-sexuality is therefore seen as obscene and even unnatural. It begs the question, what makes anyone think heterosexuality precedes homosexuality or any alternate-sexuality?

Allonormativity is a social construct that assumes all people experience sexual attraction. And this enforces compulsory-sexuality where various forms of non-sexuality get marginalised. It is a tool which controls the way we desire or even the way desire is produced in us.

These normativities are by and large, scripts that regulate, censors, shames and directs our ways of relating and being. We include here the casteist order because without taking into account the hydra-headed monster of caste, no issue of marginality, desire or justice can be discussed in India. Ambedkar, in his paper Castes in India: Their Mechanism, Genesis and Development used the brilliant metaphor of door to explain the nature of caste system, saying 'some closed the door, others found it closed against them.' This yet strictly followed, strictly endogamous rule and the hetero patriarchal casteist regime was put in a succinct manner by Uma Chakravarti, when conceptualising brahmanical patriarchy as 'the need for effective sexual control over women to maintain not only patrilineal succession but also caste purity.'

This conservative cis-hetero-allo-normative casteist order is one which creates, governs and directs our 'desire'. And the word desire encompasses both pleasure and pain. The pleasure entails both heteronormative and non-heteronormative passions and pain, the effacing of cruelty faced by the subjects of the visible order/non-queer people or the muted subjects/queer people. This desire is what gives the choice to live in conformity and get rewarded by the order or live differently, actively disrupting the order and getting punished for it. Persons choosing to become what they're not presumed to be creates a rupture in the order. And therefore the order deems the 'disruptor' to be unnatural and illegitimate. This field of legitimacy and illegitimacy is a creation of popular morality and law and both regulate and curb our intimacies and desires. That said, law also has a transformative potential, it can be retooled to raise consciousness, to hold the centre(cis-hetero-allo-normativity) up for scrutiny. Law can be both, a source of and weapon against oppression.

Let us consider the infamous verdict of the ceaselessly debated [473]Sabarimala judgement in 2018, which the supreme court ruled in favour of women(presumed to be cisgender). It deemed the Ayyappan temple's decision to disallow women from the age 10-50 to enter the temple as illegal.

The discrimination, legally stems from Rule 3(b) of the Kerala Hindu Places of Public Worship(Authorisation of Entry) Rules of 1965 which state that 'Women at such time during which they are not by custom and usage allowed to enter a place of worship will not be allowed entry into the temple'. This language doesn't specifically, explicitly state what custom it is that violates the divinity of the temple but we all know that menstruation is the reason behind their heterosexist discriminatory attitude. We provide this example to point out what more does it entail, which is the sexually-active nature of women of this age bracket(allonormativity at work).

The male deity at Sabarimala is considered to be a celibate and by allowing menstruating women, it is assumed and therefore alleged that these 'unclean' and 'impure' subjects (double whammy of active-sexuality and menstruation) would defile the status of divinity of this male deity and it would corrupt the temple premises because this presumably may ignite the heterosexual diety's passions. These women's bodies are deemed to be adulterated and even adulterating through these prejudicial suspicions and seen as that only. These menstruating women are assumed to be heterosexual, cisgender, sexually active women. On this, [474]Madhavi Menon brings light to a social and legal horror on how Heterosexuality is taken, unquestionably, as a legal assumption.

Even after a protracted struggle against these redundant assumptions, the women(aged 10-50) still can't enter the temple. This is a case where constitutional morality takes a back seat and

[473] Indian Young Lawyers Association v. State of Kerala(2018)

[474] Madhavi Menon,The Law of Desire Rulings on Sex and Sexuality in India.

the popular(patriarchal) morality triumphs. In Navtej Singh Johar and Others v Union of India (2018), the supreme court ruled that section 377 of IPC which criminalised consensual sexual acts between adults was unconstitutional, that it infringed upon the fundamental rights of sexual minorities. By decriminalising consensual sexual acts between adults, it made a significant legal intervention by legitimatising the bodies of 'illegitmate disruptors'. Fears of harassment and non-criminality of non-heteronromative life-expressions have been addressed through this landmark judgement, helping many to accept and celebrate their non-normative expressions.

However, this judgement wasted a potential legal opportunity to talk about the category of the unnatural and question how it didn't only pertain to homosexuals. The colonial-era law criminalised the carnal acts against the 'order of nature', and what does the order of nature stand for? It ostensibly stood for procreative/reproductive sex.

By this measure, every sexually active person who had sexual acts which were not of reproductive nature, acted against the 'order of nature' and committed a crime.But the legal assumption of heterosexuality prevented the police and state authorities from criminalising the so-called natural heterosexual bodies.

Navtej Singh Johar v Union of India re-affirmed the Naz foundation v NCR Delhi (2009) language of dignity, equality, privacy and inclusiveness. [475]As Arvind Narain writes, 'By bringing in a notion of morality which must be 'constitutional' the court extended its protection to 'unpopular minorities'. That brings us to the Transformative feminist jurisprudence which not only aims to transform the present state of things but also be reconstructive, in that, it reconstructs the way our desires are shaped and looked at.

It is important for us to discard the[476] 'excuses for exclusiveness' which are the various manners and practices by which we continue to validate and legitimise a way of life that makes certain personal characteristics of our people into sites of exclusion, disadvantage, marginalization and indignity. The 'tranformative' part of our feminist jurisprudence makes our focus shift from the

[475] Akash Singh Rathore, Garima Goswami, Rethinking Indian Jurisprudence114 Routledge2018.

[476] KT Shah, 'A note on Fundamental Rights' (1946)

centre(cisheteroallonormative casteist order) and hold it up for scrutiny. It makes our focus on how to use law as a counter-majoritarian-force and mobilise it on the side of the minoritized, the LGBTQIA+ people, against the popular morality or the conservative cisheteroallonormative casteist order.

INTERSECTIONAL SENSIBILITY

In Patan Jamal Vali vs The State of Andhra Pradesh (2021)[477], it is important to note the approach taken towards caste and gender-based sexual violence. It differs from the conventional single-axis approach to violence, and takes an intersectional approach. It makes for a case of a studied scrutiny into the various vulnerabilities which makes for an unique experience of oppression. In this case, the victim was a Blind Dalit woman who was sexually violated by a dominant-caste man.

The court said, 'When the identity of a woman intersects with, inter alia, her caste, class, religion, disability and sexual orientation, she may face violence and discrimination due to two or more grounds. Transwomen may face violence on account of their heterodox gender identity. In such a situation, it becomes imperative to use an intersectional lens to evaluate how multiple sources of oppression operate cumulatively to produce a specific experience of subordination for a blind Scheduled Caste woman.'

The supreme court's Intersectional approach towards casteist sexual violence is a welcome move and necessary because our society's inherent hierarchical, patriarchal and hence exploitative nature makes for a devalued and degraded life for the most marginalised, especially, dalit women. In this instance, a blind dalit woman, being in a uniquely disadvantageous position had to face the brunt of this exploitative force.

[477] Patan Jamal Vali vs The State of Andhra Pradesh (2021)

The supreme court made an exceptional note of the intersectional oppression at play, the power and powerlessness in the offence committed, while it also noted what gave the impunity, strikingly, it was a triple-force of patriarchy, ability and caste. The supreme court set aside the conviction under Section 3(2)(v) of the SC & ST Act because it was not established that the sexual-offence was committed on the ground that the victim was a member of a Scheduled Caste and gave the sexual-offender life imprisonment under IPC Section 376. [478]Justice Chandrachud pointed out how the provision read a caste-based-offence committed 'on the ground that such person is a member of a Scheduled Caste or Scheduled Tribe' and picked up the expression 'on the ground' to specify how it cannot be read as 'only on the ground', 'on the ground' means 'on the basis of' and it recognises only a single axis model of expression.

He argued, 'To deny the protection of Section 3 (2) (v) on the premise that the crime was not committed against an SC & ST person solely on the ground of their caste identity is to deny how social inequalities function in a cumulative fashion. It is to render the experiences of the most marginalised invisible. It is to grant impunity to perpetrators who on account of their privileged social status feel entitled to commit atrocities against socially and economically vulnerable communities. A true reading of Section 3(2)(v) would entail that conviction under this provision can be sustained as long as caste identity is one of the grounds for the occurrence of the offence.' The court found that the sexual-offender being in a close-knit relationship with the family of the victim left no doubt, that he committed the heinous rape by taking advantage of the position of the dalit women who was blind since birth.

In Vishakha v State of Rajasthan[479], the supreme court formulated a set of guidelines to prevent and punish sexual harassment of women in the workplace. What led to the creation of these guidelines was the story of Bhanwari Devi, a dalit woman belonging to the Kumhar caste and

[478] Centre for Law and Policy

Research,https://clpr.org.in/blog/intersectionality-matters-the-supreme-court-judgment-in-patan-jamalvali-v-state-of-andhra-pradesh/ 8/3/23.

[479] Vishaka and Ors. v State of Rajasthan AIR 1997 SC 3011

a social worker who transgressed gender and caste barriers by fearlessly campaigning against the child marriage of an nine months old, yes, an infant, in her village, because of which she was raped by a group of 5 members from the dominant caste of her village. It led to a group of NGOs headed by Vishakha, filing a PIL(Public Interest Litigation) demanding protection of women in the workplaces.

What was missed in this judgement which is hailed as a feminist one, was how the gangrape committed by the members of a dominant caste didn't move the judges to expand the ambit of the applicability of the Vishaka guidelines or see and include the factor of caste into this. Or how they invisiblized the powerplay that caste enforced here.

The guidelines only apply to the organised sector and there is a proper grievance-redressal-mechanism present in the form of ICC(Internal Complaints Committee) along with having an external expert being called to look into the matter. While, in the informal sector there's only a LCC (Local Complaints Committee) at the district level which the aggrieved can approach, though, they're not constituted in accordance with the act. And since most women who hail from oppressed castes and minorities work as domestic workers, sanitation workers, landless labourers and make a major part of the unorganised sector and yet their workplaces are not protected.

Meanwhile, the women from the privileged castes have a larger protection net. These guidelines became the basis for the Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Act, 2013, and yet both the judgement and the act did not view her rape through an intersectional lens, instead, the court reduced her rape to sexual harrasment. As Crenshaw said, “[t]he singular focus on rape as a manifestation of male power over female sexuality tends to eclipse the use of rape as a weapon of racial terror.” Here, the act of casteist sexual violence was seen and recognised but as a caste-less act.

AMBEDKARITE JURISPRUDENCE : A PATH TOWARDS EMANCIPATION FROM GRADED INEQUALITIES

Ambedkar's philosophy of law strengthens our sensibilities to stay in tune with the spirit of public discourses, to not isolate the subjects of oppression from the oppressed, to never look away from the obstacles on the grounds of what he describes as "graded inequalities" which brings in light the segregations of our society and how they play against each other leaving no space for a healthy communal bonding, fraternity, social consciousness, inclusivity and acceptance.

Ambedkar passionately advocates the principles of Liberty, Equality and Fraternity as how these are not just theories limited to a discourse or debate, they are pathbreaking values to seek, offer and value the idea of co-existence.

We must liberate ourselves from practices, norms and ideas that restrict us, the need of the hour is liberation from hate speech and from the spaces of blatant discouragement. We need to recognise the significance of conscious efforts which demand accountability, responsibility towards Equality. As Dr. Ambedkar says " Equality of what?" Equality of opportunities, which is to be read as equal access to advantage. What enables a space to be equal, is a space which has fraternity as its core because it activates the hopeful idea that our world can be healed with mutual trust, care and understanding of why it is important to not limit yourself and others, that we need to let our ideas flow like a river, don't let it be stagnant, don't let the hate consume us and this would lead us to think and act freely and most importantly, fairly. Where there is no freedom, Justice cannot prevail.

The notion of "Transformative Feminist Jurisprudence" is one such path of a rebellion against our biases to a liberated, hopeful, reliable, accepted, valued Justice System.

Constitutional Morality must be cultivated like huge banyan trees for us, to feel safe under its shade. Just the way our planet is destroyed by toxic wastes and climate crisis, our beings too are trapped in the toxic behaviours and engagements of socio-cultural prejudices.

As Justice Shah in Naz Foundation v. Govt. of NCT of Delhi put it, [480]'Thus popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of 'morality' that can pass the test of compelling state interest, it must be 'constitutional' morality and not public morality. This aspect of constitutional morality was strongly insisted upon by Dr. Ambedkar in the Constituent Assembly.'

[480] Arvind Narian,What would an Ambedkarite Jurisprudence look like?Vol. 29, No. 1 (2017), pp. 1-20 (20 pages)JSTOR arvind narain

SAVITRI PHULE AND HER PASSIONATE VIEW ON EDUCATION AND LIBERATION OF MASSES

"Awake, Arise and Educate and Smash Traditions— Liberate.[481]

The liberation doesn't come from merely going to schools and institutions, just like constitutional morality, we need our expression to hold consciousness related to us and our relationship with the society. We need to give up the isolated spaces and move towards inclusivity, which is only possible when we stop believing that someone's right to hold space and live isn't just an act to "provide" them what they deserve but it would arise from firm groundings, actions and transformative approach in all of our spaces.

We can't fathom being a land of prejudiced projections on the "other" because othering is damaging and it has ignited a burning hostility that deprives us of our inherent-compassion , that we can't let our books burn, our ideas discarded, our beings destroyed. We need to offer support to each other, we need a transformative understanding before transformative laws and we must unite to cultivate that.

In order to nurture such understanding, as Bell Hooks in her book "Teaching Critical Thinking" advocates about our trust on "love and care" as powerful tools and means through which the movement of social justice can win over the horrific-hostile acts in the community.

She says 'The moment we choose to love we begin to move against domination, against oppression. The moment we choose love we begin to move towards freedom, to act in ways that liberate ourselves and others. That action is the testimony of love as the practice of

[481] Savitri Phule,Rise ,To Learn and Act,1/30/23.https://livewire.thewire.in/politics/savitribai-phule-shall-never-diedec-for-her-pen-lives-on/

freedom".[482] Just the way kindness is not inherited, our daily engagement and practice helps us move closer to it, it's only Transformative actions which will help us. As Cornel West says, 'Justice is what love looks like in public.'[483]

The need is to shift our vision from traditionally, conventionally accepted values and thoughts based on discriminative grounds as they have never nourished us to thrive into hopeful, rational beings. Instead they have pushed us into darker, narrower spaces which have distorted our spirits, limited us, censored us, our creativity and a humane instinct which we are in dire need of, to sustain as tender-hearted individuals. We are pestered to consume hate and even digest it against our will. We consume it through our eyes and ears but our heart is crushed by it. But we are also trying not to digest it, we change the streams of these damaging voices, opinions and harm which is both physically visible and casually and conveniently erased from conversations, newspapers and textbooks. But the pain will and has made the way to the centre of the society, We can't unsee it, We must not. As Ravish Kumar says that, democracy may suffer and collapse but the public's sensibility, our means of advocating justice should not stop".

We can't let it go, let's hold on to it firmly, yet tenderly and make our constitutional morality a virtue in practice that upholds justice with equality and not without it.

[482] Bell Hooks, Love as the Practice of Freedom,Washington Post,1/30/23. https://www.washingtonpost.com/opinions/2021/12/18/bell-hooks-black-women-resistance-love-q

[483] . Dr. Cornel West's Keynote Speech at Berkeley School Of Theology https://youtu.be/_DEbcjXLj7k

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