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DEMYSTIFYING HUMAN TRAFFICKING: LEGISLATIVE FRAMEWORKS AND GROUND REALITIES

Bhumica Veera*

ABSTRACT

Addressing the problem of human trafficking has been the concern of all countries around the world, as no country today is immune to human trafficking. India too is one of the hubs for human trafficking. Although, several laws have been enacted to fight human trafficking in India, the problem has not been addressed to the fullest. The key challenge while addressing the problem of human trafficking is in understanding of the term 'Human trafficking' itself. The global scenario of human trafficking is extremely broad and with time new forms of human trafficking have evolved, which the present laws fail to address. This paper, aims to analyse the laws against Human trafficking in India, the understanding of courts and legislatures about human trafficking, and the problems arising out of the inefficient laws. The paper discusses in detail the new Trafficking in Persons, 2018 Bill and presents a critical analysis of the same. The paper will also analyse the new forms of human trafficking that have evolved and how the loopholes in the law facilitate such crimes. Finally, the paper recommends certain reforms that need to be brought in the existing framework in order to address the problem of trafficking better.

Keywords: Trafficking, Criminal Law, Human rights, Child rights, Sex trafficking.

INTRODUCTION

Rights and duties have been at the core of each and every society. As time progressed, human rights gained significant recognition. The Universal Declaretion of Human Right (UDHR), guaranteed that every human had certain fundamental rights which shall be protected by rule of law.[1] Since then the movement for protection of human rights has gained significant momentum. Paradoxically, the violation of human rights too has been increasing at an unsteppable pace ever since then. Humans enjoyed their right to freedom and escaped the cages of slavery only to be caged again in cages of 'Modern-day slavery'.[2]

Eliminating Human trafficking has been a major concern of each and every country today. No country today is immune to human trafficking. The UNODC formulated the Protocol to Prevent, Supress and Punish Trafficking in Persons which defines Human Trafficking as,

"the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person,

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[1]Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

[2]What is Human Trafficking?, Trafficking in Persons and Smuggling of Migrants (Nov. 22,2018 2.45 am), https://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html.

for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."[1]

This definition has been used globally to identify victims of human trafficking. As per the ILO, approximately 40.3 million people worldwide are victims of trafficking and the industry amounts to $150 billion dollars.[4]

India too has been a victim of human trafficking. As per the NCRB data, in 2016, only 10,047 cases of trafficking were investigated.[5] On the other hand, approximately 174 children in India go missing every day[6], the Sonagachi District of India is one of Asia's largest red-light areas and the acquittal rate of Human Trafficking in India has been as high as 72% in 2016[7] These facts, question the scant number of human trafficking cases being addressed. It has also been observed that the courts have restricted their understanding of Human trafficking only to bonded labour and sexual exploitation. Thus, the courts, which are already dealing with a limited number of cases, also fail to take cognizance of the new forms of human trafficking which have evolved. Thus, one of the key challenges while addressing Human trafficking is understanding the term itself. The Lok Sabha in India has passed the new Anti-trafficking Bill, which is a supplemental legislation for all human trafficking laws in India. However, no research has been done in understanding the feasibility of the new bill and whether or not the bill if made into a law will help in combat human trafficking.

Thus, looking at the status quo this paper aims to analyse the problem of Human Trafficking in India. The paper is divided into three parts; the first part deals with the legal provisions in India against Human trafficking and presents a time-line of the laws which have evolved. It also criticises the existing laws and explains how these laws have contributed towards a restricted understanding of the courts. The second part explains the kinds of Human trafficking seen in India and how new forms of Human trafficking have evolved due to improper legislations. In the end, the paper provides a few suggestions to improve the status-quo

LEGAL PROVISIONS RELATING TO HUMAN TRAFFICKING IN INDIA

1. **Constitutional Provisions:** Articles 23 and 24 guarantee every person a right against exploitation. These aim primarily at ending slavery and other traditional practices such as the Devdasi system that were rampantly practiced in India.
2. **Immoral trafficking (Prevention) Act, 1956 (hereinafter ITPA):** Post-independence this was the very first formal legislation against trafficking.

[3] *Id.*

[4] The scale and manifestations of modern slavery, Global estimates of modern slavery, 21 (2017) https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_575479.pdf

[5] National Crime Records Bureau Ministry of Home Affairs, Crime in India 2016, 512 (2017)

[6] Divya Gandhi & Julie Merin Yerughese, India's Missing Children: the story that WhatsApp forwards don't tell you, The Hindu, Aug 11,2018

[7] Trafficking in persons report 2018: Country Narrative: India, U S DEPARTMENT OF STATE (Nov 22,2018 2.47a.m) https://www.state.gov/j/tip/rls/tiprpt/countries/2018/282672.htm

However, the entire legislation which was dealing with trafficking in persons failed to define the word 'trafficking'. The legislation, also focused only on prostitution as a form of trafficking and did not look into any other forms of trafficking. This act, also gave powers to the police and the magistrate to put into custody any person found to be working in a brothel in the name of 'rescue'. This provision was therefore counter productive in addressing the problem of sex- trafficking, as victims always had the fear of being in police custody or jails if they complained against the crime.

3. **Indian Penal Code:** The Indian Penal Code (hereinafter referred as IPC) has had several amendments relating to Human Trafficking. Section 370[8] of the IPC originally dealt with prohibition of slavery and section 372 dealt with prohibition of prostitution. Surprisingly, the offence under Sec. 370 was classified as a non-cognizable and bailable offence. Since the offence of Human trafficking is an organised crime, making it a bailable offence directly worked in the favour of the criminals and therefore it led to the provision being highly unutilised. In the year 2013, the Justice Verma committee was set up which contributed towards the 2013 criminal law amendment act, 2013. The Justice Verma committee gave a very detailed analysis of how there is a need to recognise and define Human Trafficking as a separate offence. The report, reaffirming the UNODC definition of Human trafficking gave the following definition,

"Section 370: Trafficking of a Person (1) Whoever, for the purpose of exploitation, (a) recruits, (b) transports, (c) harbours, (d) transfers or (e) receives, a person or persons, by

Firstly, using threats, or
Secondly, using force, or any other form of coercion, or
Thirdly, by abduction, or
Fourthly, by practising fraud, or deception, or
Fifthly, by abuse of power, or

Sixthly, by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking.

Explanation I: The expression 'exploitation' shall include, prostitution or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the forced removal of organs.

Explanation II: The consent of the victim is immaterial in a determination of the offence of trafficking. (2) Whoever commits the offence of trafficking shall be punished with rigorous imprisonment for a term which shall not be less than seven years, but which may extend to ten years, and also with fine."[9]

[8]370. Buying or disposing of any person as a slave — Whoever imports, exports, removes, buys, sells or disposes of any person as a slave, or accepts, receives or detains against his will any person as a slave, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[9]Justice J.S. Verma et al., Trafficking of Women and Children, Report of the Justice Verma Committee on Amendments to Criminal Law,152-4 (2013), http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf.

This definition was further accepted by the Parliament, with a progressive change in Explanation 1 where exploitation was not limited to sexual exploitation, forced labour or organ transplant and the scope was expanded to include "any physical exploitation"[10] However, even though the scope was expanded the law was still not clear on the kinds of Human trafficking that exist. Thus, this provision too remained highly unutilised. It is important to note here, that the Justice Verma Committee was set up after the Nirbhaya case and the aim of the committee was to recognise offences related to women and children. Thus, this has further contributed towards a misconstrued understanding of Human Trafficking which is limited to forced labour and sex- trafficking. On the other hand, there are several provisions which can be applied to any victim of Human Trafficking like Kidnapping and Abduction, Rape, Voluntarily using criminal force, Voluntarily causing hurt etc. as the case may be however there is no other specific provision that recognises Human Trafficking.

4. Juvenile Justice (Care and Protection of Children) Act, 2015:

This is one of the most comprehensive legislations, which addresses a vast number of crimes committed on children. Chapter IX, of this act enlists various crimes committed against children and provides punishment for the same. The provision makes begging, providing children with narcotic substances, exploitation by employer, wrongful adoption, sale of children, use of children as soldiers/ militants etc. a punishable offence. However, this act too has been under utilised and the provisions are not implemented. The second part of the paper explains how the lack of institutional checks and balances have promoted wrongful adoptions which then lead to trafficking of children. The act provides for rehabilitation of children through Child Welfare Committees (CWCs), protection homes etc. Ironically, today in India these protection homes which were meant to rehabilitate and protect children from being a victim of crimes, have become a place where children are most vulnerable. The recent case of Muzaffarpur where a minor child was raped in a shelter home and the case of Deoria shelter home where the girls were repeatedly sexually exploited, questions the entire rehabilitation system. The Union Budget of 2018-19 allocated a mere 3.24% of the total budget for Children. The allocation has been on a constant decline every year. Lack of resources can often lead to situations like those in Deoria and Muzaffarpur.

5. The Trafficking in Persons (Prevention, Protection and Rehabilitation) Bill, 2018:

The history of Human trafficking laws in India have made the law-makers realise that a legislation that defines offences and punishes the perpetrators is not enough to solve the problem of Human trafficking. One of the most recent efforts taken by the government to address the problem of Human trafficking

[10]The Indian Penal Code (Amendment Act), No. 13 of 2013, § 8 (2013).

[11]Deoria shelter home case: FIR lodged against UP Child Welfare Committee chairman, four others., The Ind. Exp., 25th August,2018

[12]Union Budget of 2018-19: Budget For Children in #Newindia, HAQ centre for Child Rights, 2 3 (2018) http://haqrc.org/wp-content/uploads/2018/02/haq-budget-for-children-2018-19.pdf

was through this bill. This bill has received a positive feedback and has also been passed by the Lok Sabha as of August 2018. This bill aim to provide a comprehensive legislation for Human Trafficking, however it fails to do so on multiple levels. Even though, the bill has looked into various aspects of Human trafficking, has recognised new forms of trafficking, has aimed to rehabilitate the victims, the bill has several lacunae which make the legislation problematic and has a possibility of being under utilised as all the other laws relating to Human trafficking. The following are the salient features of the Bill:

a. **Creation of National Anti- Trafficking Bureau and other regional bodies:** One of the primary ways in which the Bill aims to prevent Human trafficking is by the establishment of National, State and District level Anti- trafficking units which would adopt preventive measures to curb Human Trafficking through surveillance, co-ordination, rescue etc. However, the structure of the bureau and the anti-trafficking units will act counter productive in this case, as these are entirely composed of police officers only. While, the bureau does have the power to co-ordinate with other government and non- governmental organisations, they have not been made an active part of the said units. Victims of Human Trafficking already have a fear of police in their mind, which deters them from approaching the police. This fear has partly evolved due to the laws like ITPA which gave police the power to conduct raids to rescue the victims. Since, the bureau and regional units consist only of police officers, all the surveillance and rescue activities will be done by them. This will create more fear among the victims and hence, the victims will further try to protect themselves from being rescued by the police. This concern was also expressed by the Congress MP Dr Shashi Tharoor .There is no provision for accountability of the National Anti- Trafficking Bureau. The State and District-Anti Trafficking units also have no strict mechanism for their accountability. The lack of accountability becomes problematic, as there is no system to keep a check on the police officials and record the performance of the anti- trafficking units.

b. **Search, rescue and post rescue activities:** The primary reason why ITPA failed to combat trafficking in persons was due to the poor rescue mechanisms that were adopted. The ITPA gave the police officers the power to arrest and keep in custody, the suspected victims of trafficking.[14] This 'raid' to 'rescue' mechanism failed heavily and the victims of trafficking were even more afraid to come out and stand against the crimes committed against them. The traffickers too used this provision to curb the victims from complaining against them. Despite this, the Trafficking in Persons Bill, 2018 has adopted similar raid to rescue mechanism to prevent the victims of human trafficking. The victim is therefore 'arrested' for being a victim of an organised crime. Thus, even if it is assumed that the post-rescue activities

[13]Shashi Tharoor, Coalition for an inclusive approach in the trafficking bill, 1-10, (2018) (Nov. 22, 2018 3:00 am) https://drive.google.com/file/d/1BSteUvtnRRX-PfDoDuOthwaMHBilPkyQ/view

[14]Trafficking of persons (prevention, protection and rehabilitation) Bill, Bill No. 89 of 2018, § 15, (2018).

may be helpful in rehabilitation of the victim the initial process of rescuing is counter-productive.

c. **Crimes recognised under the Bill:** The Bill has recognised several forms of offences. The bill has recognised bonded labour, surrogacy trafficking, trafficking done by administering narcotic substances or alcohol or hormones causing early sexual maturity, trafficking under the pretext of marriage, begging, illegal migration etc. as aggravated forms of trafficking and a punishment of 10 years which may extend up to life imprisonment shall be given to the convicts. While this may be considered as a progressive step, as it widens the scope of Sec. 370 of the IPC and recognises various forms of trafficking that exist but have gone unrecognised due to the misconstrued definition of trafficking limited only to bonded labour and sexual exploitation, the bill has not been successful in providing, if not exhaustive, but at least a comprehensive list of forms of human trafficking that have evolved for e.g. Adoption trafficking, Clinical drug trials, Child Soldiers, Trafficking for organ theft etc. There is a special need to recognise such crimes and provide proper definition for the same in order to punish the perpetrators. On the other hand, the bill has provided for a punishment of 3 years of rigorous imprisonment for publicising, or selling or storing any data through physical or electronic means. This provision due to it being poorly drafted makes a vast majority of intermediaries such accountable for spreading information that they are unaware of.[15] This brings in unnecessary censorship and is therefore detrimental. It can therefore be seen that the Bill has failed to recognise the crimes which need immediate attention and aims to punish innocent people who are not involved in any crimes and are mere distributers of information and have no control over the kind of information that is being spread through their channels. Many NGOs, parliamentarians and other social- activists have also criticised the bill for penalising people who voluntarily consent to sex-work, begging etc.[16]

FORMS OF TRAFFICKING

1. Adoption trafficking

One of the most gruesome forms of trafficking is the trafficking of children in the name of Adoption. The idea of adoption which aimed to provide care and protection to children without parents has now become a means to push these children into trafficking. In the Indian coutext, trafficking of children through adoption is seen at both domestic and international level.

Adoption of children is a part of personal laws in India. The three major legislations governing adoption in India are The Hindu Adoptions and Maintenance Act, 1956, The Guardians and Wards Act,1890 and The Juvenile Justice (Care and Protection) Act,2015. Adoption in India is regulated through

[15] *Supra* at 14.
[16] *Supra* at 13.

a central authority namely Central Adoption Resource Authority (CARA)[17]. CARA follows an online system of adoption where prospective parents (which include single parents, NRIs, Foreigners, Couples etc.) can register themselves for adopting a child. While there exists a mechanism to verify the prospective parents, these checks are often overlooked due to the higher supply and less demand. The procedures for adoption allow the prospective parents to give their preferences for adoption of a child. These preferences range from age, sex, skin colour, religion, health conditions etc. Due to the prevalent stereotypes that exist within the India, females, children with darker skin colour, children above a certain age etc. are not preferred by a huge majority of children. This makes these children vulnerable, as they now become the target of traffickers. Traffickers under the disguise of prospective parents willingly adopt the children that are otherwise 'unwanted' by most parents. This becomes the primary reason why the Adoption Agencies tend to ignore certain parameters of eligibility of prospective parents. This facilitates the trafficking of children by adoption.

Kidnapped children are often declared legally free for adoption. Such cases occur because, when children are kidnapped or abducted the police is often reluctant to file a FIR and only a missing complaint is filed, as no court proceedings or investigation is involved in case of a missing complaint. As per the NCRB data around 174 children go missing everyday and half of them go untraced. There is not enough budget allocated for the purpose of finding the missing children, which is often why they remain in the General diary of missing children and no active efforts are taken by the police to trace these children. This shows that a lack of proper mechanism is leading furthering trafficking of young children.

Currently, there exists no law to tackle the problem of adoption trafficking. Even though the Juvenile Justice Act penalises Adoption Agencies and Prospective Parents for illegally adopting children, there is a need for a proper policy to prevent such acts. The new Anti- trafficking bill too fails to take cognizance of Adoption leading to trafficking. However, it was of extreme necessity to address the problem of adoption, as the IPC definition of trafficking under section 370, easily allows the 'parents' of the adopted child to evade their liability as they have not directly recruited, harboured, transported, transferred, or received the child for the purpose of trafficking.

2. Community Based Trafficking:

Many times, the environment in which people hve is where they are forced into trafficking. This is known as Community Based Trafficking. One such example of community-based trafficking is the Bedia Community in India. The Bedia Community is a nomadic tribal community found in Uttar Pradesh, Madhya Pradesh, Rajasthan etc. The Bedia community is currently recognised as Scheduled Caste. Historically, this community is known for earning their hving through sex-work. The women in this community are encouraged to take

[17] See, http://cara.nic.in/

up sex-work and are not looked down upon for doing that.[18] A study done by, Maharashtra State Commission for protection of Child rights and International Justice Mission found that 71.8% of the minors between the age of 15-17years involved in commercial sex-work in Mumbai belonged to the Bedia Community. This community was also recognised as a criminal tribe by the British in 1913. The community today is so marginalised, that every woman after reaching the age of puberty is either pushed into prostitution or is married off. Even after the woman is married, in majority of the cases the husband of woman often forces her into prostitution. Such problems exist not just in the Bedia community but there are many other communities such as the Bacchada community, the Nath Community which have historically forced women into prostitution.[20] Such crimes often go unrecognised because the victims are often brainwashed and told not to prosecute their own families and husbands. The police in such areas are also not able to resolve these issues, as either most of them are involved in facilitating such crimes or the community[19] ties are often so strong that even police are not able to intervene in many cases. This is where the problem of the bill comes into picture. Because the Anti- trafficking units are composed of the police officials only, such community-based trafficking will still remain unaddressed due to the involvement of police and lack of accountability.

3. Clinical Drug trials:

One of the least discussed and least recognised forms of Human trafficking is Clinical Drug trials. Clinical Drug trials are conducted by giant pathological companies where they test the impact of the drug in curing ailments.[21] Many hospitals and doctors are involved into this business, where patients are given certain medicines and the impact of them is tested by the pathological companies. Such trials often lead to death of many innocent people. Clinical drug trials fail to fall under the ambit of Human Trafficking due to the misconstrued definition of Human trafficking, where trafficking is only recognised if 'source-transit-destination' model is seen. However, in cases of clinical drug trials 'transit' stage is missing, and thus it falls out of the scope of human trafficking. In many cases, since the patients blindly trust their doctors are not even aware that a drug trial is done upon them, the perpetrators go scot-free. In 2009, the Bill and Melinda Gates foundation, funded the 'Path Project' which aimed at testing an HPV vaccine. This project caused the death of 9 minor girls, and it was later found that even though the parents and school principals of those girls had signed the consent form, the parents were illiterate and the teachers and principals were unaware about the harms of the project. The NGO was also not penalised for violating

[18]Veerendra Mishra, Combating Human Trafficking: Gaps in Policy and Law, 156-61 (2015) (Nov.19 2018, 8.53 pm) https://books.google.co.in/books?id=5IwIDAAAQBAJ&printsec=frontcover&dq=human+trafficking+veerendra+mishra&hl=en&sa=X&ved=0ahUKEwi6lMbd2uDeAhWCq48KHY5XAQ4Q6AEIKTAA#v=onepage&q=human%20trafficking%20veerendra%20mishra&f=false

[19]Commercial Sexual Exploitation of Children in Mumbai, 56. (2015) (Nov.19 2018, 8.53 pm) https://www.ijmindia.org/files/library/CSES%20Study%20Report%20Rev%20(Final%20Prevalence%20Study).pdf

[20]Veerendra Mishra, Human Trafficking : The Stakeholder's perspective, 380. (2013) (Nov.19 2018, 8.53 pm) https://books.google.co.in/books?id=892GAwAAQBAJ&printsec=frontcover&dq=human+trafficking+veerendra+mishra&hl=en&sa=X&ved=0ahUKEwi6lMbd2uDeAhWCq48KHY5XAQ4Q6AEILzAB#v=onepage&q=nath%20&f=false

[21]Supra note 20 at 206.

drug trial norms, as no legal provisions existed at that time to deal with the case and the NGO received support from the government of India.[22]

The new Anti-trafficking bill, 2018 fails to take cognizance of clinical drug trials. Section 31 (iv)[23] of the bill talks about trafficking of a person 'by' administering drugs, narcotic substances, alcohol etc. This means that if a person is pushed into slavery, sexual exploitation etc. by the use of drugs or any such substances it will constitute as an aggravated form of trafficking. This provision therefore does not deal with Clinical Drug trials.

CONCLUSION AND RECOMMENDATIONS

The problem of trafficking in India is of pressing concern as it is a grave violation of Human rights. However, empty legislations with no implementation will not help in combating the problem of human trafficking. The author here suggests certain reforms that are needed in the country for combating Human trafficking:

1. **Capacity building of Police officers:** The real implementers of the laws against Human trafficking are the Police. On most occasions, the victims of trafficking first resort to the police for help. It is the police who are entrusted with the responsibility of surveillance and prevention of human trafficking. This makes the police one of the most important stakeholder.[24] It has been seen, that in India, the victims are scared to approach the police due to the fear that exists in the minds of people. This fear is partially due to the raids that are conducted by the police, where victims are often beaten up and kept in custody and partially induced by the traffickers by brainwashing the image of police not as guardian but as a punisher. While the brainwashing aspect is beyond control, there is a strong need to reform and educate the police officials, and sensitise them on various issues relating to human trafficking. In many remote areas, the police are not even aware about the change in the law and therefore continue with the old practices. Police officers through various education and capacity building programmes, should be taught about the new laws, about treating the victims correctly and about reporting the matters.
2. **Mechanism of checks and balances:** As mentioned earlier, the current bill has no proper mechanism of checks and balances in order to ensure proper functioning of the anti-trafficking units. This reduces the possibility of situations where the police themselves facilitate trafficking. This also helps in understanding the impact that such units have on the state of trafficking, which further allows us to frame better and more improved policies for the future. Even though NCRB and other such organisations keep a record of the

[22] Utkarsh Anand, 'Can't penalise US NGO for violating Drug Trial Norms', The Ind. Exp., April 18,2015
[23] Section 31 (iv) "by administering any chemical substance or hormones on a person for the purpose of early sexual maturity"
[24] Nilanjana Ray, Looking at Trafficking through a New Lens, 12 Cardozo J.L. & Gender 909, 928 (2006)

number of crimes committed, there is a need to have a detailed analysis of such crimes in order to improve policies and provide better rehabilitation to the victims.

3. **Active participation of NGOs in rescue and rehabilitation process:** The role that NGOs have played in India is highly commendable. Making NGOs an active part of the rescue and rehabilitation process will help in removing the taboo that is associated with the traditional rald to rescue policy. It will help in create a positive environment and the fear of police that exists in the minds of the victims can be reduced if NGOs contribute to the rescuing process. This will also act as an indirect check on the working of the police, as the NGOs will now be in a position to ensure that the no violence is faced by the victims while they are in custody.
4. **Helpline for the victims:** In many cases of trafficking especially in cases of Commercial sex work and slavery, the victims are not allowed to go out freely and interact with others. This makes it difficult for such people to approach the courts or police stations, for their protection. A helpline number, which specifically addresses the problem of human trafficking can help in identifying the victims and provide a better recourse to them by making justice more accessible. The U.S.A, has a human trafficking hotline, which functions 24x7, and allows victims to call, text, chat and all information is kept confidential. Since its inception in 2007, the national hotline has identified 45,241 moderate victims and 43,564 high victims.[25]
5. **Increased role of Judiciary:** The Judiciary has played an active role in combating human trafficking through various judgements like Bachpan Bachao Andolan V. UOI[26] and Buddhadev Karamaskar V. State of West Bengal,[27] by issuing various guideline to combat human trafficking.In order to combat Human trafficking, it is necessary to identify and punish the people involved in this business. Therefore, a more equipped investigation will contribute in increasing the conviction rates for such crimes.

It can therefore be concluded, that mere legislations cannot combat human trafficking and it is necessary to include all the stakeholders for a holistic approach. Media, by highlighting the problem of human trafficking can also play a huge role in combating human trafficking by spreading awareness amongst the masses. There is a need to not only recognise but also build ways and means to combat the new forms of trafficking that have evolved over the past years, only then will the country truly uphold the constitutional principles of providing social, economic and political justice.

[25] See www.nationalhotline.org/statistics
[26] Bachpan Bachao Andolan v. UOI, 5 SCC 1,18 (2011)
[27] Buddhadev Karamaskar v. State of West Bengal, 10 SCC 283, 283-5 (2011)

FREE SPEECH AND DEFAMATION: THE INDIAN LEGAL SCENARIO

Aryan*

ABSTRACT

"Oh that teacher, he always troubles us…the new neighbour is so uncultured."

We often say things like these during a conversation. Negative opinions and judgements often form in our minds. But do we realise that such statements could have serious legal repercussions? The defamation law (more particularly Criminal defamation) would mark these statements as a violation and the concerned party could file a suit against you. Normally, this doesn't happen as normal people like us avoid the hassles of court and law. Does this mean that defamation law has become a tool to be used by the rich and powerful only? Also, doesn't this stand in grass violation of freedom to express opinions about something or someone? Is it justified to vilify someone's reputation and dignity under the garb of free speech? This paper will, inter-alia delve deep into such questions, and try to present the situation and solutions in a reasonable way.

Keywords: Free Speech, Defamation, Freedom Of Expression, Violation, Opinion, Dignity

FREE SPEECH AND ITS RELATED ASPECTS

Humans are social animals. Since the beginning of time, we as a species have been looking for ways to communicate. It could be through the earliest forms of cave paintings of Australia or South East Asia, or any of the numerous sign languages used earlier by the early people. Even the multitude of sounds which we learnt to produce was one of the means. low pitch or high pitch grunting sounds used could be probable warning signs[1]. Body language was also a means to express. Later these means of expression started to include stories, dances, songs to communicate various ideas and feelings. Smoke signals, beating of drums were a part of this. Humans moved a step further in communication when the invention of earliest organised languages took place.

All of this was because it is our inherent nature to find ways to express ourselves.

George Washington said, "If the freedom of speech is taken away then dumb and silent we may be led, like sheep to the slaughter."

Free Speech as a principle dictates that everyone has a right to express his opinions and ideas without any fear of legal action and censorship. Freedom of Speech and Expression is upheld as a fundamental right in our constitution in Art. 19 (1) (a).[2] Even our constitution makers understood the importance that basic

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[1] South African History Online, Oldest Forms Of Human Communication, SAHO (Nov. 16, 2018), https://www.sahistory.org.za/article/oldest-forms-human-communication

[2] IND. CONST. art. 19, cl. 1, cl. a

right holds. Irrespective of one's social status, economic, educational or cultural background; gender, race, ethnicity, age, position; each person is entitled to the same right to voice their opinion. We would just be a mass of flesh and bones if we would have not been given the power by nature to express ourselves. Had the lawmakers not taken this into account, there would be a situation of dictatorship. Democracy, as defined by Abraham Lincoln in his Gettysburg Address of November 19, 1863, is a government of the people, by the people, for the people. It is a government where the citizens have a right to choose their representatives, and are directly or indirectly involved in decision making. Freedom to express is an inseparable right when we think about this concept. A democracy loses its meaning if there is no free flow of ideas and opinions. This is what differentiates a democracy from some absolute monarchical or dictatorial sort of a government, where one person or a group of persons does what it feels like, and all others are expected to follow all orders without questioning or giving it a second thought. Thinking about it, our Right to Freedom of speech is in many ways the crux of our existence as natural beings and as citizens of a state, governed by its constitution.

What happens is that we always try to avoid criticism as individuals. The persons in power can do so by censorship. Media is considered as the fourth pillar of democracy after legislature, executive, and judiciary. But such censorship can hamper the free flow of views. In British India, the Vernacular Press Act of 1878 was an example to oppress dissenting voices against the Raj. This law was passed to inhibit the liberty of the Indian-language (i.e., non-English) press. It was presented as a proposal by Lord Lytton, who was the viceroy of India at that time (1876-80). This act was passed in order to stop the vernacular press from criticizing the policies of the British- notably, the opposition which had been growing. The act excluded English-language publications. Because of this there were strong protests from a widespread strata of the population across India.[3] As a nation we've come really far from such oppressive colonial tactics, but still the freedom of press remains under question. There is this new problem of fake news and paid news which we face in today's time. At an individual level we often forget that it is okay to disagree. Not everyone can have the same views over anything. This is because of the difference in our upbringing, education, way of living, state of mind, or any other such thing. All of this dictates the way we think, the opinions we frame, and hence what we speak. We should start to agree that it is okay to disagree and that a healthy debate doesn't necessarily mean imposing one's views on the other.

FREE SPEECH: ABSOLUTENESS AND RELATIVITY

The first question which arises when we talk about a fundamental right is that whether it is absolute. Let's take the example of Right to freedom of movement[4]. Under the garb of this right, I cannot walk off to the Indo-China border on my

[3] The Editors of Encyclopedia Britannica, Vernacular Press Act 1878, ENCYCLOPEDIA BRITANNICA (Nov. 17, 2018),https://www.britannica.com/topic/Vernacular-Press-Act

[4] Constitution of India; art. 19, (1) (d).

own whims and fancies. Or, I cannot enter the parliament in session, claiming that I have a right to freedom of movement endowed upon me by the Constitution of India. There have to be certain reasonable restrictions on any right. With regard to the right to freedom of movement, the constitution says:

"Nothing in [sub-clauses (d) and (e)] of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe."[5]

Rights are not absolute. They cannot be. They always come with reasonable restrictions. My freedom to exercise my rights ends where it starts infringing someone else's rights. Also rights come along with certain duties. There can be no question of rights if we are not bound by certain duties, and vice versa. This means that rights and duties go hand in hand. Indian constitution provides for Fundamental Duties enshrined in Part IV A, Article 51A; brought about by the 42nd Amendment Act, 1976. This is where morality also comes into picture. What may be granted by laws, if used in an immoral way could prove to be fatal. Also, there is a very fine line on how we distinguish between something which is immoral and something which is not. This distinction is pretty subjective, and relative to one's perspectives. Similar relativity (rather than absoluteness) can be seen when we talk about the right to free speech. This is when my right to freedom to speech creates problem for someone else, for example. Regarding Freedom of Speech, the constitution of India says:

"Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."[7]

We have taken up this project to bring about the relativity with the existing defamation laws in India. So when it becomes clear that freedom of speech comes with a certain amount of reasonable restrictions, the question left to deal with is the ambiguity which still lies, the arbitrariness which surrounds the defamation laws, and the problems which still arise and make the situation a bit more grave and dangerous. This situation will be dealt with in the subsequent sections.

DEFAMATION IN INDIA

Defamation means communicating a false statement that in the eyes of right minded people of the society, lowers or tends to lower the reputation of some other entity. Broadly it is of 2 types:

[5] Constitution of India. Art. 19, (5).
[6] *Id.*

1. Slander
2. Libel

Slander is generally meant as something whose effects are transient and temporary. It could be made through spoken words or gestures, something which doesn't tend to last for long. There can be action available in slander cases only when damage can be proved in its actuality.[7] This is because it becomes difficult to determine whether something which was said, was said in what context, or what tone, and/ or did it harm the plaintiff in the way which he claims.

Libel is what can be construed as something which is of a more permanent nature, and which sticks along with the victim for a longer period of time. It is generally something which can be presented in a written form for example, or let's say something mentioned on an online podcast, or by any other means which can be treated as a permanent form. Libel is actionable per se. No special damage will have to be proven as the proof of libel being committed. It is enough to assign liability on the defendant's part. This can be understood better through the legal maxim in latin, 'Res Ipsa Loquitor' which means that things speak for themselves (hence shifting the burden of proof on to the defendant).

Defamation is considered as a civil wrong, as a part of the Law of Torts. The Tort law till date is largely not codified as a part of any statute or act. It works on the common law's Doctrine of Precedence and principle of Stare Decisis, wherein previous judgments are used to dictate conduct and decide wrongs.

The essentials to prove defamation in tort law are:

- False Statement
- Publication of the false statement
- Loss of reputation in the eyes of a reasonable person

By publication, we mean that the statement should reach some third person other than the initial 2 people. As an illustration, John sends a sealed letter to Tom hurling derogatory false accusations at him. After reading the letter, Tom cannot sue John for defamation as there is no publication.

Another aspect which is of immense significance here is that in civil wrongs, intention is considered as irrelevant. This is one basic aspect which differentiates civil and criminal defamation. So even if someone says something without any malicious intention on his part to defame other person, he will be held liable. Truth is an absolute defence in cases of defamation under the civil law.

Remedies for Defamation under Civil Law:

Tort Law (Civil Law) provides for unliquidated damages, or in other words, compensation which is not pre-decided. If the victim can prove a sufficient loss of reputation and associated losses with that, he is entitled to receive such compensation from the defendant.

[7]Types of Defamation, LAW TEACHER (NOV. 16, 2018), https://www.lawteacher.net/free-law-essays/common-law/types-of-defamation.php.

Apart from this, the defendant may be asked to publicly issue an apology to the plaintiff, and to take back his statement. Also, he may be asked to retract/ recall the publishing media from the public domain (for e.g. calling off a book from the market).

Defamation as a Criminal Wrong:

Now this is where the problem arises. Section 499 of Indian Penal Code (1860) holds defamation as a criminal wrong. The essentials required to prove criminal defamation are same as those of civil defamation. The only difference which lies is that intention to defame becomes relevant over here. Malice is an essential to prove criminal defamation. Truth alone is not considered as a defence, rather truth only if for public good, is considered a defence in such cases.

Also, the IPC says:

"Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both."[8]

Until compensation, statement recall, injunction are remedies, the defamation laws were fine under the civil ambit, but by criminalising it, there are severe negative implications. This law has become a tool for harassment rather than seeking aid. The threat of arrest and imprisonment proves to be a serious demotivator to a person who would want to exercise his freedom of speech but would always be under a fear of criminal prosecution.

ARTICLE 19 V. ARTICLE 21- THE CONFLICT

So, to begin with, let's see how it plays out when a person defames another person. Let us say that a person does so. By defaming, we mean that this particular person has made a false remark about this other person, and which causes his reputation to get lowered in the eyes of other persons. This does violate the dignity of that person, and his right to reputation per se. Even though such a principle isn't coded anywhere in a broad head, its implications can be seen almost in many spheres. For example, Article 21 of our Constitution talks about Protection of Life and Personal Liberty.[9] Here, even if not explicitly stated, it is understood that a right to life includes right to a dignified and respectable life, and if that sentiment is hurt by a defamatory remark for example, this would amount to a violation of the right. The need to protect an individual's reputation is imperative and is of high importance. Its importance can be judged by the fact that the English legal system had to come up with a separate concept pertaining to defamation and liabilities were set for committing defamation.

This is one perspective to it that defamation causes the violation of human rights of the victim on the grounds as mentioned above. But, there is another angle to this, when we bring about laws to punish for defamation (that too

[8] Indian Penal Code, No. 45 of 1860, Section 500.
[9] IND. CONST. art. 21.

criminally), we essentially try to curtail the freedom of speech of a person who may have been giving his opinion. This view states that the laws relating to defamation are in stark contradiction to Article 10 of the European Convention of Human Rights[10], which provides for freedom of expression.

And yes, this makes sense. In this age of extensive media for communication, there will always be a constant flow of ideas and opinions going on. And it is very likely to happen that at times a mere opinion would be considered defamatory even when the person did not intend to say a particular thing to defame someone. The Tort Law won't give importance to intention and would impose punishment in the form of compensation. This doesn't stop here, as the concept of Criminal defamation also poses a threat to a free and fair flow of ideas.

MISUSE OF DEFAMATION LAWS

Widely in use nowadays; Criminal Defamation is enshrined in Section 499 of the Indian Penal Code.[11] Section 500[12] of the Indian Penal Code specifies in this regard that the punishment for the act of 'criminal defamation' could be a simple imprisonment which may extend up to two years, or it could be fine; or both.[13] Now imagine the kind of repercussions this can have on a free society. Such a provision could be heavily misused by those who wish to seek a garb under such provisions and sneak out of the public opinion frame. There have been numerous demands to treat defamation as a civil wrong only, as criminalizing it threatens the essence of free speech. It is argued that such laws pertaining to defamation are violative of the principles of Article 19 of our constitution.[14] This therefore becomes a tool which is easily invoked and enables persons to drag others to courts across the country. There is a lot of anomaly in this regard, and it is unclear as to why the civil remedies are not sufficient enough and encourage the need of criminal ones. Though, it should be noted, that advocates of free speech are trying to do away with defamation laws in any form, civil or criminal.

When it comes to the other side of the story, the people who support defamation laws and its incrimination advocate that the crucifixion of an individual's reputation should be non-permissible under any given circumstance, and cannot be justified even by arguments of free speech. They believe that declaring the present law unconstitutional would not be a healthy exercise. If not treated properly, there can be a lot of imbalance between Article 19 and Article 21 in this regard, and that a balance is needed.

Also, it is not such that the provisions are inflexible provisions of the IPC. These sections pertaining to defamation in IPC[15] have a plethora of explanations

[10] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS 5.
[11] Indian Penal Code, No. 45 of 1860, sec. 499.
[12] Indian Penal Code, No. 45 of 1860.
[13] Id.
[14] IND. CONST. art. 19.
[15] Indian Penal Code, No. 45 of 1860, Section 499, section 500.

and exceptions. This does two things primarily; it adds content and context to the wrong; and tries to remove away any scope of ambiguity.

Recently there has been a lot of chaos in this regard. There have been multi-million dollar law suits where any one ranging from politicians to actors are suing for defamation. And there are a lot of successful suits like those filed by Chris Gayle against an Australian media house Fairfax, for starters. Recently we saw the spat between Mr. Arun Jaitley and Mr. Arvind Kejriwal also, which grew into an ugly battle. This defamation claim saw lawyers and parties bad mouthing about each other in the court room itself.

MODERN TRENDS IN DEFAMATION

Earlier, defamation was restricted to a personal level of communication only; it could also have been done by letters, postcards etc. The modern form of this is undoubtedly social media and other digital means. According to a survey, out of the 7.6 Billion people on earth, 4.6 Billion use the internet to consume content; and that there are 5.54 Billion social media accounts, out of which 3.04 Billion active users register a daily presence and consume content in some form of the other. Also, this survey points out that there may be a new user every 15 seconds.[16] What essentially happens is any such publication turns into a case. Many a times, defamation suits seem to be frivolous and people randomly file it in order to satisfy their ego or out of any personal enmity as well.

Next up is media houses, print or television, where issues arise when powerful personalities sue for defamation charges claiming compensation and in order to present to the society at large that they are of a clean character. This is how we see a threat comes to the freedom of media as well. Media is considered as the fourth pillar of democracy after executive, legislature, and judiciary. Once we fail to understand this need for a free media, our existence as a democratic society ceases to serve its purpose. Man is a social animal; for him the most fundamental of all rights is being able to voice an opinion. If this freedom is curtailed, the repercussions can be really bad. As it is we are facing the problem of fake news in today's times due to a lot of favoritism among the news publishing fraternity, and due to their loyalties to certain political parties or business houses etc. Added to this, due to the extensive amount of user generated content, and open source materials, one can never be sure about the authenticity of the news which is being presented. There is a network of hoax fake news on platforms like Whatsapp, Facebook, where billions of people are consuming news daily. And if we allow this curtailment of the freedom of press, there would be no point in consuming news. The basic essence of an unbiased critical view would be lost. On the other hand, no person has a right to intentionally put one's reputation in jeopardy. Such defamation is also driven by motive. And when it comes to modern business world competitions, a person's reputation has a lot to cash on.

[16] Kit Smith, Amazing Social Media Statistics and Facts, BRANDWATCH (Nov. 20, 2018), https://www.brandwatch.com/blog/amazing-social-media-statistics-and-facts/.

Also, who usually files defamation suits? The cases take years to get disposed off and require a lot of money. So, apparently, only the economically well off have the means to actually fight a case on an issue like defamation. A common man's reputation is given less value as compared to a rich resourceful man. It is high time to start thinking whether this law is fair.

CONCLUSION

Through this project, we tried to deal with a human right issue, i.e. free speech in connection with the defamation laws in India. Our main point of focus was how these two legal concepts somewhat conflict and contradict at times. First up, we had a look on the concept of free speech and the aspects related to it. Then we determined how no right can be termed as absolute and how reasonable restrictions can be put on the basic fundamental rights. Herein, defamation was introduced and its essentials, remedies, ambits were discussed. . It was imperative for us to study these nuances in this particular regard because there hasn't been much talk about it lately. We tried to bring about common grounds where there was a clash between these two concepts. Then we saw how article 19 and article 21 stood in juxtaposition when it came to different perspectives on whether or not defamation laws should be held valid. Later we tried to study these perspectives to modern setups and tried to find a middle ground. Also we studied various recent trends with regard to defamation suits, and how there has been some kind of frivolity when it comes to famous personalities filing defamation suits. Then we saw that the issue of media freedom also comes into play when we talk about this issue, and how this could prove to be dangerous in modern times of fake news and biased reporting. These findings were substantiated by examples, illustrations and statistics. This did help us to view the issue in a new light and with a broader frame of reference. Criminal Defamation as a concept gives rise to ambiguity and there have to be law reforms to clear the confusion that abounds it.

What essentially remains after this is the question, how can these issues be resolved. There can not be any sure shot answer to this. What we need to do is to find a balance in midst of every conflict. This is what the true spirit of democracy is. This is how revolutions are brought about. We find something in the society which is troublesome, we look for probable solutions, we try and implement that particular solution, we see if all sections are at peace with a particular setup, we see if there are unresolved issues, we hold discussions, we share opinions, we exchange ideas, we try to improve and move towards better solutions to the same problems. This is how we grow as a society and learn from our mistakes. What we can do meanwhile, is to keep expressing our views and hope for the best. And in the end, may democracy triumph!

EVOLUTION OF FEDERALISM IN INDIA: PAST, PRESENT AND FUTURE

Saisha Singh*

ABSTRACT

Federalism as a concept in India has gone through a watershed development, ever since independence of the country. Ranging from Anthony Birch's definition, that called India a system of 'cooperative federalism', to KC Wheare's observation of it being quasi-federal, the interpretation of Federalism has seen a sea change

Through this paper, the author briefly analyses the existence of federal form of governance in India, and puts forth, the evolution of federalism, from the time of introduction of constitution, to the times of emergency, and proceeds towards the conception of federalism in contemporary era. Discussion of the latter, involves a variety of issues at hand, an important one being the Goods and Services Tax (GST), which can be referred to, as an event, that has changed the face of federalism in the country, and created space for deliberation regarding the same. As for the conclusion, what is analysed is whether federalism has evolved for the better or not

INTRODUCTION

India, as a democracy, has a kind of political structure which is unusual in itself, thereby making it impossible to formulate a single, normative description for the same. Terms, such as 'quasi-federal' and 'statutory decentralization' have found their way across for describing the federal structure that exists in India. This is due to the fact that India as a country, faces problems unique in nature, which are not confronted by any other federations in due course of time. Moreover, it was also observed that federalism itself as a concept wasn't definite and lacked stable meaning , thereby leading the members of the constituent assembly not to believe or adhere to any theory or dogma or, for that matter, adopt the recourse to any one theory while imagining the nature of the Indian polity.

Federalism as a concept which has been said to be adopted in India is in the form of Cooperative Federalism, which, at the foundational level calls for the interdependence of federal and regional governments. Further, Cooperative Federalism, as defined by A.H. Birch involves:

"...the practice of administrative cooperation between general and regional governments, the partial dependence of the regional governments upon payments from the general governments, and the fact that general governments, by the use of general grants, frequently promote developments in matters which are constitutionally assigned to the regions."[3]

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[1] 3 Lok Sabha, Constituent Assembly Debates 38 (2014)

[2] 11 Lok Sabha, Constituent Assembly Debates 950 (2014).

[3] A.h. Birch, Federalism, Finance And Social Legislation In Canada, Australia And United States 305-306 (1955)

In this reference, another important definition which needs to be mentional is that of Prof. K.C. Wheare, which defines federalism as *"the system wherein general and regional governments of a country shall be independent of each other within its sphere."*[4] An interesting point to note here is that both the definitions demonstrate the structure of federalism that has been adopted by India, in the spheres of operation of both the Centre and State are, at the same time, independent of and inter-dependent on one another. Not only this, but when a closer look is taken towards the definition of cooperative federalism, it needs to be considered that when the initial formation of structure of governance had been done, what emerged was a strong central government, one that didn't necessarily result in weak provincial governments, but assumed the role of administrative agency for central policies in full cooperation with the latter.

REASONS FOR THE FORMATION OF A FEDERAL FORM OF GOVERNANCE, WITH A STRONG CENTRE IN INDIA

While studying any form of governance in a given country, a significant aspect that needs to be looked upon is how that form of governance has come into being in the present-day context. Similarly, in order to take up work on evolution of federalism, I, in the first place felt the need to see why has it come into existence in India, as against a direct, parliamentary constitution and the one based on 'Gandhian Decentralization'. Some of the possible reasons for adoption of Federalism with a strong centre have been identified as follows:

1. The nation was preoccupied with communal politics from late 1920s till 1947, the year of partition. This is due to the fact that even when the introduction of diarchy was done, in the Government of India Act 1919 and 1935, the government seemed more interested in guaranteeing community rights instead of state rights.
2. Greater reliance was placed on central power rather than provincial autonomy. This was because the centre was strongly unified and a diminishing authority and autonomy of the local governing bodies due to varied other developments.
3. Conditions that existed at the time of partition, wherein resettling of refugees, controlling communal frenzy, accomplishing unfinished administrative tasks, transfer of power etc., were some of the steps required to be taken solely by the centre. Further, it was also observed that activities, such as controlling food crisis, was something to be solved only by centre, and therefore centralized control emerged as the best option.
4. Achieving goals of immediate social revolution, which is concerned with improvement of the standard of living, increasing industrial and agricultural productivity etc., were the functions to be performed by the centre, also became an important reason for bringing federalism in India.[5]

[4]K.c. Wheare, Federal Government 97 (1946).
[5]Granville Austin, The Indian Constitution: Cornerstone Of A Nation 233 (1966).

FEDERALISM AT THE TIME OF INTRODUCTION OF CONSTITUTION

It is at the time of independence that India introduced a federal form of government, which exists with a strong centre. In the words of members of the Union Constitution Committee, the following decisions were taken tentatively:

"that the constitution would be federal with a strong centre. That there should be three exhaustive legislative list and that residuary powers must exist with the Union Government. That the princely states must be at par with provinces regarding federal list, subject to special matters, and that generally speaking, the executive authority of the union should be co-extensive with its legislative authority".

Bringing forth the legacy of the statement of the Union Constitution Committee, federalism was instituted and there are the following aspects which were majorly defined:

1. **Distribution of Powers:** The basic provisions laying down distribution of powers between the union and provincial governments are found in part XI of the Constitution, bearing the title 'Relations between Union and States', and the same is divided into two parts: legislative relations (defining the three lists) and administrative relations.[6] Union Power Committee, one of the several committees introduced at the time of formation of the Constitution, deliberated at length upon the feasibility of instituting a strong central government, and apportioned powers in the form of Union List, State List and Concurrent List. Further, when the classification of subjects for these lists was discussed, the Union list was made most the most comprehensive and overarching of all, and the remaining powers were put either in the State or the Concurrent List. It is along with the efforts of the UPC, that Dr. B.N. Rau came up with the idea of introducing the subject of safeguarding civil rights of all citizens in the Union List. In his work, India's Constitution, he stated:

"The essence of the matter is that where legislation is called for on a national basis, the Central Legislature should have power to enact it without amending the Constitution. Such legislation may be needed not only in such spheres as education, cooperative farming, or public health, but also in the matter which is coming to be regarded as one of national and indeed almost international importance, namely, the safeguarding of the civil rights of all citizens."

2. **Union's Emergency Powers:** Perhaps a feature which can be said to be the most peculiar of all is that of emergency. Articles 352, 356, and 360, highlight National, State and Financial Emergency respectively. Under these, it is the prerogative of the President to proclaim emergency when national security is threatened by external aggression/armed rebellion[7] (National Emergency), or in case when the Centre is satisfied that government of the state cannot be

[6]Granville Austin, The Indian Constitution: Cornerstone Of A Nation (1966) ("Legislative relations in the form of lists was introduced in India in 1919, with the putting up of systems relating to diarchy. It was largely felt that these lists will provide a sound basis for a federal system, and that their exhaustive description shall help escape the issue of residuary powers, a controversial issue giving rise to communal tension at that time").

[7]India Const. art 352(1), amended by The Constitution (Forty-Forth Amendment) Act, 1978.

carried out in accordance with the Constitution (State Emergency). Further, it is also in the hands of the President that even in case of threat to the financial stability of the country, emergency can be proclaimed. While this is valid, the Union Executive may direct the unif executives to observe 'such canons of financial propriety as may be specified in such directions.'[8]

The aspect of federal state with a strong centre comes into being in the manner that, it is only the President who has powers relating to Emergency, and not the Governor. But it must be noted that not all leaders were satisfied with the provisions of emergency granting the centre a lot more control than expected: it was considered that such powers granted the Centre 'utmost interference' in provincial affairs, bringing to light the fact that distribution of revenues must be done in a liberal manner.[9]

3. **Distribution of Revenues:** The arena of revenue distribution forms a unique aspect in the federal structure of India. Under classical federalism, both general and regional governments must have independent financial resources and these must be in their respective control, sufficient to perform their designated functions[10]

Under the Constitution, the cooperative system of revenue distribution comes under Part XII, and can be roughly divided into four categories: the allocation of taxing power especially grants-in-aid, articles regulating borrowing, and provisions for finance commission. Taxing power is seen divided into three categories, viz. Union taxes (levied by union and retained by them), collected by union and shared with states, and third, collected by Union but with proceeds granted to states wholly.

Along with various other provisions, the guardian of equitable and fiscally sound distribution is a quasi-judicial body, the Finance Commission, as appointed by the President. This body has achieved great importance as it majorly aids in allotment of taxes, which have been collected by the Union. It is this body whose reports are accepted without question by all parties, thereby affecting the balance of the federal system in India.

FEDERALISM DURING THE EMERGENCY PERIOD, 1975

"By combining an emergency governance and a federal system, the political leadership tried to get the best of the two possible worlds, though, in time, the Indian system could be alleged to have become a case of pathology of federalism." - B.D. Dua[11]

The Constitution of India enshrines within itself Part XVIII, and lists the provisions for emergency in its ambit. Listed from Article 352 to 360, three kinds

[8] INDIA CONST. art 360 (it is perhaps helpful to reiterate here that the words 'the President' are used with reference to the emergency. Provisions, as elsewhere stated in the constitution, mean the president as advised by his ministers).

[9] 7 Lok Sabha, Constituent Assembly Debates 734 (2014).

[10] K.c. Wheare, Federal Government (1946) Accord Granville Austin, The Indian Constitution: Cornerstone of A Nation 270 (1966).

[11] B.D. Dua, Presidential Rule in India (1950-74): A Study in Crisis Politics 5 (1985).

of emergencies are advocated. These are: National, State or Presidential, and Financial. For this section, the researcher's focus shall be on the period of National Emergency between 1975-1977.

Emergency as a period lasted for about nineteen months, between 1975-77. It is during this period, that the state autonomy an important point for critical discussion was not only relegated to the background, but the very federal character of the system had undergone complete alteration. During this period, the strong armed tactic of the government, or to be more precise, the party in power betrayed the imbalance between the Centre and States. Moreover, it is this period, which exposed the increasing constitutional imbalance, and reduced the status of the states to that of magnified municlpalitles.[12]

The most important development of this period is The Constitution (Forty-Second Amendment) Act, 1976, which was largely responsible for alteration of the original federal character of the Indian system. An addition in reference to Fundamental Duties, prescribes that every Indian citizen has a duty to uphold and protect the sovereignty, unity and integrity of india. Certain articles were also modified, which then enabled the President to make an Emergency proclamation in respect of a part of the country, or restrict an Emergency proclamation made in respect of the country as a whole or a part of the country. These provisions enable the establishment of a lasting Union wherein the states don't have a right to secede.[13]

Some other changes significant towards the aspect of Federalism during Emergency are:

1. **Subject transfers from State List to Concurrent List:** Some of the subjects which have seen a transfer from the State to Concurrent List include administration of justice; constitution and organization of all courts except the Supreme and High Courts, education, weights and measures, forests, protection of wild animals and birds.
2. **Deployment of Armed Forces:** Authority was then granted to the Union Government to deploy any armed forces of the Union, or any other forces subject to its control or any contingent or unit thereof in any part of India, in order to maintain law and order.
3. **Authority to regulate courts in a uniform manner:** Here, Article 368 was amended to include the fact that no amendment to the Constitution is to be brought under judicial review except it being unconstitutional in nature. Under this, part III, i.e. Fundamental Rights were also included.
4. **Federalism in India:** The nature of federalism in India, through introduction of this amendment, is not contractual, but administrative in nature, which deterlorates the essence of Indian Federalism from cooperation to dictation.

[12] R.S. JAIN, Federalism In India: Emerging Trends And Future Outlook, in Seminar on Indian Constitution: Trends and Developments 1-14 (1978).

[13] *id.*

[14] *id.*

5. **Politicization of the office of President:** In a country like India, where the office of the President has been non-partisan in nature, where he is expected to act as an impartial arbiter of the states as well as union rights, the office became politicized. This was well in evidence during the presidential elections of late 1960s. Further, the forty-second amendment made the advice of the council of ministers legally binding on the president, thus putting the authority entrusted with overseeing application of federalism in jeopardy.[14]

FEDERALISM IN THE PRESENT-DAY CONTEXT

Indian Constitution, even where referred to as federal, comprises of such features which signify it being essentially unitary in nature. The formation of the Constitution in large part has reflected consensus among members of the Constituent Assembly which, despite facing a variety of issues, made the structure as it exists today.[15]

The fact that needs to be kept in mind, and given due importance, is that the Constitution, even while prescribing states to exercise their rights in a limited manner, making their functioning fall in tandem with the idea of one nation granting single citizenship to all its citizens, has never intended to create one. This is because states since that period are functioning as municipalities, and as outlined in the PART IX of the Constitution, creation of funds for the national economy isn't achieved merely on the will and whim of the government, but also through taxes which the states impose within their respective territories.

Federalism in the contemporary era has been stated to have been fared out well. But there are certain arenas which can be stated to be significantly problematic, such as, cross-border terrorism. In recent decades, this has been of particular relevance to India. In 2008, for instance India witnessed a terror attacks in Mumbai, where terrorists took hostages in multiple locations across the city for over four days and killed scores of Indians and foreigners.

It is this incident that triggered anguish among the citizens at the inexplicable delay in arrival of security. Seen in terms of Indian federalism, the attacks called for a restoration of 'public order', a subject that is entirely on the State List and not on either the Union List or Concurrent List.[16] Unlike the US, 'federal crime' is not a concept In Indian Law, and cannot be introduced unless the amendment of the Constitution takes place. The relevance of this subject has been debated for long, but the idea remains legally elusive.[17] Another incident in this regard the hijacking of an Indian Airlines flight from Kathmandu was to Kandahar in 1999. The Government had to agree to a humiliating deal that released well-known terrorists from Indian jails in return for safety of passengers and the case never got registered as a crime.[18]

[15]Nirvikar Singh & T.N. Srinivasan, Federalism And Economic Development In India: An Assessment (November 6, 2006), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=950309.

[16]Ashutosh Varshney, How Has Indian Federalism Done?, 1(1) STUDIES IN INDIAN POLITICS 43-63 (2013).

[17] *id.*

[18] *id.*

Further, central agencies including those trained for urban terrorism, cannot be functioning without state government and police's cooperation, and cannot make unauthorised entry into their area. The commandos operating in India were based in Delhi and Mumbai at the time of the 2008 attacks, following which, hubs were created in Hyderabad, Chennai and Kolkata, thereby making their deployment quicker at times of exigency. But at the end of it all, they still require state police's cooperation as they are not always aware of the specifics in the area of operation.

Another important aspect that comes to play is the flawed intelligence system of India. The Central Bureau of Investigation (CBI), which has the ability to function both as an investigative and intelligence agency, but the work that it carries out is only that of ex-post investigation. For intelligence related work, state police, and Intelligence Bureau are the ones to be in operation. Not only this, but the CBI is not given the power to carry out investigation suo motu, but has to take permission from the respective state, or be ordered by the Supreme Court or High Court, and is heavily dependent on the state machinery and police.[19]

With regard to the contemporary era, the biggest change that the economic system of the country as a federal structure has witnessed is the introduction of Goods and Services Tax (GST) regime. This tax reform, which had been on cards for more than a decade, has now been brought in the country, and been inserted in the Constitution of India by way of the 101st Amendment Act, 2016, which given the states, the power to make laws with respect to GST, and the Parliament, the power to make laws with respect to GST when supply of goods/services or both, takes place in course of inter-state trade or commerce.[20]

The banking institution of India, the RBI, states in its report on state finances, that introducing GST shall herald a new era in cooperative federalism, as it sets a new course by strengthening Centre-State partnership.[21] This is due to the fact that the government is desirous of ushering the system of dual GST, levied and managed by different administrations, i.e. the centre and states, and also, their monitoring and compliance shall also be done in an independent manner at two different levels.

However, this optimism surrounding GST's introduction needs to be examined in all its nuances. While it is referred to as an epitome for cooperative federalism, the GST regime makes it inevitable for state's freedom to be curtailed. This observation comes in light of the fact that taxing of varied items, which has remained in state domain, and has continued to be an important source of revenue, shall be governed by a single legislation, thereby taking away the prerogative of the respective state in this regard. Some points which substantiate the aforementioned ones are:

[19] *Id.*

[20] Ministry of Law and Justice, The Constitution (One Hundred and First Amendment) ACT (2016).

[21] Special Correspondent, GST to Herald a New Era in Federalism: RBI, The Hindu (May 12, 2017, 12:18 AM), https://www.thehindu.com/business/gst-to-herald-a-new-era-in-federalism-rbi/article18439670.ece.

- Categorisation of goods and services to be done by the GST Council
- Setting of CGST and SGST rates by GST Council, which doesn't let the states make changes on their own will.
- Problems in setting up of the GST Council.

It is further submitted that more than the aspects that define GST as a concept, it is the practicallty of it which poses the real problem in present times. This is being claimed as GST, when compared with other countries where it is in vogue, has one, or maximum two types of taxes, whereas in India, the items are taxed in multiplicity. Further, the fact that the country isn't ready for infrastructural and logistical overhaul in a day is something which cannot be denied, which is the reason that it has been argued that GST should have been introduced in instalments and not in one go. Lastly, the mechanism for enforcement of GST remains unclear as to in those cases where the states may be in conflict with the centre, and would refuse to bring GST in operation. [22]

CONCLUSION

Federalism in India came to be adopted at the time when the country was struggling to get up on its feet. Aspects of cooperative federalism reflected many of the measures undertaken by the Constituent Assembly at that time, meant to carry a legacy of proportionate distribution of powers forward, by earmarking the states as equal stakeholders in running operations in the country.

But, as time progressed, the aspect of cooperative federalism has come to be marred by several difficulties. . The Union, which ought to have been functioning in the manner adaptable for cooperation, has, over time become whimsical, thereby forcing the system to proceed towards being unitary. The times of National Emergency are reflective of the same. The 42nd Amendment, even though corrected at a later stage, comes as an apt example of the grave situation that may arise when the Central Government makes attempts to undertake all those activities which go against all the ideals for which federalism was initially established as a system of governance.

What also needs to be duly considered, is that the government doesn't make conscious efforts in straying away from cooperative federalism, but various functions of the system of governance, bring to light those areas which give rise to dilemma as to whether subjects should remain at the disposal of the centre, or the states be involved as stakeholders along with the centre in operations related to those areas. Examples taken up in this regard include cross – border terrorism, and functioning of the intelligence agencies. These dilemmas continue to exist, and solution for them is still being sought.

Another side to this story as discussed in the essay is the ongoing debate about the introduction of GST. Where on one hand, the government stakes large claims in heralding this system of taxation as paving way towards cooperative

[22] Sr. Adv. Arvind Datar, Speech on the Constitution, Federalism, and GST, NALSAR (Jan. 21, 2017), https://www.nalsar.ac.in/Constitution-Federalism-And-Gst.

federalism, the other side brings to the fore as to how states lose autonomy of the items they want or not want to tax, and how formation of GST Council poses a problem in making choice of goods in terms of introducing the tax slabs. Not only this, but the debate that at present surrounds as to how GST comes as a threat to federal system, thereby giving it the direction of proceeding towards making the government unitary in nature.

In conclusion to this paper, the researcher reiterates, that federalism as part of the basic structure of the Constitution of India, has been established in the best manner possible. Further, despite all the issues which come its way, the process for evolution for this type of governance continues, within the framework of the Constitution of India, as well as the contemporary era.

To conclude, claims of incidents, which could be thought of as a threat to federalism, as was seen with regard to Goods and Services Tax, such claims in reality are unlikely to succeed. This can be stated due to the fact that the chances that a country as large and diverse as India, it is best for the governance system to comprise itself of federal structure, and not go on to be unitary in nature. Therefore, evolution of federalism is a desirable element of the Indian democracy.

BIOTERRORISM AND LAW

Madalsa Jain*

ABSTRACT

The following essay explores the newly developed concept of bioterrorism and how it has evolved as a part of international law. Bioterrorism was first recognized as a global threat after the anthrax attacks in United States of America. Since then, the development, use and manufacturing of the same has created a global awareness regarding the danger of the same. It is dangerous to the health of citizens and governments are solely responsible for the protection of the same. Hence, on the international platform, Protocols and Conventions have been introduced to ensure governance over the acquisition, use and manufacturing of the same. Precautionary theory and the Theory of Arms Control have proved most effective for lessening the danger and harms of biological warfare. Biological Weapons Convention, 1972 has been enacted on the same principles and bioterrorism was first recognized under Geneva Protocol, 1925. This essay studies the reasons why biological warfare is a major threat to the existing social order and how it can be curbed. Biological warfare is cost effective as compared to nuclear warfare and is convenient in its making. It also causes greater damage and creates more panic and terror than non-nuclear weapons. It is easier to manufacture and smuggle across boundaries as well. This essay also explores the primary problems affiliated to banning of biological material and pathogens and the conflicts arising if the restriction is limited on the same. Hence, biological warfare is far more dangerous than other weapons and the need to curb the same has been recognized on the international platform.

INTRODUCTION

"The greatest existential threat faced by humans today is biological."
- United States Senate Majority Leader William Frist

Today, the primary and fundamental duty of every government, across all countries, is the public's health, safety and welfare. Public attention, across the world, has never been engaged by any topic as much as it has been engaged by bioterrorism. It is today recognized as a serious threat which could destroy civilizations. It has successfully created medical, health and national security issues for various governments.

Bioterrorism was first recognized on an international level after the attack in Unites States of America in 2001. "The attacks were made on the World Trade Center and the Pentagon by nineteen young Arab men. These men hijacked four aircrafts and attacked the World Trade Center, the Pentagon and the fourth aircraft missed its target and landed in/on a field. They caused a massive amount of killing, including aircraft crew, passengers and innocent workers. The United States suffered an economic loss nearing two million dollars as well. Shortly after these attacks, on 15th October, 2001, a letter containing anthrax spores was opened in the Hart Senate Office Building in Washington, D.C. The one letter impacted staff (about thirty congressional employees tested positive for

Second Year Student, Damodaram Sanjivayya National Law University

anthrax exposure) and caused the closure of the Hart Building and several other government buildings along the mail delivery route. The cleanup costs to the Environmental Protection Agency were $27 million."[1]

"The unnatural and deliberate use of pathogenic strains of micro-organisms such as bacteria, viruses or their toxins to spread life-threatening diseases on a mass scale with the aim to devastate the population of an area is referred to as 'bioterrorism'."[2] *"Bioterrorism is a form of asymmetrical warfare in which a terrorist, with biological expertise and modest means, could inflict great harm upon millions of innocent victims."*[3]

We are all threatened by the reality of bioterrorism and critical choices need to be made without delay.[4] Our choices must focus on preventing terrorists from acquiring or developing biological weapons.[5]

HISTORY OF BIOLOGICAL WARFARE

The history of biological warfare has developed for a long time and across different regions. It was earlier used in the middle ages and since then has been used in different wars, including World War II and Indo-Pakistan war. "Its history traces back to 1984, where two salad bars were contaminated by followers of a guru in United States of America and in 1995 when Iraq was found to have created harmful weapons using bacteria and viruses. Another famous incident in biological warfare is that of Japan Subway Sarin Incident where Nerve gas 'Sarin' was released by perpetrators of a religious movement Aum Shinrikyo in the Tokyo subway system in 1995 killing 13 people, severely injuring 50 and causing temporary vision problems for nearly 1000 others."[6]

Since then, many incidents have taken place, across the world, in 1998, 1999 and 2001.

BIOTERRORISM AND PUBLIC HEALTH

The fear of bioterrorism threatens the vital social contract between a public health system and the people it serves.[7] Public health was usually a part of the State's policy sphere. However, with the new development of biological warfare, federal governments are also required to make policies for better public health system. "An act of bioterrorism is both a federal and a state crime, It is also an act of war."[8]

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[1]Brigadier General Murray G. Sagsveen (Ret.) & Sarah M. Bird Nelson, Bioterrorism: A Potential Existential Threat, 6 U. ST. THOMAS L.J. 517, 518 (2009)

[2]Divashree Sharma et al., Bioterrorism: Law Enforcement, Public Health & Role of Oral and Maxillofacial Surgeon in Emergency Preparedness, 15(2) J. MAXILLOFAC. ORAL SURG 137, 137 (2016).

[3]Murray & Nelson, *supra* note 1, at 517.

[4]Barry Kellman, An International Criminal Law Approach to Bioterrorism, 25 HARV. J.L. & PUB. POL'Y 721, 721 (2002).

[5]Barry Kellman, Biological Terrorism: Legal Measures for Preventing Catastrophe, 24 HARV. J.L. & PUB. POL'Y 417, 417 (2001).

[6]Sharma et al, *supra* note 2, at 138.

[7]Laurie Garrett, The Nightmare of Bioterrorism, 80 FOREIGN AFF. 76, 87 (2001).

[8]George G. Annas, Bioterrorism, Public Health and Civil Liberties, 346 N ENGL J MED 1337, 1337 (2002).

The public health sphere of a country came under scrutiny after the biological warfare incidents increased and the threat became all too real for the governments. Many changes were made in the existing public health system. An endeavor to better understand the relationship between public health and human rights was initiated.[9] It has been understood that no nation today is prepared enough to survive a large-scale bioterrorism attack. Hence, it has today become a central focus of different countries, across the world. "World Health Organization declared that the world faced a "world crisis" in infectious diseases for which immediate international action was required."[10]

It is understood that as the protector and the representatives of the people, the government is entrusted with the responsibility of protecting its citizens and their public health. The main threat to public health at a large-scale is bioterrorism. *"To fulfill its responsibility, that is, to ensure the public's health, government authorities could temporarily constrain certain civil liberties, could require private sector participation in public health objectives, could shut down potentially harmful industries, could destroy contaminated property, could deport or prevent the entry of individuals who may infect others, could ration supplies, and could also control the flow of information."*[11]

Many proposals which have taken place include improving the health infrastructure of the country and training emergency medical personnel to recognize and treat the diseases which are most probably caused by a bioterrorist attack.[12] More efforts have to be put into improving coordination between different officials who are to respond to such emergencies.[13]

"It is also the government's responsibility to investigate any bioterrorist attack that takes place. Bioterrorism is unlawful, unlike the spread of any epidemic disease. The government is entrusted with the responsibility of finding the unlawful element and to control it before it harms the public health of its citizens. Bioterrorism is a product of a criminal activity."[14] The investigation of the same is carried out by both public health authorities, the state and federal governments. The identification of actual health threats is extremely important in order to understand the next course of action and to prevent the same from occurring again. The primary role of the investigating government is to find out the criminals behind the same, whereas the public health officials are required to take steps towards ensuring public health safety.

BIOTERRORISM'S CHALLENGE

A. Bioterrorism Weapons are Unique

One of the primary reasons for the uniqueness of biological weapons is the mass destruction that can be caused by the spreading of smallpox virus

[9]Ronal Bayer & James Colgrove, Bioterrorism, Public Health and The Law, 21 HEALTH AFF. 98, 99 (2002).
[10]World Health Organization, World Health Report, 1996.
[11]James G. Jr. Hodge, Bioterrorism Law and Policy: Critical Choices in Public Health, 30 JL. MED & ETHICS 254, 256 (2002).
[12]Annas, supra note 8.
[13]*Id.*
[14]Hodge, supra note 10, at 258.

and anthrax virus. These viruses can cross borders and bring casualties to an extent beyond what has been faced in the past. These weapons are much more dangerous than any other non-nuclear weapon and can bring devastation on a much larger scale. It can also wipe out the existing social order.[15]

"With communication and growing population, the scope of the devastation is remarkable. Also, biological weapons are comparatively easier to make."[16] The complexity that accompanies the making of nuclear weapons is absent in biological weapons which require comparatively less sophistication. It also requires lesser equipment and hence is convenient for criminals to build.

Biological weapons are also more useful in their physical appearance than nuclear weapons. They can be transported and carried anywhere across the world with lesser threat. Biological weapons, on the whole, are a much more affordable way of creating fear and carrying out terrorist activities than nuclear weapons. This is advantageous as many weapons can be carried from one State to another and one country to another with lesser risk of detection. Catastrophic consequences of the same are virtually impossible to predict and control since the viruses and bacteria can spread extremely fast. All of this makes bioweapons a massive threat to humankind and existence. It imposes all the more accountability on the governments to protect its citizens and to arm themselves sufficiently for future threats of the same.

B. Preventive Theory

Bioterrorism can mainly be battled with the principle of prevention. Prevention means to make sure that the engineering and building of bioterrorist weapons is reduced to the most possible extent. Prevention by the governments of different countries would mean to reduce the accessibility of equipment and resources through which terrorists can make biological weapons.

Many laws focus on the ownership of actual weapons like guns and revolvers but in the case of biological weapons, the ban on the final weapon can be disastrous and not as precautionary as other ammunition. The ban for biological weapons is established on the ingredients and the equipment which are used to make biological weapons. The dangerous resources which are needed to make these weapons and the earlier stages of production are more adequate for preventative principle. However, since this is still a new and developing concept, the legal enactment for the same still needs to be addressed on many fronts. "Some States do not have adequate authority to investigate the biological weapon activities whereas other States do not have enacted criminal penalties for persons caught manufacturing these weapons."[17]

However, preventive measures can be taken but the access to these equipment cannot be completely restricted since the use of the same is both legal and illegal.

[15]Barry Kellman, State Responsibility for Preventing Bioterrorism, 36 INT'L L 29, 30 (2002).
[16]*Id.*
[17]Barry Kellman, *supra note* 14, at 31.

Hence, the access to these resources and equipment can be regulated through proper cataloging of the buyers and sellers. It can be sold for educational purposes and commercial purposes. Hence, these consumers of the same should be registered and licensed in order to regulate the purchasing and access to these harmful pathogens. All transfers should be reported and records should be maintained under the federal government.

Another risk that the government faces is the theft of the licensed and registered pathogens by criminals who would use the same for illegal activities. "Additional security for biological agents is important to prevent and deter potential terrorists from surreptitious acquisition of pathogens."[18] Hence, officials who are involved in the commercial and educational use of these pathogens should also be monitored.

Some rules and regulations should also be established for the legitimate use of these equipment and resources. Some basic guidelines should be provided for legitimate use of the same. "A corollary to these guidelines would be a code of ethical conduct for scientists and laboratory personnel concerning the scope and purpose of their activities, the safety and containment practices that they employ, and the transfer of the products of their work including their new knowledge."[19]

Like all terrorist activities, bioterrorism can also involve a large network of criminals, across different countries. To make equipment and weapons available to different networks, these pathogens can be smuggled across various countries as well. The smuggling networks which are currently used can also be used for the biological weapons and articles. The authority which is responsible for governing the manufacturing and marketing of these pathogens should also be responsible for the smuggling and the illegal trade activities which can be carried out for these materials. One of the ways to make sure such activities do not take place is stricter and more efficient border controls. Since different countries are involved in the same and the threat faced by each country is equivalent in nature, cooperation is extremely important and essential for the same. Each country would be required to cooperate and undertake the international obligation since bioterrorism is a global threat at large.

However, main problem faced during state cooperation is of different states capabilities with regards to their military and financial means to implement legal enforcements on the same platform, across the globe. Communication of smuggling of particular pathogens and the suspected group of terrorist needs a complex system of communication between different organizations and States.

BIOTERRORISM AND INTERNATIONAL LAW

"Bioterrorism basically operates on the principle of using deaths and diseases to create terror amongst people. This implicates number of areas of international

[18] *Id*, at 32.

[19] Barry Kellman, *supra note* 14, at 33.

[20] David P. Fidler, Bioterrorism, Public Health and International Law, 3 CHI. J. INT'L. L. 7, 11 (2002).

law."[20] Bioterrorism cannot be battled with physical and military strength until and unless the terrorist group behind the war crime is identified. The States right to self-defense only comes into being when a country or a terrorist group, responsible for the attacks, is known.

A. Arms Control

"The arms control approach provides an effective set of measures to cope with a dangerous threat to international security: vertical and horizontal weapons proliferation among national militaries, with associated acceleration of both the likelihood that war among nations will erupt and that, if and when war does break out, the consequences will be catastrophic."[21] Arms control method is more effective with nuclear weapons than biological weapons.

A part of the Arms Control principle is to make sure that States do not use or keep in their possession, any equipment, resource or ingredient that is integral in the making of the weapons. Arms control, in a way, denies State the access to these materials in order to make sure no State is producing the same. "International conventions on the same include verifications and they make sure of a State's obedience to the international law obligations and to deter a State from producing such weapons by increasing the threat of discovery."[22]

For verification, States can participate by willingly providing information about their military resources and technology. However, this measure is often perceived as an activity threatening the confidentiality of a State's business secrets. States are also required to provide access to some relevant amenities but they risk privacy intrusion during the same.

Biological Weapons Convention was one of the first and foremost initiatives to make the arms control principle an obligation under international law. "The Biological Weapons Convention (BWC), Article I, prohibits development, production, stockpiling, or acquisition of: (1) biological agents that cannot be justified for prophylactic, protective, or other peaceful purposes; and (2) weapons designed to use such agents for hostile purposes or in armed conflict."[23] It also states the jus cogens principle of international law. Under Article III, States are also prohibited from assisting or transferring international material for the production of these weapons. Under Article IV, any State can file a complaint with United Nations Security Council against any other State violating their international obligation.

Biological Weapons Convention does not have the capability to force obedience from States. The treaty also concentrates specifically on the State and its development of biological weapons. However, outside the ambit of the Convention, many non-state actors can also develop these weapons and use them illegally. BWC does not provide any existing operational mechanism to enforce the provisions.

[20]Barry Kellman, supra note 4, at 725.
[21]Barry Kellman, supra note 4, at 725.
[22]Biological Weapons Convention, 1972, Article I.

In 1994, for the same, "BWC State Parties sat a special conference and discussed the instruments to make the BWC more effective. It also asked the States to declare, with transparency, any biological weapons that they had used or manufactured in the past or any such activity that they had undertaken related to biological warfare. To ensure the declarations made were honest and transparent, random checks could also take place in the relevant facilities of these countries."[24] "This particular Protocol emphasized on a point that was primarily lacking in the BWC, that is, investigation of any outbreaks of diseases and identification of terror groups who could be responsible for the same. The Protocol also encourages peaceful uses of biotechnology like educational and commercial uses and ensures States of the protection against use and threat of bioweapons. The Protocol also calls for the development of an international system for the global monitoring of emerging disease."[25] "The Protocol requires states to review and report on their national export controls and declare data on the export of certain dual-use equipment."[26]

However, the Protocol had its shortcomings as well. All the relevant facilities which could undertake activities related to biological warfare could not be identified and hence, only a small fraction of all the facilities would undergo routinely random inspections. Non-obedience is a high possibility in the international sphere given the impracticality of the routinely inspections given the share of the facilities in each State. Practically, if illegal activity was to take place in any of these facilities, the evidence could be easily cleaned up and concealed, making sure that no such investigators could find any indicators of non-compliance.

In light of all this, Biological weapons in the hands of non-state actors is a growing concern as well. Biological weapons are the most effective weapons till date since they target mass communities at once and cause terror and panic on a larger scale than other weapons like nuclear and chemical weapons. They have subtle and discreet use, unlike nuclear weapons and can be easily concealed and smuggled. Verification of non-manufacturing by States is also impossible practically. The access to these resources can be restricted but a global level check on the facilities of all States is impossible.

All of this makes bioterrorism a threat much larger in magnitude than any other dangers the world has faced in the past.

B. Legislative Preparedness and Laws Today

"Many laws at the international as well as the domestic level pertain to the biological weapons and the issues surrounding them. Applicable international laws on the same are Geneva Protocol, 1925 and Biological Weapons Convention, 1972."[27] However, at the same time, these have ineffectively prevented nations

[24] Barry Kellman, supra note 4, at 726

[25] Ad Hoc Group of the BWC, Procedural Report, 2001

[26] *Id*

[27] *Allan* A. Dagen, Bioterrorism: Perfectly Legal, 49 CATH. U. L. REV. 535, 538 (2000).

from manufacturing and using biological weapons. As discussed earlier, BWC and the Protocol did not have widespread, intricate and elucidated procedure for the implementation of supervisory checks on the States and their use of the facilities. There were loopholes in the provisions of the same. For example, "merely possessing dangerous pathogens is not a crime unless a prosecutor can prove that the possessor intended to use a pathogen as a weapon."[28]

The 1925 Geneva Protocol banned the use of bacteriological use of warfare. This treaty recognized biological use of warfare and banned the bacteriological use. The treaty emphasizes more on a state of law and not on any kind of preventive theory for bioterrorism. The Protocol reflects the international customary law[29] and therefore, is applicable to all nations.[30]

The 1972 Biological Weapons Convention focused primarily on development, production, manufacturing, acquisition of biological weapons and the ingredients and equipment used to make the same. BWC is an arms control treaty and functions on the precautionary principle. It encourages all States to restrict the access to materials used for production of these weapons and clearly defines resources. It also defines the peaceful uses of these biological pathogens.

One of the main challenges faced by the governments today is the implementation and enactment of laws which protect the public health and yet safeguard the right to possess biological equipment for peaceful uses. Some measures to criminalize the individual possession of biological materials can protect the public from bioterrorism, to an extent. Government can be given better control over these agents and can regulate their use as well. Countries can enact federal laws, making reporting and filing of these resources, with the government, compulsory. At the same time, the government cannot restrict scientists and legal scholars from possessing these materials for research and educational purposes but can only make the regulation laws more rigid.

Amidst all these challenges, bioterrorism and law has evolved.

CONCLUSION

Bioterrorism is one of the imminent threats in the world. It is a serious threat today to the citizens across the world and is more successful at spreading terror than other non-nuclear weapons. Bioterrorism is the most effective way to create panic amongst people since it targets more people than nuclear and chemical weapons. Biological weapons are easily communicable and highly concealable. They are also comparatively easier to smuggle. Bioterrorism has recently developed and is posing a major threat to human existence. It threatens the public health of citizens across the world and the responsibility to safeguard the same lies with the government of different countries. Hence, protection of public health

[28] *Id.*
[29] Statute of International Court of Justice, 1945, Art. 38(1)(b).
[30] Dugen, *supra note* 27, at 540.

and regulating the biological weapons has been incorporated in international law. Different Protocols have been enacted, recognizing bioterrorism and laying down rules and regulations for possession of the equipment and resources which are needed for the manufacturing of biological weapons. There are challenges which are yet to be overcome when it comes to biological warfare. Current laws and regulations are insufficient to tackle the threat of bioterrorism since the threat of individuals using the same for illegal purposes still exists at a large scale. Stricter verifying mechanisms should be implemented and regular checks across facilities in different States should also be governed.

CONSTITUTIONAL POSITION OF THE DIFFERENTLY-ABLED IN INDIA: AN ANALYSIS

Raajdwip Vardhan* & Sanjivan Chakraborty**

ABSTRACT

The term disability has been misunderstood by the general populace of this nation since times immemorial, and has often been associated with insufficiency, or lack of certain traits. This has led to discrimination and stereotyping of the disabled, or more appropriately, the differently abled, in society. From its introduction in the year 1949 to 2018, one of the most prominent features of our Constitution has been equality. The very first text of our constitution, that is the preamble, talks about JUSTICE: social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; and to promote among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation. These lines prove that one of the basic part of our constitution is equality among all of its citizens irrespective of their physical or mental capabilities. Part IV of the constitution provides certain rights and protections, which are for all and not specified for a group of people, article 14, 15, 20, 21 etc are rights which are made for all the citizens of India irrespective of their physical appearance and capabilities. Article 32 provides remedies to all the citizens. These articles validate that the constitution was made keeping in mind the idea of equality which has been given utmost importance in our constitution regardless to ability. Apart from these rights, the constitution makers also concurred under the Directive Principles of State Policy, the responsibility on the government to work for the progress and development of the differently-abled sections of society.

In the present research paper, the researchers will try to emphasise on all these protections provided under the Constitution of India to the disabled section of the society. This research paper will be a systematic study of various provisions under the Indian Constitution on how these laws and provisions helped in the development and maintaining an equal legal status for the disabled people in India.

Keywords: Disabled, Constitution, Protection.

1. INTRODUCTION

The Constitution of India, from its very inception over sixty eight years ago, has envisaged and implemented rules wherein, equality, one of the greatest hallmarks of a democratic society, is given the utmost reverence in the world's largest democracy, and thus, all people under the umbrella of Indian citizenship are treated without any bias or discrimination of any sort. It has also sought to extend a helping hand to those who might not be able to compete on equal terms with others in society because of certain shortcomings, and thus, it evolved the concept of treating unequal in an unequal manner, with the only ground for treatment being the presence of certain distinguishable intelligible differentia. The Constitution of India, being a Constitution for a widely diverse country like

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India fulfils its core principle of equality by providing a uniformity and fairness in terms of legal standings to all the legal citizens of the country.

The Constitution protects all the rights of differently abled people equally, as it protects the rights of other people. It protects the rights of legal citizens, from right of equality and justice to liberty and freedom of speech and expression of thoughts, beliefs, opinions and faith; Also it provides a safeguard for equality of status and opportunity for all people, the differently abled included. There are several articles in the Indian Constitution that protects the rights of disabled people at par with that of all the other persons like Article 15, Article 17, Article 21, Article 23, Article 24, Article 25 etc. These articles under the Indian Constitution will be discussed further in the research paper by the authors. Not just these articles under the Constitution of India protects the rights of disabled equally like the other people but there are several other laws as well under the education laws, health laws, family laws, succession laws, labuor laws, income tax laws etc., that provide the disabled people an equal footing in the country as compared to other peoples.

According to a World Bank report of 2011, India has about 40 to 80 million differently abled persons. In about every twelve families there is at least one family where there is a disabled member. The rate of illiteracy, unemployment and poverty is very high among the disabled populace. Now if we look at the school going population, it is five times more likely for a disabled student to be out of school, because of the stigma and the stereotype comments made. States like Tamil Nadu, Andhra Pradesh and Karnataka though have taken many good practices and programs for the benefits of the differently abled there is a long way to go.

2. PREAMBLE AND DISABLED

Throughout history, the disabled have been some of the most discriminated and stigmatized people in this country, and their treatment has been on par, if not worse, than the treatment forwarded to the lowest of castes. The stereotyping and marginalization have led to a societal notion wherein they are treated as the lowest strata of society, and the treatment forwarded to them was justified by the societal position that they occupied.

However, after Independence, when the Constitution of India was adopted by its makers i.e. the Constituent Assembly on 26th November 1949, and later ushered into force on 26thJanuary 1950, it sought to do away with all the discrimination and stigmatization that the disabled had been suffering from throughout the ages.

The preamble of our constitution states that the people of India shall secure for all its citizens the ideals of Justice, Liberty, Equality and Fraternity and[1] the preamble itself, thus confers the basic rights of Justice, Liberty, Equality and

[1] IND. CONST. Preamble.

Fraternity, among all citizens, and thus, it includes within its ambit, all the citizens of India, irrespective of any physical or mental differential that may exist among the people. The words of the Preamble are further strengthened by the fact that the Constitution derives its ultimate sanction from the people of the country themselves, and thus, the people of the nation are themselves the source of the authority vested in the Constitution.

The question that now arises is what authority does the preamble have as far as determining the rights and positions of the people in the country goes? The major point to remember here is that although the Preamble of a Constitution does not hold any statutory significance of its own, in India, the position is different. Here, the preamble is also considered a basic feature of the Constitution, and thus a similar stand has also been emphasized by the Supreme Court of the Country when it stated that the Preamble of the Constitution is of foremost importance, and as far as the interpretation of the Constitution itself is concerned, the same should be done in the light that the Preamble itself provides. This was held in the landmark case of Keshavananda Bharati.[2]

Thus, the Preamble is an integral part of our Constitution, and enjoys a special status even among the Constitutional Provisions. The fact that it emphasizes on conferring a certain brand of rights on the citizens irrespective of any difference between them goes on to further iterate the fact that under the Constitution, all the citizens, irrespective of any mental or physical disabillties, are empowered with the same set of rights and legal status that anyone else is, without any hint of discrimination whatsoever.

3. FUNDAMENTAL RIGHTS AND DISABLED - EQUALITY

The availability of the basic rights of Liberty, Equality, Justice and Fraternity, as the Preamble envisaged for all the citizens of India, is made possible by inclusion of the provisions of PART III of the Constitution. These provisions seek to confer on the citizens of India, a group of fundamental and rights that are important for the functioning of any civilized nation; a group of rights that are inalienable to their core, except in very special circumstances of emergency. This same notion, regarding the importance of such fundamental rights was held by Dr. B.R Ambedkar, when, in his concluding Constituent Assembly Speech, he stated that there is no point in the existence of political democracy until and unless there lies social democracy as the foundational pillar at the base of such political democracy. Regarding the meaning behind the term social democracy, Dr.Ambedkar stated that it simply meant a way of life in which the ideals of liberty, equality and fraternity were duly recognized.[3]

Article 14 of the Constitution of India has often been quoted as the Right to Equality in the country, and it states that equality before the law shall not be

[2]Kesavananda Bharati Sripadagalvaru v. State of Kerala, AIR 1973 SC 1461 (India)
[3]M.p Jain, Indian Constitutional Law 13 (8th Ed. 2018).
[4]IND. CONST. art. 14

denied to any person by law, and all the people will be equally protected by the said laws within the territory of the nation without any unreasonable arbitrary bias[4] The duality of this article extends two rights simultaneously, the first being equality before law, and the second being equal protection of laws.[5] What the former means is that all people must adhere to the laws that have been enacted, and no one, irrespective of whether one is a president or a commoner shall be above the provisions of the law. The latter means that every person shall be given equal protection under law, which means that again, irrespective of the status of a person or his social standing, the person shall be equally protected by law. There is no discrimination of any sort as far as adhering to laws is concerned, and it extends to anyone and everyone, irrespective of differences.

Article 15 takes the concept of equality a step further, and explicitly states that people may not be discriminated on certain grounds. Article 15(1) specifically prohibits the state from discriminating against any citizen of the country on grounds of caste, religion, sex, race or place of birth. This protection again extends to the differently-abled as well, and thus, if looking at their physical or mental shortcomings, they are subjected to any form of discrimination on behalf of the state, it is unconstitutional subject to the provisions of Article 15(1).

Article 15(2) takes the concept of the proceeding clause one step further, and prohibits any citizen from subjecting any other citizen to any liability, restriction or disability on grounds only of religion, race, sex, place of birth or case, as far as access to shops, public places, including any natural reservoir of water, or places of entertainment is concerned. Thus, it protects the differently abled from discrimination on behalf of the state as well as other fellow citizens.

Article 15(4) and 15(5) state that nothing contained in Articles 15, 29 or 19 shall prevent the state from making any special provisions for the advancement of the socially and educationally backward classes of the country, as well as the Schedule Tribes and Schedule Castes. Although the Socially and Educationally Backward Classes (SEBCs) does not usually contain the differently-abled under its ambit, it does contain the concept of intelligible differentia and reasonable nexus that can be used to justify the special provisions for the disabled. Under Article 15, reservations can be made for the following:

i) Women under Article 15(3)
ii) Socially and Educationally Backward Classes and the Scheduled Castes and Tribes under Article 15(4) and 15(5).
iii) Other groups not falling under Articles 15(3), 15(4) and 15(5).[6]

Thus, when the government of India passed the Disabilities Bill during the Parliament's winter session in 2017, and increased the quota of reservation for the disabled in India into educational institutions to 5%, the matrix evolved under Article 15 can be used to justify the reservation forwarded to the differently-

[5] D.D Basu, The Constitution of India: An Introduction 24 (22nd Ed. 2017).
[6] M P Jain, Indian Constitutional LAW 985 (8th Ed. 2018).

abled. The constitutionality of the provisions of Section 39 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 which sought to give a minimum of three percent reservation to the differently-abled in educational institutions of India can also be therefore justified under this clause. The test on whether the classification under Article 15 is reasonable or not can be adjudged as valid as long as it is identified on the basis of reasonable, rational and relevant intelligible differentia, and there is a nexus between the differentia and the object to be achieved.[7]

Carrying forward the concept of equality, as envisaged by both the Constituent Assembly and the Preamble, Article 16 (1) strives to provide equality of opportunity to all citizens as far as employment under the state is concerned, whereas Article 16 (2) prohibits any discrimination as far as employment is concerned on the grounds of religion, race, caste, sex, descent, place of birth or any of them. This means that any differently-abled person has the same opportunity as someone who is not differently-abled as far as employment under the state is concerned.

Article 16 (4) further proclaims that nothing contained within the Article shall prohibit the State for making certain reservations for the people who according to the opinion of the State fall under the purview of the term 'backward class' and have not been given adequate representation by the State.[8] Thus, under this clause, the state may make reservations of appointments or posts in favour of any 'backward classes' that the state may feel is not adequately represented in the services under the state.[9] This was also held by the Supreme Court when it stated that the Article 16 (4) was an *'enabling provision'*[10] that allowed the state to exercise a discretionary measure of sorts that allowed to state to make special provisions for classes that the state ntay feel are not adequately represented. Thus, when the Government proposed to give 4% reservation to the differently-abled through the Disabilities Bill of 2017, the move's constitutionality can be justified under the provisions of Article 16(4).

Article 17 bars anyone from being regarded as an untouchable, and states that any disability that arises out of treating someone as an untouchable shall be punished according to the law. In a country like India, which has been ruled by mysticism and superstition since times immemorial, mental disabilities have often been regarded as the hauntings of ghosts or demons, which when coupled with the superstitious nature of the people, especially in the rural areas, has led to the practice of untouchability being exercised over these people, who actually suffer from medical disorders. The abolishment of untouchability extends to all the people who reside in the country, and thus, irrespective of whether the cause behind untouchability is caste or disability, the practice has been banned by the Constitution of India.

[7]State of Madhya Pradesh v. Nivedita Jain, 1981 SC 2045 (India).
[8]IND. CONST. art. 16, cl. 4.
[9]M.P JAIN, INDIAN CONSTITUTIONAL LAW 985 (8th Ed. 2018).
[10]Mohan Kumar Singhania v. Union of India, 1992 SCC 594 (India).

4. FUNDAMENTAL RIGHTS AND THE DISABLED – LIBERTY

Liberty, as has been envisaged by the Preamble, has been written down and enlisted in the six freedoms of Article 19(1). Apart from these six explicitly stated rights in Article 19 (1), the Supreme Court has also stated that although certain rights may not find explicit meaning within these six, they may also be covered under the ambit of this clause if their meanings can be tied to this clause implicitly.[11] For example, the right to fly the national flag and sing the national anthem has been regarded as part of freedom of speech and expression under Article 19 (1) (a).[12] Right to silence has also been considered to be a part of freedom of speech and expression.[13] Apart from these, the right to vote has also been considered to be under the ambit of right to freedom of speech and expression,[14] and thus, every citizen of India, including the differently-abled are empowered with the right to vote, a notion that is consistent with the concept of universal adult suffrage that India subscribes to. Thus, Article 19 (1) contains some of the most natural and inherent freedoms that a human being may exercise, and all the citizens of this country can enjoy these basic freedoms, subject to only certain limitations as laid down by the provisions of Articles 19 (2) to 19 (6), or unless suspended under Article 358 of the Indian Constitution during a Proclamation of Emergency caused by external aggression or internal armed rebellion.

What this means is that every citizen of India, including the differently-abled are constitutionally allowed to enjoy these six freedoms explicitly, and any implicit meanings that can be attributed to these six basic freedoms that have been enlisted under Article 19 (1). Moreover, limiting the scope of clause 19 (1) through the provisions in clauses 19 (2) to 19 (6) also ensures that these are not limited by the State or the Legislature arbitrarily,[15] and thus safeguards the availability of these freedoms as far as the general populace is concerned.

5. THE RIGHT TO LIFE

Article 21 of the Indian Constitution is known as the Right to Life, and it states that no person shall be deprived of either his life or of his personal liberty except on the basis of the procedures which have been established by law.[16] These lines have been interpreted and re-interpreted many times, and thus, these 18 words have evolved in their scope to include a plethora of rights within their ambit, the most exhaustive one being the right to life and dignity.

Life, under Article 21 has been defined in a number of cases by the Supreme Court, and one of the most inclusive definitions was given in the case of P Rathinam v Union of India, wherein it was argued by the Hon'ble Court that the right to life means a life with human dignity, and the same does not suggest a life

[11]Maneka Gandhi v. Union of India, 1978 SC 597 (India).
[12]Union of India v. Naveen Jindal, 2004 2 SCC 510 (India).
[13]Re Noise Pollution, 2005 5 SCC 733 (India)
[14]People's Union of Civil Liberties v. Union of India, 2003 4 SCC 399 (India).
[15]M.P JAIN, INDIAN CONSTITUTIONAL LAW 985 (8th Ed. 2018).
[16]IND. CONST. art. 21.

of continuous drudgery. Within the ambit of the term, there lies the fine graces of civilisation that makes life worthwhile and if the concept of life is expanded to its fullest, then it also include within itself the traditions, culture as well as the heritage of the person in question.[17] In the famous case of Olga Tellis, the Supreme Court had emphasised that the term 'life' does not mean mere existence of a person in an animalistic sense; rather, it means something much more. The inhibiting against the deprivation of life extends to all those limits and faculties by which life is enjoyed.[18]

Thus, right to life and human dignity, a right which is available to citizens and non-citizens alike, within the dominion of India, does not merely mean the right to be alive; rather, it contains within its scope and ambit the right to live with all the facilities necessary for a cultured and dignified life. Thus, simply being alive is not alive, the quality of life also matters.

A livelihood is one of the foremost necessities in order to live a life of dignity and quality, and recognising this aspect, the Supreme Court has mandated that right to livelihood is a part of Article 21 under Right to Life and personal dignity. According to the Statistics provided by the Ministry of Statistics and Programme Implementation in India, the Census 2011 notes that out of the overall population of disabled people in India, only 36% of them are working, whereas, the other 64% are living their lives without any sort of livelihood to support themselves. Moreover, among the disabled non-workers, the percentage of the dependents has been cited to be the highest[19]

Thus, we find that the differently-abled are unable to secure livelihoods, and are reduced to living a life as dependents. From a wider perspective, this is a failure of the government under Article 21. The Supreme Court has also taken a similar view in the matter, wherein, it stated although the State may not be held compellable to ensure that adequate and proper means of livelihood is ensured to each and every one of its citizens, any person who has been deprived of the same except fair and just procedure established by law, can challenge in a Court of law said deprivation for offending the provisions contained within Article 21.[20]

It must be noted at this point, that disability is not always from birth, rather, it can also be caused by an accident or a disease. People who work at dangerous workplaces are often at risk of facing accidents and thus losing life or limb during their day to day work. Construction workers, factory workers etc. are prime examples of such jobs which contain a high risk to the well-being of the labour force. Keeping in mind the same, the ambit of Article 21 has also been interpreted to include the health of labour, wherein, protection from occupational hazards and the results caused therein were included within the scope of Article 21, by the Supreme Court. The Hon. Supreme Court had held in CERC v Union of

[17]P Rathinam v. Union of India, 1994 3 SCC 394 (India).
[18]Olga Tellis v. Bombay Municipal Corporation, 1986 SC 180 (India).
[19]Ministry of Statistics and Programme Implementation Government of India, Disabled Persons in India - A Statistical Profile, 2016
[20]Olga Tellis v. Bombay Municipal Corporation,1986 SC 180 (India).

India[21] that the right to good health as well as medical aid that protects the health and vigour of a worker both during service as well as during retirement is a Fundamental right that is covered within the ambit of Article 21.

Apart from these, Right to Life also extends itself to include Right to Shelter, for shelter, clothing and food are the three most important aspects of any life that is to be lived with personal dignity. Without these basic amenities, a quality life of dignity, as envisaged by Article 21 is simply not possible. The Right to Shelter can also be read in unison with the Right to Residence as provided by Article 19 (1) (e) of the Constitution, and the Supreme Court has also reiterated this by saying that Right to Life also contains within its scope the right to shelter, which springs forth from the Right to Residence ensured under Article 19(1) and thus, the right to shelter is also a fundamental right.[22]

6. RIGHT TO EDUCATION

Initially, free and compulsory education was simply a directive principle under Article 45 of the Constitution, which read that the state was to provide within a period of ten years from the commencement of the Constitution of India, free and compulsory education until the age of 14 for all children.[23] This goal however, took a lot longer, and only became a reality by the 86th constitutional Amendment of 2002, wherein Right to Education was made a part of the Constitution as a Fundamental Right under Article 21 (A), and the provisions of this Article ensured that free and compulsory education, as enshrined within Article 45 shall be provided to children until they reach the age of fourteen. The same was further reiterated when right to education was given the form of a statutory right by passing the Right to Education Act of 2009. This, when read in consonance with Article 29 (2) which states that no citizen shall be denied admission to any educational institution that is receives aid from the state on the grounds of religion, race, caste, sex, language or any of them. Thus, the differently-abled children cannot be denied admission on any of the above stated grounds, and are also liable to receive free education until the age of fourteen.

However, according to the figures for differently-abled children, from the Census 2011, a mere 61% of the children between the age group of 5 – 19 years are attending some sort of educational institution, with 27% of the remaining 39% having never attended any educational institution in their life. Moreover, among the mentally disabled children, 50% children have never attended any educational institutions in their lives.[24]

These are harrowing statistics, mainly due to the fact that although the government has implemented the scheme to ensure that education is provided, to children free of cost, it has not been able to ensure that the education is

[21]Consumer Education Research Centre v. Union of India, 1995 SC 922 (India).
[22]UP Avas Evam Vikas Parishad v. Friends Co-Operative Housing Society Limited, AIR 1996 SC 116 (India).
[23]INO. CONST. art. 45.
[24]Ministry of Statistics and Programme Implementation Government of India, "Disabled Persons in India - A Statistical Profile", 2016.

inclusive of the disabled, and this has led to a shortcoming in its availability for these children, something that the statistics clearly reflect. According to a study conducted in the State of Karnataka by Times of India, 50% of the lower primary schools don't have disability friendly ramps.[35] According to another study conducted by the newspaper 'The Hindu', in the states of UP and Orissa, in the year 2013, the enrolment of disabled children in Government Schools stood only at 1%.[36]

Thus, although constitutional provisions do exist, their implementation hasn't been done properly to ensure the inclusion of the differently-abled children into the educational institutions, and the performance of the Government in implementing the Right to Education Scheme to be disabled-friendly has been lacklustre at best.

7. REMEDIES PROVIDED

Article 32, which is commonly known as the Right to Constitutional Remedy has been described by Dr B.R.Ambedkar as the 'heart and soul of the Indian Constitution.' This is because, irrespective of all the fundamental rights that a person may be conferred with, unless the person has also been appropriated a right to approach the court in case the fundamental rights are infringed, suspended or limited without due authority, the fundamental rights conferred on the person become meaningless for he cannot ensure their enforcement.[37]

Keeping true to this philosophy, Article 32 (1) empowers any person whose fundamental rights have been curtailed to move to the Supreme Court regarding the enforcement of those rights. Thus, the provision protects arbitrary curtailment of Fundamental Rights by the State or any other private person of the country. The Supreme Court has also been empowered under Article 32 (2) to issue writs.

This Article and its provisions are available to the differently-abled of the country, and they too can approach the Court in case any of their Fundamental Rights are infringed upon.

8. CONCLUSION

To conclude our study on the rights of the differently-abled under the Indian Constitution, it can be stated that the differently-abled have been bestowed with the same set of rights as anyone else in the nation, keeping in line with the provisions of equality that the Constitution seeks to uphold. A majority of these rights are under Part III of the Constitution, and neither the Constituent Assembly that drafted the Constitution, nor the Constitution itself has differentiated

[35]Deepika Burli. Most Government Schools in State far from Disabled Friendly, THE TIMES OF INDIA (Oct. 28, 2017), https://timesofindia.indiatimes.com/city/bengaluru/most-government-schools-in-state-far-from-disabled-friendly/articleshow/61235334.cms.

[36]Preeti Mehra. Report Says Enrolment of Disabled Children in Government Schools Under 1%, THE HINDU (Dec. 30, 2013), https://www.thehindu.com/news/national/report-says-enrolment-of-disabled-children-in-govt-schools-under-1/article5519483.ece.

[37]M.P Jain, Indian Constitutional Law 1407 (8th Ed. 2018).

between anyone on the basis of mental or physical disabilities. These rights have empowered the differently-abled to live a life of dignity, at least as far as their rights are concerned, although certain lacunae exists on behalf of the state regarding their efforts to ensure the differently-abled are given the same set of opportunities and amenities has resulted in a different ground reailty. The prime example of this is the Right to Education wherein a majority of the schools are not friendly for the differently-abled, thus preventing them from taking full advantage of their right to seek an education to some extent. Moreover, the reservation for the differently-abled in jobs has only recently been increased, and even then, that increase has been marginal at best, with the overall implementation of this reservation, again being questionable. This has been proved by the fact that around half the population of differently-abled are living as dependents, and this can be argued to be a violation of right to livelihood under Article 21.

Thus, although rights do exist in the Constitution, and those rights are enforceable in a court of law, a lot of effort on the State's part is still required to make sure that the enforcement of the rights written down in the Constitution for the differently-abled become a reality, and they are able to enjoy the benefits of the rights bestowed upon them to the fullest.

RISING RAPE CASES IN INDIA: AN ANALYSIS

Neha Gupta*

ABSTRACT

The Nirbhaya case brought a lot of legal and administrative changes for women in India. Still, the year 2016 registered 38,947 rape cases under Indian Penal Code and Protection of Children from Sexual Offences Act. In 2015, 34,210 rape cases were reported. Even the number of gang rapes increased. In 2015, 2,113 gang rapes were reported and in 2016, 2,167. The 2016 recorded 106 cases per day. In most of the cases the offender was known to the victim. The UN Secretary asked India for women protection. The UN Commissioner called rape as India's national problem. The nation is certainly concerned about women safety but the crime graph is climbing upwards. In 2014, 34,530 rape cases were registered, 7 percent more than 2013. Most of the rape cases go unreported due to trauma and shame associated with it. The reporting is even less in rural areas. The rate of conviction in rape cases is low due to poor police investigation and poor presentation of case by public prosecutor. The media does not cover all cases and deals insensitively.

The Nirbhaya case had long term positive effect. The effect was not limited to Delhi. The reporting of rape cases improved all over India. Nirbhaya Fund was made. The definition of rape widened. New category of offences like stalking and voyeurism were introduced. The legislature also made changes in the Indian Evidence Act and Code of Criminal Procedure.

The legislative and executive changes introduced post Nirbhaya case were not enough to control rape. The death penalty introduced in its aftermath via 2013 amendment is only a regressive step. Nations like Pakistan and Afghanistan provide capital punishment for rape. Instead of harsher laws, better laws should be brought. It is important to note that marital rape is outside the ambit of rape in India. The woman can be treated as chattel after marriage. It is important to mention here that in recent past the judiciary has shown pragmatic approach in declaring adultery and lumosexuality provisions as unconstitutional. So, one can expect judiciary to declare marital rape as against Article 14 and Article 21 of the Constitution.

The rape incidence depends on many factors such as social, political and demographic, police efficiency, judicial independence and media. Better sex ratio, improvement in employment conditions, higher female working population, high media exposure, better education, lower exposure to prone, no open defecation, controlled usage of alcohol can lead to a lower rape rate.

The offence of rape should be seen as offence against humanity rather than an offence against public morality, decency and modesty. Change in law is not enough to control the menace of rape. A change in outlook is required. The society needs to leave the practice of victim shaming and blaming. The rape victim often indulges in compromise on promise of marriage. However, the law does not allow this. The criminal proceedings cannot be quashed in rape cases keeping in mind the seriousness of the offence.

Key Words: NCRB, Rape, Conviction Rate and Rape Rate.

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INTRODUCTION

Rape is one of the most heinous offences. It is one of the most common crimes committed in India. Rape is intercourse or sexual intercourse related acts against the particular law of land.[1] What constitutes rape varies from one country to other. Some nations define it from penetration side and others from consent side. France defines it from penetration point of view and the U.S.A defines it from consent view point.[2] An act which may be an offence of rape outside India may not be such an offence in India. For example, sexual intercourse with or without consent with wife not under the age of 15 years is not rape in India but it may be rape outside India.

In common terms, the offence of rape may be defined as sexual intercourse against the consent of other person. The definition of layperson is oversimplified. The rapist has many new ways of committing rape. This is the reason, the definition of rape under Section 375 of I.P.C, 1860 has been amended many times. The Criminal Law (Amendment) Act, 2013 has broadened the definition of rape. Earlier, only penetration of penis into the vagina of women against her will or consent was considered rape. Now, penetration of any object in the vagina comes under the ambit of rape. After the Nirbhaya case, the need for change was felt. In this case, an iron rod was inserted in her private part. The rapists dealt, her with brutality which resulted in her death. The Nirbhaya case led to an outburst of public anger. It forced the Government to bring in administrative and legislative changes. The amendments were brought in I.P.C, 1860,[3] The Indian Evidence Act, 1872, The Code of Criminal Procedure, 1973 (Cr.P.C) and The Protection of Children from sexual Offences Act, 2012. The age of trying a juvenile was lowered to 16 years from 18 years. The amended definition of rape as per new provision is as follows:

> Rape is said to be committed when he-
>
> Puts his penis in the mouth, urethra or anus or vagina of a woman to any extent or makes her do the same with himself or somebody else or
>
> Puts something or body part except penis in her urethra, anus or vagina or makes her do the same with himself or somebody else or
>
> Manipulates her body part to penetrate in the urethra, vagina, anus or makes her do the same with himself or somebody else or
>
> Applies his mouth to her vagina, anus, urethra or makes her do the same with himself or somebody else in any of the following seven circumstances:

1. Against the will of a woman
2. Without the consent of the woman.

[1] Raktim Tamuli, A Statistical Analysis Of Alleged Victims Of Sexual Assault- A Retrospective Study,13(1) JPAFMT 7, 7-14 (2013).

[2] Karina Filcraas, Legal Definition of Rape,7EWTW 1205, 1205-09 (2011)

[3] The Indian Penal Code, 1860,No 45, Acts of Parliament,(1860).

3. With the consent of the woman when her consent has been obtained by putting her or any other person in whom she is interested under fear of death or hurt.
4. With the consent of the woman when the person possesses knowledge that he is not the husband. She has consented under the belief that she is lawfully married to him.
5. With the consent of the woman. However, at the time of giving consent, she is unable to understand the nature and consequences of the act. Reason can be unsoundness or intoxication.
6. The consent is immaterial if she is below 18 years of age
7. She is not able to communicate the consent.

Explanation 1-The word 'vagina' includes labia majora.

Explanation 2.—Consent for the purpose of this section means an unambiguous willing act. It must be communicated by words, gestures or any other way for the sexual act. Non resistance does not mean consent.

Exception 1.—A medical treatment shall not be construed as rape.

Exception 2.—Sex or sexual activity with one's wife is not rape if she is not below 15 years.

Even after changing the definition of rape. The number of rape cases in India is on rise. In the year 2016, 38,947 rape cases were registered under the Indian Penal Code, 1860 and Protection of Children from Sexual Offences Act.[4]

INDIA MOST DANGEROUS NATION FOR WOMEN

In a survey conducted by Thomson Reuters Foundation, India has been declared as the world's most dangerous nation for females. The reasons for declaring it dangerous are sex crimes and slavery. Last survey was conducted by these global experts in 2011. In 2011, Afghanistan was at the top followed by Democratic Republic of Congo and Pakistan. India was at fourth place followed by Somalia. Now India has topped the table, despite the fact that after Nirbhaya case, violence against women became a prime agenda of the country. Amongst the western nations, only United States is there in the table of ten most dangerous countries for women.

The question of the survey:

Out of 193 United Nation Countries whom do they think is most dangerous for women?

Same question was asked with respect to sexual and non sexual violence, harassment, health and economic sources, culture and tradition and human trafficking.

[4]Crime in India – 2016, India, (Nov.1, 2018, 10:04 AM), http://ncrb.gov.in/.

India was ranked most dangerous for activities like domestic help, custom and practices which include forced marriage and female infanticide, human trafficking and sex slavery.

Manjunath Gangadhara, an official at the Karnataka state government said:

On one side India is world's fastest growing economy, leader in space and techno know how and on the other side women are subjected to rape, sexual assault, harassment, female infanticide and marital rape.[5]

In *Bodhisatva Gautam v. Subhra Chakraborty's, AIR 1996 SC 922*, the Court observed:

Rape is a crime not only against a woman. It is a crime against the society. It tarnishes the woman mentally. It is against basic human right. It violates Art 21 of the Constitution which provides right to live with human dignity.

In the *Vishakha Case*, the Supreme Court laid down guidelines to be followed at workplace relating to women. However, as per the judge who delivered this judgment, Justice Manohar there is a need to revise Vishakha guidelines. The revision should be such as to include present incidents. She said this in regard to Me Too Movement. The Vishakha judgment was delivered by Justice Manohar, CJI Late J.S. Verma and Justice B.N. Kirpal. As per her opinion, the change in guidelines may be done, not only by legal experts but opinion of sociologists must also be included. However, there is no limitation of time. But it will become challenging for the judge to determine the truth in examination and cross examination. Judges should be sensitized.

Section 509 (outraging woman's modesty) of the IPC, 1860 needs to be made more specific. As thinking changes, remedies should also change.

The National Commission for Women (NCW) has been asking women to approach them but then it is just an advisory body.

OBJECTIVE

The main objective of this paper is to analyze the problem of rising rape cases in India. The other objective is to examine the age wise distribution of rape cases and to analyze the offender and the victim relation in India.

RESEARCH QUESTION

The main question put up in this paper is. Why is there an increase in rape cases in India?

[5]Belinda Goldsmith & Meka Beresford, Exclusive: India most dangerous country for women with sexual violence rife - global poll, Thomson Reuters Foundation, (JUNE 26, 2018, 6.09 AM),https://www.reuters.com/article/us-women-dangerous-poll-exclusive/exclusive-india-most-dangerous-country-for-women-with-sexual-violence-rife-global poll-idUSKBN1JM01X/.

METHODOLOGY

The present research paper is based on doctrinal study. Secondary sources have been used. Government data, statutory provisions and scholarly articles have been evaluated.

NCRB Data

Cases registered for Rape:	
Year	Cases
2001	16,075
2002	16,373
2003	15,847
2004	18,233
2005	18,359
2006	19,348
2007	20,737
2008	21,467
2009	21,397
2010	22,172
2011	24,206
2012	24,923
2013	33,707
2014	36,735
2015	34,651
2016	38,947

Source: NCRB Data

As per the above table, the number of reported rape cases in 2016 is 106 per day. In 2015, India recorded as many as 94 rape cases per day. In 2014, as many as 100 rape cases were recorded. The number of rape cases per day is very high even after change in law post the Nirbhaya case. Indicating change in law is not the only solution. In last 10 years, 2,78,886 rape cases have been reported. As compared to 2007, reporting of cases improved by 88%. In 2007 20,737 rape cases were reported against 38,947 in 2016.

As per the data, Delhi has become the rape capital. In Delhi, 1996 rape cases were reported. While Mumbai, Pune and Jaipur recorded 712, 354 and 330 cases respectively.

As many as 3,38,954 cases were recorded as crimes against women in India for the year 2016. The crime which dominated this head was 'cruelty by husband or relatives' at 32.6%. Second dominant crime against women was 'assault on women with intent to outrage her modesty' at 25%. Followed by 'kidnapping and abduction of women' at 19% and rape at 11.5%.

Acid attack cases were 206 and stalking cases were 7,236.

	India	% of total	Haryana	% of total
Total Rape Cases	38947		1187	
Offenders known to victim	36859	94.6	1172	98.7
Relation with victims	India	% of known offenders	Haryana	% of known offenders
Grandfather/father/brother/son	630	1.7	25	2.1
Other close family members	1087	2.9	19	1.6
Distant relatives	2174	5.9	44	3.8
Neighbors	10520	28.5	549	46.8
Employer / Co-workers	600	1.6	35	3.0
Live in partner / Ex or separated husband	557	1.5	22	1.9
Known persons on promise to marry the victim	10068	27.3	109	9.3
Other known persons	11223	30.4	369	31.5

Source: NCRB Data

As per NCRB Data in 94.6% cases of rape, the offender is known to the victim. Out of 38,947 cases, in 36,859 cases victim knew the offender. The data of Haryana has been included deliberately as Haryana has worst sex ratio and high percentage of rape and gang rapes.

LOW CONVICTION RATE

Year	Conviction Rate(%)
2007	26.4
2008	26.6
2009	26.9
2010	26.6
2011	26.4
2012	24.2
2013	27.1
2014	28
2015	29.4
2016	25.5

According to NCRB Data, the numbers of recorded rapes are on rise. This shows more and more rape cases are reported every year. Despite large reporting, conviction remains low. In 2016, only 1 rape accused got convicted out of 4 rape cases recorded. The conviction rate was lowest in 2016 since 2012. The conviction rate in the year 2016 was as low as 25.5% for rape cases.

The NCRB data shows rise in crime against women but there is increase in reporting and not conviction. The rate of crime against women population per 1,00,000 is 55.2%. Out of all the crimes against women, cruelty against women by husband or relatives accounted at 33% and rape at 11%.

Possible reasons for low conviction in rape cases:

1. False accusation

2. Poor perusal of case by prosecution
3. Poor investigation

Keeping in mind the consequences of rape like secondary victimization, trauma and low prospects of marriage, the chances of false accusation are less but there is no denial of the fact that such cases do exist.

Age wise distribution of rape victims in the year 2016

Age in years	Rape victim (%)
Below 6	1
6-12	4
12-16	16
16-18	22
18-30	42
30-45	13
45-60	1
Above 60 Years	0

Child and adults as % of total victims.

Out of all the rape victims, 43.2% are children and 56.8% are adult.

Limitation of NCRB Data

The NCRB publishes the data related to crimes, every year. The NCRB data considers only the registered cases. In many cases, police does not register the case. Many cases are not even reported. Although, NCRB started collecting data in 1953 but the offence of rape found mention in the year 1971 only. In 1971, data revealed 2043 rapes. In 2016, this number has risen to 38,947.

REASON FOR RISE OF RAPE CASES IN INDIA

Sex Ratio

Sex ratio is calculated as number of females per thousand males. It is used to determine number of females and male to female ratio. The last census of 2011 showed 940 females per thousand males. The figures of 2011 are better against 2001 census which showed 933 females per thousand males. The improvement is marginal. The main reason behind poor sex ratio is preference for male child and treatment of females by society.[6] Sex ratio is indirect cause of rape.[7] The state

[6]The Census Organization of India, Sex Ratio in India, Government Of India (2011), https://www.census2011.co.in/sexratio.php/.

[7]Radha Sharma, The Problem of Rape in India: A Multi-dimensional Analysis, 7(3) IJMPB 6 (2014).

of Haryana has shown a declining trend. Haryana and Daman and Diu have the worst sex ratio. Haryana has the lowest sex ratio i.e. 877 females per thousand males. The states of Puducherry and Kerala have more females than males.

Legislation

The Indian Penal Code, 1860 does not recognize marital rape. Section 375, exception provides sexual intercourse with wife who is not under 15 years of age is not rape. It allows the man to intrude women's right to privacy. The *Justice* Verma Committee recommended criminalization of marital rape.[8] It is important to note here that NCRB considers marital rape cases while calculating total rape cases. The amended sections of Penal Code do recognize death as punishment in certain cases of rape. The death penalty provides motivation for rapists to kill the victim and witness and avoid identification. It is important to note that countries like Saudi Arab, Pakistan and Iraq provide death penalty for rape. The incidence of rape is high in these countries.[9]

Sex Education

Sex Education is almost nil in the nation which developed *Kamasutra*, the literature on sex. India has become conservative. This narrow thought gives rise to rape cases.

The Patriarchal set up

The Patriarchal set up gives power to men to dominate women. Women are subdued. Problem of rape, female foeticide, dowry deaths and sexual harassment are common in such economies. India is a patriarchal society.

Police

The role of police is to protect the people. There have been many cases where police has discouraged rape victim from filing F.I.R. The police come under political influence.

Aggression

On one hand, women in India are making use of education and employment opportunities and on the other hand, as a consequence, men are showing aggression through sexual violence. As income inequality is increasing in India, the poor men are reacting by raping women as revenge.

Class Divide

The upper class people specially police and military force use their position and rape people from lower strata. In *Mathura Rape case* two constables used their position and raped a woman. It is only after this case, a separate category known as custodial rape was introduced.

[8]National Legal Research Desk, Justice Verma Committee Report – Download Full Report,(January 24, 2013) https://nlrd.org/justice-verma-committee-report-download-full-report/.

[9]Franklin E Zimring & David T Johnso, On Rape and Capital Punishment, 48 (4) EPW15-16 (2013).

Rape Law

The rape law in India does not cover all aspects. Every time a brutal rape has taken place the resultant mass media coverage from it has resulted in Criminal amendment. But the amendment has never served the purpose of stopping the menace. The Indian Rape Legislation is far from international standards. Even after Verma committee recommendation, India has not criminalized marital rape. The committee recommended life imprisonment as maximum sentence but the legislature went ahead to the extent of death penalty. The definition of rape does not meet the standards set by U.N and WHO.

Alcohol and Drugs

As per WHO, men are expected to behave sexually violently under consumption of liquor. Alcohol affects the thinking power of a man. The drunk assumes that he will not be held liable for his behavior.[10]

Wrong Association

As per NCRB Data, the *Gangrape* cases rose from 2,113 in 2015 to 2,167 in 2016. The NCRB introduced gang rape as a separate head in 2014. It is worth mentioning that state of Haryana which has the worst sex ratio, also had highest number of Gang–rapes in the year 2015 and 2016. In 2016 as many as 191 gang rapes were reported and registered. The average gang rape rate for India is 0.3% and 1.5% of Haryana calculated on the basis of per lakh population.

Family Set Up

In India, families are set in such a manner that blame is put on girls and not on boys. A girl's virginity before marriage is associated with family's pride. In such environment, a man attains power of dominance and cannot tolerate women empowerment. In such an environment rape may take place.[11]

Learnt Behavior

Children learn from what they observe. As per WHO, the children who are abused in childhood are most likely to sexually abuse others at a later stage. It indicates a behavioral pattern. Such young boys are likely to be violent and sexually coercive even against their spouse.[12]

In India, the child rape is on rise. In 2015 10,854 cases of child rape were registered and recorded and in 2016, 19,765 child rape cases were registered. The figures show an increase of 82%. The state of Uttar Pradesh showed maximum rise in child rape cases in 2016 as compared to 2015. In 2015, U.P. had 594 such cases and in 2016, 2115 such cases.

[10]The World Health Organization,SexualViolence,W.H.O (2014)http://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap6.pdf.
[11] ibid
[12]ibid

Poverty

Poor people are most likely to be the victim as well as the offender in sexual crimes. A poor person may find it difficult to satisfy his sexual need and may end up committing sex related offences.

Masculinity

In India, masculinity is related to success and sex. Young men often get drifted and commit such offences.

Social Factors

Such factors include family, workplace, school, college and society. At the macro level, national and international policies as well as laws relating to equality and sexual violence. In male dominated societies, many men cannot take rejection of sexual advances by women. They take marriage as duty of wife to adhere to husband's sexual demands. Rape is very common in such societies.[13]

FEW MEASURES FOR CONTROLLING RAPE

1. Restriction on Alcohol Usage

Though, complete prohibition may not be possible but usage control is possible. Consumption of alcohol at public places especially buses and trains be prohibited.[14]

2. Media Censoring

The sites showing pornography be banned. The sites which provide information for victim rehabilitation should be promoted.[15]

3. Enforcement Efficiency

The rape law has been amended many times. Still, the menace of rape is on increase. The law itself cannot curb the offence. Thus effective implementation of laws is must. For effective implementation a hand in hand effort is needed with the judiciary, police, administration and government.

4. Change in Mind Set of Judiciary

The words of Indira Jaising are very relevant in this context:

"Indian Courts should look inside and leave patriarchal notions. The judgments should be fair to females. Sexism should be avoided by judiciary".[16]

The words of the Supreme Court are relevant here:

"The judiciary should not leave common sense. Vital points should be considered. It should not focus on unnecessary considerations. Human probability should be borne in mind while considering victim's statement. What will a girl get by making a false rape

[13]Ibid

[14]Indira Sharma, Violence against Women: Where are the Solutions? 57 (2) IJP131-139 (2015).

[15]Ibid

[16]Indira Jaising, Blind to What, Your Honour,TOI , January 6, 2013.

allegation on someone unknown to her? Motive and facts should be taken in view. The injury suffered by her, must be taken into account. The Courts should behave practically. The Court of law is areal world. A Judge should be socially sensitive. The circumstances of the case are not laws of nature but guidelines and good counsel".[17]

5. Education

Improvement in quality of education and rise in employment opportunities will surely improve the condition.[18] Educating women about the offence and remedies available will also improve the chance of reporting such cases as they would become more aware of their rights.[19]

6. Moral and Religious Values

Moral and religious values are imparted to children as early as possible. At home these values can be inculcated by parents and at school by the teachers.[20]

7. Change in Law is Not Enough

In India, the word 'rape' was first defined legally in Indian Penal Code, 1860. Till then many law reports have given suggestions as to what changes should be made?[21] Laws are made strictly with the goal of serving deterrent against such an offence. The Criminal Law Amendment Act, 1983 amended Section 375 and Section 376. Before the said amendment Section 375 had four clauses and after amendment six. The offence called custodial rape was also added. Minimum punishment was also increased. The Mathura Rape case compelled all these changes.[22] Till date (1955-2017), as many as 4 Law Commission Reports have been submitted on the topic of Rape as core issue (42nd, 84th, 156th and 172nd). The Law of Rape has been changed before 2013 also, i.e. 1983, 2003, 2005, and 2009.[23] The Nirbhaya Gang-Rape triggered mass protest. The Government was forced to take active role. The Government formed three member committee comprising, the former Chief Justice of India, Justice J.S. Verma, Justice Leila Seth and Gopal Subramanium. The reasons identified by the commission for violence against women are:

1. Lack of Good Governance
2. Old Fashioned Police System
3. Public Apathy

Even after 2013 Amendment, cases of rape are on rise. So change in law is not the only solution.

[17]Krishna Lal v State of Haryana (1980) 3 S.C.R (3) 305 (India).
[18]Indira Sharma,Violence against Women: Where are the Solutions? 57 (2) IJP133-139, (2015)
[19]Kaushlendra Tripathi & Anindita Chatterjee, Reporting Rape Cases in India 5(7) IJHAMS (July 1, 2017).
[20]Ibid
[21]Dr. R. C. Jiloha, Rape: Legal Issues in mental health perspective 55 (3) IJP 250-256 (2013).
[22]MK Jha, BC Majumder,T Bose, DS Bhullar, SS Oberoi and SS Sandhu, Rape Law-latest trends: criminal law (amendment) act 2013 and supreme court on right to privacy 13(1) JPAPMTN 45-48(2013).
[23]Ms. Saumya Rai, Changing Perspectives of Law Of Rape: A Judicial Paradigm Shift, BLR202-215 (2018).

8. Police Reforms

Law is nothing without its proper implementation. Police Reforms are a must. Police should be properly trained. Training should be imparted on how to deal with rape victims. They should be trained in such a way that victim should not feel reluctant in filling F.I.R.[24]

The relevant words of Justice Verma Committee in this context are:
"The accountability of police is to law and no one else".

9. Social Transformation

The change should come from within. Each and every member of society possesses power and it has been seen in the Indian Legal HIstory that public voices do matter.[25]

10. Gender Justice

There is a need to check gender inequality. Boys should be educated and they should be taught how to respect women.[26]

11. Educating Females

Females of all ages should be made aware of offences and thier prevention methods. They should be encouraged to report any kind of victimization.

12. Community Policing

It can be very effective in reducing victimization of any type. Police together with NGOs and members of society can help in eradicating this menace. Young people of the society should be trained accordingly. These young people with police and other enforcement agencies can prove to be very effective.[27]

10. Compromise

The law does not allow compromise. However, compromise in rape cases is not unknown. In *Parbatbhai Aahir and Ors. v. State of Gujarat and Ors, 2017 (12) SCALE 187,* The Supreme Court held that Courts must take in consideration the nature and seriousness of an offence. Offences grave as rape, murder and dacoity should not be quashed. These offences are not private affairs, they affect society at large. Marriage does not result in quashing of criminal proceedings.[28]

11. General Mind Set

After every popular rape case, we adhere to change in law. But what is required is general change in mind set of not just the judiciary. Total positive outlook is required from media, society, common man, NGOs and political leaders.[29]

[24]Annapurna Chakraborty, Critical Analysis of Development of Rape Laws in India(2013) (Law and social transformation project, The West Bengal National University of Juridical sciences.
[25]*Id*
[26]*Id*
[27]Shraddha Kulkarni, Vidya Gaonakar, Crime Against Women in India: An Awakening Alarm 2(1) IIRIR)334-336 (2014).
[28]Siba v. State of Orissa (2006) Cr.LJ. 80 (India)
[29]Dharmendra Kumar Mishra and Anshu Mishra, Reconceptualising Sexual Offences In India 43(1) BLJ 43-52(2014)

12. Offence against Human Rights

Sexual offences should be viewed as offence against human rights and not merely against public morality, decency or modesty. This view is also in line with India's international obligation.[30]

13. Shift from Strict Punishment to Better Laws

The focus of society asking for reforms is on more on punishment for rapist rather than on procedures, modes of investigation and support for victim.[31]

14. Mass Media

Mass media should create awareness about legal rights which the rape victim possess. They should also create social awareness about protective measures.[32]

CONCLUDING REMARKS

The economic, social and institutional conditions in a country are determining factors of crime rate. The level of literacy does affect reporting of crimes. Rape is an offence in which the victim re-lives the offence due to lack of cooperation by police, witnesses and society. Due to physical and psychological consequences that follow rape, most of such cases go unreported. The NCRB covers cases reported to police. The Government agency is showing an increasing rape rate followed by low conviction. In India, the rape cases are increasing due to poverty, unemployment, patriarchal set-up, and skewed sex ratio. The masculinity factor also has a role in rising rape cases. Rapid rise in gang rape especially in Haryana shows the unlawful agreement of more than one person towards such grave offence. Stringent provisions post Nirbhaya case has resulted in better reporting. However, the numbers of such cases has increased. The infrastructure needs to be developed. Sex education need to be imparted at school level. Awareness programmes need to be conducted. A holistic approach needs to be taken towards rape victims. The amount of compensation provided to rape victims by different states needs to be made uniform. On one side, Goa provides compensation as high as 10 lakhs and on the other side, the state of Orissa gives Rs.10,000.[33]

Indian families still consider home as safest place for girls. But it is shocking to look at a figure of acquaintance guilty of rape. In majority of cases reported, the offender is either victim's brother, father, grandfather, son or acquaintances. As many as 36,869 rape cases were registered against close and other relatives. The criminal justice system in India needs to support the rape victim. The legislature, executive and judiciary should take pragmatic steps towards such serious crime. The society should change its attitude towards females. They should not indulge in victim shaming and blaming.

[30]Ashutosh Misra & Simon Bronitt, Reforming Sexual Offences in India: Lessons in Human Rights and Comparative Law 2(1) GAQ37-56 (2014)

[31]*Id*

[32]Ramu Rawat & Tadapatri Masthanaiah,Explosion of rape cases in India. A Study of Last OneDecade IJCR 7(7) 17976-17984 (June 2015)

[33]Jharkhand State Legal Services Authority, Compendium on Compensatory Relief to The Victims of Crime In Criminal Justice System 53 (Jhalsa, 2016).

Me Too – IN SEARCH OF JUSTICE

Tanushree

ABSTRACT

This paper deals with the viral campaign which took place in 2017 called Me too which primarily addressed the sexual harassment in workplace. History of this campaign is to be understood in order to know its real purpose, where it all started and to understand the magnitude of the issue. The movement is just the child of various other movements which took place in India. The flaws in various laws led to the spreading of this movement in India. This paper deals with flaws in laws relating to sexual harassment in workplaces and various statistics backing it as to how ineffective this law is. How this #Me too campaign affects due clause in India and the impact of me too campaign in India is also dealt with in this paper. The paper also provides suggestions as to how the disadvantages are to be dealt with in order to stren then peoples belief in laws resort to rather than social networking websites to deal with their issues.

HISTORY

#Me-Too is a campaign against sexual harassment, which has social networking websites used as a platform to share personal stories of sexual harassment and sexual advances especially in workplace. This hashtag helped a lot of women relieve the burden which they have been carrying around.

This movement had its origin because of an advocate and a blogger named Tarana Burke. When she was a Youth Camp Director in 1996, she was assigned to talk to a girl privately. The girl opened up about how she was sexually harassed and assaulted by her step dad but Burke interrupted her when she was finally opening up and assigned her to another counselor who could help her. Burke saw that girl walking back masquerading what she was going through. Burke, at that point of time wanted to tell her that she was with her and she need not go through it all alone but she couldn't bring herself to do it.[1] This resulted in a movement where women had their own space to open up regarding their painful experiences.

When the initiative was started it was not a viral campaign but a movement to bring a change. So the movement in October 2017 took the form of a viral campaign when Actress Alyssa Milano tweeted on her twitter handle as to use the hashtag and called out the victims to share their experience as it would give an understanding about the magnitude of the problem.

The statistics have it that nearly half a million people responded to the tweet of Milano and Facebook reported to a news channel that it had nearly 12 million

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[1]Cassandra Sandiago & Doug Cris, An Activist, a little girl and the heartbreaking origin of "Me too", CNN International Edition, (Oct. 17, 2017) https://edition.cnn.com/2017/10/17/us/me-too-tarana-burke-origin-trnd/index.html.

posts and the comments were just going up[2], in just 24 hours. By November there were 1.7 million tweets under this hashtag. Even Google produced a list of places like Australia, Canada, Norway, U.K, South Africa, Sweden and New Zealand where this campaign has been highly googled. This viral campaign gained huge responses from countries like India, U.S, Australia and Europe. So this shows that the campaign proved to be impactful and gave an opportunity to voice out their concerns and experiences of sexual harassment.

MOVEMENT IN INDIA AGAINST SEXUAL HARASSMENT IN WORKPLACES

When it comes to curbing sexual harassment in workplaces, India is a forerunner and took the issue into its hands right from 1997. It was the landmark case of Vishaka vs. State of Rajasthan, which decided the fate of many oppressed women. Me-too can be considered as a child of that movement when it comes to India. Looking into the factual background of the case, it was a painful incident for a social worker Bhanwari Devi who was fighting against the child marriage. As a revenge for her fight against the marriage of a child less than one year she was brutally raped by 5 men in front of her husband when she was working in the fields. The only doctor in the Primary Health Care refused to examine her and she was asked to leave her lehanga as evidence. She and her husband were refused shelter at Police Station, past midnight. Though Trial Court acquitted the accused but Bhanwari Devi decided to fight against the cruelty that happened to her. Backed by an NGO called Vishaka, a petition was filed seeking for guidelines to protect women against sexual harassment in workplaces.

Until 1997, neither Indian Judiciary nor Legislature were aware of a concept called protection of women when it comes to workplaces. When Legislature did not really understand the magnitude and depth of the issue, Supreme Court of India stepped into the shoes of the Legislature and formulated guidelines known as "Vishaka guidelines". Vishaka guidelines extensively dealt with duties of an employer to protect women at workplace, establishment of Complaint Commission, Complaint mechanism etc.

In 2013, India was totally shaken by Nirbhaya rape case which forced legislature to come up with a proper set of laws protecting women. As a result, The Criminal Amendment Act, 2013 and The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 were passed. In 2017, a major outburst in the name of Me-too made women to speak out about Sexual Harassment in workplaces where names of big shots from various industries emerged in the public sphere.

[2]More than 12M "Me Too" Facebook posts, comments, reactions in 24 hours, (2017), CBS NEWS (Oct 17, 2017, 6:50 PM), https://www.cbsnews.com/news/metoo-more-than-12-million-facebook-posts-comments-reactions-24-hours/.

DEFINITION OF SEXUAL HARASSMENT

When women are reporting cases of sexual harassment and sexual abuses many report the cases which don't fall under the purview of the definition. So there is a need for understanding the definition of sexual harassment.

The definition of the EEOC is very particular about Sexual Harassment in workplace and defines the nature of the act. The EEOC (Equal Employment Opportunity Commission) has given a definition for sexual harassment as sexual advances and sexual favors unwelcoming in nature and also physical and verbal sexual conduct taking places under any of the following circumstances:

1. Where the victim is forced to submit to the sexual advances in order to keep or continue the job (explicitly or implicitly).
2. Where a supervisor personally decides based on an employee's submission to or rejection of sexual advances.
3. When sexual conduct unreasonably obstructs or interferes with a person's work performance or work life.

The EEOC clearly mentions that for misbehavior in workplace, the employers are responsible and have the obligation to protect the employees and avoid such incidents of sexual abuse.

The definition of same nature and a deep understanding as to what is sexual harassment is provided under The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.Section 354 (A), Section 209 and Section 509 of IPC also deals with Sexual Harassment and prescribes punishment according to the respective offences committed.

Sexual Harassment is against the fundamental rights of women affecting their right to equality and also right to life. It is against Article 14, 15 and 21. Not only that but also Article 19(1) (g) is also violated.

WHY Me Too IN INDIA?

So a major question which strikes everyone is that when there are laws protecting women in India, why me-too became viral in India and one of the countries where it had huge impact.

This question shall be answered by taking into account Vishaka guidelines and its flaws. Though Vishaka guidelines laid down foundation for protection of women from Sexual Harassment in workplace, it proved itself to be effective only for a shorter period of time. The judiciary laid down those guidelines understanding the impact of the problem and by exercising its power under the name of judicial activism. One of the guideline clearly directs Central or State government to bring a legislation to ensure that these guidelines are complied with. It took legislature nearly 14 years to understand the impact of the problem and bring a legislation under that particular head. So there existed no proper

statutory remedy for the victims of sexual harassment and they had to approach the court under IPC. Approaching under IPC was a tedious process which women did not want to undergo so they refrained from doing so. So in order to remove the disadvantages of the Vishaka guidelines, The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 was passed.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, has a number of flaws that requires a total revamp in order to be effective. The major flaw rested in the Committee which was set up to hear the complaints because many companies did not even have such committee and if there was a committee, there was no proper justice rendered. A recent case of Air India proves how unsafe the workplace has turned out for women. A woman working in Air India filed a complaint with the Committee which did not give a proper response and the accused was having continuous promotion for six years after the complaint was filed. She was subjected to sexual harassment all those years. This shows the incompetency of the committees to redress the problems faced by women.

The second major issue is that though a redressal mechanism exists, women are not feeling safe enough to report the incident. Statistics clearly reveal that majority of the cases go unreported. When such incidents take place, co-workers are aware of the pain and trouble women undergo. Since the Act mentions that the reporting of cases can only be done by "aggrieved women", the third party though aware of such incidents do not have the power to report them.

The third issue is also a major issue which deals with limitation period. The Act prescribes maximum three month time period to report the cases of sexual harassment. So in cases reported under Me-too hashtag, many cases have crossed the time period of 5 years. So this Act in no way can redress such incidents. And it is high time that the legislators should understand that woman need time to come out of such painful incidents and report it. To look at it from the positive side, the limitation period is essential because after certain period of time it is difficult to gather evidence and sometimes the accused has left the particular job. So only when the ICC (Internal Complaints Committee) has right to condone the delay, this shortcoming can be easily be brushed off. Section 473 of the Code of Criminal Procedure (Cr.P.C) provides for waiving of limitation in case of criminal cases

The next important shortcoming of this Act is that when an employee is found guilty then the compensation is paid out of the employee's salary or payment made to him by the company. The organization or establishment in no way takes responsibility which goes against the primary rule of the employer's duty to take care of his employees. When such establishment is made liable for employing or in any way nurturing the accused, then the right to safe workplace as a fundamental right shall be restored. Because the establishment is made liable, they would take many serious steps as it would become a part of running their business.

The last but one of the most important disadvantages of the Act is that the company has been given too much leverage in selecting the members constituting the ICC. ICC has to be a mixture of employees from all level but companies tend to select people who have pledged their allegiance to the company as the members of the ICC. Such people tend to care more about the reputation of the company rather than seriously addressing the sexual harassment cases. Sometimes the mandatory requirement of third party member in ICC is not at all complied with and even if complied they are somehow related to the company.

ME TOO – DID IT BRING ANY CHANGE?

Me too campaign though was a progressive one, legally speaking there was no change in the system. It gave women new strength to voice out their concerns. It also had many big shot coming clean with the way in which they acted and apologized for what they have done. Many organization fired the employees against whom the accusations were levelled.

Looking from the viewpoint of Constitution, this movement has a negative side to it. Due Process gained back door entry into the Indian Constitution. This campaign affects the due process. A good example can be a disciplinary proceeding conducted in any institution where there is no law governing it. Immediate conclusion without looking into the issue is arrived. Similarly in this campaign where accusations are levelled against them immediately the particular person is fired as it is necessary for the institution to protect their reputation. But the innocent has no say or principles of natural justice is not followed. The investigation into the issue is not made and even if such investigation takes place it shall have a lot of bias and also no trained person is investigating the case. All this violates the due process and also principles of natural justice. People who have been accused find their way out in the form of a defamation suit.

The Supreme Court refused to entertain PIL based on the Me too accusations and clearly stated that when there are provisions under Cr.P.C, then obviously the people have to approach the court under those provisions only. Moreover the Bombay High Court in one case has clearly told that the Me too platform in only for the victims and it shall not be misused. To speak legally under I.T. Act, the me too accusations made under twitter handle can be taken into consideration.

STATISTICS ON SEXUAL HARASSMENT IN WORKPLACE

- Cases of sexual harassment within office premises rose by more than 100 % between 2014 and 2015, which is post the enactment of laws to protect Sexual Harassment in Workplace.
- There has been a 51 % rise in sexual harassment cases at other places related to work from 469 in 2014 to 714 in 2015.[3]

[3]NCRB Statistics 2014, 2015

- There was a 35 % increase in sexual harassment, complaints at workplace, from 249 to 336 between 2013 and 2014.[4]
- 38 % women had faced sexual harassment at workplace.
- 70 % working women do not report workplace sexual harassment in India.
- 65.2 % women said their company did not follow the procedures laid under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.
- 46.7 % surveyors said the members of Internal Committee were not aware of the legal provisions available under the Act.
- 66.7 % participants said the Internal Complaint Committee dealt fairly with their plaints but 50 percent victims left the place post the closure of the cases.[5]
- 36 % of Companies in India and 25 % of Multi-National Companies are non-compliant with the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, according to FICCI survey.
- 35 % of companies and 38 % of MNC'S stated that they were ignorant of the penal consequences of non-compliance with respect to not setting up of ICC.

Nature of Complaint	Percentage
Physical Contact and Advances	47 %
Demand or request for sexual favors	13 %
Sexually colored remarks	37 %
Display of Pornographic content	4 %

Sources: FIDS (Fraud Investigation and Dispute Services) Survey 2015.

SUGGESTIONS

- There is a need for a new system addressing the issue. Complaints levelled in online forum should have a proper mechanism and the courts should try to address those in a serious manner.
- Protection of identity of persons making statements in the sexual harassment cases should be ensured and also the name of the accused.
- Awareness about the functioning of committees like ICC should be made to the employees of the Company.
- Women should try to report the incidents of sexual harassment. And such kind of neutral mechanism should be adopted.
- The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 requires a total makeover and it should be formulated in a neutral manner.

[4]National Commission for Women
[5] Indian National Bar Association statistics

- 'Discrimination' and 'Sexism' should also be taken into consideration when new laws are made in this regard because the whole concept of sexual harassment affects equality and the above mentioned two evils also has the same impact.
- Since Sec.377 is struck down and also NCRB statistics reveal even men face sexual harassment, the law should be formulated in gender neutral manner.
- Online and Offline training to educate about sexual harassment and the laws regarding it should be conducted in workplaces.

REFLECTING UPON THE RIGHTS AND SOCIETAL STATUS OF TRANSGENDERS

Anisha Routray* & Rupal Chhaya**

ABSTRACT

From the very advent of society, there has been recognition of a third gender apart from males and females. Some of the literatures and Hindu Scriptures have discussed about them at length. We have always recognised their presence but never cherished it, in the ancient India, various dynasties have appointed them but for menial jobs or ones which required loyalty. They remained to be a secluded section of the society and this peculiarity aggravated especially during the British rule when they were declared a criminal tribe. This further forced them to adopt strange methods of earning such as dancing, going from one place to another collecting money etc. It was not until the time. Human Rights befell our ways and compelled civilised society us up to give this segment of the society their share of deserved rights.

Argentina and Denmark lead the way by granting recognition to the LGBT community by including sexual orientation as a part of their everyday rights. In India, it was only in 2014 that civil society realised the same and the toddler step in this regard being the Transgender Persons (Protection of Rights Bill), 2016. The seeds of the same were however sown in the NALSA judgement along with the Transgender Bill, 2014 which was introduced by a private member, Tiruchi Siva, in the Rajya Sabha. Simultaneously the government had started to work on a draft of the bill and which was put on the website for inputs from the public. Initially it was open for two weeks but had to be extended for a week, after receiving the response. The government however didn't want to face any more criticism and thus declared the bill as approved by the cabinet. This paper deals with the historical background of the transgender society, the Transgender bill, in the light of the NALSA judgement along with the various cases dealing with the constitutional validity of S.377 of the Indian Penal Code.

Keywords: LGBT community, S.377, Transgender Bill

INTRODUCTION

The transgender society has gone through various phases, life has never been easy for them especially in the Indian society. Even though they are treated as a sign of good luck and many fear any curse from them, we have failed to accept them as a part of our society. The women have been fighting for their rights, the latest #MeToo movement has been evidence of it. However, the transgenders have yet not been able to take a stand for their rights. their fights have somehow not borne fruits, until the recent judgement of Navtej Singh Johar the nation hadn't witnessed a revolutionary step as this. Yet, there are miles to go, other nations have surpassed us in this regard. This paper tries to evaluate these steps taken by our nation to protect the transgender society.

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1. Historical Background of the Transgender Society in India

In India we often come across different names referring to the transgenders, some such include: hijras[1] in North India, kinnars in Delhi, eunuchs,[2] chakkas, Kothis,[3] jogappas[4] in Karnataka and Maharashtra etc. Hindu scriptures and the literature, have talked about the existence of a third gender. Even in Hindu laws, astrology, linguistics and in the field of medicine the existence of a third sex has been discussed. In Ramayana, Lord Rama had instructed all the women and men to return back to Ayodhya, however the transgender stood at the same place they were for 14 years, as they were neither men nor women. When Lord Rama returned back from exile he was impressed by their loyalty and sanctioned them with the power to confer blessings on an auspicious occasion.

In 700 AD, during the Rajputian Era, the transgenders were slaves in the kingdom where they were assigned to do work such as bathing, giving a massage, carrying litters or any other menial job. They were also relied upon as guards for the royal family. One reason they were considered loyal was that as they had no family of their own, they would serve till their last breath.

During the Mughal rein, the "hijaras", were considered to the most loyal of all. As they were neither male nor female, they were made guards at the "Harems" (the palace where the queens resided). They also were the guardians of the holy places like Mecca and Madina and had a strong position to hold in the same.

The Britishers had always feared the transgenders, this was because of the way they dressed up and the activities they had to take up for their livelihood. They eventually came up with the Criminal Tribes Act, 1871, where they incorporated the hijaras as a criminal tribe and they would be imprisoned for two years and/or a fine, if they found to be dancing in the public wearing women's clothes, related with any kidnapping or castrating children.

However, this act was repealed in 1952 but it left a lasting effect on the minds of the Indians. In the year, 2012, the "Karnataka Police Act was amended to provide for registration and surveillance of Hijras who indulged in kidnapping of children, unnatural offences and offences of this nature."

2. Tracing The Constitutional Validity Of S.377 Of Ipc

2.1. Naz Foundation Case

The question regarding the validity of S.377 of the Indian Penal Code 1860 (hereinafter IPC), was first raised in the case of *Naz Foundation v. Government of*

[1]Hijras are biological males who reject their 'masculine' identity in due course of time to identify either as women, or "not-men", or "in-between man and woman", or "neither man nor woman".

[2]Hijras in Tamil Nadu identify as "Aravani". Tamil Nadu Aravanigal Welfare Board, a state government's initiative under the Department of Social Welfare defines Aravanis as biological males who self-identify themselves as a woman trapped in a male's body.

[3]Kothis are a heterogeneous group. 'Kothis' can be described as biological males who show varying degrees of 'femininity' - which may be situational. Some proportion of Kothis have bisexual behavior and get married to a woman.

[4]Jogtas or Jogpappas are those persons who are dedicated to and serve as a servant of Goddess Renukha Devi (Yellamma) whose temples are present in Maharashtra and Karnataka.

*NCT of Delhi*5. Naz foundation is a Non-governmental organisation which filed the PIL before the Delhi High Court. The respondents includes the National Aids Control Organisation, Delhi State Aids Control Society, Commissioner of Police, Delhi and a number of NGOs whose intervention was seeked at the request of ?

"The judgement explains the history of this legislation which accounts as follows; s.377 of IPC criminalizes sex other than heterosexual penile vaginal. The legislative history of the subject indicates that the first records of sodomy as a crime at Common Law in England were chronicled in the Fleta, 1290, and later in the Britton, 1300. Both texts prescribed that sodomites should be burnt alive. Acts of sodomy later became penalized by hanging under the Buggery Act of 1533 which was re-enacted in 1563 by Queen Elizabeth I, after which it became the charter for the subsequent criminalisation of sodomy in the British Colonies. Oral genital sexual acts were later removed from the definition of buggery in 1817." And in 1861, the death penalty for buggery was formally abolished in England and Wales. Sodomy or buggery remained as crime not to be mention by the Christians. The Indian Penal Code was drafted by Lord Macaulay in the year 1861 and introduced in the British India. S.377 is a part of Chapter XVI of IPC titled of "Offences affecting Human Body", in the sub-chapter, "Unnatural Offences" and it reads as follows:

S.377: **Unnatural Offences**—Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

Naz foundation was working on a project related to HIV/AIDS, where it was found that the gay community or the "men who have sex with men (MSM)" were one of the most vulnerable groups. This could be taken care of if they were given an identity of their own, people fear to reveal their sexual orientation from the fear of getting prosecuted under the legislation. This section has been used as a weapon by the police to abuse, torture, detain and question, force sex, payment of hush money. This violates Article 21[6], Article 19(1) (a)[7] (b)[8] (c)[9] (d)[10] and Article 15[11] of the Indian Constitution. Under Article 21, right to dignity and privacy is an implicit part of right to life. Article 19 which provides for the freedom of free speech and expression about one's sexual preferences, freedom to form

[5]Naz Foundation v Government of NCT of Delhi, 2010 Cri LJ 94.

[6]"Protection of life and liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law".

[7]"Protection of certain rights regarding freedom of speech etc: - (1) All citizens shall have the right- (a)To freedom of speech and expression.

[8](b) to assemble peaceably and without arms.

[9](c) to form associations or unions.

[10](d) to move freely throughout the territory of India".

[11]"Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth".

associations/assemble, freedom to move about freely is being violated. Article 15, uses the word "sex", which doesn't include sexual orientation.

The respondents contented that the S.377 is a safeguard against child sexual abuse, rape laws and not just homosexuality. It also contended that as per the 42nd Law Commission Report, the legislation stands good keeping the morals of the society in view. The laws are meant for the public at large to follow; thus, it must be as per the morals they look up to.

The court held S.377 insofar it criminalises consensual sexual acts of adults in private, to be violative of Article 21, 14 and 15 of the Indian Constitution. It would however continue to govern the non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. Where, adults include anybody and everybody above the age of 18.

2.2. Suresh Koushal Case

The decision of the court was however short lived; this decision was struck down in the case of *Suresh Kumar Kaushal and Others v. Naz Foundation* and Others[12]. Here it was elaborately discussed whether constitutional morality has an upper hand over public morality and if s.377 of IPC violates Article14, 21 and 15 of the Indian Constitution. The Supreme Court however, reversed the decision of the Delhi High Court, stating that s.377 is not violative of any fundamental right.

The question which rises at this point is that at one point we are talking about giving an identity to the transgender society and on the other hand we are taking away some of their basic rights away from them. If s.377 of IPC holds good then what is the use of even putting forth various legislations to protect the transgenders. We however support the view of the Delhi High Court in this regard that it is violative of Article 14, 15 and 21. Article 21 covers the domain of right to privacy and S.377 is violative of the same. When every other citizen of the country has a right to choose their own partner, then, why not the transgenders? Such a provision will further instil a fear and an individual with a sexual orientation other than that of the sex he/she is assigned at birth, will never be able to reveal his/her sexual orientation amidst the society. It is time for the society to be progressive thinking. When the mind-set of the people cannot be changed then probably the legislation would help bring about the change. Things are not easy as yet, even though untouchability is prohibited under Article 17 of the Indian Constitution, till date it exists in air society. In the case of dowry too the legislation has left a little impact on the society but a small step may in the future bring about a huge transformation.

2.3. Navtej Singh Johar Case

The case where the Court said "History owes an apology to the members (LGBT) community";[14]

[12](2014) 1 SCC 1

[14]"Abolition of untouchability: - "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law

The 16-year long struggle of the LGBT community reaps fruitful results after the efforts of the 5 members of the LGBT community, Navtej Singh Johar (Bharatanatyam Dancer), Ritu Dalmia & Ayesha Kapur (restaurateurs), Aman Nath (hotelier) and Sunil Mehra (media person), all of whom filed curative petitions after the judgement of the Supreme Court recriminalizing S.377[15]. The 5-judge bench, consisting of Chief Justice Dipak Misra, Justice Rohinton Nariman, Justice DY Chandrachud, Justice Indu Malhotra and Justice AM Khanwillkar partially struck S.377 to the extend it criminalised, 'consensual sex between adults of the same gender'. The judgement points out the flaws in the Suresh Koushal Judgement[16], a few of these being how the Court was unable to justify the use of 'reasonable classification' under Article 14, here the Court pointed out that there was no reasonable classification between 'natural intercourse' and 'carnal intercourse against the order of nature'. Moreover, the Court holding that the LGBT community was a miniscule of the population, just to hold the constitutional validity of Article 14 was not justified. In Navtej Johar case, the Court placed emphasis on Article 14, 15, 19 and 21 and how these were being violated by S.377. The following is how the Court substantiated its arguments:

"Right to Equality, Article 14": The Supreme Court held that there stood no intelligible differentia between people who engaged in "natural intercourse" and those who engaged in "carnal intercourse against the order of the nature".

"Right against discrimination, Article 15": The Court diverted from its narrow view about Article 15, which till date was restricted only to the grounds mentioned in the provision, it went ahead to include any direct or indirect form of discrimination based on the understanding of sex to be a part of discrimination. Alongside, the Court included sexual orientation as a part of sex in the provision.

"Right to freedom of Speech and Expression, Article 19": Here the Court went ahead to distinguish between public morality and constitutional morality, and held that it was the constitutional morality which has to be considered and not the public morality. The judges even pointed out this to the advocates appearing for the respondents, that something which is considered to be morally wrong to the society cannot be wrong in the eyes of law. Further adding it stated that consensual carnal intercourse in private doesn't in any way harm the public morality or decency.

"Right to life, Article 21": Over the years the Supreme Court has been widening the scope of Article 21, by adding the right to privacy which further incorporated the right to autonomy, right to choose and the right to live with dignity.

s.377 was found to be violative of all these articles.

The Court didn't stop here, it went ahead to incorporate the various civil rights which the community from the time immemorial being devoid of. Stating

[15]Navtej Sihgh Johar & Ors. V. Union Of india Thr. Secretary Ministry Of Law And Justice, (2018) 10 SCC 1
[16]Suresh Kumar Koushal v Naz Foundation, (2014) 1 SCC 1
[17]*Id*

how the various nations have gone ahead to give the right of citizenship, right to adoption and the right to marriage to the community. Yet, the struggle for this community in India doesn't stop here. We are waiting for the various laws like the Sexual Harassment at Workplace to be made neutral, along with various other civil rights.

3. The Transgender Bill, 2016 in The Light of NALSA Judgement

The transgender bill defines transgender as an individual who is "neither wholly female nor wholly male; or a combination of a female or male; or neither female nor male; and whose sense of gender does not match with the gender assigned to that person at the time of birth and includes transmen and transwomen, persons with intersex variations and gender queers."

A transgender person must obtain a certificate of identity which acts as an evidence of recognition of identity as a transgender person and to invoke their rights under the Bill. Such certificate would be allowed by the District Magistrate on the recommendation of a Screening Committee, which would comprise of a medical officer, a psychologist or psychiatrist, a district welfare officer, a government official, and a transgender person.

The Bill prohibits discrimination against a transgender person in field of education, employment and healthcare. It directs the central and state governments to provide welfare schemes in these fields.

Offences like compelling a transgender person to beg, denial of access to a public place, physical and sexual abuse, etc. would attract up to two years' imprisonment and a fine.

3.1. Rights of The Transgender People

The preamble of the constitution provides to secure all its citizens justice, social, economic, political and equality of status and of opportunity.

The constitution protects transgender rights primarily through Article 14[17], Article 15[18], Article 21[19] and Article 23[20].

[17]"Equality before law: the state shall not deny to any person equality before the law".

[18]"Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth: -

(1) The state shall not discriminate against any citizen on grounds only f religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on the grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to

(a) Access shops, public restaurants. Hotels and places of public entertainment; or

(b) The use of well, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State fund or dedicated to use of the general public.

(4) Nothing in this article or in clause (2) of Article 29 shall prevent the state from making any provision for advancement of any socially and educationally backward classes of citizens or for the scheduled castes and the scheduled tribes".

[19]Protection of life and liberty: - No person shall be deprived of his life or personal liberty except according to procedure established by law".

[20]"Prohibition of traffic in human beings and forced labour: - (1) Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law."

[21](2014) 5 SCC 438.

3.2. National Legal Services Authority s. Union of India[21]

The judgement described transgender as an umbrella term for persons whose gender identity, gender expression or behaviour does not conform to their biological sex. Transgenders include those persons who do not identify with their sex assigned at birth.

RIGHTS DISCUSSED IN THE CASE:

"Article 14 of the Indian constitution ensures equal protection and hence imposes a positive obligation on state to ensure equal protection of laws by bringing in the necessary social and economic changes."

"Article 15 & Article 16 prohibit discrimination on basis of sex".

"Article 19 guarantees those basic rights which are recognised and guaranteed as the natural rights inherent to the status of the citizens of a free country."

"Article 21 is heart and soul of constitution which speaks right to life and personal liberty."

Judgment: The Supreme Court directed the centre and state government to grant legal recognition to the transgenders by the way of the introduction of a third gender apart from male and female. Along with treating them as socially and educationally backward classes and extend all kinds of reservations in-case of admission of educational institutions and public employments.

The centre and state government should seriously address the problems faced by such communities which includes; social pressure, suicidal tendency, social stigma, etc, and any insistence of Sex Reassignment Surgery for declaring one's gender as immoral and illegal. Transgenders should be provided separate public toilets and the necessary medical facilities. They further directed the government, to take adequate measures to restore their respect and place in the society and formulate social welfare schemes for their advancement.

3.3. Critique of The Nalsa Judgement With Transgender Persons (Protection of Rights) Bill, 2016

NALSA v. Union of India deals with third genders right to self-expression, equality and dignity in accordance with Art-14, 19 and 21 of the Indian Constitution. The court mentioned nine directions to be followed and ordered that the report of Ministry of Social Justice and Empowerment Expert committee must be examined and implemented in accordance with the aforementioned judgement. However, after examining the Bill, it is found that it does not uphold the spirit of the judgement.

Contrary to its title and NALSA judgment, the bill deviates and adopts a welfare-oriented approach instead of rights-based approach. The importance of a rights-based approach is that its denial leads to violation. Furthermore, this neglects a rights-based approach which leads to deviation from rights-based

legislation like, the Rights of Persons with Disabilities Act 2016 and Mental Healthcare Act 2017.

The definition in the two, the bill and the judgement differ from one another. In NALSA judgment transgenders are those whose sense of gender identity doesn't match to that assigned at birth. It also brings in its amid, trans-men and trans-women independent of medical procedure and socio-cultural identities which the Transgender Bill, 2016 conflates, restricting the constitutionally guaranteed right of the persons which the NALSA upheld.

In accordance with the NALSA judgment clause 2 (i) of this bill must clearly state that medical intervention or procedure is not an important pre-requisite condition for identifying a transgender person however the bill doesn't state any such provision.

The bill mentions a transgender person's right to be recognized and right to self-perceived gender identity which it fails to define. Whereas, in NALSA judgment, the terms gender identity and gender expression are fundamental rights protected under art-19(1) (a), elaborated in clause 4 of the bill.

The formation of a district screening committee (for determination for provision of medical certificate of a transgender) dilutes the right to self-identity and gender identity as given in NALSA. Furthermore, it hinders an individual from exercising their fundamental right, which is a part of clause 6 of transgender bill. Clause 6 deals with district screening committee and the persons they should comprise of. However, the judgment clearly mentions that persons should not be forced to undergo any form of medical or psychological treatment or procedure as a person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured and suppressed.

"The Bill in clause 9 directs the appropriate government to take measures and secure effective participation of transgender persons and their inclusion in the society, where the word 'appropriate government' doesn't clearly define which government. However, the judgement directs the state and central governments to treat transgender persons as socially and educationaliy backward class of citizens and also extend reservations in educational institutions and public employment."

Clause 18 of the Bill describes the duties and functions of the national council which are limited and vague. However, to ensure the essence of NALSA judgment is upheld the council must be given specific and elaborate functions and duties.

While clause 3 covers a wide range of fields of discrimination it fails to provide appropriate safeguards that must be framed for transgenders during trials. There must be a clause which prohibits carrying out of any physical, medical or psychological examinations to determine whether a person is transgender or not which is in accordance with the NALSA judgment.

3.4. Issues with the Transgender Bill

The problems faced by transgender and intersex variations are different, but some overlap too. Hence the bill must address their problems as well, consequently changing its name to the Transgender and Intersex Persons Bill, 2016.

The bill lacks proper provisions for its implementation. In clause 9 it mentions appropriate government without stating the duties of different agencies. There is an unclear segregation of responsibility between the centre and the state, thus, creating confusion which consequently results in a delay. Vague language has been used in different clauses of bill which results in reduced liability of the actors.

Laws such as family law, Indian penal code are gendered and only recognise male and female. These laws hamper transgenders' right of seeking relief against various crimes and societal institutions.

Clause 3 and 10 the transgender bill seeks to protect a transgender person from discrimination. However, neither of these clauses have defined what comes under discrimination. It also fails to mention methods to be employed for prevention and redressal against such violence.

Clause 16 of transgender bill deals with health-related measures such as pre and post sex reassignment surgery and hormonal therapy counselling and medical insurance schemes for transgender persons to cover such expenses. However, the measures to make these economically and otherwise accessible to people who can't afford is not stated in the present bill.

The Bill mentions setting up of "National Council of Transgender Persons". This council will comprise of representatives of certain governmental ministries, National Human Rights Commission, National Commission for Women, State government, the transgender community and Non- Government Organisations. However, it fails to layout, its powers.

4. SOCIAL STIGMA FACED BY THIS COMMUNITY

Let alone the legislations which the legislature can give to the transgenders, the question is whether the Indian society is ready to accept this change, will they adopt and adapt to the new members of the society. Even though in the ancient times, the Indian society had a sense of respect for this segment of the society however, during the British rule we lost this sense of respect because of the British Legislations, which declared this segment as a criminal tribe. People developed a fear towards them, because of their dressing style, actions etc. Probably all because of this today, the transgender even though not a minority, lives as a segmented part of the society. They live under absolute poverty because of the restricted means of livelihood for them, which includes, sex, begging or getting gift money on a special occasion such as marriage, when a baby is born

etc. They usually live in slums or areas completely dejected from the society. Time and again they have been the victims of hate crime, forced sex, torture by the police, they are left alone at the time of birth by their families and they have to be ultimately be taken care of by the others members of the community. This exclusion of theirs in the society is somehow not allowing them access medical facilities, education or for that matter any right of theirs. The sad part is that they are devoid of their right to be cremated with dignity, if not in life but at least afterlife. The dead of a transgender in India, is beaten with a stick and then buried in a standing position upon which salt is poured. They live a very stressful life, reveals an interview conducted with this segment of the society.

Due to social exclusion, they are not able pursue their education because the schools don't permit applications fearing the parents of the other students would revolt against this. This becomes a road block in their carrier thus making them the slaves of the society. However, it is also a fault on their part to act absurdly in public places, when they wish to be treated with dignity, they also must present themselves in a dignified manner.

Till date we have failed to give them an identity of themselves. However, now a few changes like the AADHAR card, the provision for a third gender exists. In 1994, they were given the right to vote. In 1999, Shabnam Mausi Bano became India's first hijra MLA. In 2003, Hijras in Madhya Pradesh have established their own political party called "Jeeti Jitayi Politics" (JJP). In recent Loksabha elections, Daya Rani Kinnar, a transsexual activist, stood as an independent candidate from Ghaziabad constituency against Rajnath Singh. Tamil Nadu became the first state to give recognition to the transgender. In official forms, there is 'T' along with 'M' and 'F' in the gender identification column. In Chennai, toilets are being built for the transgender. The concept of gender-neutral toilets is being introduced in many educational institutes. Recently a large no. of NGOs has come up to work for the transgender. Things are changing. But the limits to these changes are in our mindset. There is a need to broaden our mindset, to make our mindsets more human or more rational.

5. CONCLUSION

From the very advent of the society the transgenders were looked down upon. They remain to be the secluded and the minority population in India. They are no less than a marginalised group, as per the NALSA judgement they are to be treated as other backward class and suitable provisions must be made in their interest and to ensure their upliftment. The Transgender Bill, 2016 is vague and does not fulfil the objective of the NALSA judgement. Various protests have been made in this regard, the last one being in Mumbai on the 3rd of February, 2018. As the bill is in its premature stages suitable amendments should be made in accordance with the NALSA judgement. Although the nation has taken its first step in this regard by decriminalising s.377 and bringing consensual carnal intercourse within the constitutional provisions, we are still lagging behind in the

very practical aspects, where we are in dire need to make the civil rights gender neutral or ones which incorporate the transgender. Various reports have stated that the Indian provisions related to the transgenders are violative of the Human Rights, in specific right to life, right to live with dignity and right to self-identity. Even though the society is adapting to the changing times, the mind sets still isn't welcoming towards them. Till date there is denial of education, medical facilities, right to vote, right to access the public places etc, to the transgender persons. They have been the victim of torture, harassment, forced sex, detention by police. They have had no means of livelihood other than begging and other inappropriate jobs. The concept of gender-neutral toilet, inclusion of a provision of third gender in various application forms of institutes and government offices along with the various identity cards such as passports, AADHAR cards, etc.

THE JOURNEY OF TRIPLE TALAQ: FROM CONSTITUTIONALITY TO UNCONSTITUTIONALITY

Anchit Jain* & Anshu Tulsyan**

ABSTRACT

Talaq Ul Biddat, popularly known as 'Triple Talaq', is a mode of divorce which used to be a very common practice among the Sunni School of Muslim community until very recently. But, in recent years, it was struggling for its legality: whether it is valid? Whether it passes the right of equality? Whether it is domination of a specific gender? And now it has been declared unconstitutional by the apex court of India.

The process of Talaq-Ul-Biddat includes pronouncing the word 'Talaq' thrice by a husband to his wife. The main reason of it being followed so widely was that it is an instant mode of divorce. However, there are many flaws in the practice of Triple Talaq such as, it is against the principles of natural justice, it isn't in accordance with the Quran and the Sunnats of Prophet Muhammad, it violates certain fundamental rights, it is irrevocable, the follow up process i.e. Nikah-Halala itself is immoral, etc. which is why it was so urgent to bring this reform in the country.

Instead of Triple Talaq, we have so many other options available for divorce which are considered proper. Many of the Islamic countries have abolished this practice way back and it was high time for us to take this step. And finally, in the case of Shayara Bano v. Union of India & Ors. Triple Talaq was held to be unconstitutional. However, the Triple Talaq Bill is still pending in the Rajya Sabha. But there is an urgent need to pass suitable legislation regarding this matter so as to prevent the continuous harassment of hapless married Muslim women due to Talaq-ul-Biddat and to give some relief to them.

INTRODUCTION

Talaq-ul-Biddat or Triple Talaq is a mode of divorce which used to be a very common practice, amongst the Sunni school of Muslim community. But, in recent years, it was struggling for its legality; whether it is valid? Whether it passes the right of equality? Whether it is domination of a specific gender? And now it has been declared unconstitutional by the apex court of India.

All these questions were entertained by the vacation bench, headed by the Chief Justice of India itself along with other judges making it a constitutional bench, in the Supreme Court of India under the issue 'Legality of Triple Talaq'.

'TALAQ-UL-BIDDAT': TRIPLE TALAQ

Talaq, a word of evil, is stated by the Prophet himself in Quran, it was never desired to be versed by anyone in the whole world and in triple Talaq the same word is pronounced thrice and sometimes also in unstable states like tempered mind or during intoxicated state.

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It'll be very surprising to know that 'Talaq-ul-Biddat' is nowhere mentioned in the Quran and the Prophet also never approved a divorce in which there was no opportunity for reconciliation between the parties. This form of Talaq was not in practice during the life of the Prophet. As per Ameer Ali, an Indian jurist, this mode of Talaq was introduced in the second century of the Islamic era by the Omaiyad Kings because they found the Prophet's formula of Talaq inconvenient to them.

The process of Talaq-Ul-Biddat includes pronouncing the word 'Talaq' thrice by a husband to his wife. The communication could be made through telephonic resources also. The only requirement in the process is the presence of two witnesses, so that they could verify the execution of this process.

It is an irrevocable mode of divorce as this kind of divorce does not even provide any time period for the reconciliation of the held event. The process leads to divorce and then enters the next step i.e. 'Nikah Halala' which means that if the divorced couple wants to remarry then the wife will have to marry another person and then get divorce from him and then only the divorced wife can remarry his former husband. However, this is a very typical, lengthy and immoral process.

The explanation of above comment made on the process of Nikah-Halala is simplified through the following example:

- A, a male, married to B, a female.
- A and B had conflicts between them and during a heated argument A divorced B through Talaq-ul-Biddat.
- 2 days later A realized his mistake and confessed it in front of B, and asked her to remarry him.
- B agreed to remarry A.
- But here comes the provisions of Nikah-Halala which says that 'a wife can marry his former husband only when she gots divorce from his later husband'.
- As per this provision B had to marry C, another male and she also had to consummate with C. And then, only on the will of her 2nd husband, B divorced him so that she could remarry A.

Also, after both the divorces, the wife will have to follow the iddat period of three months. And the implementation of such process with so many numbers of steps makes it devastating. The issue is in the highlights since the decades as in year 1985 the famous case of 'Shah Bano' advocated the issue of 'mahr ki rakam' i.e. the pre-announced contractual amount of maintenance and that case is the result of triple Talaq[1]. which was filed under the Code of Criminal Procedure.[2]

[1]Ahmed Khan v. Shah Bano Begum, AIR 1985 SC 945.
[2]The Code of Criminal Procedure 1973, Section 125 and 127.

DRAWBACKS

1. **Unfit with principles of natural justice**

As per jurisprudence, there should be consistency with the principles of natural justice. Every law, every act in practice and every step in process must follow the principles of natural justice.

There are 2 principles of natural justice-

I) **Audi Alterem Partem = 'let the other side be heard as well'.**

It says that there must be equal opportunity for both the parties to put their argument in front of the court. But in the practice of Talaq-ul-Biddat this principle is violated. The Talaq given during argument, anger or in unstable state of mind, without hearing the wife, leads to a scenario where the wife is not allowed to put her statement. The thing that the wife is not given the chance to speak costs the couple.

II) **Nemo judex iu causa sua = 'No one should be a judge in his own cause'.**

The above principle says that no one can judge a case in which they have an interest, but in case of Talaq-ul-Biddat, the husband has the right to decide things on his own. He is the sole authority in his case to decide that whether he wants to quit or remain in marriage. What he needs is just the presence of two witnesses so that someone will support that he had conveyed those three words.

Thus, there was an urgent need to think that how such a process, violating the principles of natural justice, could be the solution for a community.

In the case of A. S. Parveen Akhtar v. Union of India[3], the petitioner, Ms. Parveen's husband demanded additional dowry in the form of a scooter. On Ms. Parveen's family's inability to oblige towards the demand, she was thrown out of the house by her husband. After living in a local ladies' hostel for a few days, Ms. Parveen was intimidated by her father that her husband had divorced her by way of Triple Talaq. The arguments made on behalf of the petitioner in this case were that this practice violated human rights and the principles of natural justice. Furthermore, it was argued that the practice was unconstitutional as it went against Article 14, Article 15 and Article 21 of the Constitution of India. The Hon'ble Court held that the petitioner's apprehension that notwithstanding absence of cause and no efforts having been made to reconcile the spouses, this form of Talaq is valid and not going against the constitution of India. The writ petition was accordingly dismissed.

But we are of the strong opinion that this judgment of the Hon'ble High Court of Madras which has held Talaq-ul-Biddat to be valid has not only resulted in atrocity on Muslim women but has also inflicted a great blow to the fundamental rights.

[3]SWP No. 782 of 2009 and SWP No. 1814 of 2009

2. Religiously unacceptable

The procedure of Talaq-Ul-Biddat, which was facing question of legality in the Supreme Court under the title Triple Talaq is actually nowhere mentioned in the holy Quran. The book has its different and very systematic provisions for Talaq. The Umaiyad monarchs introduced this instant form of Talaq as the non-time consuming process.[4] Thus, Talaq-ul-Biddat is a non-religious method which was just interpreted and not even scripted. Talaq-ul-Biddat is a form of Talaq in which the word 'Talaq' needs to be pronounced thrice while the Prophet declared the word Talaq as the word of evil nature, which should not be pronounced until there remains no other option. The procedure of Talaq-ul-Biddat does not provide any provision of consultancy period or any time to rethink about the serious step, however the Prophet always wanted to settle down the issue of Talaq, that's why he had put in the provision of Iddat period under which the couple has three months to rethink about the marriage and thereby giving them an option to resettle their marriage.

Talaq-Ul-Biddat is in practice because it is the instant solution of this three months long process and that is the only reason why it was adopted and being practiced by so many people.

However, the Shia community of Islam believes it is sinful, as they do not believe in any kind of irrecoverable form of Talaq. in the words of AIMPLB (All India Muslim Personal Law Board) 'Triple Talaq' is not a solution, it is a 'Sin'.

Also in Masroor Ahmed v.State[5], the Delhi High Court after considering different forms of Talaq has held "There are views even amongst the Sunni school that the Triple Talaq pronounced in one go would not be regarded as three Talaqs but only as one. Judicial notice can be taken of the fact that the harsh abruptness of Triple Talaq has brought about extreme misery to the divorced women and even to the men who are left with no chance to undo the wrong or any scope to bring reconciliation. It is an innovation which may have served a purpose at a particular point of time in history but, if it is rooted out, such a move would not be contrary to any basic tenet of Islam or the Quran or any ruling of the Prophet Muhammad. In this background, I would hold that instead of Talaq-ul-Biddat, Talaq-ul-Sunaat should be considered. This would enable the husband to have time to think and to have ample opportunity to revoke the same during the Iddat period. All this while, family members of the spouses could make sincere efforts at bringing about reconciliation. Moreover, even if the Iddat period expires and the Talaq can no longer be revoked as a consequence of it, the estranged couple should still have an opportunity to re-enter matrimony by contracting a fresh Nikah on fresh term of Mahr, etc without the process of Nikah-Halala."

Another novel Indian concept regarding Triple Talaq is that Talaq must be "for a reasonable cause." This was first held in Jiauddin Ahmed v. Anwara

[4]Divorce under Islamic law- Mir Mehrajuddin, Cochin University Law Review Vol. IX, 1985 P.315-349
[5]2008 (103) DRJ 137
[6](1981) 1 GLR 358

Begum" by the Gauhati High Court. Two other grounds were also added. Talaq must be preceded by "attempts at reconciliation" by the nominees of the spouses, and it "may be affected" if the said attempts fail. In this case, the wife was thrown out of her matrimonial home by her husband and she applied for maintenance. The husband argued that he had divorced her. The first question that the court had to answer was whether there had been a valid Talaq by the husband. The court held that the Talaq allegedly given by the husband was invalid under Islamic law and the wife was entitled to maintenance. The prevailing case law in India, therefore, is that Talaq given without a valid cause, which is not preceded by an attempt at reconciliation between the nominees of the spouses, is invalid. However, such reforms should be brought by legislators and not through judicial law-making or judicial activism.

3. Miscellaneous

"For a married Muslim women there is no provision in the Hanafi code of Muslim law to obtain decree from the court dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her, or absconds leaving her unprovided for and under certain other circumstances. In the absence of such provision muslim women in British India were put to unspeakable misery."[7]

Thus, it is very clear from the above mentioned statement that muslim women are not given equal basic rights as compared to muslim men. Also, apart from being a very cruel method of divorce, Triple Talaq violates fundamental rights of muslim women provided to them by the Constitution of India.

When Talaq-ul-Biddat was introduced it might be possible that only the initial part was introduced and that's why it was accepted so profoundly. The main focus is on the method to obtain Talaq, but the clause of remarriage remains faded. It was not observed at that time that in case of unconsciousness if a couple suffers Talaq then how difficult it would be to remarry. For getting remarried, a lot of steps, a lot of characters and infinite sentiments and moralities are involved.

The process of Nikah-Halala not only includes that the two parties who were married earlier but also a third party with whom the Muslim woman will have to marry and then divorce just to complete the process of Nikah-Halala, so that the couple could remarry. Once a woman marries to a man in the process of Nikah-Halala then comes the scene of the second divorce. Also, we cannot ignore the fact that for a valid Nikah-Halala, the second marriage must be consummated. Getting divorce from the later husband involves so many emotions, procedures and paper work. There are chances that husband can deny divorcing his wife, the new couple comes to another relation, the former husband denies remarrying the wife etc.

[7]Universal's Publication 2017, Muslim Laws, The Dissolution of Muslim Marriages Act, 1939, Pg. No. 12.

Thus the question arises that why was there even a need to practice such controversial, non-religious, immoral and fake practice when so many other systematic options are available.

Consistency with Uniform Civil Code: A Question in Court!

"The State shall endeavor to secure for the citizens a Uniform Civil Code throughout the territory of India."[8]

The meaning of article clearly states that the State, as per the meaning of Article 12, should try to secure the citizens of the nation by bringing uniformity in the acts and the law within the territory of India. The article clearly states that there should be same structure for every citizen, there should be similar laws for each and every person and that's why the Constitution was framed.

But along with this article there is a need to understand that India, a nation of highly diversified cultures, has to negotiate with its policies on the given terms and condition of peace and good conscience.

We have policies which are neither valid nor amended but are still in practice, e.g. people practice doctor's profession without degree in villages and they do not get penalized because they are lifelines in those areas where no other option is available.

But when we compare the status of Triple Talaq with Uniform Civil Code then we do not have much to fill in the pages. Also the former chief justice of India, Justice J.S. Khehar had said that "SC is looking at triple Talaq, not Uniform Civil Code". The issue came in news when the writ petition of Shayara Bano case came in front, which questioned about the rights of women suffering from the cruelty of Talaq-ul-Biddat.[9] The petitioner handled divorce after 15 years of marriage. The issue was not only about divorce, the case also contained the facts of polygamy and Nikah Halala. However, both the issues are different. The issue of Triple Talaq is a question for the Sunni community which has majority in the minorities of this nation, and the question deals with only the validity of Talaq-Ul-Biddat, Nikah-Halala, and polygamy and not with the issue of Uniform Civil Code.

In the case of Triple Talaq, this process has wide acceptance, it never faced any serious challenges in the past. Recently, so many cases were up there in the court along with the case of Shayara Bano which questioned about its validity.

Triple Talaq being in question with Uniform Civil Code also raised the question upon the other personal laws, which are inconsistent with laws but are still in practice for example, the question of the introduction of rights for polyandry in comparison of existing polygamy.

[8]The Constitution of India, article 44

[9]Shayara bano v. Union of India & ors, writ petition (civil) no. 118 of 2016.

And all these questions were needed to be answered with the reference of the religious holy book Quran and nation's faith book, the Constitution of India. Technically, applying both of them simultaneously will never bring a solution thus, it is an implied condition to negotiate with the laws. Uniform Civil Code in itself nowhere forces to apply the uniformity in the nation, as it clearly uses the term "Endeavor" which asks for trying only.

Thus it's a question only, whether implementing Uniform Civil Code in the name of triple Talaq is a solutions or it will hyper the sentiments only.

OTHER OPTIONS FOR DIVORCE

1. **Talaq-Ul-Sunnat**

   As per the holy Quran, for the husband, the systematic procedure to give divorce is Talaq-ul-Sunnat and there are 2 methods under Talaq-ul-Sunnat.

   I) **Ahsan**

   The Ahsan method is considered to be the most proper way to present divorce to the wife.[10] As Talaq is considered as an evil word thus under the Ahsan method there is need to pronounce Talaq only once and then begins the period of Iddat i.e. the three months duration for the resettlement of the conflicts. The Ahsan process can execute when husband wants to divorce his wife. Husband can divorce his wife only in her 'Tuhr' period. Tuhr period is the period of purity, when women is free from her menses.

   As the husband says 'Talaq', there is execution of Iddat period, the three months of separation begins with the day of pronouncement of word. The period of 3 months is given so that the couple can resolve their issues and cohabitate so that the divorce can be revoked. This process is the most proper form of divorce as per Islam.

   In *Marium v. Md. Shamsi Alam*[11], the husband had pronounced triple talaq on his wife but later on he repented his action, the wife filed a suit for a declaration that she had been divorced by Alam. The Allahabad High Court held that "a divorce pronounced thrice in one breath by a Muslim husband would have no effect in law, if it was given without deliberation and without any intention of affecting an irrevocable divorce; such divorce is a form of Talaq-e-Ahsan, and thus is revocable by the husband before the Iddat expires." The court ruled that Talaq pronounced by Alam was revoked by him within the Iddat period. Therefore, the marriage between the couple was subsisting and the wife was denied the relief she had asked for. The Allahabad High Court, thus, had based its decision on the opinion of Ibn Taimiyah, which in the subcontinent, is endorsed by the Ahl-al-Hadith.

[10]Adjudication in religious family laws: cultural accommodation, legal pluralism, and gender equality in india- Gopika solanki, Cambridge university press, pg. no. 131.
[11]AIR 1979 All 257.

Thus, in the above mentioned case, since it was the Talaq-e-Ahsan mode of divorce, the parties had the chance to revoke divorce when the husband repented his action. But if the parties would have been divorced through Triple Talaq then this option would not have been given to them. The point is how could such sinful process of Triple Talaq be practised to break the pure bond of marriage without having the option to revoke the process, & without trying to reccocile between the parties and without hearing the wife.

II) Hasan

The Hasan is the proper form of divorce.[12] The only difference between Hasan and Aasan is that, in Hasan the word is pronounced thrice with the interval of one month.

The Hasan process starts with the pronouncement of word Talaq and then begins the period of Iddat. After every one month there is need to revise the term so that the period can be expanded. At the end when the 3 pronouncements are made and the 3 months are over then there is final divorce. The period of Iddat results in separation and not termination of marriage.

This is to note that under following circumstance Talaq will be considered valid if-

S. No	Basis	Shia	Sunni
A.	The husband has attained the age of majority.	Yes	Yes
B.	The husband must be of sound mind.	Yes	Yes
C.	The pronouncement must be made in the presence of 2 witnesses.	Yes	No
D.	Talaq will be accepted in written only if the pronouncement is not made due to duress or compulsion.	Yes	No
E.	The announcement must be made in Arabic and strictly with the terms of sunnat.	Yes	No
F.	There should be no intercourse between couple during the period of Iddat.	Yes	Yes

2. Divorce by agreement between the parties

I) Khula

It is a divorce on the request of wife. The husband and wife agree to divorce each other on the offer of consideration. The consideration is passed by wife to her husband. Consideration is essential for this divorce. The consideration is basically the amount of mehr (dower), paid by husband earlier or the dower gifted by the husband.

On the exchange of his consideration, the divorce is effective as well as irrecoverable since the couple is bound to observe Iddat period.

Wife can reclaim the consideration during the Iddat and thus husband can revoke the khula.

[12]Adjudication in religious family laws: cultural accommodation, legal pluralism, and gender equality in india- Gopika solanki, Cambridge university press, pg. no. 131

II) Mubarat

It is a mutual consent between husband and wife. When both the parties agrees to dissolve the marriage, they can dissolve it. One has to make an offer and other has to accept it and then the couple has to observe the Iddat period.

3. Judicial Process

The Dissolution of Muslim Marriages Act 1939'[13], talks about the grounds on which a woman can divorce his husband. There are 2 methods available:

I) Lian

If a husband claims charges of adultery over his wife and if charges are proved wrong, then in that case wife has a right to dissolve the marriage. The marriage dissolves as the judicial decree is passed.

II) Fask

The Muslim law allows a lady to approach the Qazi for the dissolution of marriage, under the following conditions:

- If marriage is unbalanced.
- If the person has exercised his option to avoid the marriage.
- If marriage falls within prohibited measures.

INTERNATIONAL SCENARIO OF TRIPLE TALAQ

The concept of Triple Talaq is not same everywhere. There are various nations who abolished the concept of Talaq-ul-Biddat from their divorce system at various times.

Law Minister Ravi Shankar Prasad said when the legality of Triple Talaq was in issue, "Islamic countries like Egypt, Pakistan and Bangladesh have regulated Triple Talaq. They have said you can't say Talaq in one sitting. India is a secular country. If women are facing abuse, we need to take a decision."

The status of Triple Talaq in some other nations-

1. **Pakistan**- The laws relating to divorce in Pakistan were amended in year 1961 by the Muslim Family Law Ordinance, 1961.[14]
   There is need to pronounce Talaq word thrice in three successive menstrual cycles.
   The husband has to inform the authorities for his intention to divorce. Couple has to follow the period of Iddat. Also, the wife can remarry her husband after the divorce.
2. **Iraq**- As per the Iraq's personal law, the 3 immediate calls of Talaq, it amounts to one only. Both spouses can start the process of Talaq.[15]

[13] Section 2

[14] Munir M. Reforms in triple talaq in the personal laws of Muslim states and the Pakistani legal system: Continuity versus change, International Review of Law 2013:2 http://dx.doi.org/10.5339/irl.2013.2

[15] Iraq law of personal status 1959.

Court can investigate the reason of talaq and can appoint the arbitrators so that the talaq must not commence.

3. **Indonesia-** As per the Law of Marriage, 1974, if attempts at reconciliation have failed, then a married couple can get divorced but only in court, not by any religious body. "Breakdown of marriage" is an important pre-condition for divorce.
4. **Afghanistan-** As per Section 145 of the Civil Law of 4 January 1977, Afghanistan, "Divorce, where three pronouncements are made in only one sitting, is considered to be invalid in Afghanistan.

SHAYARA BANO V. UNION OF INDIA & ORS.

Different countries with different solutions are here to fight the complexity of this process. In India, before the case of *Shayara Bano v. Union of India & Ors.*, Talaq-ul-Biddat was valid but it was held unconstitutional. We will now see that how this landmark judgment came.

Shayara Bano, the petitioner, was married to Rizwan Ahmed for 15 years and was divorced by her husband through Talaq-ul-Biddat in the presence of two witnesses. The petitioner, then, filed a petition in the Supreme Court of India challenging the constitutional validity of Talaq-ul-Biddat, polygamy and Nikah-Halala for violating Articles 14, 15, 21 and 25 of the Constitution of India. The main issue of the case were as follows:

a. **Whether Triple Talaq is valid?**

The contention of the petitioner was that Talaq-ul-Biddat is nowhere mentioned in Quran, neither the Prophet ever approved it. It was introduced by the Omaiyad kings as they found the proper form of talaq inconvenient to them and also time consuming.

The argument of the respondent was that Quran does not mention any form of Talaq and if this is to be followed then all forms of divorces will be unislamic and then the married couples will remain remediless in case of marital disputes.

b. **Whether Triple Talaq violates any fundamental right under the Indian Constitution and is it protected under Article 25?**

Regarding Articles 14, 15 and 21, it was held that Triple Talaq violates these Articles as this right is not given to females, but only males and also it hampers the right to life. Also, Triple Talaq is not protected by Article 25 as this practice is not an integral and essential part of Islam. An essential practice is the practice on which core benefits of the religion are founded, without which the fundamental character of the religion would change.

And then, in this manner, the judgment of the constitutional bench of 5 judges came in 3:2 majority and Triple Talaq was finally held to be unconstitutional. The judgment given was in this way:

Majority- Rohinton Nariman, Uday Umesh lalit

Concurring- Kurian Joseph

Dissenting- Jagdish Singh Khehar, Abdul Nazeer

The Muslim Women (Protection of Rights on Marriage) Bill, 2017 (Triple Talaq Bill) has Been drafted in the aftermath of the Supreme Court decision in the case of Shayara Bano v. Union of India & Ors. and the same has been passed by the Lok Sabha. The reason why the bill was brought is that it was felt that there is a need for State action to give effect to the order of the Supreme Court and to redress the grievances of victims of illegal divorce.

In this Bill, Section 1 deals with the short title, extent and commencement. Section 2 is the definition clause in which "electronic form", "talaq" and "magistrate" is defined. Section 3 states that if a male makes any pronouncement of Talaq upon his wife in any manner, it shall be void and illegal. Section 4 states that whoever pronounces Talaq upon his wife shall be punished with imprisonment for a term which may extend to three years and fine. Section 5 states that a married Muslim woman upon whom talaq is pronounced shall be entitled to receive from her husband such amount of subsistence allowance for her and dependent children may be determined by the Magistrate. Section 6 states that a married Muslim woman shall be entitled to custody of her minor children in the event of pronouncement of Talaq by her husband in such manner as may be determined by the Magistrate. Section 7 states that an offence punishable under this Act shall be cognizable and non-bailable within the meaning of CrPC, 1973.

CONCLUSION

Since ages the, Islamic society was facing the problem of Talaq-ul-Biddat, popularly known as Triple Talaq, which in no doubt, was introduced to provide sudden solution for the problem, but then this mode of divorce had turned into a cause of problem. Some of the major problems faced by the couples divorced through Triple Talaq were that instantly the wife is left with no option, the follow up, i.e. the difficult and complex process of Nikah-Halala, the Talaq was binding even when the husband doesn't mean it, as it may be done in a heated argument, etc. Although various standard concepts for divorce with proper solutions are available in the Quran and in the laws of the nation, still the majority of this nation believed to adopt this process due to its convenience. As the AIMPLB also quoted in their argument during the Supreme Court proceedings that it'll be incorrect to abolish the old process and they suggested that they will provide the same right to the wife also i.e. to practice the Talaq-Ul-Biddat, in their marriage, while signing of Nikah-nama. Still the problem of Triple Talaq cannot be avoided. Thus, the court has ultimately decided that the other available proper solutions for divorce are sufficient rather than an unreligious practice with fake description in the name of Allah is required just because of its convenience. Thus

one of the greatest landmark judgments of Indian judiciary was made by making the practice of Triple Talaq unconstitutional. However, the milestone is yet to be achieved and we should not stop in the midway. The Indian judicial system has performed it duty by making Triple Talaq unconstitutional but the role of the legislature is still due. The bill regarding Triple Talaq is still pending in the Rajyasabha. But there is an urgent need to pass suitable legislation regarding this matter so as to prevent the continued harassment of hapless married muslim women due to Talaq-ul-Biddat and to give some relief to them.

ANTI-CONVERSION LAW AND ITS CONSTITUTIONALITY

Gursimran Singh*

ABSTRACT

Indian Constitution under Article 25 provides for "freedom of conscience and free profession, practice and propagation of religion. For a country like India which is deeply religious, such a constitutional guarantee was very important. The paper will study the various aspects of Article 25 like right to propagate and right to freedom of conscience. There are various restrictions to which this freedom has been subjected to. One such restriction has come in the form of Anti Conversion Laws which have emerged to stop fraudulent and forceful religious conversions. Prima facie, it can be said that such a law is important in a country like India to guarantee that no person is deprived of their freedom of religion forcefully as it can create communal tension. However, it will be argued in the paper that such laws have merely become a tool in the hand of extremist organizations to stop even valid conversions. The laws of all these states have been compared with each other and their constitutionality has also been tested. The author has also tried to answer the question that whether the right to propagate religion will include the right to convert other people. Many of these laws as will be discussed in the paper, have provided unfair restrictions which has limited the scope of the Article 25. Further the role of Indian Judiciary will also be studied as to how they have responded to such laws and it will be argued that the position taken by the Supreme Court in Rev. Stanislaus case needs to be reconsidered.

INTRODUCTION

Anuradha Needham and Rajeswari Rajanin in their work The Crisis of Secularism in India assert that:[1]

"Religion's role in the modern world has been vastly reconstituted, so much so that religious debates and conflicts are no longer primarily waged over matters of belief, the true god, salvation, or other substantive issues of faith, as they once were; it is instead religion as the basis of identity and identarian cultural practices—with co-religionists constituting a community, nation, or "civilization"—that comes to be the ground of difference and hence conflict."

Religion played a very important role right from the freedom movement of Indian National Congress under Mahatma Gandhi in 1920s in the politics of India. In lieu of attracting more and more people into the freedom movement, Mahatma Gandhi kept on basing his political ideas on the basis of Hindu religion and giving primacy to religion over politics in many spheres of freedom movement.

Scepticism of mixing up religion and politics had always been there and many leaders of the INC including Nehru and Jinnah were against the idea of sacralisation of politics. "I used to be troubled sometimes by the growth of this

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[1] Anuradha Dingwaney Needham & Rajeswari SundarRajan, The Crisis of Secularism in India (2009).

religious element in our politics", wrote Nehru.[2] But Nehru was well aware that religion supplied a deep inner craving in human beings.[3] While being sceptic about sacralising politics, freedom fighters knew that religion does play an important role in the life of general public. So the history of use of religion as a political tool goes as back as pre-independence era. The Anti-Conversion Laws are also nothing but a political tool made with the purpose of catering to the feelings of the majority religion in India.

The role of religion has been very prominent in India and has been both a reason for recognition of India in international spheres and a reason for degradation of people of lower castes and tribes in India. The role Hinduism played in uplifting downtrodden had been next to non-existent. Inhumane conditions in which these tribes and castes lived were never improved by the upper-caste Hindus. The advantage of which, was rightly taken by Christian missionaries of western nations. They converted them and gave them humane conditions to live in.

A lot many converted to other religions not because they were forced to, but to enjoy the humane conditions of living, of that religion, which was missing in their own. Buddhism was one such home for them. Islam and Christianity too have been major acceptor of such people. The increasing danger of people leaving Hinduism was the major reason of the passing of the first Act prohibiting conversion in the state of Orissa (1967) and then in Madhya Pradesh(1968).

The current ruling regime and many of its compatriots have been supporting Anti-Conversion Laws in a more aggressive manner.[4] The states in which the Hindu right wing political parties were in power have come up with more stringent Anti-Conversion Laws. We will study further on how the new laws, which are passed by such political parties are more stringent and biased towards religions which are considered 'foreign'. Article 25 of the Indian Constitution provides the "right to freedom of conscience and free profession, practice and propagation of religion." In the paper, I will argue that the Anti-Conversion Laws come in direct conflict with the Article 25 of the Indian Constitution.

This paper studies the constitutional validity of these Anti-Conversion Laws and the harm it causes to the secular character of the Indian democracy. Part II will deal with the constitutional perspective of right to religion and the restrictions which can be imposed on such freedom. Part III of the paper discusses the various Anti-Conversion Laws which have been brought forward by the several State Governments. Part IV will deal with the constitutionality of these laws and existence of minimal jurisprudence on the issue of Constitutionality of Anti-Conversion Laws. Part V includes the concluding remarks.

Right to Religion: A Constitutional Guarantee

Part III of the Indian Constitution deals with Fundamental Rights in which the

[2] J. NEHRU, TOWARD FREEDOM: AN AUTOBIOGRAPHY OF JAWAHARLAL NEHRU 72 (1936)
[3] Id.
[4] PTI, BJP Pitches for Anti-Conversion Law, THE FREE PRESS JOURNAL (Dec 20, 2014, 09:20 PM) https://www.freepressjournal.in/headlines/bjp-pitches-for-anti-conversion-law/501410.

Article 25-30 contain provisions providing religious freedom to citizens as well as non-citizens. For the study we have undertaken, Article 25 as it more connected to it. Article 25(1)provides:

"Article 25. Freedom of conscience and free profession, practice and propagation of religion: (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion."

'conscience' means "a knowledge or sense of right or wrong, moral judgment that opposes the violation of previously recognised ethical principles and that leads to feelings of guilt if one violates such a principle". It also implies the right of a person not to be converted into another religion[5] or to become a part of any religion at all.[6]

There is a clear need to differentiate between the words 'freedom of conscience' and 'freedom to profess', as they both mean two different things. The word 'conscience' means how the individual personally or privately pursues his religious beliefs whereas the word profess would give him right to publicly state his religious beliefs.[7] This would mean that no individual can be forced to profess a religion and if he so desires he may change his religious beliefs as his conscience deems fit.

The controversy starts with the term 'freedom of propagation' which is provided in Article 25, which means an individual has a right to spread his religious views and spread one's religion by exposition of tenets of that faith. One view is that the term propagation would not include the right to 'convert' another person to the former's faith[8], because the latter person is 'equally entitled to freedom of conscience'. Another view is that the purpose of propagating religion is not to impart knowledge and spread it more widely, but to produce intellectual and moral conviction leading to the adoption of that religion.[9] The inclusion of the 'propagation' in the Constitution was also debated in the Constituent Assembly, but was added at the end. The reason this has been such a controversial topic is its nexus with the word 'conversion'.[10]

Conversion is a corollary to propagation.[11] The conversion itself should not be seen in a negative light. People always have good opinion of their own religion and may want it to be followed by others as they see their religion as leading to the path of success and salvation. No matter how much good intention people might have while propagating their religion, a person must be able to make his/her

[5]Stainislaus Rev. v. State of M.P., AIR 1975 MP 163.
[7]D.D. BASU, SHORTER CONSTITUTION OF INDIA (14TH ED. 2009). (INDIA)
[8]DHIRENDRA KUMAR SRIVASTAVA, RELIGIOUS FREEDOM IN INDIA: A HISTORICAL AND CONSTITUTIONAL STUDY 139 (1982).
[9]Stainislaus Rev. v. State of M.P., AIR 1977 SC 908.
[10]H.M. SEERVAI, CONSITUTIONAL LAW OF INDIA 1289, (4th ed.1993).
[11]Saadiya Suleman, Freedom of Religion and Anti Conversion Laws in India: An Overview, ILI LREV.105, 107(2010), available at https://www.academia.edu/23649093/freedom_of_religion_and_anti_conversion_laws_in_india_an_overview.

own decision related to one's life and death based on well-thought out judgment of his/her own mind. No doubt that sincere help from outside is welcome but while choosing one's religion, no individual must face any external pressures or temptations, making an individual responsible for what one believes."[12]

Restrictions to the Freedom Provided

In Article 25(1), freedom of religion has been provided subject to various restrictions such as public order, morality and health of society. Any religious activity done in contravention of these three words can be stopped and will not come under the protection of freedom of religion, making the freedom of religion subject to the restrictions provided. The State could make a law in interest of public order, health, and morality, "to regulate or restrict any economic, financial, political and secular matter" of the religion. The State could also make laws "providing for social welfare and reform or for throwing open of the Hindu religions institutes of a public character." This issue will be further discussed in Part IV of this paper with the relevant case laws.

ANTI-CONVERSION LAWS: A COMPARISON

Presently 9 Indian states[13] have Anti-Conversion Laws working and many more states are coming up with their own. In 2004, The Tamil Nadu Government repealed the anti-conversion law passed in 2002[14] after opposition from minority groups. The history of these laws goes long back to the British era when many princely states[15] made Anti-conversion laws, making conversions done by fraud, misrepresentation, coercion, intimidation, undue influence or the like, liable for punishment.

British government did not make any such law. Post-Independence, Orissa was the first state to come up with its own Anti-Conversion law named "Orissa Freedom of Religion Act "(hereinafter referred to as "Orissa's law") in 1967. Madhya Pradesh government made its anti-conversion law on the basis of report of the highly controversial Niyogi Committee which was set up in 1952 to look into the Christian missionary activities and to recommend ways to tackle it. The Committee came into controversy as soon as it was formulated, as 5 out of its 6 members were Hindus and the only Christian in the Committee was not considered a Christian orthodox enough, by his fellow community members and had been criticised earlier for his views.[16]

[12]Dr. Irfan Ahmad Khan, Freedom to Change One's Religion: The Quranic Approach, ASSOCIATION FOR QURANIC UNDERSTANDING (May. 16th 2011),http://quranicunderstanding.com/2011/05/16/freedom-to-change-ones-religion-the-quranic-approach/

[13]Orissa(1967), Madhya Pradesh(1968), Arunachal Pradesh(1978), Chhattisgarh(2000), Gujrat (2003), Himachal Pradesh(2006), Rajasthan(2006), Jharkhand(2017) and Uttrakhand (2018)

[14]Anti-Conversion Law: No Scope for Revival says Jayalalithaa, THE HINDU (April 22, 2005), http://www.thehindu.com/2005/05/22/stories/2005052204380400.htm.

[15]The first anti conversion law was passed by the Rajgarh State in 1936 which was followed by the Patna Freedom of Religion Act, 1942, Surguza State Apostasy Act, 1945 and the Udaipur State Anti-Conversion Act, 1946.

[16]Parvathi Menon, An Old Debate in a New Context, FRONTLINE,(April 10-23 1999) http://www.frontline.in/static/html/fl1608/16080380.htm.

Despite all these controversies the committee gave its report to Madhya Pradesh government in 1956. After 11 years the state enacted Madhya Pradesh Dharma Swatantraya Adhiniyam 1967 (hereinafter referred to as Madhya Pradesh's law), and by the time it became a law, Orissa had already passed its own similar law. We will now compare the laws of different states side by side and then analyse the constitutionality of these laws.

Definitions.

All the laws made, define conversion in a very similar fashion i.e. 'renouncing one's religion and adopting another religion'. But the conversions punished are differentiated in case of Arunachal, Rajasthan and Chhattisgarh which will be dealt later in this part.

The laws (freedom of religion laws) of Madhya Pradesh, Gujarat and Rajasthan define allurement as offer of any temptation in the form of 'material benefit, monetary or of any other type and any gift or gratification either in cash or kind.' Laws of Orissa, Arunachal Pradesh and Himachal Pradesh give similar definition for inducement which is used in place of allurement. This is the controversial part of the law.

Many religious bodies provide benefits like free education and basic health care to its followers, which would mean that if a person converts himself to get these benefits it will be said to have been induced or allured by these material benefits, which is nonsensical. What can be expected from a poor or backward person who may be in bad need of these facilities which are not being provided by the State? The vagueness in the definition of the term inducement and allurement and its probable misuse is worth calling this law a bad one.

All the Acts define "force" as including "show of force or threat of injury or threat of divine displeasure or social ex-communication" and 'fraud' as including "misrepresentation or any other fraudulent contrivance." So for instance if a person is converted on the promise that he/she will be more connected to God after changing their religion but doesn't reach the expected amount of connection, then this will come under the case of misrepresentation[17] which is another vague provision, as connection with God is subjective and cannot be measured.

The definition clauses in any law are provided to clear out any iota of doubt in mind of the executing body while implementing the law, which is completely missing in these laws creating confusion in differentiating between legitimate and illegitimate conversion, in turn providing discretion to misuse the law.

The next sections of all these Acts prohibit forceful conversion and even its abatement by means of fraud, allurement or by forceful means. Himachal Pradesh's Law differs a bit here and goes forward and provides that any conversion done through these prohibited means will not be considered as valid conversion. This will create confusion in the mind of the affected person as to

[17]South Asia Human Rights Documentation Centre, Anti-Conversion Laws: Challenges to Secularism and Fundamental Rights, 43(2) EPW 63, 73 (2008).

which religion he belongs to, as ritually he will be a person of another religion but lawfully he would still belong to a religion which he originally followed.

The amendments which have been proposed by the government of Chhattisgarh to its principle Act are more controversial. It is clearly mentioneds the addition made to Section 2 of the law: "Provided that the return in ancestor's original religion or his own original religion by any person shall not be construed as 'conversion'." So by default every conversion done from one religion to Hinduism would not even be considered unlawful as it is usually contended by right wing Hindu organizations that Hinduism was the only rehgion prevalent in India during Vedic ages, which means that the ancestor of every Indian citizen is a Hindu. This provision violates Article 14 as it clearly makes arbitrary difference between two religions.

Punishments

All these Acts have sections prescribing punishments to the converter for any conversion done through the prohibited manners mentioned in the law. All laws except that of Rajasthan and Arunachal Pradesh provides for two set of punishments. If a converter does forceful conversion of a person who is not an SC/ST or a minor or a woman, then he will be subjected to a different and a less rigorous punishment[18] and if the converted person is SC/ST or a minor or a woman, then the punishment provided is more rigorous.[19]

The law of Rajasthan and Arunachal Pradesh provides no such two provisions and provides a single set of punishment. All the laws provide that the punishment given would not affect any parallel civil suit for the same offence. But the law of Rajasthan goes forward and provides for the allowance of any other criminal suit for the same offence[20] which could lead to violation of the principle of double jeopardy laid down in the Article 22(2) of Indian Constitution.

Permissions and Intimations

Orissa's law does not provide for any such provision requiring permission or intimation to be taken by the convert, but the Madhya Pradesh's law passed after Orissa's law, provides a provision under which a converted person has to intimate to the District Magistrate about his conversion within 30 days failing which he may be liable for punishment of 1 year or with fine not exceeding Rs. 1000/- or with-both. Similar is the situation with the law of Arunachal Pradesh.

However, the law of Himachal Pradesh talks about showing intention by giving a notice of 30 days prior to any such conversion to District Magistrate failing which fine of Rs. 1000/- may be imposed. The law provides that in case a person is reconverting to his original religion he need not send his intention

[18]1 year or Rs. 5000 fine or both(Orissa, Madhya Pradesh),3 year and Rs. 50000 fine(Gujrat, Tamil Nadu) and 2 years or Rs. 25000 fine or both(Himachal Pradesh)

[19]2 years and Rs. 10,000 fine(Orissa, Madhya Pradesh), 4 years and Rs. 1 Lakh(Gujrat,Tmail Nadu) and 3 years and 50000 fine(Himachal Pradesh).

[20]Rajasthan Freedom of Religion Act, 2006, Section4 provides "4 Punishment for contravention of provisions of Section 3 Whoever contravenes the provisions of Section 3 shall, without prejudice to any other civil or criminal liability, be punished with simple imprisonment for a term which shall not be less than two years but which may extend to fifty thousand rupees "

notice which as explained earlier is a weapon in hands of extremist organizations to freely convert people back to their 'original religion'.

Gujarat's Law goes a step further and provides a provision that a person would have to take permission from the District Magistrate for changing his religion. The law of Chhattisgarh which was similar to the law active in Madhya Pradesh, was amended in 2006. The most surprising amendment proposed is the change of Section 5 of the principle act. The principle act only asked to give mere intimation to District Magistrate for conversion but the amendment made it necessary to take permission from District Magistrate similar to the provision in Gujarat's law. It further explicitly mentions the power of District Magistrate to reject such permission or request. Both laws provide for the punishment in case these provisions are violated.

If we study these laws with the timeline that they have been passed by respective legislatures, we clearly see that the rigorousness of these laws has kept on increasing and is straightaway questioning the secular character of the Indian Constitution which has been affirmed as its basic structure. A District Magistrate can always refuse to give permission of conversion as they are influenced more or less by the ruling government, depicting clear influence on the decision of District Magistrate in such a matter. This requires an urgent need for the intervention of the Constitutional Courts of the country in the matter. So I have in the next part studied the role played by the judiciary with regards to Anti-Conversion Laws.

CONSTITUTIONALITY, ROLE OF JUDICIARY AND THE NEED FOR EVOLVING

The judiciary has played a very positive role in maintaining the 'secular' character of the Indian Constitution and has affirmed it as a basic structure of the Indian Constitution.[22] The secular character of the Indian Constitution is not ensured by just the Preamble but various other provisions like Article 25-30. However, all the Articles are subject to various restrictions. Articles 25 while providing for religious freedom also mentions various subjects on which the State could make law to regulate the religious freedom. It provides that the State could make a law in interest of public order, health, and morality, to regulate or restrict any "economic, financial, political and secular" matter of the religion. The State could also make laws "providing for social welfare and reform or for throwing open of the Hindu religious institutes of a public character."[23]

There are two debates surrounding the Anti-Conversion Law, one states that these laws promotes, religious freedom as they protect the interest of citizens from forceful or fraudulent conversions, but on the other hand the second contention is that these laws impose unreasonable restrictions to the right of propagation of religious beliefs as well as freedom of conscience of an individual.

[22]S.R. Bommai v. Union of India AIR 1994 SC 1918.
[23]Id.
[24]IND. Const. Art. 24, cl. b.

The Orissa Freedom of Religion Act was challenged before the Orissa High Court[24] where the High Court held that the definition of the term inducement is vague and wide which could not be covered by the restriction clauses of Article 25. Court said that the term being vague would be prone to misuse as it would cover various other methods of proselytizing of religions. The wide definition, court said was 'open to reasonable objections on the grounds that it surpasses the field of morality.'

The most important aspect of the Orissa High Court was its consideration of the importance of conversion in the Christian religion. The court referred to various religious scriptures and thoughts and came to the conclusion that propagation and conversion was a part of the Christian religion. The other important aspect of the decision was that the state government had no power to enact such legislation as neither the entry 1 of List II nor Entry 1 & 2 of the List III of Schedule VII provides for the scope of passing this law. Court said that Orissa's law deals neither with a matter of public order nor with a criminal matter despite having penal provisions. According to the High Court, the pith and substance of the law was 'religious' in nature, which could only be covered under Entry 97 of List I (Union List) of the Schedule VII and not Entry 1 of List II and III.

The decision in the case of Yulitha Hyde[25] is right to the extent where it finds that the conversion is part of the Christianity and the term inducement is wide enough to be misused and hence unconstitutional. However I don't agree with the arguments regarding the non-inclusion of this law in the List II of Schedule as forced conversions could very well be a problem of 'public order' in a country like India where religious issues are prone to political and social misuse.

In 1974 Madhya Pradesh High Court passed a judgment[26] upholding the constitutionality of the Anti-Conversion Law. It was stated that the law would be well covered under the public order clause of the Article 25(1) meaning that the State also has powers to make such a law under Item 1 of the List II of Schedule VII.

The sole Supreme Court Judgment that we have in case of Anti-Conversion Law is Rev Stainislaus V. State of M.P[27] which was an appeal against the orders of High Court of Orissa and Madhya Pradesh. The Supreme Court affirmed the decision of the High Court of Madhya Pradesh and overturned the decision of Orissa High Court upholding the constitutionality of laws in both the states. The Court affirmed that the term public order is wide enough to cover such laws. The argument of the court could be summed up by stating that the conversions by fraud, force and allurement creates a problem of public order, making Anti-Conversion Laws well covered under the restriction clause of Article 25(1) and Item 1 of state list of Schedule VII.

[24]Mrs. Yulitha Hyde and Ors. v. State of Orissa and Ors., AIR 1973 Ori 116.
[25]Id.
[26]Stainislaus Rev. v. State of M.P., AIR 1977 SC 908. (India)
[27]Id.

However the point on where the judgment of Madhya Pradesh High Court and Supreme Court falters is the inability of both the judgments to deal with the issue of importance of conversion in Christianity. Both the judgments did not once they to refute the judgment of the Orissa High Court on the point that the conversion being a part of Christian religion would be very well covered under the freedom of propagation provided by the Article 25(1).

The Madhya Pradesh High Court failed to make any remark on the use of word allurement (inducement in case of Orissa's law) used in the Madhya Pradesh Law and its vagueness. Even Supreme Court in the appeal did not question the vagueness of the term "allurement" (inducement) and affirmed the decision of Madhya Pradesh High Court. There is no difference in the judgment of Supreme Court and Madhya Pradesh High Court as far as they fail to negate the main arguments of the vagueness of the terms and importance of conversion in Christianity, making both the judgments half-hearted while not covering the main aspects of the Anti-Conversion Laws.

In the above Supreme Court judgment[28] Ray, C.J. made an observation, that there was no fundamental right to convert another person and conversion needs to be differentiated from transmitting or spreading the tenets of his religion or that would encroach upon the freedom of conscience equally guaranteed to all the citizens.

It is submitted that the argument of the Ray, CJ 'fails to analyse the several concepts embodied in the Art. 25'. As has been argued by Seervai, that there is no possibility of separating the transmission or spread of tenets of religion from conversion as 'the conclusion reached in untenable'[29] which is conversion in this case. The opinion of Ray, CJ is not valid as there is no point of transmission of one's religious belief if one is not allowed to convert those prospective converts.

The Court in the above case failed to analyse the legislative history of the Article 25. In Shiva Rao, The Framing of Indian Constitution- Study, it was observed that:

"The Minority sub-committee considered this clause on April 19, 1947. The sub-committee accepted the suggestion made by M. Ruthnaswamy that certain religion like Christianity and Islam were proselytizing religions and that they should be permitted to propagate their faith. The sub-committee accordingly recommended a redraft of clause 16 which not only restored the right to free practice of religion but also secured an additional right to propagate religion.30"

It is clear that the conclusion reached above by Ray, C.J. runs counter to the legislative history of the Article 25(1), and is wrong. Seervai argues that our constitution has adopted a system which allows free choice of religion. The right to propagate religion gives a meaning to freedom of choice, as choice involves not only knowledge but an act of volition.[31]

[28]Id.
[29]Supra note 8 at 1287.
[30]Shiva Rao, The Framing of India's Constitution- A Study at 261,(1968).

Successful propagation of religion would only result in conversion.[32] The arguments given by Seervai are valid and hence must be accepted. If the arguments of Ray, C.J. were to be accepted even a law banning religious conversion would have been accepted as a valid one. Hence Seervai also concludes that the judgment of Orissa High Court was correct on law and should have been upheld and the Supreme Court judgment in Rev Stainislaus case ought to be overruled.

However there are new barriers which are being brought up through the new Anti-Conversion Laws. The Madhya Pradesh law provided in Section 5 that the person converting any person should within a specific time intimate the District Magistrate of such conversion otherwise making him prone to one year jail sentence and one thousand rupees fine. The freedom of conscience of a person has been subjected to such restriction that what remains behind are only restrictions subject to reasonable freedom. As has been mentioned previously, that the laws of Chhattisgarh and Gujarat provides for taking necessary permission from District Magistrate with the power of rejecting such application. The future judgment of Supreme Court could deal with these aspects which provide for such discretionary power to District Magistrates.

In the Rev Stanislaus case, argument of petitioner that giving intimation of the conversion amounts to self-incrimination hence violative of Article 20(3) was rejected as being invalid. As has been already mentioned in Part III of the paper, that the term intimation is now replaced by more rigorous terms like 'intention and 'permission' in laws of several other states which came at later stage. These new words also raise new barriers on the freedom of religion of the ones who legitimately want to convert themselves.

In the Himachal Pradesh's law[33] Section 4 states:

4. *(1) "A person intending to convert from one religion to another shall give prior notice of at least thirty days to the District Magistrate of the district concerned of his intention to do so and the District Magistrate shall get the matter enquired into all by such agency as he may deem fit: Provided that no notice shall be required if a person reverts back to his original religion.*

(2) Any person who fails to give prior notice, as required under sub-section (1), shall be punishable with fine which may extend to one thousand rupees."

The constitutionality of Section 4, along with the rules concerned was challenged before the Himachal Pradesh High Court[34] in 2012. The Court while declaring the Section as well as concerned rules as unconstitutional stated that

"36. A person not only has a right of conscience, the right of belief, the right to change his belief, but also has the right to keep his beliefs secret. No doubt, the right to privacy is, like any other right, subject to public order, morality and the larger interest of the State. When rights of individuals clash with the larger public good, then the individual's right

[32]Supra note 8.
[33]Supra note 8.
[33]Himachal Pradesh Freedom of Religion Act, No.5 of 2007.
[34]Evangelical Fellowship of India v. State of Himachal Pradesh, MANU/HP/1259/2012

must give way to what is in the larger public interest. However, this does not mean that the majority interest is the larger public interest. Larger public interest would mean the integrity, unity and sovereignty of the country, the maintenance of public law and order. Merely because the majority view is different does not mean that the minority view must be silenced."

The court further raised these questions:

"38. Why should any human being be asked to disclose what is his religion? Why should a human being be asked to inform the authorities that he is changing his belief? What right does the State have to direct the converted to give notice in advance to the District Magistrate about changing his rebellious thought?"

While dealing with the second aspect of the section, which states that no permission is required to be taken by a person to convert to his original religion, Court held it to be violative of Article 14 of the Constitution and found no reason as to why in case of such a conversion there is no need to provide notice and take permission.

The Himachal Pradesh High Court has held that such provision violates the right to privacy of a person and the same view has been taken by Chelameswar J., in the Right to Privacy case[35] where he states that:

"37. .....While the right to freely "profess, practice and propagatereligion" may be a facet of free speech guaranteed under Article19(1)(a), the freedom of the belief or faith in any religion is a matter of conscience falling within the zone of purely private thought process and is an aspect of liberty."

Hence, the position taken by Himachal High Court is correct, that a person's belief is a matter of privacy and the State cannot make law by which a person has to intimate or take permission from the State to change his religious views or practices.

The need of today is to question the validity of the Anti-Conversion Laws which have turned more offensive and reliance cannot be made upon a half-hearted judgment which missed various aspects of the law present in Orissa and Madhya Pradesh. The view taken by the judgment of Orissa High Court and that of Himachal High Court[36] is correct and should be the basis of future judgment[37] which may come in other High Courts or in the Supreme Court.

CONCLUSION

Conversion leads to a transformation in an individual's *"sense of 'root reality'"* and changes their identity within a community. Since conversion is a state of dramatic personal agitation, the State has no role to play in imposing their choice on citizens rather they must ensure that all people have the freedom to follow

[35] Justice K.S. Puttaswamy and Ors. v. Union of India, AIR 2017 SC 4161.
[36] Supra Note 25.
[37] Supra note 35.

whichever religion they choose.

'Freedom of Religion' is an individual's fundamental right and it includes 'freedom to change one's religion'. The idea to support conversion only to one's own religion while opposing the reverse from the perspective of 'freedom to change religion', involves a policy of double standard which is self-contradictory and cannot work in a plural society ensuring peaceful existence of communities from various faiths despite radical differences in their belief systems.

If we see the genus of these laws it comes from the concern of the missionary activities prevalent in Madhya Pradesh and many other states because of which Niyogi Committee was formed. These laws have been formed precisely to curb the spread of a religion which is not home-born. Many radical Hindu organisations have even questioned the patriotism of Christians converts as most of the missionaries are foreigners. The question then comes is "Can the Indian identity be defined with respect to one's religion alone? Muslims forming close to 20% of the total population of India and Islam being a foreign religion, this logic will make them non-patriotic if not non-Indians. There is no iota of doubt that there have been cases of forced conversion which have to be stopped and penalised, but what justification can be given for penalising only few religious conversions and providing a separate definition clause for excluding conversions which have been done to the religion in which the person's forefathers belonged or he originally belonged to which has been rightly held to be unconstitutional by the Himachal Pradesh High Court.

In the judgment when the question was asked by the court as to what did the original religion. Subramanian Swamy replied that the Hindu religion would be the only original religion. Court rejected the definition and stated that the original religion would be the religion the convertee was born into. However, what is clear here is that there has been deliberate effort by the Hindu nationalists to support only one type of conversion i.e. to Hindu religion.

The next point is about the so called reasonable restrictions which have been imposed on the right of an individual. Analogy can be drawn with other rights provided. This can be equated by saying that prior permission has to be taken to exercise your freedom of speech as there have been many cases of defamation and sedition. The right which is fundamental has been subjected to such restriction that there is not much fundamental left about it. An individual must have freedom to change his or her beliefs and religion. Restriction on one's freedom to change religion has a chilling effect on the provided freedom. The judiciary has to take steps to attain actual secularity of the Indian Constitution and to remove such chilling effects which are used as political tool by the extremist organizations to gain politically while undermining the constitutional guarantees of other religions.

[9]Ralph W.hood,Jr.,Peterchill & Bernard Spilka, The Psychology of Religion: an Empirical Approach at 210 (4th ed. 2009).

[10]Supra note 12.

COMPARITIVE JURISPRUDENCE IN INTERNATIONAL CRIMINAL LAW

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ABSTRACT

In my paper, I have started with the origins of the law tracing back to as much as 700-450 BCE and how the concept of international rules on criminal law seem to be reflected in Plato's book "Republic", written around 375 BCE. Gradually, the importance of a code and a need for a document codifying predominant customs necessary for maintaining peace of the community, ultimately taking the name of law, only kept increasing. A major occurence highlighted in the history in 1386, where at instance of Richard II of England, an ordinance was brought forth which had forbidden the acts of violence against women and priests, burning of houses, and the desecration of churches. And, finally, a landmark case, the first in history, wherein a real investigation occured, leading to the conviction and trial of Peter Von Hagenbach in 1474.

Further discussed are the tribunals which were set up to address various international concerns, which were Nuremberg trials, proceeding onto Tokyo trials, further leading onto the setting up of the International Criminal Tribunal of Yugoslavia and Rwanda, due to the horrific mass atrocities committed by the perpetrators, and ultimately, the high point of international criminal justice in the 20th century: the adoption of the Rome Statute in 1998, leading to establishment of the ICC, the first treaty-based court to punish perpetrators of the most heinous crimes concerning the international community. The efforts that were put in by ICC to strengthen the inchoate law were truly commendable, some of them being ;The "lessons learnt" exercise, which was set about by the Preparatory Commission, wherein the court took upon itself to fill up all the loopholes in the ICC's procedure, make them more crystal clear and unambiguous. Then came about the Revision project, to streamline and make the procedures in ICC more alike.

Light must also be thrown on the fact that ICC won't be the only international criminal law institution interpreting and making new declaration and laws, leading to emergence of different jurisprudences; there is very much a possibility that there might arise conflicts with ICC's codes. What I identify as the major grievance here is that, unlike the UN, this treaty based permanent institution does not have a police force of its own. If it really aims to succeed in punishing all the perpetrators of all serious crimes, it needs a lot of support from the international community. Not having a police force can render the court helpless in situations where it needs its verdict to be followed. Looking at some of its provisions, what can be clearly seen here is that under the powers of jurisdiction accorded to the court, the court does not have power to extend its jurisdiction by reference to international customary law. Another flaw that I recognize is with respect to the principle of 'complementarity majorly' and how the ICC should the one prosecuting all the international crimes. Ultimately, for ICC to achieve all its aims, it needs to function with full cooperation from all nations without any threat to its independence so that international criminal law keeps evolving beautifully just like it has evolved through these centuries.

ANALYSIS

Classical Origins

"With good, comes bad" is a renowned adage and this particularly stands true

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for criminal law. Since ages the world has witnessed crimes against humanity, a plethora of atrocities inflicted upon people the only difference being that it changed names on papers throughout history. Looking into the classical origins of this law, the first corroborations can be traced back to the period of 700 to 450 BCE in the Ancient Greek states, where there were rules of warfare which actually took the form of customary international law, governing the way in which the prisoners of war were to be treated and how and to what extent the vanquished army must be dealt with. Plato in his book "Republic", written around 375 BCE, reflected upon these rules and further elucidated in his book how citizens living in occupied territories must not be attacked or oppressed, the corpses must not be robbed and the conquered forces must not commit arsons and cause destruction in the inhabited areas.[1] One also finds the traces of this law in respect of war crimes in St. Augustine's discourse on a just war in his exposition "City of God".[2] The crusades in the 11th century can very well be regarded as one of the earliest forms of genocide. The rationale, or intention, behind this has not only been to usurp the material wealth and expand their empire, but also to foist a particular belief, religion or ideology upon people with diverse set of beliefs.

A major occurence highlighted in history is in 1386, where, at the instance of Richard II of England, an ordinance was brought forth which forbade acts of violence against women and priests, burning of houses, and the desecration of churches.[3] Proclamations on similar veins were issued by Henry V of England in 1415 and 1419,[4] Ferdinand of Hungary in 1526, Emperor Maximilian II in 1570, and King Gustavus II Adolphus of Sweden in 1621.[5] Other examples are the invasion by Spanish and Portuguese of the Americas accompanied by the extermination of great numbers of the native population, the massacre of thousands of the French Huguenots during the rule of St. Bartholomew in 1572, and the massacre of Glen Coe in 1692. In all of these cases there were no investigations, no arrests, and no criminal convictions, and the punishments were given in rarest of rare cases and reprievement was the rule.

Finally, a landmark case where there was a proper investigation which led to conviction, was the trial of Peter Von Hagenbach in 1474.[6] Historical antecedents which exist say that the holding of trials by wartime victors over their defeated enemies, such as the trial of Peter Von Hagenbach, have taken place from "the dawn of modern international law".[7] In this historic case, Charles the Bold, Duke of Burgundy, infamously known as "Charles, the terrible" had kept Landvogt Peter von Hagenbach at a very high position in his cabinet of Breisach. The

[1]Plato, Republic 197–9 [bk V, §§469-71] (Desmond Lee tr, Penguin 1987).

[2]Christopher L. Blakesley, Report on the Obstacles to the Creation of a Permanent War Crimes Tribunal, 18 Fletcher Forum of World Affairs, 77 (No. 2, 1994).

[3]Georg Schwarzenberger, Judgement of Nuremberg, 21 TULSA L. REV. 330 (1947).

[4]Theodor Meron, Shakespeare's Henry the Fifth and the Law of War, 86 American Journal of International Law 1, 23–4 (1992).

[5]See generally, Edoardo Greppi, The Evolution of International Criminal Responsibility under International Law, 836 International Review of the Red Cross, 531 (1999); Kenneth Ögren, Humanitarian Law in the Articles of War Decreed in 1621 by King Gustavus II Adolphus of Sweden, 313 International Review of the Red Cross, 438 (1996); MH Keen, The Laws Of War In The Late Middle AGES (Routledge and Kegan Paul 1965).

Governor, who was more than happy to follow the orders and commands of his king, brought in a reign of arbitrariness, tyranny and terror which wreaked havoc in the city of Breisach. And then finally when a large coalition of German mercenaries and local citizens revolted against the government and besieged the city of Breisach and threw them out of power, Peter Von Hagenbach was put into chains and brought before the tribunal consisting of 24 judges established by the Archduke of Austria and was put on trial for, among other crimes, murder, rape, and perjury. At the end of it, when he was found guilty, he was stripped of all his entitlements and privileges and was ultimately rewarded a death sentence. This is said to be the first major trial in relation to international criminal law with regards to the war crime prosecutiou. It was not until 19th century that a systematic codified law defining the scope and ambit of crimes and a procedure was put into place and subsequently a duty was created to punish international crimes.

At the beginning of the 19th century, the punishability of piracy was acknowledged under customary international law.[8] Furthermore, slavery was declared a crime of international concern due to numerous international treaties which had been concluded since 1815.[9] In the case of Paquete Habana, the US Supreme Court criticized the capturing of two civilian boats as prized possessions for just emerging victorious in the war. The court held that this was a clear violation of customary international law.

WAR CONVENTIONS

The first steps towards the creation of a war convention began in the 19th century with the objective of bringing about humanization of war in relation to; firstly, determining the legitimate means and methods to be adopted in warfare and, secondly, in relation to the protection to be given to the victims of conflict who are not fighting in war. The latter finds mention in Hague law and the former, about combatants who can no longer fight, finds mention in Geneva law.

But, the proposal put forth by Gustave Moynier, President of International Committee of the Red Cross (ICRC), to bring into existence a proper international criminal court to try all the offences related to crimes, after the French German war which took place in 1870-1871, fell on deaf ears and didn't receive much support from the law fraternity.[10]

When the Allied and Axis powers came together for the 1919 Preliminary Peace Conference, the International Investigative Commission came into being. In

[6]Maogoto, War Crimes, 21 (2004); Kemper, Weggp 7 (2004); Hofstetter, Verfahrensrecht 26 (2005); König, Legitimation 38 (2003); Cryer, Prosecuting 17 (2005).

[7]The United Nations War Crimes Commission, History of The United Nations War Crimes Commission and The Development of The Laws of War 30 (1948). See Further, L. C. Green, The International Judicial Process and The Law of Armed Conflict, 38 Revue De Droit Militaireet De Droit De La Guerre 15 (1999); Georg Schwarzenberger, International Law as Applied By International Courts, Volume II: The Law of Armed Conflict, 462–466 (London: Stevens & Sons Limited, 1968).

[8]Oehler, Internationales Strafrecht 433 (1983); König, Legitimation 50 (2003)

[9]Bassiouni, Crimes Against Humanity 305 (1999).

this conference, Germany finally surrendered and gave in to the terms of Treaty of Versailles, and the peace treaty was born. It was also for the first time, on the basis of this treaty, that an individual criminal responsibility was recognized for International crimes.

When this treaty was created after the coming together of the Axis, and the victorious Allied powers, it led to the evolvement of a new legal policy for the prosecution of criminals at the end of the wars, and finally 4 new groups of crimes were created which were; sanctity of the treaties, crimes against the international morals, war crimes, and violations of the laws of humanity. In here, the definition of 'international morals' was not clearly defined, and was kept really vague because it was the first time that an attempt was made towards formulating a fleshed out legal policy for the prosecution of war criminals in the form of a treaty, which also gave a ray of hope for a fine possibility in the future for widening the ambit of the crimes. But at the same time, it had to be seen that all those guilty of committing grave and widespread organized or unorganized hostilities in the war fell under the ambit of a narrowly defined crime, if not under other well defined sections, with the objective that none of them could evade the punishments or go scot free by conveniently falling outside the ambit of the already defined crimes. This was only the onset of starting to define the atrocities being inflicted on people. Apart from this, it would not be wise of us to ignore the fact that there were definitely political motives behind framing of this.

Under the Paris Peace Agreement, there took place Leipzig War Crimes Trials, a series of trials wherein all German war criminals and suspects after the World War I were to be tried and prosecuted. Germany passed a legislation to be able to bring them before its own court of law i.e. the Reichsgericht (German Supreme Court), and the German prosecutor reserved all the rights to decide which cases must be brought before the German courts for trial. But the Allied powers still had the powers to bring the suspects for trials before their own tribunal in case they suspected that the German courts would showcase biasness or avenge the defeat and not display fairness in the prosecutions intending to let go the army generals scot free. The Leipzig trials turned out to be a failure because only 12 individuals were prosecuted. But, the reason a political compromise was made by handing over the prosecutions to the German court was, because, there was an outcry by the German population and internal conflicts amongst the Allied powers. The French wanted Germany's downfall, but Britain did not see any point in doing that and particularly didn't want France to emerge as a superpower. In the end the Leipzig were only widely criticized.

What also cannot be overlooked is that all the trials held under the treaty of Versailles were not totally impartial and fair, and they intended to prosecute only the defeated armed forces for the war crimes.

[10]König, Legitimation 60 (2003); Maogoto, War Crimes 21 (2004); Hofstetter, Verfahrensrecht 29 (2005); Satzger, Internationales Strafrecht 12 (2010).

Another major incident that was documented because of its extreme level of tyranny and oppression exercised in the course of first world war was the persecution of the Armenians in the hands of Turkish. Though the atrocities on the Armenians by the Turkish had begun in 1984 by a cruel suppression of a revolt led by the Armenian mountain farmers, in 1914 when the war begin, within a period of 6 months, the Turkish army had terminated 1.5 million Armenians, which roughly made up for two-thirds of the whole Armenian populace. The phrase "crimes against humanity" is supposed to have been coined after this Armenian genocide and finds root here. To punish those involved in this crime, the Allied powers on an international level signed the Treaty of Sevres, to punish the guilty but unfortunately this treaty never took effect.

Even before the Allies came together after the World War II to discuss the setting up of a war crimes tribunal (International Military Tribunal), there were trials already in place in connection with this. Even before the tribunal was established and even after tribunals were in place, there were proceedings which had taken place in the US occupied Germany. But the Allies felt that there was a real necessity for war tribunals to come in place as there was a fear of Nazi criminals escaping punishment under domestic law or there were circumstances where the crimes were conducted in various European jurisdictions and hence there were arising conflicts with respect to jurisdictions. Henceforth, the Allies had agreed to set up IMT. Also, the fact remains in case of nations, domestic legislations were defined in such a way that there was a good defense available to flout superior orders, but in the case of IMT, there was no defense available against the orders of the Superior court.

Pre Nuremberg Trials

Just before the Nuremberg Tribunal Trials came into the picture in 1942, the Allied powers came together in St. James Palace in London, and the United Nations War Crimes Tribunal (UNWCC) was set up to document all the war crimes and crimes against the humanity. Its main function was to investigate, collect evidence, and provide/suggest all the information to the Allies with the cases that should be brought for trials. Subsequently, the "Declaration of St. James" was signed which laid the foundation of IMT, and later in pursuance of that, Moscow Declaration of 30 October, 1943, which was like a re affirmation by the Allies to set up an ad hoc tribunal. Finaliy, the Declaration of London was signed by Britain, USA, France, and the Soviet Union (USSR) which gave birth to the IMT or the Nuremberg War Tribunal.

Nuremberg Trials

The Nuremberg Charter consisted of three categories of offences: crimes against peace, war crimes, and crimes against humanity. The Nuremberg trial lasted eleven months. The IMT tried twenty-two individuals and six organizations. The main objective of the IMT was to prosecute major war criminals. In addition to the trials at Nuremberg in Germany, the Allies set up a

tribunal to bring to trial the leaders of Japan, another member of the Axis powers in World War II.

The Tokyo Trials

The Tokyo Trials were based on the Charter for the Far East, or 'Tokyo Charter', which was proclaimed on 19 January 1946 by the Supreme Commander of the Allied Powers, General Douglas MacArthur.[11] The Charter was, unlike the London Charter, not part of a treaty or an agreement among the Allies. The definition of crimes against humanity differed from that of the IMT Charter in two ways: first, the IMTFE Charter expanded the list of crimes to include imprisonment, torture, and rape. Secondly, it eliminated the requirement that 'crimes against humanity' had to be connected to war by omitting the words 'before or during the war'.[12] Though one can totally deduce that these tribunals were a way of avenging the Axis powers, yet these ad hoc Tribunals marked a watershed in the history of the international criminal law. Professor Ian Brownlie has observed, *"whatever the state of law in 1945, Article 6 of the Nuremberg Charter has since come to represent general international law."*[13]

The Nuremberg and Tokyo Trials were followed by a second series of prosecutions of Nazi leaders.[14] The most famous proceedings were the twelve trials before the US-American court in Nuremberg.[15]

THE NUREMBERG PRINCIPLES AS THE IMMEDIATE CONSEQUENCE OF THE NUREMBERG TRIALS

After the Nuremberg trials, there was a need to codify all the principles that had emerged from the trials. On 1 December, 1946, the UNGA adopted those principles and established on the very same day a committee for the codification of international law; the Committee on the Progressive Development of International Law and its Codification (CPDIL). The committee was to codify the 'Nuremberg Principles'.[16] Upon the recommendation of the CPDIL, the International Law Commission (ILC) was founded in November 1947 and was immediately instructed to integrate the Nuremberg Principles into a draft code on ICL.[17]

In fact, it was the call of the former President of the Soviet Union, Mikhail Gorbachev, to set up an ICC for the prosecution of terrorism and a similar request by the government of Trinidad and Tobago with regard to the prosecution of drug trafficking, that made a fresh start possible, taking the groundbreaking

[11]Proclamation by the Supreme Commander for the Allied Powers (19th January 1946), reprinted in Prichard and Zaide, Tokyo (1981).
[12]*Id.*
[13]IAN Brownlie, Principles of Public International Law, 562 (4th ed. 1990).
[14]AMBOS, Der Allgemeine TEIL 83 (2002/2004); KÖNIG, LEGITIMATION 97 (2003); ENGELHART, JURA 26 (2004), 737.
[15]US GPO, i-lv (1950–3).
[16]GA Res. 95 (I), Dec. 11, 1946, in UN YB (1946-7), 254.
[17]GA Res. 177 (II), Nov. 21, 1947 in GA ILC, Charter (1949), 32.

decision to bring the work on the code, and the statute for an ICC, together. This resulted, within the framework of the ILC, in the 1994 Draft Statute and 1996 Draft Code which were both very influential in the negotiations on an ICC Statute and finally led to the adoption of the Statute in 1998 in Rome.

Before we further discuss the developments, procedure, and faults in the Rome Statute, we must also look into other mixed, hybrid tribunals which were setup specifically to cater to the needs of the states where crimes involved had connections to the International community.

ICTY

The International Criminal Tribunal for the former Yugoslavia (ICTY), based in The Hague (Netherlands), was established in 1993 pursuant to the Security Council resolution 808. Its jurisdiction is limited to acts committed in the former Yugoslavia since 1991 and covers four categories of crimes as defined in the Tribunal's Statute, namely, grave breaches of the 1949 Geneva Conventions, violations of the laws and customs of war, genocide, and crimes against humanity.[18]

ICTR

The International Criminal Tribunal for Rwanda (ICTR) was set up by UN Security Council pursuant to Resolution 955 in 1994, in response to genocide along with other systematic, widespread, and blatant violations of international humanitarian law which had been committed in Rwanda.[19]

Both ICTY and ICTR have remarkably contributed to peace building in post war societies. Both institutions have helped marginalize nationalist political leaders along with other armed forces related to ethnic war and genocide, to discourage retribution by victim groups, and to transform criminal justice which is an important aspect of the current international agenda.[20]

The United Nations Mechanism for international Criminal Tribunals (MICT) was embarked upon to carry out a number of functions which were eminent to help out both the tribunals to accomplish their objectives. For the same, MCIA had the powers to enforce punishments, grant or refuse pardons. or commute sentences. The MICT branches in Arusha and The Hague started functioning in 2012 and 2013, respectively.[21]

Mixed Tribunals and Special Chambers

Following the warfare between Serb authorities and the Kosovo Liberation Army, the first hybrid tribunal system was established by UNMIK in 2000.

[18]ICRC, international Criminal Justice: The Institutions; international-criminal-justice-institutions-icrc eng.pdf.
[19]Kittichaisaree K, International Criminal Law (Oxford University Press) (2001).
[20]Akhavan P, Beyond Impunity: Can international Criminal Justice Prevent Future Atrocities, 95 American Society of International Law, 7-31 (2004).
[21]*Id.*

Regulation 64 Panels were established in Kosovo courts. The panels have jurisdiction over all war crimes cases. Pursuant to the Security Council resolution 1664 in 2009, the Special Tribunal for Lebanon (STL) was the first international tribunal to try crimes under domestic law and to deal with terrorism as a distinct crime. The tribunal sits in the Hague and has an office in Beirut.[22]

Special Chambers were established in the courts of East Timor, Cambodia (Extraordinary Chambers), Serbia, and Bosnia-Herzegovina in 2000, 2001, 2003, and 2005, respectively in Kosova.[23]

In July 1998, 120 states voted to adopt the Rome Statute of the International Criminal Court[24] and came into force in 2002. In Nuremberg and Tokyo the Allies repeatedly declared that the law according to which they judged major war criminals would have to be applied in the future to judge their own behavior. In the words of American Chief Prosecutor Justice Robert H. Jackson, the parameters for judging these criminals would have to be taken very seriously as it is on the basis of the record of how the present criminals are being judged that the way in which the trials are to be conducted in the future will be ascertained.

The attempt has been all along to instill a pacifist mindset, to weigh the consequences of actions, more so, if I may rather label "instincts" more seriously, to be more considerate; to make nations believe that the bloodlest wars that were fought in history, which had resulted in a nation's so called "emerging triumphant", what did the winners of the war really win? The insight that was missed out here was , that it was not the countries that had fought against the triumphant ones that were defeated, but it was humanity that was defeated.

CONCLUSION

One needs take into consideration the efforts that were put into by ICC to make the provisions work, and to strengthen criminal law. A Preparatory Commission was put into place which had worked extensively on the making of the Court's Rules of Procedure and Evidence and the elements of crime, and the original drafts of the same were presented in the Assembly of Parties (ASP) when the Rome Statute came to force in 2002.

Apart from this, the court in 2012 also commenced the "lessons learnt" exercise under which the court took upon itself to fill up all the loopholes in the ICC's procedure and majorly looked into the regulatory framework in judicial proceedings to understand which fragments of the change are the only constant. After all procedures need to keep evolving and suit the changing needs of the society. Removing the obscurities from the code is a major task which cannot be ignored. The Lessons Learnt exercise had also taken into consideration the

[22]ICRC, International Criminal Justice: The Institutions; international-criminal-justice-institutions-icrc-eng.pdf.
[23]UN Security Council Resolution, 1244.
[24]Schabas WA, an Introduction to The International Criminal Court, (Cambridge University Press) (2011).

trial methods and delved upon the pre trial trial and post trial procedure, and also look into how the victims were to be protected during the course of such proceedings. The aim is to keep procedure as less complex as possible.

The ICC had also undertaken the ReVision project, to bring about some fundamental changes in the Registry, basically to streamline the procedures in the ICC and make them all the more efficient. It is not to be forgotten that while all these projects are being undertaken, none of their principles should come into conflict with the basic fundamentals enshrined in the ICC code such as fair trials and the protection of the victims before, during, and after the trials.

One of the achievements in elaboration of the code was also laying down of a succient definition of the 'crime of aggression' by the ASP's Special Working Group in the Kampala Conference, 2010. Another equally important and major amendment that was made here was regarding the war crimes in non international armed conflict. As time passed, more and more amendments were brought forth in the context of poisoning weapons, asphyxiation, and other biological weapons. This was a major breakthrough and also a testimony to the fact that the ICC was open to inducting the war crimes committed in the non international arena.

GRIEVANCE AND SUGGESTION/IDEA

What I can identify as the major grievance here is that, unlike, the UN, this treaty-based permanent institution does not have a police force of its own. If it really aims to succeed in punishing the perpetrators of all the serious crimes and war criminals, and set examples for the international community, it needs exponential support from the international community at each and every step to be able to enforce its decisions. This can be very problematic if the court delivers verdicts, for example, against the government officials of a country Z being prosecuted, or the verdict favours their enemies, it would then only be very easy for the particular state Z aggrieved with the court's decision to withdraw their support in their further cooperation with the court, which will indisputably be very threatening not only for the country Z, which takes away its support but also for the criminals of other countries who commit atrocities in their host country, and seek refuge in Z for protection. In such a scenario, the lack of its own forces can become a reason for its own failure in the course of time because, by having its own police force, the court will be able to in some extents, control the situation or halt the atrocities committed in the state Z or arrest the criminal seeking refuge in there. There might generate expectations on part of the countries that provide more help, whether in monetary terms or otherwise to the court, that if they, at any time, are rendered dissatisfied with the verdicts of the courts which goes against them and/or favours their enemies, the nations might stop offering them monetary support or otherwise. But the court, irrespective of all that, will have to act in a fair, transparent, and unbiased way, to achieve its purpose and prosecute

not only the perpetrators of serious war crimes but also those countries, groups, organizations shielding the suspects and harboring them with full knowledge in their territory. One more problem that I can vividly draw out here is the number of organizations that the court works with, like the United Nations, African Union, European Union, and other regional organizations. The challenge for the court while working with these international organizations is to not become one political figure itself and to save itself all the influences, biasness, and the arbitrariness amongst all of that, which is one of the most challenging tasks of the court.

While many tribunals were set up alongside the ICC, there is a tricky part in here which is that the ICC won't be the only international criminal law institution interpreting and making new declarations and laws; there will be other adjudicating authorities too, consequently leading to emergence of variety of jurisprudences. Therefore, there lies a very high possibility of onflict of interest with the ICC's codes. International law not being binding is a major cause of concern here and it provides a leeway to the mixed tribunals to enforce its own domestic laws on the pretext of being familiarized locally with the social conditions and also being within the vicinity of the place of the commission of the crime.

Coming to dissecting some of its provisions, what can be clearly seen here is that under the powers of jurisdiction bestowed upon the court, unlike the ICTY in its infamous Tadic Jurisdiction decision of 2 October 1995, ICC does not have the jurisdiction to extend its jurisdiction by reference to international customary law. I take some issues here, according to me, the law fraternity here needs to take into consideration that it's not always imperative that well thought out boundaries be defined for operation. Biological warfare was something unfathomable in 1800s, on similar veins, there are only more new and dangerous methods of warfare evolving every day. Irrefutably, technology is advancing at a pace that we can't comprehend, and upcoming technology keeps has capacity to vanish thousands from the face of the earth. In such cases, boundaries will have to be crossed by courts in the emergency situations and it will be their duty to take charge of the crime that were never committed before and punish criminals for their acts otherwise the criminals shall go scot free only because the ICC had no jurisdiction to cover that particular crime as it was not specified in the statute. This shall instill a lot of fear in the international community. Court needs to be given extended powers which shall not be effusive, but enough to tackle all critical and life threatening situations.

Another aspect I sense a problem in is the principle of complementarity, which forms one of the foundational pillars of the Rome Statute system, and bears an important challenge for both the ICC and its States Parties. According to this principle, a suit of war crimes has to be first tried in the domestic court and when the domestic courts are genuinely unable or unwilling to prosecute

the criminals, only then will the suit go to the international criminal court. This is the issue of complementarity, it intends to resolve internally the case first. I, as an author, having traversed through the whole trajectory of jurisprudence of the international criminal court and having reflected upon several facets realized that, the power to decide the war crimes must lie with the international criminal court. I draw this observation because the national courts maybe biased, and may let off their suspects, and the history of the Leipzig trials shall repeat again. There are lot of countries which are major super powers and possess not only economic power, but also enough political influences. In today's grim scenario, where so many terrorist organisations are willingly being harbored by many countries with ulterior motives, there needs to be an independent body established to deal with such crimes and works independently on its own and doesn't let the accused or the criminal escape with their doings. The independent body here is ICC, and ICC should be the one prosecuting "all" the international crimes. Retaining the first power with the domestic courts to prosecute the international crimes might result in biasness of the judges towards the parties of their own states involved in the suit which shall not result in justice to the victims of the crimes. And if the accused belongs to the enemy nation then there hardly remains any scope for true justice. In this 21st century, countries are ready to go to any extents to be able to assert themselves as super powers and therefore can compromise peace to any extent to remain the most powerful on the map and, where the situation arises, to save its international repute, it can resort to taking the presumptuous advantage of this principle and render biased decisions, even if at the cost of lives of other people.

Therefore, though this particular suggested move would take up a lot of resources, yet to secure justice to the victims at all levels this move is cardinal. Because, for many poor and undeveloped countries who are oppressed and persecuted, whose livelihoods are snatched away and whose large populations are rendered homeless due to the atrocities committed by other individuals or nations, the court becomes their last hope for expecting any sort of relief or justice. The court must amend its provisions so as to make a provision for creating its own force so as to as help in controlling some situations when in exigencies, just like UN or NATO. The smallest of the efforts have the potential to go a long way, for example extending of its jurisdiction so as to take up a matter in their own hands when in extremely critical situation by reference to international customary law. And , to delve upon the principle of complementarity once again , and weigh the consequences where I come to realize that the pros of enacting it are more than the cons of it. Keeping a pacifist mind set and making people aware of how crucial it is to adopt this mindset is of paramount importance as ideology of one nation will compel the other peaceful nation to take up arms even when it detests so, because only the innocents will be losing their lives for absolutely no fault of theirs. Fire ignited by one nation is enough to engulf the world and affect every possible innocent and

infact, affecting generations altogether, as we have witnessed in the world wars already. Surely, we don't want the histories repeating itself again. Ultimately, for this judiciary to be able to flourish, it needs cooperation and support from all states and it must also be free of any negative influences and threat to its independence. The international criminal law shall keep evolving, shall keep thriving, and shall keep striving for justice for everyone in this world, just like how it has evolved beautifully through all these centuries.

A WEAPON TO THE RAPE PERPETRATORS BY THE SUPREME COURT OF INDIA IN GOVINDASWAMY VS. STATE OF KERALA

Saman Asif*

ABSTRACT

The Honourable Supreme Court of India in the year 2016 passed an inglorious judgment wherein it stated, "resulting in death of a rape victim by keeping her in a supine position was only for the purpose of sexually assaulting her and not causing her death".[1] A weapon rightly given in the hands of rape perpetrators to sexually assault or rape a woman, and even if during the course of such assault for whatsoever reason the victim dies, the court trusts the accused enough that he just had the knowledge and guilt of sexually assaulting her and had no knowledge or guilt regarding the gravest consequences of his actions that is death.

Ignoring the present scenario that led to the foremost Amendment of the year 2013 in the Indian Penal Code 1860, The Hon'ble Supreme Court of India in the case of Govindaswamy v. State of Kerala laid down many and subsequently denied justice to the hapless rape victim who died after several days of survival in a vegetative state. This paper submits a critical analysis of the judgment with regard to the case being one of the 'rarest of rare' with further analysis of the principle of Just Deserts.

INTRODUCTION

It is a matter of serious concern that crimes against women have been increasing in recent times. Offences like rape impose a series of threat to the criminal justice system. There are outcries for the severest punishments, but oft-times such a violence overshadows the real quandary of the victim. Rape is an incident which disturbs the core foundations of the lives of the victims and peace of the society. For many it impairs the capacity for personal relationships, altering their behaviour for a long-term causing chronic depression, anxiety and fear. But sometimes just raping a woman does not seem enough to satisfy the need of the flagitious monster that inhabits inside the mind of the perpetrator, so in order to satisfy their deadly hunger they tend to hurt the woman so brutally till the extent she stops resisting and dies.

This offence of rape cum murder, due to its heinous nature demands the deserved punishment to the offender and the hope for justice of the society lies within the hands of the criminal justice system which sometimes fails in doing so, resulting in decrease of the faith of the people and eventually increasing the occurrence of such crime, as happened in the case of Govindaswamy vs. State of Kerala[2] where The Honourable Supreme Court of India failed in providing the deserved punishment to the offender.

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[1] Govindaswamy v. State Of Kerala, AIR 2016 SC 4299.
[2] *Id.*

SYNOPSIS OF THE CASE

Facts At A Glance

The factual matrix depicts the rape and murder of a deplorable girl who was travelling by a passenger train before the eve of her engagement. The girl who was travelling in the Ladies Compartment of the train was brutally raped and murdered 10 minutes before the arrival of her destination.

The accused being a habitual offender, noticed that the girl was unaccompanied in the compartment. When the train moved towards Shornur after leaving the Vallathol Nagar Railway Station, the accused fleetly moved into that ladies compartment, and rushed to the victim. The horrified victim frantically tried to escape and ran here and there but was trapped due to the limited space, her cries turned into screams, but no one came to rescue her from the clutches of the accused.

She resisted and opposed hard, but was caught and her head was forcibly hit again and again on the walls of the compartment. On sustaining fatal injuries, she became practically immobilized and dazed. Her protest remained in-efficacious and her screams died down between the walls of the compartment. She was dropped down to the track from the running train and as a result the side of her face forcibly hit against the crossover of the railway track. The accused then jumped down from the moving train on the other side, rushed towards the victim, dragged her to a shady place where he placed her between two railway tracks in a supine position. He hurriedly tore her clothes and disrobed her, and raped the piteous girl while blood was dripping from her face, oozing out from the freshly sustained injuries on her head and face. He rather acted as necrophiliac. After fulfilling his sexual desire, the accused searched for the valuables in her bag, ransacked her belongings, and robbed her cell phone which was the only worthy material with the victim, and decamped with the boot, by leaving the poor girl in nudity.[3]

Judgment Of The Trial And High Court

Besides the sentencing of the accused under section 376, 394, 397 and 447 of the IPC, death sentence was awarded to the accused by both the trial court and the High court by taking into consideration that the case was fit to be categorized among 'the rarest of rare' due to the presence of all the aggravating circumstances and the absence of any mitigating circumstances.[4]

Post the judgment of the Kerala High Court an appeal was made before the Supreme Court, challenging the vallidity of the death sentence that was passed.

Acquittal By The Supreme Court

The awarding of capital punishment for the perpetration of the offence of murder as per section 302 of the IPC was dismissed and the accused was

[3]Govindaswamy v. State of Kerala, (2014) ILR 141 Ker.
[4]*Id.*

convicted for voluntarily causing grievous hurt under section 325 of the IPC. The decision of the Apex court was on the basis that the act of the accused was neither intended to cause the death nor did he had the knowledge that his act was likely to cause death. The volition of the accused in keeping the victim in a supine position, according to the doctor who examined the post-mortem report was only for the purpose of sexual assault, and the fact that the victim died after several days of survival in a vegetative state, does not create any nexus between the victim and the accused.

Therefore, the Apex court stated that raping the girl by keeping her in a supine position between the crossover of the railway line after smashing her head in the walls of the compartment and throwing her out of the train, was not enough to cause her death and was not intended by the accused, it was all done only for the purpose of sexual assault, the accused had sexual desire and so he just wanted to fulfill it and during the course he just voluntarily caused grievous hurt to the victim as she was trying to resist and save herself, which resulted in her death. Hence, the accused was considered not guilty of the death of the victim.[5]

CRITICAL ANALYSIS

Following are the issues raised as per the factual matrix and judgement order passed by the of the Supreme court-

1. Was the act of the accused intended or he had knowledge that his act was likely to cause death?
2. Does this case fall fit within the category of the "rarest of rare" case?
3. Was the deserved punishment awarded to the offender?

1. Knowledge On Behalf Of The Accused

The judgment of the Honourable Supreme Court seems to have been passed on the basis that the knowledge on behalf of the accused might not have been attributed to him as his intention was only the sexual assault and not death, which apparently does not seem enough for the acquittal of the accused. Mens rea in a crime has got two essential elements that is intention as well as knowledge. Knowledge is just the state of being aware of the future consequences of one's actions and in this case the series of injuries and assault that were inflicted on the victim is suffice for the accused to be aware of what kind of offence he has committed.

In the case of *Richhpal Singh Meena vs. Ghasi*[6] it was stated it is not a matter of much concern that the offender had the knowledge that his inflicted injuries would cause the death of the victim, if a person inflicts injuries of that kind, they must face the aftermath and can only be held not guilty if the injury was not intended or was accidental. Nevertheless, intention is something that can be

[5]Govindaswamy v. State of Kerala AIR 2016 SC 4299.
[6]Richhpal Singh Meena, Ghasi. AIR. 2014 SC 3595.
[7]Ki Vibhute, PSA Pillai' v. Criminal Law 568 (11th Ed. 2012).

extrapolated from the acts of the accused and the circumstances and the nature of injuries inflicted.[7]

2. Application Of The "Rarest Of Rare" Formula

The Supreme Court in the case of *Bachan Singh vs. State of Punjab*[8] laid down certain guidelines that should be followed by a court before awarding death penalty:

i. Only in cases of immense culpability, the harshest penalty of death must be given;
ii. The situation of the offender and the circumstances of crime has to be considered;
iii. When the nature and the circumstances of crime appears inadequate to award life imprisonment, then only death penalty must be awarded; and
iv. The balance between aggravating and mitigating factors has to be drawn.

Although in the case of *Machhi Singh v. State of Punjab*[9] the Supreme Court held that there must be something uncommon with the crime and if it shook the collective conscience of the public that the society should expect the judicial power centre to award death sentence.

Likewise in the case of *Gurmail Singh @ Gala v. State of Punjab*[10], the Apex court held that on determining the appropriate sentences for death penalty, two things must be taken into consideration:

i. The court should proceed to take step when the aggravating factors outweigh the mitigating factors.
ii. It should not be judge-centric rather it should depend upon the perception of the society, it must be made clear that the society approves or disapproves the awarding of death penalty.

Applying these guidelines in the case of Govindaswamy vs. State Of Kerala, it can be determined that the circumstances of the crime and its barbaric nature is undeniably falling within the category of the 'rarest of rare' cases as:

i. Upon balancing the aggravating and mitigating factors of the case the aggravating factor outweigh the mitigating factors as there is not a single mitigating factor in the favour of the accused, the aggravating factors being such-

- The accused was a habitual offender; and
- The way in which he raped, robbed and caused death of the girl shows the extortionate criminality in his behaviour. His diabolic method and sadistic approach was not like a mundane criminal or sex pervert but was rather of a necrophiliac.

[8]Bachan Singh v. State of Punjab. AIR 1980 SC 898.
[9]Machhi Singh v. State of Punjab. AIR 1983 SC 957.
[10]Gurmail Singh@galav v. state of punjab.AIR 2013 SC 1117.

ii. In this case culpability has determined the proportion of extreme depravity, the accused is a ferocious criminal.

iii. The incident sent tremors in the society and shook the collective conscience of the community.

3. Principle Of Just Deserts

The principle of just desert means that the deserved punishment must be given to the offender, it is a retributive theory of justice which says that a punishment is justified because it is deserved.[11] This retributive theory focuses on the reasoning of the wrongdoer's just desert i.e. a proportionate punishment must be given.[12] According to the leading theorist on just deserts Andrew von Hirsch 'penalty must comport with the seriousness of crime so that the reprobation on the offender through his penalty reflects the blameworthiness of his conduct ,thus punishment are to be awarded on a penalty scale so that their relative intensity reflects the seriousness rankings of the crimes involved.'[13] The punishment that has to be awarded for a crime should be appropriate and must conform to and be in accordance with the brutality and atrocity of the crime that has been committed.[14] If the suitable penalty is not given for a crime which has been carried out not just against the victim herself but also against the society to which the culprit and the victim belongs to, then the court would fail in providing justice.[15] As the culpability of the offender is mirrored in the penalty that is imposed.[16]

CONCLUSION

It can be concluded from the above analysis that the acquittal of the accused by the Apex court is flawed, relying upon a hypothetical presumption that the act of the Govindaswamy was likely to cause death and it was not intended is no way justified from the fact that the victim died after several days. The accused was aware of what his action would lead to. The aggravating factors of this case are such that the case is fit to fall within the category of the 'rarest of rare' and there must not have been a speck of doubt while giving the order of death penalty to the accused.

The offence of rape cum murder or death due to rape is increasing day by day and the Criminal law Amendment Act, 2013 introduced section 376A[17] in the IPC i.e. punishment for death of a rape victim which clearly states that the accused can be awarded with death. Ignoring these legislation and the situation that lead to these amendment in recent times, If the Apex court passes such a flawed judgment then it would unquestionably result in dis-balance in the criminal justice system as such criminals need to be punished with what they deserve in

[11] Cyndi Banks, Criminal Justice and Ethics 143 (2nd Ed. 2009).
[12] *id.*
[13] Andrew Von Hirsch, Proportionality in the Philosophy of Punishment, 16 Crime and Justice 79, 55 98 (1992).
[14] Rajvi v. State of Rajasthan AIR 1996 SC 175.
[15] *id.*
[16] Cyndi Banks, Criminal Justice and Ethics 143 (2nd Ed. 2009).
[17] The Criminal Law (Amendment) Act, 2013, No. 63, Acts of Parliament, 2013.

order to provide justice to the victim, society and to create fear in the mind of other perpetrators. The present situation of our country is getting worse in terms of sex crimes against women. As per the National Crime Records Bureau, In India about hundred sexual assault are reported every other day to the police. An increase in 12% was observed in the year 2016 and there were nearly 39,000 alleged attacks.[18]

One of the gravest sexual offence is the offence of rape cum murder which kills a woman several times, at first the woman is subjected to sexual assault during which she might have died thousands of death while resisting and trying to save herself, her will, respect, modesty, everything is taken away brutally and then she is beaten or attacked so harshly that can even lead to her death. This offence of causing death of women while raping her is not like a simple murder where a person is just killed by stabbing, through poison or shooting etc. But it varies from insertion of an iron rod in her private parts[19] to drug overdose and beating to the extent the victim becomes lifeless. In recent times humanity has lost its essence as they have diversified their sexual desire which can be observed form the instance where eight men gang raped a pregnant goat which resulted in its death.[20]

When the crisis of safety of not only women but every female being whether a human or an animal is such in our country and in the meantime, The Honourable Supreme court passes such a flawed judgment then it is not less than providing a weapon to the rape perpetrators.

[18]Sugam Pokharel & Chandrika Narayan, Indian Police arrest main suspect in gang rape and murder of teenager,CNN (Jul. 31 2018, 10:00 PM), https://edition.cnn.com/2018/05/05/asia/india-rape-killing/index.html.
[19]Mukesh and Ors. v. State of NCT of Delhi and Ors. AIR 2017 SC 2161 (India).
[20]Sanjana Agnihotri, Pregnant goat dies after 8 men gang-rape it in Haryana, INDIA TODAY (Jul. 31 2018, 10:12PM), https://www.indiatoday.in/india/story/pregnant-goat-dies-after-8-men-gang-raped-it-in-haryana-1299168-2018-07-28.

ANAND KUMAR MOHATTA AND ANR. V. STATE (GOVT. OF NCT OF DELHI)

Rudra Shandilya* & Manisha Arora**

ABSTRACT

There was a development agreement between the two parties i.e., Appellant No.1 and Respondent No.2 by the virtue of which they had to develop the property owned by the former. The agreement entered could not be fulfilled. An FIR was filed by Respondent No.2 under section 406 of the IPC. Then Appellant number 1 moved High Court of Delhi under the section 482 of the CrPC in order to quash the FIR. The High Court disposed off the appellants' petition. The appellants then approached the Apex Court. When the appeal was sub judice in Supreme Court, Respondent No.1 filed a charge sheet against the Appellants. So, the appellants additionally filed an amendment application seeking to incorporate a prayer for quashing the charge sheet in addition to the prayer for the quashing of FIR. The Court quashed the FIR and held that the dispute involved is civil in nature.

INTRODUCTION

Indian Judiciary, one of the most robust institutions of the world, is in itself an illustration how the settled law can be changed when powers vested in particular sub-organ of the judiciary requires it to act for the benefit of its upholder. Time to time whether it is a civil wrong or a criminal offence the Judiciary repeal the law when any of its cited provision is violating or disrespecting any legal right of an Indian national. Same such issue is the restriction of the power granted to High Courts in order to administer justice and for the protection against the abuse of powers only to the stage of filing of First Information Report (FIR). Regarding this provision related to exercise of inherent powers by a High Court guaranteed to it under the CrPC,[1] there have been conflicts between the lawmaking bodies and various interest groups which will be dealt with the help of the following case analysis.

Anand Kumar Mohatta and anr. V. State (Govt. of NCT of Delhi) Department of Home and anr.[2]

Facts-

There was a development agreement between the two parties i.e., Anand Kumar Mohatta (Appellant No.1) and Ansal Properties and Infrastructure Limited (Respondent No.2) dated 03.06.1993 by the virtue of which they had to develop the property owned by the former. The property owned by Anand Kumar Mohatta is situated at 20, Feroz Shah Road, New Delhi, which falls under Lutyens Zone. The parties agreed to develop the said property by constructing

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[1]Code of Criminal Procedure, § 482 (1973)

[2]Anand Kumar Mohatta and Anr. v. State (Govt. of NCT of Delhi), Crl. No. 3730 of 2016.

a high-rise building comprising of flats. The Respondent No. 2 deposited the security amount of one crore as regard to the clause 38 of the development agreement. The property was initially owned by Appellant No.1 but later in the existence of the development agreement, the Appellant No.1 transferred the ownership of the property to his wife (Appellant No. 2). The agreement entered could not be fulfilled as the construction of the high-rise building was against the new building regulations which were introduced in the Lutyens Bungalow Zone 2 where the building was situated.[3] Due to the prohibition, the Appellant No.1 on 14.03.2011 wrote a letter to Respondent No. 2 stating that he does not wish to develop the property. The appellants did not take any further action including non-returning of the security amount of one crore deposited by Respondent No.2. A criminal complaint was filed by Respondent No. 2 before the Magistrate on 03.11.2012 which was later withdrawn by him on 11.11.2013. Then a subsequent FIR was filed by Respondent No. 2 on 20.08.2014 for the offence of criminal breach of trust[4]. Following the complaint, the Appellant No.1 approached the High Court under the CrPC in order to quash the FIR. The High Court disposed off the appellant's petition on the basis that it has been filed when the case is at the stage of the investigation. The appellants then moved to the Highest Court of Appeal by way of the Special Leave Petition. During the pendency of the appeal in Court, Respondent No.1 filed a charge sheet dated 03.08.2018 in the Court of Metropolitan Magistrate, Patiala House Court, Delhi against the Appellants. So, the appellants additionally filed an amendment application seeking to incorporate a prayer for quashing the charge sheet in addition to the prayer for the quashing of FIR.

Issues-

1. Whether the offence can be termed as a criminal breach of trust under section 406 of IPC with regards to transferring of property by Appellant No.1 to Appellant No. 2 and non-returning of the security amount of one crore which was deposited by Respondent No.2 to Appellant No.1.
2. Whether the inherent power of the High Court is limited to the quashing of FIR before filing of charge sheet under section 482 of CrPC.

Judgement-

1. It was held by the Apex Court that the dispute involved is a civil wrong, not a crimmal offence, hence it cannot be dealt under Section 406 of the IPC.

Furthermore, the Apex Court held that the amount has been rightfully retained by the appellants.

2. The Apex Court held that High Court's inherent power under Section 482 of the CrPC can be extended for quashing of FIR even after the filing of a charge sheet.

[3]New Delhi Municipal Council v. Tanvi Trading and Credit Private Limited, 8 SCC 765 (2008).
[4]Indian Penal Code, § 406 (1860).

Comments-

Dealing with the first issue i.e. whether the offence can be incorporated under the section 406 of the IPC with regards to transferring of property by Appellant No.1 to Appellant No.2 and non-returning of the security amount of one crore which was deposited by Respondent No.2 to Appellant No.1.

In the Judgment, the Supreme Court of India supported that the Respondents contention that transferring of said property by Appellant No.1 to his wife i.e. Appellant No.2 is done by the way of fraud and thus constitutes a criminal breach of trust is unarguable as the alleged deceitful transfer of property by the Appellant No.1 to his wife, presuming it to be unlawful, can never form an offence of criminal breach of trust under section 406 of IPC as that property was not endowed by Respondent No.2 to the Appellants. The property was owned by the Appellant No.1 and hence there was no doubt of appellants having been endowed with their own property, and that too by the complainant, who had only entered into a development agreement in the association of property.

This contention given by the court was correct in the manner that property was owned by Appellant No.1 and hence he can transfer the property to anyone as per his wish and the Respondent No.2 cannot file a complaint regarding the transfer of the property and he should be concerned only with the development agreement. Herein, in accordance with the above-stated reasoning, the Appellant No.1 is not guilty of defrauding the Respondent No.2 by misleadingly transferring the property associated with the development agreement.

Dealing with the other contention of the Respondent No.2 under the same issue regarding the non-returning of the security amount of one crore which was deposited by the Respondent no. 2 to Appellant No.1, the counsel who appeared on behalf of the appellants submitted that the retention of security amount of one crore is purely a civil dispute and thus the complaint of retention of the security amount by the Respondent No.2 cannot be dealt as criminal breach of trust. Learned counsel further stated the reasoning that the security amount deposited by the appellant shall be refunded under the clause 30(b) of the development agreement which states that the developer should handover the areas of the possession of the owner's share to the owner. As this was a contingent contract between the two parties, the non-arising of the contingency shall be the reason for non-refunding of the security amount. Besides, the counsel for the appellants also gave the reasoning that the developer i.e. the Respondent No.2 is a tenant to the property by acquiring possession of a part and has not compred with the obligation of vacating it after Appellants notice regarding the dissolving of the agreement.

The senior counsel on the behalf of the Respondent No.2 gave the reasoning to withheld the petitiou which was filed by the appellants to quash the FIR dated 20.08.2014 as the proceedings have gone beyond it and resulted in the filing of charge sheet. The learned senior counsel who appeared on behalf of the Respondent No.1 i.e., the state government of NCT submitted that non-returning

of the security amount constitutes a criminal offence under section 406 of IPC and has placed confidence on the charge sheet.

In the case, we figure out that the charge sheet has been filed against the appellants under section 406 of IPC on the grounds of non-returning of the security deposit of one crore. In order to justify the reasoning of the judgement, section 405 and section 406 of IPC will be read together. As section 405 of the IPC clearly highlights the terms on which the liability arises. It states that if any person dishonestly misappropriates the entrusted property or disobeys the legal obligations attached to that property then such act attracts liability. In this case, the security amount of one crore which was handed over to the Appellant No.1 at the time of signing of the agreement shall be liable to be refunded on handing over the possession of the area of the owner's share to the owner by the Respondent No.2 which is mentioned under clause 30(b) of the agreement.

Here two contentions of the Appellant party are taken into consideration:

Firstly, the handing over of the possession of the area of owner's share to the owner by the developer has not occurred. The Complainant-Respondent No.2 failed to vacate the property of the owner i.e. the Appellant No.I. As the contract stands frustrated because the property lies in the Lutyens Zone and constructing high rise building over the property is against the regulations of the zone.[5] Hence, the Appellant No.1 withdrew from the contract.

Furthermore, applying section 405 and section 406 of the IPC subsequently it can be noticed that the Appellant has neither used the entrusted amount for personal purpose nor he misappropriated the security amount of one crore in contrary to any law or condition mentioned under the agreement.

Considering the agreement dated 03.06.1993, the security amount of one crore needs to be refunded on construction but herein that condition failed thus the obligation to return money did not arise. The Respondent No.2, on the other hand, has not demanded the return of money at any point of time and on inquiry, he argued that he didn't ask for a refund because according to him the contract is still in subsistence. The apex court held that if in any stretch of imagination it is proved that the Appellant No.1 misappropriated the security deposit of one crore, the case cannot be dealt as a criminal offence but a civil dispute. In the landmark judgment of *"Indian Oil Corporation v. NEPC India Ltd"*[6], the Court observered the surge in trends of converting the civil wrong into a criminal offence.

in addition to this, the Supreme Court stated that it did not find any other attempt by Respondent No.2 except the filing of the criminal complaint and thus this act of the Respondent No.2 seems to be malicious in nature. Hence, the Supreme Court finds out that the filing of the criminal complaint by the prosecution is mala fide and unacceptable and also a way to harass the

[5]Supra note 3

[6]Indian Oil Corporation v. NEPC India Ltd., 3 SCC (Cr) 188 (2006)

Appellants since there was no prior attempt made by the Respondent No.2 other than filing a criminal complaint to recover the security amount. Furthermore, in lieu of a criminal complaint, the recovering of security amount shall be treated as a civil dispute.

Dealing with the second issue i.e. whether the intrinsic power of High Court given under is limited to the quashing of FIR before filing of charge sheet.

The High Court of Delhi discarded the petition filed by Appellants under section 482 of CrPC as it considered that the case was still at its investigation stage and the petition was filed prematurely. The court with regards to the reasoning cited directed to continue the investigation. The Appellants consequently filed the Special Leave Petition in the Apex Court wherein it protected Appellants from arrest and directed further investigation. Accordingly, the Respondent No.I carried on its own investigation and filed the report under CrPC in the Court of Metropolitan Magistrate, Patiala House Court, Delhi. The senior counsel on behalf of the Respondent No.2 stated that the proceedings have gone beyond the stage of FIR as the police submitted the charge sheet. As the police submitted the charge sheet, the Appellants now filed amendment application for quashing of the charge sheet along with the FIR.

In the case of *"Joseph Salvaraj A. v. The state of Gujarat"*[8], the Court while deciding on the issue similar in nature observed that *"from the popular overview of the numerous sections under which the appellant is being charged and is to be prosecuted would display that the same is not made out prima facie from the complainant's FIR. Even if the charge sheet had been filed, the learned single judge could have still examined whether the offences claimed to have been perpetrated by the appellant were prima facie made out from the complainant's FIR, document, charge sheet, etc or not"*.

Considering section 482 of the CrPC, it can be clearly deduced that nothing under this section can stop the High Court from exercising its power after filing of charge sheet in order to check abuse of powers and miscarriage of justice. It can be said that the abuse of power while filing FIR gets aggravated if it leads to the filing of charge sheet. Nothing can restrict the Court from exercising its power for curbing abuse of powers. Doing this is within the jurisdiction of the Court under the section that it can entertain discharge application though it is pending before the trial court.

While deciding the case of, *"State of Haryana and Ors. v. Bhajan Lal and Ors."*[9], the Court listed down the grounds in para 102 of the judgment, on which the inherent power of High Court can be exercised for the sake of protection of abuse of powers as well as to ensure justice. An exhaustive list formed contained the following grounds:

[7]Code of Criminal Procedure, § 173 (1860).
[8]Joseph Salvaraj A. V. The State of Gujarat, 7 SCC 59 (2011).
[9]State of Haryana and Ors. v. Bhajan Lal and Ors., SCC (Cr) 426 (1992).

1. If the allegations made against the accused at the stage of FIR even if they are in totality accepted does not constitute an offence at the first sight or make out a case against the accused.
2. When the allegations in FIR and other materials, along with it do not mention a cognizable offence, explains an investigation by police officers in the CrPC[10] excluding under an order of a magistrate inside the dimensions[11].
3. When the evidence collected in support of the allegations made against the accused does not reveal any evidence related to the commission of an offence.
4. When the allegations under FIR only makes a non-cognizable offence and not a cognizable, a police officer does not allow investigation without an order from the Magistrate.
5. When the allegations made against the accused are so absurd that no prudent person can figure out any conclusion for continuation or initiation of proceedings against him.
6. When there exists a displayed legal bar inserted in any provisions of the Code (under which criminal proceeding is made) or where there is a given provision in the code, giving an effective remedy for the wrong of the distressed party.
7. When the allegations made against the accused in FIR are mala fide in nature wherein the ulterior motive is vengeance and personal grudge against the accused.

The Supreme Court decided that this case includes the 1st, 3rd and 5th listed grounds stated in the para 102 of the *judgment of Bhajan Lal's case*[12]. Instead of exercising its intrinsic power under section 482 of CrPC the High Court dismissed a petition filed by Appellants. In addition to this, the Apex Court held that this was the suitable case for High Court to exercise its inherent power.

Deciding the famous case of *"Karnataka v. L. Muniswamy and others"*[13], the Apex Court stated; in availing its power vested, the High Court can annul the proceeding in a case resulting to abuse of powers or its continuation would lead to harming the public interest, in order to secure justice.

The Apex Court supported that the filing of the charge sheet is the consequence of malicious intent of the Respondent No.2 and thus it finds no hesitation in quashing the FIR dated 20.08.2014 along with the charge sheet dated 03.08.2018 and thus set aside the judgment given by High Court of Delhi dated 02.02.2016 by virtue of which it dismissed the petition filed by the Appellants and didn't agree to nullify the First Information Report.

[10]Code of Criminal Procedure § 156(1) (1973).
[11]Code of Criminal Procedure § 155(2) (1973).
[12]*Supra* note 9
[13]Karnataka v. L. Muniswamy and Ors., 3 SCR 113 (1977).
[14]*Supra* note 2.

CONCLUSION-

In the present case i.e., *Anand Kumar Mohatta and anr. v. State (Govt. of NCT of Delhi) Department of Home and anr*[4]. and in other such cases, the Supreme Court has laid down the guidelines regarding the inherent power given to High Court under section 482 of the CrPC. Additionally, it also laid down the information as to what constitutes a criminal breach of trust. However, the authors conclude that this judgment has made the point clear that Indian judiciary is now no longer hesitant to take any new decision in a case which can contravene the traditional process that takes place in a similar case. After this judgment, unlawful harassment by the Law enforcement agencies in the name of FIR and charge-sheet will now come under control.

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