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IILS LAW REVIEW

INDIAN INSTITUTE OF LEGAL STUDIES
Accredited by NAAC
Affiliated to the University of North Bengal
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Recognized by the Bar Council of India, New Delhi

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ABOUT IILS

The Indian Institute of Legal Studies established in the year 2010 has evolved into a unique system of imparting legal education not only in North Bengal but also as an emerging education and Research Centre in the SAARC region with the establishment of the Centre for SAARC on Environment Study & Research. Acknowledged as one of the best law colleges in India, IILS is nestled in the cradle of the quaint Himalayas and picturesque surroundings assimilating nature and education, a combination which is a rarity in itself. IILS is an institute that promotes holistic study in Law in the form of short-term courses, field work, experiential learning, Clinical legal classes in addition to the regular undergraduate course. Post Graduate courses and Research Centre are already functional, which will mature into doctrinal courses.

The Institution takes pride in hosting workshops for police officers of North Bengal on Human Rights and Cyber Crimes, where the institute was privileged to have the presence of eminent police officers and scholars from different corners of the country. The Bureau of Police Research & Development, Ministry of Home Affairs, Government of India had approved the organising of a vertical interaction course for IPS officers on Criminal Justice Delivery System which was witnessed by the gracious presence of the Hon'ble Judges of the Supreme Court of India and the various High Courts.

The Institution has been organising a series of National and International Seminars, Conferences, Symposiums, Workshops and Inter and Intra Moot Court competitions. The Institute had started with organising a national seminar on the "Civil Justice Delivery System". Today, it has reached the peak of organising international seminars with the SAARC Law Summit & Conclave being the blooming one.

Presently, the world is facing health crises due to the emergence of a pandemic caused by COVID-19 virus and physical gatherings have been completely stopped, especially in schools, colleges and universities since the past almost 24 months with only a few months of physical classes. But even during this pandemic, the Indian Institute of Legal Studies was the first of its kind in this region that has undertaken the initiative of conducting online classes for the students of both UG and PG

courses and has been conducting them effectively since its very beginning to reach out to the students through online teaching- learning mechanism from the very initial period of lockdown. Also, the college has successfully conducted internal examinations through online mode so that the continuous evaluation of students does not come to a halt.

The Institution's vital location, its active participation in imparting knowledge and molding its students into sensible and responsible individuals has brought to its credit to serve as the nucleus for education in the North Bengal region. The emphasis in academic development with its adoption of inter-disciplinary and practical approaches has aided its students to gain a deeper understanding of the learning process and value for education. Additionally, it has not merely laid the importance for the value and the need to be educated individuals, or to serve as efficient lawyers, but more essentially, to be reborn as socially viable and responsible beings to construct appropriate mechanisms for building a better society for the coming future.

MESSAGE FROM THE PATRON

SHRI JOYJIT CHOUDHURY

Founder Chairman

Indian Institute of Legal Studies

It's been quite some time that I have used my prerogative for penning in a few lines under the Caption "From the desk of the Chairman." The Pandemic has probably changed the preferred and known rules in education and it is disheartening to see the once buzzing campuses filled with vibrant and youthful energy being bereft of the exuberance that existed.

If we take a look at the history of the Corona Virus, it originated sometime in the middle of December, 2019 in China at a live seafood market and then spread to the Wuhan area. Gradually, it spread to Italy, U.S.A., Europe and other countries of the world. The affected countries have been called to take immediate steps to detect, treat and reduce the further spread of the virus to save lives of the people. Presently the COVID-19 is no more confined to China, Italy or U.S.A. It has become a global issue. The economic impact has had devastating and cascading effect world-wide with closure of business entities, rampant job loss coupled with non-existent economic activities putting the lives and the livelihood of a large section of the world's population in peril.

The poor vulnerable daily wage earners and migrant workers are the ones who are worst affected. Concrete measures must be adopted by the governments to provide this section of the population with sustainability incomes or else the world shall witness an increase in the pre-existing inequalities. The Governments must strengthen social protection and livelihood, reorient public finance to augment human capabilities, introduce measures to limit bankruptcies and create new sources of job creation.

To my view, the Pandemic has caused a dramatic and perceived change in the socio-economic structure of the entire world. Millions of wage-earners in the United States have been bugged of leaving their current employment and demanding higher wages and they have chosen to be unemployed if wages are not commensurate with their expectations. This is probably the outcome as to how the pandemic has led to increased inequality and unequal income distribution amongst different classes. According to Oxfam's "The inequality virus" report in the Indian context, India's billionaires increased their wealth by 35 percent while 25 per cent of the population earned just Rs. 3000 as income per month. The unforeseen and unpredictable nature of the mutant waves have caused immense distortions in the labour market which has exposed the migrant labourers to the destitution of low incomes at their native places or starvation at their outstation job sites.

Research based data shall illuminate us about the devastation caused by cyclical mutant waves in the times to come but in the meantime, we have no choice other than to maintain status quo till the pandemic subsides. It is heartening to see that in spite of closure of many educational institutions, the editorial team has put in their honest efforts to publish the journal in such antagonizing and unprecedented times. I sincerely laud and appreciate their endeavors in making this happen.

Wish everybody good luck & health.

JOYJIT CHOUDHURY

MESSAGE FROM EDITOR IN CHIEF

It gives us utmost pleasure to announce that the IILS Law Review is a bi-annual (erstwhile annual) from its current edition, Volume 8 Issue I. It is a peer reviewed journal acclaimed for original ideas and academic honesty. The institutional motto of our journal is the creation and dissemination of knowledge.

This Volume puts together a wide range of important contemporary socio-legal issues relevant to both national and international laws. Our journal promotes and encourages the authors to contribute to the existing knowledge bank by focusing on interdisciplinary research both original and enticing in nature.

However, the limitation we have in our current issue has been the inability to place the journal thematically amidst pandemic. We shall strive to present the journal on theme/ sub theme basis in the near future.

The Editorial Board would like to extend thanks to the College Authority for providing congenial ambience and required provisions and to the Reviewers and to the Authors for contributing towards the knowledge production process.

Legal scholarship is very vital to the continued relationship of law and society. It sheds light on particular issues, creating dialogue between scholars' lawyers, judges and policy makers, causing us to think more critically. Writing also gives voices to the oppressed, and by speaking out against injustice, we create ripples in the fabric of society. It leads to shifts in legislative policy, making our leaders and entrepreneurs aware of the pulse of the people. The only way for a society is to progress by entertaining contrasting perspectives, each holding the other accountable. My ultimate vision is that of a society where we are free to have different views and one where we constantly challenge ourselves to accept new ideas.

The IILS Law Review from its very inception in 2014 has worked to push the boundaries of academic literature, garnering literature from students, academicians and legal professionals with a vision of providing fora to academicians, professionals and students alike to express their views on various dimensions of the law as it stands and the law, as it ought to be. The IILS Law Review has sought to sustain and support legal excellence through its continued standards of publication.

I am extremely proud to present the Eighth Volume (Vol. 8, Issue No. 1/2022) of the IILS Law Review. I thank the Hon'ble Chairman of the Institute, the Editorial Advisory Board, the authors of the articles and the teachers who were involved in this process. A lot of hard work, intellectual discussions, and free exchange of ideas contributed to this Journal. My hope for the IILS Law Review is that it should always seek to achieve newer and greater heights and keep the spirit of legal skepticism alive.

Looking forward on Behalf of the Board of Editors,

Prof. Dr. Ganesh Ji Tiwari Editor in Chief
Principal Indian Institute of Legal Studies

IILS LAW REVIEW

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MEDIA ETHICS AS A TOOL FOR SELF-REGULATION

Dr. N. Sathish Gowda[1] *and Dr. Ashwini P*[2]

Abstract

Collecting and selling of news and views is essentially a public trust by the media, which is also an underlying principle that governs or should govern the Media. The same kind of trust is implied in the relationship between a doctor and his patients, though medical men work under the discipline of a professional code and are obliged to hold medical degrees, whereas journalism is a 'free' profession subject only to the external restrictions which the law may place upon it. But the dishonest doctor can harm only a few dozen or a few score patients, while a dishonest journalist may poison the minds of thousands or millions of his fellow men. At this juncture, the paper evaluates the question about ethical/ self-regulation of media in the light of the fundamental public purposes and social responsibilities and also an attempt has been made to examine role of codes of conduct or media ethics in avoiding the harm or danger supposed to be done by media personnel to an individual, a family, a group, a culture and to a country.

Key Words*: Media, Self-Regulation, Statutory-Regulation, Ethics, Co-Regulation.*

I. Introduction

Media is the powerful social institution which brings changes within societies, subcultures, families and individuals. It plays an important role in shaping opinions, beliefs and attitudes. It is the primary source of information in modern democratic society. People of this fast-moving postmodern world solely rely on the media for first-hand information. It makes their judgment concerning home, family, education, institution and societies on the basis of information provided by the media. Furthermore, the media plays an important role in fashioning our tests and moral stands. It has a significant role in the socialization of the young generation. Moreover, the media has been called the fourth pillar of democracy. It is the backbone of democracy. It helps democracy become 'of' and 'by' the people. It facilitates

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democracy by making interaction between the governed and the governor. However, the media is pervasive in our lives. It has a tremendous impact on our life, our government and our society as a whole. In view of the deep penetration in society and in our life, people should be vigilant and conscious of its negative impact. As the saying goes, everything has its two sides, negative and positive. So, this equally applies to media[31]. No doubt it has positive contributions and positive impact on our society but, its negative impact can also not be denied as people have raised their voices against the media on several occasions. Apart from this, media have got potential to be used for some negative activities such as propaganda, character assassination, invasion of privacy etc. Seeing the other side of the media's negative impact or potential to have a negative impact, it is appropriate to use this powerful instrument with great caution and control. In view of the caution taken to control the media is not legal, rather moral or ethical. Media practitioners and media organizations themselves resolved to come out with 'codes of conduct' or 'canon of journalism' known as media ethics or journalism ethics as controlling measures. At this juncture, At this juncture, the paper evaluates the question about ethical or self-regulation of media in the light of the fundamental public purposes and social responsibilities[4].

II. Meaning of 'Ethics'

'Ethics' is a system or Code or morals, of a particular person, religion, group, profession etc. Ethics is defined as "that branch of philosophy dealing with values relating to human conduct, with respect to rightness and wrongness of certain actions and to the goodness and badness of the motives and ends of such actions". By dictionary definition ethics and morality are interchangeable. Media ethics apply mostly to cases not specifically covered by law. At present sub-standard journalism exists everywhere. Journalists and other media persons operate without any guidelines at all. There is a need for a Code of ethics for media persons. The Code of ethics for media persons is a statement of broad moral principles which will aid and guide the media persons and which will help them in the process of self-appraisal and self-regulation.

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[3] Mohd. Ehsan, 'Contemporary issues in media ethantic, Shodhganga', https://shodhganga.inflibnet.ac.in/bitstream/10603/70234/3/chapter1.pdf (visited on 10/06/2019)

[4] Supra Note 3.

III. Statutory Regulation of Media in India

Law consists of rules made by authority for the proper regulation of community or society. According to Austin, "Law is a rule laid down for the guidance of a being by an intelligent being having power over him". Law means any set of uniform principles which is generally followed. It refers to those rules which are issued by the State for determining the relationship of men in organised society. The purpose of law is to regulate and control human action in society. Law is enacted to regulate the social and economic acts of individuals or organizations. The ultimate end of the law is the welfare of the society.

Some propagate self-regulation for the media following their own code of ethics, disagreeing with the concept of self-regulation by the media. Former Chairperson of the Press Council of India, Hon'ble Justice Markandeya Katju favoured only regulating media, not controlling it. But regulation should be by an independent body and not by the Government. He says that "self-regulation is not always enough and that is why we have law". He further says, "Normally, negotiating with the media (on the content) should be the way, but we do need laws under some extreme situations... I believe 90% of the people are incorrigible for whom we need laws[5].

In a free society, public opinion reflects the mood of the majority of the people, especially their reactions to governmental activities. Usually, people look forward to the media for critical comments on contemporary events. This is all the more significant during elections. But, the nexus between business and press/media often colours the opinions. "Big business invaded the field of journalism and the monopoly check to manifest in press ownership. The octopus of newspaper chains with control over news agencies as well spread its tentacles far and wide"[6]. Therefore, it is suggested that there should be suitable laws to curb cross-media ownership as well as business houses owning newspapers[7].

For instance, there are certain laws which directly affect the media. For instance, there are statutes like The Indecent Representation of Women (Prohibition) Act, 1986, the Young Persons (Harmful Publication) Act, 1956 and the CopyRight Act, 1957 etc. Legal awareness of these laws will guide a person in his work as a journalist[8].

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[5] The Hindu 19.04.2012.
[6] M.K Dharma Raja, *Opinion Journalism,* Mass Media in India, 11, (1991).
[7] S Sivakumar, *Press law and Journalists: Watchdog to Guide Dog,*195, Universal Law Publications, New Delhi, (2015).
[8] *Ibid.*

IV. Code of Ethics for Media Personnel

There are various Codes of Ethics which have been formulated from time to time, such as the International Code, the Press Council's Code, the AINEC Code, and the Parliament Code etc. to guide journalists and the media. It is not possible in Code of ethics to detail grounds. To formulate a comprehensive, rigid Code of ethics for a journalist is neither feasible nor prudent. Yet, some organisations have adopted Codes of Ethics[9].

The Code of Ethics is not legal documents but they are guidelines for professional quality and efficiency. In order to carry his message effectively, and to maintain the credibility of his newspaper or magazine, a journalist has to disseminate news in accordance with established norms and traditions of the society. Despite all the provocations and dangers, journalists must function strictly within the framework of ethical norms. As the Codes of Ethics are not formulated by the State legislature they are not Acts and they cannot be enforced by law. Yet, the Code of Ethics makes a journalist a 'perfect professional' if he digests the codes of ethics and adopts them in his professional life.

In modern democracies, the media plays a significant role by presenting news as well as views. This is done with a view to creating, shaping or sometimes more importantly distorting public opinion. In this sense, media is an unacknowledged legislator[10]. Media enjoys some respect in almost all democratic countries. But it is working within many constraints as well. The law as well as the enforcement agencies often impedes its work[11]. On the one hand the government, i.e. the three organs of the government, will try to use law to protect the interests of the Media. On the other hand, Media may have to face obstacles from within, because the Media as a business may not like to invite the wrath of those in power if it can be avoided[12]. Secondly, individuals and pressure groups in the society may also try to

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[9] The Codes of Ethics and a Charter for Editors formulated by the All India Newspaper Editors Conference, 1953, International Code of Ethics, 1991,All-India Newspaper Editors Conference Code of Conduct, 1968, National Integration Council Code Conduct for the Media, 1962, Press Council Code of Ethics, Press Council Code of Ethics on Communal Writings, Parliament Code of Ethics, 1976, Code of Ethics for Broadcasters, 1969, Code of Ethics adopted by the International Public Relations Association at Athens, 1963.

[10] Analyzing the place of journalism in the discipline of communication, especially in a democratic country like the USA, Barbie Zelizer observed: Media power is one of the standing conundrums of contemporary public disclosure, in that we still cannot account for the media's persistent presence as arbiters of events of the real world. Audiences tend to question journalistic authority only when journalist's versions of events conflict with the audience's view of the same events. And while critical appraisals of the media should be part of everyday life, journalistic power burgeons largely due to the public's general acquiescence and its reluctance to question journalism's parameters and fundamental legitimacy.

[11] In *Branzburg v. Hayes*, 408 US Supreme Court held that journalists did not have a First Amendment Right against forced disclosure of confidential source or information when summoned before grand juries investigating crimes. In countries following common law also such privilege is absent.

[12] Barbie Zelier, *Has Communication Explained Journalism,* 43, Journal of Communication, 80, (1993).

protect and defend their interests which might be threatened by the work of an investigative journalist.

A question about ethics of media needs to be evaluated in the light of the fundamental public purposes and social responsibilities of media[13]. All media personnel need not be honest. Moreover, in the modern era communication, revolution has become a 'walking paradox'[14]. This is because of "the contradictions involved in the very nature of journalism as a *profession* and *mission,* being with the anti-democratic tendencies associated with any strong profession"[15]. Ethical standards have come down.

Even though the print media is losing dominance with the advent of electronic one, it continues to be of vital importance in democratic societies. According to Karle Nordenstreng, there are four aspects or dimensions which are:

- Obvious:
- Accuracy,
- Rapidity,
- Seriousness and Autonomy[16]. It means that quite often the presentation of news and facts suffer from doctoring or colouring and consequently accuracy suffers[17].

Speed is the most essential requirement of journalism. With the development of electronic media, the whole media environment has been overflowing with information. This offers many details about what is happening. But it may not present a true picture of fundamental developments. Thus, modern journalism is becoming more narrative than interpretative. Thirdly, the new media environment does not attach importance to seriousness. Rather the media caters to what is attractive for the readers[18].

Fourthly, autonomy[19] means a certain degree of independence of government, management and pressure groups etc., which represent sociolect-politico-economic forces. The paradox that emerges here is the fact that autonomy will easily lead the media into a self-centred fortress of journalism, alienated from the people it is supposed to serve.

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[13] Stephen J. A. Ward, *Global Journalism Ethics: Widening the Conceptual Base,* 1, Global Media Journal, 137, (2008).
[14] Kaarle Nordenstreng, *The Journalist: A Walking Paradox in Philip Lee (Ed.),* The Democratization of Communication, *114* (University of Wales Press, 1995).
[15] *Ibid*.
[16] Supra note 11.
[17] *Ibid*.
[18] Supra Note 5
[19] Owen M. Fiss, *Why the State,* 100 Harv. L. Rev. 781 (1986-87)

In India, the media enjoy lesser autonomy but the fortress of journalism is very strong because of the vertical movement of labour. To ensure "healthy public debate" the media should be aware of this conundrum. Moreover, the situation becomes all the more complicated as the print media faces grave challenges from electronic media.

Media profession, like any other, has its own ethical standards[20]. A code of conduct distinguishes a profession from an occupation[21]. Profession of media is different from other professions because of its unique fourth estate role. It is singular because of its independence. In a profession it is necessary that a member should be judged by his peers and the function is to be so exercised as to maintain the objective of exemplary professional conduct.

V. Advantages of Self-Regulation

A significant advantage is that it lends credibility and trust to the media. In jurisdictions where the media is seen as strictly regulated or not independent, citizens tend to lose interest in the media and the quality of freedom of expression and consequently public debates are diminished. A good example is the Nigerian media which is divided into state owned broadcast media and privately owned print media. The public media sector is dominated by the Nigerian Television Authority (NTA) which is spread across the country. However, due to its close association with the government and the perceived lack of independence in its news content, it has lost its audience to independent television stations considered more credible.

Another reason for self-regulation is the ease with which self-regulation responds to changes and new developments. Another good example of self-regulation is the way the Press Complaints Commission (PCC) in the United Kingdom works and how it has responded to the criticisms of its operations following the phone hacking scandal. The unique nature of online media which operates without boundaries makes it almost impossible for statutory regulation, which makes self-regulation the best option[22].

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[20] Ethics is usually understood as something dealing with right or wrong in reference to determinative principles. In the Greek philosophical tradition, it means the systematic study of the principles that ought to underline behaviour

[21] V. S. Deshpande J, 'Preface' to *violation of journalistic Ethics and Public Taste (1984).* It is said that the responsibility of journalists to the community grows every year in a fairly exact ratio to the way in which an educated democracy itself broadens its spheres of knowledge and interests.

[22]International Journal of Communication and Social Research, Vol. 2, No.2: July 2014 30

VI. Review of Self-Regulation in India

The freedom of speech and expression or freedom of press is present in all statutes and constitutions but not appropriately practiced. Therefore, it is crucial to understand the importance of freedom of press and the type of regulation followed in a country. The principle of self-regulation entails regulation by itself where the media does not have a regulatory body under it. The primary rights of reporters and editors under freedom of expression have to be acknowledged and at the same time their reports should not be detrimental to the functioning of state[23]. There comes the dilemma of who maintains the checks and balances in what is written and published. Theoretically speaking, leaving the regulations to the media itself would generate the likelihood that it may subjugate regulatory aims to its own business goals. For instance, cross-media ownership by big corporate companies has assumed alarming proportions. Early 2013 saw the leak of the *Radio* tapes which disclosed the shocking and unholy links between journalists and politicians, lobbyists and business groups. The Press Council of India through its Chairman addressed this issue; however, no stringent measures had been taken. That depicts the incapacity of the Press Council of India. It cannot suspend the journalists for the unfair work they do[24].

Presently, there is no qualification prescribed by the Press Council for journalists, although there is such a situation prevailing in the Bar Council Act for advocates and Medical Council Act for medical practitioners. The Bar Council of India and the State Bar Councils have control to remove[25] a member from the profession for professional misbehaviour and infringement of professional principles. The Medical Council also has similar powers[26].But, the Press Council does not have any power beyond warning or censuring[27]delinquent journalists. Thus in India, there is no self-regulation in reality. Proper self-regulation can be done in many forms, including information movement, examination charters, in-house complaints management division and procedures, accreditation, licensing and association certification, quality guarantee arrangement, standards, regulations and dispute resolution format. In fact, in India, there is no single medium on media regulation and redressal. The Press Council of India as discussed has very limited power.

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[23]This is precisely how our Constitution has the reasonable restrictions provided under art. 19 (2), India Const. Art 19.
[24]Dunja Mijatović, *Media Self-Regulation Guide Book,* (OSCE publication, Vienna, 2013)
[25] Section 35, Advocates Act, 1961, no-25 Act of parliament 1961.
[26]Indian Medical Council Act, 1956, S.24, no- 102 Act of Parliament 1956.
[27]Press Council Act, 1978, S. 14(1), no 37 Act of Parliament 1978.

VII. Self-Regulatory Authorities of Media in India.

Media in India is mostly self-regulated and there is little scope of accountability in a democratic nation. The Press Council of India was established under the Press Council of India Act, 1978 for the purpose of preserving the freedom of the press and of maintaining and improving the standards of newspapers and news agencies in India. The PCI has the power to receive complaints of violation of the journalistic ethics, or professional misconduct by an editor or journalist. The PCI is responsible for enquiring into complaints received.

The powers of the PCI are limited. It has no authority to penalize newspapers, news agencies, editors and journalists for violation of the guidelines. It is to be noted that the PCI can exercise its power only on the functioning of press media and it does not have the power to review the functioning of the electronic media like radio, television and internet media.

The television media has associated its own 'self' regulatory mechanism - News Broadcasting Standards Authority (NBSA). However, there are issues such as cross media ownership, inaccurate news being published, creating sensationalism, absence of journalistic ethics, paid news, advertisement-oriented news being released for profit, privacy violation, unnecessary news on celebrities and superstardom being circulated, unethical sting operation being held for publicity and so forth that are never addressed.[28]

The Central Board of Film Certification (CBFC) takes part in screening the films including short films, documentaries, television shows and advertisements in theatres or broadcasting via television. The role of the CBFC is limited to controlling content of movies and television shows, etc.

On a closer look at these authorities, it is clear that they have little or no power of sanction for any offences. Therefore, the scope of accountability is minimal. The media personnel do not strictly adhere to the regulations of these authorities as there is no penal backing. In the name of Freedom of Press, the media personnel are at vast liberty to speak their mind without any legal restrictions. Therefore, it may sometimes lead to abuse of freedom. Therefore, self-regulation through code of ethics becomes necessary.

[28]S Sivakumar, *Press law and Journalists: Watchdog to Guide Dog,* Universal Law Publications, New Delhi, (2015)

VIII. Criticisms on Self-Regulation

Several criticisms have been raised against the self-regulatory model not being effective. The recent example is the failure of the PCC in not stopping incidents like the phone hacking scandal in UK[29]. Criticisms include the fact that "self-regulation means that complaints are handled by an old boy network where journalists shrug off problems and defend the indefensible". Other criticisms include the fact that self-regulatory bodies are ineffective since they cannot impose penalties, and that corrections, which is the common type of remedy for complaints imposed by the press councils, are often buried in the publications. Further, the press councils and most self-regulatory models do not entertain third party complaints. Other criticisms of the self-regulatory model are that it allows newspapers to avoid ethical and legal responsibilities, allows the press to engage in excesses where there is no complaint, does not prevent excesses in the tabloids, is weak at safeguarding privacy and does not provide room for appeal. This has led to calls for statutory regulation[30]. Proponents of statutory media regulation argue that the government's power to impose penalties keeps the media in line. They also argue that a democratic government passing a legislation to control the media is in the public interest. However, they fail to disclose that in practice, the government is made of people and in most cases regulating the media has been used to protect the government in power and not public interest.

IX. Criticisms on Statutory Regulation

Freedom House, an NGO which advocates media rights globally published in September 2011 instances where statutory regulation has been used as a tool for censorship. The three common ways in which statutory regulation is used to restrict press freedom include statutory controls on licensing and registration, the creation of nominally independent regulatory bodies with built in avenues for political influence and legal imposition of vague or burdensome content requirements[31].

X. Media and Co-Regulation

The tendency for statutory regulation to be abused and the perception that self-regulation is weak has led to calls for co-regulation by critics of the statutory and self-regulatory models.

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[29] Hadwin & Bloy, 2007

[30]Nielsen, 2004,defines statutory regulation as "The imposition of rules by a government backed by the use of penalties and the authority of the state, that are meant to change the behaviour of individuals or groups" or broadly as "any technique or approach designed to control, alter or influence behaviour."

[31]Karlekar, Radsch, & Sierra, 2011)

A co-regulatory system combines elements of self-regulation as well as traditional statutory regulation to form a new and self-contained regulatory system[32]. An example of a co-regulatory system is the proposed News Media Council (NMC) in Australia. The NMC, which was proposed by an independent media enquiry set up by the Australian government, will be statutorily backed but operate independently and be in charge of print, broadcast and online media regulation with the stated aim "to promote the highest ethical and professional standards of journalism"[33]. The government will fund the NMC while an independent committee is supposed to appoint members of the NMC. The proposal fails to state clearly the process for the appointment of the independent committee though they are expected to consist of senior lawyers and academics[34].

XI. Addressing the issues – A Way Forward

- There is a need to bring a specific provision for ensuring freedom of media with specific grounds of its regulation under Part III of the Indian Constitution in the changed scenario of media functioning
- Only those who have qualified with journalism should take up this profession like that of medical and legal profession.
- There is a need for having the contracts made and drafted among media and journalists or guest contributors that lay prominence on clear requirements to follow the Code of Practice. Each media establishment should have a concerned branch to see if it is followed strictly.
- Sufficient amendments are to be incorporated and that are to be put up under the Data Protection[35] which must be an indispensable part of contracts of employment service for journalists, editors, freelancers who write as guest columnists.
- There should be a universal code of ethics made and those should be distributed to staff journalists without impediment; assets and income or earnings of the

[32]Pulsar Scheuer, 2004
[33]Ramsay, 2012
[34]International Journal of Communication and Social Research, Vol. 2, No.2: July 2014 30
[35] Information Technology Act, 2000, s. 43A provides for the protection of sensitive personal data or information ('SPDI'). Also, s. 72A protects personal information from unlawful disclosure in breach of contract. The author feels that these sections need to be interpreted widely

newspaper company, the editors, journalists are to be made public. There should be meticulous appraisal controls for cash payments[36].

- There should be an independent ombudsman appointed to solve any issues pertaining to newspapers and channels. This can be done assessing the circulation or viewership and further on the basis of revenue threshold[37]. The ombudsman should act as a support system for reporters who are asked to refrain from covering any matters, and additionally for readers to lodge complaints[38].
- There is a necessity for media training that can be commenced by media establishments as part of journalism courses. New approaches need to be developed where students will be well informed about the current affairs, the working of press, media and that inculcates interests in them[39].
- In the discharge of their duties, journalists shall attach due value to fundamental human and social rights and shall hold good faith and fair play in news reports and comments as essential professional obligations.
- All persons engaged in the gathering, transmission and dissemination of news and in commenting thereon shall seek to maintain full public confidence in the integrity and dignity of their profession. They shall assign and accept only such tasks as are compatible with this integrity and dignity and they shall guard against exploitation of their status.

XI. Conclusion

Media ethics has to be flexible in the ever-changing scenario of the world. Media possess a wide area of discretion in news gathering and in publishing the same. A judicious exercise of this discretion, keeping in mind the 'guide-dog' role of the media is desired. The objective is to make the stream of public debate flow unobstructed. Determining the content of a critical, global media ethics is a work-in-progress. According to Aristotle, moral virtue is a means

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[36] Supra Note 23

[37] *Ibid.*

[38] Keval J Kumar, Media Education, Communications and Public Policy: An Indian Perspective, (Himalaya Publishing House, Bombay, 1995). Available at : http://www.diplomatie.gouv.fr/fr/IMG/pdf/KevalKumar.pdf (visited on Aug. 25, 2016).

[39] Here, the author means training and not marketing by the media. There was an allegation that some newspaper publishers, under the pretext of doing 'media education' have entered schools to market their products. Such is the attempt of The Times of India, one of the foremost national dailies, (with a circulation of over a million copies every day), to market the paper in the schools of New Delhi, Bombay, Pune and Bangalore. The experiment is termed 'Newspapers in Education' (NIE), and is taught during regular school hours, not by school teachers but by young men and women carefully recruited by the response department.

between two extremes. When this principle is applied to the media it may be said that the media should not do anything in excess. It means that it should not sensationalize the news or probe too much into private affairs. Newsworthiness is to be decided based on the virtues of balance and fairness.

Therefore, the Media can only be regulated and cannot be controlled. But, regulation should be by an independent body and not by the Government. Despite the difficult questions and daunting problems such as self-regulation being ineffective and unsatisfied statutory regulation, the future of journalism ethics requires nothing less than the construction of a new, bolder and more inclusive ethical framework for a multi-media, global media amid a pluralistic world or a co-regulatory system combining elements of self-regulation as well as traditional statutory regulation to form a new and self-contained regulatory system as an appropriate solution to overcome the negative impact of media on society.

LAW AND THE RIGHTS OF THE NON-HUMANS

Dr. Deepa Kansra[1]

Abstract

The law confers rights on the non-human entities, namely nature, machines (AI), and animals. While doing so, the law is either viewed as progressive or sometimes as abstract and ambiguous. Despite the critique, it is undeniable that many of the rights of the non-humans have come to solidify in statutory and constitutional rules of different systems. In the context of these developments, the article sheds light on the core justifications for advancing the rights of non-human entities. In addition, it discusses the conditions for the emergence of these rights and the non-binding normative statements adopted by different stakeholders for advocacy. These include the Charter on the Law of the Living (2021), the Toulon Declaration (2019), and Vienna Manifesto on Digital Humanism (2019), etc. The paper also discusses the relevant theoretical frames, namely post-humanism, digital humanism, and multi-species justice, followed by selective critical views on the subject.

I. Introduction

There are multiple roles attributed to the law, out of which three roles stand out, namely the regulation of human conduct, reforms, and the harmonization of diverse and conflicting interests. While fulfilling these roles, the law makes use of various legal tools and concepts. Take the example of the juristic/juridical/legal personality (juristic personality hereinafter). The concept of juristic personhood has been applied to give effect to and operationalize interests like that of the corporate entities, trusts, and organizations. The concept of juridical personhood in law applies to define the subjects of law, more so the subject matter of rights and duties. Take the example of the United Nations Organization (UNO). The Convention on the Privileges and Immunities of the United Nations, 1946 provides that the United Nations is defined as juridical personality encompassing the specific capacity (a) to contract; (b) to acquire and dispose of immovable and movable property; (c) to institute legal proceedings.[2] According to Reinisch, "when the United Nations was established it was considered

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[2] Convention on the Privileges and Immunities of the United Nations, 1946. Available at https://legal.un.org/avl/ha/cpiun-cpisa/cpiun-cpisa.html.

necessary that it should enjoy the status of a legal person under the domestic law of its Member States. Such a domestic legal personality is a prerequisite for international organizations to effectively manage numerous practical needs such as procurement contracts, the acquisition of property and the capacity to pursue its private law rights before national courts".[3]

According to Fitzgerald, "legal persons are beings, real or imaginary, who for legal reasoning are treated to a greater or lesser degree in the same way as human beings." [4] In the case of *Salim* v. *State of Uttarakhand* [5], the Indian court writes, "the juristic person connotes recognition of an entity to be in law a person which otherwise it is not. It is not an individual natural person but an artificially created person which is to be recognized to be in law as such. This extension of the personality to the class beyond human beings is one of the noteworthy accomplishments of law or the legal imagination." In other words, the juridical person is not a human/natural person, but one who is attributed a personality by the legal system. On juristic personhood, the court in the case of *Karnail Singh* v. *State of Haryana*[6] states, "for a bigger thrust of socio-political-scientific development, the evolution of a fictional personality to be a juristic person becomes inevitable. This may be any entity, living inanimate, objects or things. It may be a religious institution or any such useful unit which may impel the Courts to recognize it. This recognition is for subserving the needs and faith of the society." According to Tanasescu, "whoever or whatever has legal standing becomes, because of that, a 'person' in front of the law. Legal personality and legal standing are a package; you cannot have one without the other".[7]

A look at the juristic/legal person brings one closer to the category of the non-human entities, their status, and their importance in law. This is also the area that sheds light on the assertions for recognition of the non-human category, particularly animals, machines, and nature. A series of developments in the fields of technology, philosophy, and other disciplines, have moved the non-human entities to the forefront of legal reforms, domestic and international. The key question that emerges from these developments is who are the non-human entities? And why are they claiming rights?

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[3] August Reinisch, Convention On The Privileges And Immunities Of The United Nations Convention On The Privileges And Immunities Of The Specialized Agencies (2009). Available at https://legal.un.org/avl/pdf/ha/cpiun-cpisa/cpiun-cpisa_e.pdf

[4] P.J. Fitzgerald, *Salmond on Jurisprudence* 62 (2009).

[5] High Court Of Uttarakhand, Writ Petition No. 126 Of 2014 (Dated March 20, 2017); 2016 (116) ALR 619.

[6] High Court of Punjab and Haryana at Chandigarh (decided on 31.5.2019); CRR-533-2013

[7] Mihnea Tănăsescu, Understanding the Rights of Nature A Critical Introduction (Verlag 2022).

The more recent literature on the subject brings forth the grounds behind the rise of the non-human in law. In *Non-Human Nature in World Politics: Theory and Practice*, the editors cite two grounds. Firstly, there is a clear understanding that "nature is not external to human politics" and thus must be represented in the political spaces, and secondly, "harm and violence inflicted on non-human nature compromises human security and the very conditions that enable life (human and non-human)". [8] In *Rights in Nature: A Critical Introduction*, the author writes, rights of nature are best understood in the context of this double movement of rights expansion and intensification of human pressure on the environment through capital flows.[9] In the same context, the Supreme Court of Pakistan in *DG Khan Cement Co. Ltd.* v. *Government of Punjab through its Chief Secretary, Lahore*[10] states, "the environment needs to be protected in its own right. There is more to protecting nature than the human-centered rights regime." In the context of animal rights, Swemmer writes about the "gaps in international law towards protecting the rights of all non-human animals" and that "there is a need for reform."[11]

II. The Seven Conditions

The literature cited above speaks of the emerging consensus on the gaps in the existing legal frameworks that concern the responsibilities of human beings towards nature and the other species (the non-human life forms). Seven conditions that are most cited for leading to "taking the non-human seriously".[12] These conditions are (1) the governance challenge (2) conflict of interests (3) advancements in technology (4) emerging consciousness (5) new theoretical frameworks (6) law's evolution, and (7) cross-disciplinary influences.

The first condition i.e. the governance challenge relates to the gaps in existing legal frameworks. In *Karnail Singh's Case*[13], the court states that the animals including avian and aquatics have a right to life and bodily integrity, honor and dignity. They can not be treated as property. There are gaps in laws and new inventions are required to be made to protect the environment and ecology.[14] In another case in which the governance challenge was

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[8] Joana Castro Pereira, André Saramago (Eds.), *Non-Human Nature In World Politics: Theory And Practice*, 3 (Springer 2020).
[9] *Supra* note 7.
[10] C.P.1290-L/2019
[11] Sheena Swemmer, "International Law, Domestic Violence, And The Intersection With Nonhuman Animal Abuse" *Society & Animals* 1-19 (2019).
[12] Florian Cord, "Posthumanist Cultural Studies: Taking the Nonhuman Seriously", 6 *Open Cultural Studies* 25-37 (2022).
[13] *Supra* note 6.
[14] *Ibid.*

underlined was at the adoption of the Ordinance on *Establishing Sustainability Rights* by the City of Santa Monica in 2013. In its objective clause, the Ordinance states, "in the last fifty years, national and state governments have attempted to address the crisis by adopting specific environmental protection laws, such as the Clean Water Act, Clean Air Act, National Environmental Policy Act and California Environmental Quality Act, that limit pollution and resource consumption; but those laws also have proven inadequate to provide long-term protection of our rights to clean air, water, and soil, and sustainable food systems, and the rights of natural ecosystems; and whereas, the inadequacy of these laws results, in part, from the underlying legal assumption that the natural world is property, which may be used by its owners -- be they individuals, corporations, or other entities -- for their own, private, short-term economic benefit, generally with minimal regard for the health of the environment".[15] In the case of rights of animals, advocacy efforts are moving beyond animal welfare legislations to address animal suffering through in-depth research, knowledge production, training, and education.[16]

The second condition is the conflicts in interests. The clash of interests between the human and the non-human categories, particularly animals, machines, and nature has been posed as one of the biggest challenges to existing legal processes. A notable instance is a legal case for the freedom rights of *Happy*- the elephant, pursued by the Non-Human Rights Project against the zoo in the United States. The *Project Annual Report*, 2020 cited a few responses to the litigation from the academia.[17] The Report cites Lawrence H. Tribe, who states, "one of the greatest blemishes on our justice system is the wrongful detention of persons ...While the Writ (*Habeas Corpus*) has provided a procedural vehicle for vindicating the right of thousands of humans to not be unlawfully detained, this brief argues that the time has come to consider the Writ's application to other cognitively complex beings who are unjustly detained. The non-humans at issue are unquestionably innocent. Their confinement, at least in some cases, is uniquely depraved—and their sentience and cognitive functioning, and the cognitive harm resulting from this imprisonment, is similar to that of human beings."[18] The

[15] The City Council Of The City Of Santa Monica Ordinance Establishing Sustainability Rights (2013). https://www.smgov.net/departments/council/agendas/2013/20130409/s20130409_07A1.htm.
[16] Animal Ethics, Strategic considerations for effective wild animal suffering work (2022). Available at Strategic-considerations-wild-animal-suffering-work.pdf (animal-ethics.org).
[17] The Non- human Rights Project, Annual Report, 2020. Available at https://www.nonhumanrights.org/blog/2020-annual-report/.
[18] *Supra* note 17.

conflict of interests is apparent in many such instances of animal, nature, and machine rights litigation.

The third condition is the rapid pace of technological advancements, which have opened immense possibilities for human beings. These developments demand the recognition of technological entities as an important subject matter of legal reforms. According to Pietrzykowski, "another cutting edge technology that casts doubts on the traditional dichotomy between persons and things concerns the rise of autonomous artificial agents capable of flexibly adjusting their conduct and reactions to the environment. This technology is still in its very early stage of development, but even the first and the most primitive semi-autonomous devices (such as driverless cars and drones or software bots) suggest that further progress in their design and scope of capabilities may pose serious questions concerning the liability for their activities. Moreover, some strands of this technology, such as companion humanoid robots, dedicated in particular to assist elderly patients, may make it difficult for people interacting with them to continue perceiving them as mere objects."[19] In the same context, Hofkirchner writes, "it seems a common agreement that due to certain progress made in Artificial Intelligence (AI) and related fields mankind is facing a blurring of the human and the machine such that humanism is put under pressure".[20] The field of Intellectual Property Rights is one of the fertile legal grounds for the above-mentioned claims.[21]

The fourth condition is the emerging consciousness, which is embedded in the worth and sacredness of non-human life and forms. Studies from across several fields have contributed to the development of a universal ethic on protecting and nurturing the non-human world. In the words of Svoboda, "non-human entities have intrinsic value independent of their instrumental value. Svoboda writes, "mind-independent intrinsic value is held to be a property possessed by some entities independently of the beliefs, desires, or attitudes of any actual or possible valuer or knower."[22]

The fourth condition connects with the fifth condition about the application of new theoretical frameworks across legal and other disciplinary spaces. This paper, in particular,

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[19] Tomasz Pietrzykowski, The Idea of Non-personal Subjects of Law, in V.A.J. Kurki, T. Pietrzykowski (eds.), *Legal Personhood: Animals, Artificial Intelligence and the Unborn*, Law and Philosophy Library 54 (2017).
[20] Wolfgang Hofkirchner, Digital Humanism: Epistemological, Ontological and Praxiological Foundations, in Pieter Verdegem (ed.), AI for Everyone: Critical Perspectives (2021).
[21] LexCampus, "AI and IP: The Dabus Patent Case" (2021). Available at https://www.lexcampus.in/ai-and-ip-the-dabus-patent-case/.
[22] Toby Svoboda, "Why there is no Evidence for the Intrinsic Value of Non-humans", 16(2) *Ethics & The Environment* 26 (2011).

discusses three theoretical frames, namely multispecies justice, posthumanism, and digital humanism. These frameworks aim for **"**the reach of inclusion, and the distinction between life and non-life need to be posited as questions.[23] While speaking for the mainstreaming of the new frameworks, Pietrzykowski writes, "the dualistic divide of the world into persons and things is far too crude to adequately respond to the present and future ethical challenges. Theoretical deficiency here becomes one of the critical obstacles in reconciling law with its scientific and ethical context."[24]

The sixth condition is law's evolution. Recent literature on the future of international and constitutional laws assumes that the law has begun to evolve towards the equal representation of the interests of the human with the non-human entities. On the question of why the language of legal rights is preferred for the non-humans, Tanasescu writes, "rights provoke strong advocacy and inspire passionate struggle"[25] Further, "a right has a non-negotiable character, it cannot be traded off as one interest amongst others. Rights Holders are understood as the moral source of the claim, as distinct from being considered an object, albeit a valued one, afforded protections when ethical others recognize their worth."[26] Another way to see law's evolution is through the emergence of legal sub-fields, for instance, animal law. "It is found that animal law, and the corresponding academic field of legal animal studies, is flourishing and animal rights are gradually beginning to emerge and solidify in case law". [27]

The seventh notable condition is the development and exchange of cross-disciplinary research, which has informed and infused the reforms for sustainable systems and effective rights for non-humans. In the book *Non-Human Nature in World Politics*, Carter and Harris write, "over the past decade, notions of the non-human have become established in a range of disciplines—for example, archaeology, human geography, anthropology, and architecture".[28] One notable cross-disciplinary contribution is the Cambridge Declaration on Consciousness, adopted in 2012 by members of the scientific community. The Declaration claims that "non-

[23] Danielle Celermajer, David Schlosberg, Lauren Rickards, Makere Stewart Harawira, Mathias Thaler, Petra Tschakert, Blanche Verlie, Christine Winter, "Multispecies Justice: Theories, Challenges, And A Research Agenda For Environmental Politics" 30:1-2 *Environmental Politics* 119-140 (2021).
[24] *Supra* note 19 at 65.
[25] *Supra* note 7.
[26] *Supra* note 23 at 130.
[27] Editorial, "Animal rights: interconnections with human rights and the environment", 11:2 *Journal of Human Rights and the Environment* 149-155 (September 2020).
[28] Bob Carter and Oliver J. T. Harris, The End of Normal Politics: Assemblages, Non-Humans and International Relations, in Joana Castro Pereira, André Saramago (eds.), *Non-Human Nature in World Politics: Theory and Practice* (Springer 2020).

human animals have the neuroanatomical, neurochemical, and neurophysiological substrates of conscious states along with the capacity to exhibit intentional behaviors. Consequently, the weight of evidence indicates that humans are not unique in possessing the neurological substrates that generate consciousness. Nonhuman animals, including all mammals and birds, and many other creatures, including octopuses, also possess these neurological substrates."[29] The Declaration has been cited on several occasions, including the Indian case of *Karnail Singh*[30]. In *Karnail Singh*, the court cites the Declaration and other scholarly contributions to conclude that "the entire animal kingdom including avian and aquatic are declared as legal entities having a distinct persona with corresponding rights, duties and liabilities of a living person. All the citizens throughout the State of Haryana are hereby declared persons in *loco parentis* as the human face for the welfare/protection of animals". A cursory view of the legal advancements for the non-humans indicate the benefits arising from cross-disciplinary influences and research.

The above-mentioned seven conditions establish the grounds for asserting the interests of the non-human entities in law.

III. Non-Human Life and Dignity

The factors that drive a legal system to pursue reforms can be multi-fold and complex. In the case of the dignity of human beings, for instance, authoritative international instruments like the Universal Declaration of Human Rights, 1948 speak of human capacity, potential, and worth, which should be the basis for legal rights to prohibit and prescribe codes of conduct. Further, the UDHR, in its Preamble, refers to the inherent dignity of all members of the human family as the foundation of freedom, justice, and peace in the world. The essence of the UDHR stands tall in the text of various national and international documents that speak of respect and protection of human dignity.

A question as compelling, and on the lines of human dignity, concerns the worth and potential of the non-human life forms. Comparative research and studies (the Cambridge Declaration, for instance) indicate that because the essence of life reflects in many non-human life forms, human beings are not the only species that can be designated as "living", "existing", and "worthy".[31] In this context, a host of questions were also posed on the

[29] Animal Ethics, Five Years of the Cambridge Declaration on Consciousness (2017). Available at Five years of the Cambridge Declaration on Consciousness — Animal Ethics (animal-ethics.org).
[30] *Supra* note 6.
[31] Deepa Kansra, Dignity, "A regenerative idea", *ILI Law Review* (Winter 2016).

occasion of the seventieth anniversary of the UDHR. Should the "UDHR be recast for a time in which new technologies are continually altering how humans interact, and the legal status of robots, rivers, and apes alike are at times argued in the language of rights?"[32] According to Huneeus, a lot of these questions can no longer be cast aside, because lawyers are raising these arguments in courts and other legal venues and there is a blossoming field of post-humanism in the humanities in dialogue with the social sciences and even natural sciences, and an important national security law debate on autonomous weapons (or killer robots) and humanitarian law.[33]

With great vigor, the interests of the non-human category have informed several constitutional and statutory reforms. For instance, in 2017, the Te Awa Tupua (Whanganui River Claims Settlement) Act of New Zealand, declared the Whanganui River as a spiritual and physical entity, a living whole. Another example is the Uganda National Environment Act, 2019, which under Section 4 provides the rights of nature. Under clauses (1), (2), and (3), the Act provides, "nature has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution. A person has a right to bring an action before a competent court for any infringement of rights of nature under this Act. Government shall apply precaution and restriction measures in all activities that can lead to the extinction of species, the destruction of the ecosystems or the permanent alteration of the natural cycles".

IV. Advocacy For Reforms

Litigations instituted before domestic courts have also been complemented with the adoption of academia/expert-led declarations and instruments. Most of them project a set of values that are expected to shape the legal systems of the world. A few notable ones are the Charter on the Law of the Living (2021)[34], the Toulon Declaration (2019)[35], the Universal Declaration of Rights of Mother Earth (2010)[36], Collective Thinking on the Rights of the Pacific Ocean, 2018 (Ocean Rights Statement hereinafter)[37], Vienna Manifesto on Digital Humanism[38], etc.

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[32] Alexandra Huneeus, Human Rights and the Future of Being Human, Vol. 112 *American Journal of International Law* (2018).
[33] *Ibid.*
[34] United Nations Harmony with Nature Programme, The Charter on the Law of the Living, 2021. Available at https://www.univ-tln.fr/IMG/pdf/charter_on_the_law_of_the_living_-_eng.pdf
[35] Declaration of Toulon, 2019. Available at https://www.univ-tln.fr/Declaration-de-Toulon.html
[36] Available at https://declarationproject.org/?p=1164
[37] Collective Thinking on the Rights of the Pacific Ocean, *Study on rights of the Pacific Ocean*, New Zealand (2018).
[38] Available at https://dighum.ec.tuwien.ac.at/dighum-manifesto/

In totality, the contributions of the above-mentioned statements can be summarized as follows;

- They emphasize the need for greater advocacy for reforms of the non-human entities in legal systems around the world.
- They emphasize the need for entity-specific rights, meaning culturally appropriate rights supported by scientific research and shared knowledge.
- They emphasize the need for recognizing the embeddedness of human interests in the non-human world, making both the human and non-human worlds entwined through a shared destiny.
- They emphasize the need for recognizing the dependency of human rights on the rights and welfare of the non-human entities.

On the subject of legal reforms, the Charter on the Law of the Living makes a direct reference to the needed reforms within legal systems and the change in "legal dynamics" for the non-human world.[39] Section 3 provides, "the interests of human beings and of other animals, as well as the integrity of ecosystems, must be prioritized. Said interests may only be affected exceptionally, measuredly and extraordinarily." Under Section 6 it provides, "it is necessary to widen each legal system, based on the criteria of the living, as well as the notion of natural persons, to include the above mentioned non-human persons. Specific and appropriate positive rights, different from those attributed to human persons, must be recognized with respect to the principles arising from this Charter". Section 6, in particular, insists on the development of specific and appropriate rights, as distinct from the rights applicable to the humans. In this regard, The Ocean Rights Statement writes of "a transformational shift" that is needed in the behavioural, societal, legal, governance and economic relationships to live in harmony with the Ocean.

The Toulon Declaration concerns the legal personality and rights of animals. It states, "in most legal systems, animals are still considered as things and lack legal personality, which alone can confer on them the rights they deserve as living beings. Believing that today, the law can no longer ignore the progress of science that can improve the consideration of animals, knowledge that has been largely underused until now. Finally, considering that the current inconsistency of national and international legal systems cannot support inaction and

[39] *Supra* note 34.

that it is important to initiate changes so that the sensitivity and intelligence of non-human animals are taken into account."[40]

On the requirement of specific rights for the non-human world, the Ocean Rights Statement provides, she (oceans) is an entity, with rights including but not limited to the right to exist, thrive and evolve, the right to integral health, the right to be free of pollution and a healthy, functioning climate system, the right to restoration and regeneration, and to continue her vital functions and cycles.

On a shared destiny and intricate bonds of the human and the non-human world, the Declaration of Mother Earth in its Preamble provides, "considering that we are all part of Mother Earth, an indivisible, living community of interrelated and interdependent beings with a common destiny. Gratefully acknowledging that Mother Earth is the source of life, nourishment and learning and provides everything we need to live well. In addition, the Statement on the Rights of Oceans provides, "we are the Ocean and the Ocean is us. The Ocean is our source of life, our family and blood. All Earth's systems and beings are related and interdependent. The Ocean has authority (mana) and life force (mauri)". The Charter on the Law of the Living speaks for "sustainable, reasonable and balanced development for present and future human and non-human generations".

On the dependency of human rights on the rights of the non-human entities, the Ocean Rights Statement provides, "we have a responsibility and obligation to conserve, protect and defend the rights of the Ocean; the rights of past, present and future generations of all beings rely on respect for the rights of the Ocean" The Declaration of Rights of Mother Earth affirms the same. It provides, "to guarantee human rights it is necessary to recognize and defend the rights of Mother Earth and all beings in her and that there are existing cultures, practices and laws that do so".

The above-mentioned Statements are commonly cited for advocacy and furthering the cause of legal rights for non-humans.

V. Theoretical Frames

In addition to the academia-backed statements, one must also look at A few theoretical frames that establish the boundaries for making claims for non-human entities. These include multi-species justice, post-humanism, and digital humanism.

[40] *Supra* note 35.

In the article *Multispecies Justice: Theories, Challenges, And A Research Agenda For Environmental Politics*, the authors make a case for re-thinking the notions of justice to respond to the "destruction of multi-species lifeways".[41] The authors write, "rethinking the subject of justice moves attention from the fiction of individuals to the actual ecological array of relationships that sustain life. As humans and other beings surround, infuse, and support each other, justice for any cannot be divorced from MSJ for all."[42] Further, it is through the prism of the "multi-species justice" (MSJ) concept that the false assumptions about the supremeness of human beings can be addressed and countered. In this regard, Plunkett states that influential works speak of the ethical status of the non-humans and how it matters in terms of accounts of justice. This is because of the combination of two facts; first, the fact that non-human animals are radically marginalized in much theorizing in political philosophy, and second, the fact that many non-human animals in our world are having a lot of bad things happen to them.[43] The idea of MSJ responds to the question about the non-human i.e. "what about those non-subjects, such as animals or natural living entities—habitats and biotopes—which cannot even fight for recognition, whose interests do not appear recognizable, and which are not eligible for consideration in the law's already institutionalized processes and structures of representation? How can those who have no voice be heard? Can those who have not yet assembled find justice as well?".[44]. According to Ulmer, the aim of MSJ is not to remove humans from research, but to deemphasize the focus on humans and recognize that non-human elements are always already present. And "knowledge frameworks that privilege the human at the expense of the more-than human could therefore be viewed as incomplete, as well as a potential injustice to non-human entities". [45]

The second frame, posthumanism, stands as a response to humanism. Humanism, according to Figdor, "situates the human species as distinct and unique from the non-human categories in terms of their cognitive capacities (superior and advanced), ability to self-reflect, reason, and communicate through language. These abilities forge the basis for developing a system of respect for all those that are humans"[46] In response, posthumanism speaks of the "human

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[41]. *Supra* note 23.
[42] *Id.* at 120.
[43] David Plunkett, Justice, Non-Human Animals, and the Methodology of Political Philosophy, *Jurisprudence* 6 (2016).
[44] Malte-Christian Gruber, Why Non-Human Rights? 32:2 *Law & Literature* 268 (2020).
[45] Jasmine B. Ulmer, "Posthumanism as Research Methodology: Inquiry in the Anthropocene", International *Journal of Qualitative Studies in Education* 3 (2017).
[46] Carrie Figdor, The Psychological Speciesism of Humanism, 178 *Philosophical Studies* 1545-1569 (2021).

beings' inextricable embeddedness in biological and technological worlds.".[47] Under posthumanism, *life* is viewed as interconnected, relational, and transversal, it then can be positioned as an interactive and open-ended process.[48] Gruber writes, today's "posthuman" humanism seeks dignity of the living, and that is the only message of the idea of human rights that we still ought to dream of".[49]

The third theoretical frame, digital humanism, speaks about the blurring of boundaries between humans and technology/AI. The Vienna Manifesto on Digital Humanism speaks of digital humanism as the humanism which "describes, analyzes, and, most importantly influences the complex interplay of technology and humankind, for a better society and life, fully respecting universal human rights." On this, writes, digital humanism, means an update of humanism-of the image of man- in the age of digitalization.[50] It is also about "preserving the value of human dignity in the context of the digital society, understood as the recognition that a person is worthy of respect in her interaction with autonomous technologies."[51]

A social robot, for instance, is "an autonomous entity that interacts and communicates with humans or other autonomous physical agents by following social behaviors and rules attached to its role." Digital humanism in this context would suggest that social robots must understand social contexts i.e. understand users' behaviour and emotions, and respond with appropriate gestures, facial expressions, and gaze. The challenge is to provide algorithms to sense, analyse situations and intentions, and make appropriate decisions."[52] These ethical considerations about the human and machine interactions would be pressing in the times to come, as the demands for social or assistive robots increases. The perspectives on digital humanism consider the vast landscape of possibilities being created by human and machine interaction.

VI. Conclusion

While there is great interest in the legal rights of the non-human, the critique of such developments is not far behind. A diverse set of reasons have been advanced to caution about

[47] *Supra* note 23 at 123.
[48] *Supra* note 45 at 6.
[49] *Supra* note 44 at 269.
[50] *Supra* note 20 at 35.
[51] Paola Inverardi, ``The Challenge of Human Dignity in the Era of Autonomous Systems", in Hannas Werthner, Erich Prem, Edward A. Lee and Carlo Ghezzi (eds.), *Perspectives on Digital Humanism 25* (Springer 2022).
[52] Nadia Magnenat Thalmann, Social Robots: Their History and What They Can Do for Us", in Hannas Werthner, Erich Prem, Edward A. Lee and Carlo Ghezzi (eds.), *Perspectives on Digital Humanism* 13 (Springer 2022).

the law's turn towards conferring rights to the non-human. Some would ask whether the law needs new theories? Are there any limits to the application of the juristic/legal person concept? Is it viable to extend the reach of existing frameworks like human rights to the non-human? What are the challenges in the way of the rights of the non-humans?

In the case of the rights of machines, caution is exercised. Take the example of the Statement on *Artificial Intelligence: An Evangelical Statement of Principles* (2019)[53]. The Statement poses a theological challenge to the growing interests in the entwining of AI and human life. The Statement provides, "while technology can be created with a moral use in view, it is not a moral agent. Humans alone bear the responsibility for moral decision making". Under Article 12, it states, "we deny that AI will make us more or less human, or that AI will ever obtain a coequal level of worth, dignity, or value to image-bearers. Future advancements in AI will not ultimately fulfill our longings for a perfect world. While we are not able to comprehend or know the future, we do not fear what is to come because we know that God is omniscient and that nothing we create will be able to thwart His redemptive plan for creation or to supplant humanity as his image-bearers" (Article 12).[54] According to Richards**,** the Evangelical Statement is sceptical that computers can become conscious moral agents (Article 3). The Statement also explores the relationship of AI to medicine, sexuality, work, war, public policy, and the future.[55]

In the context of rights of nature, Tanasescu writes, "the underlying assumption is often that all of these cases are fundamentally similar – part of a nature rights movement – and that they are (at least in theory) a radical solution to environmental degradation. But practice has not yet proven that these kinds of rights are a good mechanism of environmental protection. Instead, it has demonstrated that these rights are of various kinds, have appeared in different contexts, and embody tensions and contradictions that predate them." [56]

Many have also spoken of a research-informed approach to what the moral and legal requirements for each of the entities are. Like it was in the case of ending animal suffering (Animal Ethics).[57] The Charter on the Law of the Living also speaks of "specific and

[53] https://erlc.com/resource-library/statements/artificial-intelligence-an-evangelical-statement-of-principles/.
[54] *Ibid*.
[55] Jay Richards, New Evangelical Statement on AI is Balanced and Well-Informed, Mind Matters News (2019). Available at https://mindmatters.ai/2019/04/new-evangelical-statement-on-ai-is-balanced-and-well-informed/.
[56] *Supra* note 7.
[57] *Supra* note 16.

appropriate" rights for the non-human as different from those for the human category.[58] The critical views, like those advanced by, make it sort of mandatory to understand the diversity in approaches and arguments for rights of the non-humans.

In terms of laws' evolution, the new theoretical frames like multispecies justice. Posthumanism and digital humanism make way for re-imagining representation, democracy, and institutional governance.[59] The "non-human" category also introduces a turn towards knowledge systems that have historic validity, practical wisdom, and emancipatory potential.[60] In light of the many developments cited in the paper, it is substantiated that protecting and representing the *life* and *worth* of the non-human is a great evolutionary demand that is creating many implications for legal systems across the world.

[58] *Supra* note 34.
[59] Joe Gray, Anna Wienhues, Helen Kopnina and Jennifer DeMoss, Ecodemocracy: Operationalizing ecocentrism through political representation for non-humans, Vol 3 No 2 *The Ecological Citizen* (2020).
[60] *Supra* note 7.

ROLE OF INTELLECTUAL PROPERTY RIGHTS AND COMPETITION LAW ON INDIAN ECONOMY

Dr. Sushma Singh[61]

Abstract

Competition and new ideas are essential components of any market system. They serve as the foundation for all future growth, advancement, and efficiency. Both competition law and intellectual property rights (IPR) were intended to encourage economic progress, technical innovation, and consumer welfare. Intellectual property encompasses a wide range of rights, including patents, trademarks, and copyright, each of which has its own scope, term, and purpose. Intellectual property owners, assignees, and licensees have complete ownership over their assets. Competition legislation assures that manufacturers and providers of goods, services, and technologies effectively compete against each other in order to foster competition, market access, and customer advantage. The battle between competition laws and intellectual property rights rages on. Both legal regulation systems have unique purposes, but due to their interconnection, they cannot be regarded in isolation. As technology, research, competitive market structures, and other factors have advanced, innovation and creativity have grown increasingly vital. Various markets are governed by different regulatory systems. The mechanism's main purpose is to create an acceptable balance between the competing interests of the many stakeholders. Because the supply and demand for fundamental essentials are not regulated by the government, the free market self-regulates. As a result, in this system, entrepreneurs control the market. Due to a lack of equitable regulations, consumers suffer. The regulated market mechanism is more efficient than the unregulated market mechanism because it ensures that both the consumer's basic necessities and the entrepreneur's interests are addressed. It is one of the most essential components of the regulatory mechanism that attempts to strike a balance between societal interests and the free exercise of monopoly rights IPR grants a limited monopoly time to avoid the emergence of an endless market domination. Competition law tries to prevent harm to competitors, anti-competitive agreements, and mergers and acquisitions. This paper argues that the goals of IPR and competition law are similar in that they seek to balance the rights holders, consumers', and society's interests. The analysis shows that legislation in both professions seek to prohibit misuse of dominating positions.

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Keywords: *Economic progress, technical innovation, Consumer welfare, Regulations.*

I. Introduction

Intellectual property is that which is created by the human mind and intellect. Intellectual property and the rights attached to it have become extremely valuable in recent years. Protecting intellectual property rights (IPR) is made easier in India thanks to well-established administrative, statutory, and judicial frameworks.[62] However, competition law is a branch of law that promotes or attempts to maintain market competition by enforcing anti-competitive practices by companies. Competition law and intellectual property law are the two most important areas of law for managing the market, promoting consumer welfare, and facilitating technological transfer. As a result of competition and intellectual property laws, the economy remains dynamic and competitive. They are like two halves of the same coin since they have numerous similarities and are often complementary to one another.[63] The goals of IPR and competition law are frequently seen as being at odds with one another. Competition rules appear to be in conflict with IPRs because they restrict horizontal and vertical limits or on the abuse of monopoly position because they establish limits within which competitors can exercise exclusive legal rights over their invention. The word "competition" has a different connotation in the fields of intellectual property rights (IPR) and competition law. Licenses granted under IPR are intended to promote competition among potential innovators while also limiting that competition in a variety of ways and putting an end to that competition after a predetermined period of time has passed. ' Competition law's primary goal is to ensure that customers get the proper product at a reasonable price and with improved quality at an affordable price. These rights are used to create monopolies that deter other players from entering the market, which reduces competition and conflicts between the goals of both of these laws. When it comes to IPR, it is based on the theory of reward theory, which only serves to exacerbate the conflict between the inventor and the public.[64] It's easy to see that both laws benefit consumers while also encouraging new approaches and approaches that are better. Anti-monopoly legislation was put in place prior to enacting competition legislation in order to ensure that the monopoly power granted by the statute was not misused. Competition Act 2002 has broadly accepted intentions of IPR while framing provisions and

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[62] V.KAhuja,, Law relating to intellectual Property Rights, Edition 2019, page19.

[63]Samir Gandhi, Hemangini Dadwal and Indrajeet Sircar, 'Antitrust and Competition in India',Global compliance, https://www.globalcompliancenews.com/antitrust-and-competition/antitrust-and-competition-in-india/, (last visited on 22/01/2022.)

[64] Holyoak & Torreman, Intellectual Property Law, Oxford University Press, 2008.

does not eliminate dominant individuals due to Intellectual Property Rights. This means that a well-balanced approach is needed to create the statute while also clarifying the various jurisdictional opinions that must be taken into account.[65]

II. Importance of Intellectual Property Rights:

The term "intellectual property" refers to a set of intangible assets that can be owned by any individual or company. Because of its ability to give businesses a competitive edge, an IP asset aims to provide the same level of protection as any other physical property. Because it's so easy to replicate any unique design, logo, or feature in a web-based environment, it's more important than ever. It is possible for consumers to choose between competing entrepreneurs and the products or services they offer because of intellectual property (IP). Intellectual property (IP) protects businesses' unique, non-tangible assets, which is inherently pro-competitive. Lacking IP, less efficient producers and service providers would imitate the goods and services of their more efficient competitors in an attempt to gain customers' business. As a result, there would be no incentive for the latter to improve or to develop new products and services. The general public would suffer as a result. However, IP can only ensure competition by safeguarding genuine differences.[66] IPRs have been elevated to a level of solemn international commitment thanks to the successful conclusion of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) at the World Trade Organization. Trademarks, copyrights, industrial design rights, plant variety rights, trade dress, geographical indications, and trade secrets are all examples of intellectual property rights.[67]

Importance of Competition law: To prevent anti-competitive etiquette or unfair trade practices, many countries have drafted their own competition laws. The primary goal of competition law is to prevent market practices that are harmful to either businesses or consumers, or both, and to limit those practices that violate the ethical conduct of the market. Efforts to protect the interests of consumers and long-term viability of competition are supported by the Competition Act, 2002, which was enacted in 2002.This law encourages competition among businesses and prevents the market from being manipulated by the more powerful trading firms. Regulation of the market is the goal of competition law. This is

[65] Best IT World India Private Limited v. M/s Telefonaktiebolaget L M Ericsson (Pub) (CCI), Case No. 04/2015

[66] WIPO, -IP and Competition Policy, https://www.wipo.int/ip-competition/en/,(last visited on 25th February 2022.)

[67]Wikipedia, Intellectual property, https://en.wikipedia.org/wiki/Intellectual property, (last visited on 25th February,2022.)

accomplished by keeping an eye out for and enforcing regulations on businesses that engage in anti-competitive behaviour. The goal of competition law is to create a level playing field for producers and consumers to do business in. In order to protect new and small businesses from unfair competition, it aims to outlaw unethical tactics aimed at increasing market share.[68] Section 3 of the Indian Competition Act, 2002 states "*No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India*."[69] To put it simply, it means that the company or group of the company cannot enter into any agreement that would harm competition. It's only available in India. Section 3(5) of the said Act talks about the exception *"competition law does not affect the IPR rights. But if we study the Section 3(5) with Section 4 then we find that it also restrains the IP holders to abuse its dominant position and if they misuse its dominating position then competition law will come into the picture."* As a result, we can say that they complement rather than contradict each other.[70]

III. Role of Intellectual Property and Economy

To encourage investment in new ideas and technologies, intellectual property law plays an important role in protecting the rights of creators. Keep competitors and others from profiting off of your intellectual property without your permission. As a means of promoting innovation, the invention should be put into practise. Material costs can now be reduced by using new ideas and inventions, making them more cost-effective. Here, it's essential to stay on top of new technology developments. Others will be discouraged from exploiting the public's interest in intellectual property if there is a strong IPR statute in place. Even if legislation is well-crafted, enforcement is just as critical. Strict laws are useless if they are not properly enforced. Loopholes in the law that can be exploited will reduce the amount of innovation. When intellectual property rights are violated, individuals must be held accountable.[71]

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[68] Karney, Competition law in India, https://www.legalserviceindia.com/legal/article-1814-competition-law-in-india.html, (last visited on 28th February, 2022.)
[69] Section 3, Competition Act 2002.
[70] Ibid.
[71] Ministry of External Affair,- Intellectual Property in India (2017), https://indbiz.gov.in/intellectual-property-rights-in-india/ (last visited, 3rd March , 2022.)

As a result of IPR, the person who created a product or service now has sole ownership of it. To whomever he or she wishes, he or she is free to set a price and sell them. We can incentivize developers to create new innovations by rewarding them for their work, and they can incentivize us to do the same. A business owner can also take advantage of this privilege by charging far more than the marginal cost of the product or service. It is possible to establish a monopoly through the exercise of this exclusive right. When one company has a monopoly, the wealth of consumers and producers is unfairly distributed. There are both antitrust and intellectual property laws in the legal framework. In the market, competition plays a critical role in keeping the market in check, which in turn affects customer satisfaction. Leaders in the market wield considerable power. They are in a position to exert power and influence over the market. Developers are protected by IPR because of the consumer-producer/developer duopoly, which keeps the market alive.[72] Equilibrium is required for the market to function properly. There can be a benefit to using intellectual property rights (IPR). An exclusive IPR right can only be transferred to another party if it is owned by the rightful owner. so that the owner can sell it to anyone for a profit. Increases in market productivity are essential for India's fast-growing economy. World-class services have long been the norm in India. Improvements in technology and methods can help boost productivity. A large investment is required for innovation, which is expensive but crucial to the investment process. The rate of development in developed countries like the United States and Japan increased fivefold during the time when intellectual property laws were implemented.[73]

Intellectual property rights (IPRs) are now the subject of several competing economic theories. Many of China's more forward-thinking businesses faced brand infringement in the 1980s. Local businesses began manufacturing and reselling counterfeit goods under the guise of a well-known brand. Following the implementation of Trade-Related Intellectual Property Rights, there was a noticeable shift in the market ("TRIPS"). Because of the legislation, the companies were able to innovate and grow. Private companies are now making R&D investments. There has been an increase in Indian patent applications since TRIPS was implemented. Thanks to the new WTO system, trade-related aspects of intellectual property rights (TRIPS) are now a part of the global system for protecting intellectual property rights.

[72]Indian Institute of Technology Delhi, Intellectual Property Rights, https://ird.iitd.ac.in/content/intellectual-property-rights-ipr (last visited on 3rd March, 2022).

[73] Srija .R, The Role of Intellectual Property Rights in Economic Development(2020) https://www.legalserviceindia.com/legal/article-7335-the-role-of-intellectual-property-rights-in-economic-development.html, (last visited on 3rd March, 2022).

In accordance with the WTO agreement, all WTO members must adopt and enforce high levels of intellectual property rights protection. As one of the World Trade Organization's most important multilateral trade agreements, the TRIPS Agreement has a new and important role in global economic development. By signing this agreement, the World Intellectual Property Organization (WIPO), which promotes Economic Cooperation and Development (ECD), hoped to bring an end to the period of global intellectual property management (OECD).[74]

IV. Competition law and Indian Economy

Keeping the benefits of trade from being concentrated in the hands of a few is critical to ensuring a level playing field for everyone. It is the primary goal of competition law to ensure that there is healthy competition among the market's suppliers and that this competition is beneficial to the market's customers. Applying competition law on a day-to-day basis entails identifying markets and determining whether or not competition is effective in those markets. Firms' actions are evaluated in terms of their effect on competition and consumers. These are primarily issues of a monetary nature. [75]

In order to manipulate markets, competition is essential, as is modernization, production efficiency, and economic growth, all of which lead to prosperity and a reduction in poverty. In a competitive market, healthy efforts that benefit the poor on a large scale aren't supported by market forces. With greater market dominance comes the ability to perform monopoly, and it is widely accepted that the decline in market competitiveness is a sign of dynamic income inequality. The economic policies of a country are intended to ensure that the market is free from unfair competition by means of regulatory mechanisms. It isn't meant to impede social progress by imposing restrictions. One of the most important aspects of competition policy is that it has a positive impact on Indian economic growth as well as job creation for both the middle-class and lower-income households.[76] Competition can have broad economic effects on the amount of economic wealth available on the market at any given time, productivity of companies, and their incentives to innovate or improve the quality of their products, says an economist. It has become increasingly common for developing countries

[74]WTO, Intellectual property: protection and enforcement, https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm(Last visited on 4th March, 2022).
[75] E. Ianchovichina and S. Lundstrom, "Inclusive Growth Analytics: Framework and Application" PRP 4851 (2009).
[76] Aditya Bhatacharji, -India's Competition Policy an Assessment, Economic and Political weekly, August 2003, https://www.jstor.org/stable/4413938, (last visited on 5th March 2022).

around the world to incorporate economic growth into their efforts to eliminate poverty. Any growth strategy that favours the poor should include a robust competition policy. Since the beginning of the post-liberalization reforms in early 1990, India has made unprecedented economic and social progress. During 1990-2015, the average annual growth rate of GDP per capita was 5.2 percent; in 2016 and 2017, it increased by 6.2 percent and 6.3 percent, respectively. There are now less than 20 percent of the world's population living in extreme poverty, down from almost 50 percent in the early 1990s, as a result of this strong economic growth. Life expectancy rose from 58 years in 1990 to 68 years in 2014 as sanitation and health care improved, resulting in a 50% reduction in child mortality. Large-scale governmental reforms have contributed significantly to India's impressive economic growth rate. To reduce inflation and stabilise the currency, the new monetary policy framework aimed at enhancing inflation expectations was implemented. As part of the current government's efforts to loosen and simplify investment regulations, this contributed to an increase in inbound capital. Improved employment opportunities and a more effective education and training system are essential for a more equitable economy. Improved hygiene and sanitation, as well as a reduction in water-borne illness, have had a positive impact on health outcomes. A country's public policy objectives such as macroeconomic stability, creating employment opportunities, promoting innovation, and ensuring high living standards should not be looked at in isolation, but rather in conjunction with competition policy. This competitive environment necessitates strong regulation in order to maintain a functioning democracy that promotes the social and economic well-being of its citizens.[77]

V. Comparative analysis of intellectual property rights and competition law

It may appear that IP rights and Competition Law are at odds, but they are not; rather, they serve to restrain rigid competition, allowing individuals to invest in a dynamic one. It allows the holder to enjoy the exclusivity of his product for a limited period of time. Patent holders enjoy a period of monopolistic power and dominance during this period. As a result of such market dominance, antitrust laws will not be broken. Each law serves a different purpose as time goes on and new situations arise. In order to fully grasp the issues raised by the intersection of IPR and competition law, it is necessary to look at Indian competition law and how it was designed to do so.

[77] K.D. Raju, "Interface between Competition law and Intellectual Property Rights: A Comparative Study of the US, EU and India" 2(3) IPROA 116 (2014).

VI. Conclusion:

From the above discussion it can be concluded that these two laws appear to be at odds, but as we learned from the above study, they are actually complementary, and one comes into play when the other is abused. It is the goal of competition law to provide customers with a wide range of options and to ensure that both the manufacturer and the customer benefit from a quality product at an affordable price. In addition, IPR enables the manufacturer to be compensated for the product's sole creation, benefiting the general public in the process. Primarily, the IPR's monopoly position does not contravene the antitrust policies, but misuse of the position may. As a matter of fact, in today's economy, intellectual property (IP) and competition work together to protect the interests of consumers. Intellectual property (IP) encourages new product development and, as a result, increases market competition. Although the immediate and short-term goals of the organisation cannot be overlooked, there is enough tension between these two branches of the law that a middle way must be found. The only way to get to this middle ground is to separate the two extremes. The two spheres work independently of each other. Permitting intrusion in the end, there'll be a conflict that must be resolved by placing one above the other in terms of importance. Can be made by the government as a rule If their operations are kept separate from one another, this problem can be avoided. the issue of property and how it is granted and used must be addressed by IP. while competition law is concerned with the manner in which rights are exercised only in terms of the impact on the market of these rights. There must be a clear separation between policy and individual case decisions. Separation is necessary if the two areas are to work together effectively and complement one another in the long run. However, both laws are critical to the Indian economy's well-being. The fact that these two laws are contributing to the growth of the Indian economy is cause for celebration because India is still a developing country.

UNIFORM CIVIL CODE: GENDER JUSTICE AND EQUALITY NOT HOMOGENISING CULTURE

– SAMIRAH KHAN[78] AND DR. GHULAM YAZDANI[79]

Abstract

The notion of a Uniform Civil Code contradicts the right to religious freedom, despite the fact that it enhances equality before the law. Separate personal laws are one method that people have exercised their freedom to practise their own religion, which is especially essential for minorities. The Uniform Civil Code has the potential to weaken this right, marginalised minorities, and homogenise culture. It is erroneous to believe that India's religious plurality has resulted in disparities in personal laws. In truth, the legislation varies from one state to the other. Both Parliament and state assemblies have the right to legislate on personal laws under the Constitution. The inclusion of personal law in the Concurrent List appears to be motivated by the desire to preserve diversity. Personal laws would have been included in the Union List, with Parliament having exclusive competence to create legislation on these topics, if consistency of laws was the major aim. The strident calls for improvements in personal laws made by a number of Muslim women's organisations have been a welcome move. While completely supporting Muslim women's organisations in their fight for the eradication of many patriarchal practises under Muslim Personal Laws, the attempt to initiate a discussion on a "Uniform Civil Code" must be viewed with care and must be challenged in the current communal atmosphere. With the communal forces' onslaught on the very identity of minority communities, any attempt to advance the agenda of the Uniform Civil Code, as is being done by the government directly and via its institutions, is detrimental for women's rights because uniformity does not ensure equality. If the goal and objective are equality, the best path ahead is to amend all personal laws while also broadening the reach of secular laws.

Keywords:- UCC, Personal Law, National Integrity, Religion.

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I. Introduction

India is a pluralistic country. Since the time of the Aryans India has been the domicile of eight major faith and religious groups. Equally pleasant has been the fact that all next to mores, religious brotherhood and communal harmony have been pragmatic and sustained as a sacramental commitment by the people in India. As a result dissimilar personal laws thrived in this country to legalize personal lives of the people in agreement with the faith. From a historical point of view, various areas of Islamic and Hindu laws have remained impervious by centuries of socio-economic upheavals and political vicissitudes.

When the Constituent Assembly set out to sketch the Constitution of India in the late 1940s, it had to face no undersized task. In the context of this religious disorder and chaos, the especial concern of the Constituent Assembly was marginal and religious rights (Art.25-30)[80]. On the other hand, the drafters also sought to endow with equality in the midst of all individuals despite of caste, religion, sex or creed, as equality provisions of our constitution currently demonstrates (The endorsement of gender identical prospect in the Constitution begins with Article 14 and Article 15 reinforces it).[81]

II. Religion and the Law

Religion being a matter of personal faith must be separated from state authority. Prof Fyzee writes "*laws are impersonal and objective rules which the state applies to all its citizens without exception. But religion is based on the personal experience of great teachers; its appeal is personal, immediate and intuitive. While its rules, its rituals and its trapping can be of general application in a community, the inner core of belief is extremely personal...*"[82]. He also differentiates Shariya and religion, as Shariya embraces both law and religion in which religion is unchangeable but law is the will of the community expressed by legislature which varies from country to country and from time to time.

As far as the question whether Personal law is a "law" as per article 13 of the Constitution the court has not answered it in *Shayara Bano* v. *Union of India*[83] and has not inquired into on

[80]James Chiriyankandath, *'Creating a secular state in a religious country': The debate in the Indian constituent assembly*, 38 Commonwealth & Comparative Politics 1-24 (2000).

[81]M. Raja Ram, Indian constitution (New Age International Publishers 2009).

[82] Syed Hamid & A. A. Fyzee, A Modern Approach To Islam (Oxford University Press 2008).

[83]Shayara Bano -vs- Union of India, AIR 2017 SC 609

being fundamental rights supreme in case there arises conflict among fundamental rights and personal law and the premise of Narasu Appa Mali[84] was not overturned.

III. Article 44- Uniform Civil Code

Citizens belonging to diverse races, numerous religious values and castes not showing any similarity whatsoever subsist in the Indian sub-continent. *"Fissiparous tendencies, separatist attitudes, secessionist demands, divisive elements of casteism and communalism"*[85] have not, therefore, been uncommon.

One of the steps for the purpose of attaining national integration is the recommendation of a common civil code.[86] The application of the code ought to be on all irrespective of any differences in religion, race or caste.[87]Various areas like succession, marriage, adoption, divorce, etc. will fall within code's purview. Article 44 of the Constitution[88] directs the state *".... to endeavour to secure a uniform civil code throughout the territory of India".*

Article 44 is an idea enshrined in part IV of the Constitution and is thus unenforceable. Neither timeline nor any progression for implementation and drafting, respectively, of Article 44 has been provided in our Constitution; hence it is left for the discretion of the state to adopt suiting the time. Thus it has been the topic for debate for several decades and is used as a Political agenda by politicians. The Supreme Court held in Sarla Mudgal judgment[89] that *"the desirability of uniform civil code can be hardly doubted but it can be concretize only when social climate is properly built by the elite of the society and the statesmen, instead of gaining personal mileage, rise above and awaken the masses to accept the change."*

IV. Is Uniform Civil Code Feasible in India?

Article 44 almost undoubtedly sounds like an end to religious personal law, needing all citizens to be governed by and subjected to one secular civil code.[90] However, one should, before forming a quick opinion, oversee all the facets of UCC. This critical opinion exists because various jurist and academicians, both Indian and foreign thinkers, have written on

[84]The State Of Bombay -vs- Narasu Appa Mali, AIR 1952 Bom 84.
[85]Mohammed Ghouse, Secularism, Society and Law in India 21-45 (Vikas Publishing House1973).
[86]Visheshwar Dayal Kulshreshtha, B. M Gandhi & Jayantilal Chottalal Shah, V.D. Kulshreshtha's landmarks in Indian legal and constitutional history 298, 446 (1989).
[87]K M Munshi, *Pilgrimage to Freedom*, 1 Indian Constitutional Document, 62-63 (1967).
[88]INDIAN CONST. art. 44.
[89]Sarla Mudgal v. Union of India, AIR 1995 SC 1531.
[90]supra note 9.

UCC since independence but majority have them taken Muslim Personal Law as a point of reference. Generally, thinkers tend to ignore how other minorities perceive UCC.

Tahir Mahmood writes that;

> "*A deeper analysis of Article 44 brings forth the following elements: —*
> *1. The directive principle is addressed to the state and not exclusively to the legislature.*
>
> *2. The State is being asked to secure the code which does not necessarily mean enacting it either by parliamentary legislation or by judicial law-making.*
>
> *3. What the state is being asked to secure is that the civil code of India be uniformly applied to all the citizens of the country.*
>
> *4. The application of the code is required to be uniform throughout the length and breadth of the nation. The directive speaks of a civil code to be uniformly applicable all over the country and, as such, it casts no aspersion on any personal law.*"[91]

i) Uniform Civil Code- vs. -Common Civil Code

Prof. Faizan Mustafa in an interview with NDTV reporter Ravish Kumar[92] had proficiently pointed out that India already has civil code in the form of Civil Procedure Code, 1908, Indian Contract Act, Transfer of Property Act, Registration Act, etc. which equally applies to all India irrespective of their religion. He further said that it is only with respect to Personal law a freedom is given to individuals to govern themselves either by their own personal law or Civil law (Special Marriage Act, 1956 and Indian Succession Act, 1905).

Law is at variance from state to state. It appears that the intention of the constitution framers was not total uniformity in the sense that there should be one law for the whole country, as the power to legislate in personal law's respect has been granted to both the parliament and state assemblies as well. Thus, there can be different personal laws at least within 28 states and 8 Union Territories. It seems that the reason for personal laws to be

[91]Tahir Mahmood, Vol.11 Dharmaram Journal of Religions and Philosophies, 230 (1986).
[92] YouTube, https://www.youtube.com/watch?v=72v0cm3w7Po (last visited Mar. 15, 2022).

included in Concurrent List is the preservation of legal diversity. Thus, it can be safely inferred that *`one nation, one law'* is not what our Constitution really envisages.

Perhaps by "uniform" it is understood by us that every citizen ought to be subjected to the same law, regardless of their religion, identity and community. But when the freedom to practice religion is anchored by the personal law; fundamental rights may be violated by state intervention. Further, it is decided by whom what is required by the religion: All the coreligionists or the custodians? What social and legal meaning is to be given toArt.51-A (f), which envisages the fundamental duty of every citizen *"to value and preserve the rich heritage of composite culture"*? When may this clash with Art.51-A (e) that speaks of the need to *"renounce practices derogatory of women"*? The duty (in clause *"h"*) to *"develop the scientific temper, humanism and the spirit of enquiry and reform"* social inclusion is reinforced in the state and religion. Serious consideration is warranted from all sides on how to have the best of legal controls over the religious practices that hurt human rights.[93]

ii.) UCC- A Tool for National Integration

One of the conditions favouring UCC is that it would serve the purpose of national integrity. Several states have been provided certain protections by the sixth schedule of the Indian constitution. While various tribal laws shield systems which are matriarchal in regards to family organizations, some of these also protect provisions which are against the interest of women. Further provisions are there which allows for complete autonomy on matters pertaining to family law to which the local panchayats can also adjudicate and it, once again, follows its own procedures. Thus, it is to be borne in mind, while framing a law that there should be no compromise of cultural diversity to the extent that the territorial integrity of the nation is threatened by reason of our urge for uniformity.

iii.) Would Secular Personal Law Serves the Purpose?

It is not necessary that a secular personal law would serve the goals of equality enshrined in our Constitution. The already existing secular law on marriage and divorce that is Special Marriage Act, 1956 is a good example reflecting several lacunas and biasness apparent in its evaluation. The mandatory 30 days' notice period before registering marriage under SMA (sec. 5) gives ample opportunity to the so-called *"custom ke rakhwale"* to oppose such marriage and harass the intending couple. Moreover, the clause which makes the consenting

[93]Upendra Baxi, *Securing the Code*, The Indian Express, 2016.

age of girl and boy as 18 and 21 years old respectively is a manifestation of Indian attitude of preferring younger girls for marriage. Provision which protects the Personal Succession law of only Hindus contracting civil marriage whether within or outside the community is a classic example of favouritism with respect to the majority.

All personal law, if do not prohibit, recognizes child marriage as valid marriage. The secular law, Prohibition of Child Marriage Act, 2006 (PCMA) prohibits child marriage, but various provision considers it as a valid marriage which can be avoided at the option of the party who was minor at the time of marriage. But child marriage still take place and hence Law cannot ban child marriage until right conditions has been created where parents do not fear for their girls getting raped and must be virgins when they marry. The state should ensure a secure environment for females.

Goa is the only state which has Uniform Civil Code, but then it is imperative to mention it is not an ideal code as it permits bigamy if a man's wife does not bear a child till the age of 25 or if a male child is not born to her till the age of 30.

iv.) Incompetency of Legislators

One cannot overlook the miserable truth that our majority legislator lacks the potential to frame legislation at a go which would be Just. The legislator hardly pays any heed to the true needs of the people and the social implications of the law. The present contention can be substantiated by the Amendment made in 2012 in Anand Marriage Act, 1909 which enabled Sikhs to get their marriage registered under the said act and not Hindu Marriage Act, 1956. This year in the month of June, Maharashtra government has come up with a draft of the proposed Boudha (Buddhist) Marriage Bill 2017 which lays down the process to be followed by the Buddhist community while solemnizing their marriage as per their own traditional rituals. The enactment of this legislation shows the incompetency of our law maker and their petite understanding of the existing law. The Hindu Marriage Act, 1956 provides sufficient safeguard for custom. It is suggested that as the four communities which are governed by the 1955 to 1956 Acts have been listed in their opening provisions, from their titles just delete the word “Hindu” and replace it with “every person governed by this act” in the inside provisions and making it look Secular on its face. With the said innocuous changes, the Acts may be perfectly acceptable to Sikhs and Buddhists.

V. Conclusion

With the communal forces' onslaught on the very identity of minority communities, any attempt to advance the agenda of the Uniform Civil Code, as is being done by the government directly and via its institutions, is detrimental for women's rights because uniformity does not ensure equality. If the goal and objective are equality, the best path ahead is to amend all personal laws while also broadening the reach of secular laws. Legal pluralism and Constitutional goal of equality and secular state has to be respected while amending personal law. We should remember that social reforms are not brought by mere normative changes; instead, the state should bring reform within each personal law and move toward a sophisticated society. It's better to have Uniform Civil Law and not Common Civil law in order to slowly align all communities on Constitutional values.

CORPORATE GOVERNANCE AND COVID-19 PANDEMIC – A NEED TO REVISIT THE CORPORATE GOVERNANCE FRAMEWORK IN INDIA

Shruti Nandwana[94]

Abstract

Corporate governance reforms all over the world have been introduced as a response to crisis management. These crises are generally in the form of corporate misbehaviour such as excessive risk taking by firms, accounting frauds, insufficient disclosures, poor or lack of regulation etc. However, the COVID-19 pandemic has posed the corporates with a crisis which neither emanates from their misbehaviour nor from the lack of regulation or control. Governments all around the world-imposed lockdowns and controlled functioning of the corporate entities as a response to mitigate the spread of the virus. While this helped to a certain extent in controlling the pandemic, the impact it has had on the economy and the functioning of corporate bodies is immense. Several relaxations were made by regulatory bodies for corporations to be able to comply with the statutory requirements such as permitting virtual Annual General Meeting, relaxing limits for filing disclosures etc. In India, these relaxations are seen in the form of relief measures under the Companies Act, 2013, relaxations in the compliances to be made under SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 and relaxations in filing audited accounts to name a few. The present research aims to look into the relaxations and reliefs provided to corporations to cope with the COVID-19 pandemic and their impact on the corporate governance of these entities. The paper would first analyse the conceptual framework of corporate governance from the perspective of COVID – 19 pandemic. The paper would then critically evaluate the relief measures and relaxations provided to corporates in India during to COVID-19 pandemic. It would then move on to evaluate their impact on the functioning of the corporates and look into what further challenges are posed to corporates in these testing times. The paper would conclude by suggesting ways in which the corporates can strengthen their governance mechanisms in these testing times of COVID-19 pandemic.

Keywords*: COVID-19 pandemic, corporate governance, stakeholder theory, shareholder primacy, governmental measures.*

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I. Introduction

Corporate governance is concerned with the ethical and transparent working of an organization. Larcker and Tayan define corporate governance as follows, "*Corporate Governance is a collection of control mechanisms that an organization adopts to prevent or dissuade potentially self-interested managers from engaging in activities detrimental to the welfare of shareholders and stakeholders*".[95] Corporate governance includes in its ambit a wide spectrum of elements such as legislation, the power and role of the board, independence of the board, code of conduct with respect to operational and financial reporting, risk management, audit committees, director compensation etc.

The importance and need for codes of corporate governance came to focus in the wake of the corporate scandals such as the Enron Scam, the Watergate Scandal, the Satyam Scam to name a few. Thus, corporate governance reforms are generally a response to crisis and a means of mitigating further crises. However, the COVID-19 pandemic has posed a crisis which is not of a form which would have been foreseen by the companies or governments. The COVID-19 pandemic has not only shocked the economy but has the potential to affect corporate governance severely. The pandemic has posed the governments and the boards of companies to adopt corporate governance policies which helps them both in sailing through in the current crisis as well as ensures the survival of the companies. Nations were forced to go into lockdown to curb the virus and this had an immense impact in how the companies functioned. As a response to this Governments all over the world have provided companies with relaxations and relief measures to ensure that their working remains smooth. In India as well, the Ministry of Corporate Affairs (MCA) and Securities Exchange Board of India (SEBI) provided companies with relaxations in holding their meetings and such other compliances. While these reliefs have helped the company to adapt to the pandemic in the short-term, there is a need to revisit their governance structures to adapt the companies to the long term effect of the pandemic.

Corporate governance norms evolved with a shareholder primacy theory, however over the last decade the focus of corporate governance has shifted from shareholders to stakeholders at large. Indian laws have also been amended to incorporate the Stakeholder model of corporate

[95] David Larcker & Brain Tayan, Corporate Governance Matters: A Closer Look at Organizational Choices and their Consequences pp 8 Pearson Education (2nd Ed. 2011).

governance.[96] However, the pandemic has made the corporates realise the importance of following the stakeholder model to ensure the continuity and success of the company.

The paper delves into the shareholder primacy vs. stakeholder theory of corporate governance to highlight which theory should corporations adopt and implement in this new crisis. The paper then discusses and analyses the amendments introduced by the government in the Companies Act, 2013, and SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 in order to provide companies with certain relaxations in their annual compliances to deal with the COVID-19 pandemic. The paper further discusses the challenges the boards of companies would face in the years to come because of the impact of the pandemic and suggests solutions for the boards to adopt in order to ensure that their governance policies are framed in a way to help in efficient working of the organization.

II. Corporate Governance in context of COVID-19

The major theoretical debates around corporate governance boil down to two major theories: the shareholder primacy vs. stakeholder theory. All major theories on corporate governance find their genesis from these theories. An understanding of these two becomes even more important in wake of the COVID-19 pandemic, since the pandemic has highlighted that corporations are not merely profit-making entities, rather corporates have come forward as organizations which have contributed majorly towards societal commitments. It is now debated that corporates should move towards the stakeholder theory in order to survive the pandemic rather than concentration on wealth generation for the shareholders only.

i. Shareholders Primacy Theory

Shareholder primacy theory states that shareholders give their money to the company's managers who are responsible to spend it only in the way which is approved by the shareholders.[97] In the words of Milton Friedman "There is one and only one social responsibility of a business – to use its resources and engage in activities designed to increase its profits so long as it…engages in open and free competition, without deception or fraud"[98] Thus, as per the shareholders primacy theory, the only responsibility a company owes is towards its shareholders and the company is responsible to function in a manner so as to increase shareholders wealth.

[96] The Companies Act, 2013 has incorporated various provisions to include the stakeholder model of corporate governance.

[97] Andrew Keay, Shareholder Primacy in Corporate Law: Can it Survive? Should it Survive?, 7 ECFR 369 (2010)

[98] M. Friedman, Capitalism and Freedom, 133 Chicago: University of Chicago Press,(1962)

Berle in the classic debate called the Berle-Dodd debate[99] in the 1930s developed the shareholder primacy model. He argued that in essence corporate law is a variant of the law of trust in which the managers owed a fiduciary duty to manage the corporation for the interest of the shareholders.[100] He described this in the following way :

> "[A]ll powers granted to a corporation or to the management of a corporation . . . are . . . exercise only for the ratable benefit of all shareholders as their interest appears."

His argument was based on the conception that shareholders are the owners of a company and the managers owe obligations to shareholders as trustees or agents of the owners. His foundation for drawing on the trust law was to constrain the managers discretion which he considered would lead to the managers acting in their own interest rather than owing fidelity to the shareholders who were the owners of the corporation. [101]

This gave way to the progress of the theoretical dialogues on corporate governance in the ground-breaking work of Berle and Means[102] where they underscored the agency problem associated with modern corporations. They stated that governance in companies demonstrated agency cost associated with the separation of ownership and control in companies, which results in self-interested managers to take corporate decisions for their own benefit and hence abuse their position and power. They presented this problem by means of the following analogy:

> "*It has often been said that the owner of a horse is responsible, if the horse lives he must feed it; if the horse dies, he must bury it. No such responsibility attaches to [the owner of] a share of stock. The owner is practically powerless through his own efforts to affect the underlying property. The spiritual values that formerly went with ownership have been separated from it……the responsibility and the substance which have been an integral part of ownership in the past are being transferred to a separate group in whose hands lies control*".

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[99] Barbara Marie L'Huillier, What does "corporate governance" actually mean?, pp.300-319,Corporate Governance, Vol. 14 Issue (2014).
[100] Adolf Berle, Corporate Powers as Powers in Trust, 44 HARV. L. REV. 1049, 1074 (1931).
[101] Id.
[102] A. A. Berle, & G. C Means, The modern corporation and private property. Macmillan, New York, (1933).

The role of corporate governance thus became to reduce the agency cost associated with a company and to ensure that the managers work for the benefit of the shareholders who were in essence the "owners" of a company and not merely in self-interest.

ii. Stakeholder Theory

Stakeholder theory on the other hand states that corporate managers owe a duty to the shareholders as well as to "*individuals and constituencies that contribute, either voluntarily or involuntarily to [a company's] wealth-creating capacity and activities, and who are therefore its potential beneficiaries and/or risk bearers*"[103] i.e. to the stakeholders of the corporation.

In the Berle-Dodd debate stated above, Dodd responded to the conception of managers to be only trustees of shareholders by stating that managers "should concern themselves with the interests of employees, consumers, and the general public, as well as of the stockholders."[104] He wished to distance corporate law from private law stating that the public opinion was shifting law to a view where business corporations have "a social service as well as a profit-making function."[105]

The starting point of the stakeholder theory can be traced back to Freeman who described stakeholders as "*any group or individual who can affect, or is affected by, the achievement of a corporation's purpose*".[106] The essence of the theory can be encapsulated by the two questions posed by Freeman. The first being that "*What is the purpose of a firm?*" which led the managers to create the feeling of shared value and bring together the key stakeholders which drive the company forward, navigating it to generate improved performance in terms of both business goals and financial metrics of the marketplace. The second question which the theory poses is "*What is the responsibility of the management of the firm to its stakeholders?*". This question forced the managers to delineate as to how they wanted to carry on the business i.e. what nature of relations they wished and in fact needed to build with the stakeholders to meet their business purpose.[107]

The stakeholder theory aims to create a balance between the interest of all stakeholders of a company. It states that the company is a social entity and if a company takes care of all its

[103] J.E. Post, L.E. Preston and S. Sachs, Managing the Extended Enterprise: The New Stakeholder View, California Management Review 45 no. 1 (fall 2002).
[104] Merrick Dodd, For Whom are Corporate Managers Trustees?, 45 HARV. L. REV. 1145, 1156 (1932).
[105] Id. at 1148.
[106] R.E. Freeman, The politics of stakeholder theory, pp. 409-421 Business Ethics Quart, Vol. 4(4),. (1994).
[107] Id.

stakeholders, it would increase its profits in the long run. Thus, the stakeholder theory contemplates a company as a social entity socially responsible towards all those it impacts.

iii. Corporate Governance Theory Relevant in the COVID-19 Pandemic

The pandemic has demonstrated that corporations need to pay attention to long term plans rather than short term ones. The interest of the companies lies not in the short-term wealth creation for shareholders rather in survival and future value creation which can be achieved by taking care of all its stakeholders such as employees, customers, creditors and the society at large. COVID-19 pandemic is resulting in resetting the corporate priorities. With the possibility of a further crisis and the need to sustain in the times post pandemic, the corporates need to focus on (i) survival, (ii) value creating stakeholders; and (iii) long term shareholder value.[108]

The agency theory of corporate governance has shareholder primacy as its cornerstone, however, the pandemic has highlighted the importance of each stakeholder of the company and how they add to the ability of the company to function in its day to day activities, let alone survive and succeed. During the pandemic companies struggled since their customers diminished, some saw a reduced workforce which consisted only of essential employees, for some issues such as disruptions in supply chains, debts or insufficiency of capital to carry on functions cropped up. With the onset of the pandemic, Boards of companies started taking updates on the situation of each of their stakeholders with most boards declaring safety and health and safety of employees and customers to be the priority.[109]

The abandonment of shareholders primacy theory started creeping in around the early 2010s however, it reached its peak in 2019 at the Business roundtable in the United States which proposed that companies must work for the benefit of all stakeholders which includes employees, customers, suppliers, shareholders and the communities.[110] Companies globally have also started including the Environmental, Social, Governance (ESG) criteria in deciding executive compensation.[111]

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[108] Paul Strebel, COVID-19 Is Turning The Tables On Short-Term Shareholders, IMD, (February 25, 2022 , 10.30 am), https://www.imd.org/research-knowledge/articles/COVID-turning-tables-short-term-shareholders/.
[109] Lynn S. Paine, Covid-19 Is Rewriting the Rules of Corporate Governance, Harvard Business Review, (May 25, 2021 , 12.30 pm), https://hbr.org/2020/10/covid-19-is-rewriting-the-rules-of-corporate-governance.
[110] Business Roundtable, Statement On The Purpose Of The Corporation (2019), (February 26, 2022, 2.00 pm) https://s3.amazonaws.
com/brt.org/BRT-StatementonthePurposeofaCorporationOctober2020.pdf (last visited January 18, 2022).
[111] Stavros Gadinis & Amelia Miazad, Corporate Governance and Social Risk, VAND. L. REV. 16-17.

The COVID-19 pandemic has had a considerable impact on most companies in India as well. Most companies were ill prepared to provide work from home facilities for their employees. National and state lockdown lead to disruption of supply chains.[112] Since sales dropped, the creditors payments were at a risk. This led to an adverse impact on the stock prices of companies and the stock markets crashed. This further led to erosion of the shareholders wealth. Due to the fall in revenues, certain companies laid-off their employees in order to ensure their own survival. The society as a whole suffered since companies did not carry out their corporate social responsibility efficiently in the past.

Companies need to revisit their corporate governance policies to ensure their policies take into account the interest of all the stakeholders of the company. It is only when all stakeholders work in coherence and are taken care of, that the shareholders wealth would grow. Debates on the efficacy of stakeholders theory in enhancing the companies performance have existed since long, however, the pandemic has provided corporations with an opportunity to test the stakeholders theory.[113] The difference between the traditional corporate governance functions and stakeholder governance functions relevant in the post-COVID-19 era would include change in the functioning of the organisation in respect of how the management undertakes its activities.[114] In terms of oversight functions of a corporation, the focus has to shift from the oversight of the company's affairs for the purpose of maximization of shareholders value to the stakeholder focused oversight for creation of shared value for all stakeholders. The primary focus has to shift from accomplishment of financial performance to accomplishment of non-financial ESG as well as financial performance. With respect to managerial performance, the focus has to shift from short term performance to sustainable performance and business continuity. With respect to regulatory compliances, the focus has to shift from compliances pertaining to promoting the concept of shareholder primacy i.e. financial compliances to compliances related to financial as well as non-financial compliances such as those related to environmental, social and human capital.

[112] Nexdigm Private Limited India: Impact Of COVID-19 On Supply Chain, Mondaq, (May 26, 2021 , 3.00 pm) https://www.mondaq.com/india/operational-impacts-and-strategy/987330/impact-of-covid-19-on-supply-chain.
[113] Martin Gelter and Julia M. Puaschunder , COVID-19 and Comparative Corporate Governance, ECGI Working Paper Series in Law, (February 26, 2022, 5.00 pm) https://ecgi.global/sites/default/files/working_papers/documents/gelterpuaschunderfinal.pdf.
[114] Zabihollah Rezaee & Nick J. Rezaee, Stakeholder Governance Paradigm in Response to the COVID-19 Pandemic, Journal of Corporate Governance Research, Vol. 4, No. 1, (2020).

III. Enabling Corporate to function in the Pandemic: Measures taken by the Government

In order ease the burden of compliances on companies in the wake of the COVID-19 pandemic, the Government of India through its regulatory bodies such as Ministry of Corporate Affairs (MCA) and Securities Exchange Board of India (SEBI) has provided the companies with certain relaxations with respect to their meetings, filings and compliances. These were made to ensure that the working of the companies is not affected due to the pandemic. Some of the major relaxations provided to company under the Companies Act, 2013 and the various SEBI Regulations in order to cope with the COVID-19 pandemic are as follows:

1. **Company Affirmation of Readiness (CAR) – 2020 –** with the onset of the National Lockdown in India, the MCA on 23rd March, 2020 rolled out a web form to be filled in by companies and LLPs. It was a step towards sensitizing the corporates to fulfil their social obligations towards their employees during the pandemic. The companies and LLPs were advised to devise a policy for their employees to work from home as a measure to combat the pandemic. It was by no means a mandatory compliance to be done by companies, but was only a voluntary form to be filled in by companies and LLPs to show their readiness to deal with the situation at hand. The last date to fill in the form was 31st March, 2020 and it was withdrawn on 14th April, 2020.[115] This was the first step taken by the MCA to prepare and advise the companies and LLPs to be prepared for the pandemic.

2. **Meetings of the Board to be Conducted Through Virtual Means** - In order to ease the requirement to hold Board meetings by means of physical presence of Board members, the MCA amended the Companies (Meetings of the Board and its Power) Rules, 2014 to allow board meetings to be conducted by means of Video conferencing on certain restricted matters such as the approval of Boards report, annual financial statements, prospectus and the matters which relate to mergers, acquisitions, mergers, demergers and takeover. [116] The said relaxations have been given till 30th June 2020 and the companies are required to duly comply with Rule 3 of the Companies

[115] Vinod Kothari and Company, COVID-19 preparedness: some questions on MCA Form CAR-2020, Vinod Kothari Consultants, (May 26, 2021 , 9.00 pm), http://vinodkothari.com/2020/03/covid-19-faq-on-mca-form-car-2020/.

[116] Ministry of Corporate Affairs notification dated 19th March, 2020, (February 26, 2022, 9.30 pm), http://www.mca.gov.in/Ministry/pdf/Rules_19032020.pdf.

(Meetings of the Board and its Power) Rules, 2014 for conducting the meeting by virtual means.

3. **Increasing Gap Between Two Board Meetings –** understanding the difficulties which have arisen due to the pandemic and keeping in mind the numerous requests raised by the stakeholders, MCA has extended the maximum time intervals which are required to be kept between two board meeting to 180 days from 120 days for the first two quarters of the financial year 2021-2022.[117]

4. **Meetings of the Independent Directors –** The Independent directors of a company are mandated to hold at least one meeting in a financial year without the presence of other directors. In light of the pandemic, the MCA considered that it would not have been possible to physically hold such a meeting prior to 31st March, 2020. Hence the MCA vide its circular[118] dated March 24, 2020 stated that the inability of Independent Directors to hold such a meeting for the financial year 2019-2020 would not be considered as a violation of the law. However, the circular clarified that the Independent Directors "may share their views amongst themselves through telephone or e-mail or any other mode of communication, if they deem it to be necessary."[119]

5. **Expansion in Corporate Social Responsibility (CSR) Activities –** the MCA has enlarged the ambit of activities which can be undertaken by the companies in furtherance of their statutory obligations of CSR. CSR funds can now be spent for activities related to providing relief for COVID-19 and contributions made to PM-CARES Fund are also eligible for CSR activities.[120] Activities such as creation of health infrastructure for COVID care, manufacturing and supplying oxygen concentrators, oxygen cylinders and medical necessities related to COVID-19 are also brought within the ambit of CSR activities.[121]

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[117] Ministry of Corporate Affairs, General Circular No. 08/2021, (February 26, 2022 10.30 pm), http://www.mca.gov.in/Ministry/pdf/GeneralCircularNo8_03052021.pdf.

[118] Ministry of Corporate Affairs, General Circular No. 11/2020, (February 26, 2022, 10.30 pm) https://www.mca.gov.in/Ministry/pdf/Circular_25032020.pdf.

[119] Id.

[120] Ministry of Corporate Affairs, General Circular 10/2020 dated March 23, 2020, (February 26, 2022, 10.00 am) http://www.mca.gov.in/Ministry/pdf/Covid_23032020.pdf and MCA Office Memorandum CSR-05/1/2020-CSR-MCA.

[121] Divya J Shekhar, Inside the reshaping of CSR in India during Covid-19, Forbes India, (February 26, 2022, 10.30 am) https://www.forbesindia.com/article/take-one-big-story-of-the-day/inside-the-reshaping-of-csr-in-india-during-covid19/67821/1.

6. **Conducting of Annual General Meetings (AGM) and Extraordinary General Meeting (EGM)** – the MCA had vided its circular dated 8th[122] and 13th[123] April 2020 had provided companies the relaxation to conduct its EGM by virtual means. The MCA further recognized that AGMs constitute an indispensable part of the functioning of a company and that it would be impossible to conduct AGMs physically given the pandemic situation and national lockdown in the country, on 5th May, 2020[124] by means of a circular permitted company to conduct AGM virtually. It had placed certain conditions and qualifications on the conducting of AGMs by companies. The details of the same are given below in Figure 1 and Figure 2.

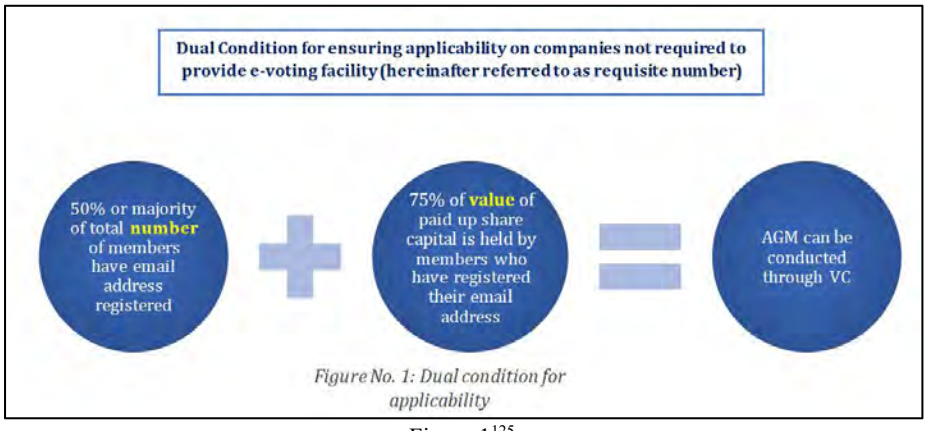

Figure 1[125]

[122]Ministry of Corporate Affairs, General Circular 14/2020 dated April 8, 2020, (February 26, 202211.00 am) https://www.mca.gov.in/Ministry/pdf/Circular14_08042020.pdf.
[123]Ministry of Corporate Affairs, General Circular 17/2020 dated April 13, 2020, (February 26, 202211.30 am) https://www.mca.gov.in/Ministry/pdf/Circular17_13042020.pdf.
[124] Ministry of Corporate Affairs, General Circular 20/2020 dated May 5, 2020 , (February 26, 2022, 12.30 pm) https://www.mca.gov.in/Ministry/pdf/Circular20_05052020.pdf.
[125] Vinod Kothari and Company, FAQs on conducting AGM through VC, Vinod Kothari Consultants, (February 26, 2022, 9.00 pm), http://vinodkothari.com/2020/05/faqs-on-conducting-agm-through-vc/.

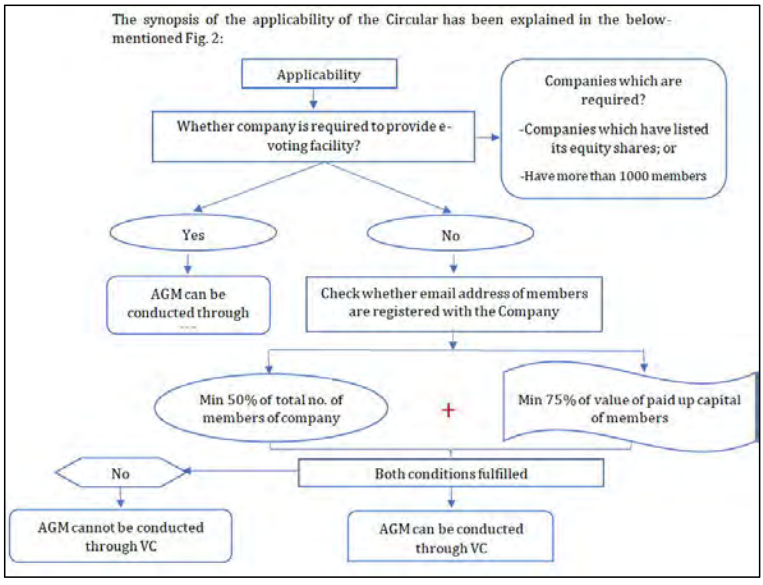

Figure 2[126]

7. **Rights Issue Under SEBI (Issue of Capital and Disclosure Requirement) Regulations, 2018 (ICDR Regulations)** - Amidst the national lockdown and economic breakdown of companies, SEBI with an intent to make capital easily available to companies, eased the ICDR Regulations with regard to Rights issue. The 21st April 2020 circular[127] provided temporary relaxations to companies to raise funds from rights issues which open on or before 31st March, 2021. SEBI has provided relaxations in the preconditions related to listing of equity shares of the issuer company reducing it to 18 months from 3 years. The average market capitalization which an issuer company should have is also reduced to one hundred crore from two hundred and fifty crore rupees. The compliance of the issuer company with the SEBI (Listing Obligations and Disclosure Requirement) Regulations (LODR Regulations) has also been reduced to 18 months from 3 years. Earlier, in case a company had any show cause notice or prosecution initiated against it or its whole time directors or promoters it was ineligible to raise money through fast track rights issue. However,

[126] Id.

[127] Relaxations from certain provisions of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 in respect of Rights Issue, Apr 21, 2020, Circular No.: SEBI/HO/CFD/CIR/CFD/DIL/67/2020, (February 26, 2022, 10.00 pm),https://www.sebi.gov.in/legal/circulars/apr-2020/relaxations-from-certain-provisions-of-the-sebi-issue-of-capital-and-disclosure-requirements-regulations-2018-in-respect-of-rights-issue_46537.html.

this has now been relaxed to allow companies by allowing companies to make rights issues by disclosing the above with respect to the issuer company as well as its group companies and the adverse impact of the same in the letter of offer which is issued. Relaxations are also provided to companies to make rights issues if they have settled the violations made by them under securities laws or have followed the directions which were given under the settlement order. Relaxations are also given for submission of audit reports, minimum subscription and changes in minimum threshold for exemption in filing of the letter of offer.

8. **Extension in Time to Pay Charges, Fees etc and Filing Of Forms** - MCA and SEBI have provided companies with extensions in payment of interests and charges on various deposits, debentures, charges etc. to help companies cope with the pandemic situation and fall in earnings. Due date for filing returns and forms has also been extended by MCA. [128]

The MCA and SEBI stepped up to provide temporary reliefs to companies in order to cope with the pandemic, however the impact of these reliefs in the long run is yet to be ascertained. The measures taken are reliefs in holding of board meetings, AGMs and independent directors meetings, extension in timelines for mandatory disclosures etc. which are the cornerstones of corporate disclosures. The reliefs granted were in the nature of temporary reliefs till the financial year 2020 ended. However, the reliefs had to be extended in the light of the second wave of the COVID pandemic which has hit India. Impact of these on the working of the corporations is a moot question since timelines are being extended continually because of the pandemic.

IV. Re-framing Corporate Governance Norms: The way forward

The COVID-19 pandemic has highlighted that the corporate governance policies in India are not adequately prepared for management of a crisis of this magnitude. What is now certain is that the pandemic would have an impact on the way companies are governed in the long run and this would definitely involve certain changes in how governance codes are formulated in a company. Amidst the changing regimes in the governance mechanism in the pandemic, the directors would have to evolve their role to manage the organization in order to ensure

[128] Calendar for revised timelines for submission of compliance filings under various Regulations due to COVID-19 pandemic, (February 26, 2022, 9.00 am) CAIRR https://ca2013.com/clarifications/calendar-revised-timelines-submission-compliance-filings-various-regulations-due-covid-19-pandemic/.

survival in the long run. The pandemic has made clear that maximization of shareholders wealth is not the only objective of an organization. The Companies Act, 2013 mandates that "A director of a company shall act in good faith in order to promote the objectives of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of the environment."[129] These duties of a director should be assumed by the company in letter and spirit to ensure that the company moves towards a stakeholder oriented model of governance. Ensuring that work from home policies are made applicable in essential cases even after the pandemic ends, ensuring their health and social security and the overall wellbeing of employees should be a part of the policies which are made by the Board. One of the most recent examples of the same is that of Reliance Industries which has rolled out the largest COVID-19 vaccination drive called "R-Suraksha" for its employees and their families.[130] The definition of family for the purposes of the vaccination drive includes "spouse, parents, grandparents, parents-in-law, eligible children and siblings. Besides, the vaccination drive is not limited only to the current employees, but to its retired employees and their family members."[131] This is a step taken by the company to safeguard its employees against the pandemic and is an example of the stakeholder theory of corporate governance.

The ambit and scope of activities covered under corporate social responsibility will also undergo a major change post the pandemic. The MCA has amended the provisions on CSR to include a wide variety of activities related to COVID-19 pandemic and health case within its ambit. However, post the pandemic, the companies have to keep in mind the inclusion of environmental, social and governance issues (ESG) into decision-making.

The role of the government, boards of companies, institutional investors and the general public needs to be renewed to form laws, policies and codes with respect to corporations so that they pay greater attention and play an active role not just in earning profits but also in addressing societal problems. COVID-19 should be taken by the Board of Directors of companies as a lesson to create an environment in the company where the board actively monitors its relationship with its stakeholders. This might include continuing practices

[129] Section 166(2) of the Companies Act, 2013.

[130] Reliance conducts mega COVID-19 vaccination drive for employees, family members, Firstpost, (February 26, 2022 , 10.00 am) https://www.firstpost.com/india/reliance-conducts-mega-covid-19-vaccination-drive-for-employees-family-members-9660531.html.

[131] Reliance to Vaccinate All Its Present, Retired Employees in Biggest Inoculation Drive by a Corporate, News18 India, (February 26, 2022, 10.00 am) https://www.news18.com/news/india/reliance-to-vaccinate-all-its-present-retired-employees-in-biggest-inoculation-drive-by-a-corporate-3782171.html.

developed during COVID-19 in order to cater to the needs of the employees, customers, creditors and community at large. Boards of companies must also walk an extra mile to ensure that trade-offs between the concerns of its several stakeholders are managed in such a way that they are in harmony with their obligations towards these groups as well as with the long-term well-being of the company.

Another important aspect which the Indian corporate sector needs to keep in mind is the threat of cyber-attack. COVID-29 has resulted in many companies permitting their employees to work from home in order to cope with the lockdowns and ensure the continuity of business. Major activities of the companies such as its Board Meetings, AGM, audit information and confidential information are kept on a virtual platform in order to ease the working during pandemic. However, this has resulted in greater vulnerability towards cyber-attacks. Companies need to ensure that their IT policies and working are efficient to ensure that the data and information of the company is safe from being exposed.

V. Conclusion:

Governance changes made by companies during the pandemic would not automatically revert. They might be seen as a temporary relaxation at the present but would have a long-term impact in their functioning. Corporates need to adopt an evolutionary method of change and adapt to the changes brought about in the laws and policies in such a way that they come out of the pandemic in a stronger and more resilient way.

Companies need to move towards the stakeholder theory of corporate governance in order to ensure long term survival and wellbeing of the company. Further, the impact of the amendments and relaxations made by MCA and SEBI is yet to be seen but companies must ensure that the pandemic does not result in lapses in their functioning. To recapitulate, it seems that a continued pandemic would mean that companies will not only have to foster an extra resilient financial structure, but also act as a socially responsible entity in order to survive in the long-term.

RE- DRAWING THE DIMENSIONS OF FREEDOM OF SPEECH AND EXPRESSION: LEGAL REGULATION OF OTT PLATFORMS

Meher Sachdev[132]

Abstract

Over-the-top (OTT) refers to network-driven services that bring value to customers without the involvement of the network company service provider in planning, marketing, provisioning and service. In fact, the term means to provide online content unlike mainstream media such as radio and cable TV. By September 2020 about 15 major platforms in India signed the pending code of conduct. OTT services have created a consistent way to distribute such content. That has led to a situation where similar content may be screened in cinemas and on television, but not in broadcast media as content management on paid OTT services does not exist. The present paper focuses on studying OTT based entertainment platforms such as Netflix, Amazon Prime, Zee5 etc. from the perspective of Right to Freedom of Speech and Expression. In recent times, there have been many complaints about regulating such platforms. The major areas of concern with regard to the OTT platforms have been use and portrayal of violence, the inappropriate adult material, controversial and blasphemous content etc. amongst others. A few complaints in the form of public interest litigations were also filed previously to regulate forums but were rejected claiming that there were adequate regulatory provisions to deal with problems. Therefore, the present paper makes an attempt to analyze whether there is a need to regulate OTT platforms and assess if the existing laws are sufficient to regulate the same. Different measures adopted by various countries across the globe shall also be discussed and emphasis shall be laid on landmark and recent judicial pronouncements and case studies on the subject matter while addressing the key research questions concerned. The author will rely upon Doctrinal Research methodology to undertake the research in hand.

Keywords: *OTT (Over the Top) Platforms, Media, TV, Film Board, Digital Platforms, Freedom of Speech and Expression etc.*

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I. Introduction and Conceptual framework:

Over The Top Platforms, (hereinafter referred as OTT Platforms) have witnessed a significant amount of growth, popularity and engagement in the past few years. It is important to note that the rise and growth of OTT Platforms portray nothing short of a revolution in the media and entertainment industry. In today's world, the engagement, retention rate and viewership of OTT Platforms have risen to such an extent that it has completely transformed the traditional notion of consuming content across various entertainment channels such as movie theatres, television, special screenings etc. amongst others. During the COVID-19 Pandemic, since the cinema theatres were closed, OTT Platforms witnessed a significant surge and growth in its viewership and premium subscriptions. It is evident from the fact that OTT platforms such as Amazon Prime, Netflix, Voot, SonyLiv, Zee5 etc. saw a 45% increase in the number of their subscribers cum viewers with Paid Subscription.[133] The said platforms are offering a huge variety of new content and novelty, with the exception of set-top box issues, for subscriptions at a comparatively lower cost. At this juncture, it would be significant to quote the opinion of Bill Gates as to the role of content and the internet in capturing big market shares of the broadcasting and entertainment industry. He has opined that, *"Content is King. Content is where I expect much of the real money will be made on the Internet, just as it was in broadcasting. When it comes to an interactive network such as the Internet, the definition of 'content' becomes very wide. No company is too small to participate. One of the exciting things about the Internet is that anyone can publish whatever content they can create. Over time, the breadth of information on the Internet will be enormous, which will make it compelling."*[134] In this light, it is equally important to note and articulate that OTT Platforms have been a highly unregulated segment of the media and entertainment industry since its very inception. Since the underlying model of offering content on OTT Platforms moves away from the traditional approach of regulating media broadcasting industry, it is an accepted truth that the prevailing norms and rules would not be sufficient in order to manage and regulate such platforms. In the past decades, theatre production has been a source of controversy over its content, where it has been criticized for its content being obscene, damaging or inappropriate to the religious sentiments of particular sections of the society. But, legislative bodies such as CBFC i.e.

[133] KPMG in India's Media and Entertainment Report 2019, *India's Digital Future,* (Feb. 20, 2022, 11:14 AM), https://assets.kpmg/content/dam/kpmg/in/pdf/2019/08/india-media-entertainment-report-2019.pdf.
[134] Heath Evans, "*Content is King" – Essay by Bill Gates 1996,* (Feb. 20, 2022, 11:16 AM), https://medium.com /HeathEvans/content-is-king-essay-by-bill-gates-1996-df74552f80d9.

"Central Board of Film Certification" and BCCC i.e. *"Broadcasting Content Complaints Council was* established to regulate the same along with additional guidelines and norms. Per Contra, OTT Platforms do not have any specified law or body, for their regulation, unless they are regulated under the Information Technology Act, 2000 and incidental laws for that matter, In fact, these platforms possess some self-regulatory/ research standards as in the case of Netflix; which has its own maturity standards set for itself. Therefore, absence of a well-established organization or body regulating the conduct and standards of OTT Platforms is a major legislative void in the present times.

II. Tracing the Evolutionary Perspective of OTT Platforms:

The rapid rise and growth of the OTT platforms lies in the fact that OTT Platforms offer some sort of hybrid entertainment mechanism; whereby the passive model of consuming content as in the case of television; is combined with a pro-active selection or choice of the content as in the case of web. The striking growth of the OTT platforms could also be addressed from the perspective of increased accessibility and connectivity. This goes on to suggest that ever since the ordinary users in the market were bombarded with the revolution of smartphones, better internet connections and networks etc., the way to formulate newer habits and consume content in different ways became more convenient. In other words, evolution and rise of OTT Platforms proved to be an inevitable byproduct of the advancement in technology and availability of better communication mediums for the masses in general. The said argument is evident from the fact that with the introduction of affordable data plans by Jio in the year 2016, the overall consumption of the data witnessed a surge of approximately ten times.[135] Furthermore, in recent times, the competitors and different market players like Vodafone-Idea, Airtel, Jio etc. have started offering an inclusive subscription of the premium plans of some of the OTT Platforms along with their existing subscription plans for availing the ordinary services of calling, messaging and data plans.[136] With such measures, users are being driven towards a habit of consuming content through OTT Platforms; thereby resulting in perceptible magnification of OTT Platforms. At this juncture, it becomes crucial to point out that having seen the sharp growth and increasing demand of the usage and consumption of content on the OTT Platforms, the prominent and key broadcasters in the country switched to the digital revolution very briskly and launched

[135] Kanchan Samtani, Gaurav Jindal, *Internet Goes Online – A $5 Billion Opportunity,* (Feb. 21, 2022, 09:07 AM), https://www.bcg.com/en-in/entertainment-goes-online-a-5-billion-opportunity.
[136] *Id.*

their quality online streaming platforms; as in the case of SonyLiv, Hotstar, Voot, Zee5 etc. The introduction of big players in the market of offering content through online streaming platforms ensured that there is no compromise on quality and reputation in the content which is being offered; resulting in a wide range of available options for the consumers to dive into. As far as tracing the timeline of the growth and evolution of OTT Platforms is concerned, 'BigFix' was the first OTT Platform, which was brought in the year 2008 under the name and banner of Reliance Entertainment Pvt. Ltd.[137] As discussed above, the actual acquisition and retention of consumers and user databases picked pace only after 2016, with the introduction of free data services by Reliance Jio, followed by economical and affordable data packages and data services by almost all the players in the market.[138] From then on till date, the market structure revolving around the OTT Platforms has only expanded and increased in numbers to an extent that there exists as many as 40 players in the Indian market itself, ranging from global players such as 'Netflix' and 'Amazon Prime' to native players in the form of 'Zee5', 'Eros Now', 'SonyLiv', 'MX Player', 'ALT Balaji', 'Disney+Hotstar', 'Voot' etc. as the leading, prominent and most accepted in the market.[139]

III. Major concern around usage and need to regularize OTT Platforms:

The major concern surrounding the usage and utility of the OTT Platforms is fastened to its regulatory mechanisms. It becomes crucial to note that the Information and Technology laws in the country are still in the developing and evolutionary stage. It cannot be ignored that Hon. The Supreme Court and respective High Courts have been playing a proactive role through various judgments in order to give extended and enlarged interpretation to the arena of Information and Technology laws. In this light, it becomes a moot question to answer whether the prevalent laws are self-sufficient in regulation of the OTT Platforms. Addressing the issue in a more comprehensive and a deeper outlook would bring forth the underlying concerns attached with the usage of these platforms. Streaming of content which brings disgrace or disrepute to national symbols, idols, emblem, flag etc. is the *first* and foremost concern. *Secondly,* display of such content which infringes the religious sentiments of a particular religious community, thereby violating the secular fabric of the country is a major concern surrounding the usage of OTT Platforms. *Thirdly*, presentation of pornographic,

[137] Monica Saraf, *The Evolving OTT Market in India,* (Feb. 21, 2022, 05:07 PM), https://womeninlocalization.com /7791-2/.
[138] BS Web Team, *No end to data wars: Reliance Jio free offers to continue for 12-18 months,* (Feb. 21, 2022, 06:18 PM), https://www.business-standard.com/article/companies/data-war-reliance-jio-free-offers-to-continue-for-12-18-months-117042600206_1.html.
[139] *Supra* note 5.

erotic and adult content without any filter of viewership or a mechanism to differentiate the suitability of such content to the target audience is another concern in the present times. *Fourthly,* portrayal and glorification of violence, drug usage, criminal activities, mafia, terrorism etc. is yet another issue from the perspective of influences which an individual might retrieve from consuming such content. In ordinary sense, it could be pointed out that since there is no content review panel *qua* approval and streaming of the online content, there is a good chance that content will influence public or political harmony in a negative way and will hurt people's feelings on various matters as mentioned above. There exist no specified legal guidelines or independent bodies which could manage and monitor the digital content available and being provided on the said platforms. It would be safe to point out that Over the Top platforms have become affordable, convenient and a medium of entertainment and consuming content for the general public without any filters and without it being put to test or governmental scanner for that matter. Unlike television, print or radio media, which is required to follow government-issued guidelines on various subject matters in order to test its fitness for viewership for the general masses, Over the Top platforms do not undergo such rigorous regulations with respect to the content they offer, subscription rates, adult content certification etc. amongst others. The concerns surrounding the availability and streaming of content through medium of OTT platforms could be best summarized as presented in a Public Interest Litigation filed by *'Maatr Foundation'* before High Court of Madhya Pradesh, wherein it was alleged that, "Over the Top content broadcasters broadcast uncontrolled, unconfirmed, obscene, and forbidden content, which often includes discriminatory remarks against women. Moreover, the challenges around its usage include dangers of public disclosure, distribution and exposure of pornography, sexual acts, acts of terrorism etc."[140] In this backdrop, it becomes crystal clear that there exists a dire and urgent need to regularize the said platforms.

III. Regulation of OTT Platforms vis-à-vis Freedom of Speech and Expressions:

One of the pivotal ambitions of the framers of the Constitution was to ensure and impart liberty to its subjects. This is depicted in the Preamble to the Indian Constitution which aims at bringing forth liberty – of thought, expression, belief, faith and worship. An important corollary to the notion of liberty which the Constitution makers aimed at achieving was its extension and execution through the colors of expression. In an addendum to the said ambition, Article 19 (1) of the Indian Constitution particularly vests upon the citizens -

[140] WP (Civil) No. 18801/2019.

Freedom to speech and expression and promotes it to the level and extent of a Fundamental Right enforceable by law. A major argument which continues to be put forth in respect of maintaining *status quo* with reference to the OTT platforms and circulation of its content unbridled is attached to the rationale of freedom to speech and expression. It is also worthwhile to mention that with the Right to freedom of speech and expression enshrined in Part III of the Constitution, there comes associated restrictions as well contained in Article 19(2) to Article 19(6) of the Constitution. Some of the major restrictions in that regard constitute *"public order, decency, morality, contempt of court, defamation, incitement to an offence."* The restrictions imposed upon the freedom of speech and expression from Article 19 (2) to Article 19 (6) of the Constitution itself is proof that the said right is not arbitrary or unlimited. In fact, it goes on to suggest that certain restrictions can be imposed upon the freedom of speech and expression if the such form of expression violates any of the criterions so contained from Article 19 (2) to Article (6) in that regard.[141] These restrictions must be imposed in such a manner that various other underlying rights of the citizens in the form of right to privacy, decency, reputation etc. could be efficiently invoked and protected. The recent trend and approach of media houses in offering content on their OTT Platforms present a sceptic picture as far as Right to freedom of speech and expression is concerned. Since the competition amongst the players itself has become cut throat, such an assumption cannot be denied that the said media giants will go on to cross any limits and boundaries in order to catch up the eye of the viewer, lure the possible customer and acquire high retention rates of their content. Such a misuse of the freedom to speech and expression is visible from the fact that numerous complaints have been filed in the respective High Courts of the country as well as the Hon. Supreme Court in order to seek guidelines ascertaining the boundaries *and* exercising the right to freedom of speech and expression the very moment such freedom curtails upon any of the restrictions set forth between Article 19 (2) to Article 19 (6) of the Indian Constitution. It is due to this reason that Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 were brought in by the Government of India to place a vigil check with respect to the prevalent grey areas of working mechanism of the OTT Platforms, which shall be discussed in depth in the forthcoming section of the Research Article in hand.[142]

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[141] Yatharth Chauhan, *OTT broadcast and its censorship: Whether a violation of freedom of speech and expression,* (Feb. 22, 2022, 07:14 AM), https://moderndiplomacy.eu/2021/09/09/ott-broadcast-and-its-censorship/

[142] Ministry of Electronics and Information Technology, *Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021,* (Feb. 23, 2022, 08:17 AM),

V. OTT Platforms and its regularization under Information & Technology and ancillary Laws:

As more and more OTT Platforms picked up pace in the aftermath of the internet revolution in the previous decade, respective Courts of the country witnessed a big surge in the number of cases and complaints challenging the operative mechanisms of these platforms. As a result of various decisions by the Courts and a rising demand to formulate a legislative framework on the subject matter, Government of India formulated Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.[143] It is important to note that the said rules have been formulated by way of extension to the Information Technology Act, 2000. Part III of the said rules is significant from the viewpoint of laying down a code of ethics and some procedural safeguards in the context of the digital media. Rule 8 contained in Part III prescribes for the application of the Chapter which contains that the rules thereby made in the Part III shall be applicable to news and current affairs publishers; and the online content publishers. It could be clarified that regulation of OTT platforms fit within the latter category, i.e. the online content curators. Rule 9 contained in Part III also holds significant grit from the perspective that it casts an obligation upon the publisher as mentioned in Rule 8 to adhere to the 'Code of Ethics'. The Code of Ethics has been divided into five categories. *Firstly,* the general principles thereby making a direction to exercise caution in context of content which may affect sovereignty, integrity, security, friendly relations with foreign nations, public order etc. Additionally, a direction has been mandated to exercise caution while making a feature of such beliefs, practices, and activities etc. which are some religion or race specific. *Secondly,* the Code of Ethics classifies content into following classifications: "U" i.e. suitable for all ages; "U/A 7+" i.e. suitable for age 7 and above; "U/A 13+" i.e. suitable for age 13 and above; "U/A 16+" i.e. suitable for age 16 and above and "A" i.e. suitable for adults only. *Thirdly,* The Code requires the publisher to prominently display the classification on all the content being offered for streaming. *Fourthly,* every publisher shall make efforts to restrict the access of "A" category content from the reach of children. *Fifthly,* a duty is entrusted upon the publisher to make an improvement in the accessibility of the online content to the persons with some disabilities. Finally, the rules provide for setting up a three-tier mechanism to address the grievances which might come forth before the publishers. The mechanism includes "self regulation by the publishers

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https://mib.gov.in/sites/default/files/IT%28
Intermediary%20Guidelines%20and%20Digital%20Media%20Ethics.pdf

[143] *Id.*

themselves"; "self-regulation by the self-regulating bodies of the publishers"; and an "oversight mechanism by the Central Government" in this context. Apart from the said rules, relevant provisions of different legislations such as Indian Penal Code, 1860 (Section 295A, 499 and 500); Information Technology Act, 2000 (Section 67 and 67A) as well as relevant provisions of Indecent Representation of Women (Prohibition) Act, 1986 comes to play in event of violation of the prescribed standards and norms as specified under these legislations.

VI. Judicial Discourse on the Subject matter:

As the legal framework surrounding the regulation of the OTT platforms is in its evolutionary stage, reliance must be placed on the judicial pronouncements of Hon. Supreme Court and respective High Courts in order to develop a sound understanding on the subject matter. In *K.A. Abbas v. Union of India*,[144] The Supreme Court held that "the motion picture has the power to evoke profound emotion more than any other art product. The film can therefore be considered for the reasons stated in Section 19 (2) of the Constitution. The Supreme Court was of the opinion that the examination of films, their classification according to age and their unrestricted relevance exhibition with or without discharge is regarded as a legitimate use of power by interest, social behaviour, dignity etc. This should not be construed as a violation of freedom of speech and speech." Hon. Supreme Court further held that, "the portrayal of a social vice as severe as rape, prostitution and the like, could not by itself attract the censor's scissors. Rather what has to be seen is how the theme is handled by the film-maker." In *Rights Foundation v. Union of India*,[145] The High Court of Delhi adjudicated that, "Information Technology Act, 2000 provided enough procedural safeguard for taking action in the event of prohibited content by the broadcasters." In *Odyssey Communications v. Lokvidayan Sanghatana*,[146] Hon. Supreme Court held that, "the right of citizens to exhibit films on OTTs is a part of fundamental right guaranteed under article 19(1) (a) and the said right was similar to the right of a citizen to publish his views through any other media such as newspapers, magazines, advertisements, hoardings and so on." In *Directorate General of Doordarshan v Anand Patwardhan*,[147] the Apex Court held that, "Right to criticize the government exhibited through movies and web series on OTT is a prerequisite to a healthy democracy and Article 19(1) (a) covers this right. Hon. Supreme Court went on to declare that the State cannot prevent open discussion, no matter how hateful to its policies." In *Tata*

[144] (1970) 2 S.C.C. 780.
[145] WP (C) 11164/2018.
[146] (1988) 3 S.C.C. 410.
[147] (2006) 8 S.C.C. 433.

Press Ltd. v. MTNL,[148] Hon. Supreme Court observed that, "Companies that advertise for commercial gains on OTTs are no different from newspapers and other media that are run as a commercial enterprise. The fundamental right to freedom of speech and expression under Article 19(1) (a) includes the right to advertise or the right to commercial speech." In *Ajay Goswami v. Union of India*,[149] the Supreme Court held that, "the adult citizens have a right to entertainment and they could not be deprived of entertainment within acceptable norms of decency on the ground that it was deemed inappropriate for children." In *Divya Ganeshprasad Gontia v. Union of India*,[150] a plea was raised by the petitioner with respect to regulating content on the OTT platforms. The petitioner particularly raised fierce voice against the shows *'Gandi Baat'* and *'Sacred Games'* containing vulgar, obscene and nude scenes which resembled pornography. Notices were issued to the Ministry of Information and Broadcasting seeking regulation of web series of similar nature by the Bombay High Court.

VII. Latest development and current trends on the subject:

In order to understand the ground reality of the situation, a careful analysis of the latest developments and current trends on the subject matter is extremely fundamental. *'Mirzapur'* web series, available on 'Amazon Prime' platform had received a critical backlash on the ground that it presented a city of the state of Uttar Pradesh in a negative sense, thereby "maligning the image of Uttar Pradesh".[151] Similarly, web series titled *"XXX"* and *"Gandi Baat"* faced heavy criticism on the ground that it depicted obscenity and nudity. In fact, an FIR was lodged against the producer of the web series under the provisions of the Information Technology Act, 2000 and the State Emblem Act.[152] The controversy surrounding the infamous *"Tandav"* web series, available on 'Amazon Prime' became quite intensified. The matters involving controversy were based on depiction of Hindu deities as well as the office of Prime Minister of India in bad light. The gravity of the controversy arose to such an extent that the matter was put to consideration till the ministerial level. In the aftermath of the heated controversy, the makers of the web series had to offer apologies and

[148] (1995) 5 S.C.C. 139.
[149] (2007) 1 S.C.C. 143
[150] Nitish Kashyap, *Law Clerk From Bombay HC Files PIL Seeking Regulation Of Online Content, Cites 'Sacred Games'; HC Issues Notice,* (Feb. 24, 2022, 10:14 AM), https://www.livelaw.in/law-clerk-from-bombay-hc-files-pil-seeking-regulation-of-online-content-cites-sacred-games-hc-issues-notice-read-order/.
[151] Lata Jha, *Controversies help bolster viewership of OTT Shows,* (Feb. 24, 2022, 10:23 AM), https://www.livemint.com/news/india/controversies-help-bolster-viewership-of-ott-shows-11613034647761.html.
[152] *Id.*

the controversial scenes had to be edited or deleted from the portal.[153] The OTT based film *"Gunjan Saxena: The Kargil Girl"* also attracted fury over the context that the film was based on twisted and derogatory facts and brought disrepute to the institution of Air Force. In the early half of 2021, *"Bombay Begums"*, available on Netflix OTT Platform, attracted the attention of the National Commission for Protection of Child Rights. The Commission issued directions to Netflix for immediate removal of objectionable scenes present in the web series involving minors and their indulgence in resorting to drugs etc.[154] Yet another web series available on the Netflix platform titled as *"A Suitable Boy"* attracted limelight and criticism for portrayal of intimate scenes amongst a Muslim man and a Hindu woman against the backdrop of a temple.[155] Finally, a web series titled *"Aashram"* available on the MX Player platform faced heavy backlash due to the presentation of Hindu saints and deities in a controversial and derogatory manner. It becomes important to highlight that an attempt to pre-censor and regulate the streaming of content on the OTT Platforms by way of Information Technology Rules of 2021 has not been accepted in a welcoming way by various stakeholders in the online streaming of content. It has been argued that censorship would result in controlling the free flow of the ideas, which is an important tool to reflect the realities of a given societal framework. At the same time, it must not be ignored that the freedom of speech and expression is not an absolute and unfettered right which cannot be curtailed at any point of time.

VIII. Conclusion and Suggestions:

The rise of OTT Platforms as a means and medium of consuming content and being entertained has become overly popular amongst the common masses in recent years. The emergence of the said platforms into the mainstream media has a direct nexus with the increased connectivity, availability of enhanced networks, affordable data plans by the big giant telecommunication companies etc. amongst others. The popularity of OTT platforms is also based on the element of variety and novelty of content which at times crosses all the boundaries of decency, morality, ideals of national integration and public order. In order to bring in regulation of content streaming on the digital platforms, the Government of India

[153] News18 Network, *From 'Gunjan Saxena' to 'Tandav', A Look at OTT Controversies That Created a Stir,* (Feb. 27, 2022, 11:39 AM), https://www.news18.com/news/movies/from-gunjan-saxena-to-tandav-a-look-at-ott-controversies -that-created-a-stir-3607235.html.

[154] Kiran Sharma, *Netflix and Amazon under fire in India over controversial content,* (Feb. 28, 2022, 04:17 PM), https://asia.nikkei.com/Business/Media-Entertainment/Netflix-and-Amazon-under-fire-in-India-over-controversial-content

[155] *Id.*

came forward with the Information Technology Rules of 2021, prescribing for certain guidelines and classification of content which needs to be adhered along with setting up of a three-tier redressal mechanism. The said Rules have not been largely welcomed by the stakeholders of OTT platforms due to the reason that it curtails their freedom of speech and expression. But, it could be stated that the said rules must be given due adherence and must be adopted in letter and spirit. To adhere to the certain rules prescribed by the government there should be Open regional offices in the country to delegate the actions related to OTT platforms. The delegated offices should further have legal representations at par with the laws prescribed for posting obscene, immoral, defamatory etc. content. All online platforms should be treated in a similar manner and should be guided by single broadcasting service laws. Adopting a single platform for redressal would not curtail the right to equality enshrined under Article 14 of the Indian constitution. As everyone would be tried in a similar manner in the court. The creative interpretation of the information and technology (intermediary guidelines and digital media ethics code) Rules, 2021 is necessary as the government provided rules which need to be adhered and, violation of the code of ethics could be actionable on anyone violating the social standards and creating menace. The common and strict adherence and implementation of prescribed restrictions on the digital content would set a level playing field between all the mediums of entertainment and media such as OTT platforms, television, films, newspapers etc. which already undergo strict regimen of review and check before it could be declared fit for en masse viewership.

Therefore, it could be summarized that a balance must be brought in between OTT platforms reflecting the realities of the society and maintenance of standards of decency, morality as well as the public order.

CRIMINALIZATION OF MARITAL RAPE IN INDIA: UNDERSTANDING ITS CONSTITUTIONAL, LEGAL AND INTERNATIONAL ASPECTS

Devanshi Sharma[1]

"I say nothing, not one word, from beginning to end, and neither does he. If it were lawful for a woman to hate her husband, I would hate him as a rapist." [2]

Abstract

Section 375 of the Indian Penal Code,1860 defines Rape which is inclusive of all forms of sexual abuse involving non-consensual contact with any lady. Exception 2 to Section 375, on the other hand, exempts reluctant sexual intercourse between a husband and a wife over the age of fifteen from the definition of "rape" i.e., the Indian Penal Code,1860 doesn't at all acknowledge that raping one's wife is a crime. For ages, this has been seen as a loophole in the law, where husbands are not prosecuted let alone punished for abusing the sexual autonomy of women. The reasons for this are numerous, as illustrated by multiple Law Commission investigations, Parliamentary discussions, and judicial rulings. The lack of criminalization stems from countless factors, including maintaining the sensitivity and sacrosanctity of marriage, the availability of viable alternatives, and concerns that it might become a weapon of exploitation in the hands of unscrupulous women. While practically every country in the world considers marital rape to be a criminal offense, India is one of the thirty-six countries that has yet not made it a crime. The purpose of this article is to examine the challenges of criminalizing marital rape along with techniques to overcome those hurdles and proving how the justifications for impunity to such rapes are false. The article draws claims from the interpretation based on Article14 and Article 21, that the exception clause of marital rape in the IPC is unconstitutional. Additionally, this article highlights the absence of other remedies available to a woman who is a victim of the same. Furthermore, it suggests criminalizing marital rape by advocating modifications to both criminal as well as civil laws. Lastly, it talks about the most tangible and immediate manner by which India can fulfil its UDHR responsibilities.

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[2] PHILIPPA GREGORY, THE RED QUEEN 37 (Simon & Schuster 2010).

I. Introduction

As one prominent author stated: "Rape is an act of aggression in which the victim is denied her self-determination. It is an act of violence which, if not actually followed by beatings or murder, nevertheless always carries with it the threat of death. And finally, rape is a form of mass terrorism, for the victims of rape are chosen indiscriminately, but the propagandists for male supremacy broadcast that it is women who cause rape by being unchaste or in the wrong place at the wrong time-in essence, by behaving as though they were free."[3] Rape as defined in the Indian Penal Code for a lay man means 'unlawful forceful sexual intercourse or any other sexual penetration of the vagina, anus, or mouth of another person, with or without force, by a sex organ, other body part, or foreign object, by a man upon a women which is non- consensual, unwilling or deceitful'.

The most essential ingredient of rape is consent as defined under § 90[4] of the Indian Penal Code. If one successfully proves that the intercourse was consensual, he must be acquitted. In cases related to children the matter of consent is immaterial.[5] However, often consent is said to exist as in cases of Exception 2 to § 375 of the Indian Penal Code which says that "Sexual intercourse by a husband upon his own wife, who is not below the age of fifteen, is not rape."[6] is seen as an oxymoron where rape is committed when the offender is the spouse of the victim.[7] It bars the issue of consent by drawing the veil of marriage and saves the preparator from prosecution of the same. Over the years activists, feminists, and women themselves have argued upon the fact on one hand the law which safeguards them from strangers falls short in order to protect them from their own husbands. They add that "rape is rape: irrespective of the relationship shared between the victim and the offender."

This article talks about the historical background of marital rape in India and what are the changes that one needs to focus upon in the cultural regard. Further it discusses where India stands in the consideration of international rights and how the situation can be improved. In the latter half of the article, it is discussed in detail as to what are the issues that are faced by the legislature when it comes to criminalising marital rape and how the legal and constitutional rights of women are severely affected given the lack of such laws. Moreover, the remedies that are available to the victim with existing laws and their insufficiency has

[3] Susan Griffin, *Rape: All American Crime*, 10 Ramparts, 35, 1971.
[4] The Indian Penal Code, 1860 §90. No. 45, Acts of Parliament 1860.
[5] The Protection of Children from Sexual Offences Act, 2012, §3. No.32, Acts of Parliament,2012.
[6] The Indian Penal Code, 1860. §375. No. 45, Acts of Parliament 1860.
[7] Since this article talks about marital rape in the context of Indian subcontinent hence, we will assume that the offender is the husband and the victim is the wife.

been elaborated and finally the model of criminalisation with a definitive conclusion has been drawn.

II. Historical background of marital rape in India:

The Indian laws are mainly derived from British law and age-old customs. Customs were rules and practices which were laid down in Vedas and other books. One such book is the widely followed and infamous Manu smriti, dated to be from the 2nd century BCE to 3rd century CE which was the then governing law. The text reads "The man to whom her father or, with her father's consent, her brother gives her away- she should obey him when he is alive and not be unfaithful to him when he is dead. The invocation of blessings and the sacrifice to Prajapati are performed during marriage to procure her good fortune; the act of giving away is the reason for his lordship over her." [8] Women in the ancient texts have not been given their independent identities, apart from living under the shadows of their husbands, who were to surrender their lives with utmost sincerity in order to be a 'good woman'.

- India has borrowed exemption 2 of § 375 of IPC from the early British common laws; from the times when women were considered as property. Once she was married all the rights that her father possessed were passed on to her husband, women were exempted from practicing their free will and to make decisions for themselves. There existed no concept of consent when it came to wives. The Victorian law and the smritis would also allow men to give corporal punishments to their wives in case she would 'overstep her boundaries'. So, when the husband forced himself upon her, she considered it as her duty to give in and the man considered it to be his right as he was making use of his property. By defining rape as intercourse with a woman "not his wife," a majority of states immunized husbands from prosecution as late as 1977; other states simply relied on the common law exemption.[9] In 1888, *Justice Henry Hawkins, an English judge, said "The intercourse which takes place between husband and wife after marriage is not by virtue of any special consent on her part but is mere submission to an obligation imposed on her by law."*

As mentioned before, the Indian Penal Code 1860, criminalises rape. Under §375 of IPC rape is defined as: *"§375: "A man is said to commit "rape" if he-*

[8] PATRICK OLIVELLE, THE LAW CODE OF MANU, 146 (Oxford University Press 2004).
[9] See ROBIN WEST, *EQUALITY THEORY, MARITAL RAPE, AND THE PROMISE OF THE FOURTEENTH AMENDMENT*, 42 FLA. L. REv. 45, 48 (1990).

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:

First, Against her will

Secondly, Without her consent.

Thirdly, with her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly, with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly, with her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly, With or without her consent, when she is under eighteen years of age.

Seventhly, when she is unable to communicate consent.

Explanation 1. For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2. Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act.

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1. A medical procedure or intervention shall not constitute rape.

Exception 2. Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape"[10]

The code has clearly mentioned, that sexual intercourse between a husband and his wife which is within the pursuit of marriage, irrespective of the nature of the same is not to be termed as rape. Where on one hand the IPC does not criminalise marital rape on the other it criminalises a specific kind of marital rape i.e., sexual intercourse between a couple during separation under §376B of the code. [11]

Which simply means that if a husband and wife are said to be living together then it is implied that the woman has given her free consent at all times. However, upon separation the said consent which existed at the time they were living together is withdrawn.

In addition to other women centric laws various legislations have been passed to safeguard women against violence in their own house like laws against dowry, cruelty, domestic violence etc. However, over the years the act of a husband forcing himself upon his wife has passed the eyes of lawmakers to be a crime.

"Every crime of violence against women-child sexual abuse, rape, domestic battery, even murder is more likely to be committed by someone we know and trust than by a stranger. Complicating the private aspects of violence against women is the nature of the crime. Sex crimes are perceived and treated differently than all other crimes of coercion and violence." [12]

III. International Perspective and India's Position:

According to the United Nations, the house is among the most hazardous locations for women, with just 4 out of 10 nations criminalising marital rape, according to studies. It is illegal for a husband to rape his wife in more than 50 nations, including the United States, Nepal, the United Kingdom, and South Africa, but it is not illegal throughout much of Asia, according to activists. The survey also showed that nearly one in every five women aged 15 to 49 in the world had been physically or sexually abused by a past or present partner or

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[10] The Indian Penal Code, 1860. §375. No. 45, Acts of Parliament 1860.

[11] The Indian Penal Code, 1860. §376B. No. 45, Acts of Parliament 1860.
"§376B: Sexual intercourse by husband upon his wife during separation:
Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine. Explanation - In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of §375."

[12] Morrison Torrey, *Feminist Legal Scholarship on Rape: A Maturing Look at One Form of Violence Against Women*, 2 Wm. & Mary J. Women & L. 35, 36 (1995), (https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1283&context=wmjowl).

husband in the preceding year, defining violence against women as "severe and pervasive.".[13] While practically every country in the world considers marital rape to be a criminal offense, India is one of the thirty-six countries that has criminalise the same.

In countries such as United States, United Kingdom, France, Denmark, Finland Mauritius, Nepal, Russia, Mexico, etc have all explicitly identified and criminalised marital rape or spousal rape (where the laws are gender neutral). Some countries which earlier did not have legislation relating to rape within the ambit of marriage, later amended their laws, such as Germany until 1997 had the marital exemption, Similarly, the government of Guyana marital rape was made a crime in the year 2010.

There remain certain states of Africa such as – Tanzania, South Sudan, Nigeria, Morocco. etc. and states of the middle eastern nations namely- UAE, Saudi Arabia, Iraq, Syria among a few others which have not criminalised the non-consensual intercourse within the ambit of marriage. This list also includes our neighbouring countries such as China, Bangladesh, Myanmar, Sri Lanka. However, Pakistan remains the only country in the world which has maintained the status of "unclear" on the said subject matter. Earlier, in the Penal codes of specific Arab countries which have explicitly made marital rape an exception of rape, provided that if a rape offender marries the victim, the matter would be closed immediately. This law was later revoked after victims began to commit suicide after their marriages to their offenders. India is one of the 34 countries to not have criminalised marital rape.

An analysis of the provisions the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) shows that India has violated the international human rights principles prohibiting discrimination against women and rape. According to Article 1[14] of the CEDAW, "discrimination against women" includes "any discrimination on the basis of gender...has the effect of harming...women's exercise of...human rights, regardless of their marital status... …Social, cultural, civic or any other sphere of fundamental freedom." The deliberate exclusion of marital rape in the IPC meets the discriminatory definition of the CEDAW, because the victim's spouse has imposed on his body The violation was justified on the basis of the victim's marital status, thereby depriving him of

[13] GLOBAL CITIZEN, https://www.globalcitizen.org/en/content/un-women-marital-rape-laws/ (last visited Feb. 18,2022).

[14]Committee on the Elimination of Discrimination against Women, "*General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*", 2 (2017), https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_35_8267_E.pdf (Last Visited Feb. 18,2022).

protection for single women. The General Recommendation 19 of the Committee on the Elimination of Discrimination against Women believes that acts that -cause physical or mental harm or sexual violence against women constitute discrimination against women. GR19 also pointed out that the impact of violence on physical and mental health deprives women of equal rights to exercise human rights. Hands and basic freedom. GR35's recognition of the elements of marital rape highlights the violation of its non-recognition of the fundamental freedoms and basic right to dignity of women.[15] Although people cannot express their dissatisfaction to the committee, India still has an obligation to protect and strengthen the human rights of women, despite their marital status. Under Article 2[16] of the CEDAW, India is obliged to take all appropriate measures, including legislation, and to amend or repeal existing laws, customs and practices that discriminate against women. woman. GR19 also recognizes that in family relationships, women of all ages suffer violence perpetuated by customs and societies ideas, including rape.[17]

The IPC's definition of rape discriminates against married women and therefore violates Article 26 of the International Covenant on Civil and Political Rights. The ICC's failure to recognize equal protection for married women is tantamount to failing to legally guarantee the equal dignity of all women. This claim to equal dignity and rights does not distinguish human beings based on their status, because all people, even married women, have the same rights as single women. Article 28 of the Universal Declaration of Human Rights gives people a social and international order in which the rights and freedoms stipulated in the declaration can be fully recognized, forcing India to create a favourable social environment for married women.

Indian law not only violates international human rights instruments, but also violates the principles recognized by the Fourth World Conference on Women in Beijing. The state can change its discriminatory criminal law and ratify the optional protocol, not only to verify compliance with the Convention on the Elimination of All Forms of Discrimination Against Women, but also to provide a remedy for affected women. Although India has successfully

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[15]Vaibhavi Patel, *Marital rape in India : An International Human Rights law violation*, Berkeley Journal of International Law, (Feb. 18,2022, 6.07PM), https://www.berkeleyjournalofinternationallaw.com/post/marital-rape-in-india-an-international-human-rights-law-violation#:~:text=Section%20375%20of%20the%20Indian,the%20age%20of%2018%20years .

[16]Committee on the Elimination of Discrimination against Women, *Supra* note 14, at 4.

[17] Commission on Human Rights Philippines, *COMMENTS TO THE CEDAW COMMITTEE DRAFT ON GENERAL RECOMMENDATION 19 (1992): Accelerating elimination of gender-based violence against women*,1992,https://www.ohchr.org/sites/default/files/Documents/HRBodies/CEDAW/GR19/Commission_onHumanRightsPhilippines.pdf, (Last Visited Feb. 22 ,2022).

taken several measures to curb discrimination against women, it has not yet taken concrete steps to warn against the practice of marital rape, which has been recognized internationally as a crime and seriously hinders the human rights of Indian women.

IV. Legal views, Parliament debates and hindrance to not criminalise marital rape

For ages the hideous act of marital rape has been considered legitimate in order to maintain the sacredness and sanctity if the marriage. Not just by the public at large but by parliamentarians, lawmakers and various other government organisations as well. The 42nd Law Commission Report[18] was the first report that addressed the issue. It made two observations. First being that the exception clause must not apply when the married couple is separated.[19] Although this is a commendable suggestion, the reason for this is unclear. It says: "In this case, the marriage technically exists. If the husband violates her will or agrees to have sex with her, he cannot be charged with rape." The second mentioned in this report the recommendation is about non-consensual sex between women between 12 to 15 years of age.[20] The second recommendation is distinguished by a hesitation to describe marital rape as rape; at most, it is a worse sort of minor sexual assault.

The legitimacy of the exemption provision inside the 172nd Law Commission Report was promptly challenged by the Law Commission. [21]. It turned into argued that once different times of violence through a husband closer to spouse turned into criminalised, there has been no cause for rape by myself to be protected against the operation of regulation. The 172nd regulation record sheds mild at the interaction among marital rape and the sanctity of the group of marriage.

After the *Delhi Gang Rape*[22] in December 2012, there was a need for criminal law amendment and as an aftermath The JS Verma Committee was set up. The committee on the issue of marital rape noted “The exemption for marital rape stems from a long out-dated notion of marriage which regarded wives as no more than the property of their husbands.”[23]

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[18] Law Commission of India, *Indian Penal Code*, Report No. 42 (June 1971), http://lawcommissionofindia.nic.in/1-50/report42.pdf (Mar.1,2022 , 05.30pm).
[19] *Id.*, Para 16.115.
[20] *Id.*
[21] Law Commission of India, *Review of Rape Laws*, Report No. 172 (March 2000), http://www.lawcommissionofindia.nic.in/rapelaws.htm (last visited on Mar. 1,2022) .
[22] (2017) 6 SCC 1.
[23] JUSTICE J.S. VERMA COMMITTEE, *Report of Committee on Amendments to Criminal Law* (January 23, 2013).

The National Health and Family Survey (NFHS- 4) for the year 2015-16 noted that about 5.45% of women face marital rape under the category of spousal violence.[24] Similarly, the NFHS-3 had recorded a 9.5% figure for the same. However, the Women and Child Development Ministry said the idea of the same "cannot be suitably applied to the Indian context". Following which the National Crime Records Bureau (NVRB) released data in September 29,2020 from 2018-19 which shows that almost 87 rape cases were reported daily in 2019. Out of the registered cases in 2019 about 30.9% were registered under "cruelty by husbands and his relatives".

The fact that there exists data on marital rape, but the government lacks in providing the law simply shows that the age-old laws of the British and Victorian laws where wives were chattel and not human beings and is a proof of the fact, we still have a colonial hangover and there is impunity given to 'reasonable and sensible gender' after 74 years of independence.

Often there are four main questions that stand in the way of criminalising marital rape. To begin with, that permitting wives to complain will crush the family; secondly, by definition sex within the realm of marriage can never sum to rape; third, that the criminalisation of conjugal relations would damage the protection of marriage by "allowing the State into the bedroom"; and final, that it would gotten to be a weapon of mishandle within the hands of deceitful wives. The second and third stages were great when the IPC was founded in 1860. They rest upon two suspicions: to begin with, that marriage sums to a one-time, lifetime assent to sexual intercut; and moment, that the institution of marriage must be put past the domain of sacred investigation. Both these presumptions, in any case, are completely inconsistent with a protected vote-based system established upon thoughts of opportunity and independence. Without a doubt, the Preeminent Court's popular right to protection judgment clarified these issues past debate. The court held that security started with the human body, which at the heart of the right to privacy was the idea of decisional independence – that's the proper of each person to choose how, and to what conclusion, her body would be utilized. Fair as people cannot offer themselves into subjugation, nor can they be considered to have postponed their right to decisional independence upon marriage. More vitally, in any case, the proper to protection judgment clarified that protection was a right held by people. More seasoned definitions of security, expressed through expressions such as a man's domestic is

[24] Anoo Bhuyan, *Government Denies Marital Rape Occurs, National Survey Shows 5.4% of Married Women Are Victims* , THE WIRE, (Mar. 5, 2022 , 9.30 AM), https://thewire.in/gender/indian-law-denies-marital-rape-exists-5-4-married-indians-claim-victims).

his castle or the State cannot enter the room, found protection in spaces (such as the domestic), or connections (such as marriage). They were, in this manner, impenetrable to constraint, constraint, and unequal control connections inside those spaces or education. For this reason, in his majority judgment, DY Chandrachud expressly recognized the "feminist evaluate of privacy", and composed that any modern formulation.

V. Constitutional validity:

The IPC's marital exemption was created on the basis of British patriarchal traditions that did not acknowledge men and women as equals, did not allow married women to own property, and blended married couple identities under the Coverture Doctrine, which lays down that after marriage all the property that a woman has is passed to her husband. The doctrine of Restitution of Conjugal Rights as mentioned under Section 9 of the Hindu Marriage Act,[25] states that the doctrine is available as a remedy if a spouse withdraws from the society without a reasonable reason. The infamous case of T. Sareetha V. Venkata Subbaiah 1983[26] challenged the constitutional validity of section 9 of the act. The Andhra Pradesh High Court ruled that the remedy of Restitution of Conjugal Rights is an unconstitutional remedy, and is violative of Article 14[27], 19[28], and 21[29] of the fundamental rights. It is presumed that imposing Restitution of Conjugal Rights is depriving the spouse in withdrawal of their free will and that the courts encroach the right to a person's individual liberty and under Article 21 the right to life and individual freedom is guaranteed to all equally.

As claimed on various levels, one of the biggest issues standing in the way of criminalising marital rape is the question of 'how far can the courts go to settle disputes within marriage?' or as a matter of fact 'to what extent can the court intervene in the bedroom of a married couple'? This argument exists in spite of the fact that the court earlier dealt with the doctrine of Restitution of Conjugal Rights as given under the provisions of the Hindu Marriage Act.

Within the Indian legal framework up till 2017, there existed an exception expressing that sexual intercourse by a man with his wife who is over the age of 15 is not an offence. However, this arrangement came into struggle with the Security of Children from Sexual

[25] The Hindu Marriage Act,1955, No.25, Acts of Parliament,1955 (India)
[26] AIR 1983 AP 356
[27] INDIA CONST. art.14.
[28] INDIA CONST. art.19.
[29] INDIA CONST. art.21.

Offences Act (POCSO)[30]) and the Child Marriage Act 2006[31]. It was after the landmark judgement of the Supreme Court in the case of *Independent Thought v, Union of India.* [32]. The court stated that even if a minor wife consents, such a sexual intercourse too will amount to rape. Further it was stated that "It is only obsolete that this hasn't been the case for women above 18 years of age". [33]

Agreeing to inventive elucidation by the Incomparable Court, rights revered in Article 21 incorporate the rights to wellbeing, protection, nobility, secure living conditions, and secure environment, among others in the case of the state of *Karnataka v. Krishnappa*[34]. The Supreme Court determined that sexual cruelty, apart from being a humiliating conduct is an illegal disruption of a lady's right to be protected and violation of her sanctity. As per the same judgement, it was held that "non-consensual sexual intercourse sums to physical and sexual violence".

.In landmark judgement of *Equity K.S. Puttaswamy (Retd.) v. Union of India*[35], the Apex Court recognized the right to protection as a crucial right of all citizens. The right to protection incorporates '*decisional protection*' reflected by_a capacity to form insinuated decisions". Furthermore, in the *Suchita Srivastava v. Chandigarh Administration*[36], the Supreme Court likened the right to form choices related to sexual movement with rights to individual freedom, security, respect, and real sagacity under the Article 21 of the Constitution.

The Court claims that the statute's objective supports a different law for married women, and that this does not contradict Article 14 because the categorization is justified. Hence, the law treats women differently on the ground of marriage and rape is a justified when happening behind the curtain of marriage i.e., to say that marriage is a reasonable classification for rape. The present law is clearly violative of article 14 as it denies equal treatment to married women. These ideas are based on the 19th century views where women were seen as a commodity who were to be possessed and after marriage, they were to surrender themselves to their husband's wishes and whims. However, over the years the concept of marriage has evolved, where women of the 20th Century have moved out of the sphere of being

[30] The Protection of Children from Sexual Offences Act,2012, §3 and §4, No.32, Acts of Parliament,2012(India)
[31] The Prohibition of Child Marriage Act, 2006, No. 6, Acts of Parliament, 2007 (India).
[32] Independent Thought v. Union of India AIR 2017 SC 4904.
[33] Saloni Pradhann & Shic Chhatrala, *Rape in the secrecy of marriage: need for criminalisation*, ACADEMIKE, (Mar. 10 ,2022 , 3:29 PM), https://www.lawctopus.com/academike/rape-in-marriage-need-for-criminalization/.
[34] 2000 (2) UJ 919 SC.
[35] AIR 2017 SC 4161.
[36] (2009) 9 SCC 1.

domesticated like chattel, they have set foot in the world that exists outside the four walls. As women today are working, aware and educated over the years marriage has become a concept of shared responsibilities where both men and women are considered equal. Yet, there exists the infringement of both article 21 and 14 in the matter of sexual consent, that puts one sex on the back foot. Not only the society but the Supreme Court itself took in view this evolution of marriage when in 2018 §497 of IPC was struck down. In *the Joseph Shine v Union of India*[37] the case that struck down the age-old Victorian morality law on adultery, held that sexual autonomy is an essential component of everyone's right to dignity, and a law that restricts it for a married woman is against the constitutional norms. In the same case Justice DY Chandrachud noted that "under section 497 a woman is treated in such a way that the very basis of the Constitution – equality, liberty and dignity are violated and that such marriages suffer from "manifest arbitrariness."[38]

It would be unreasonable not to penalize marital rape just to maintain the marital relationship when a fundamental right is at risk and other types of violence have been criminalized. As a result, the exemption clause violates the Article 14 test, and it is thus unconstitutional.

VI. Existing remedies and modification of laws:

a. Existing Remedies

At present a common reply to maintain the status quo of marital rape and to not criminalize it is that there are already enough remedies existing in the law. The most commonly cited examples of the same from criminal law are §498A IPC, §376B IPC, and certain provisions from the civil laws. The provisions as mentioned above are all invalid and inadequate to address the sphere of punishment of marital rape and instead of them being addressed as punishment provisions for marital rape they should instead be labelled as alternatives of the same.

- Section 376B IPC talks about rape upon a wife by her husband when the couple is living separately. The key ingredients of the section talk about the couple living separately, whereas when we talk about marital rape over time and again, we have stated that the couple is residing in the same house and fulfilling all marital obligations. Criminalisation of marital rape talks about the idea of bodily autonomy instead of simply allowing a crime in the name of sanctity of marriage.

[37] AIR 2018 SC 4898.
[38] *Id.*

- Section 498A IPC which was initially added to the act for dealing with crimes related to cruelty upon women. The said section is not applicable because the nature of both the crimes differs from their core. Rape is a form of cruelty however the cruelty when applied here is different from the mental and physical cruelty. We need to note that the degree of crime and the nature of the same has a direct correlation with the evidence that is to be produced.
- Domestic Violence Act,2005 too is said to be an alternative for criminalising of marital rape. However, when it comes to entering the domain of marriage it only provides for legal protection and grounds for separation.
- Recently in the purview of civil laws, the Men Welfare Trust in the Delhi High Court argued that the civil liberties of husbands would be violated if the court was to declare Exception 2 to Section 375 of Indian Penal Code as unconstitutional.[39] Further the organisation argued that under Article 226, the court can only expand the scope of an existing offence.

b. Modification of laws:

The J.S. The Verma committee in 2013 made a recommendation that stated the removal of the exception clause. Agreeing with the suggestions made by the committee §375 of IPC should be amended and an explanation should be inserted which mentions that "The relationship of marriage does not constitute as a valid defence." and should strike down the second exception.

In accordance with that the Indian Evidence Act,1872 too needs to be amended. *§*114A[40] and *§57*[41] where husbands should not be let out of the explanation of the term accused.

Similarly, the sentencing policy should be made equal for all offenders. As under *§*376 the punishment extends to seven years of imprisonment to death penalty and on the other hand §376B punishes a husband for the same offence upon his separated wife the punishment is only for two years of imprisonment. The disparity of the years of punishment shows sex without consent within a marriage is generalised. Since, the reasonable classification under constitution is faulty there is no ground that there shall exist a disparity between the two punishments.

[39] THE LEAFLET, https://theleaflet.in/immunity-to-husband-from-marital-rape-is-to-protect-civil-liberty-of-the-husband-men-welfare-trust-tells-delhi-hc/) (Last visited on: 11 March,2022).
[40] The Indian Evidence Act,1872. §114A, No. 1, Acts of Parliament, 1872 (India).
[41] The Indian Evidence Act,1872. §57, No. 1, Acts of Parliament, 1872 (India).

Other than the codified laws we know that the culture too plays an important part in the forming and amending of laws. The set law of jurisprudence states that a law is created when the society demands for it. However, the need for criminalising marital rape is not only a need of a certain section of society but also a matter of gross miscarriage of justice and violation of fundamental rights. Even thou the society sees the term marital rape to be an oxymoron but as discussed above it is the need of the hour, as women demand their bodily autonomy and integrity and hence it becomes a new social evil that needs to be tackled just as the act of sati and dowry were taken into cognizance.

VII. The Present Scenario:

"Law is the most effective instrument of social change but at times social change becomes law".[42] Hence, as the society has moved forward women have begun to challenge the patriarchal system and when they raised their voice against the same, their rights have also been taken into account. In the most recent scenario the High Court of Kerala in 2021, showed support to a marital rape victim as a two-judge panel allowed a divorce on the basis of spousal rape[43] and established the precedent for more such cases to follow. The judgement defines marital rape by taking references from Black's Law Dictionary and further the bench of Justices A Muhamed Mustaque and Kauser Edappagath, explained the term autonomy and consent in the sphere of marriage.

The most heated debate however had been taking place in the Delhi High Court in the matter of *RIT Foundation vs Union of India*[44]. In 2015 a writ petition was filed before the hon'ble court, by the RIT foundation demanding criminalisation of marital rape. The petitioners include RIT Foundation, *All India Democratic Women's Association (AIDWA)*[45] who are represented by Adv. Karuna Nundy and a marital rape survivor who is represented by Rahul Narayan. The case was being heard in the Hon'ble High Court of Delhi before the Division Bench, encompassing Hon'ble Justices Rajiv Shakdher and C Hari Shankar.

In a brief note submitted by the Adv. Karuna Nundy on behalf of the petitioners on 09.01.2022. submitted that:

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[42] Dr.S.Durgalakshmi & Mrs.R.Ammu, *Law As An Instrument Of Social Change And For Empowerment Of The Masses*, 5, IJAR, 130 COLUM. L ,131, (2015). (https://www.worldwidejournals.com/indian-journal-of-applied-research-(IJAR)/special_issues_pdf/December_2015_1453448341__45.pdf), (Last Visited on: 11 March,2022).
[43] Bar and Bench, https://images.assettype.com/barandbench-hindi/2021-08/988f2bc9-4fb7-40e4-babc-b58172396477/Kerala_High_Court_Judgement_on_Marital_rape.pdf, (Last Visited on: 11 March,2022).
[44] Writ Petition (C) No. 284 Of 2015 (& connected matters) .
[45] Writ Petition (C) No. 6024/2017.

- Firstly, there is no presumption of the subject matter of constitutionality of a provision that is pre- constitutional,
- Secondly, no new offence will be created by striking down the exception two,
- And thirdly, the exception clause is clearly violative of many articles of the constitution.[46]

To explain these three main submissions of the plaint further, the counsel supported her arguments with recent landmark judgements such as the Independent Thought Judgement extensively which was delivered by the Hon'ble Supreme Court in 2017 and *Navtej Johar vs Union of India* [47] and the *Joseph Shine judgement* [48] at large. The petition has also referred to many provisions of the laws that govern the marital rape provisions of different countries.

After the pandemic, in January 2022 the amicus curiae in the case involves Adv. Rajshekhar Rao and Adv. Rebecca John had put forward their views and opinion as advice to the court. Where the former had urged the court to not wait for the stand of the government and to move forward with its own decision since the legislature had already made the law [49] the latter had highlighted the issue of 'the right to say no' and the plight faced by sick women who are forced to have intercourse[50].

On January 22, 2022 Justice C Hari Shankar stated that there was "too much emphasis on wife's consent", explaining this further he said that in a marital relation both parties have the right to ask for sexual intercourse which is sanctioned to them by their marital bond whereas on the other hand the same is not true for an unmarried couple. [51] In February 2022, the union government stuck to its position that it needs a wider consultation with all the state governments and concerned stakeholders before giving its final verdict.[52]

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[46] RIT Foundation v. Union of India [WRIT PETITION (C) NO. 284/2015]. Written submission of the writ petition is available at: https://www.livelaw.in/pdf_upload/written-submission-407338.pdf) (Last visited: 12 March,2022).
[47] AIR 2018 SC 4321.
[48] 2018 SCC OnLine SC 1676.
[49] THE QUINT, https://www.thequint.com/neon/gender/marital-rape-hearing-rajshekhar-rao-concludes-arguments (Last Visited on : March 13, 2022).
[50] THE QUINT, https://www.thequint.com/news/law/rebecca-john-marital-rape-exception-delhi-hc-legal-fiction-antiquated-notion-of-marriage#read-more (Last Visited : March 13, 2022).
[51] Abhinav Garg, "*Too much emphasis on wife's consent', Delhi HC tells*", THE TIMES OF INDIA, Jaunary.22.2022 (Available at: https://timesofindia.indiatimes.com/india/too-much-emphasis-on-wifes-consent-delhi-hc-tells-amicus-on-marital-rape/articleshow/89048392.cms) (Last Visited on : March 13, 2022).
[52] Richa Banka, "*Delhi HC reserves verdict on marital rape criminalisation*" THE HINDUSTAN TIMES, Februrary.22.2022. (https://www.hindustantimes.com/cities/delhi-news/centre-cites-need-for-talks-delhi-hc-reserves-verdict-on-marital-rape-criminalisation-101645475556460.html) (Last Visited on : March 13, 2022).

On May 11, 2022 a split judgement was pronounced by the division bench on the matter, where Justice Rajiv Shakdher passed the judgment stating that the marital rape exception is violative of many provisions of the constitution and hence it should be done away with and Justice C Hari Shankar on the other hand regretfully, did not share the same opinion as his. After an overview of the entire judgement and the claims made by all parties in the present case, it can be said that the judgement of Justice Rajiv Shakdher is, if not a law now, then it is a step forward. In his judgement he clearly wrote that "the provision of marital rape exception is violative of Art 14, 15, 19(1)(a) and 21 and hence is struck down. Secondly, the offending husbands do not fall into the expression 'relative' as given in the Evidence Act or IPC."[53]

On the other hand, Justice C Hari Shankar dismissed the petition by agreeing with the respondents on the grounds that to legislate on such a matter is the job of the legislature and thus formulation of this law falls outside the ambit of the High Court. Furthermore, he stated in his judgement that the exception clause is not violative of Art 14 and is based on the principle of intelligible differentia and is neither violative of Art 19(1)(a) and 21.

The petitioners have been given the certificate of leave to appeal to the Supreme Court and with this, India waits for justice to be served.

VIII. Conclusion

Criminalisation of marital rape as explained above is not just striking down of the exception clause but creating a right that ensures individual dignity and bodily autonomy of women of all ages. It would ensure justice and prevent the violation of the rights of married women which have been veiled by rigid socio- cultural norms set for women, marriage, and orthodox views of the society as a whole. Marital rape is an evil in the society just as dowry and sati were once, and this it needs to be done away with.

India has stood aback in its UDHR responsibilities as most countries have classified marital rape as an offence and fought against the social evil. The exception clause is violative of Art. 14,15, 21 of the Constitutional and thus is unconstitutional. By overturning the marital rape provision, the judiciary will not be inventing a new crime or intruding into Legislature's domain. It will rule that an 1860 legislation that provided an arbitrary exemption from criminal law can no longer withstand constitutional scrutiny. Furthermore, it will ensure privacy, safety and a sense of autonomy for all women.

[53] *Supra,* note 44 at 192.

India is one of the 34 countries to not have criminalised rape within the ambit of marriage. Countries that have marital rape as an offence have identified the women of their nations as a separate identity and have created not only laws for their protection but rights which are for the women to claim. Men and women in countries like the United States, can both file cases as they are identified to be equals. This helps in not only criminalising marital rape but also makes rape laws to be gender neutral. The reason why marital rape is not criminalised in India is due to the lack of identification of women rights.

The ideas of sociological jurisprudence states that a law is created once the ever-evolving society decides to ask for a mandate from the state regarding an act or omission. However, the very basis of asking for such a mandate for women, by women themselves is impractical as a lady after her marriage is still identified with the name of her man. What India needs is for its women to be identified in the civil laws. Also, it is to be noted that this responsibility does not only lie on the shoulders of the judiciary, instead it must be seen as a collective duty of the nation as a whole.

DOCTRINES OF COMPANY LAW, APPLICATION, AND IRREGULARITIES: CRITICAL ANALYSIS

Adv. Harshit Adwani[54]

Abstract

Judicial precedents are said to be one of the important sources of law in India. Although laws are made by the legislature of the country (parliament), it is the duty of the court to interpret these laws with an aim to achieve the desired objectives of any particular statute, which makes them the actual implementation authority. While interpreting these provisions, courts in various cases create such principles, which acts as a guidance for judiciary in future cases. This also leads to creation of various doctrines, which acts in pursuance of the existing laws. However, it is an undisputed fact that laws in India are said to be old and primitive, and various experts argue that many of the provisions need amendment as per the existing situations. The same applies to the doctrines created by the judiciary, while interpreting these primitive laws. It is an indisputable fact that Indian laws are broadly based on western principles. Company law is no exception to this. In addition to this principal legislation, various judicial precedents act as guiding principles for implementation. Some of the uncodified principles are the famous doctrines of company law, which were made by the judiciary to fill the gap for achieving the desired objectives. However, as these doctrines were made years ago, the question arises whether these doctrines have the same importance in the present scenario, where the law under which these doctrines were made have been amended. The current research is an attempt to analyse the current applicability of various company law doctrines, i.e., (doctrine of ultra vires, constructive notice and indoor management), its significance in the changing scenario, and the interpretation given by the judiciary to keep these doctrines alive and operative.

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I. Introduction

The economy of India is witnessing a noticeable trend of increasing corporate houses in the Country. As per the records, the number of registered companies in India has increased from fifty-one thousand in 2005[55] to more than eighty five thousand in 2010.[56] Rising number of companies creates an obligation on these organizations to ensure legal compliance. To confirm protection of all stakeholders, regular amendments by the legislature can be observed, in order to seal the escape routes for defaulters. The Companies Act, 2013 stands as the best illustration, which appeared as a result of major amendments to deal with the modern era. However, various unpredictable events might lead to a situation where existing piece of legislation appears to be insufficient, which shifts the burden on judiciary to interpret such legislation with an aim to achieve the desired objective, which might lead to introduction of judicial precedents or judicial doctrines, to settle the issue in hand, and create a principle for future cases. One of the well-known doctrines under company law is doctrine of lifting of corporate veil,[57] which was handed down in the case of *Salomon v. Salomon & Co Ltd*.[58] Similarly, different doctrines were laid down by judiciary, which are opined to hold great significance in current scenario as well. Some of the important doctrines are specifically dealt with ahead.

II. Doctrine of Ultra-vires

The term '*ultra vires*' is the Latin phrase which means '*beyond the scope of*'.[59] In simple words, it can be explained as something, which is done in excess to the powers granted by the authority or under any statute.

Memorandum of Association is one of the primary documents, and known as foundational document of the company,[60] as it contains all the relevant information of the company i.e.,

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[55] Ministry of Corporate Affairs, https://www.mca.gov.in/bin/dms/getdocument?mds=ZM7G34HE3La9kyXOmAN3DQ%253D%253D&type=open (last visited March 3, 2022).

[56] Ministry of Corporate Affairs, https://www.mca.gov.in/bin/dms/getdocument?mds=4xuisEanVIlunqFhKqkHDA%253D%253D&type=open (last visited March 3, 2022).

[57] Under this doctrine, the Company is considered to be a separate legal entity, which is distinct from its shareholders, members, or founders. As a result, a company acquires the independent status of a juristic person.

[58] UKHL 1, AC 22.

[59] Nidhi Vaidya and Raghvendra Singh, *Applicability of Doctrine of Ultra Vires on Companies*, RESEARCHGATE, (March 3, 2022, 113:35 AM) https://www.researchgate.net/publication/228283150_Applicability_of_Doctrine_of_Ultra_Vires_on_Companies.

[60] 1 A. RAMAIYA, GUIDE TO THE COMPANIES ACT 343 (Wadhwa & Co. Nagpur 2004).

object of the formation, capital raised etc. When the company commits any act, which is not specified under the object clause of Memorandum, it exceeds the authority provided and thus, the said act is said to be void under the doctrine of ultra-vires.

Although not codified under any law, this doctrine has played a significant role in regulating the powers of the companies and to check the actions of these companies. In initial years, companies were regulated under the rules of partnership and as a result, members of the company had unlimited liability towards creditors. This brought the balance of convenience in the favor of creditors, and made their investments secured. However, with the evolution of limited liability principle, a line of demarcation was drawn between the company and its owners, which brought the members of the company within the scope of limited liability, and this created a sense of fear and misery in the minds of creditors. Thus, to protect the interest of these creditors, the doctrine of *ultra-vires* was established. The doctrine was examined in the case of ***Sutton Hospital*** in 1612,[61] where the court held that the doctrine is not applicable on chartered corporations, even if they are separate legal entities. However, after recognition of limited liability principle, the doctrine was discussed and acknowledged in the landmark case of ***Ashbury Railway carriage & Iron Co. v Riche,***[62] in which the court said that any act or contract, which is ultra vires in nature, is void since its inception, and the company does not have any authority or power to make it valid. The court also specified that the act will not become valid after ratification by shareholders, as it will allow them to perform any act or transaction, which they are prohibited to perform.[63]

As the development of doctrine created a restrictive boundary for operations, companies started searching for loopholes to evade and escape from its application. This resulted in lengthy and vague object clauses, where companies started mentioning different kinds of activities, unconnected from the primary purpose of the company, as various objects of the company. The case of ***Re. German Date Coffee Co***.[64] brought one of such attempts into limelight, where the company was established and was performing various acts, overlooking its basic objective (acquiring of German patent), under the shadow of improving and extending its main objective. The shareholders applied for the winding up of the company on the ground that the main objective of the company has become unachievable. The court, accepting the contention of the shareholders, held that the company should wind up on just

[61] (1612) 77 E.R. 937.
[62] (1875) L.R. 7 H.L. 653.
[63] *Ibid.*
[64] (1882) 20 Ch. D. 169.

and equitable grounds. To overrule this precedent, attempts were made by the companies, where they added an independent objective clause, and mentioned that each function should be considered as primary. Although the attempt was successful in few cases,[65] court held that the independent object clause cannot be used to convert a power into an object,[66] and specified that companies are liable to mention its objects in the object clause of the Memorandum, and not the powers of the company.[67]

The doctrine was introduced in India years before attaining Independence in the case of ***Jahangir R. Modi v. Shamji Ladha,***[68] in which the directors of the company dealt in shares of other companies, which led to losses. The plaintiff challenged the validity of these transactions on the ground that the object clause, defined under the Memorandum of Association, did not specify these types of transactions. As a result, the petitioner prayed that the directors should be personally held liable to repay all the funds used by them to purchase the shares of other companies, as well as to pay all the losses incurred to the company. Protecting the interest of other parties involved, it was held by the court that

> *"A shareholder can maintain an action against the directors to compel them to restore to the company the funds to it that have been employed by them in a transaction that they have no authority to enter into, without making the company a party to the suit".*[69]

Although the doctrine has played an important role in restricting the companies to misuse the funds of the investors or to protect the interest of its creditors, there are certain cases in which the doctrine is not applicable. These are said to be the exceptions of this doctrine. Some of them are –

- When any act is intra vires i.e., within the scope of memorandum or articles of the company, but outside the authority of the directors. In these cases, such acts of the directors can be ratified by the shareholders of the company. In ***MacDougall v. Gardiner,***[70] it was observed that the court should not interfere in such acts, which the shareholders are eligible to ratify by passing special resolutions.

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[65] Cotman v. Brougham (1918) A.C. 514.
[66] Re, Introductions Ltd. [1969] 1 ALL E.R. 887.
[67] *Ibid.*
[68] 4 Bom. HCR (1855).
[69] *Ibid.*
[70] [1875] 1 Ch D 13.

- When the directors perform any valid act in an irregular manner, which can be ratified by shareholders' will and consent.
- In case the company acquires any property under an ultra vires transaction, the company will continue to own the property, as it involves shareholders' funds in the transaction.[71]
- Other than the powers provided under memorandum, certain implied powers are provided under Companies Act, 2013 and other laws in force, which authorizes a company to perform certain acts that are not specified under its memorandum. However, the same will not be ultra vires under this doctrine.
- If any act is declared to be ultra vires under the articles of the company, the same can be amended by the company by following the procedure prescribed, with an aim to validate the said act.[72]

III. Doctrine of Constructive notice and Indoor Management:

As a general act of prudence, parties entering into any commercial contract analyse and consider all the circumstances and capacity of the other party in respect of performance of contract, in order to ensure their safety in the commercial transaction. As a company is considered to be a separate legal entity, the same principle applies to any person entering in a contract with any company, to evaluate and examine the competency of the company regarding the performance of the contract. This concept is known as the doctrine of constructive notice.

The concept of constructive notice is defined as *any one dealing with a company is deemed to have notice of the contents of its "public documents", e.g., Memorandum and Articles of Association*.[73] In other words, a third party, whether actual or potential party to the transaction with the company, is deemed to have knowledge about its object clause. In case of failure, the person will be liable and not the company.

The case of ***Kotla Venkataswamy v. Rammurthy***[74] is an ideal example, in which the plaintiff entered into an agreement of mortgage with a company. The deed of mortgage was signed by the secretary and one working director of the company. However, under Articles of the company, any document executed on behalf of the company required signatures of the

[71] Muhammad Waqas, *Applications of the Doctrine of Ultra Vires in Developed Countries and Developing Countries*, 4 (7S) J. Appl. Environ. Biol. Sci. 145, 146.
[72] Adarsh Dubey, *An Analysis of the Doctrine of Ultra Vires from the Indian Perspective*, 5 IJLDAI 125, 133 (2019), https://thelawbrigade.com/wp-content/uploads/2019/05/Adarsh-Dubey-1.pdf.
[73] C.R. DATTA, COMPANY LAW PART I 30 (7th ed. 2017).
[74] AIR 1934 Mad 579.

managing director, the secretary and one working director of the company. The court held the deed to be void, as it was not executed as per the provisions of the Articles. The court highlighted that if the plaintiff had visited the contents of the Articles; she would have identified the issue in execution, and would have refrained from accepting the deed, as it was inadequately signed.[75]

The doctrine of indoor management is argued to be one of the tools enacted to protect the interest of companies along with various stakeholders involved in business with corporations.[76] However, in the initial years of growth of corporate transactions and legislations, it was witnessed that the company used various sets of laws and principles as a weapon to escape from its liability at the time of execution of contract, which led to instances of fraud with investors and creditors of the company. Similar circumstances were observed in the case of ***Royal British Bank v. Turquand***,[77] which led to the evolution of doctrine of indoor management. In this case, the plaintiff lends a sum of money to directors of a particular company. At the time of repayment, the defendant contended that the required resolution, which was a prerequisite for borrowing money under Articles of the company, was not passed in the board meeting, and hence, the company was not liable to repay the amount. Though the company attempted to hide in the shadow of the doctrine of constructive notice, the court created a line to protect the interest of investors and held that passing a resolution is part of internal management of a company, and an outsider is not liable to be aware of internal management of the company. As a result, an outsider should not suffer in case of a company's failure to complete necessary procedures. This led to fruition of doctrine of indoor management, under which any person entering into a transaction with the company is not bound to have knowledge about the internal irregularities of the company,[78]and can assume that *the company's internal management is systematic and its affairs are being carried on in accordance with its Articles.*[79]

This doctrine was introduced primarily for two reasons – to establish a limit as to what extent an outsider is liable to enquire into the business of the company, and secondly, it is not

[75] *Ibid*.
[76] Ajay Pal Singh, *Doctrine Of Indoor Management: A Hallowed Safety Valve under the Modern Company Law*, 1 IJLRA 4, 4 (2020).
[77] All ER 435 5.
[78] C.R. DATTA, COMPANY LAW PART III 2 (7th ed. 2017).
[79] *Ibid.*

possible for a person to have enough means to ascertain whether company has complied with all the inner formalities and procedures necessary to enter into the transaction.[80]

The doctrine was applied and in the landmark case of ***Mahoney v. East Holyford Mining Co***.,[81] the facts of which are that the company issued a cheque in favor of the plaintiff. It was laid down in the Articles of the company that any cheque needs to be signed by at least 2 out of 3 directors and in addition to that, by the secretary of the company. Although the cheque was signed by all the officials specified under the Articles, the company contended that the director who signed the cheque was not appointed in the prescribed manner. The court, applying the said doctrine, held that appointment of a director comes under the internal management of the company, and third parties receiving the cheque were entitled to presume that the directors had been properly appointed.[82]

In India, the doctrine was recognized in the case of ***Lakshmi Ratan Cotton Mills Co. Ltd. v. J.K. Jute Mills Co. Ltd.,***[83] in which the plaintiff company sued the defendant for payment of an amount. Defendant contended that the necessary resolution required for sanctioning the loan was not passed, and thus, the said transaction was not binding. The Allahabad High Court held that if any transaction of loan is not barred by either the charter or Articles of Association, and a person on behalf of company enters the said transaction, then other party is entitled to presume that all the necessary conditions required in respect of the said transaction have been complied with. It was further observed by the court that a transaction entered into by the borrowing company cannot be defeated only on the ground that the required resolution was not passed.

However, a person cannot claim protection under this doctrine if a person has not analysed the Memorandum and Articles of the company. This situation was observed in the case of ***Rama Corporation v. Proved Tin & general Investment Co.,***[84] in which the company (Rama Corporation) was not aware about the provision of delegation of power under the Articles of the defendant and without such prior knowledge, entered into a transaction with one of the directors and paid the consideration amount to him. Later, the defendant argued that the said director was not delegated any power by the company and hence, the company was not liable to repay the amount. It was held by the court that as plaintiff had no knowledge about the

[80] Oakbank Oil Company v. Crum [1882] 8 AC 65.
[81] (1875) LR 7 HL 869.
[82] *Ibid.*
[83] AIR 1957 All 311.
[84] [6] (1952) 1All. ER 554.

Articles of the company and was not aware about the delegation clause under the Articles, he cannot claim protection under doctrine of indoor management.

Similarly, it was held in the case of ***B. Anand Behari Lal v. Dinshaw & Co. (Bankers) Ltd***.[85] that no person can take advantage of the doctrine if he behaves negligently, or when he does not make any inquiry. In cases where a representative of company performs any unsanctioned act (as under the present case, an accountant transferred an immovable property of the company), other party entering into transaction is liable to make proper inquiries in respect of the said act and should be satisfied by such inquiry, that concerned officer is authorized to perform the transaction.

IV. Erosion of the Doctrines:

Though these doctrines were developed with an aim to protect the interest of various parties involved in day-to-day transactions with a company, with development and changing circumstances, many companies used various methods to escape from the sphere of these doctrines, which frustrated the entire purpose. As a result, these doctrines were condemned and opined to be of no use.

The Doctrine of *ultra vires* is one of the ideal illustrations of such opinions. Though the doctrine was laid down to create a clear set of objectives, companies created several escape routes such as adding different dissimilar and independent objectives in the objective clause, as seen in the case of ***Cotman v. Brougham,***[86] in which a company involved in the rubber business underwrote shares of an oil company. After analysis of its memorandum, it was observed that the memorandum contained various objects and one of them was to subscribe the shares of other companies. It was clearly specified that all the objects were independent of each other and no object should be interpreted as a part or clause of the main objective. It was held by the House of Lords that the company was authorized to deal with subscription of shares, as it was clearly specified in the object clause of the company. It was also observed that obtaining a certificate of incorporation implies that the company has complied with all the necessary requirements, and the process of incorporation does not suffer from any form of infirmity.[87]

[85] AIR 1942 Oudh 417.
[86] *Supra* n.12.
[87] *Ibid.*

The Cohen committee criticized the doctrine by explaining it as '*an illusory protection for the shareholders'* and *'pitfall for third parties dealing with the company'*[88] and opined that amendments or alterations in chief documents of the company should be permitted by passing special resolution, without any compulsion of obtaining prior sanction from the Court, which led to several amendments in Companies Act. After such amendments, the case of ***Bell House Ltd. v. City Wall Properties Ltd.***[89] was one of the important cases, which dealt with this doctrine. Under this case, the company was authorized to carry any trade or business, which was not related to the main business of the company. Company can enter into such business if the same, according to the directors of the company, was advantageous to the general business of the company. The court held such clauses to be valid and not *ultra vires*, even if the ancillary business had not any relationship with the main business of the company. The acceptance of this action by the judiciary was argued to be the *judicial death* of ultra vires doctrine.

On the other hand, a series of amendments contributed to the erosion of this doctrine. For example, under sec. 110 of Companies Act, 1989, any object, which was not specified under the object clause of the company, will not be considered as ultra vires and it can be ratified by the shareholders of the company. Similarly, the 2006 Act provided power in the hands of the judiciary to evaluate and decide which activities will be considered *as within or outside the scope of the business* of the company and the decision of the court on such matters shall be final.[90] In this way, the doctrine of *ultra vires* was terminated by legislative actions as well.

Similarly, as these corporations were said to have the same powers as humans, various questions were raised such as whether a company had power to enter into any transaction which is advantageous, or whether the company had authority to delegate all these powers to its directors, who is representing the company in various transactions. These questions were discussed in Jenkins committee,[91] which give following recommendations on doctrine of constructive notice.

(a) Any contract between the company and another party entered in good faith should not be held invalid as against the other party on the ground that it was beyond the powers of the company.

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[88]Takeovers Panel (Cohen Report 1945), https://www.takeovers.gov.au/content/Resources/other_resources/Cohen_Committee.aspx (last visited March 5, 2022).

[89] (1966) 2 WLR 1323.

[90] Adarsh Dubey, *supra* note 19, at 138.

[91] 1962 (Cmnd\749).

(b) While entering into any such contract, the other party shall be entitled to assume that the company is authorized and possess necessary power to enter into such a transaction. Such an assumption can be made without any investigation. In case of omission of such investigation, the person shall not be deprived of enforcing the agreement on the ground that *at the time of entering into it, he had constructive notice of any limitations on the powers of the company, or on the powers of any director or other person to act on the company's behalf, imposed by its memorandum or articles of association*.[92]

After the United Kingdom became a member of the European Community, it made certain modifications and amendments in its domestic laws in accordance with EC First Directive on Company Law. The effects of the same were made under Sec. 35 of Companies Act, 1985. Dealing with the constructive notice, sec. 35(2) of the amended Act stated that –

> *"A party to a transaction so decided on is not bound to inquire as to the capacity of the company to enter into it or as to any such limitation on the powers of the directors and is presumed to have acted in good faith unless the contrary is proved."*

The landmark judgment of ***TCB Ltd. v. Gray,***[93] is said to be the end of the doctrine of constructive notice in the UK. In this case, debentures were issued by the company, which were signed by the solicitor. However, according to the Articles of the company, the director was the authorized person to sign on behalf of the company. It was contended that as these debenture certificates were not signed by the appropriate person, it does not create any liability on the company. However, the court held the company liable, and observed that before the amendment, a person was liable to investigate the memorandum and articles of the company and enquire to satisfy himself that the said transaction comes within the corporate capacity, However, incorporation of Sec. 9 (1) of European Communities Act, 1972 had changed this, as it provides for presumption of good faith, and specifies that *the person dealing with the company is not bound to inquire.*[94]

The amendment of 1989 acted as a final step in abolishing doctrine. Sec. 35B of 1989 Act protected third parties by stating that it is not mandatory for such parties to enquire or to have constructive notice of the transaction beyond the company's constitution. However, it created an obligation on third parties to ensure that they are dealing with the person authorized by the

[92] *Ibid.*
[93] [1986] 1 All ER 587.
[94] *Ibid.*

board.[95] This affected the application of doctrine of indoor management as well, which was coined as an exception to the doctrine of constructive notice.

V. Doctrine under Indian Law:

As highlighted above, some principles and doctrines were introduced in the Indian legal system in the pre-independence era. In the budding stage of judicial authority, reliance was placed on foreign authorities and precedents, which gave a concrete shape to these principles in the Indian legal system post-independence as well. Similarly, after various judicial pronouncements and different interpretations in various cases, these doctrines were established under the Indian corporate system. In addition to this, legislative actions, such as enacting several provisions under Companies Act, 2013, can be analysed, which fulfills the purpose for which these doctrines were specifically evolved.

For instance, even after a lot of criticism against doctrine of ultra vires by various experts and law committees, certain provisions are enacted under Companies Act, 2013, which provides powers in the hands of members or depositors of a company to file an application against the company, whenever a company performs any act which is ultra vires, in order to restrain the company from performing such act.[96]

Similarly, effects of doctrine of indoor management can be analysed under section 176 of Companies Act, 2013, which states that –

> *"No act done by a person as a director shall be deemed to be invalid, notwithstanding that it was subsequently noticed that his appointment was invalid by reason of any defect or disqualification or had terminated by virtue of any provision contained in this Act or in the articles of the company."*[97]

Additionally, the Act creates a liability on the outsider to be aware of the Memorandum and Articles of the company, and provides provisions,[98] under which any person can inspect or analyse company's records that are available with the Registrar of the Company. This leads to the establishment of the doctrine of constructive notice, by which the person is presumed

[95] Chrispas Nyombi: *The Gradual Erosion of the Ultra Vires Doctrine in English Company Law*, 56 IJLM 347, 357 (2014).
[96] Companies Act, 2013, § 245, No. 18, Acts of Parliament, 2013 (India).
[97] Companies Act, 2013, § 176, No. 18, Acts of Parliament, 2013 (India).
[98] Companies Act, 2013, § 399, No. 18, Acts of Parliament, 2013 (India).

to have the knowledge of the information provided in the documents, which are available publicly.[99]

VI. Conclusion:

Though it is an undisputed fact that enactment of above discussed doctrines have supported in protection of parties in various unforeseen circumstances, it can be observed that these doctrines have lost their significance in under different legal systems, including United Kingdom, where applicability of some of these doctrines have been curbed,[100] while some have considered it to be of no importance. However, due to the economic conditions and growth of corporate sector in India,[101] These doctrines still play a significant role in protecting the rights of parties in the Indian legal system. In practical operations, banks and creditors provide funds to newly established companies by analysing their Memorandum and Articles, after assuring that their investments are protected under doctrine of ultra vires, and that *their money would be returned if the company acts outside the authority given by their object clause.*[102] In addition to it, these doctrines are regularly referred to by the Judiciary, which evidences their existence and contribution in framing of corporate principles. Recent cases can be taken as examples, such as ***Radhabari Tea Company Private Limited v. Mridul Kumar Bhattacharjee and Other,***[103] in which the Court explained what acts of a company are treated as *ultra vires*. Similarly, in the case of ***MRF Ltd. v. Manohar Parrikar,***[104] The Supreme Court dealt with the doctrine of constructive notice and indoor management, their inter-relation and laid down its judgement based on one of the exceptions of the doctrine of indoor management.

However, it can be observed that with the passage of time and changing environment, these doctrines have been given various interpretations, which has created a sense of confusion regarding their actual nature and implications. While these doctrines should be used to ensure maximum protection of different sections, it should be interpreted in such a manner that it is not deviated from its original objective. The same was observed in the case of ***Rolled Steel Products Ltd v. British Steel Corporation,***[105] in which the court observed that multiple usage

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[99] Adv. Chinmay Kalyani, *Doctrine of Constructive Notice and Indoor Management*, TAXGURU, (March 10, 2022, 12:40 PM), https://taxguru.in/company-law/doctrine-constructive-notice-indoor-management.html.
[100] Simran Chandok, *Critical Analysis of the Doctrine of Ultra Vires*, 2 JCIL 1, 8 (2016).
[101] *Ibid.*
[102] *Ibid.*
[103] 2009 Indlaw GUW 44.
[104] (2010) 11 SCC 374.
[105] [1985] 3 All E.R. 52.

of the term *'ultra vires'* has led to a lot of confusion. Court further specified that it should be interpreted to include only those transactions, which *are beyond the power, authority, and capacity of a company, and it should not include those transactions that merely reflect abuse of power by the company.*[106]

Thus, as it is undoubted these doctrines play an important role, and *their significance is not going to lessen anytime soon,*[107] but it is necessary to provide a balance between strict interpretation and changing circumstances. For this, specific provisions should be legislated under the law, which could act as guiding principles for the judiciary, and creates an ambit within which a liberal interpretation could be made in order to protect the interests of all the parties.

[106] *Ibid*.
[107] Simran Chandok, *supra* note 47, at 11.

ARBITRATION CLAUSE IN INTERNATIONAL AGREEMENTS

- AYUSH GARG & GAURI KANODIA[1]

Abstract

An arbitration agreement is defined under section 7 of the arbitration and conciliation act, 1996. An arbitration agreement is a contract that is made between two or more parties to submit the arbitration in certain disputes which needs to be settled down between the parties. This arbitration agreement is a legally binding contract. This research paper focuses on the arbitration agreement and its applicability internationally. Further, the authors discuss the meaning of arbitration agreements. Further, the paper discusses the forms of arbitration agreement given in article 7 of UNCITRAL Model Law of International Commercial Arbitration which was introduced in the year 1985. Section 4 of the Arbitration Law (Republic Act No. 876) also discusses the forms of the arbitration agreement. Model law of international commercial arbitration firstly established in the year 1985. The discussion of what became Article 7 was not on a purely theoretical basis, but rather on the question of what type of evidence was needed to conclude that there was a binding arbitration agreement. On the other hand, the content of Article 7 was also largely determined in that domestic law on the validity of arbitration agreements has an important meaning in the enforcement of arbitral awards at the international level. Then the authors focused on the existence of the international arbitration clause in terms of contracts. Further, the authors discuss all the laws governing arbitration agreements. Then we discussed the international arbitration clause. International commercial arbitration is defined as arbitration between individuals or companies of different states.

I. Introduction:

Incorporation of rules which was selected by the institutions with the help of reference into the arbitration clauses would be involved under the institutional arbitration. After this, the arbitration would be administered by that institution. Institutional norms are intended to provide a thorough framework for the processes from start to finish, making them more adapted to deal with any contingencies that may emerge. This is especially important when a counterpart refuses to cooperate with the arbitral procedure.

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It is a consensual and voluntary process. Arbitral tribunal does not have inherent jurisdiction to settle a dispute and it was not like the other national courts. If all the parties give their consent to submit their disputes in the arbitration, then only an arbitral tribunal has jurisdiction to settle the case. An agreement clause has been inserted to draft the arbitration.

II. Arbitration agreement and its forms

The forms of arbitration agreements are given under *article 7 of UNCITRAL Model Law on International Commercial Arbitration (1985)*[2]. This act of 1985 was adopted with amendments in the year 2006.

An arbitration agreement must be in writing, although no specific format has been established. It might be included in a single document or compiled from numerous papers or, fax messages, telegrams, communication consisting of a number of letters, or telex messages.
Section 2(a) of the 1940 Act[3] defined the Arbitration Agreement as follows: - A formal agreement, whether or not an arbitrator is designated, to refer existing or future conflicts to arbitration.

Section 7 of the 1996 Act[4] replaced the ambiguous definition. Section 7 states that an arbitration agreement is described as an agreement by the parties to submit to arbitration all or some problems that have occurred or will develop between them at a later period with reference to a specified legal relationship, whether contractual or not. An Arbitration agreement is created when two parties sign into a contract under which any disputes arising between them over the contract agreement are to be addressed without going to court and with the assistance of an Arbitrator. The agreement should state who will choose the arbitrator, what type of dispute the arbitrator will decide on, where the arbitration will take place, and so on. The parties must sign the Arbitration Agreement, and the ruling is binding on them.

When a disagreement emerges, an arbitration agreement that has been established cannot be revoked. The Supreme Court ruled in ***Ravi Prakash Goel v. Chandra Prakash Goel***[5] that if an arbitration agreement is in place and in effect, the parties cannot move to civil court

[2] UNCITRAL Model Law on International Commercial Arbitration, 1985 art. 7.
[3] The Arbitration Act 1940, s. 2 cl. a.
[4] The Arbitration & Conciliation Act 1996, s. 7.
[5] 2007 SCC Online SC 404.

without first going through arbitration. When there is an appropriate arbitration agreement, the courts are required under Section 8 of the 1996 Act[6] to send the parties to arbitration.

III. Forms of Arbitration Agreement: -

The need that an arbitration agreement be in writing is a key condition under Section 7 of the 1996 Act[7]. Aside from that, Section 7 allows the parties to construct an arbitration agreement in a variety of methods, as listed below: -

- A stand-alone Arbitration Agreement- In addition to the operational agreement between the parties, a separate arbitration agreement can be drafted.
- An Arbitration Clause- In the portion of the agreement that deals with the parties' rights and alternatives in the case of a legal dispute arising out of the contract, an arbitration provision can be written. Arbitration clauses are seen as arbitration agreements.
- Incorporation by reference- An arbitration clause in a separate contract can be integrated into a contract that is already being prepared. Section 7(5) states that any reference to a document containing an arbitration provision is considered as an arbitration agreement if the referred contract is in writing and the reference is made with the goal of making the arbitration clause a part of the contract. The Supreme Court ruled in ***M/s Elite Engineering and Construction (HYD.) Private Ltd. v. M/s Techtrans Construction India Private Ltd***[8]**.** that a broad reference to the inclusion of a separate arbitration clause is not tenable in law. The reference must be explicit and show the parties' desire to incorporate.

IV. Laws Governing Arbitration Agreement

When there are challenges to arbitration agreements and international arbitral tribunals are not bound by any kind of *"lex forti,"* they tend to apply to the body of law that is related to the arbitration. It was decided by the parties to control some of their arrangements' applicability.

The solution to the above problem which comes up in mind is to extend all the laws which are pertinent under the underlying contract where arbitration clauses take place.in the case of ***Sulamerica Cia Nacional De Seguros SA and Others vs. Enesa Engenharia***[9]**,** the approach

[6] *Supra* note 3, s. 8.
[7] *Supra* note 3.
[8] 2018 SCC Online SC156.
[9] SA [2012] EWCA Civ 538.

of interpretation of parties' choice has been seen by the court. In this approach it would be assumed that the parties will choose the new law to govern their arbitration agreement. An insurance policy was governed by Brazilian Law. Seats of arbitration were given to London. The insurers of arbitration commenced the arbitration without respecting the multi-tiered dispute resolution clause and in the consequence of the same the insured company in Brazil filed court proceedings. An anti-suit injunction was obtained by the high court of justice to append the proceedings of the insured company in Brazil. The assured company then appealed the injunction and argued before the Brazilian court by stating that under the Brazilian laws, without the consent of them they cannot invoke against them. Laws which are governing the arbitration agreement would determine the issue of whether or not the arbitration clause could be invoked? The High Court of Justice in the above case observed that if an implied choice of law is absent in the agreement of arbitration, then in that case parties assume that the entire connection will be controlled by the same legal system, which indicates that the choice of law is for the underlying agreement. Furthermore, the court concluded that the main agreement governed by Brazilian law would make the same agreement invalid and void. And because of this parties had no choice to choose Brazilian law even if parties agreed to arbitrate. The underlying agreement would apply if in case this was chosen as an implied choice of law for the agreement of arbitration is absent.

V. Parties' Capacity to Enter in an Arbitration Agreement:

An arbitration agreement, as per general contract law is "*an agreement which possesses legal validity".* Under the Indian contract act, 1872 section 10[10] to 12[11] deals with the subject of capacity to enter into an arbitration agreement. This position is discussed below: -

The capacity of parties: -

- The one (either foreigner or Indian) who is capable of making a contract can enter into an arbitration agreement. And according to the law, the one who has attained the age of majority, must be of sound mind and is capable of understanding the situations and he or she must not be disqualified from making a contract through which he or she is governed.
- Under the law of partnership, on the behalf of a partnership firm a partner may enter into partnership agreement only in that case where he has received written authorisation from the other partners from the partnership firm's agreement.

[10] Indian Contract Act 1872, s. 10.
[11] *Supra* note 9, s. 12.

- If there are no restrictions in the MOA & AOA of the company regarding arbitration agreement, then on the behalf of the company, the director or other offices of a company can enter into an arbitration agreement.
- If the central and state governments can fulfil the constitutional requirements of an agreement then they can enter into an arbitration agreement.
- Private parties and PSU's can also enter into an arbitration agreement. Such agreements can be with Indian or foreign state agencies or with foreign parties.

VI. International Arbitration Clause:

Through the way of arbitration, the parties can settle their disagreements in the case of contracts known as the arbitration clause. If the International Chamber of Commerce (hereinafter "ICC") Arbitration is adopted as the preferred form of dispute resolution, it should be decided during the negotiation of contracts, treaties, or independent arbitration agreements. However, if both parties agree, something can even be introduced after a conflict has occurred. It is advised that parties that desire to include ICC Arbitration in their contracts use the standard clause below: -

The Arbitration Clause of the ICC is a standard clause that applies to all disputes arising out of or in connection with this contract that will be resolved by equal to or more than one arbitrator appointed in accordance with the International Chamber of Commerce's Rules of Arbitration.

Parties are able to tailor the provision to their own needs. For example, given that the ICC Arbitration Rules have a presumption in favour of a lone arbitrator, they may desire to specify the number of arbitrators. It may also be helpful for them to specify the location and language of the arbitration, as well as the relevant legislation on the merits. When modifying the clause, care must be given to avoid ambiguity. Uncertainty and delay will result from unclear phrasing in the provision, which might impede or even jeopardise the dispute settlement process.

Multi- Tiered Clauses- Following an effort at settlement through other means such as mediation, ICC Arbitration may be utilised as the last forum for determining a dispute. Parties that want to add a tiered dispute resolution clause in their contracts that combines ICC Arbitration and ICC Mediation may consult the standard clauses relevant to the ICC Mediation Rules.

Other service combinations are conceivable as well. Arbitration, for example, might be employed as a backup to experts or conflict resolution boards. In addition, parties that use ICC Arbitration may opt to include a provision for recourse to the ICC International Centre for ADR for the recommendation of an expert if an expert opinion is necessary during the arbitration.

Arbitration provisions should be as detailed as feasible. As a starting point, they should include information such as:

- Details on which parties are impacted by the provision;
- When the provision will take effect and when it will expire, if at all;
- Whether or whether the phrase can be changed in the future; and
- The ramifications of breaching the provision.

Model Arbitration Clause: -

Model arbitration clauses written by arbitral institutions are sufficient for most international contracts to enable a smooth-functioning and adaptable arbitral process in the event of a disagreement. Model arbitration provisions have been used in hundreds of arbitrations and have shown to be battle-tested in terms of giving wording that is very unlikely to raise jurisdictional concerns. To remove a commercial disagreement from the domestic court system and subject it to arbitration in the case of a dispute, all that is often necessary is to copy and paste a standard arbitration provision into an international contract.

American Arbitration Association (AAA) / International Centre for Dispute Resolution (ICDR)- The International Centre for Dispute Resolution (ICDR) is a component of the AAA that deals with international issues. "Any conflict or claim arising out of or connected to this contract, or the violation thereof, will be decided by arbitration administered by the International Centre for Dispute Resolution in accordance with the International Arbitration Rules," says the model provision for ICDR arbitration.

VII. Existence of Arbitration Clause:

The Apex Court of India in ***Waverly Jute Mills Co. Ltd. vs. Rayman & Co. Pvt. Ltd.***[12]**,** held that the arbitration clause will not die or becomes dead if there is an arbitration agreement and the contract becomes illegal and void.

[12] AIR 1963 SC 90.

In two landmark cases of the supreme court of India namely ***UP. Rajkiya Nirman Nigam Ltd vs. Indore Pvt Ltd.***[13] and ***Union of India vs. G.S. Atwal & Co.***[14], respectively observed that the arbitrator lacks authority, power or jurisdiction to make a decision regarding the validity and existence of the arbitration agreement and the arbitration is illegal.

Rules of the jurisdiction of the arbitral tribunal have been governed by section 16 of the act: -

1. According to the act, the tribunal of arbitration may rule on the existence or validity of the arbitration agreement itself, and for this purpose: -
   a) An arbitration agreement is considered as a separate agreement that can be included in a contract. It is also distinct from the other terms of the contract; and
   b) The contract's arbitral tribunal's ruling is null and void. And it will result in the arbitration clause being declared illegal ipso jure.
2. A plea has been filed stating that the arbitral tribunal lacks jurisdiction, although it may be raised no later than the submission of the statement of defence.
3. The arbitral tribunal's excess scope must be addressed as soon as the subject is asserted and must go beyond the scope of its jurisdiction as mentioned throughout the arbitral procedures.
4. If there is a delay in admitting a plea then the arbitral tribunal can refer the above cases.
5. Under section 34 of the act[15], arbitral award can be set aside and the aggrieved party is free to make an application to set aside the same. And section 34(2)(a) on the above grounds challenges the awards.

VIII. Suggestions and way forwards

There are many parties who failed to realise that the phrasing of an arbitration clause is important for arbitration to function smoothly. Following are 10 guidelines for designing arbitration provisions in order to prevent procedural events that would jeopardise fast, efficient resolution of a dispute and drive up the expenses of dispute resolution through arbitration.

i. **Start with standard arbitration clauses proposed by Arbitral Institutions: -** Standard arbitration provisions provided by major arbitral tribunals are normally safe to use as a template. These standard provisions provide straightforward, basic

[13] 1996 (2) SC 322.
[14] (1996) 21 CLA 264.
[15] Arbitration and Conciliation Act 1996, s. 34.

wording of the arbitration clause, which the parties must change to the conditions of their contract if necessary. The SCC proposed the following standard clause "Any disagreement, controversy, or claim arising out of or in connection with this contract, or its violation, termination, or invalidity, will be decided by arbitration in accordance with the *Arbitration Rules of the Stockholm Chamber of Commerce Arbitration Institute*." Additions that are suggested: Three arbitrators or a single arbitrator will make up the arbitral tribunal. The arbitration will take place in [...]. The arbitral procedures will be conducted in the following language: [...]. The substantive law of [...] shall apply to this contract.

ii. **Use terms precisely: -** All wording used in the arbitration clause are significant because the arbitral panel will interpret them. Arbitral tribunals will place paramount attention on the language of arbitration provisions when interpreting them. They'll focus on what the parties actually agreed to, rather than what they may have agreed to but didn't. The phrases "must" and "may," for example, have a significant difference. The former is required, whereas the latter is merely optional. The language used should be precise.

iii. **Arbitration clause simple: -** Arbitration clauses that are straightforward, specific, and unambiguous are the most effective. This means that all phrases are obvious and unmistakable, and so cannot be seriously questioned. When the arbitration provision declares in one phrase that the issue will be determined by a single arbitrator, but then states in another language that "each arbitrator will be independent and impartial," there is ambiguity.

iv. **Ambit of Arbitration Clause Matters: -** The arbitration clause's ambit, or scope of applicability, refers to the topics and conflicts that the clause covers and can thus be handled by arbitration. The arbitration clause's phrasing is crucial here, as well. Although parties can agree to arbitrate just specific contract claims, they can also give a purposefully wide scope of arbitration agreement that covers not only all contract disputes, but also issues linked to the contract, including non-contractual claims in some situations. Various words are commonly used in this context, such as "arising out of the contract," "arising under the contract," "connected to the contract," and "in relation with the contract."

v. **Appointing proper number of arbitrators: -** The parties are able to agree on the number of arbitrators who will sit on an arbitral tribunal in their arbitration agreement; often, one or three members are named. The number of arbitrators will have a direct

influence on the entire expenses of the arbitrators' fees that the parties will be responsible for. When a three-member tribunal is formed in a case involving just a modest amount of damages or receivables, the price of the arbitrators' fees may be disproportionate to the amount in dispute (even, at times, exceeding the amount in dispute). As a result, for a contract involving minor funds, it is more practicable to select a single arbitrator rather than a three-member panel.

vi. **Name the applicable law: -** Another factor parties should remember to mention in their agreement is the relevant, or controlling law (also known as "substantive law" or "law of the contract"), if they want to prevent future discussions after initiating an arbitration. When no law is mentioned, choosing an appropriate law to apply to the merits of a dispute is a difficult undertaking, and the arbitral tribunal will take into account a number of factors, generating legal confusion. Contractual terms are subject to varied legal regimes under different laws and legal systems, which the parties should be aware of. A force majeure clause, for example, is regarded differently under French and English law. As a result, attention should be given while choosing a governing legislation.

vii. **Procedural law selected: -** The parties have the option of choosing between institutional arbitration and entirely ad hoc arbitration. Selecting purely ad hoc arbitration (unless the UNCITRAL Arbitration Rules are used) is generally a bad idea, because if the parties are unable to agree on a tribunal when a dispute arises, which happens frequently, court intervention will be required to form the arbitral tribunal, resulting in delays, wasted time, and costs.

viii. **Place/seat of arbitration: -** It establishes the jurisdiction, i.e., the nation, in which the arbitral award may be challenged by a losing party and in which State courts may interfere in the arbitration procedures. In general, choosing an arbitration seat where there would be low opportunity for judicial involvement in the arbitration procedures and which is regarded as arbitration-friendly is suggested. Paris, London, Geneva, and Singapore are all popular arbitration venues. Although the annulment regime is an important concern, it is not the only one, because the seat of arbitration might affect other aspects of the arbitration, such as the arbitration language, if it is not clearly stated in the arbitration agreement.

ix. **Language of arbitration: -** To avoid any further procedural discussions on this subject or the use of default rules included in the law applicable in the seat of arbitration, the parties should incorporate the language of arbitration in their

arbitration clause. Parties are allowed to use any terminology they like. The choice of arbitration language is especially important when the parties are of different countries.

x. **Other consideration: -** The parties are able to agree on any (legally possible) characteristic of their arbitration provision in their contract. This might contain or omit the following: Other factors to consider when appointing arbitrators: sex, education, professional background (professor, engineer, attorney), nationality, and other factors; a fee cap for arbitrators.

THE MISUSE OF THE UAPA AND THE APPROACH TAKEN BY THE INDIAN COURTS

-Rishabh Dwivedi[1]

Abstract

The recent surge in the application of India's primary legislation on anti-terror laws has raised severe concerns over the imposition of unreasonably stringent restrictions on the civil liberties guaranteed by the Constitution. Growing concerns over the inadequacies in the Unlawful Activities (Prevention) Act and the resulting misuse by the authorities to suppress dissent have spiked the recent controversy over the ambiguity and stringency of the act. The ambiguous language used by the act, along with several stringent provisions that impugn the principle of natural Justice, has raised several concerns over the misuse of the act to confine innocents into a battle with a law that was initially formulated to protect them. This article discusses the shortcomings of the act and exposes the misuse of these limitations of the law by the governments. Additionally, the article discusses the recent major cases concerning the stringent bail provisions under the act and analyses the trend being followed by the courts in such cases. It is argued that the recent cases indicate an apparent misuse of the anti-terror law by the government to target certain groups and stifle free speech in the country. The definition of a 'terrorist act' is vague and leaves scope for its wrongful application to wide-ranging lawful activities.Further, the act, an anti-terror law, has stringent and unyielding provisions that do not favour the accused. Lastly, while the courts have recently begun interpreting the constitutional guarantees to the accused within the ambit of the act, interference by the Court mandates a prior violation of fundamental rights and merely remedies an accused. Therefore, there is an urgent need to revisit the age-old law and revamp its provisions and rules based on the current need to avoid exploiting this law in the hands of law enforcement agencies to stifle public dissent in the hands of their political masters.

Keywords: *UAPA, anti-terror law, misuse of law, right to dissent, right to a speedy trial.*

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I. Introduction

"*If our democracy is to flourish, it must have criticism; if our government is to function, it must have dissent*."- Henry Steele Commager

The foundation for a well-functioning and sound democracy is maintaining the government's accountability, transparency, integrity and functioning. These salient features are a prerequisite to ensuring good governance in a democratic society. The Democracy Index by the Economist Intelligence Unit once again termed India to be a 'Flawed Democracy' due to the surge in "democratic backsliding" and "crackdowns" on civil liberties by the authorities.[2] Recent times have highlighted a surge in the instances where the government has attempted to suppress, raising concerns over government policies. Despite the Constitution of India's guarantees the citizens' rights to freedom of speech and personal liberty, several instances of the government suppressing free speech and stifling dissent by the unwarranted imposition of stringent anti-terror laws have been brought to light. The terror laws are sought to be implemented in cases of severe threat and thus have strict provisions that empower the authorities to incarcerate an accused in jail even before being tried.

The Unlawful Activities (Prevention) Act ("the UAPA")[3] is one such instrument used by the State to suppress dissent and restrict the fundamental rights of the people through pretrial incarceration for long periods. The act, which was initially formulated to combat terrorist activities, is being increasingly applied to other activities beyond its scope without any reasonable grounds. This article discusses the recent instances of misuse of the UAPA while analysing bail provisions under the act. It further examines the current trend in interpreting and applying these provisions and granting bail by the courts under the act.

II. Understanding the UAPA and its Scope:

The UAPA traces its origin back to the colonial era. In 1908, the Britisher introduced laws like UAPA by bringing necessary amendments to the Criminal Law Act.[4] This act was brought to criminalise the Indian freedom struggle. After India attained independence, the Indian government decided to continue this act as counter actives that were against the interest of the State, mainly terrorist activities. The present act was introduced in independent India as a bill in 1966 and was passed as a law in 1967. The 1967 version of the act was not

[2] 'ECONOMIST INTELLIGENCE UNIT, https://www.eiu.com/n/campaigns/democracy-index-2020/ (last visited April 13, 2022).
[3] Unlawful Activities (Prevention) Act, 1967.
[4] Priyanka Sinha, *THE CONSTITUTION OF India versus THE UNLAWFUL ACTIVITIES(PREVENTION) ACT, 1967*, 13 IJCR, 1 (2021), http://www.journalcra.com/sites/default/files/issue-pdf/41526.pdf.

formulated as an anti-terrorism law. Still, it was purported to deal with associations engaged in secessionist activities directed against the integrity and sovereignty of the nation.[5] After the infamous 9/11 terrorist attack in the U.S. in 2001 and the attack on the Parliament in India, an increased threat to peace and security from terrorism, along with the repeal of TADA and POTA, encouraged the government to come up with amendments to act in the form of UAPA Amendment Act 2004[6] which criminalised various facets of terrorism. With this amendment, the nature of the act changed from preventing activities that affect the sovereignty and integrity of the country to primary legislation for countering terrorism.[7] The act majorly focuses on punishing terrorist organisations in the country that tried to destabilise India. However, the recent amendment in the UAPA Amendment Act 2019[8]expanded the scope and definition and scope of the word 'terrorist' by amending Sections 35 and 36 so much that it now incorporates individuals within the meaning of a 'terrorist' under the act. The act has taken the form of an anti-terror law that focuses on investigating and punishing all individuals or organisations that engage in terrorist activities.

III. The Shortcomings of the UAPA that results in the misuse of the Law:

As the UAPA was the primary legislation to reduce the number of terror attacks, the provisions under the act are more stringent and non-bailable than other criminal offences.[9] Several provisions are also against the principle of natural Justice and a fundamental constitutional right guaranteed under the Constitution.[10] However, the possibility of imposition of this legislation on those who dissent from the current regime of the government cannot be denied.[11] In such instances, the stringent and uncompromising provisions pose a vicious trap for an innocent individual wrongfully charged under the act. This imposes unjust and unreasonable limitations on the exercise of fundamental rights of the individual.

IV. Ambiguity in the definition of “Terrorist Act”:

The first shortcoming that allows for the misuse of the stringent anti-terror law is the arbitrariness in defining a 'terrorist act' "*under Section 15 of the Act*". This provision is

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[5] Anjana Prakash, *It's Time for the Government To Redeem Itself and Repeal the UAPA*, THE WIRE (April 13, 2022, 8:45 AM), https://thewire.in/law/its-time-for-the-government-to-redeem-itself-and-repeal-uapa.
[6] UAPA Amendment Act, 2021.
[7] Anjana Prakash (n 4).
[8] UAPA Amendment Act, 2019.
[9] Kanishka Vaish, *UAPA ACT: A BLACK LETTER LAW OR A NECESSARY EVIL,* LEXLIFE INDIA (April 13, 2022, 8:45 AM), https://lexlife.in/2021/10/30/uapa-act-a-black-letter-law-or-a-necessary-evil/.
[10] Pragya Barsaiyan & Kumar Kartikeya, *Death sponsored by the State: How the UAPA toys with personal liberty*, BAR AND BENCH (April 13, 2022, 8:45 AM), https://www.barandbench.com/columns/death-sponsored-by-the-state-how-the-uapa-toys-with-personal-liberty.
[11] Ibid.

crucial in applying this law. It prescribes which acts can be classified as terrorist acts and the perpetrators of which can be subject to the unyielding provisions. It defines "*any act done with the intent to threaten or likely to threaten the unity, integrity, security, economic security, or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or any foreign country*" as a terrorist act. The provision uses vague and arbitrary terms like "likely to threaten" or "likely to strike terror in people" to eliminate the requirement of *men's rea* which is a prerequisite to any terrorist actions. Further, the definition also includes all actions "likely to cause the death of, or injuries to, any person or persons" as a sufficient ground to establish the likelihood of a terrorist act. The ambiguity in the provision's text to be exploited to include lawful protests by citizens, students, and activists to be included within the ambit of "terrorist acts" on the pretext of being likely to cause injuries or deaths during the protests taking a violent form. No distinction, however, is made between the right to dissent and free speech and the crime of committing violent acts against the State.[12] This gives the State extraordinary powers to arrest and detain any individuals who protest against its policies or actions or demand accountability. This violates the citizen's Fundamental Right to Freedom of Speech and Expression, Right to Protest, Right to Liberty and Free Movement, and Right against Illegal Detention.[13]

As upheld by the Supreme Court in the case of Joginder Kumar v the State of U.P,[14] "*No arrest can be made because it is lawful for the police officer or the government to do so. The existence of the power of arrest is one thing, and the justification for exercising such power is quite another.*"

Presumption of guilt:- The general principle followed in criminal jurisprudence is the presumption of innocence of the accused until proven to be guilty.[15] This would effectively mean that the burden to prove the commission of the offence lies on the prosecution. Under normal cases, there is a presumption of innocence until proven guilty; however, Section 43E of the UAPA provides that for a charge under the terrorist act, there is a presumption by the Court that the accused person has committed so and so offence alleged by the law

[12] 'Legal Correspondent, *Former Supreme Court judges raise concerns over misuse of UAPA*, THE HINDU (April 13, 2022, 8:45 AM), https://www.thehindu.com/news/national/former-supreme-court-judges-raise-concerns-over-misuse-of-uapa/article35516005.ece.

[13] Aakar Patel, '*UAPA A Tool Of Repression, The Amendment Just Makes It Worse'* (OUTLOOK, April 13, 2022, 8:45 AM) https://www.outlookindia.com/blog/story/india-news-uapa-a-tool-of-repression-the-amendment-just-makesit-worse/4118.

[14] Joginder Kumar v. State of U.P, (1994) 4 SCC 260.

[15] Babu v. State of Kerala and Ors., AIR 1999 SC 3861.

enforcement agency unless the contrary is shown. Here, by using the term "unless the contrary is shown", the act casts an equal burden on the defence to prove their innocence.[16] Further, the *"prima facie presumption of guilt by the court instead of the innocent has made regular bail more difficult to obtain by the accused"*.[17] However, in the recent case of Aseem Kumar Bhattacharya vs National Investigation Agency[18], the Supreme Court held that "*while deprivation of personal liberty for some period may not be avoidable, the period of deprivation pending trial/appeal cannot be unduly long."*

Extension for the period of investigation beyond 90 days:- Under ordinary law, the law enforcement agency is given the maximum period for completing the investigation is 90 days[19]. On the failure to complete the investigation within the said period, the accused have the right to get default bail.[20] However, Section 43D (2) of the UAPA further extends the 'extended period' under the ordinary law and allows the accused to be detained for 180 days.[21] This is done to grant the investigating agencies additional time to conduct the investigation without inconsistency. However, this provision has been misused to detain the accused in jails, denying them their right to bail due to considerable delays in filing charge sheets. In several instances, routine extensions for simple investigating procedures have been demanded. The investigating agencies have repeatedly tried to justify their delays by claiming privileges under exceptions in the law.[22] This indicates a clear non-adherence to procedural fairness and utter disregard for a citizen's liberty constitutionally protected under Article 21.

Stringent conditions for grant of bail:- Bail, in law, means procurement of release of a person awaiting trial or an appeal from prison by the deposit of security to ensure his submission at the required time to legal authority.[23] It is an indispensable part of Indian criminal jurisprudence. The issue of bail is one of liberty, Justice, public safety, and the burden of the public treasury, all of which insist that a mature jurisprudence of bail is integral

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[16] Anjana Prakash (n 4)
[17] Radhika Chitkara, *Clause By Clause, Taking Liberties With Human Liberty*, OUTLOOK (April 13, 2022, 8:45 AM), https://www.outlookindia.com/website/story/opinion-clause-by-clause-taking-liberties-with-human-liberty/380672.
[18] Aseem Kumar Bhattacharya v. National Investigation Agency, AIR 2021 SC 697
[19] The Code of Criminal Procedure, 1973, § 167, NO. 2, Acts of Parliament, 1974 (India)
[20] Bikramjit Singh v. The State of Punjab, (2020) 10 SCC 616
[21] Radhika Chitkara (n 16)
[22] Gautam Navlakha v. National Investigation Agency, 2021 (3) Bom CR(Cri) 103
[23] Sri M. Sreenu, *BAIL, ANTICIPATORY BAIL, MANDATORY BAIL & BAIL AFTER CONVICTION*, DISTRICT E-COURT (April 13, 2022, 8:45 AM), https://districts.ecourts.gov.in/sites/default/files/6-Bail%20Anticipatory%20Bails%20-%20Sri%20M%20Sreenu.pdf.

to a socially sensitised judicial process.[24] The UAPA provides for regular nails and default bail, similar to the Code of Criminal Procedure, 1973 ("CrPC "), with few alterations. In the case of a non-bailable offence under CrPC, the grant of bail is a matter of judicial discretion, and the bail can be refused only if the courts consider it essential to do so. However, Section 43D (5) of the UAPA slightly amends the ordinary procedure, limiting the scope of judicial discretion in the grant of bail in cases of 'terrorist acts.'[25] Although such a provision was inserted to enact a law where a terrorist can be kept under custody for longer periods, the arbitrary definition of terrorist has been exploited to deviate from applying the act to 'hardcore terrorists'. It has been used to target accused of violent riots, protests, and innocent students, activists, and lawyers questioning the government's policies.

Section 43D (5) applies only to the offences punishable under chapters IV and VI of the Act, including offences related to 'terrorist activities' and 'terrorist organisations.' The proviso of this Section lays down the conditions in which the courts shall deny bail. It lays down two essential preconditions. First, that the Court shall examine the case diary of the report made under Section 173[26] of CrPC, and second, that after perusal of the report, there must be reasonable grounds for believing that the accusation against such person is *prima facie* true. The first condition laid down requires that a charge sheet be filed and examined by the Court to determine whether or not bail must be granted. However, the investigation process is lengthy and often faces long delays, which result in the extension to the maximum 180-day period warranted under the act. Until such time, the case diary is used to deny the accused the grant of bail. The problematic aspect here is that the 'perusal of the case diary or report' here doesn't allow for an assessment of the evidence on its merits or demerits, which, along with the presumption of guilt of the accused, largely favours the case of the State. This results in denial of bail to the accused time and again and a denial of a fair trial.

The second requirement under the provision for the denial of bail makes the provision for regular bail under UAPA distinct from provisions under other statutes. Ordinarily, it is required that the Court have reasonable grounds for believing that the accused is "not guilty" of the alleged offence. However, the provisions under UAPA require recording an opinion by the Court deciding bail that there are reasonable grounds for believing that the accusation against such a person is "*prima facie*" true. The expression "*prima facie* true" indicates that

[24] GudikantiNarasimhulu and Ors. V. Public Prosecutor, High Court of Andhra Pradesh, (1978) 1 SCC 240.
[25] Ankit Yadav, *BAIL under UAPA: A tough task,* INDIAN JOURNAL OF LAW AND PUBLIC POLICY (IJLPP) (April 13, 2022, 8:45 AM), https://ijlpp.com/bail-under-uapa-a-tough-task/.
[26] The Code of Criminal Procedure, 1973, § 173, NO. 2, Acts of Parliament, 1974 (India).

any evidence gathered against the accused by the investigating agencies must depict the complicity of the accused in the charged offence. Thus, if the evidence sufficiently depicts a possible case against the accused, the accused is denied bail unless such evidence is rebutted.[27] Here, the degree of satisfaction to depict that their accusation is "*prima facie* true" is lower and thus easier to satisfy by the prosecution than the requirements under other statutes. Due to these reasons, the acquirement of bail in UAPA cases is virtually impossible[28] , and the accused often stay behind bars for long periods awaiting trial. This practice contradicts the general 'Bail is ruled, jail is exception' principle followed by the courts and violates the accused liberty guaranteed under Article 21.

V. The Judicial response to the misuse of the UAPA

The restrictive approach is taken in the Watali Judgement:-

In the case of "National Investigation Agency vs Zahoor Ahmad Shah Watali", the Supreme Court took a restricted approach in interpreting the already restricted provision to grant regular bail under UAPA. This posed a further restriction on judicial involvement. The Court held that "*it is not permissible for courts to even engage in a detailed analysis of prosecution case while considering bail under UAPA and to weigh whether the evidence adduced by the prosecution is sufficient or not*".[29] This would result in an almost complete prohibition on the grant of bail under UAPA, denying the accused a fair trial and their right to seek bail and be freed from generations of pretrial incarceration. Therefore, the restricted nature of the provision, along with the restrictive approach taken by the Apex Court, makes it almost impossible for the accused to get bail and poses an unreasonable strict restriction on the person's liberty.

The case of K.A. Najeeb: a shift from the stringent application of UAPA bail jurisprudence- The Court digressed from the restrictive approach followed in the Watali case and adopted a more reasonable and fair approach for granting bail in the case of Union of

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[27] Namit Saxena, *Regular bail under the UAPA qua terror acts: Outshylocking Shylock*, BAR AND BENCH (April 13, 2022, 8:45 AM), https://www.barandbench.com/columns/regular-bail-under-the-uapa-1967-qua-terror-acts-outshylocking-shylock.

[28] Apurva Vishwanath, *Reading Section 43D(5): How it sets the bar for bail so high under UAPA*, THE INDIAN EXPRESS (April 13, 2022, 8:45 AM), https://indianexpress.com/article/explained/section-43d5-how-it-sets-the-bar-for-bail-so-high-under-uapa-7390673/.

[29] Murali Krishnan, *UAPA restricts role of courts in grant of bail; Supreme Court judgment in Watali case has tied hands of defence: Justice Gopala Gowda*, BAR AND BENCH (April 13, 2022, 8:45 AM), https://www.barandbench.com/news/litigation/uapa-restrict-courts-grant-of-bail-supreme-court-judgment-watali-case-justice-gopala-gowda.

India vs K.A. Najeeb.[30] In this case, the Court upheld the ability of constitutional courts to grant bail on the grounds of violation of fundamental rights even in cases where statutory limitations for the grant of bail exist. Further, the Court stated that the constitutionality of harsh conditions for bail in special enactments like UAPA has been "primarily justified on the touchstone of speedy trials to ensure the protection of innocent civilians." Here, by placing the constitutional protections guaranteed under Part III over the statutory limitation under Section 43D (5), the Court upheld that the constitutional rights can now be brought under consideration in cases where bail jurisprudence under UAPA is in question.[31]

However, while taking a liberal approach, in this case, the Court granted bail to the accused "*owing to the long period of incarceration and the unlikelihood of the trial being completed anytime in the near future*." [32] The Court here recognised the accused right to a fair and speedy trial under Article 21. This means that at the initial stages of the proceedings, the Courts are "expected to appreciate the legislative policy against the grant of bail", and the constitutional guarantees can only be considered as a valid ground to grant bail in cases where "*there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence.*"[32] This allows for applying constitutional rights only as remedial measures when a gross violation has already occurred in the case. Though comparatively liberal from the Watali judgment, such an approach does not protect the accused fundamental rights but merely allows for the rights not to be further violated in instances where the accused has already suffered a long period of pretrial incarceration. Therefore, despite highlighting the inefficient application of Section 43D (5) and the resultant gross violation of rights, the Court merely provided the accused a remedy and failed to establish a safeguard for the rights of the accused, as required by the Constitution.

VI. The recent instances of the grant of the bail by various High Courts:-

Recently, the Honourable Delhi High Court has granted bail to three activists, namely Natasha Narwal, Devangana Kalita, and Asif Iqbal Tanha, who was charged under the

[30] Union of India v. K.A. Najeeb, (2021) 3 SCC 713
[31] Ayush Mishra, *The Supreme Court of India Reads Article 21 Protection into the Stringent UAPA Bail Jurisprudence,* OXFORD HUMAN RIGHTS HUB (April 13, 2022, 8:45 AM), https://ohrh.law.ox.ac.uk/the-supreme-court-of-india-reads-article-21-protection-into-the-stringent-uapa-bail-jurisprudence/.
[32] Union of India (n 30)
[32] Aseem Kumar Bhattacharya (n 17)

stringent provisions of the UAPA; for "conspiring to cause the Delhi riots."[33] It was held that protests and dissent against the government could not be considered 'terrorist acts' unless the ingredients required under UAPA were present.[34] The Court, in this case, also highlighted how the UAPA is used by the machinery to suppress dissent and how the government uses UAPA to suppress the voice of the people and how the use of law by the government has blurred the line between the right to protest and terrorist activity.

Further, on 6 October 2021, the Guwahati High Court granted bail to a man who stated in a Facebook post that the Taliban in Afghanistan and not terrorists.[35] The Court observed that mere Facebook posts where the individual expresses his opinion in the absence of other incriminating evidence cannot be considered a 'terrorist act.' Therefore, this indicates that the courts increasingly recognise the higher standard to be met for acts to qualify as terrorist activities under UAPA subject to stringent provisions. The High Court further upheld this while granting bail to Akhil Gogoi by stating that "*unlawful act of any other nature, including acts [of] arson and violence aimed at creating civil disturbance and law and order problems, which may be punishable under the ordinary law, would not come within the purview of Section 15 (1) of the Act of 1976 unless it is committed with the requisite intention*."[36]

Recently, the Bombay High Court held that "*mere discussion and even advocacy of a particular cause, however unpopular, is at the heart of Article 19(1)(a). It is only when such discussion or advocacy reaches the level of incitement that Article 19(2) kicks in*."[37] Therefore, mere advocacy of a cause is insufficient to classify an act as a terrorist under UAPA and cannot be subject to such stringent provisions. This further increases the threshold for qualifying a particular action within the ambit of UAPA.

Therefore, the courts have taken a more liberal approach in granting bail under the UAPA and have incorporated several rights of the accused within the stringent provisions of the act. However, it remains undisputed that the grant of bail under UAPA remains discretionary mainly. The act's provisions provide scope for misuse by the government and non-

[33] Asif Iqbal Tanha v. State of NCT of Delhi, 282 (2021) DLT 121; DevanganaKalita v. State of NCT of Delhi, 282 (2021) DLT 294; Natasha Narwal v. State of Delhi NCT, 2021CriLJ 3108.
[34] Sruthisagar Yamunan, *Granting bail to activists, Delhi HC exposes abuse of UAPA – but flaws inherent in the law remain*, SCROLL (April 13, 2022, 8:45 AM), https://scroll.in/article/997631/granting-bail-to-activists-delhi-hc-exposes-abuse-of-uapa-but-flaws-inherent-in-the-law-remain.
[35] Maulana Fazlul Karim Qasimi v. The State of Assam 2021.
[36] Akhil Gogoi v. National Investigation Agency, 2021 (2) GLT 1.
[37] Iqbal Ahmed Kabir Ahmed v The State of Maharashtra, 2021ALL MR (Cri) 3105.

interference by the courts. This leaves the citizens at the mercy of the judiciary to exercise its power to abrogate the misuse of the law. Moreover, the approach taken by the courts, though recognising several rights of the accused, is still merely focused on providing a remedy. Thus, the courts merely protect the rights of the accused from further being violated and cannot safeguard the accused persons against the misuse of the UAPA. Therefore, there is an urgent need to either bring necessary amendments to the act to prevent its misuse or repeal UAPA altogether to prevent this law from being used as a tool of operation by the current regime in power.

VII. Conclusion:

Legislature brought UAPA to combat terrorist activities in the country; ironically, the authorities use this same act to target religious minorities, activists, peaceful protestors, and others demanding accountability and good governance is more apparent than ever. As per the government data, there has been a "*72 per cent increase in the number of arrests made under the UAPA in 2019 compared with the number made in 2015*".[38] The conviction rate of around 2% has also been disclosed, with only 149 members being convicted out of the total 4690 members arrested between 2018-and 20.[39] Such an abysmally low conviction rate exposes the misuse of the anti-terror law to incarcerate innocent individuals for long periods without any reasonable grounds. It highlights how thousands of members have been detained behind bars due to long trial periods and the inability to acquire bail due to the stringent provisions.

In such cases, a mere acquittal does not grant "justice" to the accused. The effect of the jail period on the livelihood of the accused and their families is immense. The purpose sought from the increasing use of the UAPA by the State is not to convict the persons but instead to wrongfully detain them in prisons for long periods. The stringent provisions of the UAPA, the presumption of guilt, the difficulty in acquiring bail, the extended period for filing the charge sheet along with the judicial intervention being limited to granting remedies makes the draconian UAPA law the perfect weapon for suppressing free speech and dissent by detaining innocents for long periods before the trial. In such instances, the acquittal of the accused after months, years, or decades does not grant "justice". Here, as rightly pointed out

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[38] Bilal Kuchay, *With 2% convictions, India's terror law more a 'political weapon'*, AL JAZEERA (April 13, 2022, 8:45 AM), https://www.aljazeera.com/news/2021/7/2/india-terror-law-uapa-muslims-activists.

[39] Bharti Jain, *Centre: 57% of those held under UAPA in 2018-20 below 30 years,* THE TIMES OF INDIA (April 13, 2022, 8:45 AM), https://timesofindia.indiatimes.com/india/centre-57-of-those-held-under-uapa-in-2018-20-below-30-years/articleshow/88286640.cms.

by Justice Lokur, the issue of prolonged trials results in the process itself becoming the punishment.[40] One of the arguments favouring enacting such a law is that it is in line with the Directive Principles of State Policies and is necessary for "national security". On the other hand, it is argued that all laws, legislation, and statute must adhere to the country's Constitution. The act criminalises the fundamental right to form associations and crosses the fine line between the right to dissent and sedition. The right to dissent is a fundamental right that the State must protect, and this act fails to do so. While, given the intricacies of terrorism, strict legislation may be essential, there needs to be a fine balance where such legislation does not end up giving up too many arbitrary powers to the concerned authorities. The conviction rate under the act is dismally low, at only 2.2 per cent, reflecting both state overreach and misuse of the draconian law. As a result, this law must be repealed to discourage its misuse and prevent the country's democratic nature from eroding. Therefore, there is an urgent need to revisit the age-old law and revamp its provisions and rules based on the current need to avoid exploiting this law.

[40]Abhilasha Chattopadhyay, *'Long Trial Process Tends to Become Punishment': Former Justices Critique Bail and Jail under UAPA*, NEWS CLICK (April 13, 2022, 8:45 AM), https://www.newsclick.in/long-trial-process-tends-become-punishment-justices-critique-bail-jail-UAPA.

IMPACT OF RIGHT TO EDUCATION ON THE EMPOWERMENT OF WEAKER SECTIONS OF SOCIETY

-Shubhangi Chhaya[41]

Education promotes equality and lifts people out of poverty. Education is not just for a privileged few. It is for everyone. It is a fundamental Human Right.

-Ban Ki Moon

Abstract

The right to education was granted as a matter of fundamental right incorporated under Article 21(A)[42] *in 2002 and the Right to education act received the consent of the President on August 26, 2009, finally coming into effect on April 1, 2010. The paper discusses the Right to education, the background of its enactment and some of the objectives with which it was enacted. Secondly, the paper highlights the challenges and areas of gaps in its implementation with a special focus on the impact on the weaker sections of society. The later part specifically focuses on the root cause which prevents this right to education to be properly implemented which is Poverty which leads to child labor and finally leads to illiteracy and generational poverty continuing a never-ending cycle thus leaving a lacuna in fulfilling the objective to uplift the weaker section through this right to education. In the later part of the paper, some suggested reforms can be taken to effectively use this tool of the right to education in the empowerment of weaker sections of society.*

***Keywords*:** Education, Poverty, Illiteracy, Child labour.

I. Introduction

Education in these modern times is an intrinsic need of society. It was finally in August 2009 that the Right to Education Act (RTE)[43] was passed by the Indian Parliament providing for free and compulsory education for children between 6-14 years under article 21 (A)[44]. This was probably the first firm move of the Indian Parliament guaranteeing the education of every child as a matter of fundamental right. Finally in 2010, Article 21(A)[45] and the Right to Education (RTE) Act, 2009 became effective After this legislation came into force there was a justifiable legal framework for the children about free and compulsory elementary

[41] B.A.LL.B., Honours, Christ (deemed to be) University.
[42] INDIA CONST.art.21(A), *amended by* The Constitution (Eighty-sixth Amendment) Act, 2002
[43] Right to Education Act, 2009, Acts of Parliament, 2010(India)
[44] INDIA CONST.art.21(A) *amended by* The Constitution (Eighty-sixth Amendment) Act, 2002
[45] *Ibid*

education as well as strengthening the values of equality, social justice, and democracy. However in a country such as India where 6% of the population[46] is forced to live in extreme poverty, 35% in slums[47] without any adequate means of housing and shelter and around 14% population is undernourished[48], education often takes the back seat and is ultimately ignored. The fact that the right to education was guaranteed as a matter of right by the Indian parliament for achieving a greater cause, surely cannot be undermined but at the same time, in reality, other issues prevent achieving the potentially planned outcome of this legislation.

III. Right to Education:

Education is a recognized basic human right both at national and international levels. The Universal Declaration of Human Rights[49] affirms that education is a fundamental human right for everyone and this right was further detailed in the Convention against Discrimination in Education. In India, education is recognized finally as a fundamental right and has a brief history and background.

Background of Education as a Right in India:-

Education is a right and not a privilege and every child between 6 to 14 years of an age gap is entitled to free and compulsory education was finally stated in the 86th constitutional amendment of the constitution adding the Right to education under Article 21(A)[50]. This was a move to uplift the society in the long run by using education as a tool.

It was in December 2002 that the 86th constitutional amendment Act was introduced for children between the age group of 6 to 14 years and the right to free and compulsory education was incorporated under Article 21(A)[51].

Main Provisions of the Act:-

Free elementary education: The key provision of this legislation is providing free elementary education to children in the age group of 6-14 years of age and the word 'free' connotes that financial conditions must not be a barrier for any child in attending and completing their elementary education[52]. This provision not only extends to free tutor

[46] THE GLOBAL STATISTICS, https://www.theglobalstatistics.com, (Last visited Sep. 30,2021).
[47] THE WORLD BANK, https://data.worldbank.org/indicator, (Last visited Sep.30,2021).
[48] INDIA FOOD BANKING NETWORK, https://www.indiafoodbanking.org/hunger, (Last visited Sep. 30, 2021).
[49] Universal Declaration of Human Rights, 10 December 1948.
[50] INDIA CONST.art, 21(A), *amended by* the Constitution (Eighty-sixth Amendment) Act, 2002.
[51] *Ibid.*
[52] Unni Krishnan, J.P. v. State of Andhra Pradesh,1993 AIR 2178, 1993 SCR (1) 594.

facilities in school but also any other facility that a child needs to fulfil, for instance- if a child lives in a remote area providing free transportation facilities or alternative residential facilities will be inclusive of the right to free education scheme.

Quality standards:- A separate set of standard norms has been envisaged to be followed for quality education. It says that student teacher's ratio cannot exceed 1:30 i.e. 30 students per teacher[53]. Also, there are rules set for teachers which are based on their qualification and training norms as decided by the academic authority, which must be fulfilled by the teachers to get eligible for teaching. Syllabus and courses are also structured in a manner taking into consideration the age and learning outcome ability for particular age groups.

Continuous Evaluation System:-The evaluation system focuses on the overall performance of a student throughout the year rather than deciding solely based on a single exam at year-end. The evaluation procedure continues throughout the academic year. Moreover, the legislation directs to admit of children at any time of the academic year and seek admission also they cannot be denied admission on failure to present any age proof certificate[54].

Provision for the weaker section:-The Act envisaged provisions specially framed for the disadvantaged weaker sections of the society. It directs private educational institutions to reserve 25% of seats for children from weaker section[55].

III. National Education Policy, 2020

The policy adopted brought in certain major reforms almost after 34 years. For a very long time, the curriculum has been divided into a 10+2 format but the new education policy introduced a curriculum structure of 5+3+3+4 covering the age groups 3-8, 8-11, 11-14, and 14-18 years respectively**.**

The education policy has many provisions for improving the higher education system and plans to govern higher education institutions under one body except for the legal and medical institutions.

School learning has also been revised to a greater extent paving for activity-based learning and thus reducing the course-related burdens. It proposes to include skill-based courses that may help to develop some quality skills which may help in the future.

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[53] Iftikhar Islam, *A Study of Challenges of Right To Education act 2009*, 11, IJRSR, 74-81,(2020).
[54] Right to Education Act, 2009, Acts of Parliament, 2010 (India).
[55] *Ibid.*

Coming to the points from National Education policy which is most persistent with the topic of discussion in this paper is the education of weaker sections, NEP proposes a plan for inclusive and equitable education for all. The direct aim of which is to ensure that no children are deprived of any opportunity to learn and excel because of their economic status and background.

Special importance is given on socially and Economically Disadvantaged Groups (SDGs) which include gender, socio-cultural, geographical identities, and disabilities. Many children drop out of school just because their economic and financial status does not favour them. This was a very prominent problem that was finally addressed in the National Education Policy, 2020. Socially and economically unprivileged children were always on receiving ends of education deprivation, National education policy is thus a great and welcoming legislation in this regard in which economically underprivileged children are given emphasis.

A provision of a special education zone also includes that no child is deprived of his right to education because of living in a disadvantaged area. Financing of students for education is also an important initiative taken up by central and state governments together to reach 6% of GDP in the education sector.

IV. Challenges in implementation of the Right to Education

Free and compulsory education is granted as a matter of right as a great development in Indian democracy, however in such a big country like India implementation and execution of any legislation face a number of challenges. Similarly, the educational right guaranteed to every child aged between 6 to 14 years has certain procedural shortcomings and loopholes.

Is the age group of 6 to 14years justified?

RTE discusses the age group, which begins at the age of six. In India, however, basic schooling begins at the age of two and a half years. As a result, the statute does not apply to children under the age of six. The age chosen cannot be justified. As a signatory to the United Nations Convention on the Rights of the Child, India has recognized the international definition of a child under the age of 18 years[56]. By omission, the law disregards the requirements of children aged 15-18 years, which is absurd because, at 14 years of age, a kid would barely be in the 9th grade. After 14 years, the youngster may be obliged to work as a

[56] Bairagi, A. & Shrivastva, A. *Right to Education in India: A Study* 3 (2).ISRJ, (2013).

labourer because his or her education would not provide him or her with respectable employment. As a result, the issue of child labour remains unaddressed.

Lack of awareness:-The fact that Education is not a privilege but a right is something that not many are aware of. Neither the teachers nor the guardians of children are aware of how the right to education works. In many remote villages, teachers are not clear about how to implement the Right to Education Act and just operate it based on personal understanding.

Compromise with quality:-Though the provisions of the right to education act promise a quality education, the ground reality is that lack of clarity on information and training about how to execute the right by the teachers were pointed out as a major challenge in its implementation. As a result of lack of clarity about the execution, results in compromise with the quality of education and poses a question on its effective implementation.

Fewer Resources available:-There is a major problem with resources be it be- monetarily, infrastructure, or human resources. No doubt resources are separately allocated by the government for maintaining the right to education guaranteed by the constitution but this resource is not enough given the number of children. Poor infrastructure which includes a lack of classrooms, and the absence of basic amenities and facilities that are required in a school often lead to compromise in education quality. Most government schools lack basic amenities like drinking water, a playground for children, and barrier-free entrances.

Private schools are preferred over government schools:-Most elementary school teachers and officials interviewed in the Mohali and Chandigarh regions said they favour or will choose private schools for their children[57]. The reasons given were that private schools have superior facilities, qualified teachers, and a higher standard of education. The setting of private elementary schools instils a strong sense of self-assurance in the child's personality.

V. Poverty- The real Problem

Poverty has far-reaching consequences on children, and it may lead to lifetime challenges, especially when young people do not obtain a complete education. Poverty and education are intimately intertwined because poor individuals may skip school to work, leaving them without the reading and numeracy skills needed to further their professions. Years later, their children find themselves in a similar circumstance, with little cash and little alternatives but

[57] Uma, *Right to Education (RTE): A Critical Appraisal*, 6, IOSR journals,55 (2013).

to drop out of school and work. Those who live in poverty are more likely to keep their children out of school, which implies that their children will have a higher risk of living in poverty as well which gives rise to poverty that continues from one generation to another.

As very correctly put by noble peace prize winner social activist Kailash Satyarthi that "***There is a triangular relationship between poverty, child labour and illiteracy which have a cause and consequence relationship and this vicious cycle need to be broke***n".

A universally acknowledged solution to the poverty cycle is providing access to high-quality primary education and promoting child well-being but the reality is in our society education still is a privilege because many choose to earn for their family and livelihood than to be educated. This fact, however, can be debated but surely cannot be underestimated that people leave in such extreme poverty that for them even a basic meal two times a day is a luxury and to merely maintain their existence each family member has to earn and as a result children are forced to engage in child labor. Undoubtedly, many children from low-income families are compelled to drop out of school owing to health issues associated with starvation or work and support their families[58]. Factors connected to poverty, such as unemployment, sickness, and parental illiteracy, increase the likelihood of a kid not attending school and dropping out by a factor of two[59].

VI. Right to Education as a Tools for Empowerment of weaker section

Who are the weaker sections?

The term "weaker sector" refers to a segment of the population that is socially, economically, and politically behind the rest of the population and has suffered from a variety of disabilities as a result of their backwardness. The Government of India Act, 1935[60] defines "weaker sections" as a class or classes of people who suffer from educational and economic backwardness[61], as well as other areas of social life. The weaker groups in India are categorized into three categories by the Indian government: Scheduled castes, Scheduled Tribes, and Other Backward classes. Women, the elderly, and sexual minorities are all denied benefits and mistreated.

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[58] *Ibid.*
[59] Government of India, *Ministry of Human Resource Department, Department of School Education and Literacy, Department of Higher Education*, Annual Report, 2006-07.
[60] Government of India Act, 1935.
[61] T.M.A Pai Foundation v. the State of Karnataka, AIR 2003 SC 355.

Right to education helps develop skills and Abilities which in the long run help weaker section children to improve their earning opportunity: A good education system aids the development of a child's social, emotional, cognitive, and communicative abilities. They can then use these abilities and skills to increase their earnings or build other fundamental assets. Since this right is guaranteed and recognized by the constitution as well under Article 21 (A)[62], every child is entitled to it.

Right to education addresses the issue of gender inequality: The most vulnerable members of society are frequently not treated as equals in their communities. As a result, they are marginalized in terms of representation, power, and status. Individually, though, education is a fundamental human right for all[63]. Before providing greater possibilities for people to participate in society, we must first address certain unique barriers to participation. Gender is one of the most significant inequities that sustains the poverty cycle[64].

Through the right to education, the vulnerability of the weaker section is reduced: Conflict, diseases, and natural catastrophes are frequently linked to the lives and livelihoods of the poor. These can operate as elements that make poverty more likely to persist[65]. Education can protect against susceptibility and danger in addition to eliminating inequality[66].

Education as a matter of right can help eradicate the poverty cycle: The link between poverty and education is complicated, but we do know that education aids individuals in making healthier and more informed decisions regarding their children, their livelihoods, and how they live and thus it would not lead to generational poverty among the disadvantaged community. Children who lack the abilities necessary for lifelong learning may encounter more challenges in terms of earning potential and jobs later in life and thus deterring the conditions of weaker society as a whole as a result of which their capacity to create a better future for themselves and their communities is stopped.

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[62] INDIA CONST.art,21(A) *amended by* the Constitution (Eighty-sixth Amendment) Act, 2002.
[63] *A Human Rights-based approach to education for all*. UNESCO and UNICEF (2007).
[64]HUMANISM, https://www.humanium.org/en/right-to-education/ Right to education: Situation around the world, (Last visited Oct, 9. 2021).
[65] World Bank, *Attaining the Millennium Development Goals in India: Role of Public Policy and Service Delivery: Human Development Uni*t, South Asia Region (2004).
[66] Olivi Giovetti, *How does education affect Poverty?*https://www.concernusa.org/story/how-education-affects-poverty/ (Last visited Oct, 3,2021).

VII. Suggestions

The right to education guaranteed under Article 21A is a fundamental human right to which every child is entitled and the provisions promise a quality compulsory learning but the fact cannot be undermined that there are still certain lacunas and the gap in provisions made and its intended desired outcome. Following are some suggestions to bridge this gap-

First, the issue of child labor needs to be dealt with: It needs to be understood that ending child labor and achieving universal basic education are intertwined concerns that cannot be solved without the other. Poverty is a factor that contributes to child labor. As household income increases the need for children to contribute financially decreases. Working-class families were able to shift their approach and invest in their children by sending them to school when incomes increased.

Age 6 to 14 years needs to be amended: The legislation excludes the children below 6 years and above 14 years, according to the various standard definition of the child a child is any person below 18 years of age and so providing this right to education for up to 14 years when a child would probably be in 9th standard is not properly justified. This age gap in itself paves the way for child labor and children after the age of 14 when they have to leave school tend to engage in child labor.

Infrastructure and other facilities need to be improved: The government should fund projects that are time-bound. The government should first invest in the structure and infrastructure before establishing a school. However, things are different in this case. The school initially appears in documents and files, followed by the building years later.

Maintaining regional balance in the opening of new schools is essential: Government schools should be established in areas where they are desperately needed. In the school's rural and urban sectors, there is an imbalance[67]. The government can order the private sector to come forward and open schools in rural regions where there are none. It will also meet the goal of providing high-quality education in remote locations. To eliminate the regional imbalance in education, schools should only be located where they are required, i.e. isolated rural regions[68].

[67] National Sample Survey, March 21,(2007).
[68] Uma, *Right to Education (RTE): A Critical Appraisa*l,6, IOSR journals,53-55,(2013).

The quality of education offered must be strictly monitored: teachers are responsible for a variety of responsibilities in addition to teaching, such as building maintenance, supervising construction work and material supply, inspecting the preparation of the midday meal, and sending mail. All of this interferes with the instructors' primary function. Their primary responsibility is to educate the students. The administrative and teaching duties must be separated. Teachers must be given proper training and they should only be left with the duty to teach rather than maintaining other administrative functions. Proper professional counselors must be there in school to cater to the needs of young children and help them with any assistance needed. Moreover, training drives must be organized to make parents aware of the right to education of their children. The weaker portion must be made aware of their rights

VIII. Conclusion

In conclusion, it is important to note that enacting legislation is not sufficient. The necessity of the hour is to effectively implement and monitor the legislation. To be successful, it must be constantly monitored and supported by political will. The much-anticipated Right to Education (RTE) Act[69], which was just enacted by India's parliament, should help the country achieve a universal basic education. RTE's success or failure would be primarily determined by political attention. In this case, a reasonable budgetary allocation of cash should suffice. In India, the young and civil society should step up to promote the value of education to illiterate parents who do not understand the importance of education in combating social ills. Social inequality and monopolization by any group should be avoided. All people should have access to free education[70] until they reach a particular age. The fundamental right to education in India needs some special effort to achieve the aim for which it was incorporated. If implemented properly at the ground level, in schools, the positive elements of the right to education policy can have a beneficial influence on enrolment and retention leading to the betterment of weaker sections of society in the long run.

[69] Right to Education Act, 2009, Acts of Parliament, 2010(India).
[70] INDIA CONST, art.21(A) *amended by* The Constitution (Eighty-sixth Amendment) Act, 2002.

IS POLICE CUSTODY A WALL FENCED WITH WIRE OF VIOLENCE AND BRUTALITY: AN ASSESSMENT

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Abstract

The entire concept of 'police' was introduced to maintain law and order in contemporary society. In order to maintain this status quo, police officials had a responsibility to interrogate, curb and prevent the happening of criminal acts or any related offence that tends to dilute society's harmony. To execute such objectives, police often circumscribe suspects or offenders behind the walls of custody. It is evident that police officials are representative of the state and are there for the protection and safeguard of the rights of citizens. However, with passage of time a different story has emerged altogether; a story that has taken shape behind these walls. The other side of the coin depicts the fact that while the police execute their responsibilities, these suspects or offenders are often subjected to atrocities during the process. Furthermore, since newspapers and reports are known to bring contemporary issues in the lime-light, if one tends to consider and analyse the same; increasing instances of violence within police custody have been often reported. Regular tortures and other brutalities within police custody are not a hidden secret anymore. Furthermore, it won't be futile to state that such instances have violated basic rights of individuals and diluted the concept of Rule of law. The paper initiates with such discussion and elaborates as to whether these proverbial walls are in reality fenced with wire of brutality and violence or the story is vice-versa? It also does a comparative analysis considering the relevant international developments and comments on the way forward to bring in a paradigm shift.

Keywords: *police custody, brutality, custodial violence, right, rule of law.*

I. Introduction

At the outset, the term 'police' referred in this entire depiction inculcates all police officials, personnel deployed within a given territory and indulge in activities revolving around police custody and several other matters connected therewith and incidental thereto. The domain of police finds its genesis from a Latin word *i.e. Politia,* which basically interprets the *condition of a State*. Thus, it can be inferred that police in general represents the state within which it is functional. From An Indian perspective, a police system was introduced to keep an eye on the

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several criminal activities and to curb the possibility of such happenings. Historically, when Sir Charles Napier[2] was given the responsibility to administer areas like that of Sindh; he soon realized that to control such a place that has ongoing criminal activities, a police system would be required. In light of the same, a separate department of police was created with responsibilities to maintain law and order. Further a distinct Police Act[3] was passed with an objective to felicitate the Police officials in executing their responsibilities towards the society. Therefore, it is true that since time immemorial, police organizations are in our country as law enforcement agencies of the state.

Furthermore, even the Constitution of India emphasizes and elaborates police to fall in the domain of 'state'[4] which is operational within Indian territory to maintain public order, security of state and integrity of the entire India. Police custody came as a medium to curb and prevent violence in society. Suspects and offenders are circumscribed within police custody with an objective to maintain public order. However, with time it has been seen that the concept of police custody has been violated. These suspects or the accused that are curbed within such custody face brutality on the hands of police and are subjected to various forms of violence. In light of the same, it becomes vital to analyse the contemporary state of affairs of police custody in India. Moreover, apart from depicting the existing loopholes, this paper also emphasizes on suggestions by critically evaluating the entire domain and depicts international practices in this regard so that an appropriate way forward is achieved.

II. Contemporary state of affairs: The Real Societal Mirror

Even when our nation was adjusting to the concept of lockdown and struggling through the pandemic, police brutality was in its normal phase. It is worth remembering an instance of Madras High Court[5] wherein the Hon'ble High Court took *suo-moto* cognizance of an incident where both father and son namely Jayaraj P. and Bennix[6] were brutally assaulted by police personnel while they were in police custody at the police station of Sathankulam, Tamil Nadu. The Hon'ble court went ahead to observe that there was enough evidence to charge the policemen with murder for death of these father and son. The court also issued

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[2] Sir Charles Napier, 'Encyclopaedia Britannica,' (August 2020). <https://www.britannica.com/biography/Charles-James-Napier> accessed 6th January 2022.

[3] The Police Act, 1861.

[4] The Constitution of India 1950, Article 12.

[5] *Registrar General (Judicial), Madurai Bench of Madras High Court v State of Tamil Nadu and ors* [2020] SCC OnLine Mad 1249.

[6] Arsheen Kaur, 'Custodial Deaths in India are a Cold-Blooded Play of Power and Class' *The Wire* (14 Jul 2020 <https://thewire.in/rights/custodial-deaths-in-india-are-a-cold-blooded-play-of-power-and-class> accessed 8th January 2022.

guidelines for conduct of judicial inquiry against the concerned police officials. There have been various annual reports published that depict the atrocities faced by individuals in police custody. Recently, the *Status of Policing in India Report* (SPIR) of 2020-2021 in Volume I[7] and Volume II[8] was published in August 2021 that divulged various data on policing in the Covid-19 pandemic and other extraordinary circumstances. They have made an attempt to collect and analyse original data, surveys as to the extent of use of excessive force and the satisfaction level of citizens. Then there is *India: Annual Report on Torture 2020*[9] published in 2021 that depicts that despite the fact that entire nation was facing pandemic and lockdown, there were suicides every week due to torture faced within police custody. Moreover, the same report of 2019 that was published on 26th June 2020 puts forward alarming data in front of us. It shows that nearly 125 people died in police custody and women have been subjected to several ways of torture and sexual violence in the custody.[10] In addition to this around 427 people have died in police custody during the years from 2016 to 2019.[11]

Moreover, in order to understand the entire trajectory, it becomes pertinent to analyse data of the past. It is the National crime records bureau (NCRB) that has been publishing annual reports on the custodial deaths (police custody) on a regular basis.[12] However, it has its own limitation wherein the data and records are not regularly updated. As per SPIR of 2019[13], several police officials were of the opinion that whatever violent acts police indulge in towards the criminals are truly justified. Furthermore, they even go on the extent of advocating and accepting the fact that if confession is to be sought, using torture mechanisms like beating up the accused/suspects is a valid medium. With such depictions, one can easily get a clear picture as to what impact such thought processes would have on the practices

[7] Common Cause, https://www.commoncause.in/uploadimage/page/SPIR-2020-2021-Vol%20I.pdf accessed 8th January 2022.

[8] People Archive of Rural India, https://ruralindiaonline.org/en/library/resource/status-of-policing-in-india-report-2020-21-volume-2-policing-in-the-covid-19-pandemic/ accessed 9th January 2022.

[9] National Campaign against Torture, India Annual Report on Torture-2020, http://www.uncat.org/wp-content/uploads/2021/03/IndiaTortureReport2020.pdf accessed 10th January, 2022.

[10] National Campaign against Torture India: Annual report on Torture 2019 (26 June 2020) <http://www.uncat.org/wp-content/uploads/2020/06/INDIATORTURE2019.pdf> (National Campaign) accessed 12th January 2022.

[11] Nithya Subramanian, 'In charts: High approval for police violence in India' (September 2019) <https://scroll.in/article/936162/in-charts-high-approval-for-police-violence-in-india-80-among-police-50-among-citizens> accessed 12th January 2022.

[12] National Crime Records Bureau, Ministry of Home Affairs, Indian Penal Code and Code of Criminal Procedure, Custodial Crimes (in Police custody), Crime in India <https://ncrb.gov.in/en/crime-in-india-table-addtional-table-and-chapter-contents?page=18> accessed 15th January 2022.

[13] Common Cause, 'Status of Policing in India Report 2019-Police Adequacy and working conditions' <https://www.commoncause.in/uploadimage/page/Status_of_Policing_in_India_Report_2019_by_Common_Cause_and_CSDS.pdf> (Common Cause) accessed 15th January 2022.

adopted by concerned officials. Moving on, the *Asian Centre for Human Rights* (ACHR) published a report back in June 2018[14] and claimed that around 1,674 custodial deaths have been witnessed between the time lapses of 1st April 2017 to 28th February 2018. Not to forget that this number includes deaths in both judicial and police custody. It is surprising to know that though 100 deaths occurred alone in police custody in the year 2017[15] but no conviction could take shape in due course of time. In light of the same, what is more disturbing is the fact that such a scenario was no good in the preceding decade too.[16] It is evident that in spite of such events, no major developments have taken place in this regard, lately. It will not be wrong to say that the instances of torture in police custody have become a mundane activity with none to take note of and initiate actions against it. Even the reporting of these brutal acts does not follow the prescribed guidelines of the National Human Rights Commission (NHRC).[17] It is to ponder that as per the guidelines, reporting of custodial deaths is to be done within 24 hours but the compliance is still a far-sighted dream. Moreover, it is generally claimed that out of the total numbers of custodial deaths, many die due to their own health conditions. Nonetheless this aspect demands separate reporting and discussion as to whether the police custodies possess proper health facilities or not. It is apposite to contest that those in police custody do not die due to their own health issues but due to the never-ending slumber which Police officials are into. No doubt, such circumstances give way for a genuine question as to why there lies such apathy towards individuals brought to the police custody. The disrespect of Rule of law has reached the zenith of violation. Not to forget, it is often the case that when high profile cases demand closure, false arrests are done and acts of brutality are showered upon innocents. In an autobiography M. Chandrakumar depicts his inhumane experience of a prison wherein instances of torture are considered a mundane activity.[18] At a

[14] Asian Centre for Human Rights, 'Torture Update: India' (June 2018) <http://www.achrweb.org/wp-content/uploads/2018/06/TortureUpdateIndia.pdf> 16th January 2022.

[15] Chaitanya Mallapur, '100 Custodial Deaths recorded in 2017, But No Convictions' (2 November 2019) <https://www.indiaspend.com/100-custodial-deaths-recorded-in-2017-but-no-convictions/> accessed 18th January 2022.

[16] Sankalita Dey, 'In 2017-18, there were 5 custodial deaths per day in India, says report' *The Print* (28 June 2018) <https://theprint.in/india/governance/in-2017-18-there-were-5-custodial-deaths-per-day-in-india-says-report/75654/> accessed 20th January 2022.

[17] Letter from National Human Rights Commission to all Chief Secretaries (14 December 1993) <https://nhrc.nic.in/sites/default/files/sec-1.pdf> accessed 22th January 2022.

[18] The making of a thief, An autobiography by M. Chandrakumar "Lock-Up" *The Hindu* (31 March 2017) <https://www.thehindu.com/books/the-making-of-a-thief/article17751864.ece> and <https://www.goodreads.com/book/show/29860814-lock-up> accessed 26th January 2022.

later stage his intriguing story took shape of a movie named *Visaranai*[19] and as truly said, movies are an image of contemporary society; this particular instance portrayed a replica of the reality attached to violation of authoritative power in the hands of police personnel. Thus life becomes miserable for those who happen to be within those proverbial walls without any means to raise their concern and no one to hear them.

III. Is the conviction of Police officials a Panacea?

Recently, the Hon'ble High Court of Bombay has reiterated and upheld[20] the conviction of a few cops and extended their jail terms and opined that such acts by police officers tend to dilute the confidence of the general public in the country's criminal justice system. It also demarcated the fact that with *"great power comes greater responsibility."* However, it is a wrongly established notion that if perpetrators of a certain act are convicted, justice is deemed to be delivered. It has already been analysed and published in reports[21] that the conviction graph of these police personnel has been at a very minimal rate. Therefore, this indicates a serious lacuna which lies within. In spite of this truth, it is even more sad and deafening to note the silence towards the immoral act of such perpetrators. Secondly, convictions are not the only way forward because no conviction of any nature guarantees that no such act will be committed in future. No such assurance has yet been given and neither can it be hoped to be so in the near future. Thus, lack of assurance of any nature makes it a futile remedy to seek. Moreover, the concept of 'Conviction' finds its genesis in the *Retributive theory of Justice*[22] that means that punishment or conviction of the offender is the way forward and it is believed that the offenders should suffer in return. But the vital point here is to rethink and ask ourselves as to whether the conviction of police officials is proportional to the brutality faced by inmates in the police custodies? The answer as per the conscience of any prudent human will be a loud 'No'. The police officers who indulge in activities of torture and abuse try to conceal the happening of incidents and erase evidences in order to prevent themselves from the grab of punishments. Moreover, as earlier mentioned many have a thought process that what they are doing is right in the eyes of the law. Thus, mere conviction is definitely not the only way forward.

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[19] Arsheen Kaur, 'Custodial deaths in India are a cold blooded play of power and class' *The Wire* (14 July 2020) <https://thewire.in/rights/custodial-deaths-in-india-are-a-cold-blooded-play-of-power-and-class> accessed 28th January 2022.

[20] *Yashwant and Ors. v. State of Maharashtra* [2018] SCC OnLine Bom 6795.

[21] National Campaign (n 6).

[22] Stanford Encyclopedia of Philosophy (31 July 2020) <available at https://plato.stanford.edu/entries/justice-retributive/> accessed 30th January 2022.

Moreover, the Constitution of India provides for the right to life through Article 21. In light of the same, the Supreme Court through several judicial precedents[23] has observed this right towards prisoners including those who are convicts or accused. Mere fact that a person is within police custody in no manner means that the fundamental rights will be violated. Even the Evidence Act advocates for the rights of those who are ill-treated by the police personnel.[24] Moreover, the entire domain of Section 41 of Code of Criminal Procedure 1973 has been amended with the objective to protect the rights of persons being arrested and they focus on the need for the element of transparency in the whole process revolving around police and their responsibilities. There are Sections 46 and 49[25] which protects persons who are within custody from any kind of torture. There are Sections like 54, 57, and 176 (1) that advocate for the rights of the arrested person. In literal sense, these procedures have been envisaged to keep a keen watch on instances of abuse or any violation for that matter and bring it to notice within appropriate time. Such provisions indeed act as an additional armor to the rights of those who are within the custody. But a major lacuna in this part is that in spite of this existing provision, reality has altogether a different and a gloomy story attached to it. For instance, the approach towards this duration of 24 hours has just become a mockery of rule of law wherein it is seen as a futile and porous boundary which is exploited as per authorities' whim and fancies.

IV. Need for Police system to be a Hallmark of Transparency and Accessibility

When the element of transparency and accessibility comes on the table for discussion, it reminds of the comprehensive guidelines that were laid down in the famous *D.K Basu*[26] judgment. The reason behind saying so is that this judgment has truly acknowledged the alarming acts of custodial torture and instances of assault on individuals who are within police custody. It is vital to highlight a few of the directions and guidelines given by the parent judgment in light of the present discussion at hand because it will boost the understanding of the importance of elements of transparency and accessibility and as to why such implementation is advocated for through this attempt. Firstly, the police personnel who are involved in arrests and interrogations should possess their clear identification and while

[23] Smt. Nilabati Behera v. State of Orissa [1993] AIR 1960.

[24] Indian Evidence Act, 1872, S. 24- Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding; S. 25-Confession to police-officer not to be proved.

[25] The Code of Criminal Procedure, 1973.

[26] *D.K Basu v. State of West Bengal AIR 1997 SC 610;* Sanchita Kadam, 'Revisiting DK Basu: The most relevant judgment of all time- A landmark judgment that held torture revealed the darker side of human civilization' (17 August 2020) <https://cjp.org.in/revisiting-dk-basu-the-most-relevant-judgment-of-all-time/> accessed 6th February 2022.

preparing a memo of arrest, the signature of the arrestee or family member should be made compulsory. Secondly, upon arrest, the police officials should ensure to communicate information about such an arrest made to the arrestee's friend/family member and even to the control room of the department within reasonable time and thereafter the arrestee should be made aware of any such communication taking place. Therefore, it is clear that these directives are with the objective to make the entire process transparent and accessible. Thirdly, when an arrest is made, thorough inspection of the arrestee should take place at every forty-eight hour of the detention regarding any prior injuries and medical examination of the arrestee so that health condition of the individual can be taken care of and it becomes easy to trace instance of illegal tortures[27] Further, when the second version of the DK Basu judgment was laid down in 2015,[28] it added to the earlier demarcated guidelines and depicted that installation of CCTVs within police stations and deployment of more women constables will help in making the situation more transparent and violence free. It even raised concern for awarding pecuniary compensation to the victim or their family members in offenses done by police who are in authoritative positions.[29] Such guidelines clearly bring into limelight the fact that there are lacunae in the entire process and things really need to be done in a practical sense with utmost priority. Ironically, it is even more astonishing to know that though these directives are in public domain, not much has been done in this regard. However, if recent developments are taken into consideration, it is Senior Advocate Abhishek Manu Singhvi, who has filed an application seeking intervention of the court towards preventing the occurrence of custodial violence.[30] However, since the decision of the court still remains awaited, time would be the apposite catalyst in determining what unfolds in future.

V. Singapore Model: A Lesson to Learn

Though Singapore is among the nations of South-east Asia, the developments and trajectory of the particular country is far more different from any country of the continent. When it comes to police administration and reforms within the system, Singapore has been an illustration that several countries should take note of. Though on a lighter note, recently there

[27]Kruthika R and Jai Brunner, 'Monitoring Custodial Violence' (July 2020) <https://www.scobserver.in/the-desk/monitoring-custodial-violence> accessed 10th February 2022.
[28] *D.K Basu v. State of West Bengal & Ors. (2015) 8 SCC 744.*
[29] *Gyanesh Rai and Ors v. State of U.P and Ors* [2015] ILR 3 All 1241.
[30] *Dilip K. Basu v. State of West Bengal*, Application filed by the amicus curiae (Dr. Abhishek Manu Singhvi), W.P.(CRL.) No. 539 of 1986 (S.C.) 1-25 (July 2020) <https://scobserver-production.s3.amazonaws.com/uploads/ckeditor/attachments/524/Application.pdf> accessed 10th February 2022.

have been instances of arrests[31], violence taking place within the country, however their management and tackling skills are way better. This comparison is vital because, the idea behind comparative public law and international law is to do a global analysis and accept the lacunae that are there within and try and inculcate the learning that one gets by analysing the pattern of the outer world. Through the elaborations above made, it is clear that India faces several issues when it comes to its police management and police relations with its citizens. There have been reports that point out that the atrocities within the police custody are of grave concern. In light of the same, if the circumstances of Singapore are seen, it comes out that they have walked the 'extra mile' to avoid the police brutality trap.

The entire Singapore Police Force (SPF) and its conduct have been well appreciated by their citizens. In spite of all general criticism, it has emerged as a trusted institution of the whole nation. It is vital to note that in Singapore, police personnel are specifically taught to assess the situation first and only then apply appropriate force in accordance with the circumstance that has emerged. In addition to this there are strict guidelines[32] in place that the police officials need to adhere to when it comes to using mediums and techniques of force on people. There was a 'perception survey' done in regards to the prevailing conduct of the police officials. The sample size was nearly five thousand and the survey indicated that about 92 % of the citizens and other residents are of the opinion that the safety of the region ranges from "good to very good".[33] The survey also concluded that people feel that police responded in an adequate and quick manner if there was any crime reported and the trust towards the officials have strengthened with time. Another important facet of the procedure followed in Singapore is the fact that here it is even made sure that every section of the society or the population is represented in the police and the military domain.

'Neighbourhood Policing' is another aspect that needs to be looked upon as it can immensely help countries like ours in executing a paradigm shift when it comes to police custody and ancillary atrocities. Singapore has been ahead of its time in terms of considering the vital

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[31] Jessie Lim, 'Police refute claims they used excessive force when arresting 1 year old in Clarke Quay' *The Straits Times* (Singapore 6 February 2021) < https://www.straitstimes.com/singapore/courts-crime/police-refute-claims-they-used-excessive-force-when-arresting-18-year-old> accessed 12 February 2022.

[32] Lee Li Ying, 'Shooting tasers and martial arts techniques: How the police make arrests' (Singapore 29 January 2021)<https://www.channelnewsasia.com/singapore/police-taser-martial-arts-techniques-arrests-826296> accessed 15th February 2022.

[33] Kelly NG, '90% of Singaporeans, PRs confident police can tackle any major incident' *Today Online* (3 March 2017) < https://www.todayonline.com/singapore/most-civil-servants-go-beyond-call-duty-shanmugam> accessed 18th February 2022.

aspect of 'community-oriented policing'.[34] If one is to look at the geographical location of the police stations within the country, it is noticed that the stations and the officers are so widely spread across the country that in every neighbourhood one can find a police station or an officer for that matter. Now, with these depictions one pertinent lesson learnt is that due to all these measures taken by the authorities of Singapore, a sense of connection has developed and the local residents see them as part of the same community and not any enforcement agency. Thus, it is to be understood that in Singapore, the relation between police and citizens is so smoothly intertwined to the extent that it ends up developing a sense of loyalty within the community and also leading to decrease in the force applied proportionality.

VI. Suggestions towards the right way forward

It is an established fact that police officers are a vital element of law enforcement agencies and thus they are indeed an essential ethos of our democratic country. If this will be hollow and rotten, the entire superstructure will soon collapse. In order to strengthen it from the core and bring about a paradigm shift in the domain of the Police department and different realms they venture into, it is vital to inculcate several implementations, additions and subtractions. First and foremost, there has to be implementation of the Law Commissions' 273rd Report.[35] According to the Report, accused officials should face criminal prosecution so that justice is granted. Secondly, it is the time to revisit and reintroduce the vanished Indian Evidence (Amendment) Bill 2016,[36] which evidently depicted the need for liability of police officers for acts of custodial violence. Also, it is the time to expand the domain of Section 330 and 248 of the Indian Penal Code (IPC) regarding acts of torture and include within its ambit the offences committed by police officials while on duty. It seems that the appropriate authorities have forgotten the fact that a specific Torture Bill with objective to curb such violence and brutality was initiated in Lok Sabha back in the year 2017.[37] This particular Bill was to expand the domain of torture and explain it with strict approach. However, the Bill failed to witness the sunshine and it soon was lost with the passage of time. Moreover, as above mentioned, the implementation of the *D.K. Basu's* judgment in its entirety will solve various

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[34] Sheryl Yang 'How did Singapore avoid the Police Brutality Trap? A story of NSFs and NPCS' *Kopi.* < https://thekopi.co/2020/06/12/how-did-singapore-avoid-the-police-brutality-trap-a-story-of-nsfs-and-npcs/> accessed 18th February 2022.

[35] Law Commission of India, 'Implementation of United Nations Convention against Torture and other rule, Inhuman and Degrading Treatment or Punishment through Legislation', Report No. 273 (October, 2017) <http://lawcommissionofindia.nic.in/reports/Report273.pdf> accessed 20th February 2022.

[36] The Indian Evidence (Amendment) Bill, 2016, LXVII of 2016.

[37] The Prevention of Torture Bill No. XXIX of 2017.

such hurdles at one go.[38] Recent judgment like that of *Paramvir Singh v. Baljit Singh*[39] goes on to reiterate the importance of transparency and accountability within the domain of the police system and carves out a jurisprudence that advocates the right of individuals who are lost within the opaque and rigid walls of police custody. India should rectify the Convention of United Nations against Torture and other such inhumane acts[40] with immediate effect.

Furthermore, the entire Police Act itself is an archaic act of the 18th century but it still exists around as a mere colonial hangover. In similar manner, torturing the under trials and other accused is also an archaic way of solving matters at hand. It is the time to do away with such outdated legislation and adopt a holistic and versatile statute which quenches every thirst of the contemporary society in regard to custodial tortures and other incidental violations. This will even help in bringing institutional change and reforms. However, reforms have become a cliché now, education and adequate training and sensitizing the police towards human value and rights of individuals is the need of the hour. It is to note that as per the Status of Policing in India discussed above; only 6.4% of the police officials have undergone in-service training in the past 5 years.[41] There have been several empirical studies done which point out that police personnel who are quite indifferent to the violent act opted for extracting confession or any other information related therewith. Further, as per the report, 74 % of the police officials who participated in the survey said that the violent approach adopted is for the greater good of the society.[42] Thus it is clear that one of the major hurdles in front of concerned entities is the thought processes. The concerned authorities and the legislature should adhere to the fact that there has been a false tendency among police personnel that torture and violence treatment will lead to conviction of accused/suspects and this will lead to their promotion. It has to be understood that torture and other violent acts are not the only mechanism to solve a particular situation and crime in itself or the tendency to commit crime will not lose its existence due to custodial tortures. Ultimately, it is an upgraded crime-solving-mechanism which can turn the table and bring in justice to the inmates, be it convicts or the accused.

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[38] Amitava Chakraborty, 'If Custodial torture has to stop, the DK Basu judgment has to be implemented in spirit' (2 August 2020) <https://indianexpress.com/article/opinion/columns/dk-basu-police-custodial-killing-encounter-6534750/> accessed 24th February 2022.

[39] (2021) 1 SCC 184.

[40] United Nations Convention against Torture and other cruel, inhuman or degrading treatment or Punishment of 1987.

[41] Common Cause (n 12) 22.

[42] Common Cause (n 12) 143.

Eventually within the realm of sociology, when the set-up of a particular society is to be understood; analysing the behaviour and thought processes of its members is the right way forward. Moreover, 'culture' is something which depicts the collection of ideas of the inhabitants of a society and it helps in understanding and analysing their actions. In light of this depiction, it is vital to understand the thought process of police personnel so that a consciousness towards their actions is developed. As it is said that awareness and education can ward off darkness of illiteracy, "Enlightening up", will be a perfect domain for an explanation to the entire scenario. Ultimately, it is time to inculcate the saying of Nelson Mandela, *"Education is the most powerful weapon which you can use to change the world."* Let's educate the educated!

IRRATIONALITY IN RAISING WOMEN'S AGE OF MARRIAGE TO 21 IN INDIA; AN ANALYSIS THROUGH THE IMPACTS OF MATERNAL MORTALITY

-SYED NIHAL PM[1]

Abstract

Every legislation should serve a purpose. And that legislation must impose a significant moral duty. Also, it should reflect a democratic viewpoint that reflects in constitutional morality and should be subjected to judicial justification. Considering the fact, it is indeed intuitive how the Union Cabinet's attempt to raise the age of marriage for young women in the country to 21 is irrelevant with this preconceived assumption of constitutional morality and judicial justification in mind. It seems like the National Democratic Alliance government has made arrangements for enacting legislation that no one seeks or that defies sense. However, this paper unfolds the illegality, procedural unfairness, and irrationality of raising women's age of marriage under The Prohibition of Child Marriage (amendment) Bill, 2021, which was introduced in the Lok Sabha on December 21 to raise the minimum age of women's marriage from 18 to 21 years by superseding the existing marriage and personal laws. Believing that it will meet the very said objective to diminish maternal mortality, tackle gender inequality & gender discrimination, ensure adequate health for the empowerment of women and girls, and secure the status and opportunity par with men. This paper infers by verifying the said reasons has nothing to do with the rising women's age of marriage probing through data, studies and statistical reports.

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Keywords: *women, marital age, mortality, irrationality*

I. Background

The Union Cabinet endorsed a proposal on December 16th to raise the age of marriage for women from 18 to 21 years old, based on the recommendations of the NITI Aayog task force led by Samata Party leader Jaya Jaitley. On December 20th, the Lok Sabha adopted the Prohibition of Child Marriage (Amendment) Bill, 2021. It has been presented to a Standing Committee for review. In this context, a legal analysis on the bill relating to all other concepts cops will determine the essentiality of this amendment.

II. Methodology

This paper used a mix of qualitative par quantitative along with the concept analysis to data and findings of study related to Maternal Mortality and Marital Age to unfolds constitutional backup of The Prohibition of Child Marriage (amendment) Bill, 2021. This analysis infers by verifying the and legal Status of raising women's age of marriage from 18 to 21 in behold to the maternal mortality through scientific data, legal studies and, statistical reports. Namely Maternal Mortality Ratio (MMR), National Sample Registration System (SRS) report by Registrar General of India (RGI), UNICEF collaborates index, Report by Ministry of Health and Family Welfare (MoHFW), Ministry of Women and Child Development (MWCD), NITI Aayog, The Million Death corroborators, 2014, World Health Organization index and relevant case laws etc.

III. Result

From this analysis, it is shown that the Maternal Mortality has no significant correlation to the Marital Age of women. We need to invest in welfare schemes, property development in rural areas, and health and education. Moreover, doing something else without performing that would amount to great loss.

IV. Introduction

Being 18 is the contractual age that one has all Freedom to choose for them but raising the age is a fundamental right's infringement. There are already provisions to protect women from kinds of harassment as the domestic violence act states marriage with the unlike person or and unlike time is verbal and emotional violence, then why are they harshen to raise the age of women for the said purpose. Being India is a multicultural community, there exist

many cultures with a vivid variety of norms. Thus raising the age of the whole for the sole purpose of maternal mortality is irrational and irrelevant.

There should be a purpose behind every legislation. And that legislation must compel a significant duty. Also, it should be expressing the democratic worldview assured on constitutional morality. With this preconceived notion in the account, it's straightforward to see how the Union Cabinet's proposal to raise the age of marriage for young women in the country to 21 is no longer welcomed.

The Act states that the objectives of the new reform are to reduce the number of mothers dying during childbirth, to ensure a healthy delivery, to ensure that women are empowered through addressing the issue of malnutrition. The goal, according to the government, is to provide women an equal chance by allowing them more time to finish their school, find work, mature psychologically before marriage, and achieve gender parity. This effectively moves maternal mortality into dynamic spheres.

Here is where the significance of a study stands core to the factual truth and actual reality of the issue and circumstances which is evident that this has nothing to do with the policy being adopted to meet these objectives put out by the very bill The Prohibition of Child Marriage (Amendment) Bill, 2021.

V. Analysisng women's Marital Age and Mentality Mortality

The body of a pregnant woman undergoes numerous alterations.[2] These changes are completely natural, but they may become critical if issues or concerns arise. A pregnancy-related death is defined as a woman dying during pregnancy or within one year of the end of her pregnancy as a result of a pregnancy complication.[3] The major complications that account for nearly two-thirds of all maternal deaths are severe bleeding (mostly bleeding after childbirth), infections (usually after childbirth), high blood pressure during pregnancy (pre-eclampsia and eclampsia), complications from delivery and unsafe abortions.[4]

[2] Lockitch G. Clinical biochemistry of pregnancy. Critical reviews in clinical laboratory sciences, 34(1), 67–139. (1997). Also available at https://doi.org/10.3109/10408369709038216.

[3] Davenport, Margie & Meyer, Sarah & Meah, Victoria & Strynadka, Morgan & Khurana, Rshmi. Moms Are Not OK: COVID-19 and Maternal Mental Health. Frontiers in Global Women's Health. 11. (2020) also available at 10.3389/fgwh.2020.00001.

[4] Kamara, M., Henderson, J. J., Doherty, D. A., Dickinson, J. E., & Pennell, C. E. The risk of placenta accreta following primary elective caesarean delivery: a case-control study. BJOG : an international journal of obstetrics and gynaecology, 120(7), 879–886. (2013). Also available at https://doi.org/10.1111/1471-0528.12148.

Maternal Mortality Ratio (MMR) **Table-1**

India & bigger States	Maternal Mortality Ratio (MMR)		
	SRS 2014-16	SRS 2015-17	SRS 2016-18
India	**130**	**122**	**113**
Assam	237	229	215
Bihar	165	165	149
Jharkhand		76	71
Madhya Pradesh	173	188	173
Chhattisgarh		141	159
Odisha	180	168	150
Rajasthan	199	186	164
Uttar Pradesh	201	216	197
Uttarakhand		89	99
EAG AND ASSAM SUBTOTAL	**188**	**175**	**161**
Andhra Pradesh	74	74	65
Telangana	81	76	63
Karnataka	108	97	92
Kerala	46	42	43
Tamil Nadu	66	63	60
SOUTH SUBTOTAL	**77**	**72**	**67**
Gujarat	91	87	75
Haryana	101	98	91
Maharashtra	61	55	46
Punjab	122	122	129
West Bengal	101	94	98
Other states	96	96	85
OTHER SUBTOTAL	**93**	**90**	**83**

The above table is The Maternal Mortality Ratio (MMR) of India for the period 2014-18. As per the latest report of the national Sample Registration system (SRS) data for the period of 2016- 18, the 113/100,000 live births, declined by 17 points, from 130/ 100,000 live births in 2014-16.[5] This translates to 2,500 additional mothers saved annually in 2018 as compared to 2016. Total estimated annual maternal deaths declined from 33800 maternal deaths in 2016 to 26437 deaths in 2018.

The same results do have authorised by Registrar General of India, that is according to the SRS report by Registrar General of India (RGI) for the last three years, MMR of India has

[5] Ministry of Health and Family Welfare Maternal Mortality Rate (MMR), https://www.pib.gov.in/PressReleasePage.aspx?PRID=1697441, (last visited March. 6, 2022).

reduced from 130 per 100,000 live births in SRS 2014-16 to 122 in SRS 2015-17 and to 113 per 100,000 live births in SRS 2016-18.[6]

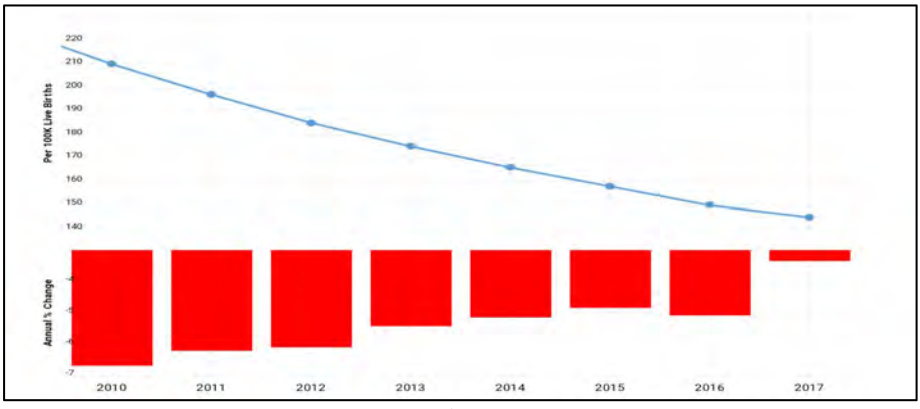

Fig. 1

A woman's death during pregnancy, delivery, or shortly after delivery is a tragedy for her family and society at large. According to the World Health Organization, around 45,000 mothers die each year in India from reasons related to childbirth, accounting for 17% of all maternal deaths worldwide.

India has one of the highest maternal mortality rates in the world. About 5 women die every hour due to obstetric complications. Although the maternal mortality rate has dropped from 130 in 2006 to 113 by 2019, still, it kills 26,437 women every year. Now let's analyse the awful dilemmas in raising the age of women's marriage from eighteen to twenty.[7]

According to the World Health Organization, Seventy-five percent of maternal deaths are due to haemorrhage, infection, or high blood pressure. The main cause of this is bleeding. It is due to anaemia, malnutrition, lack of emergency medical care, and unavailability of skilful staff during childbirth. A major contribution to decrease mortality decline can be attributed to more women receiving care from skilled attendants.[8] Nowhere in the data it States death is due to marriage and not because of giving birth by women between the ages of 18 and 21.

[6] Office of the Registrar General & Census Commissioner, India, https://censusindia.gov.in/Vital_Statistics/SRS/Sample_Registration_System.aspx, Sample Registration System (SRS) report of Registrar General of India(RGI), (last visited March. 3, 2022).

[7] Macrotrends, India Maternal Mortality Rate, https://www.macrotrends.net/countries/IND/india/maternal-mortality-rate, (last visited March. 6, 2022).

[8] A. S. Nyamtema, D. P. Urassa, and J. Van Roosmalen, "Maternal health interventions in resource limited countries: A systematic review of packages, impacts and factors for change," BMC Pregnancy and Childbirth, vol. 11, article 30, (2011). Also available at https://bmcpregnancychildbirth.biomedcentral.com/track/pdf/10.1186/1471-2393-11-30.pdf.

UNICEF has taken the following steps to improve access to high-quality maternal health services. UNICEF collaborates with the Ministry of Health and Family Welfare (MoHFW), the Ministry of Women and Child Development (MWCD), NITI Aayog, and state governments on planning, budgeting, policy creation, institutional capacity, monitoring, and demand generation. It facilitates the ability of district and block health managers and supervisors to plan, implement, monitor, and supervise effective maternal health care services, with a focus on high-risk pregnant women and those living in remote, vulnerable, and socially disadvantaged areas. UNICEF is assisting the Indian government in implementing a number of initiatives, including:

1. ***Reaching every mother***: UNICEF backs the Ministry Health and Family Welfare's policy that every delivery be attended by a qualified health care practitioner in a healthcare facility.
2. ***Continuum of Care:*** Using a continuum of care approach, improving the health and nutrition of expectant mothers and offering high-quality maternity and newborn health services. Improved access to family planning, prenatal care during pregnancy, expert attendant management of routine deliveries, emergency obstetric and neonatal care when needed, and timely postnatal care for both mothers and new-borns are all examples of this.
3. ***Antenatal care:*** All pregnant mothers must register for antenatal care at the nearest health facility as soon as aware of the pregnancy to assure healthy progress of their pregnancy) On the 9th of every month, the Ministry of Health and Family Welfare (MoHFW) establishes a scheduled day for pregnant women to get free, comprehensive, and high-quality antenatal care. This programme improves antenatal care detection and follow-up of high-risk pregnancies, helps to prevent maternal mortality, and lowers India's MMR.
4. ***Janani Shishu Suraksha Karyakram (JSSK)***: this scheme encompasses free maternity services for women and children, a nationwide scale-up of emergency referral systems and maternal death audits, and improvements in the governance and management of health services at all levels.

We have to work more to reach those who are most at risk, such as women in rural areas, urban slums, poorer households, adolescent mothers, women from minorities, and tribal, Scheduled Caste, and Scheduled Tribe groups, in order to achieve the global goal of improving maternal health and saving women's lives.

The MMR declined in India by about 70% from 398/100 000 live births (95% CI 378-417) in 1997-98 to 99/100 000 (90-108) in 2020. About 1.30 million (95% CI 1.26-1.35 million) maternal deaths occurred between 1997 and 2020, with about 23800 (95% CI 21 700- 26000) in 2020, with most occurring in poorer states (63%) and among women aged 20-29 years (58%). The MMRs for Assam (215), Uttar Pradesh/Uttarakhand (192) and Madhya Pradesh/Chhattisgarh (170) were highest, surpassing India's 2016-2018 estimate of 113 (95% CI 103-123).

After adjustment for education and other variables, the risks of maternal death were highest in rural and tribal areas of north-eastern and northern states. The leading causes of maternal death were obstetric haemorrhage (47%; higher in poorer states), pregnancy-related infection (12%) and hypertensive disorders of pregnancy (7%).[9]

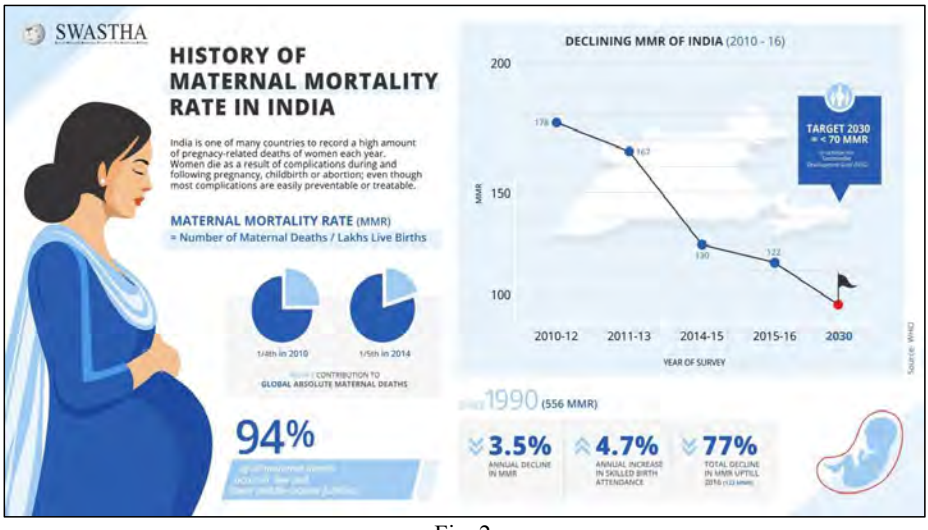

Fig. 2

According to the study of The Million Death corroborators supervised in 2014 which is also mentioned before that half of all maternal deaths in India occur between the ages of 20 and 29, of which only 6% are under the age of 18.[10] There are many important Observations in this study that shows that three-quarters of all deaths occur in the poorest states of the country,

[9] Meh, C., Sharma, A., Ram, U., Fadel, S., Correa, N., Snelgrove, J. W., Shah, P., Begum, R., Shah, M., Hana, T., Fu, S. H., Raveendran, L., Mishra, B., & Jha, P. Trends in maternal mortality in India over two decades in nationally representative surveys. An international journal of obstetrics and gynaecology. 23-34 (2021). Also available at. https://doi.org/10.1111/1471-0528.16888.

[10] Roosa Tikkanen et al., Maternal Mortality and Maternity Care in the United States Compared to 10 Other Developed Countries. (2020). Also available at https://doi.org/10.26099/411v-9255.

especially that place of illiterate people in rural areas, which account for 72.30 percent of deaths, and urban areas, which account for 46.10 percent, 49.70 percent of all deaths, and 13 percent of deaths on the way to the hospital, while 25 percent received no medical attention. 37.60% of women do not have access to treatment at the time of the onset of labor complications. This means that the main cause of death during childbirth is social and economic backwardness.

The states like Assam, Uttar Pradesh, Madhya Pradesh, and Rajasthan have the highest maternal mortality rate in the country which are falling behind the Human Development Index. While, in the states like Kerala which is above the Human Development Index, the maternal mortality rate is very low.[11]

The World Health Organization emphasizes the same. It is estimated that 94% of maternal deaths occur in resource-deficient areas. Poverty, distance to health facilities, inadequacies, and certain cultural and religious norms are some of the reasons the World Health Organization considers. Which can be more reliable to see the below given table.

In the last two decades, maternal healthcare has received a lot of attention all across the world, and system-wide changes have led to better pregnancy outcomes and lower maternal mortality rates.[12]

VI. Analysisng women's Marital Age and the Statue

In United Nations Universal Declaration of Human Rights, 1948, to which India is also a signatory, Article 16 provides that:

"(1) Men and women of full age have the right to marry and start a family without regard to race, ethnicity, or religion. They have equal rights when it comes to marriage, both during it and after it terminates.;[13]

Similarly, in the International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 19.12.1966, Article 23 provides that:

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[11] Hamal, M., Dieleman, M., De Brouwere, V. Et al. Social determinants of maternal health: a scoping review of factors influencing maternal mortality and maternal health service use in India. Public Health Rev 41, 13 (2020). Also available at https://doi.org/10.1186/s40985-020-00125-6.

[12] L. Alkema, D. Chou, D. Hogan et al., "Global, regional, and national levels and trends in maternal mortality between 1990 and 2015, with scenario-based projections to 2030: a systematic analysis by the un Maternal Mortality Estimation Inter-Agency Group," The Lancet, vol. 387, no. 10017, pp. 462–474, (2016). Also available at https://doi.org/10.1016/S0140-6736(15)00838-7.

[13] Narender Kumar vs State Of H.P. And Others, Cr. MP(M) No. 2259 of 2019.

"1. The family is the natural and essential unit of society, and it is entitled to social and state protection;

2. The right of men and women of marriageable age to marry and to found a family shall be recognized;[14]

It is well established that international covenants, which India has ratified, are enforceable to the degree that they do not conflict with domestic legal provisions. The Supreme Court has ruled that in a circumstance when both spouses are majors, there has been a lawful marriage conducted in accordance with the law, and both of them are living together, the marriage should be maintained and nothing should be permitted to jeopardise that status.

The Hon'ble Supreme Court had, in the facts of the said case, cautioned the parents to accept the situation and create no problems in their marriage. In a similar case along with similar statements The Court also had ordered that the Court proceedings cannot be permitted to degenerate into a weapon of harassment and persecution.[15]

According to the World Health Organization, pregnant women between the ages of 10 and 14 are at higher risk of death if they are considered of marriageable age.[16] There is no mention anywhere that pregnant women between the ages of eighteen and twenty-one are in any particular category at particular risk. Marriage between persons under the age of eighteen are termed child marriages by the World Health Organization and UNICEF. In all democratic countries, the age of marriage is established at eighteen. As a result, raising the marriage age from eighteen to twenty-one years old to minimise maternal mortality is illogical. It will also cause a significant deal of harm. because the amendment makes marriages between people under the age of twenty-one illegal. As a result, they may be barred from participating in numerous maternity-related social security programmes.

Forty percent of all child marriages in the world today are in our country. In 2003 it was forty-seven percent of the total marriages, and in 2019 it has dropped to twenty-three percent. Various social welfare, women empowerment schemes and the expansion of education have made such a change possible.[17] However, the rate of child marriages in India is not at all

[14] Ibid 13.
[15] Sangita Rani (Smt.) alias Mehnaz Jahan v. State of Uttar Pradesh and another, 1992 Supp (1), SCC 715.
[16] UNICEF. Ending child marriage: Progress and prospects. New York: UNICEF, 2013.
[17] Jennifer McCleary-Sills, Lucia Hanmer, Jennifer Parsons & Jeni Klugman. Child Marriage: A Critical Barrier to Girls' Schooling and Gender Equality in Education, The Review of Faith & International Affairs, 13:3, 69-80. (2015). Also available at https://doi.org/10.1080/15570274.2015.1075755.

comfortable. Most of this is happening in poor and rural areas. This situation is not going to change as the age of marriage has been raised by law. We are talking about information based on the fact that marriages of women under the age of eighteen are considered child marriages.

However, as the marriage age rises to twenty-one, the number of child weddings rises again, necessitating greater hidden marriages. Otherwise, it will be considered a crime. They will become even more alienated and disabled as a result of this. Women between the ages of eighteen and twenty-one will be excluded from all aspects of nourishment, medical care, social security, and legal protection, all of which are necessary to prevent maternal mortality. By 2019-20, all of the progress we've made in this area will disappear.

A quick look at the standpoints of other countries could help to clarify a few aspects of our discussion. Teenagers as young as 15 are allowed to marry with parental authorization in Estonia, the European country with the lowest marriage age cap on the continent.[18] According to the Independent, the Spanish government declared in 2015 that the marriage age would be raised from 14 to 16 in order to align with the rest of Europe. These rules do not appear to encourage child weddings; rather, it appears that they simply permit marriage, not sexual actions that result in pregnancy, as some contemporary intellectuals and activists contend..

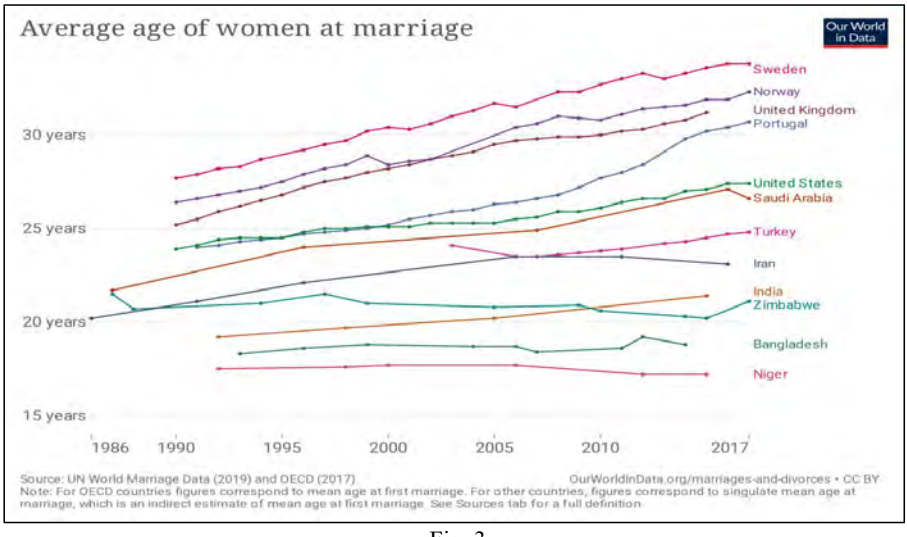

Fig. 3

[18] Efevbera, Y., Bhabha, J. Defining and deconstructing girl child marriage and applications to global public health. BMC Public Health 20, 1547 (2020). Also available at https://doi.org/10.1186/s12889-020-09545-0.

Now while analysing the United Kingdom, in England and Wales people are allowed to marry at the age of 18. However, they can also marry at the age of 16 or 17 with parental consent. According to a well-revised BBC story, there is no rule prohibiting weddings between people under the age of 18. Similarly, according to a US State Department human rights report from 2014, the official marital age in Trinidad and Tobago is 18 for both men and women. Muslims and Hindus, on the other hand, have their own marriage laws. For Muslims, the minimum age is 16 years old for boys and 12 years old for girls. Hindus, on the other hand, are 18 and 14 years old, respectively. This will place a higher value on global human utility criteria.

When it comes to marriage age in the United States, it is determined by the states or the common law. In the majority of cases, the minimum age is established at 18 years old. However, the minimum age in Nebraska is 19, whereas in Mississippi it is 21. In China, men must be 22 years old to marry, while women must be 20 years old. In Niger, the Civil Code stipulates that boys must be 18 years old and girls must be 15 years old before marrying. Similarly, in Nebraska, one can only marry once they reach the age of 19. Massachusetts, on the other hand, has the lowest minimum marriage age with parental agreement, at 14 for boys and 12 for girls.

The regulation in Canada authorizes 16 and 17-year-olds to marry with parental consent. Boys 16 and older are allowed to marry in Mexico, whereas 14-year-old girls can marry with parental authorization. In Argentina and Australia, the marriageable age is 18 years old; however, parental consent and court permission may allow them to marry when they are 16 years old.

VII. Maternal Mortality and Women Empowerment

Another argument is that raising the age of marriage is conducive to women's empowerment. The reason is that the proposed amendment would give women more time to get an education and seek employment. But the fact is that this benefit is only available to a very limited category. This is because the major causes of child marriages in the country take place in areas and communities where there is no opportunity for further education or employment.[19] Do not assume that this only applies to any particular religion but Education, social backwardness, and economic status are the criteria.

[19] Nieuwenhuijze, M., & Leahy-Warren, P. Women's empowerment in pregnancy and childbirth: A concept analysis. Midwifery, 78, 1–7. (2019). Also available at https://doi.org/10.1016/j.midw.2019.07.015.

This amendment will only serve to strengthen the social consciousness that girls will be considered as a burden for two more years among these categories. Where there are opportunities and chances to study and work, the average age of marriage increases, and the age difference between the bride and groom decreases. Global experience confirms this. In developed democracies, the average age of marriage is higher and the age difference is lower. The government has a responsibility to create opportunities for such change. We need to invest in welfare schemes, property development in rural areas, and health and education. Moreover doing something else without performing that would amount to great loss.[20]

Up to the age of 21, the new reform in the age of women's marriage proposal also subjugates a woman's freedom to self-determination to a patriarchal and racist social order. It has the potential to jeopardise two adults' consented sex and cohabitation. Women will not be able to make the most critical decisions in their lives until they reach the age of twenty-one. It will not only take away the sexual freedom of persons over the age of eighteen, but it would also make "living together" relationships illegal.

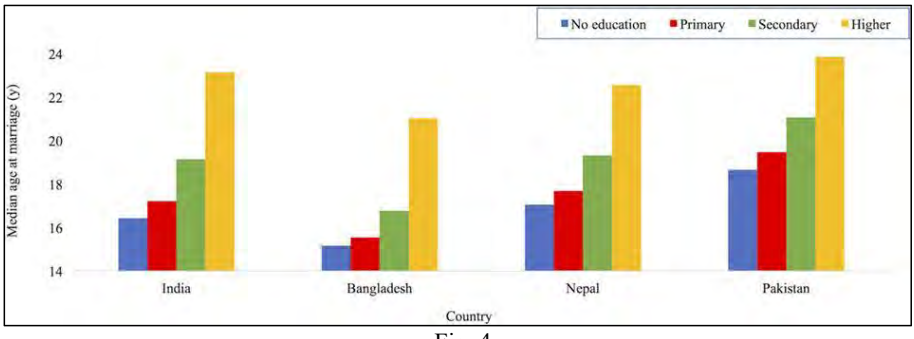

Fig. 4

The biggest aspect of the Prevention of Child Marriage Act (PCMA Act) in the country is not that it punishes child marriages, but that it protects and helps children in marriage. Section 3 (3) of the Act provides for early marriage and termination of marriage within two years of the age of marriage.[21] That is, if the girl wants to leave the relationship by the time she is 18 or 20, she can make such a decision. But she will have to wait until she is 21 years old.

[20] Prata, N., Tavrow, P. & Upadhyay, U. Women's empowerment related to pregnancy and childbirth: introduction to special issue. BMC Pregnancy Childbirth 17, 352 (2017). Also available at http://doi.org/10.1186/s12884-017-1490-6.

[21] Diamond-Smith, N., Treleaven, E., Murthy, N. Et al. Women's empowerment and experiences of mistreatment during childbirth in facilities in Lucknow, India: results from a cross-sectional study. BMC Pregnancy Childbirth 17, 335 (2017). Also available at https://doi.org/10.1186/s12884-017-1501-7.

The PCMA statute states that a marriage between a girl under the age of 18 and a boy under the age of 21 is valid but voidable. The court has the power to issue judgments instead of condemning anyone who marries. Conversely, marriage is legal only if the bride and groom are minors. Such is the marital life of those who overcome adversity and live with loved ones. In these cases, the girl's parents often use PCMA. When it comes to lovers, the law is widely applied against them. It seems likely to happen now. After establishing consensual sex at the age of 21, it remains to be seen how the rules, especially pox, will be enforced. When linked to the multiple anti-conversion laws and "love jihad" ordinances imposed in the northern states, it only serves as a crucial tool for forcing women into the traditional caste-religious-tribal equation.

VIII. Conclusion

The Bill refers that it would further end discrimination against women and A woman must be eighteen years old to marry, whereas a male must be twenty-one years old to get into a marital relationship or simply the marriage. It is legitimate to insist that deviating this and harmonising the marriage age would indicate gender equality. But if it's a matter to consider then it's not by raising the age of marriage for women, but by dropping the age of marriage for men to eighteen, as it's a bygone notion that a woman is the one who matures first. The momentum has passed to render a variation. However, when it comes to modern-day change, global standards must be met.

The age of marriage for women is eighteen in 158 nations around the world. Eighteen is the average age of men in 180 countries. The age of marriage for both men and women is 18 in all European countries. Marriage should be at least 18 years old, according to the International Convention for the Elimination of All Elimination of Violence against Women (CEDW). The Supreme Court made it clear in the NHRC case in 2018 that marriage age should have been standardised. In a 2008 report, the Law Commission made a similar comment. Men's marriage age should be set at eighteen years old, according to the Law Commission.

The legal age of consent in India is 18 years. It can also be found in a variety of legal documents. You can vote in elections that will determine the country's fate. Yet it defies no logic that they are unable to decide for their own lives, such as marriage. And here it is clear that raising the women's age of marriage in India upon the maternal mortality is irrational par illegal as far as constitutional morality is concerned.