# IILS LAW REVIEW

**INDIAN INSTITUTE OF LEGAL STUDIES**

**UG & POST GRADUATE ADVANCED RESEARCH STUDIES IN LAW**

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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, IIIS 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.

Even during this pandemic, the Indian Institute of Legal Studies was the first of its kind in this region that had undertaken the initiative of conducting online classes for the students of both UG and PG courses 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 moulding 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

The Covid-19 days have passed. With each passing day, the world is healing and the people are gradually overcoming their personal and professional losses. As the famous saying goes "when God closes one door, He opens another", the inexplicable horror and helplessness the Covid-19 casted upon the human race on one hand has also given us the unfathomable will and capacity to create our own paths of survival on the other.

It was a great challenge but we were able to find ways to uphold the spirit of education and academic learning. On this positive note, I would like to encourage the students, research scholars, academicians and interested contributors to keep ablaze the flames of research to identify, highlight, address, redress, conceptualise, formulate, analyse, interpret and simplify the issues and challenges of unlimited topics in the field of research.

It is a matter of immense pleasure and pride for me to stand witness to the journey of the Indian Institute of Legal Studies, Siliguri's IILS LAW REVIEW through the years and appreciate every individual involved in the making of this journal and converting the valuable ideas into comprehensive intellectual work.

# MESSAGE FROM EDITOR IN CHIEF

The mission of the college is to fulfil the existence and its road maps are meant for the achievement of its vision*: "To achieve and to sustain excellence in teaching and research, to enrich local, national and international prospective through our research and to improve the skills in academic and educational periphery."*

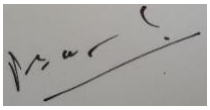
To achieve and promote excellence in publication and applied research, the college has taken the initiative to launch IILS Law Review exclusively to create assets of academic literature from students, academicians and legal professionals with a vision to provide a platform for them to express their views on various dimensions of the law as it stands and the law as it should be.

The IILS Law Review has provided an opportunity to our students to focus on research and learn from excellent examples. The articles are reviewed by the review committee and tested for plagiarism before publication. After incorporating all the suggestions recommended by the committee the articles are revised and then finally published. The college has successfully released Vol. 9 Issue 1 of the IILS Law Review after careful scrutiny. The editorial board has attempted to maintain the threshold of quality while encompassing current issues in a consistent manner. Our Journal seeks to sustain and support legal excellence by maintaining its consistent standard of publication.

I would like to convey my sincere thanks and congratulate the "IILS Law Review Editorial Board" and its contributors for devoting their ethos and time. I believe that this edition will enrich the readers for enhancing their research skill and knowledge. In the journey of this journal the tireless works of students, teachers and other professionals are appreciated.

I would also like to thank the students and teachers who have shared their ideas, views, emotions and expressions for the fruitful completion of the journey of the journal IILS Law Review Volume Issue.

Thank you.



Prof. Dr. P. K. Sahoo,
Editor in Chief,
Principal,
Indian Institute of Legal Studies

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# NON-OPERATION OF IP RIGHTS DURING WAR CRIMES IN THE PARADIGM OF RUSSIAATROCITIES ON UKRAINE

*Aditi Manya*[1]

***Abstract***

*On February 24, 2022 Russia set an example of arbitrariness by invading into Ukraine's sovereignty. The step taken by Russia was completely unreasonable and unfair and it tried to reflect that Ukraine doesn't have a right to take its own sovereign decision because the decision somehow threatened Russia's security. The scenario that has been created by the involved nations has once again established that the Right to Life is the most basic right that all the nations should protect and guarantee. In Ukraine amongst Russian atrocities, life needs to be protected and for that need for Intellectual Property Suspension was felt. Ukraine even adopted a law on April 1, 2022 for IP suspension so that medical needs of the country can be fulfilled but the question that arises is whether IP suspension should be allowed? Whether decision-making power regarding suspending IP rights should freely be in the hands of sovereign powers? And if yes, then is there a possibility of abuse of such power?*

*This question must be answered on an urgent basis because instances of such abuse are being noticed now and the situation is somewhat like biased in nature where only positive aspect of IP suspension is being highlighted and not its dire consequences. The article aims at throwing some light upon all the possible ways into which IP suspension can affect nations as well as the lives of nationals and concludes that there are two dimensions of IP suspension at will. One, where IP rights are suspended in times of emergencies as a safe-guarding measure and the second, where IP suspension is used as a threatening tool just like in the case of Russia. The article looks into both the dimensions of IP suspension and tries to find out best possible way to protect lives in the times of war.*

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## 1. INTRODUCTION

Before delving into the depth of what Intellectual properties are and how does it gets affected in the times of war, we should understand what exactly war crimes are. It has always been difficult to define "War Crimes" because it is a constant developing concept which has been changing and evolving in a rigour's manner especially after World War I. The first time the term war crime was attempted to define was the Instructions for the Government of Armies of the United States in the Field, also known as the "Lieber Code." The name of the document was after its Author Francis Lieber. The Lieber Code tried explaining the concept of war crimes with various examples like forcing the army personnel of the losing country into the service of the wining country or torturing people of the invaded country including maiming, rape, murder, etc. War crime was again defined in an international statute through which International criminal court and tribunals in Yugoslavia and Rwanda were established.

A war crime is a violation of the laws of war that gives rise to individual criminal responsibility for actions by combatants in action, such as intentionally killing civilians or intentionally killing prisoners of war, torture, taking hostages, unnecessarily destroying civilian property, deception by perfidy, wartime sexual violence, pillaging, and for any individual that is part of the command structure who orders any attempt to committing mass killing including genocide or ethic cleansing, the granting of no quarter despite surrender, the conscription of children in the military and flouting the legal distinctions of proportionality and military necessity.

Now, after understanding the concept of war crimes and having seen legislations that bar the idea of war crimes, it is easily extractable that life is the most important right that humankind possesses and it shall be protected at all costs. Anything that stands in the way of right to life should be suspended entirely or to the extent it is creating contradiction. Article 21 of the Constitution of India reveals the same idea and guarantees the right even in the times of emergencies. It says, the right cannot be taken away except for the procedure established by law. From this very nature of Right to life comes in the current controversy of IP suspension in Ukraine during Russia's invasion in Ukraine.

To safeguard individual interest during the times of war, on April 1, 2022, Ukraine adopted a law named the Law of Ukraine on Protection of Individuals' Interests in the Sphere of Intellectual Property. The idea of the law is that it suspends all the rights relating to the protection of IP deadlines and terms. It even suspends the deadline of acquisition of such rights.

The law will not only suspend the terms and deadlines for protection of IP rights but also other deadlines present under other legislations like deadline to challenge decisions of the national IP body of Ukraine. According to the Law, all deadlines are extended up to 90 days from the date martial law is cancelled and the terms will be renewed starting from the date following the end of martial law.

The suspension, however, does not cover terms and deadlines for the National IP Body of Ukraine and the Ministry of Agrarian Policy and Food of Ukraine to execute actions provided for in the legislation.

Ukraine has suspended all the physical operation from its IP office since all the physical infrastructure has been converted into hospitals and help centres. Applications for grant of IP protection are being done through emails and no physical operation is in picture because of the application of martial law.

Similarly, Russia is getting affected in a way different manner during the war situation. Russia is going through an economically rough phase because of the sanctions getting imposed on it for invading Ukraine so, in return it has suspended all the IP protection rights working in favour of those countries which means anybody can use any IP protected product without the permission of the IP holder. In Russia, even McDonald's was copied and a business was being run with the exact same mark.

It is pretty evident from the different scenarios of two separate nations arising out of the same situation of waging war that compulsory suspension of IP can lead to various consequences probably into ones that we haven't even thought of yet. How to deal with war crimes and how to reduce its gravity is a subject matter of Human rights law but then how to deal with the dire consequences of IP suspension in all possible ways is the subject matter of this arena and international forums concerned in this front must try to anticipate all the possible ways in which IP suspension can probably affect the globe.

In this paper ahead, I intend to reflect all the probabilities in which IP suspension can possibly affect the globe and also, will try to answer a raging question that is of the utmost importance – Whether or not IP suspension should be adopted and accepted and allowed in the today's digital across global networked trade environment.

## 2. WHY IP SUSPENSION IS NECESSARY AND WHY NEED FOR THE SAME WAS FELT

On February 24, 2022 Russia invaded Ukraine and a war that was unjustified and unreasonable in all rights started. The war is so brutal that it is claimed to be the greatest atrocious activity after World War II. The war has left both Russia and Ukraine in a difficult position, not to forget, Russia has stepped into the troubled water because of its own idea of sovereignty which implies that Ukraine doesn't have the liberty to join or quit organisations or international platforms because it somehow affects the security of Russia. The dispute that is being discussed here is about Ukraine's decision to join NATO which Russia strongly opposed because of the threat felt by it that if Ukraine also joins NATO, all the borders of Russia will be sealed with those nations that who are members of the organisation. Also, Ukraine happens to be the second largest nation of Europe having access to the black sea. It is to be noticed that Ukraine seals Russia's border from east. These facts are sufficient for Russia to feel great threat from Ukraine's membership in NATO. Now, the question arises why NATO is a threat to Russia? *Actually, NATO was created in 1949 with the purpose of, at that time, preventing the expansion of the Soviet Union to other European countries. The organization initially had 12 countries, among which are the most important United States, Canada, United Kingdom and France. The Soviet Union collapsed in 1991. At the time, Russia claims that* ***President Gorbachev*** *was promised by the US that* ***NATO*** *would not move east. Instead, several countries joined* ***NATO,*** *such as the Baltic Republics, Poland, Romania and Lithuania. Currently, the organization has a total of 30 countries. In this way, Russia feels a threat from* ***NATO****'s expansion to the east and, above all, fears that Ukraine, a country in which it can exert influence, will end up joining* ***NATO****, something that has not yet happened. In this way, Putin wants to avoid at all costs that Ukraine ends up in the influence of the West.*[2]

Similarly, Ukraine is in trouble and is bound to protect its existence against Russian atrocities. Russia has violated almost all international law norms in the name of its territorial security and as a result thousands of people including children have died in Ukraine. The infrastructural capacity of Ukraine has also been damaged by attacks through missiles and vacuum bombs. The condition of Ukraine is so dire that approximately 10 million people have been forced to flee their homes[3] and nearly 1 million people have been left without electricity.[4] All the sectors

[2] Why does Russia don't want Ukraine to join NATO?, MARCA, https://www.marca.com/en/lifestyle/world-news/2022/03/06/622517e222601d1e328b4571.html , ( last visited on – May 5,2023).
[3] Saving Ukrainian Lives During the Russian War: Ukraine Must Waive IP Rights under Article 73 TRIPS to Provide Access to Essential Medicines,https://academic.oup.com/grurint/article/71/8/719/6650007 , (last visited on -May 05,2023).
[4] *Ibid.*

of Ukraine have been severely affected but most of them all, the healthcare system. The healthcare system was already badly affected because of the Covid-19 pandemic and then Russian invasion degraded it even further. All the hospitals and healthcare centres were nearly or completely destroyed leading to lack of place for treatment of people ill or injured. Even if some places were available for treatment because of the Covid-19 scenario and because of the aggression between Russia and Ukraine, number of people in need for medical aid was way more than the resources available. Also, the economy of Ukraine was so badly affected that invention of new medicines and access of those much-needed medicines were almost nil. Though Ukraine has stood exceptionally in front of Russia defending its sovereignty in ways that were not at all expected as per its size and capacity but still, one can imagine the condition of Ukraine with such less resources and raging medical needs every day. To deal with the very situation, need of IP suspension was felt. Terms and conditions for grant, operation and protection of IP suits and grows in a country which is economically strong and, in a condition, to invent more and more IPs adding to its portfolios and not in a country that is already struggling on the survival part. Restrictions are meant to make IP operation tough so that there is fairness in the creation and dealing of the moral and economic rights of the creators alongside, balancing it with the right of exploitation of the users but making IP operation fair also implies leaving IP on the wishes of the creator with some minimal restrictions that government is authorised to impose under the validity of the statute. Now, when IP is left entirely on the wishes of the creator, it's not necessary that he will keep the country's welfare and needs above his individual benefit because that is a moral obligation and not a legal obligation as long as IP rights of the creator are intact. So, Ukraine is then left with only one way out that is waiving off its IP rights so that those moral obligations can be converted into legal obligations finally helping the drowning economy and people in desperate need of the medical attention. IP rights allow the creator to benefit from his creation economically and non-economically in exclusion of others. This bundle of rights gives a kind of monopoly to the creator that can lead to blockage of essential products from the market by affecting its access to the general public. Suppose taking a hypothetical scenario of Covid-19, a company developed a medicine that was effectively capable of curing covid. This invention was something that was much needed at that time but the problem now is that the invention of the medicine is protected by the IP rights and hence, the company gets to control the pricing and access of the medicine in the market leaving the entire population of the country at the mercy of the company. Such monopolistic rights can be dangerous at times but there are some

solutions also to these monopolies for balancing the rights of creators and needs of the ordinary people in need. Solutions like compulsory licensing are there in the provisions of TRIPS agreement. Compulsory licensing is an authorisation given by a state authority to the third person to use the patented invention without the consent of the creator. This right was given to all WTO members in 2001 through Doha Declaration on the TRIPS agreement and public health. Article 31(b) of TRIPS agreement talks about a different type of 'compulsory license' called 'Government use' where the government authorises the use of patented invention for itself and controls the production, importation and distribution of the patented products. This already existing mechanism under TRIPS agreement balances both the rights of the creator and the use of the ordinary public but when it comes to exceptional circumstances it is not enough and that is why waiver of IP rights is needed. IP rights waiver allows use of patented products without the permission of the right holder allowing free access and sound availability of necessary products.

## 3. DRAWBACKS OF IP WAIVER

It is very much evident now that IP waiver is important for dealing with the exceptional circumstances that Ukraine is in but it also must be acknowledged that IP suspension has several drawbacks attached to it. Power and discretion of a state to suspend IP rights of the creators can be very devastating for economic and non-economic incentive of the creators as well as for economy in the long run. This threat can be understood by Russia's reaction in the light of Russia – Ukraine dispute. Russia's invasion into Ukraine's sovereignty is seen as the most unjustified and unreasonable humanitarian crisis after World War II. Russia is going through a lot of economic and non-economic sanctions imposed by different nations to compel Russia to call off the atrocious practice against Ukraine. Russia's reaction to such sanctions is a classic example of drawback of state's power and discretion to suspend IP rights. Russia has suspended all the IP rights of the creators belonging to the countries who have imposed sanctions on Russia in support of Ukraine. The implications of such IP suspension are that all the businesses are now open to be copied. All the trademarks are open to be infringed.

"……*the Russian government issued unauthorized use of patents and other related Intellectual Property Rights of companies based in unfriendly countries. This step was taken in response to the United States Patent and Trademark Office and European Union Intellectual Property office, after they halted work with Russian counterpart, Ros patent Russia IP Office. As per the above decree, no compensation shall be payable to the patent owner on making use of*

*inventions, utility model or design without consent. This means a company based in an unfriendly country will not be able to enforce its intellectual property right in Russia. By this move government is intending to nationalize the assets of enemy companies and mitigate the effect of unemployment and keep producing their products locally."*[5]

In Russia, a business is running with the same trademark of that of the McDonald's that is not McDonald's. Since, McDonald's is a big brand and has huge economic value; this fake business using the trademark of McDonald's can cause great loss to the country and if such infringements are more in number it can cause significant loss to the economy as well.

Now, we have seen both the scenarios of IP suspension effect of which runs both in positive as well as negative direction. Once, where IP suspension can grant ordinary people access to basic necessities especially in the times of war at the same time, it can abuse monopolies of businesses in an arbitrary manner just like Russia did.

## 4. EFFECT OF IP SUSPENSION BY RUSSIA ON RUSSIA'S INTERNATIONAL STANDING

Russia is getting widely affected by the sanctions imposed on it and to mitigate the losses being caused, Russia is normalizing foreign trademarks and giving it to local bodies. This is a clear violation of IP rights of those market giants. Russia is indulging into such practice because of two reasons. The first one being Russia's discontent with countries those are imposing sanctions on Russia in support of Ukraine. The second one being, trying to get through the rough patch of down economy. *As per the consultancy BRAND FINANCE, public opinion in most of the countries is that Russia is guilty of the war.*[6] Russia is being seen as manipulator of its own sovereign power for unreasonable reasons. A lot of countries have lost their faith in Russia and hence, they are trying to get out of the Russian market. Russia tried a lot to convince and even threaten them to stay back and function there but once the trust is gone, it's gone. Neither incentives nor threat is working to serve Russia's purpose. Russia threatened to seize all the assets of businesses but still it couldn't stop them from stepping out as a result of that Russia finally suspended all the IP rights that companies of foreign countries held within the

[5] The effect of Russia-Ukraine war on Intellectual Property Rights of the Countries, ZEST IP, https://zestip.com/the-effect-of-russia-ukraine-war-on-intellectual-property-rights-of-the-countries/. (last visited on – May 05,2023).

[6] *Ibid.*

territory of Russia. It won't be wrong to say that Russia took the step of IP suspension in a state of panic but then, what happened in the state of panic is very usual but with dire consequences. Russia couldn't comprehend that IP suspension in a haphazard, unreasonable and threatened manner will lead to loss of potential investors. Losing potential investors will cause loss to Russia in long run and the loss will continue until the trust is restored which will surely take decades until some miracle happens.

*According to a CNN Business report dozens of companies have halted their services in the country some of them are:-*

*Autos – Companies like Ford, General Motors, Toyota, Volkswagen and Nissan have suspended their production and sales in the country.*

*Aviation – Companies like Airbus and Boeing have suspended their operations and supply of spare parts to the country.*

*Big tech – This list includes Airbnb, Amazon's, Apple, Meta, Hitachi, IBM, Intel, Microsoft and others. All these companies have suspended their services in the country.*

*Energy and metals – Companies like BP, Equinor, Exxon, Rio Tinto, Shell and Total Energies all these companies have declared not to continue their services in Russia till the situation gets normal.*

*Finance – Several companies like Norway's, MasterCard, Visa, American Express, Moody's, Goldman Sachs, JP Morgan Chase, Western Union, Citi group, PayPal etc. have decided to suspend their services in the country.*

*"…. other services have also been affected by the war such as retail, media and entertainment, hospitality, food and beverages, shipping and transportation. In order to fulfil the demand of all these services it is desirable to lift protection of IP rights of these services.*

*In short, the war has created a negative impression of Russia in the global market which will result in an economic crisis in the coming days."*[7]

## 5. CURRENT SITUATION REGARDING IP SUSPENSION IN UKRAINE

[7] *Ibid.*

We have briefly discussed what the situation in Ukraine is and what should ideally be done by the government of Ukraine to lessen the impact of atrocities inflicted by Russia now it is time to witness what Ukraine has actually done meaning thereby the actual current situation regarding IP in Ukraine.

The working of IP in Ukraine is affected and operation is not running in full speed like old times. As of September 12, 2022 Ukrpatent continues to work that is the IP office of Ukraine but the Patents Board of Appeals has ceased the operation. Ukrpatent though continues to work but there is a lot of change in the operation of the office. It has suspended physical operation which means physical filing of IP in the country is suspended. On **April 5, 2022** a notification was issued by the director of department of examination of applications for inventions, layout designs and utility models stating that all the applicants must send their email ids with the application to receive their documents/notifications on time. This notification has been issued to prevent delay in receipt of documents on time because of the in operation of Ukrpatent in physical mode. Those who fail to provide email address, their documents will be withheld by the IP office until physical operation resumes were also conveyed by the office.

Now, if we speak about IP suspension specifically, on **April 1, 2022** the Ukrainian Parliament passed a law "On Protection of Interests of Intellectual Property in Martial Law" (Law No 7228) which has suspended all the rights and deadlines related to filing of IP and also deadlines of acquisition of IP. This step is the most significant step to deal with the emergency situation in Ukraine right now because it will ease the difficulty in access and availability of medical products which is need of the hour.

*"……the law allows authorized persons to submit documents within 90 days of the abolition of martial law, without paying a fee for extension, or restoration of the relevant deadlines. Martial law was declared in Ukraine on February 4, 2022, following the issue of Decree 64/2022, for a period of 30 days. Since then, it has been extended twice for periods of 30 days each, and then twice for periods of 90 days each. The most recent 90-day extension is set to expire on November 21, 2022." This law applies to all IP rights holders before Ukrpatent, including both Ukrainian and foreign rights holders.*[8]

[8] *Ibid.*

## 6. CONCLUSION

For concluding the paper, it is to be noted that Ukraine also just like Russia suspended IP rights of the creators exercising its sovereign power but this suspension was for right purpose and was done in a situation which was not created by Ukraine itself unlike Russia. From the analysis of entire paper, this can be concluded that there are two dimensions of IP suspension at will out of which only the positive dimension is being highlighted and the negative side is being neglected because positive dimension is the need of the hour. But, at the same time we should not forget the negativity that this freedom of suspending IP rights without any justification or grounds can bring in the long run. This power can completely prove arbitrary defeating the entire purpose of IP rights. It will simply defeat all the protections extended to creators discouraging them to create further. The power of suspending IP rights at will not only cause loss to the creators but will also affect the credibility of the nation that chooses to suspend IP rights for reasons to be determined by itself. Taking the example of Russia, it is suspending IP rights of all big brands functioning in its territory just to retaliate to those states that are imposing sanctions on it so that Russia could be brought down in atrocities committed towards Ukraine. Implications of Russia's action is even out of Russia's own foreseeable sight right now. Suspending IP rights and allowing for open use of trademarks are not just detrimental to the profit and goodwill of those brands but is also harmful for the credibility of Russia itself. Russia, first suspended IP rights of big brands and when they decided to move out of the territory, their assets were confiscated by the Russian federation and even threats were served to them for not stepping out of the market. This whole lot of action is highly criticized and is unacceptable. Russia has developed a tendency of imposing its sovereignty over other sovereign powers which is an alarming signal for all of us. Finally, the suggestion for tackling this situation would be to have a check on state's power to suspend IP rights without any justification and to introduce some grounds on which such suspension could be done to make the system fair and to improve the situation into a better and reasonable environment.

# JUDICIAL INTERPRETATION OF INDIA'S AFFIRMATIVE ACTION: A MODERN PICTURE

*Arindam Shit*[1]

***Abstract***

*Reservation Policy is the term for affirmative action recognized by the Indian Constitution and carried out by various governments. One of the constitutional tools India has used to address the issues of long-standing discrimination against some groups that has led to various forms of inequality is the reservation policy. The issue of which group members must receive preferential treatment over others is crucial in a quota system based on the preferential treatment of groups. The disparities within beneficiary groups are extremely important to uphold the essence of reservation policy in India. The most marginalized groups are left behind in receiving the advantages of reservations because internal differences are ignored.*

*This insufficient consideration of the sub-classification issue demonstrates the inability of the Apex Court of India to create a formal structure within which reservations may be viewed. This ambiguity in normative expectations affects areas of discrimination specifically in the educational sector and public employment, as well as the internal homogenization of such groups. The Supreme Court of India has determined that reservations in public employment as well as in higher education serve essentially the same purpose.*

*This paper has been developed to study the judicial intervention in such reservation policies and to understand the intent of the judiciary while dealing with limitations to such reservation and how they are looking at the same whether the limitation is a tool for social transformation. And if then to what extent? the reservation scheme in India has been in place from the foundation of the Constitution and the Indian government followed by the judiciary has been practicing this scheme for more than 60 years, whereby it has encountered numerous challenges and taken unexpected turns. Several new contours are developing as a result.*

***Keywords:*** *Affirmative Action, policies, judiciary, intervention, limitation.*

[1] BBA LL. B Student, Alliance School of Law, Alliance University, Bangalore.

# 1. INTRODUCTION

## 1.1. Overview:

The social framework of India consists of high levels of structural inequality, based on caste and ethnicity institutions. The Scheduled Castes (SCs), also known as the "untouchables" castes, have suffered the most from the unequal and hierarchical assignment of rights, even though every caste (aside from those at the top of the caste hierarchy) is affected. They have historically been denied the right to own property, to engage in business (apart from a few jobs deemed immoral and polluting), to receive an education, and to exercise all other civil, cultural, and religious rights—except for manual labor and serving castes below them. Additionally, social isolation and residential segregation are problems for the untouchables.

A further cause of exclusion is tied to ethnic identity, a problem experienced by groups like the Adivasis (indigenous people), also known as Scheduled Tribes (STs). Due to their geographic and cultural isolation, this group has experienced loneliness, exclusion, neglect, and underdevelopment. In their situation, exclusion can take many different forms, such as being denied access to the resources they depend on and being displaced because of economic growth.

A total of 250 million people, or about one-fifth of India's population, were STs and SCs in 2001, respectively making up about 17 and 8 percent of the country's total population. Both SCs and STs, on average, own fewer capital assets, are more likely to rely on casual wage labor, have lower levels of education, and experience higher rates of poverty and infant mortality. Two crucial clauses in the Indian constitution have influenced the Indian government's treatment of these groups. The "non-discrimination and equal opportunity" principle and the State's authority to take action to ensure non-discrimination and equal opportunity in practice are these. The current "reservation policy" in India, also known as affirmative action, is in place in three key areas: hiring and promotion in the public sector, enrolment in public universities, and seats in the national, state, and local legislatures.

The most crucial component relating to reservation policy pertaining to government services. Article 16(4) of the constitution[1] gives the State the authority to "make any provision for the reservation in appointments, or posts, in the services under the State, in favor of any backward class of citizens" and "provision for reservation in matters of promotion to any class or classes

[1] INDIA CONST. art. 16, cl. 4.

of posts." To implement this clause, the government made reservations for SCs and STs proportionate to their population share. There are concerns regarding the promotion of workers as well. The public sector undertakings, statutory and semi-governmental bodies, and non-profit organizations under the control of the government or receiving grant-in-aid are included among the government services. However, some services, most notably the judiciary and defence systems, are not covered by the reservation policy at the central level. Other provisions are included with reservation to improve SC and STs' ability to compete for government jobs. These include lowering the minimum age to enter the service, lowering the minimum standard of suitability (subject to a minimum qualification requirement), offering pre-examination training, holding separate interviews for SCs and STs, and including individuals from SC or ST backgrounds on selection committees. This paper has been designed to analyze the need of such privilege in modern scenario and also to deal with possible amendments to be done in legislation so as to comply with todays' social demand.

### 1.2. Research Problem:

One of the group's largest Affirmative Action Programs is found in India. A series of Supreme Court orders govern how uniform government positions are distributed. The terms 'vertical reservations' and 'horizontal reservations' refer to two different types of affirmative action policies and both the policies "reserve" a certain percentage of jobs as well as seats in an educational institution for various protected groups. The concept of affirmative action had great significance at its foundation in the 1950s but with changing times and for political advantage it has become a mandate even after so many years of its implementation and is not easy enough to ignore such policies in today's scenario. Judiciary played an important role to uphold as well as defining the scope of such policies time and again and has kept a 50% cap over the reservation in educational institutions and jobs. After many years passed, society witnessed several changes in the equality structure in terms of caste, but the judiciary is still abiding by the said pronouncement rather to interpret it concerning the modern scenario.

### 1.3. Review of related literature:

In an article which has the same objective as that of this paper has dealt with current disputes relating to reservation policies in India, whereby the author has discussed how those policies have been taken over the period from the foundation. He further illustrated and expressed

concern about the role of judiciary while deciding cases related to this field.[2] Another article by Tayfun Sonmez and Bumin Yenmez, displayed the present scenarios of different forms of affirmative action practiced in India. The authors in this article have dealt with 2 SMG mechanism and illustrated their view with verdict of *Saurav Yadav vs. State of UP*. Authors here mainly focused on technical aspects and the intelligibility of categorization through certain combinations to reach to the conclusion. [3] Further, a thesis by Anup Surendranath, showed how limitation on reservation can be a useful tool for social transformation. Also, the author in his view for sub-classification for fair justification of such policies.[4] An article by Shailee Mishra, shows how the judiciary is taking action against reservation in promotion nowadays. Apart from that the author has tried to display what should be the approach of the judiciary in future to deal with such cases and also argued that reservation in modern India is how much essential to achieve the sole objective of such policies.[5]

A legal editor of Hindustan Times, Utkarsh Anand also covered the proceedings of the recent case going on EWS category reservation. This article focused on the arguments of Attorney General KK Venugopal and how he is establishing the EWS reservation is different from other reservations granted under Article 15(4) and 16(4) of Indian Constitution. Moreover, the author focused on how EWS is justified in the modern scenario irrespective of crossing the 50% upper limit.[6] Another article by Soutik Biswas. discussed the debate of the recent approach of the government towards affirmative action in India and also the emerging issues that the government is facing for the same.[7]

### 1.4. Objectives:

1. To study the current judicial trend to deal with Indian affirmative action.
2. To understand the use of the 50% limit of reservation in recent society.

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[2] Rao, J. Laxmi Narasimha. "AFFIRMATIVE ACTION IN INDIA: EMERGING CONTOURS." The Indian Journal of Political Science 69, no. 3 (2008): 483–92, http://www.jstor.org/stable/41856439. (last visited Oct 18, 2022).

[3] TAYFUN SONMEZ & M. BUMIN YENMEZ, AFFIRMATIVE ACTION IN INDIA VIA VERTICAL, HORIZONTAL, AND OVERLAPPING (2021), https://www.tayfunsonmez.net/wp-content/uploads/2021/11/IndianAA-v8.pdf. (last visited Oct 12, 2022).

[4] Anup Surendra Nath, JUDICIAL DISCOURSE ON INDIA'S AFFIRMATIVE ACTION POLICIES: THE CHALLENGE AND POTENTIAL OF SUB-CLASSIFICATION ORA (2013), https://ora.ox.ac.uk/objects/uuid:69493f4c-a6e3-48df-bee1-08bc3c8f4a41. (last visited Oct 12, 2022).

[5] Shailee Mishra, RECENT APPROACH OF THE SUPREME COURT OF INDIA ON RESERVATION JURIST (2020), https://www.jurist.org/commentary/2020/07/shailee-mishra-india-reservation/. (last visited Oct 18, 2022).

[6] Utkarsh Anand, 50% CEILING OF RESERVATION IS NOT SACROSANCT: CENTRE TO SUPREME COURT HINDUSTAN TIMES (2022), https://www.hindustantimes.com/india-news/50-ceiling-of-reservation-is-not-sacrosanct-centre-to-supreme-court-101662488739316.html. (last visited Oct 15, 2022).

[7] Soutik Biswas, IS AFFIRMATIVE ACTION IN INDIA BECOMING A GIMMICK? BBC NEWS (2019), https://www.bbc.com/news/world-asia-india-46806089. (last visited Oct 12, 2022).

3. To study the judicial interpretation of affirmative action in India from its foundation.

### 1.5. Scope and Limitation:

The scope of the paper is limited to legal system of India with respect to Indian Constitution with regards to the affirmative action policy in India. Any foreign decision if taken in this paper, is just for reference that how Indian judiciary has appreciated those decision and not otherwise. This paper has been designed in a manner to deal only with the judicial interpretation to reservation policies in modern scenarios and previous related judgements. All the analysis has been done based upon the relevant judgements given by respective authorities as well as from the provisions of Indian Constitution. This paper has been further extended to question the validity of previous judicial decisions with respect to affirmative action in India.

### 1.6. Research Question(s)

1. What should be the approach of the judiciary with regards to affirmative action in recent India?
2. Whether previous judicial decisions on affirmative action hold importance in the modern scenario?

### 1.7. Hypothesis:

The researcher is of the opinion that the previous judicial decision and the scope of the affirmative action should be relooked as it doesn't fit as per the scenario of modern India, although complete abolition of affirmative action is not possible as well as not justifiable as per as the situation of Indian society is concerned.

### 1.8. Methodology:

This research paper has been developed by means of the Doctrinal method of research and the paper has been divided into various chapters to deal with the statement of the problem. The researcher has collected all the data and judicial decisions from relevant sources and a major attention has been given to Indian judicial pronouncements to conclude the paper. Various secondary sources have been referred to develop the outline of this paper.

## 2. EVOLUTION IN INDIA'S AFFIRMATIVE ACTION

Indian reservation policies have been in place for a very long time. This policy underwent a number of changes as time went on. Talking about the policy from the ground up is the best way to comprehend it and the reasoning behind it. This "Reservation Policy" depicted the tree's root points to the beginning of caste-based social stratification.

### 2.1. Post-Independence Developments:

After the Independence in 1947, the oppressed classes received political representation in both public employment and education, as well as reservations. The joint electorate system for political representation remained in place. Due to this, 84 seats in the 543-member Lok Sabha have been set aside for members of the Scheduled Caste, and 47 seats are designated for members of the Scheduled Tribe. The Scheduled Castes (SCs) and Scheduled Tribes (STs) were given priority for seats in the legal and educational systems under the Indian Constitution, which came into effect on January 26, 1950. (STs).[8] The Backward Classes Commission, which identified Oppressed Backwards Classes, was established in 1953 under Kaka Kalelkar. A report was then published in 1955 as a result.

The Persons with Disabilities (Equal Opportunities, Protection of Rights, and Full Participation) Act of 1955 was put into effect in 1955. In 1962,[9] the Supreme Court of India limited the percentage of reservations that could be made to 50%. Mandal Commission was established in 1978 to establish quotas for underrepresented castes. They suggested setting aside 27% for OBCs. The president was assisted in December 1978 in appointing the backward class commission, which was headed by B. P. Mandal, and all thanks to Article 340 of the constitution for granting the authority.

The purpose of creating this commission was to identify the standards by which social and educational backwardness will be measured, which will then aid in this category's advancement process. Prime Minister B P Singh starts putting the Mandal Commission's recommendations into practice in 1989. Further Apex Court held that reservations cannot exceed 50% and upheld the 27% OBC reservation in spite of criticism.[10], The Ministry of Human Resource Development wants to increase the percentage of reserved seats in educational institutions to

[8] The Constitution of India, 1950.
[9] M. R. Balaji and Others v. State of Mysore, 1963 AIR 649.
[10] Indra Sawhney & Others v. Union of India, AIR 1993 SC 477.

49.5% by 2006. According to the 103rd Constitutional Amendment of 2019, this reservation went a step further and granted 10% reservation to Economically Weaker Sections (EWS).[11]

This increased the percentage of reservations to almost 60% overall. "The youths of the economically backward sections in the General category would get 10% reservation in education and government services, which would boost the morale of the New India," Prime Minister Narendra Modi said when announcing this decision.

### 2.2. Role of judiciary in the development

In 1951, the first significant judicial pronouncement relating to reservation has been noticed[12], which was brought by the then-State of Madras, the communal G.O. that provided for caste-based reservation in medical and engineering colleges was set aside on the allegation that it was against the provision of Article 15 of Indian Constitution. Due to this, the government passed the first constitutional amendment, which added Clause (4) to Article 15 and gave it the authority to make special provisions for the advancement of Scheduled Castes and Scheduled Tribes as well as any socially and educationally backward classes of citizens in India.

Further, in 1962, the constitutional bench of the Supreme Court[13] held that the amount of reservation should typically be less than 50%. At the time, there were 68% reservations in the State of Karnataka for admission to educational institutions. The Courts spent a lot of time dealing with the reservation issue and suffice it to say that there have been a number of decisions from the Supreme Court and several High Courts that have different perspectives. In this very judgment the cap of 50% has been introduced, which suggests that there cannot be reservation for more than 50 % of the total seat and if there is less than 50 %, that amount will be based on circumstances of that particular case.

Then, under the direction of B.P. Mandal, the second National Commission for Backward Classes report was released, paving the way for a 27% reservation for other backward communities that had been identified based on various criteria, caste being the most important one. With the already-existing 22.5% reservation in favour of SC/STs, the total amount of reservation became 49.5% at the union level, and it is the first time that reservation—which was previously only applicable to SC/STs—was introduced in public appointments under the Union Government for other backward classes. And the Mandal Commission's

[11] INDIA CONST. art. 15, 16 amended by the Constitution (One Hundred third Amendment) Act, 2006.
[12] Champakam Dorairajan v. State of Madras, 1951 AIR 226.
[13] *Id* at 11.

recommendations have been contested before Hon'ble Supreme Court in the case of *Indra Sawhney v. Union of India,*[14] and the decision was led by a 9 judges' bench, of which Six judges independently wrote their verdicts. The main point of this decision is that the percentage of reservations must always be kept below 50%, though the ceiling can be exceeded in exceptional circumstances arising from the country's and its citizens' inherent great diversity. It may also happen that in distant and remote areas, the population there may need to be treated differently due to its exclusion from the mainstream of national life, though with extreme caution.

Constitutional amendments although overridden some of the rulings made by the Supreme Court in the *Indra Sawhney case* and other later cases, such as the addition of clause (4A) to Article 16[15] to allow for reservations in promotions with consequential seniority and clause (4B) to exempt the carry forward rule in promotions from the 50% cap.[16] Then the 102nd amendment to the Constitution came into picture. It included, inter alia Article 338 B dealing with the establishment of a National Commission for Backward Classes as a constitutional body (in accordance with the Supreme Court's directions in Indra Sawhney), Article 342 A allowing the President to compile a "Central List" of Socially and Educationally Backward Classes (SEBCs), and Article 342 A defining SEBCs for the purposes of the Constitution.

Further in the case of *Ajit Sigh's Case,*[17] which dealt with the issues of reservation in promotion and whether promoted reserved candidates would have the right to assert precedence over promoted general candidates in the future. The court relied on prior judgements in *MR Balaji v. State of Mysore and CA Rajendran v. Union of India* and ruled that there is no requirement on the government to give reservations The court stated that both Articles 16(4) and 16(4A) are only in the nature of enabling provisions, giving the State discretion to consider providing a reservation if the circumstances mentioned in those Articles so warranted. *"In view of the overwhelming authority right from 1963, we hold that both Articles 16(4) and 16(4A) do not confer any fundamental rights nor do they impose any constitutional duties,"* the court said.

And then in 2006, amendment to Article 16(4A) was challenged as amended in 2001. In its ruling, the court noted that the government is not required to provide reservation for SCs and STs in the context of promotions.[18] The state must, however, gather quantitative data

[14] *Id* at 12.
[15] INDIA CONST. art. 16, cl. 4-A.
[16] INDIA CONST. art. 16, cl. 4-B.
[17] Ajit Sigh v. State of Punjab, 1967 AIR 856.
[18] M. Nagraj v. Union of India, Writ Petition (civil) 61 of 2002.

demonstrating the backwardness of a class and the inadequate representation of that class in public employment if it chooses to use discretion and establish such a provision. To which, the court listed down conditions to be fulfilled to reserve backward classes in terms of promotion.

## 3. RECENT APPROACH OF JUDICIARY

Over the decades the Apex Court of India constantly stated that "reservation is not a fundamental right". But the concept of reservation in the modern scenario became a major element based on which the political parties plan their elections. And when it comes to the removal or modification of reservation structure it has been often noticed that such a step caused heated political discussion and discontent in backward communities.

In 2020, The political parties of Tamil Nadu challenged the decision of central government in the case of *Anna Dravida Munnetra & Ors. vs. Union of India,*[19] the allegation was, the central government chose not to provide the Other Backward Classes (OBCs) reservation. The fundamental rights of OBC candidates are allegedly being violated, and a petition was filed under article 32 of the Indian Constitution. The Supreme Court of India, however, ruled that because the right to a reservation is not a fundamental one, this petition cannot be filed under article 32 because that provision is only applicable when a fundamental right is violated. Therefore, the petitioners were asked to withdraw their applications by a three-judge panel chaired by justice L.N. Rao. Thus, the judiciary time and again makes it very clear that reservation policy and the rights so provided to the backward classes of the society are not fundamental rights rather it has been implemented to bring the marginalized sector of people to par with the educated and civilized sector of people. Also, it has to be considered that, this was an approach made in 1950 when there was a huge gap between civilized people and those marginalized backward people. But 'where is the social standing now?' is the major question.

In February 2020, the case of *Mukesh Kumar and Anr. V. State of Uttarakhand and Ors.*[20] showcased another aspect of the current scenario concerning affirmative action in India. In this very case, the reserved category candidate contended that the report produced in the M. Nagaraj Case, which discussed the inadequate treatment of SCs and STs in government employment at the time, directs that the State is required to provide reservation, but the government of Uttarakhand has not done so in this case. But the Hon'ble Supreme Court upheld the verdict of

[19] Anna Dravida Munnetra & Ors. v. Union of India, W.P.No.8324 of 2020.
[20] Mukesh Kumar and Anr. v. State of Uttarakhand and Ors, S.L.P. (Civil) No. 23701 of 2019.

*Ajit Singh v. The State of Punjab* held that Article 16(4) and Article 16(4-A) does not give any fundamental right in reservation in promotion.

The Supreme Court made it very clear in the Mukesh Kumar case that the government is free to disregard any committee's report while dealing with reservation in promotion. It must first gather quantifiable data to demonstrate how poorly that class is represented in the sector of public services, if it wants to grant any class of people a reservation. If the State Government's declaration to provide reservations for promotion is challenged, the State in question must present the Court with the crucial calculable facts and assuage the court that such reservations became necessary due to the lack of representation of SCs and STs in a particular class or classes of posts without jeopardizing the overall effectiveness of administration as specified by Article 335 of Indian Constitution.[21] But in the *Suresh Chand Gautam's case*,[22] the Apex Court stated that the court cannot issue a mandamus ordering the state to present quantifiable data showing that SCs and STs are adequately represented in public services.

Despite the Supreme Court's numerous decisions, several people argue that reservation is a fundamental right. And the major reason behind these arguments are two decisions they relied on. Their contentions are based on *Ashok Kumar Gupta v. State of U.P.*[23] and *Jagdish Lal v. The State of Haryana*.[24] As in these cases it was discovered that in some situations, reservation is a fundamental right. Further, some individuals thought that since Article 16(4) is covered under Part III of the Indian Constitution i.e., (Articles 12-35), which deals with fundamental rights, then why Reservation is not covered under the fundamental rights?

But the words of Article 16(4) and Article 16(4-A) don't indicate any order or command and these provisions are different from Article 16(1).[25] Thus, even under part III of the constitution, these two provisions are mere empowering provisions. Only reservation can be regarded as a fundamental right if Article 16(4) and Article 16(4-A) both state that "notwithstanding anything in this article, State shall provide reservation." And the larger benches of the Apex Court also made it clear that fundamental rights are not discussed in Articles 16(4) or 16(4-A), nor are any constitutional obligations to the State carried out by them. As a result, the court ruled that the cases of Jagdish Lal and Ashok Kumar Gupta are per curium, or do not lay out the regulation properly. The aforementioned cases have demonstrated that the right to claim reservation is not

[21] INDIA CONST. art. 335.
[22] Suresh Chand Gautam v. State of Uttar Pradesh, Writ Petition (Civil) Nos. 690, 715 and 273 of 2015
[23] Ashok Kumar Gupta v. State of U.P, W. P. (C) No. 511 OF 1995.
[24] Jagdish Lal v. the State of Haryana, W. P. (c) No 4965 of 2015.
[25] INDIA CONST. art. 16.

a fundamental right. However, as any law, regulation, or act may be used to support the terms of reservations, this can be said to be a statutory or legal right.

Further, in the recent case of *Janhit Abhiyan v. Union of India,*[26] AG KK Venugopal argued in favour of the central law on 10% quota advantages for the economically weaker section, saying that the cap on reservations of 50% is "not sacrosanct". He further emphasized that the Constitution's Preamble calls for the advancement of the EWS and such an advancement can be accomplished educational institution reservations, public employment positions, and several welfare programmes that the State is required to provide for its economically weaker citizens. In response to the challenge regarding the ceiling, the AG argued that the court should determine whether a certain percentage of reservations must be made for these categories jointly or separately. According to him, *"The 50% ceiling restriction is not inviolable. And the petition filed based on this ground deserves to be rejected."* His submissions came before another Constitution bench in 2021 refused to consider abolishing the 50% ceiling as it quashed a Maharashtra law providing quotas for Marathas in jobs and education.[27] The 50% upper limit as fixed by the *Indra Sawhney case* follows principles of reasonability and equality,[28] the bench stated, *"to change the 50% limit is to have a society which is not founded on equality but based on caste rule"*.[29]

Hence, the judiciary in modern Indian society is constantly trying to keep a check whether reservation policy has been misused by any community to earn benefit. And if it does so, the judiciary is making all efforts to bar such approaches. Keeping in mind that the right of reservation is not a fundamental one, they are trying to bring harmony and balance between developed and marginalized sectors of people. The concept of caste equality via reservation has become an old fashion for judiciary as well as legislation, which is true, as the rate of untouchability and caste-based discrimination is quite low in modern India. But again, the concept of reservation cannot be flushed out at this moment as certain sections still struggle for their representation and development in terms of economy and education.

[26] Janhit Abhiyan v. Union of India, W.P.(C)No.55 of 2019.
[27] 50% CEILING OF RESERVATION IS NOT SACROSANCT: CENTRE TO SUPREME COURT HINDUSTAN TIMES (2022), https://www.hindustantimes.com/india-news/50-ceiling-of-reservation-is-not-sacrosanct-centre-to-supreme-court-101662488739316.html. (last visited on - Oct 15, 2022).
[28] *Id* at 12.
[29] *Id* at 30.

## 4. CONCLUSION AND SUGGESTIONS

The proportion of SCs and STs in government employment and educational institutions has significantly increased over time. In the executive and decision-making processes, SCs and STs now have a place in the legislative, whose credit goes to reservations. The formal government sector reservation policy and the informal private sector affirmative action policy have both improved the human development of SCs and STs. The rate of advancement has been quite gradual, though, and there are still gaps between SCs and STs and non-SCs and non-STs in terms of human development attainment. Some issues have emerged during the process of implementing India's reservation policy. Its success hasn't been uniformed across all industries and divisions. In general, SC and ST participation in low-skill jobs is similar to their population proportions, but substantially lower than their shares in high-skill jobs. The development and diffusion of reservation policy to many government sectors has also been gradual due to indirect resistance. The demand of SCs and STs for formal affirmative action policies to be extended to private sector employment and private educational institutions is another problem. The government is currently actively taking this into consideration. The judiciary at the other hand constantly trying to restrict the freedom of reservation as they found out that this whole concept is politically influenced and can be misused to conquer the authority. Despite of the fact the reservation provisions falls under part III of the Constitution, the judiciary refused to accept these rights as fundamental rights moreover, the judiciary authorized the state governments to ignore any committee report with regard to reservation promotion if they think it is unfit for the society. There were two sectors of previous judicial pronouncements. The First part put an upper limit of 50% of reservation and the second sector states that how much reservation below 50% to be given, is depends upon circumstances of that particular case. Now, in this recent Indian society, that 50% margin is not acceptable as we moved about 2-3 decades after such drafts. And the judiciary also doesn’t want to increase any more reservation percentage over 50 when it comes to equality in terms of caste. They always tend to decrease the percentage and time and again allowed state to take its own decision based on variety of circumstances when the reserved seat percentage becomes below 50. The concept of EWS category specifies a separate domain, although such categorization also count under Indian affirmative action. The concept of economically weaker section and its reservation is solely based on economic criteria and the same has been given to general category people only. Thus, it excludes reservation based on equality with respect to castes, as the reservation based on castes has been already given Article 15(4) and 16(4). This is a practical example how society

and the government's ideology on reservation in modern scenario. There were debate on this topic of 10% reservation of EWS, but mere political need of a ruling party single handedly cannot amend the constitution. The society felt the need of such reservation and thus it came into the draft of constitution.

Hence, the concept of reservation or the affirmative action of the government in India will be there as some sector of society is still lagging behind in terms of education, developments and many other factors. And it is the duty of the government to bring them in the light of development by giving them privileges whenever required, as the constitution empowers the government for the same. At the other hand it should be look after by the judiciary that while providing reservation to any particular community another sector of people should not be discriminated arbitrarily. There should be distribution of privileges based on proper rational and the judiciary should examine those rationale. The modern-day approach of judiciary while dealing with such matter is to keep separate fundamental rights and reservation policies and empowering state decide amount of reservation which is of course below 50%, in educational institution and jobs, which is a correct approach as per my opinion. Because, once it made fundamental, neither legislation nor judiciary can lower down that upper limit when the society will develop in near future. Moreover, with the changing time there may be certain other reservation to be included based on grounds other than caste, economy, then in such case the seat for merits will be decrease which may again lead to the situation of M.R. Balaji v. State of Mysore. Thus, the hypothesis of this paper proved to be true, as the recent judicial approach is to relook the previous judgements and only to advance with essence reservation as the power is gradually shifting to state to reserve as per their need but not more than 50 % and definitely, the concept of reservation is not going to be destroyed soon in near future.

# DECODING "UNFAIR TRADE PRACTICES" AND FINE IMPOSED BY CCI ON ONLINE HOTEL MARKET INTERMEDIARIES: A COMMENT ON Re FHRAI v. ORAVEL STAYS PVT. LTD. & MMT-GO PVT. LTD.

*Astle*[1]

***Abstract***

*The Contention being fined by CCI on 'online hotel intermediaries for booking services companies (Oravel travels ltd. and MMT-GO) trade name as OYO and Make my trip Go ibibo. The Competition Act 2002 ensures a free market and laissez-faire economy. The Competition Commission, established by the ministry of corporate affairs, acts as a quasi-judicial body and investigates and imposes penalties per the law. The director general (DG) has been empowered to investigate the complaint or information suo moto or the information received. The case has outlined every mark of information received by the Federation of Hotel and restaurants association of India by CCI. This has been considered, and three significant issues have been framed. The first is, Inquiry procedure under Sec-19 (1)(a) on report and information received, especially under Section-19 (3), where inquiry under the anti-competitive agreement (Section 3(3)) an appreciable adverse effect on competition like the creation of a barrier to new entrants in the market, accrual of benefit to consumer, driving competitors out of the market read with the type of agreement under section 3(3-4). The second issue is, Fine imposed and determining the quantum of the monetary fine. The final one is the secret commercial agreement and limiting the enterprise on the motion of its dominance in the market under section 4 inquiry established with the requisites under section 19 (4) of the Competition Act. The case law has established the procedure relating to a prima facie case formed under section 26 (1) and investigation by DG and objections invited and contention of relevant market in hospitality industry.*

***Keywords:*** *Relevant Market, Appreciable adverse effect, Vertical Market, Monetary fine, Abuse of Dominance*

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## 1. INTRODUCTION TO APPRECIABLE ADVERSE EFFECT AND UNFAIR TRADE PRACTICES

Precisely, the act nowhere defines the phraseology of appreciable adverse effect or anti-competitive market. It has just been inferred through the development of economic jurisprudence and EU principles underlying unfair trade practices. To, understand the 'appreciable adverse effect', it is to be noted that the practice in trade, whether probable or actual, causing restrictions or creating a situation where lessening or destroying the competition is there in the market shall be presumed to be Unfair trade practices.

Section 3 and Section 4 of the Competition Act 2002[2] deal with anti-competitive agreements and abuse of dominance, respectively. So, the situation where there is restricted trade practice that results in appreciable adverse effect on competition by the anti-competitive or abuse of dominance of enterprises may or may not create appreciable adverse effect. The situation of anti-competitive agreements and abuse of dominance shall be read with the provision of section-19(3) r/w section-3 for determining the adverse effect in anti-competitive cases and section 19(4) r/w section 4 to determine the abuse of dominance. In the context "cause or likely to cause", appreciable adverse effect certainly means that certain factors for deciding the said situation may or may not create appreciable adverse effect on the competition. As such, in case of inquiry under section 19(3) for anti-competitive agreements, determinants like causing entry barrier, a hindrance to the distribution chain, accrual of benefits and a few other factors are defined as satisfying, creating appreciable adverse effects.

If an agreement has adverse effects on the market and is anti-competitive. The same agreement shall be appreciable on competition to attract unfair trade practice. Negligible adverse effect on the market does not qualify for penalties under the Competition Act. The first stage in order to assess the effect on the market, determining the relevant market where there is adverse effect is mandatory. Those markets are called Relevant Market and is defined under Section 2(r) of Competition Act. It is an important factor to determine, assess and for investigation wherein there is adverse effect on the market. Relevant Market is a broad term and is divided as relevant product market and Relevant geographical market and is useful to determine the unfair trade practice. As such, suppose if a person wants to enter into steel related business, the relevant

[2] The Competition Act, 2002, No.12, Acts of Parliament, 2002 (India).

product market would be steel and the companies dominating the industry shall be the leading steel companies. So, on that basis the adverse effect will be determined.

## 2. CASE ANALYSIS IN ANTITRUST ISSUES

In matters relating to antitrust, CCI based on complaint, Information or suo moto can take cognizance of the issue and may proceed with the investigation under section 26(1) of the competition act. In this case, the 'Informant' was - *Informant 1 Federation of hotel and restaurant associations of India (FHRAI)* Informant *2 Casa 2 Stays Pvt. Ltd. Opposite party 1- Make MyTrip India Pvt. ltd, Opposite party 2- Oravels stays private limited (OYO) Opposite party 3 - Ibibo group private limited*[3].

The information filed was under section 19 (1) (a) of the Competition Act, wherein the power to inquire into an alleged issue has been bestowed to the commission if the informant submits it in a prescribed format and fee. That information contravenes sections 3(1) and 4(1), anti-competitive agreements and abuse of dominance, respectively. In this case, the informant (Hotel association of India) informed the commission of Oyo and MMT-GO to indulge in 'Using dominant position in the market and also providing deep discounting, rate cuts, price rigging and secret commercial agreement. The legal rationale used was consideration under section -19(1)(a), formation of prima facie case under section 26(1), Report submission and order under section (27), interim relief under section (33) of the Competition Act.

The decision and the submitted report clearly stated that both these E-platforms indulge in price rigging and deep discounting; even the margin they take is around 22-30% per booking. Rules and regulations are formed time to time by these OTA (Online travel agency) platforms and are supposed to be followed by the hotels listed, and they even cannot deny in any case thereof. This put hotels chain in restricted business with these e-platforms. Here the party FHRAI is a non-profit organization for all the hotels and restaurants in India registered under section 8 of the companies Act. While the opposite parties are OTA (Online travel agency). Now on the information DG, under section 26(1), started an investigation and found Oyo as the "market for franchise service for budget hotels" as a relevant market and for MMT-Go "*Market for online intermediation service providers for booking hotels in India as the relevant market"*[4].

[3] In re FHRAI v. Oravel Stays Pvt. Ltd. & MMT-GO Pvt Ltd. Case No. 19 of 2019 under Competition Commission of India.
[4] The Competition Act, 2002, §. 2(r), No.12, Acts of Parliament, 2002 (India).

This stipulates that even their agreement hindered other OTA's from doing business in the market (Creating barriers for new entrants in the market- 19(1)(3)). The report was submitted and objections were invited; both MMT-GO and Oyo denied the allegations, but OYO admitted to being involved in deep discounting. Based on the report submitted and arguments held, CCI decided to impose a fine of 5% of the preceding three financial years' average financial turnover. Henceforth, OYO sum of Rs. 168.88 crores and MMT-GO sum of Rs. 223.48 crores were imposed.[5] In the coming sub-section, we will assess the alleged issue and arguments and will look into the fine aspect.

## 3. ALLEGATION/ ISSUED RAISED

### 3.1. Price Fixing

It was alleged that MMT-GO and Oyo indulged in price fixing. Contravention to section 3(3) (a) of the act. This type of Horizontal anti-competitive agreement is in which the business competitor determines the price to sell their products. Price fixing is an agreement that directly or indirectly determines the product's price in the market, creating an adverse effect on the competition. In one case, *Delhi automobile P. Ltd & others,*[6] the distribution joined together and inserted an advertisement in the newspaper for minimum cash down payment and monthly instalments. This resulted in fixing the price, and the arrangement between them was an anti-competitive agreement, resulting in unfair trade practices such as price fixation. Similarly, in this case, both the e-platforms were involved in joint price fixing, and their arrangements affected the market. So, the allegations were made on price fixing (Section 3(3)(a)).

### 3.2. Predatory pricing

The allegations based on the report submitted by DG were also about predatory pricing. It was alleged by the hotel and restaurant associations of India that these E-platforms force us to offer accommodation at a lesser value than the average room rate. Predatory pricing is an arrangement wherein the firm sells the product below the average or manufacturing level of production. Herein the hotel association stated that the material or the infrastructure cost has to be owed by them. These E platforms don't give the product pricing, service pricing or any other infrastructure issues thereof. So, surviving at a lower cost than the average price is impossible.

The term predatory pricing is defined under section 4 explanation (b) of the act. Economists believe that predatory pricing is not always illegal and tough to determine; by virtue of section

[5] Non- Confidential Report (Order -Case no. 14 of 2019 no.1 of 2020) Competition commission Jurisdiction.
[6] In re MANU/MR/0018/1975: (1976) Cas.610 (MRTP).

4(2)(a) (Explanation 2) predatory pricing is unfair. The Predator pricing is also explained in *MCX-SE and NSE case*[7], wherein 'zero price'[8] was considered to be Predatory pricing by examining the allegations. Henceforth unfair trade practices. It is often stipulated that predatory pricing is a subset of Unfair trade practices. CCI imposed a penalty of 5% of the average turnover of the last three years, which was Rs. 55 crores.

### 3.3. Confidential Commercial agreement

The informant stated that both these e-platforms are in a confidential, secret commercial agreement and are creating an appreciable adverse effect in the market. This was also found in the report of DG that both these are involved in secret commercial agreements that are anti-competitive agreements (section -3 (1)), and this results in hindrance to new entrants in the relevant market and denial of market access to few established platforms as stated in reports like treebo and Fab hotels. This type of secret commercial agreement by the competitors is anti-competitive as this arrangement creates an Unfair trade practice and adverse effect on the market.

### 3.4. Excessive Commission

The final allegation made was on the issue of excessive commission by these E-platforms. The hotel and restaurant association of India stated that these e-platforms don't provide any services or infrastructure to hotel and restaurant chains, all the cost has to be owed by the hotel owners only, then after giving deep discounts to the customers through their app and mandatory forcing the hotels to abide by the same. Then on each booking, on an average, *22-30 percent* of commission is charged by these e platforms, which is unjust and tough for the hotel owners to sustain in the market.

## 4. DIRECTION BY DIRECTOR GENERAL (DG)

### A. Procedure for Investigation in Antitrust cases

Director general (DG) appointed by the commission to investigate and assist the commission in any contravention of the provision. This power has been bestowed under section 41 of the Competition Act. The preliminary case has to be formulated based on information received under section 19(1)[9] and the investigation formed under section 26 (1) by DG. On that, DG

[7] MCX Stock Exchange Ltd. v. National Stock Exchange of India, Case No. 13 of 2009, Decided on 23 June 2011.
[8] *Id.*
[9] Competition Act 2002, Inquiry into the certain agreement of abuse of enterprises.

submits the report and invites an objection. This is the didactic procedure for inquiry and investigation by DG. DG submitted a few directions in the report.

The procedure of a case in the Competition Act starts with CCI getting the information under Section 19(1) of the Act; It could be suo moto, by an informant or government then a prima facie case is formed under Section 26(1). After that, DG investigates under sec.26(1). The issue is closed if no contravention to any provision is found. If the contravention is found, the report shall be submitted, and the informant shall invite the objection based on the report. If agreed, arguments, testimony deposition, and cross-examination will occur based on that CCI, which will come with appropriate order and the case is closed. If not, Further investigation into the disputed point.

### B. Observation and Finding by DG in case

DG stated that MMT-GO has a relevant market under the head "*Market for intermediation service for booking of hotels in India*" and is enjoying the dominant position in the market. While Oyo, it was the 'market for franchising services for hotels in India'. They both were enjoying dominant positions, and their arrangements and agreements were creating hindrances to new entrants, Denial of market access and Predatory pricing for the hotel chain by mandating excessive pricing and abiding by the rules and regulations without failure.

The report stated that the arrangement between the MMT-GO and Oyo has a tie-in arrangement of agreement (Under section 3(4)(a) of the act), creating an appreciable effect on the market. Since the DG determined the relevant market, now they were in a dominant position and hence their act altered the competition in the market attracting ‘abuse of dominance’ under section 4(2) of the Competition Act.[10] With that commission also seek for interim relief under section 33 of Competition Act and that relief can be both contractual, directional and monetary relief.

### Order and direction by the commission[11]

On account of reports submitted, arguments made, evidence deposition and cross-examination by the learned counsel. It was stipulated that Oyo and MMT-GO have a dominant position in the respective relevant market and the secret commercial agreement between them is creating a denial of access to any other players hence in contravention to section 3(4)(a) r/w 19(3) abuse

[10] *Supra* note 7.
[11] Non-confidential report (Order- case no. 14 of 2019 no. 1 of 2020) Anticompetitive.

of dominance and controlling and limiting the price is in violation to Section 4 (1) abuse of dominance r/w section- 19(4) parameters for determining abuse of dominance.

Henceforth, in light of observations and findings, the commission stated that: -

(l) Directional and monetary fines shall be imposed. The direction will be so that both these e-platforms shall cease all contracts involving Predatory pricing, price rigging and excessive commission.

(II) The E platform's confidential agreement is in contravention of Section -3(3) and section 3(4)(1) of the act. Hereafter, the same shall cease to be in play.

(III) Commission stated that MMT-GO violates Section 4(2)(a)(1) by abusing its dominant position to control, limit and alter the condition of the sale and purchase in the market, creating an adverse effect in the competition.

(IV) Oyo and MMT-Go contravene section 3(1) anti-competitive agreement, Section 3(4)(a) vertical anti-competitive agreement by tie-in arrangement.

(V) Commission, based on the inquiry and investigation under section 19 and section 26(1) can execute the order under section 27 and imposes a penalty of 5 percent of the last three financial years' average turnover of both these companies[12].

***MMT - 223.48 Crore***

***Oyo - 168.88 crore***

**Valuation for imposing the fine**

The commission is empowered under section 27(b) of the Competition Act 2002 to impose a penalty of not more than 10% of last preceding three-year average turnover of the company found in violation of any provision of the act. The major contention to impose this fine is to (a) to safeguard the competition in the market and reflect the seriousness of any unfair trade practices. (b) to ensure the quantum of fine equivalent to gravity of offence**.** In case of *Excel Corp Ltd. v. Competition Commission & others*[13] has decided to use relevant turnover for determining the imposition of penalty

As shown in the table, we will derive the same valuation.

[12] *Id.*

[13] Excel Corp Ltd. v. Competition Commission & others CIVILAPPEAL NO. 2922 OF 2014.

| Financial Year | MMT (Relevant Turnover in crore rupees) | GoIbibo (Relevant Turnover in crore rupees) | MMT-Go (Relevant Turnover in crore rupees) |
|---|---|---|---|
| 2017-18 | 2,759.07 | 1,356.31 | 4,115.38 |
| 2018-19 | 3,145.53 | 1,430.89 | 4,576.42 |
| 2019-20 | 3,130.72 | 1,586.45 | 4,717.17 |
| **Total** | 9,035.32 | 4,373.65 | 13,408.97 |
| **Average** | 3,011.77 | 1,457.88 | **4,469.66** |
| **5% of Average Relevant Turnover** | | | **223.48** |
| **Rupees Two Hundred Twenty-Three crores and Forty-Eight Lakhs only** | | | |

Fig 1 – Non- confidential Order by CCI **(Case no. 14 of 2019)** Evaluation report

In case of *FHRAI v MMT-GO* and *Oravel travel Pvt Ltd.*, the purpose of determining revenue shall be considered by taking the entire E-platform as one unit and then determining the valuation. It has to be noted that the case was of 2019 and case 1 of 2020. So, the preceding three years would be 2017-18 2018-19 2019-2020. it doesn't attract the fact that the case decision was released in 2022, but the date on which it was filed shall be taken as origin. so, as seen in the table, it was 223.48 crore as average net turnover[14] for MMT-GO.

As stated, the relevant market for the Oyo being a franchise for providing booking to avail hotel services was also fined in the same ratio of 5% of last three preceding years of average[15] turnover of the company. As shown for 2017-2020, it was calculated as 168.88 crore. so, the penalty imposed was 168.88 crore on Oyo, cumulatively, it was 392.8 crore as penalty by CCI.

Non-Confidential Version

| Financial Year | Oravel Stays Limited (in crore rupees) | OHHPL (in crore rupees) | OYO [Total] (Relevant Turnover in crore rupees) |
|---|---|---|---|
| 2017-18 | 265.91 | 160.86 | 426.77 |
| 2018-19 | 3,595.13 | 535.94 | 4,131.07 |
| 2019-20 | 36.29 | 5,538.98 | 5,575.27 |
| **Total** | 3,897.33 | 6,235.78 | 10,133.11 |
| **Average** | 1,299.11 | 2,078.59 | 3,377.70 |
| **5% of Average Relevant Turnover** | | | 168.88 |
| **Rupees One Hundred Sixty-Eight Crores and Eighty-Eight Lakhs only** | | | |

**(Fig 2-** Non-confidential report by CCI on **Case no. 14 of 2019)**

[14] Non-confidential report (Order- case no. 14 of 2019 no. 1 of 2020) Anticompetitive.
[15] Regulation 35 of General Regulations, 2009 (as amended).

## 5. CONCLUSION AND WAY FORWARD

The case has set a precedent that the economy and market is a fair and equitable place offering every entity an equal and fair opportunity to do trade practices. The evolution of the Competition Commission of India has also paved the way for the laissez-faire economy. It has situated itself as an organisation ensuring fair market play. The fine imposed reflects the veracity and gravity of the order passed and bulwark the interest of small stakeholders as well. Now, the Competition Commission ensures that no matter how big and powerful an entity is, it is always subject to rules and regulations and principles of fair trade in the market. Be it predatory pricing or a hindrance to new entrants, the Competition Commission always ensures the veracity and generates a value of the free economy. With this decision, Author believes that the Competition Act has developed, redefined and reassessed itself to cope with the paradigm shift of the economy. Be it antitrust laws or combination-related issues. The Competition Commission has dealt with the notion of restricting unfair trade practices.

The judgement is also a setback for the hotel management intermediary as Oyo (a leading company providing hotel services) recently listed its IPO (Initial public offering) in the stock market. Now, it has to be assessed what will be the impact of the order by CCI on the capital market of the company.

# RIGHT TO SAFE ABORTION FOR MINORS- IF INTENTION OF THE POCSO ACT IS INTACT?

*Divya Gautam*[1]

***Abstract***

*In modern times, the role of a woman in the society has changed significantly, her duties are no more limited to household duties but she has taken charge in the domain of politics, policy making, nation building, and so on and so forth. She was able to break the glass ceiling and establish her own identity in the society with help of various factors including changes in societal mindset and cooperation from the government. A woman, today, who is educated, financially stable and capable of taking her decision is considered as an independent woman who need not seek anyone's permission to take decisions of her life. But is she really free to make decisions as innate and as personal as the decision of bearing a child in her body? The answer is NO.*

*Keeping my paper restricted to laws and policies as India and the relevant jurisprudence laid down by the Supreme Court of India, it reflects on the recent amendment of 2021 made by the legislature in Medical Termination of Pregnancy Act, 1971 and recent judgment of X v. The Principal Secretary, Health and Family Welfare Department, Government of NCT of Delhi & Anr. wherein the Apex Court held that Article 21 of the Constitution recognises and protects the right of a woman to undergo termination of pregnancy if her mental and physical health is at stake and it is the woman alone who has the right over her body and is ultimate decision maker on the question of whether she wants to undergo an abortion. The Court in the same judgement also recognised that right to dignity encapsulates the right of every individual to be treated as a self-governing entity having intrinsic value. The Supreme Court has also attempted to strike a balance between POCSO Act and MTP Act, under POCSO Act there is a duty on the medical practitioner to report cases pregnancies in minor but when it happens so minors are forced to take recourse of unregistered clinics or quacks to terminate their pregnancy which defeats the purpose of MTP Act. The Court held that with the consent of the guardians of the minor, medical practitioners are not obliged to report the same under POCSO Act.*

*I argue in my paper that intention of POCSO Act is to prevent abuse of children which includes mental and sexual abuse both. Keeping in mind the prevalent data that Approximately 30% of*

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*children who are sexually abused are abused by family members. The younger the victim, the more likely it is that the abuser is a family member further molesting a child under six, 50% were family members. Family members also accounted for 23% of those abusing children ages 12 to 17. The social condition in the country is such their stigma attached to reporting of sexual abuse, the victim face gender biased stereotypes and family fear loss of their reputation. On top of it, if the abuse is someone from the family, they do not report such cases most of the time. The medical practitioner is obligated by the law to report such cases to the authorities. Now, with such a ruling at place, no one will report it and abusers might walk free. Therefore, while we appreciate the court for striking the balance between both the legislation and furthering the right to safe abortion to all including minors, we lose sight of the reality of the society.*

***Keywords:*** *MTP Act, Minor, Child, Abortion.*

## 1. INTRODUCTION

Right to bodily integrity and autonomy is a crucial aspect of the right to privacy under Article 21 of the Constitution. This has been recognized in the noted judgment of *K.S Puttaswamy v. Union of India.*[2] Further, bodily integrity is perceived as the highest form of self-expression. An individual, irrespective of their gender, is bestowed with the right to make decisions as to what to do with their own body. Especially female bodies which are blessed by mother nature and have the physical capacity to bring new life into this world. With this power comes the great responsibility of childbearing and child-rearing which is demanding in nature. It requires not just physical capability, but also mental and emotional capability followed by the requirement of a conducive and supportive environment for childbirth and development. The external environment and societal support are equally important for a pregnant mother. She requires the presence and support of her partner, family and society as well. But it's not the case that a woman always wants to bear a child and continue with her pregnancy. This could be due to a catena of reasons including unplanned pregnancy, lack of resources- financial or otherwise, or any other consideration. The Supreme Court in Suchita Srivastava v. Chandigarh Administration recognized that the women's choice to continue with the pregnancy or not is nothing but exercising her reproductive right and her choice should be respected. Therefore, it observed that *"the crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth-control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children."*[3]

Reproductive rights are not just limited to making a choice between being a mother or not, but also take into its ambit the right to safe termination of pregnancy and the same was acknowledged by the Supreme Court in its recent judgment on the safe abortion right of a woman.[4] The court opined that *"Reproductive rights include the right to access education and information about contraception and sexual health, the right to decide whether and what type*

[2] K.S Puttaswamy v. Union of India, (2017) 10 SCC 1.
[3] Suchitra Srivastava v. Chandigarh Administration, (2009) 9 SCC 1.
[4] X v. The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr., 2022 SCC OnLine SC 1321.

*of contraceptives to use, the right to choose whether and when to have children, the right to choose the number of children, the right to access safe and legal abortions, and the right to reproductive healthcare. Women must also have the autonomy to make decisions concerning these rights, free from coercion or violence."*

This in essence means accessibility to each and every information to women necessary for making informed choices and the right to chose pregnancy for herself. In the same judgement, the court further elaborated on rights of different categories of women including minors[5] to access medical facilities to safe abortions. Specifically, in case of minors and to give true meaning to Medical Termination of Pregnancy Act, the court has made efforts to particularly remove the hurdles posed by compulsory reporting of sexual abuse, as presumed under the Prevention of Children from Sexual Abuse, Act, even if minor girl has engaged in sexual relationship with her partner with her consent.

As of now, the women in our country are fairly situated in a place where abortion is legal but with few restrictions as laid down by Medical Termination of Pregnancy Act, 1971 which prescribes age, procedure and categories of women who may terminate their pregnancy and with coming of 2021 amendment act those restrictions where further relaxed which makes it evident that the legislative intent is to provide safe medical abortion facility to every possible women at the same time keeping in mind interest of the unborn child.

## 2. RIGHT TO SAFE ABORTION – AVAILABLE TO ALL

The Medical Termination of Pregnancy Act, 1971 (hereinafter "MTP Act") was brought in by the legislation for the termination of certain pregnancies by registered medical practitioners. The act provides for a duration of twenty weeks for termination of pregnancy by a registered medical practitioner (hereinafter "RMP") or a period of twenty weeks but not exceeding a period of twenty-four weeks in case of certain categories of women. Such termination of pregnancy is allowed in certain circumstances as provided in section 3(2) of MTP Act which reads as follows

"Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner, —

[5] Medical Termination of Pregnancy Rules, 2003, ***vide Notification G.S.R. 485(E), dated 13.6.2003***, Rule 3B.

(a) where the length of the pregnancy does not exceed twenty weeks, if such medical practitioner is, or

(b) where the length of the pregnancy **exceeds twenty weeks but does not exceed twenty-four weeks in case of such category of woman as may be prescribed by rules made under this Act**, if not less than two registered medical practitioners are,

of the opinion, formed i**n good faith**, that—

(i) the continuance of the pregnancy would i**nvolve a risk to the life of the pregnant woman or of grave injury to her physical or mental health**; or

(ii) there is a **substantial risk that if the child were born**, it would suffer from any serious physical or mental abnormality."

Section 3(2) of MTP Act prescribes that for termination of pregnancy by a registered medical practitioner, in case of pregnancy does not exceed twenty weeks or in case of certain categories of women pregnancy has not exceeded twenty-four weeks, then if two RMPs has formed a opinion in good faith that continuance of pregnancy would cause risk of life or grave injury to health of pregnant women or if the child is born then substantial risk to his mental or physical health. The conditions specified in the provision are such, if the pregnancy is continued, it will expose the mother or the new-born child to physical or mental injury.

Following the power given by the Act under section 6, the Central Government brought in the Medical Termination of Pregnancy (Amendment) Rules, 2021 to amend the Medical Termination of Pregnancy Rules, 2003.

It is noteworthy that Rule 3B was added to elaborate the category of women as mentioned in section 3(2) of the MTP Act. Following are the categories of women eligible for termination of pregnancy as per the said provision

"*(a) survivors of sexual assault or rape or incest;*

*(b) minors;*

*(c) change of marital status during the ongoing pregnancy (widowhood and divorce);*

*(d) women with physical disabilities [major disability as per criteria laid down under the Rights of Persons with Disabilities Act, 2016 (49 of 2016)];*

*(e) mentally ill women including mental retardation.*

*(f) the foetal malformation that has substantial risk of being incompatible with life or if the child is born it may suffer from such physical or mental abnormalities to be seriously handicapped; and*

*(g) women with pregnancy in humanitarian settings or disaster or emergency situations as may be declared by the Government.*"

Rule 3B provides for an exhaustive list of categories of women who may be seeking termination of pregnancy as per section 3(2) with permission of not less than two medical practitioners. The pregnancy may be terminated if in the opinion of two RMPs the continuance of such pregnancy may cause risk of life to the pregnant woman or cause mental or physical injury to her or cause substantial risk to the new-born child. It is intriguing to note that in the specified categories of women, a minor is also included. The legislative intent is quite clear from the bare reading of the above-mentioned provisions that it wants to keep the door open for the women who are not properly situated to take care of the child during pregnancy and post-pregnancy due to their age, as in case of minors, or other prevailing circumstance. A minor girl may be pregnant as a result of sexual abuse or due to consensual sexual activity. Whatever the case may be, her reproductive rights and bodily autonomy is preserved by the legislation.

## 3. PREGNANT MINORS- APPLICATION OF POCSO ACT

The conundrum is faced when a girl child is pregnant. A child is a person who is below the age of 18 years. There is an interplay between two legislations when a girl child is pregnant, namely, Medical Termination of Pregnancy Act, 1971 and Protection of Children from Sexual Offences Act, 2012 (hereinafter "POCSO Act").

The Protection of Children from Sexual Offences Bill, 2011 was introduced in the Rajya Sabha with the legislative intent to safeguard children and *"to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto."*[6] The goal is to provide them a safe and conducive environment for their physical and mental development by protecting them from sexual assault, sexual harassment and pornography and ensuring a proper justice delivery mechanism by establishing special courts for the same. Children, if in their tender age, are abused whether physically or emotionally bear scars of such events in their lives throughout.

[6] Protection of Children from Sexual Offences Act, 2012, No. 32, Acts of Indian Parliament, 2012 (India).

Article 15(3) the Constitution of India mentions that "Nothing in this article shall prevent the State from making any special provision for women and children." Therefore, the state is empowered by virtue of Article 15(3) to make laws keeping in view the special requirements of the vulnerable group of society which includes women and children.

India is a signatory to the Convention on Protection of Rights of the Child, 1992 as adopted by the United Nations General Assembly. To pursue its international obligation as provided in the convention that *"States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child*."[7] Therefore the POCSO Act came into being and same as mentioned in the Act also that the "Government of India has acceded on the 11th December 1992 to the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations, which has prescribed a set of standards to be followed by all State parties in securing the best interests of the child"[8]

The POCSO Act has taken into consideration concerns related to indulging a child in unlawful sexual activity or use of a child for prostitution or for pornographic performances as it is mentioned in the Convention that "*States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:*

*(a) The inducement or coercion of a child to engage in any unlawful sexual activity;*

*(b) The exploitative use of children in prostitution or other unlawful sexual practices;*

*(c) The exploitative use of children in pornographic performances and materials*."[9]

It is praiseworthy that the POCSO Act has relevant provisions to take care of the concerns as mentioned and appropriate measures are prescribed for prevention and prompt reporting of sexual abuse to concerned authorities.

It is praiseworthy to note that understanding the limitations of a child to report any case of sexual abuse towards him, the legislation has imposed an obligation on other stakeholders of

[7] UN Commission on Human Rights, *Convention on the Rights of the Child.*, 7 March 1990, E/CN.4/RES/1990/74, Article 19.
[8] *Supra* note 5.
[9] UN Commission on Human Rights, *Convention on the Rights of the Child.*, 7 March 1990, E/CN.4/RES/1990/74, Article 34.

the society. This is clear from the reading of section 19 which provides that "*Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to*

*(a) the Special Juvenile Police Unit;*

*or (b) the local police.*"

The provision mentions that irrespective of law as mentioned in Criminal Procedure Code, any person including a child if has knowledge of an offence under the POCSO Act or has knowledge that such an offence was committed under the POCSO Act that person including a child **must** provide information of the same to a special juvenile police unit or the local police.

The provision imposes a statutory obligation on the person concerned to put the information of the commission of such an offence as mentioned under the Act to concerned authorities. This means that parents, relatives, guardians, school authorities, medical practitioners, whosoever become aware of the fact that an offence has been committed against the child as defined in the Act should give intimation of the same to the authorities.

Further, to ascertain that no person should fail to satisfy their statutory obligation, the POCSO Act prescribes punishment which mentions that "*Any person, **who fails to report the commission of an offence under sub-section (1) of section 19** or section 20 or who fails to record such offence under sub-section (2) of section 19 **shall be punished with imprisonment of either description which may extend to six months or with fine or with both".***[10]

The punishment for not reporting any offence under section 19 is prescribed in the POCSO Act which is imprisonment of either description which may extend to six months or a fine or both imprisonment and fine. The Supreme Court in the case of *Shankar Kisanrao Khade v. State of Maharashtra*[11] opined that prompt and proper reporting of an offence committed under the POCSO Act is of utmost importance as per the scheme of legislation. Anyone who fails to report any offence committed under the Act is hiding the offender from punishment and such a person will be subjected to criminal liability. On similar lines, in the case of *State of Maharashtra v. Dr. Marotis Kashinath Pimpalkar,*[12] the court observed that non reporting of an offence committed under the Act by any individual or organisation as the case may be under

[10] Prevention of Children from Sexual Offences, Act, 2012, § 21, Act No. 32, Acts of Indian Parliament.
[11] Shankar Kisanrao Khade v. State of Maharashtra, (2013) 5 SCC 546.
[12] State of Maharashtra v. Dr. Maroti, 2022 SCC OnLine SC 1503.

POCSO Act is a serious offence. The law, therefore, imposes an obligation on every such person to report an offence committed under POCSO Act.

## 4. MTP ACT AND POCSO ACT- CONFLICT AND CONGRUENCE

From the above understanding of provisions of both the legislations, the author intends to throw light on the conflict between both the legislations which has been addressed time and again by various high courts in the country and recently the Apex court of the country has also made the best possible effort to address this difficulty. The court noted and it is prevalent that "*when a minor approaches an RMP for a medical termination of pregnancy arising out of consensual sexual activity, an RMP is obliged under Section 19(1) of the POCSO Act to provide information pertaining to the offence committed, to the concerned authorities. An adolescent and her guardian may be wary of the mandatory reporting requirement as they may not want to entangle themselves with the legal process.*"[13]

### Conflict between POCSO Act and MTP Act

The conflict arises when a girl child who is pregnant approaches, with statutory permission including permission from her guardians, a medical facility for terminating her pregnancy. The MTP Act facilitates termination of pregnancy in case of minors as well with permission of her guardian[14] and the opinion of not less than two registered medical practitioners (hereinafter "RMP"). It is pertinent to note that in the *State of Madhya Pradesh v. Balu,*[15] the Supreme Court observed that the consent of minors has no value in the eyes of law hence it is not valid. Similarly, POCSO Act does not recognise the consent of a minor as valid consent while engaging in a sexual relationship which essentially means that any sexual relationship with the consent of a minor is a punishable offence as per POCSO Act. In a Conference organised by the National Human Rights Commission[16] concern about the infringement of the right to privacy of adolescents engaging in consensual sexual behaviour under POCSO Act was addressed and it was suggested that a study must be conducted to assess whether the age of consent should be lowered from the present 18 years to 16 years. Since POCSO Act as per section 19 imposes a statutory obligation on the concerned RMP to report such cases of pregnancy which may be a result of sexual abuse and guardians and minor girls may not want

[13] *Ibid*, Paragraph 80.
[14] Medical Termination of Pregnancy Act, 1971, § 3(4), Act No. 34, Act of Parliament.
[15] State of Madhya Pradesh v. Baloo, (2005) 1 SCC 108.
[16] North West Regional Review Conference held on 18-19 June, 2018 organised by the National Human Rights Commission.

to entangle themselves in the court proceedings. Therefore, in instances of teenage pregnancy minor girls are taken to a quack for abortion which may lead to serious health hazards and at times death also.

**An attempt to harmonious reading by the Supreme Court**

The Supreme Court in its recent judgment of *X v. Principal Secretary of Health and Family Welfare Department, Govt. of NCT of Delhi & Another*[17] attempted to give both statutes a harmonious reading and observed that *"To ensure that the benefit of Rule 3B(b) is extended to all women under 18 years of age who engage in consensual sexual activity, it is necessary to harmoniously read both the POCSO Act and the MTP Act. For the limited purposes of providing medical termination of pregnancy in terms of the MTP Act, we clarify that the RMP, only on request of the minor and the guardian of the minor, need not disclose the identity and other personal details of the minor in the information provided under Section 19(1) of the POCSO Act. The RMP who has provided information under Section 19(1) of the POCSO Act (in reference to a minor seeking medical termination of a pregnancy under the MTP Act) is also exempt from disclosing the minor's identity in any criminal proceedings which may follow from the RMP's report under Section 19(1) of the POCSO Act. Such an interpretation would prevent any conflict between the statutory obligation of the RMP to mandatorily report the offence under the POCSO Act and the rights of privacy and reproductive autonomy of the minor under Article 21 of the Constitution. It could not possibly be the legislature's intent to deprive minors of safe abortions."*[18]

The intention of the court is crystal clear through the observations made by it in the above paragraph. The court has made the best effort possible to strike a balance between both the legislation. The POCSO Act mandates compulsory reporting of sexual abuse of the child as and well the person gets the knowledge about it, on the other side, the tenor of MTP Act as amended in 2021 and followed by recently introduced Rule 3B is to extend the right to safe abortion to all specified class of women which including minor. Now, the conflict between each legislation arises when a child below age of 18 approaches a medical health centre to terminate a pregnancy that was the result of a consensual sexual relationship between a girl below age of 18 years and her partner. In such instances also, the registered medical practitioner has to necessarily report the same to the concerned authorities under POCSO Act irrespective of the

[17] X v. Principal Secretary of Health and Family Welfare Department, Govt. of NCT of Delhi, 2022 SCC OnLine SC 1321.
[18] *Ibid*, Paragraph 81.

fact that pregnancy of the girl below age of 18 was a result of a consensual sexual relationship with her partner. There is a chronic fear of prosecution, if RMP fails to report the same, it creates a chilling effect on the behaviour of RMPs. It creates a chilling effect by impacting decision making autonomy of a RMP and hinders access to safe abortion.

It is to be noted that when such reporting to consensual sexual activity between a girl below age of 18 years and her partner is made mandatory, there ought to be sense of fear in mind of the guardian and the pregnant girl of below 18 years that they may end up running to the court for an act which was wholly consensual. As a result of which, they may resort to a quack or unauthorised person to terminate the unwanted pregnancy which runs counter to the legislative intent behind MTPAct. Further, if a minor girl has indulged in a consensual sexual relationship, it will have serious implications for the male partner because an offence committed under POCSO Act is viewed seriously by the authorities and prescribes serious punishment for the offender. The problem is even grave in cases where both, the girl and the boy, who consented for sexual relationship are minors. If the minor girl is pregnant as a result of sexual relationship with her male partner who is also minor then he may land up in jail, that he may be sentenced 7 years or 10 years as minimum imprisonment, as the case may be. if such a minor girl goes for abortion to a medical facility and RMP reports the same. Addressing the same incident, the Madras High Court, observed that, *"An adolescent boy caught in a situation like this will surely have no defence if the criminal case is taken to its logical end. Punishing an adolescent boy who enters into a relationship with a minor girl by treating him as an offender was never the objective of the POCSO Act. These incidents should never be perceived from an adult's point of view and such an understanding will in fact lead to lack of empathy. An adolescent boy who is sent to prison in a case of this nature will be persecuted throughout his life. It is high time that the legislature takes into consideration cases of this nature involving adolescents involved in relationships and swiftly bring in necessary amendments under the Act. The legislature has to keep pace with the changing societal needs and bring about necessary changes in law and more particularly in a stringent law such as the POCSO Act."*[19]Therefore, the court not only emphasised on punishing a adolescent boy for consensual sexual relationship with a girl will haunt him for entire life and end up tarnishing his reputation. There is a need to amend the legislation keeping in mind societal changes. Further, there is an unwilling victim where

[19] R. Parthiban v State, Manu/TN/5377/2022.

mandatory reporting of the case is done against her wish and she may turn hostile during the course of prosecution.[20]

The balancing approach exhibited by the Supreme Court in the above said judgment has though widened the scope of MTP Act and has called off the rigours of POCSO Act.

The enactment of POCSO Act was to curb sexual abuse of children but it was never intention of the legislation to deprive girls below age of 18 years of their right to privacy or right to safe abortion in cases of unwanted pregnancies. With the coming of this judgment, there is hope that guardians and minor girls will have less hesitation and access to safe abortion facilities in the real and true sense as intended by MTP Act.

**Critical Analysis of the judgement**

However, the endeavour of the court in judgment to strike a balance between both the cases may end up defeating the intention of POCSO Act because now RMP, on request of guardian and minors, not reveal identity of victim and other relevant information in the report filed under section 19 of the POCSO Act. Further, he may not disclose the identity of the victim in any other proceeding as a consequence of such reporting under the POCSO Act.

This reasoning is fallacious since the court is looking at all sexual relationships between a girl below the age of 18 and her partner arising out of consent and mutual infatuation. Such understanding complicates the situations where timely intervention is required by some outside who will report the case to the authorities as obligated under POCSO Act. In instances where a minor pregnant girl is taken to the RMP for abortion where her pregnancy is a result of a non-consensual act of sexual abuse by a relative or by an acquaintance or by a third person which needs reporting since in such instances guardian or the family of the minor girl will be reluctant to report such cases of abuse as it is a matter of shame and compromises with family prestige and degrades the dignity of the minor girl who has her whole life ahead of her. Similarly, when the protector becomes the perpetrator of sexual abuse on a minor girl which may result in a pregnancy in such instances as well reported by the RMP may help minor girl. Now, by virtue of this judgment if the parents or guardians of the minor girl request the concerned RMP to not disclose her identity or any other personal information then it will, if not impossible but difficult for the authorities to reach out and rescue such victims. The judgment loses sight of the larger picture of society where still there are instances where sexual abuse is perpetrated on minor

[20] Vidhi Centre for Legal Policy, A Decade of POCSO, https://vidhilegalpolicy.in/wp-content/uploads/2022/11/221117_Final-POCSO-Draft_JALDI.pdf. , (last visited on 13th March 2023).

girls by their own family members. Though, it takes care of concerns related to access to medical facilities for safe abortion and the right to privacy of minor girls and her right to bodily and sexual autonomy but at the same time limits the scope of POCSO Act which was came into being for the protection and prevention of sexual abuse of minor irrespective of their gender.

However, if legislation takes into consideration lowering the age of consent from 18 years to 16 years that is also cannot be helpful in the long run provided the diversity and disparity in society. We need to understand that the understanding of a minor who resides in a metropolitan city and exposure to so-called urban culture will not be the same as in the case of a minor who resides in a village/town and do not have any access to any media of technology. The author perceives that there is a necessity to look at each of such cases of teenage pregnancy with a subjective eye rather than putting it down as a mathematical unit in a legislation that does not cater needs of society in long run. There is a need of the hour to have a more sensitive and careful approach in such matters to address crimes as serious as sexual assault of a minor while making sure that none of the parties is penalised for an act that was mutual and at the same time there is no hindrance in access to safe abortion facility for a minor girl.

## 5. CONCLUSION

The judgment of *X v. The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi* has addressed the issue of mandatory reporting of a sexual abuse of a minor by RMPs whenever such minor girl comes to a medical facility for termination of her pregnancy, after satisfying prescribed conditions in MTP Act, to an RMP irrespective of the fact that such pregnancy is a result of consensual relationship between the minor girl and her partner. The conundrum between MTPAct and POCSO Act was resolved by the court by giving a harmonious reading to provisions of both the legislations. The court observed that for the limited purpose of MTP act, at the request of the guardian of the minor, there is no necessity for a RMP to disclose her identity while reporting such case of sexual assault. The MTP Act and POCSO Act, both, are reflective of legislative intent to safeguard rights of the vulnerable section of the society, women and children. The intention of both the acts is praiseworthy, where MTP Act secures the reproductive rights of a women and facilitates safe access to medical facilities. With recent amendment in 2021, MTP Act has extended the right to special categories of women as well which due to their prevailing circumstances are not able to bear the child. A minor is also recognised in special category who may resort to abortion even after twenty weeks of pregnancy but not after twenty-four weeks. The termination of pregnancy may

be allowed by not less than two RMPs if in their opinion, in good faith, that continuation of pregnancy is detrimental to the health of such mother and her child.

Coming to POCSO Act which intends to safeguard minors from sexual assault perpetrated to them in any manner or form poses a statutory obligation on any person including a child to report any case of sexual assault to a minor or even knowledge of it to concerned authorities, failing which, there is a punishment prescribed in the legislation.

The observation made by the court has certain limitations, first, the court has looked at a minor girl who comes for termination of pregnancy to a medical facility, is become pregnant due to a consensual sexual relationship with her partner. Therefore, her identity may not be disclosed in the case where her guardians request the RMP. It loses sight of the larger picture of society, where a minor girl may become pregnant as a result of a sexual relationship that was not consensual and the perpetrator of such abuse was a family member. In such cases, due to shame and in name of preserving the dignity of the family, the guardians may not be willing to disclose the identity of such minor or other related details. The RMP with the consent of her guardians may not disclose her identity and it defeats the intention of the POCSO Act. Therefore, the difficulty with this judgment is that though it caters to the objective of the MTP Act but defeats the intention of the POCSO Act. The need of the hour is to understand such a situation with more of a more sensitive approach while keeping in mind the diversity and disparity prevalent in the country.

# SIGNIFICANCE OF SPECIAL LAWS TO THE STATE OF SIKKIM WITH REFERENCE TO ARTICLE 371F OF THE CONSTITUTION OF INDIA

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***Abstract***

*Article 371F of the Constitution of India is a special provision with respect to the state of Sikkim, providing a special status to Sikkim within the Union of India, due to its non-obstante clause. Before Sikkim was merged with India, the laws of Sikkim comprised of royal proclamations along with traditions, conventions and customs which are still in force due to, and are protected by, Article 371F of the Constitution of India. Article 371F of the Constitution of India is a constitution in itself to the state of Sikkim. Clause (k) of the said Article has still empowered the Old Laws of Sikkim (herein after referred to as Special Laws of Sikkim). These Special Laws have in all the ways protected, preserved and uplifted the dignity, identity, status, land, political rights of the people of Sikkim. Consequently, the people of Sikkim remain indebted and immensely grateful towards the Government of India for fulfilling the assurances and political commitments given during the time of merger by India and are patriotic towards their country, India. This paper will focus on the importance of Special Laws to the state and people of Sikkim, furthermore, analyzing the positive and negative aspects of the implementation of Special Laws in this era of globalization. It will also highlight the importance of Article 371F to the Union of India.*

***Keywords****: Article 371F, Old laws of Sikkim, Special Laws of Sikkim.*

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## 1. INTRODUCTION

Sikkim, the only brother to the seven north-eastern states of India, is one of the smallest states of India with regard to area and population. It took two Constitutional Amendment Acts (35th and 36th) to merge Sikkim as in the Union of India. The Constitution (Thirty-fifth Amendment) Act, 1974, through Article 2A of the Constitution of India, designated Sikkim as an associate state of India and the Constitution (Thirty-sixth amendment) Act, 1975, gave recognition to Sikkim as a full-fledged state in the first schedule to the Constitution (Article 2A was repealed). The state of Sikkim was conferred with special constitutional status with regards to Article 371F of the Constitution of India.

Before the merger of Sikkim, the legislations were promulgated by royal proclamations. Along with those proclamations, traditions, conventions and customs of the different communities also formed a part of legislations.[3] These royal proclamations along with customs are still in force in Sikkim with respect to Article 371F (k)[4] of the Constitution of India. They are known by "Old Laws of Sikkim" which in actual should be "Special Laws of Sikkim" (as they give special status to the state of Sikkim within India). The administration of Sikkim is governed by the Special Laws of Sikkim.

### 1. ARTICLE 371F AND SIKKIM

To Sikkim and the Sikkimese, Article 371F of the Constitution of India is a constitution in itself due to the Special Laws which govern the whole territories of Sikkim or certain parts thereof. Article 371F of the Constitution of India has provided Sikkim a special status within the Union of India, which makes the bonafide Sikkimese with 'Sikkim Subject Certificate' (here in after referred to as SSC) and 'Certificate of Identification' (here in after referred to as COI) Special Indians. SSC was the citizenship of Sikkim and the descendants of SSC holders were granted COI by the Government of India (through the State Government) keeping in view the sanctity of the Constitution of India (Article 371F). The reason for the insertion of special provision of Article 371F in the Constitution of India was to give effect to the political commitments and assurances which was given to the bonafide Sikkimese by the Government of India and was also regarding the new State of Sikkim. It is also said that the inclusion of Article 371F in the

[3] Significance of Article 371F of the Constitution of India for Sikkim, http://www.sikkimexpress.com/news-details/significance-of-article-371-f-of-the-constitution-of-india-for-sikkim., (last visited on May 5,2023).

[4] All laws in force immediately before the appointed day in the territories comprised in the State of Sikkim or any part thereof shall continue to be in force therein until amended or repealed by a competent legislature or other competent authority.

Constitution of India is due to the disagreement by the 12th Miwang Denjong Chogyal Chenpo Palden Thondup Namgyal to sign the Instrument of Accession. Article 371F of the Constitution of India has facilitated the Sikkimese (regardless of caste, creed, religion, profession, etc.) with exclusive rights to carry trade, businesses, hold land holdings, contest elections within state, apply for Government jobs, etc. within the territory of Sikkim or certain parts thereof. Along with the state of Sikkim, there are other states as well in India, who are provided special status within the Union of India with respect to special provisions of the Constitution of India.

## 2. ARTICLE 371FAND THE SPECIAL LAWS OF SIKKIM

Two clauses of Article 371F of the Constitution of India, i.e.; (k) and (l),[5] profess about Special Laws of Sikkim. Taking into consideration Article 371F (k) of the Constitution of India, the laws and legislations which were in force before the merger of Sikkim, is still in force even after the merger, on the whole part or some part thereof of Sikkim. It will lose its validity only when a competent Legislature or any other competent authority amends or repeals it. Article371F (l) of the Constitution of India had given the authority to the President of India to bring about any kind of modifications and adaptations of the laws of Sikkim (then applicable in Sikkim) by way of repeal, amendment or any other way for the purpose of not violating any provisions of the Constitution of India. Furthermore, the adaptations or the modifications made to the Sikkim laws is not to be questioned in any court of law. For this, the time period provided to the President of India was for a period of two years from the appointed day. Therefore, any of the Special Laws of Sikkim, which are applicable after the merger, have undergone all the scrutiny and challenges for them to be applicable in the territories of Sikkim or any part thereof. None of the Special Laws can be said to be unconstitutional. In Sikkim, the Special Laws are to be given preference and if the matter does not fall within the purview of Special Laws, other laws are applicable.

### 3.1. Sikkim Subject Certificate and Certificate of Identification

Sikkim Subject Certificate (here in after referred to as SSC) was issued with respect to the Sikkim Subjects Regulation 1961. It was issued to the subjects of the erstwhile Kingdom of

[5] For the purpose of facilitating the application of any such law as is referred to in clause (k) in relation to the administration of the State of Sikkim and for the purpose of bringing the provisions of any such law into accord with the provisions of this Constitution, the President may, within two years from the appointed day, by order, make such adaptations and modifications of the law, whether by way of repeal or amendment, as may be necessary or expedient, and thereupon, every such law shall have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law.

Sikkim and to those who willing had surrendered their citizenship of other countries. After Sikkim became part of India, the SSC holders' descendants were provided with Certificate of Identification with regards to Notification number 66/Home/95, dated 22nd November, 1995, Home Department, Government of Sikkim. It is issued even to those whose hold agricultural land in rural areas and resident of Sikkim, to a person who is issued Indian Citizenship Certificate by the District Collector of Government of Sikkim under the Sikkim (Citizenship) Order, 1975 and to those persons whose father or husband was working under the Sikkim Government Service on or before 31.12.1969. SSC was replaced by COI in the state of Sikkim and SSC is still a valid certificate. COI and SSC are the certificates which denotes whether that person is Sikkimese or non-Sikkimese. But there has been doubtful, fake and untraceable COI as well, which has become a vital problem in the state of Sikkim.

### 3.2.The Sikkim Government Establishment Rules, 1974

Rule 4 (4) of the Sikkim Government Establishment Rules, 1974, is one of the most important special legislations. It states that Sikkimese candidates would be given preferential treatment in all Government employment. It was challenged by Mr. Surendra Prasad Sharma. In the case of *State of Sikkim v. Surendra Prasad Sharma, 1994 AIR 2342; 1994 SCC (5) 282*, Rule 4(4) of the Sikkim Government Establishment Rules, 1974, was challenged by stating that it is unconstitutional. But, Justice A. M. Ahmadi, Supreme Court of India, delivered judgement stating that "…the Establishment Rules were merely 'adopted' with modification with effect from 26/04/1975. Rule 4(4) remains as it was and the Rules continue to be effective from 01/04/1974."[6] Furthermore, he added, "Therefore, if a provision in the Establishment Rules appears to offend Article 16(2), since such a provision is permissible by virtue of Article 16 (3) and Parliament permits its continuance by a special provision, Article 371F (k), the said requirement giving preference to 'locals' cannot be struck down as unconstitutional and any action based on the said provision would not be inconsistent with Part III of the Constitution."[7] Various other cases have also been filed regarding Rule 4 (4) in the High Court of Sikkim.

### 3.3. Revenue Order No. 1

In the territories of Sikkim, only those individuals are allowed to hold lands and immovable properties whose ancestors' name or whose names are recorded on the SSC Registers under the Land Revenue Department of Sikkim. Those individuals who possess S.S.C. and C.O.I. have

[6] State of Sikkim v. Surendra Prasad Sharma, *1994 AIR 2342; 1994 SCC (5) 282.*
[7] *Id.*

the right to buy, sell, mortgage immovable property in the territories of Sikkim, under the laws of Sikkim. The Special Laws of Sikkim also consist of property laws under which the immovable properties of the two indigenous communities of Sikkim are well protected. That Special Law is the "Revenue Order No. 1".

On 2nd January, 1897, a 'notice' was issued by John C. White (the then Political Officer of Sikkim) relating to transfer of land by the Lepcha and Bhutia communities. The main essence of the notice was that, the Bhutias and Lepchas (herein after referred to as B.L.) were not allowed to sell or sublet any of their land holdings without the permission of the Council and if anyone commits this, then he would be punished severely. With reference to this notice, Revenue Order No. 1 was issued with some changes. Revenue Order No. 1 was issued by C. A. Bell (the then Superintendent of Sikkim) on 17th May, 1917 at Gangtok. This is the first modern law regarding the transfer of land.[8] It expressed that the Bhutias and Lepchas of Sikkim are not allowed to sell, mortgage or sublet any of their land holdings to any individuals belonging to any other communities other than a Bhutia or Lepcha without the express sanction of the Durbar or officers empowered by the Durbar. Severe punishment would be given to those who did not follow the order. Mortgage, in this order, means mortgaging the whole or part of land holding on Biyaz or Masikata system and Sub-let means sub-letting the whole or part of land holding on the Pakhuria system.

C. E. Dudley, a British Civil Engineer and author of the Administration Report 1930-301 had interpreted the Revenue Order No. as, "a law prohibiting land alienation by the hereditary State subjects (i.e. Bhutia, Lepcha), in favour of non-hereditary subjects such as Nepalese or domicile plainsmen is in force and acts as a very useful check on the former class, which is poor and improvident, being speedily replaced by the latter, who are more subtle and shrewd."[9]

Nari Rustomji, the author of the book 'Sikkim, a Himalayan Tragedy' was of the view that the B.L. needs to be protected as they were leading to disappearance.[10] Revenue Order No. 1 not only protected the land holdings of the B.L., it also protected their identity, culture, farming practices and provided them source of income. For the most, Revenue Order No. 1 has given power in the hands of the B.L. With land comes power, financial security and contentment. A person who holds land in a society is respected and looked upon. If there would not have been

[8] The 1961 Sikkim Subject Regulation and 'Indirect Rule' in Sikkim: Ancestrality, Land Property and Unequal Citizens, https://www.tandfonline.com/doi/full/10.1080/14631369.2020.1801338., (last visited on 5 May, 2023).
[9] *Id.*
[10] *Id.*

Revenue Order No. 1 then, most of the B.L. would have become landless in their own land as of now. When the law of Revenue Order No. 1 was framed, the Sikkimese Society was not much educated and did not have much knowledge regarding the benefits of holding land. As time gradually passed by, the individuals of B.L. communities got educated, started to think broadly and realized the importance of land holdings in the present era, they started to support the Revenue Order No. 1 and are grateful that is still in force and protected by the Constitution of India.

### 3.4.Right to contest Election and Right to cast Vote

With regards to Notification No. 9/C.E., dated, 19th October, 1972, Election Department of Sikkim, the nomination papers must be supported by SSC. In other words, only those who was a Sikkimese citizen were allowed to contest election. After Sikkim became part of India, the same had been followed in the Representation of the People Act, 1951. Section 5A of the Representation of the People Act, 1951, it is mentioned that only Sikkimese origin individuals are allowed to contest election in Sikkim. SSC or COI must be submitted with the nomination papers.

The law regarding the casting of vote in Sikkim was notified by way of Notification No. 2/C.E., dated 11th September, 1972, Election Department of Sikkim. According to this notification of the Darbar, only those individuals who were registered as Sikkim Subject were entitled to vote and the age limit was not less than 21 years on the 1st of March, 1973. And those individuals should not be of unsound mind or convict. This law has not been followed. A PIL had been filed in the High Court of Sikkim for the voting rights to be conferred only to the SSC and COI holders in Sikkim. But this PIL was disposed of in view of the foregoing observation that the petitioner may take recourse challenging the vires of the provision of Representation of the People Amendment Act, 1980.[11] It is still a question whether this law had been repealed by the President of India within the two years period provided by the Article 371F (k) of the Constitution of India. But there is no mention of amendment or repeal of the old Election related laws of Sikkim in the Election Laws (Extension to Sikkim) Act, 1976.

[11] Vivek Anand Basnett v. Union of India & Ors. W.P. (PIL) No. 03/2019.

### 3.5.Income tax Exemption

Sikkim used to follow its own Income Tax Manual, 1948 and under it, no Sikkimese was to pay taxes to the Centre. This law was repealed and replaced by the Income Tax Act, 1961. Keeping the sanctity of the special law, a section was inserted in the Income Tax Act, 1961. Under Section 10 (26AAA) of the Income Tax Act, 1961, "any Sikkimese individual would enjoy exemption from income tax provided his source of income originates from Sikkim or he earns by way of dividend or interest on securities. It may be noted in this regard that a Sikkimese woman will not have this benefit of exemption who, on or post 01.04.08, marries a non-Sikkimese man."

Here, Sikkimese includes-

i) all those individuals whose name are recorded in the Sikkim Subject register under the Sikkim Subjects Regulation, 1961, read with the Sikkim Subject Rules, 1961; or

ii) all those individuals whose name is included in the Register of Sikkim Subjects by virtue of the Government of India Order No. 26030/36/90-I.C.I., dated the 7th August, 1990 and Order of even number dated the 8th April, 1991; or

iii) any other individuals whose father or husband or paternal grandfather or bother from the same father has been recorded in the above-mentioned register.

However, those who have fraudulently achieved the COIs are also exempted under this section. Non-Sikkimese are also taking advantage of tax exemption can be witnessed by the Multi Commodity Exchange money laundering case.[12]

There are many more Special Laws which the Constitution of India have provided the status of Constitutionality and the above mentioned are very few ones.

## 4. CONCLUSION & SUGGESTIONS

Article 371F of the Constitution of India has its roots to the 8th May Tripartite Agreement, 1973. While Article 371F was framed, references were taken from the 8th May Tripartite Agreement, 1973. The merger of Sikkim in the Union of India is said to be conditional and the Constitution of India has provided the conditions in Article 371F. The Special Laws of Sikkim provide a

[12] Money laundering speculations: MCX under ED's scanner over illegal commodity trading from Sikkim, Zee Business, https://www.zeebiz.com/markets/commodities/news-money-laundering-speculations-mcx-under-ed-s-scanner-over-illegal-commodity-trading-from-sikkim-183459., (last visited on 5 May, 2023).

special status to the state of Sikkim and to Sikkimese. In a letter written by Home Minister, Mr. Rajnath Singh to Finance and Corporate Affairs Minister, Mr. Arun Jaitley, dated 8th December, 2018, it is stated that Sikkimese are not at par with the Indian Citizens. SSC and COI are vital certificates which separate the Sikkimese with non-Sikkimese. But what has been seen is that there are plenty of COI which the non-Sikkimese have acquired fraudulently and these fake COIs have become a plague to the state of Sikkim. The rights provided by the Constitution of India to the Sikkimese are being diluted by the fake COI holders. Furthermore, lands are being registered to non-Sikkimese who do not possess SSC or COI. Though the Government of Sikkim has notified it with a notification but such notifications should be supported by a legislation (Act or royal proclamations) which in this case is not present. The order passed by the Executive cannot supersede the laws.

Various NGOs are fighting for the rights of the Sikkimese. They are of the views that fake COIs, fake voters, etc. are threat to the national security of India as Sikkim is a border and politically sensitive state. Influx has become a major problem to the state of Sikkim. After 48 years of merger, the bonafide Sikkimese fear that they are on the verge of being submerged. The Sikkimese are in favour of implementation of Inner Line Permit (herein after referred to as ILP) in Sikkim which in some way might reduce the dilution of the rights provided to the Sikkimese by the Constitution of India. If the Special Laws are taken into consideration, there are royal proclamation regarding the implementation of ILP in Sikkim.

To keep the sanctity of the Constitution of India, the Special Laws should be obediently followed in the state of Sikkim. All those executive orders which are against the virtue of the Special Laws should be withdrawn. There should be a chapter in the school regarding the importance of Article 371F to the Union of India and to Sikkim as well. Awareness regarding the dilution of the Special Laws needs to be spread among the people residing in Sikkim (whether it be Sikkimese or non-Sikkimese).

# PROTECTION OF PRISONERS OF WAR: AN INTERNATIONAL OBLIGATION UNDER THE THIRD GENEVA CONVENTION

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***Abstract***

*Although combatants and other persons taking a direct part in hostilities may be attacked, the moment such persons surrender or are rendered hors de combat, they become entitled to protection. Such protection is provided for in the Third Geneva Convention relating to the treatment of prisoners of war (POW) supplemented by Additional Protocol I. These conventions are binding as treaty law, but the key provisions are in any event customary in nature. Humanitarian treatment of prisoners of war was not emphasised until the second half of the nineteenth century. The Third Geneva Convention of 1949 is concerned with POW. It consists of a comprehensive code entered upon the requirement of humane treatment of POWs in all circumstances. This article attempts to address the issue of POW through the prism of international law. Further it presents a conceptual map of the Third Geneva Convention vis-a-vis the humane treatment of prisoners of war.*

***Keywords:*** *Combatants, Hostilities, International Humanitarian Law, Prisoners of War.*

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## 1. INTRODUCTION

The United Nations in the preamble to its Charter declares, "We the people of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind…"[2] It is one of the important principles of the UN stated under Article 2(4) that, "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations". However, since times immemorial there have been wars. In spite of the provisions of the UN Charter wars are taking place even now and they will continue to take place in future also and the plight of prisoners' captive of war will also continue. It is a well-established fact that prisoners of war (POW) are not criminals. They are merely an enemy no longer able to bear arms. As such, they are defenceless persons who are entitled to be respected and treated humanely while in captivity and to be liberated at the close of hostilities.

## 2. HISTORICAL BACKGRAOUND OF WAR PRISONERS

In the history of war, prisoners are the relevant aspect of war and the main aim of the conquered State is to control or take the combatants of vanquished state so a stop enslave them or kill. Since many years the prisoners' conditions have not been uniform in the world. Confinement in dirty cells, no food or insufficient food supply, insufficient hygiene, ill treatment as well as inhuman treatment are problems faced by prisoners. Therefore, voice rose for the need to address prisoners' problems, to promote good practices for the development of social, emotional physical as well as psychological needs of the prisoners.

## 3. PRISONERS OF WAR: CONCEPT AND MEANING

The term prisoner of war (POW) is defined under Article 4 of the Third Geneva Convention. If the definition of POW is strictly interpreted then it applied only to members of regular armed forces but if wider interpretation is applied then guerrillas and civilians who take up arms against an enemy openly or non-combatants with military force are also included. Definition of POW under Article 4 of the Third Geneva Convention has been expanded by by Additional Protocol I of 1977. Article 43 and Article 44 are important in this regard.[3]

[2] United Nations Charter, 1945, Preamble.
[3] Treaty of Versailles, https://www/loc.gov/law/help/us-traeties/bevans/m-ust000002-0043.pdf., (last visited on May 5, 2023).

The Laws of war distinguished between civilians and combatants. Combatants who are captured in international armed conflicts become POW and are to be treated humanely until released or interned by a belligerent power during war. If the definition of POW is strictly interpreted then it applies only to members of regular armed forces, but if wider interpretation is applied then guerrillas and civilians who participate in the conflict against an enemy or non-combatant with a military force are also included.

According to Article 13 of the Third Geneva Convention, "Prisoners of war shall at all times be treated humanely". Keeping in mind this requirement the rules regarding the protection of prisoners of war are formulated in the form of the Third Geneva Convention1949. These rules may be discussed as follows:

## 4. PRISONERS OF WAR: SAFEGAURD UNDER THE CONVENTION

The Third Geneva Convention on POW regulates the smallest details regarding the treatment of POW in general and safeguarding them in particular. Article 12 to 16 under Part II of the Third Geneva Convention deals with the principles which are vital in nature and governs the basic treatment of POW which is applicable at all times and in all places. The Prisoners of War are entitled to following protections in general:

1. POW must be humanely treated. They should not be subjected to any physical, medical or scientific experiments. A measure of reprisal against them is prohibited.[4]

2. According to Article 14 all POW are entitled in all circumstances to respect for their person and honor.[5] Women due to their nature and tenderness shall be treated with due care and caution. They shall retain the full civil capacity which they enjoyed at the time of their capture.[6]

3. The POW are entitled for maintenance and medical care.[7]

4. All POW are entitled to equal treatment irrespective of race, nationality, belief or political opinion or on any other similar grounds.[8]

[4] The Geneva Convention relative to the Prisoners of War, 1949.
[5] Article 14, Geneva Convention, 1949.
[6] *Supra* note 5.
[7] *Supra* note 3 at Art. 15.
[8] *Supra* note 3 at Art. 16.

## 5. PROTECTION OF PRISONERS OF WAR UNDER THE THIRD GENEVA CONVENTION, 1949

The Third Geneva Convention explicitly states that the POW are not in the hands of individual or military units but are in the care of adverse state. Since the state is a party to the Geneva Convention, it has the responsibility of fulfilling its international obligations.[9] POW are allowed to keep their legal status from the time, they are captured until they are repatriated because being the POW is not a form of punishment. They cannot lose their status during captivity either by the authority in charge or on their own. Protected persons are not allowed to renounce the rights granted to them under the Third Geneva Convention.[10] This protection is extremely important which protects them against their own action or conduct which may have major consequences during war time. Third Geneva Convention on POW deals with the protection of Prisoners of War under captivity. It is divided into six sections which are as follows:

- First section deals with interrogation of prisoners, property of prisoners and their evacuations. It is obligatory on the part of POW, when asked, detail personal information such as name, surname, date of birth, any other relevant information. They shall not be subjected to any form of torture whether physical or mental, as well to any form of coercion on POW to get any type of information.[11] POW are allowed to keep all such articles of personal use such as clothing, food and money. Articles such as arms and ammunitions are to be handed over.[12] Further the evacuation of POW shall be made after their capture and in a humane manner.[13]
- Second section deals with living conditions for POW in camp or during transfer. It covers general rules which are to be observed by the states with respect to POW such as release of POW partly or wholly on parole. If the area where POW is kept in unhealthy or climate is injurious to them then they shall be removed from that area, quarters.[14]
- Third section deals with prisoners' labour. POW who are physically fit, may be utilised as labourers by the detaining authority such as agricultural work, domestic service, art,

[9] *Supra* note 3 at Art.12.
[10] *Supra* note 3 at Art. 7.
[11] *Supra* note 3 at Art. 17.
[12] *Supra* note 3 at Art. 18.
[13] *Supra* note 3 at Art. 19.
[14] *Supra* note 3 at Art. 21 to 48.

craft, public utility services which are not of military purpose or character and so on. Similarly, no POW can be forced to do unhealthy or dangerous work unless voluntary.[15]

- Fourth section deals with financial resources of POW. POW may be allowed to have cash in their possession. The maximum amount of which shall be determined by the detaining authority. The excess amount shall be placed to their account. Provisions have also been made for the payment of advance of pay.[16]
- Fifth section deals with correspondence and relief shipments. Prisoners of war shall be enabled by the detaining authority, immediately after capture within a week after arrival at a camp, to send letter to his family and to the Central Prisoners of War Agency about their capture, address and health condition. POW are allowed to receive telegraph, letters and parcel which may include medicines, religious articles, clothes, books and all other things which pursues to their cultural activities.[17]
- Lastly, sixth section deals with penal and disciplinary procedure. The Third Geneva Convention guarantees POW the right to make complaints tot he military authorities in whose powers they are. Such complaints must be transmitted immediately and no punishment shall be imposed for making such complaints or even unfounded complaints.[18] To represent them before the military authority, ICRC or any other organisation which help them, POW are entitled to elect by secret ballot their representative.

## 6. FUNDAMENTAL RULES FOR PROTECTION OF PRISONERS OF WAR

In addition to above protection of POWs, following are some of the fundamental rules to be followed by the detaining authority. The Third Geneva Convention provides some of the basic protection to the POW which are as follows:

i. Non bis in dem i.e., POW cannot be punished for the same act or on the same charge more than once;[19]
ii. According to Article 87 of the Third Geneva Convention POW may not be sentenced either by the military authorities or by the detaining state to any penalties except those provided

[15] *Supra* note 3 at Art. 49 to 57.
[16] It shall be an obligation of the detaining powers to grant all prisoners of war a monthly advance pay at the rate mentioned in Article 60 of the Third Geneva Convention.
[17] *Supra* note 3 at Art. 69 t0 77.
[18] *Supra* note 3 at Art. 78.
[19] *Supra* note 3 at Art. 86.

for in respect of member of the armed forces of the said power who have committed the same acts;

iii. POW who are undergoing a judicial or disciplinary punishment are subject to the same punishment as if given to the member armed forces of detaining power;[20]

iv. The Third Geneva Convention classified two types of escapes i.e. successful and unsuccessful escapes. POW who has made successful escape is not liable to punishment but unsuccessful POW is liable to punishment. Shall be liable only to a disciplinary punishment;[21]

v. POW cannot be detained for an act which is not forbidden by the laws of the detaining authority or by international law. POW has the right to present his defence with the help of an advocate or counsel.[22]

## 7. REPATRIATION OF PRISONER OF WAR

Repatriation of POW is one of the most important matters mentioned in Third Geneva Convention. Article 109-121 of the Third Geneva Convention deals with important provisions related to POW's repatriation. there are two kinds of repatriation, repatriation and accommodation of prisoners in neutral countries during hostilities and repatriation at the close of hostilities. POW are to be sent back to their country regardless of number or rank and if seriously wounded then as soon as he gets fit to travel. Cooperation with neutral state to make necessary arrangement for accommodation of POW in the neutral state is necessary requirement.

Once the hostilities end, measures are to be adopted for the release and repatriation of POW without delay. POW are allowed to take with them their personal belongings, clothing and parcels which have arrived for them. If any criminal proceeding is pending against POW, then he may be detained at the end of proceedings or after the complaint of punishment. The same shall apply to prisoners of war already convicted for an indictable offence. Unjustified delay in repatriating POW is a grave breach of Protocol I.

An interesting case of repatriation of Pakistani prisoner of war may be mentioned here. There took a hostility between India and Pakistan in 1971 as the consequence of creation of a new

[20] *Supra* note 3 at Art. 88.
[21] *Supra* note 3 at Art. 91 to 93.
[22] *Supra* note 3 at Art. 92.

state Bangladesh. A large number of Pakistani prisoners of war were detained in India, the repatriation of some of them was refused by India mainly on the ground that the release and repatriation of the Pakistani prisoners of war required the concurrence of both India and Bangladesh and to negotiate the matter with it. It may be mentioned that the Pakistani forces surrendered on 16 December 1971. Pakistan filed a case in Amy 1973 before the International Court of Justice alleging the violation of 1949 Geneva Convention by India. In particular it was alleged by Pakistan that India was transferring 195 Pakistani prisoners of war to the Government of Bangladesh for their trial for the crime of genocide. India pleaded that the court has no jurisdiction in the matter. However, an agreement was reached between India and Pakistan and the matter was settled amicably. Pakistan also requested the Court to drop the matter.[23]

## 8. DEATH OF PRISONERS OF WAR

Article 120 of the Third Geneva Convention deals with will, death certificates, burial and cremation of the POW. POW may make the Will according to the laws of the country of their origin, and transmitted without delay to the protecting power. Death certificates are issued which shall have details such as place of death, date, cause of death, place of burial and other related information. They are buried according to their rites of religion. Bodies may be cremated only for imperative reasons of hygiene, on account of the religion of the deceased or in accordance with his express wish to this effect. In case of cremation, the fact shall be stated and the reasons given in the death certificate of the deceased. Medical examination of the POW ’s body is done which shall confirm the death and report is prepared.

## 9. CONCLUSION

The adoption of the Third Geneva Convention constitutes the only international treaty designed to ensure protection to POW. All the countries of the world ratified it and therefore agreed not only to respect it but also enforce it. Thus, it has achieved universality. From the Hague Regulation, 1899 and 1907, devoting seventeen articles to POW, to the Geneva Convention Relative to the Treatment of Prisoners of War, 1929, incorporating 97 articles on the subject and from these to the Third Geneva Convention, 1949 containing 143 articles relating to POW, and Additional Protocol I to the Geneva Convention, the law on POW has taken great strides.

[23] Case concerning Trial of Pakistani prisoners of war, Pakistan v. India ICJ 1976.

Even after the two World wars and various adoptions of laws, war is unavoidable. Therefore, POW need protection from the danger of war.

In the light of the above, it is clear that the Third Geneva Convention on POW provides basic safeguards of rights of POW. The Convention plays a decisive role in preventing inhumane and degrading treatment against POW by the detainee state. The implementation of these provisions under the Convention depends first and foremost on the political will of the parties to the conflict. All the bodies mentioned in the Convention can play a role in accordance with their respective mandates. Compliance with the Geneva Convention and the International Humanitarian Law is essential. By respecting Geneva Conventions on POW, prisoners of war will no longer be subjected to any kind of treatment that violates their rights and will be protected from harm, even if they posed a threat to one warring party.

# GENDER SPECIFIC IPC: ERASING THE EXPERIENCES OF LGBTQ+ INDIVIDUAL

*Harshit Agrawal*[1] and *Nalini Bhattar*[2]

***Abstract***

*Indian Penal Code of 1860, is structured around Victorian morality and Judeo-Christian beliefs which viewed women as a 'feathered sex' always in need of protection from 'other' men (lower class, non-Christian, non-white). IPC protects women from variety of offences including sexual harassment, molestation, rape, dowry death, harming modesty etc. The Criminal Law (Amendment) Act, 2013 further strengthened these protections by broadening the definition of violence to cover its complexity. However, the amendment solidifies the image of women as passive victims with no agency of their own. This victimisation is clearly reflected in Section 354c of IPC which denies women autonomy over their own bodies. The Indian Penal Code even after multiple amendments fails to recognise the changing gender realities of Indian society. Gender specific nature of IPC has contributed in erasing and marginalising the experiences of LGBTQ community. It has left the members of LGBTQ community outside the realm of legal protections, which has proven to be a hindrance in their path towards dignity and equality. The transgender community has suffered most from this gender-specific language. Engagement of the LGBTQ community with the law is primarily defined by its gender-specific language. Members of the LGBTQ community faced multiple and often intersecting forms of violence through state and society. Rape of trans persons in police custody, corrective rape of lesbian and/or bisexual women by their family members, sexual harassment, and domestic and intimate-partner violence are things almost every member of LGBTQ communities undergo. However, the inability of the law, especially IPC, to comprehend violence and crime beyond gender binaries has left them with little or no protection from institutional and day-to-day violence. Inclusion of the LGBTQ community in participatory democracy and achievement of equal citizenship would require a queer assessment of the law. Queer analyses of law would be based on an intersectional standpoint which would challenge not only the hierarchies of gender and sexuality but also eliminate other asymmetrical relationships in the law. Using a queer*

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*lens allows us to unearth historically neglected voices and to include divergent and emerging politics of gender and sexuality*.

***Keywords:*** *LGBTQ, IPC, Colonialism, Queer Perspectives and Heteronormativity.*

## 1. INTRODUCTION

The institutions of our society are constructed along the lines of hegemonic ideas of the dominant culture, religion, and ethnic identity in any given period of time. Institutions are not formulated out of an unbiased and abstract consensus. However, they reflect histories, popular beliefs and social norms within them. Every institution, as an agency, continuously shapes the behaviour of individuals and communities and works to preserve, maintain and reproduce the status quo in society.

Legal system being one such institution is a reflection of multiple and intersecting identities (race, caste, class, gender etc.) embedded in our society. Though it is claimed that under the law, every individual is regarded as the same, in reality, the law sees the bodies of individuals as marked with separate social identities. and, in turn, codifies those differences and discrimination; therefore, it ends up creating new hierarchies in the process. The Indian Penal Code of 1860 (IPC) was the first attempt to codify different social customs, laws and beliefs in India by its principal framer Thomas Babington Macaulay. However, IPC, in its original formulation and enactment, reflected the larger context of the imperial British Raj, their concerns about promoting effective and legitimate authority and an extension of hierarchy between the colonised and the colonisers.

The sociology of Indian Penal Code is influenced by ideals of Victorian morality, customs of English Common Law and an imperial mindset which largely defined colonised natives as barbaric, uncultured people with regressive customs, unworthy of governing. This notion was manifested in various Sections of IPC especially those dealing with sexual autonomy, morality and women's rights in marriage. Section 377 of IPC which criminalised "voluntarily has carnal inter-course against the order of nature"[3], finds no legal or moral standing in Indian ethos and was a vestige of Buggery Act of 1553 meant to punish "the detestable he detestable and abominable Vice of Buggery committed with mankind or beast" with death penalty.

The colonial legal project of defining and marking the boundaries of legality transformed the indigenous "notions of justice, honour and property and brought them in line with the requirements of modern legal discourse"[4]. The anti-hijra campaign of Britishers which led to the enactment of Criminal Tribes Act of 1871 (Part II), the act criminalised the traditional

[3] The Indian Penal Code,1860, $ 377, No. 45, Acts of Parliament, 1860 (India).
[4] Nivedita Menon, *Embodying the Self: Feminism, Sexual Violence, and the Law*, 211 (Katha, 2003).

customs of hijra community like dancing & begging in public or dressing in feminine clothing[5]. This act illustrates that "gender expression, sexual behaviours, domestic arrangements and intimate relationships were central to colonial governance".[6]

## 2. COLONIAL LEGACY OF INDIAN PENAL CODE

Gender relations in the society is one of the pillars upon which legal jurisprudence is built. Gender roles, responsibilities and social relationships between men and women are sustained and perpetuated through their codification in the law. Women's position has always been defined through the misogynistic and patriarchal customs of society. They have been put under the purview of modesty, chastity and honour from time to time. It is through these patriarchal lenses women's socio-legal rights and duties are delineated. This asymmetrical relationship between men and women is reflected in the laws enacted during British Raj.

During colonial rule in India, women's experiences were constructed at the intersection of three different but overlapping discourses. Postcolonial feminists have pointed out that in imperial context women's sexuality got new meanings to justify foreign domination. Control over sexuality forms one of the bases of colonial power structure. Thus, within the British empire, "Africa and the Americas had become what can be called a porno-tropics for the European imagination- a fantastic magic lantern of the mind onto which Europe projected its forbidden sexual desires and fears"[7]. Ronald Hyam has examined the ways in which colonial male officers took advantage of their authority and power to have sexual encounters with native women and sometimes men too. In this hierarchical structure, contrasting images of white women were constructed as pure and innocent in comparison to indigenous women who were promiscuous tools for British fantasies.[8]

Another discourse used by the Britishers to solidify their control over the Indian subcontinent was the appalling treatment of Indian women in their eyes. Colonial administration used the theory of 'white man burden' as means to extend their control over indigenous lives. Britishers argued that the Indian customs and laws are derived from regressive religious beliefs pertaining back to dark ages. Third discourse on women's position was advocated by Indian male

[5] Criminal Tribes Act of 1871 (Act No. 27 of 1871) Part II.
[6] Jessica Hinchy, *Governing Gender, and Sexuality in Colonial India: The Hijra, c. 1850–1900* 3 (Cambridge University Press, Cambridge, 2019).
[7] Anne McClintock, *Imperial Leather: Race, Gender, and Sexuality in the Colonial Contest* 22 (Routledge, New York, 1995).
[8] Sara Mills, *Postcolonial Feminist Theory*, 100-104 (Edinburgh University Press, Edinburgh, 1998).

reformers who argued that it is not Indian beliefs, but the distortion of it has led to deteriorating position of women in the society.

It is under this context that the colonial government introduced different laws to restructure the social lives of Indians and imposed modified English law based on Judeo-Christian beliefs, Victorian morality and Greco-Roman customs which in some cases eroded the traditional rights awarded to women. For instance, through the series of judgement colonial judiciary abolished the right of *Streedhan* given to Hindu women and brought property rights of married women in line with English legal theory of 'coverture'.

The Indian Penal Code has several sections which defied British claim of English law being superior and progressive in regard to women's rights. The infamous exception 2 to Section 375 of IPC, which defines rape, states that "sexual intercourse by a man with his wife is not raped unless the wife is below 15 years of age".[9] This section broadly defined women as the property of their husbands. Similarly, Section 312 of IPC denies women autonomy over their bodies and positions women's rights as subservient to the rights of an unborn foetus.

## 3. FEMINIST INTERVENTIONS: RESTRUCTURING THE IPC

Legal structure of Indian Penal code is embedded in patriarchal notions, though the IPC provides protection and punishment against women from varying forms of violence, violence against women is still rampant. Women's bodies and their lives have always been perceived as a tool as per the gimmick of the patriarchal and misogynistic society. Because of which they have a universal experience of sexual violence against them. Women of different castes, classes, religions, ethnicity, and sexuality all face sexual violence in their lifetime; what differs is the degree, level and experience which is shaped by their position in society. They have been victims of sexual assault, rape, trafficking, dowry death, cruelty, sexual harassment, domestic violence, and other varying forms of violence.

Violence against women, the LGBTQ community and other marginalised groups, is continuously reshaping itself, taking new forms which are not covered in the law. The women's movement in India has been integral in providing legislative action by reacting to violence and discrimination against women. In early 1980s feminist jurists and independent women's groups soon realised that the constitutional guarantee of equality needs to be reflected in laws

[9] The Indian Penal Code, 1860, $ 375, No. 45, Acts of Parliament, 1860 (India).

protecting women from violence. Women's groups first began to organise when dowry-related deaths got the attention of the women's movement. Despite the Dowry Prohibition Act of 1961, there were countless incidents of women being subjected to violence, especially by their husbands and in-laws, primarily due to dowry.

The first protest against dowry by the women's movement was made by Progressive Organisation of Women, Hyderabad (POW) in 1975. In Delhi, the movement against dowry was started when women groups like Stree Sangharsh and Mahila Dakshata Samiti took up the cause. The movement was started against the violence married women had to endure due to demands for dowries, which sometimes lead to women committing suicide.[10] After years of demonstration and agitation against dowry and deaths due to it, the Criminal Law (second amendment) Act was passed in 1983. It established section 498A to the IPC. This made cruelty to a wife as cognisable, non-bailable offence and defined punishment up to three years of imprisonment and a fine. In 1986, Section 304B was added to IPC which protects women from dowry death.[11]

Rape and sexual violence against women are an issue prominently raised by women's movement in India. Women's experiences in terms of sexual violence have been omnipresent. History has witnessed rape being used a tool to assert power over fallen empires when army of a victorious king rape the women to assert their power and domination over them and present is a witness for rape as a tool to take revenge, humiliate communities or fulfil their lust. The second major amendment to IPC pertaining to women was enacted after the December 2012 brutal gangrape in India which numbed the whole country. Nirbhaya, a female student, was gang raped and tortured by six men when she was travelling in a private bus. This horrific incident not only gathered attention and protest nationally but also got international coverage and condemnation. Because of large scale agitations Justice Verma Committee was formed to suggest reforms in the laws dealing with sexual crime.[12]

Committee's objective was to review and suggest possible amendments and alterations for speedy court trials and strident punishments for ferocious crimes against women. Finally, the

[10] Radha Kumar, *The History of Doing: An Illustrated Account of Movements for Women's Rights and Feminism in India 1800–1990* 114-124 (Kali for Women, New Delhi, 1993).
[11] Dowry Prohibition (Amendment) Act, 1986, $ 11, No. 46, Acts of Parliament, 1986(India).
[12] Yamini, "Criminal Law (Amendment) Act, 2013: Sexual Offences" *Academike: Articles on Legal Issues,* Apr. 8, 2015, https://www.lawctopus.com/academike/criminal-law-amendment/. (last visited on August 28, 2022).

Criminal Law (Amendment) Act was passed in 2013 amending a large number of provisions of Indian Penal Code, Indian Evidence Act and the Criminal Procedure Code. Through this amendment, several new offenses have been recognised and inducted into the Indian Penal Code, including acid attack (Section 326 A & B), voyeurism (Section 354C), stalking (Section 354D), attempt to disrobe a woman (Section 354B), sexual harassment (Section 354A), and sexual assault which causes death or injury causing a person to be in persistent vegetative state (Section 376A). Apart from these changes Section 375 of IPC was amended to expand the definition of rape. Section 370 of IPC was replaced with Section 370 and 370A.

Ironically, the case which reflected such fury, shock and outrage from the public and brought several amendments and provisions in the laws could not hinder such crimes. Recent cases like Kathua Rape case, Hyderabad veterinary doctor rape and murder case and Hathras gang rape and murder case, all these cases and the others which never came in public eyes demonstrates that legal changes cannot reconstruct patriarchal power- an architect of social relations and hierarchy in our society.

Even after having gender specific legal provisions, women's struggle to live a life free from violence and inequality is far from reality. These gender specific laws paradoxically are not only less fulfilling in their objectives but also outcaste and marginalised other sexual and gender minorities. The Indian legal discourse works by a mechanism which fixates itself to a singular meaning, by creating uniform categories through homogenising multiple experiences and possibilities and by suturing open ended ness. The Indian legal discourse works on the patriarchal belief of gender being binary i.e., male and female, thereby ignoring the lived experiences of other genders.

## 4. CRITICALANALYSIS OF IPC VIS-A VIS LGBTQA+ PRESPECTIVE

Arvind Narrain and Alok Gupta points out that "the historical existence of queer people is rendered invisible through silence, by a dismissal of same-sex tradition as completely irrelevant, and by a wilful attempt to heterosexualise existing queer traditions".[13] The Colonialgovernment created a socio-legal discourse in which expression of sexuality was highly controlled through an order of public morality, decent, obscenity and medicalisation. Under this order every form of sexuality, gender identity and social relationship which did not

[13] Arvind Narrain and Alok Gupta, *Law Like Love: Queer Perspectives on Law* xiv (Yoda Press, New Delhi,2011

conform to heteronormative structure of marriage and procreation was criminalised, shunned upon and slowly eroded from social existence.

The different views on Indian sexual practices, cultivated in the backdrop of colonial rule and Victorian puritanism, was deeply rooted in its anti-pleasure and anti-sex bias. The rhetoric constructed by western theorists had a major influence on the social reformers who tried to form an ideal Indian family primarily functions through imitating the British Victorian nuclear family system[14]. The western imported homophobia found its new grounds in the nationalist movement, movements of religious revivalism and emergence of puritan literature.[15] The colonial legacy of transphobia and homophobia was intertwined within the legal structure of independent India, therefore creating exclusionary systems in social, political and economic spheres. The ignorance of India's legal system to acknowledge diverse and multiple expressions of gender and sexuality has perpetuated a plethora of ways in which LGBTQ community face discrimination and marginalisation in the society from which they don't have any form of protection.

The life of queer individuals is filled with mental trauma, societal pressure to conform with given gender norms, and exclusion and discrimination in the society. Violence faced by LGBTQ community in India is shaped by their experiences as a member of an 'outcaste' community. The multiplicity of violence in part is caused by state non-recognition of violence faced by LGBTQ community in law, especially in the Indian Penal Code.

The patriarchal and heteronormative notions dictate sexual violence or assault can take place only on the bodies of cis-gender women, where the boundaries between the aggressor (cis-gender man/men) and victims (cis-gender woman/women) are clearly defined. Flavia Agnes argues that the notion of penile-vaginal penetration is rooted in the control exercised by men over their women as property. Rape challenges the exclusive right over such properties (women) as it might cause pregnancies by 'othered' men and threaten the structure of patriarchal power.

While formulating legislations, legal jurists have fails to understand that at the centre of rape or any form of sexual violence lies power, power to control, to assert domination and one's

[14] Ruth Vanita and Saleem Kidwai, *Same-Sex Love in India: A Literary History* 220-224 (Penguin Books India, Gurugram, 2008).
[15] *Ibid*, *227*-233.

status in the society. Since androcentric thinking has put that power in the hands of men, they automatically become infallible from such violations. The sexual power and authority awarded to men in patriarchal setup has made even the imagination of a man being raped as impossible. Because of which gay and bisexual men are left outside the purview of legal protections.

Recently, there has been an increase in the incidents of gay or bisexual men raped and/or sexual harassed. In September 2018, Apoorv, a 31 years old gay man met someone on Grindr (a popular dating app which allows gay, bisexual men and transgender persons to meet anonymously). However, the date didn't turn out as he expected. Further he described how while waiting for his date near a secluded park, suddenly two men approached him, holding him tightly and then started abusing him. But this was not the end, two more men joined the previous men and forcefully took him to an anonymous place, afterwards he was raped and robbed[16]. In July of 2021, R (real identity concealed), a trans man, made allegations against a well-known therapist Aanchal Narang of sexually harassing them.[17]

Section 375 defines a rape if a man (or men) penetrates his penis into a woman's vagina, urethra, anus or mouth. Or if he put or pushes any object or any of his body parts in the above-mentioned parts of woman or asking another person to do so constitute an offence of sexual assault. He also commits sexual offence is he uses his mouth to above said parts of woman or force her to do so with him or any other person.[18]

Section 375 of the IPC elucidate rape as "sexual intercourse with a woman against her will, without her consent, by coercion, misrepresentation or fraud or at a time when she has been intoxicated or duped, or is of unsound mental health and in any case if she is under 18 years of age".[19] The punishment for rape, defined under Section 376 of IPC, says if a man is found to be culpable of raping a woman he may be awarded with a punishment of minimum of ten years in prison, which may be extended to life. The law also provides for death penalty in cases where

[16] Gay Men in India Reveal Terrifying Tales of Rapes And Extortion on Dating App Grindr, https://www.news18.com/news/buzz/gay-men-in-india-reveal-terrifying-tales-of-rapes-and-extortion-on-dating-app-grindr-1884845.html (last visited on August 30, 2022).
[17] Why It Is Time For India To Consider Gender-Neutral Rape Laws, https://article-14.com/post/why-it-is-time-for-india-to-consider-gender-neutral-rape-laws-6136d766effef (last visited on August 30, 2022).
[18] What is Section 375 IPC, Section 375 News, Section 375 Amendment, Section 375 punishment, https://www.business-standard.com/about/what-is-section-375 (last visited on September 3, 2022).
[19] *Ibid.*

the woman is left in a vegetative state, or repeat offenders, or raping a girl below the age of 12.[20]

In 2014, the Supreme Court of India passed a pioneering judgement known as NALSA judgement in which transgender got the right to self-recognition of their gender identity. However, since the edict there has hardly been an effort to provide equitable legal coverage to them. After Nirbhaya rape case, Justice Verma Committee was formed and it recommended number of reforms in its report. The report stated that sexual crimes performed against individuals who are not women should be enacted. "Since the possibility of sexual assault on men, as well as homosexuals, transgender and transsexual rape, is a reality the provisions have to be cognizant of the same", the report mentioned.[21] The consequences of Committee's recommendation and nationwide protests against rape resulted in tougher punishments for the crime but scarcely anything is done to protect other genders under same crimes.

The Transgender Persons (Protection of Rights) Act, 2019 seeks to recognise the identity of transgender persons and protects them by prohibiting and punishing any form of discrimination. The act tries to create an environment of equal opportunities for trans individuals in the fields of education and employment, also preventing exclusion in healthcare, property rights or using any form of public services.[22] But the act has also fallen short to integrate them. The Act of 2019 lays down the penalty for the physical and sexual abuse of a transgender person with an imprisonment of minimum six months which can be extended for a person of maximum two years in prison with fine.[23] This provision, thus, attach little importance to the perilousness of the sexual offence committed against transgender persons and also neglect the exigency associated with it. The inconsideration that the legislation reflects towards a particular community not only violates their constitutional rights but disregards the recognition and achievements they got in the NALSA Judgement. The Act reflects how the bodies of transgender persons are less valuable to their cis-gender women counterparts, whose bodily autonomy, privacy and dignity is protected through a series of more stringent laws.

[20] India's rape laws don't cover transgender people. They say it's putting them at risk, https://edition.cnn.com/2020/12/08/india/india-transgender-rape-laws-intl-hnk-dst/index.html (last visited on August 31, 2022).
[21] *Ibid.*
[22] The Transgender Persons (Right to Protection) Act, 2019, No. 40, Acts of Parliament, 2019 (India).
[23] The Transgender Persons (Right to Protection) Act, 2019, $ 18, No. 40, Acts of Parliament, 2019 (India).

The bodies of LGBTQ people are considered to be an aberration in the patriarchal society which need to be mended for violating traditional gender notion. Corrective rape is often used to cure queer individuals from their 'aberration'. "Corrective rape also called 'curative rape', 'punitive rape' or 'homophobic rape' is a term reportedly coined in South Africa to describe the practice of rape committed against lesbian women in order to "cure" or punish them. Lately, the term began to be used in other parts of the world and in relation to LGBTI and gender non-conforming women and persons".

Corrective Rape is defined as a violation of individual's right over their body and sexual identity which results into denial of genuine societal equality.[24] Another violation that LGBTQ people have to go through is Conversion Therapy. It brutalises the LGBTQ+ community under the ambit of medicine, science and religious immorality or sin, ultimately crushing individual's right to freely exercise their sexuality or gender identity through labelling it as deviancy. As per British Psychological Society, conversion therapy attempts to alter a person sexuality and gender identity by forcing them to suppress their feelings for a person of same sex, or from identifying to a gender which is not given at birth[25] It has been built on the belief that same sex affection is not normal and is unnatural, thus needs to be treated. It seeks to fundamentally alter someone's sexual orientation or gender identity using different methods like using violence, pseudo medical treatments or religious cleansing. In 2014, Indian Psychiatric Association acknowledged that homosexual relations cannot be considered mental illness and nothing in medical sciences indicates that an individual's sexuality can be changed. But the acknowledgment cannot hinder the cases of conversion therapy and suicides associated with it.

Satyavati (2016) is a film directed by Deepthi Tadanki which focuses on the issues of corrective rape in India. The film centres around truthful events that happened in the city of Bangalore. Deepti said, "When I was researching on this subject for my film, I came across two gut wrenching stories of corrective rape — one, where a gay girl was raped by her cousin so that she could be "cured" of homosexuality; and another, where family members forced a gay boy to have sex with his mother, in a bid to turn him straight"[26]. In most cases it is the family of LGBTQ individuals who forced them to undergo such inhumane practices. Anjana Harish, who

[24] Sarah Doan-Minh, "Corrective Rape: An Extreme Manifestation of Discrimination and the State's Complicity in Sexual Violence" 30 *Hasting Women's L.J.* 167 (2019).
[25] What is conversion therapy and when will it be banned? https://www.bbc.com/news/explainers-56496423 (last visited on September 2, 2022).
[26] Parents use 'corrective rape' to 'straighten gays,https://timesofindia.indiatimes.com/life-style/relationships/parenting/Parents-use-corrective-rape-to-straighten-gays, (last visited on September 2, 2022).

identified as bisexual and was a student from the state of Kerala committed suicide, in a Facebook video she recorded her ordeal, explaining how her own family force her to go through a treatment meant to correct her sexuality. In a Facebook video, she said "my own family did this to me, that's what saddens me the most, the ones who were supposed to protect me, tortured me."

The Section 306 of IPC fails to address the complexity of conversion therapy and how it forces victims of it to the brink of mental breakdown, which sometimes leads to suicide. Conversation therapy is a manifestation of pseudo medical practices that builds upon societal shame and rejection experienced by members of LGBTQ community. Law neither acknowledges nor protects queer people from this travesty.

Analysing the law from queer perspectives provides us with new insights which were earlier ignored. The life and freedom of queer women is hindered by many laws which question their autonomy through infantilising and placing them in protective care of either their parents or the state. Section 340, Section 361, Section 362, Section 366, Section 368 wrongful confinement, kidnapping, abduction, compelling a woman to marry, wrongful concealment or confinement of an already kidnapped person respectively are laws which are used by parents and police to force lesbian couples from living together.

There are many cases in which parents filed cases of abduction, kidnapping against lesbian partner or simply a missing person's report. State institutions, like police, weaponize such laws to enforce their definition of justice and to uphold the sanctity of marriage, so that 'perverted' relationships do not splinter the fabric of (patriarchal) society.

Sections 292, 293 and 294 of IPC have been formulated to perpetuated Victorian ideas of public morality thereby prohibiting the publication, sale and distribution of obscene literature. However, the vague language used in the law leaves the definition of obscenity for judicial benches to decide thus also allowing police to enforce and harass people (mainly sex workers and Hijras) who do not confirm to their standards of morality. Feminists have highlighted how these laws are crafted to exercise control over women's sexuality, in order to maintain community honour and chastity of a wife. Flavia Agnes argues that definitions of indecency, morality and obscenity reinforce the idea that anything sexual in connection with women was obscene and that true Indian respect for Women was equivalent to treating them as asexual[27].

[27] Brinda Bose, *Translating Desire: The Politics of Gender and Culture in India* XII (Katha, New Delhi, 2003).

The Hijra community in particular is victim of these laws as police often assert them, based on the charges of obscenity, public decency and for creating nuance. Anxiety of middle-class India towards the Hijra community is also reflected via these laws. As there is a constant effort to regulate the visibility of Hijras through monitoring their movement under the ambit of protecting public morality from the presence of 'undesirables.'

The society has imposed discrimination and violence against LGBTQ community. Due to this the violence, they face from their partner at home becomes unheard. Domestic violence is magnified due to the stress same-sex couples experience to sustain their relationships without any social or legal support. As same-sex couples have no one to turn during periods of crises, individuals suffering from intimate partner violence do not report it[28]. A study on Perception and Prevalence of Domestic violence among LGBT in India[29] reveals that out of 440 respondents, 272 respondents i.e., 61.8% were exposed to intimate partner violence. Section 498A of IPC, was enacted in the year of 1983, protects married women from the cruelty inflicted by her husband or his relatives. The section also prescribed a punishment extended up to 3 years, along with a fine. However, the refusal of law to acknowledge same sex relationships has left queer couples facing intimate partner violence with no support for protection and justice.

## 5. CONCLUSION

The legal system of India still carries the baggage of colonial legacy. Ironically structures of democratic India characterise homosexuality and LGBTQ rights as western imports, imposed on the subcontinent to undermine and corrupt Indian values. The Indian Penal Code does not recognise queer Indians as part of democratic India, degrading their status as second-class citizens. In 2018, Supreme Court of India decriminalised same-sex relationships between consenting adults in private. However, the journey from decriminalisation to full and equal citizenship rights would require fundamental and structural changes in the social fabric of India. Reforms in the legal sphere would act as a catalyst to changes in other spheres of life. Therefore, it's necessary to analyse IPC and other laws from queer lenses in order to strengthen constitutional guaranteed principles of equality, liberty and justice.

[28] Societal stress causes domestic violence between same-sex couples: Study, https://www.indiatoday.in/india/north/story/gay-couple-lesbian-same-sex-harassment-societal-pressure-293621-2014-09-21 (last visited on September 3, 2022).

[29] A study on Perception and Prevalence of Domestic violence among LGBT in India, https://vixra.org/pdf/2106.0100v1.pdf. (last visited on September 3, 2022).

# RESTORATIVE JUSTICE IN THE REALM OF DOMESTIC VIOLENCE CASES IN INDIA: A NEED FOR A PARADIGM SHIFT?

*K S Oviya*[1]

## 1. INTRODUCTION

Domestic violence is a global as well as a national problem. Across the nation of India, the crime of domestic violence continues to be unabated. National surveys of domestic violence survivors, like National Crime Records Bureau (NCRB) and National Family Health Survey (NFHS), show that the majority of the cases go unreported, and even when the cases are reported, many victims of domestic violence end up withdrawing the charges (due to reasons like familial pressure, financial dependency, and fear of family breakdown) and returning to their abusive relationships. The disproportionate ratio in the rate of occurrence of domestic violence cases (as given by the NFHS - 5 survey) and the cases registered (as given by the NCRB 2019 report[2]) hints at a story of unaddressed and ongoing harm. This also sheds light on a justice system that offers only a limited set of options, unutilized by many of the victims. Survivors of intimate partner violence and their advocates have long searched for alternatives to the legal justice system. The advocates of restorative justice contend that the mandatory arrest legislation in the cases of domestic violence had compelled the state to treat domestic violence as severely as violence between strangers with no attention to the fact that it is a problem within the family. Restorative justice is a way of responding to criminal behavior by balancing the needs of the victims, offenders and the wider community, that is, 'restoration' of offenders, victims and the community[3] (the concept of restorative justice will be further elaborated in Section III as to how it will be used and understood in this paper). In the ensuing decades, the conversation has continued, with restorative and transformative justice models emerging as promising approaches in other countries. This paper aims to start the conversation around restorative approaches to domestic violence against women in India as well. India should introduce restorative justice programmes[4] like victim-offender mediations in the existing criminal justice system at the pre-trial stage to deal with cases of domestic violence

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[2] National Crime Records Bureau (Ministry of Home Affairs, Government of India). 2019. Crimes in India, Statistics 2019, https://ncrb.gov.in/sites/default/files/CII%202019%20Volume%201.pdf., (last visited on – May 05,2023).

[3] Thom Brooks, Punishment: A Critical Introduction 65 (2 ed., Routledge 2021).

[4] According to the United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, "restorative justice programmes ('the RJ programmes) mean any programme that uses restorative processes and seeks to achieve restorative outcomes."

filed under Section 498 A of the Indian Penal Code. The researcher recommends the introduction of victim-offender mediation as a complementary process and not as an alternative to the criminal justice system where the place of victim-offender mediation as a diversionary measure is controlled by the government through its agents (public prosecutors and Judges).

Section II of the paper analyses the ground reality of the crime of domestic violence cases registered under Section 498-A of the Indian Penal Code in India. In this section, the problem of extensive under-reporting is explored and analyzed with data from the National Crime Records Bureau (NCRB) and National Family Health Survey (NFHS) and the reasons for under-reporting. In Section III, the researcher provides a working definition of the research paper as to how it is used and understood in the paper. The application of restorative justice in other countries with regard to domestic violence has been explored in order to get an international perspective. Through these discussions, this Section posits restorative justice as a viable option for dealing with the problems faced in the realm of domestic violence in India as contested against the approach taken by the conventional criminal justice system.

In Section IV, the researcher engages with the debate on whether restorative justice is a viable option for dealing with the problems faced in the realm of domestic violence in India and whether there is any scope for the introduction of restorative justice programmes in the existing criminal justice system in India. This section of the paper argues the case for the need for restorative justice by analyzing the criticisms of employing restorative justice in domestic violence cases and counter-perspectives to those criticisms. The researcher is going to defend the idea that restorative justice is a viable option for dealing with the problems faced in the realm of domestic violence in India and there is scope for the introduction of restorative justice programmes in the existing criminal justice system in India by employing three main arguments: firstly, restorative justice principles provide centrality to the victims' interests that is not adequately served in the conventional criminal justice system, therefore aiding in the restoration of victims; secondly, restorative justice principles aid in the restoration of offenders; thirdly, the introduction of restorative justice programmes help in the reconciliation of the parties to the marriage.

Then, Section V of the paper analyses the future of restorative justice in India and suggests a procedural change in the existing legislation. In Section VI, the researcher recommends a model of the restorative justice programmes that is suitable to India.

## 2. DOMESTIC VIOLENCE IN INDIA

### A. Defining 'domestic violence'.

Domestic violence normally refers to violence against a party in a domestic relationship of any kind by the other party. Protection of Women from Domestic Violence Act, 2005 ('the DV Act) defines 'domestic violence' as,

> any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it— (a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse.[5]

The DV Act provides a comprehensive definition of 'domestic violence' that not only includes physical abuse but also sexual, economic, emotional or verbal abuse within its ambit.

For the purposes of this research paper, domestic violence can be taken to refer to the violence and abuse committed by males against their female partners in the institution of marriage. The researcher is aware that domestic violence does not involve just this aspect but also violence between intimate partners, including same-sex partners abusing one another and women abusing men, as well as domestic violence in the context of elder abuse. In the quest to answer the question of whether restorative justice interventions are appropriate for cases of domestic violence registered under Section 498A of the Indian Penal Code, 1860 ('the IPC'), discussions are framed in terms of the classic and legally-defined circumstance of men's violence against women who are related by marriage.

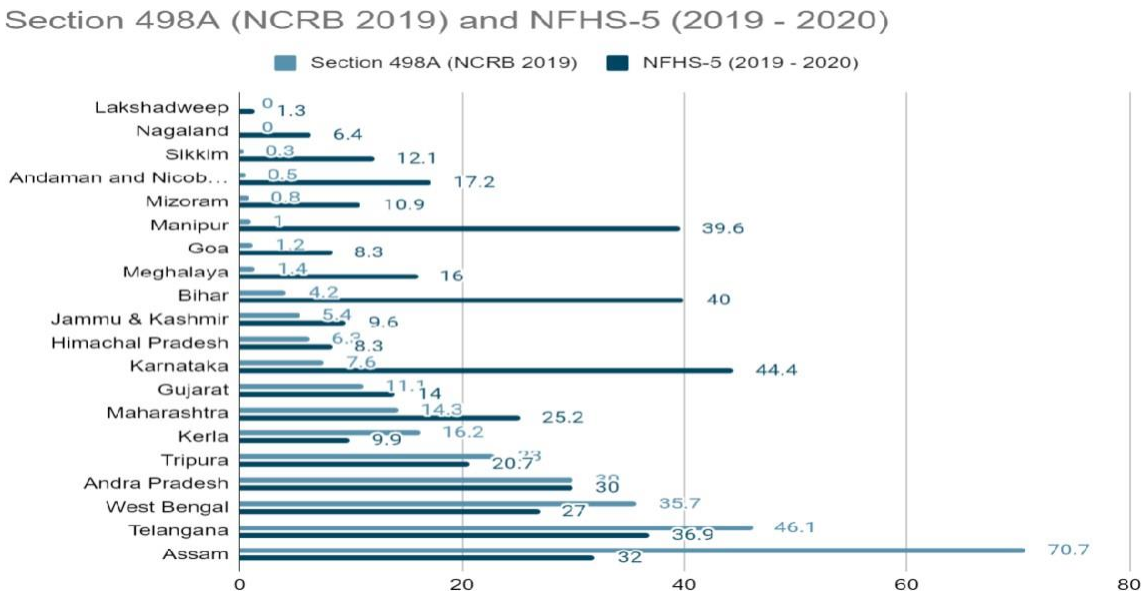
Whenever the term 'domestic violence' on its own is used, it refers to domestic violence or intimate partner violence against women only. Similarly, whenever the terms 'victims' or 'victim' on its own are used, it refers to victims of the female gender (women) only. The limitation is that the male victims of domestic violence are not considered in this research paper as there is an absence of gender neutrality in that aspect. The researcher also limits the scope of domestic violence crimes only to domestic violence crimes in few instances and not in cases of repeated violence or long battering situations. The first is where there has been violence and controlling behaviour in a single or in several events – these situations are specific events where things have escalated and violence has occurred. This category is named by the researcher as

[5] Protection of Women from Domestic Violence Act, 2005, $ 3, No.43, Acts of Parliament,2005 (India).

'situational domestic violence' and defined as to include cases in which physical violence and examples of controlling behaviour had only taken place in a few occasions, but signs of possible intensification of these kinds of behaviours also occurred. This is referred to as 'domestic violence' in this paper. The researcher has limited the scope of domestic violence to 'situational domestic violence' (as termed and defined by the researcher) because these are the situations where restorative justice can help to put things right and prevent further occasions of violence. The second situation of repeated violence or long-battering violence is one where violence is part of systematic coercive control. This is a much longer-term issue and less suitable for a restorative approach. Apart from the less suitability, the Strengthening Crime Prevention and Criminal Justice Responses to Violence Against Women, the United Nations Office on Drugs and Crime (UNODC) has provided that high-risk cases have to be excluded from the application of restorative justice to ensure victim safety – mentally and physically.

**B. The problem of extensive under-reporting**

Domestic violence has taken the top spot among crimes against women, according to data from the National Crime Records Bureau (NCRB) for 2019, despite the fact that rape and sexual assault frequently make the news. According to NCRB-2019 data, domestic violence cases registered under Section 498A of the Indian Penal Code, 1860 accounted for 1.26 lakh cases, or 30%, of the 4.05 lakh overall crimes against women that were reported. It is also clear from analyzing the NCRB data that domestic violence cases have dramatically increased in India. Although it accounts for the majority of crimes against women, domestic violence is consistently underreported. The reasons range from embarrassment, financial dependency, fear of retaliation, family breakdown, and victim-blaming to following a convoluted procedure. Comparing the state-level percentages of NCRB data (which records the crime rate under Section 498A of the IPC as the number of cases registered) and the National Family Health Survey (NFHS-5) (2019-2020) that records self-reported responses for spousal violence (irrespective of reporting that incidence); it is seen that there is an extensive under-reporting of domestic violence cases, which is evident in Figure 1. The surge in cases and the systematic under-reporting of cases despite the well-established justice system in India portray a story of unchecked and continuous harm that occurs as a result of a judicial system that provides few options, many of which go unutilized by persons who need assistance and services.




***Graph I:***[6] Comparison of cases of domestic violence recorded under Section 498-A of the Indian Penal Code as per National Crime Records Bureau Data (2019) as against the self-reported cases of domestic violence as per the National Family Health Survey - 5 (2019-2020) Data.

## 3. BEYOND CONVENTIONAL CRIMINAL JUSTICE: TOWARDS RESTORATIVE JUSTICE?

The shortcomings and failings of formal criminal justice are typically where the argument for restorative justice in place of the conventional criminal justice system for sexualized violence like domestic violence against women begins. Huge pendency of cases in criminal courts leads to congested court dockets and improper usage of the effective court resources as well. Common criticisms of the latter are the 're-victimization' of women during the processes, low conviction rates, and low prosecution rates.

[6] Data compiled by the author. The Y axis depicts the states of India while the X axis depicts the number in percentages. The light blue indicator depicts the number of domestic violence recorded under Section 498-A of the Indian Penal Code (that is, Cruelty by husband or his relatives) as per National Crime Records Bureau Data (2019) divided by the *women's population in lakhs multiplied into 100. The dark blue indicator reports the percentage of married women aged 18-49 years who had experienced domestic violence as recorded by the NFHS-5* (Units of Measurement: Percentage)

### A. Restorative Justice

An interesting alternative to the rival theories of punishment is restorative justice. The fundamental tenet of all theories of punishment, such as the deterrence theory or the retributive theory, is that imprisonment is permissible in specific situations. However fundamentally different they may be, retributivists and deterrence theorists both justify the idea of "prisons". Restorative justice is a way of responding to criminal behavior by balancing the needs of the victims, offenders and the wider community, that is, 'restoration' of offenders, victims and the community. The idea is that the relationship between the three stakeholders mentioned above has been damaged through criminal offending. Restorative Justice proponents argue that this requires a process that may help restore the broken bonds of association damaged by crime through shared communication and not imprisonment.[7] This approach looks at crime as a fundamental violation of people and interpersonal relationships.

According to the United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (hereinafter referred to as the Basic Principles), "restorative justice programmes ('the RJ programmes') mean any programme that uses restorative processes and seeks to achieve restorative outcomes." The same document defines "restorative process as any process in which the victim and the offender, and, where appropriate, any other individual or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator." A restorative justice process maximizes the input and participation the stakeholders mentioned above – but especially the victims as well as offenders – in the search for restoration, healing, responsibility and prevention. The state has circumscribed roles, such as investigating facts, facilitating processes and ensuring safety, but the state does not replace the role of the victim as in the case of the traditional criminal justice system.

## 4. THE CASE FOR RESTORATIVE JUSTICE IN INDIA

Identifying and repairing the harm done to the victims, holding the perpetrator accountable, and involving the individuals who were impacted by the crime as a whole are the main tenets of the restorative justice approach to crime. Advocates against domestic violence have been justifiably cautious about using restorative justice approaches with victims/survivors, despite the fact that they have shown to be highly beneficial to victims who choose to engage. The

[7] Thom Brooks, Punishment: A Critical Introduction 65 (2 ed., Routledge 2021).

application of restorative justice techniques and principles in domestic violence cases in India will be examined in this Section, which makes the case that, at the very least, some of these techniques can be utilized safely and advantageously given an awareness of the dynamics of domestic abuse, careful preparation, and sensitivity to the needs of domestic violence victims and survivors. This section explores the case for restorative justice by exploring three main arguments supporting the introduction of RJ programmes for domestic violence cases in India. The researcher concludes that there is scope for the introduction of RJ programmes like VOM's the case for restorative justice will be discussed below.

### A. Centrality to the Victim's Interests: From a Victim's Perspective

It is asserted that the victims' interests may not be appropriately served in the conventional criminal justice system. Three National Institute of Justice (NIJ) grant reports on domestic abuse cases showed a considerable level of victim dissatisfaction after going through the conventional court system. Dissatisfaction thus caused apprehension about informing the police of instances in the future. The findings indicated that battered women benefited most when they felt in control of their cases and when the criminal justice system and nonprofit and community-based organizations coordinated their efforts. Though this observation is from a study in Massachusetts, this can be used as a reference for the Indian criminal justice system as the victim virtually takes a backseat in the criminal justice network of India.

The victim is neither a participant in the criminal proceedings launched against the offender, nor even reckoned as a guiding element in the process of prosecution or the ultimate decision-making. The system employed in India to provide criminal justice is the adversarial system. The prosecution and the accused assume the place of parties to the criminal proceeding when the party actually suffering is the victim. The role that the victim will play is largely decided by the police and the prosecution from the beginning of the investigation of the crime up to the end of the trial. In the current criminal justice system of India, victims are not in control of their case proceedings. In certain other studies, it was found that the victim's sense of control over the procedure and the result were directly correlated with her level of satisfaction.

Restorative justice approach provides centrality to the victims' interests which is not so in the case of the conventional criminal justice system, as mentioned in the beginning of the section. Restorative justice, in contrast to traditional criminal courts, places more emphasis on the harm done to the victim most affected by the crime and how to make that person whole. While a crime is seen as a violation of the law for which the state imposes punishment in traditional

criminal courts, this is not the case in restorative justice. Restorative justice procedures that provide victims with a chance to meet their offenders often increase their satisfaction with the criminal justice system and reduce their fear of re-victimization. According to studies, victims who take part in restorative justice interactions report consistently high levels of satisfaction. According to research from Oregon, for instance, eight out of ten victims were pleased with the restorative justice procedures.

Moreover, the argument for the employment of restorative justice processes like victim-offender mediation is not just about the effective resolution of the offence but also other benefits that follow it. One such benefit is the information on support services and the awareness about the legal options available that the victims get by participating in restorative justice processes. Many of the victims of domestic violence, especially illiterate and even partially educated women, are not really aware of the legal options available to them. It is really costly for the victims to avail of legal services from advocates, particularly for the victims who are highly dependent on their spouses for their finances. This conclusion is supported by the findings of the research study undertaken by the researcher Paivi Honkatuia in which victims were interviewed to gain the victims' perspective of the Finnish practice, "many admitted that mediation did not solve the conflict for good, but they did see other benefits: information on support services, a place to be heard, a possibility to see the problem from new angles, a chance to make sense of their situation or solve it in some other way than punishing the offender."

**B. Restoration of Offenders**

The RJ programmes does not just help in the restoration of victim but also offenders. For offenders, the researcher takes restoration to mean in the sense of restoring a belief in the offenders that the process and outcomes were fair and just to them; and the outcomes were as a means of restoring responsibility to them for their offending and its consequences. The latter part also includes the restoring of a greater sense of control to them to make amends for what they have done. Restorative justice theory sees crimes as violations that creates obligations. Offenders are given the chance and encouragement to comprehend the harm they have done to their victims and the community, as well as to develop strategies for being accountable for their actions and accepting proper responsibility. The evidence from foreign studies seems clear that this can occur. The aforementioned Finnish study in Finland shows to have positive, educational and integrative effects on the offenders. This is because "criminality is seen as an outcome of marginalization from society, which should be prevented by social policies and not

prison sentences." Additionally, participants in restorative justice have a stronger connection to and understanding of the impact of their victims, which increases the likelihood that they will abide by agreements than participants in traditional justice who have little or no say in the process. Comparatively to individuals who do not participate in the restorative justice process, offenders recidivate at a lesser rate.

The principles of restorative justice also aim to address the harms caused by and to the offender by taking two factors into consideration when assessing an offender: firstly, factors underlying their offending in the first place; and secondly, the consequences of the offending and whether or not the offender intended for those consequences. At first sight, it would be very similar to the approach of the conventional criminal justice system but it is not entirely so. The second factor may be considered in the conventional justice system but where it lacks is the realization of those consequences and victim's perspective of the crime that is achieved through RJ programmes like VOM's.

**C. Focus on reconciliation of the parties to the marriage: Compounding the offence of domestic violence?**

It is asserted that the conventional formal criminal justice system, with its roots in adversarial, offender-oriented practices, does not aim to reintegrate the parties to the marriage but only seeks to attain the doctrinaire end of the prosecution and trial. It does not provide an amicable resolution in family-related issues, as a criminal complaint and court adjudication lead to the breakdown of families. This is something many women in India cannot afford, as many of the women are still dependent on their husbands financially. This adversarial system implants a fear of re-victimization in the victims of domestic violence that they either do not report the crime or withdraw the cases they once filed due to a scarcity of options.

The law shouldn't stand in the way of terminating the proceedings when the victim herself is willing to forget the violence and cruelty meted out to her due to the remorse on the part of the perpetrator (the husband and in some cases his relatives) for his acts and his efforts for reparation of the injury caused to the victim. The 237th Law Commission Report on the compounding of (IPC) offences also advocated for the compounding of Section 498A offence. This was reiterated in the 243rd Law Commission Report as well. The proponents of restorative justice posit that the introduction of RJ programs helps in the reconciliation of the parties to the marriage and provides a platform for the restoration of victims and offenders. The

introduction of RJ processes in the criminal justice system is seen to be compounding of the offence since RJ processes like mediation deal with the resolution of these offences.

The opponents of restorative justice argue that offences that are of non-compoundable nature (like domestic violence in India) cannot be compounded. In India, domestic violence, as envisaged in Section 498A of the IPC, is an offence that is cognizable, non-compoundable, and non-bailable. A list of IPC offences that may be compounded by the victims of those offences is outlined in Section 320 of the Code of Criminal Procedure, 1973 ('the CrPC'). According to subsection 9 of Section 320 of the CrPC, any other offence included in the IPC is a non-compoundable offence. An offence under Section 498-A is stated to be non-compoundable under Section 320 of the CrPC. So, it is stated that restorative justice programs in the form of mediation and others cannot be employed to deal with an offence of non-compoundable nature.

The researcher has duly taken note of the legal barrier that exists to the introduction of RJ processes in the criminal justice system in cases of domestic violence against women. An examination of the judicial approach taken by the Courts can show us that India is just an inch away from incorporating restorative justice in its criminal justice system. In order for domestic violence under Section 498A of IPC to be compounded with the Court's approval, the Law Commission of India recommended it to be included in the Table annexed to Section 320(2) in its 154th report (1996).

Reiterating what was said in the 154th Report, Supreme Court in *B.S. Joshi v. State of Haryana* has firmly established the idea that the High Court may employ its inherent authority under Section 482 CrPC to suspend criminal proceedings at the instance of a husband and wife who have amicably resolved the issue and want to put an end to the conflict.[8] This is very necessary in order to further the goals of justice. In the case of *B.S. Joshi v. State of Haryana*, the High Court held that offence under Section 498-A of IPC being a non-compoundable one, the application for compounding was dismissed by the High Court based on the ground that the "offences which are non-compoundable in nature would not be allowed to settle on the ground that there has been a settlement process between the parties".

The Supreme Court, in the same case of B.S. Joshi, commented that the Courts should understand "the delicacy of the relations in family disputes, that at any stage good sense may prevail upon the parties and they may enter into a compromise, or withdraw the complaint, and

[8] B.S. Joshi v. State of Haryana, (2003) (2) Crimes 284 (SC).

a hyper technical view would be counter-productive and would be against the interests of women and against the object for which this provision was added". Therefore, in such matters, the Courts are expected to have a liberal approach and permit the parties to settle their dispute.

In the case of *Thankamma v. State of Kerala,*[9] it was held appropriate to accept the request for compounding the offences so that the institution of marriage could be saved, considering that the husband and the wife have reunited and that they are living peacefully with their daughter and family members. From these judicial decisions, it can be inferred that the cases under Section 498A of IPC are quashed due to the settlement between the spouses. This implies that there is sufficient scope and feasibility for compounding of domestic violence in the backdrop of the Indian criminal justice system.

Another argument against the introduction of victim-offender mediations to resolve domestic violence is that the justice will be decided by private facilitators which will result in the criminal offence losing its criminal character and veracity. That is why, instead of making the offence a compoundable one as put forth by the 237th Law Commission Report, RJ processes are suggested to be introduced at the pre-trial stage. The idea is not to leave it to the hands of the private actors to resolve the issue but to integrate the essence of re-integration and restoration into the criminal justice system through RJ processes like VOM that is controlled by the state. This ensures that the victims are not coerced or pressurized and at the same time, providing them with a multiplicity of options.

Now that the question on the compounding of the offence is answered in positive that there is room for compounding of domestic violence cases, the need for the introduction of the RJ processes into the Indian criminal justice system needs to be considered. In the above-mentioned examination of the judicial approach on the impugned issue, it is established that the criminal proceedings are quashed amidst the proceedings after the trial has been instituted. In order for the goal of reconciliation of the parties to the marriage to be achieved, it is necessary for the mediation to take place before the institution of the criminal proceedings. Once a complaint of domestic violence is filed under Section 498-A of the Indian Penal Code, it becomes inevitable that the Police arrest or threaten to arrest the husband and his relatives against whom the complaint has been lodged. When the members of the family are arrested and sent to the jail, it is obvious that there will be no room for amicable reconciliation of the

[9] Thank Amma v. State of Kerala, (2007) (1) RCR 410 (Ker.).

spouses or salvaging the marriage. Now, it has been established that the possibilities of reconciliation can not be ruled out. The quashing of the criminal proceedings after the trial has been instituted will thus be counter-productive. Therefore, India should introduce victim-offender mediations in the existing criminal justice system at the pre-trial stage to deal with cases of domestic violence filed under Section 498 A of the Indian Penal Code.

## 5. BALANCING THE RIVAL APPROACHES: RESTORATIVE JUSTICE ALTERNATIVES AS A SUPPLEMENT TO THE CURRENT CRIMINAL PROCEEDINGS

Restorative justice is considered as a distinct alternative to rival theories of punishment, that underlie the current criminal justice system. Undoubtedly, there are certain concerns attributed to the isolated approach of restorative justice in dealing with offences of serious nature. Concerns regarding the potential impact of restorative justice practices in India may be allayed by looking at the alternative restorative justice processes and strategies as an addition to, rather than a replacement for, the present criminal justice system and its proceedings. It will be a complementary and parallel system to the existing criminal justice system. This paper suggests for a gradual and voluntary introduction of alternative paradigms into pre-existing criminal justice system in India. The usage of RJ processes like mediation as a complementary or parallel process to court proceedings finds grounding in the Finnish mediation in Finland. Finnish mediation is closely linked to the criminal justice system in Finland through which cases that has been filed can be diverted from the criminal process after mediation. The researcher recommends the model employed by Austria (which is discussed in length below) to be employed in India as well.

The model recommended by the researcher introduces VOM as a complementary process to the criminal justice system and the place of VOM as a diversionary measure is controlled by the government through its agents (public prosecutors and Judges). The inspiration for the introduction of victim-offender mediations complementary and parallel to the criminal proceedings in domestic violence cases has been taken mainly from the working of the Victim-Offender-Mediations in Austria. In Austria, VOM has not only been closely integrated into the entire spectrum of criminal law reactions, but its place and role as a diversionary measure is also clearly defined, and the state prosecutors remain the ‘masters of the procedure’, exercising discretion both at the beginning and end of the VOM intervention. This is despite its distinctive diversionary character and being defined as different, as truly an alternative to the conventional

criminal procedure. The primary gatekeepers in this process are public prosecutors, who have the discretion to send cases to restorative processes. Cases are directed to NEUSTART, the main victim-offender mediation provider, which is an independent entity under the Ministry of Justice and provides other community service initiatives. The charge will often be dropped when an agreement has been reached and satisfied. The judge may decide to close the case after the successful conclusion of the agreement if charges have been filed. The core supplier offers a thorough four-year training program for mediators. Chart I explains the organizational and procedural set-up of the VOM practice in Austria. It helps us understand the course taken by the criminal cases that are diverted to the VOM services of NEUSTART by prosecutors and/or Judges.

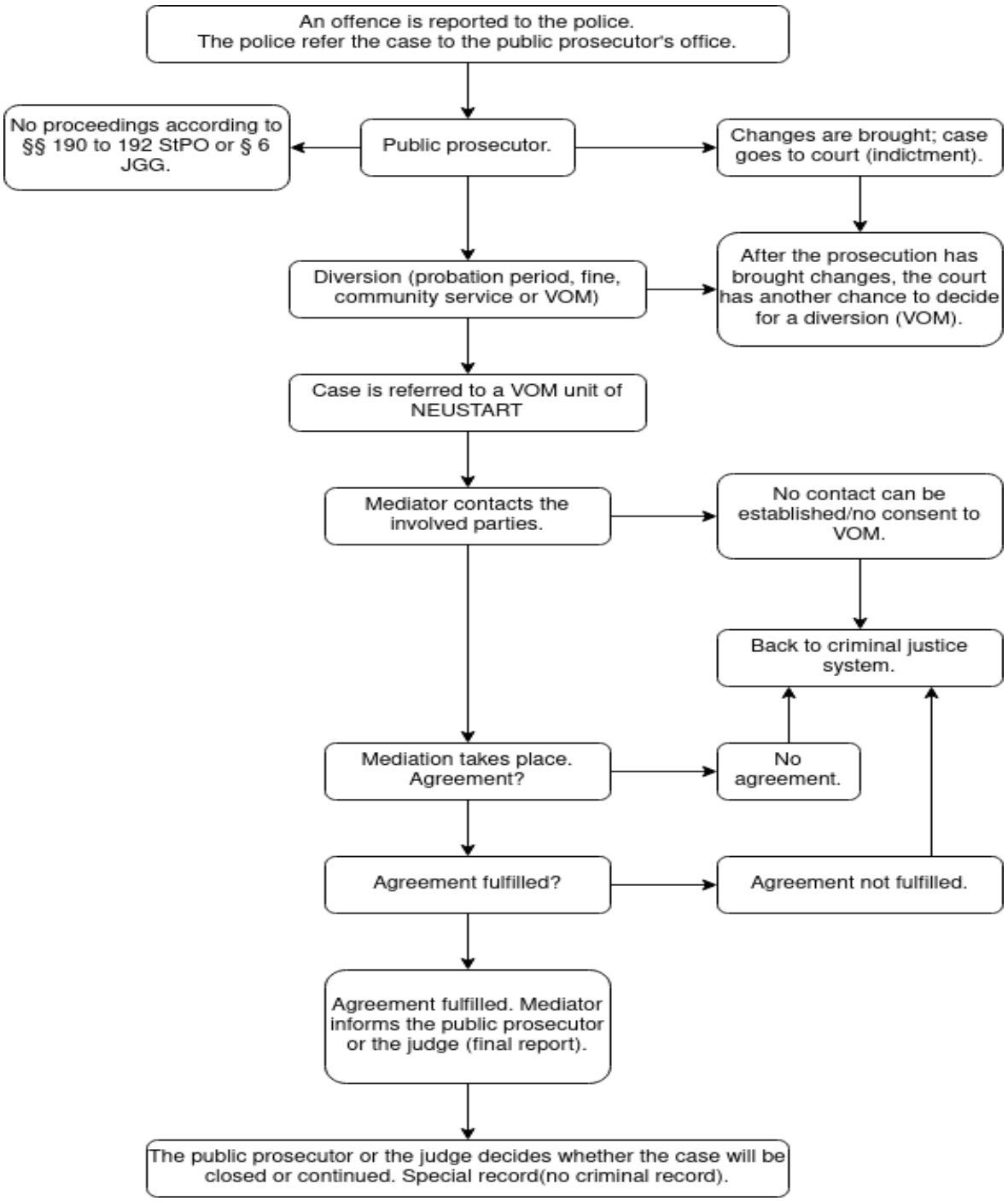



**Chart I-** Referring and processing of criminal cases in Austrian VOM Model (The Chart has been given since the researcher wants to employ the same model in the Indian criminal justice system for dealing with cases of domestic violence under Section 498-A of the IPC.)

Both the subsidiary role of the courts and the major role of the public prosecutor's office in referring cases to the VOM units of NEUSTART are clearly marked. The researcher has referred to the Austrian model as it provides a successful organizational set-up that is suitable to the Indian structure. As already mentioned in the paper, this adoption of the VOM as a complementary procedure to court proceedings in a similar way to that stated in the Austrian model ensures that the resolution of cases does not go into the hands of private actors completely. This does not make the offence an absolutely compoundable one as the RJ processes are used as complementary processes that are inducted in the criminal justice system and not as an alternative one. This way, the place of RJ processes as diversion is clearly marked, and the discretion rests with the State Prosecutors and Judges both at the beginning and at the end of the intervention.

The process should take place at the option of the victims and the offenders, that is, it should be a voluntary process. Article 32 (b) of General Recommendation No. 35 on Women's Access to Justice of the Convention on Elimination of all forms of Discrimination Against Women (CEDAW) states that gender-based violence against women must not be referred to alternative dispute resolution procedures like mediation and conciliation mandatorily. It also states that ADR processes can be employed to deal with crimes against women but only with the informed consent of the victims/survivors. It can be inferred that there is nothing against the employment of RJ programs for crimes against women like domestic violence cases unless it is mandatorily referred to alternative dispute resolution procedures like mediation. The Basic Principles provides certain fundamental safeguards to the victims and offenders. One such safeguard is the 'right not to participate'. This right ensures that both the parties are not coerced or induced by unfair means to participate in restorative processes. The voluntariness of the victims and offenders will be ensured by the state actors referring the cases to VOM.

The employment of RJ programs like VOM for domestic violence cases is also qualified by making them available only in cases where the researcher defines it as 'situational domestic violence' and not in cases involving repeated or long battering violence. Article 32 (b) of General Recommendation No. 35 further states that the use of alternate dispute resolution procedures like mediation should be "should be strictly regulated and allowed only when a previous evaluation by a specialized team ensures the free and informed consent of victims/survivors and that there are no indicators of further risks to the victims/survivors or their family members". When the model proposed by the researcher is employed, this

recommendation can be followed as the parties are referred to the VOM only after previous evaluation by the Prosecutor or the Judge.

## 6. CONCLUSION

An inquiry into the question of whether restorative justice principles can be employed for dealing with cases of domestic violence and cruelty charged under Section 498A of IPC revealed that there is scope for the application and integration of those principles in the Indian criminal justice system. This research paper using various principles and international examples has argued that RJ processes, especially the mediations in the type of Austrian VOMs, can be employed to fill in the gaps in the conventional criminal justice system that makes it difficult for the state to provide the victims with effective and practical justice. Many problems faced by litigants and courts alike might be resolved if restorative justice approaches were incorporated into criminal justice proceedings. Firstly, the benefit of such an approach is that it would enable a more wholesome and holistic approach to one of the most delicate legal issues in India instead of the mechanical and doctrinaire approach. Second, creating a nonjudicial substitute for the regular protection order hearings would save the courts' limited financial resources. Finally, giving litigants more flexible routes for redress would guarantee offender involvement and centrality to the victims' interests. In the existing social construct and the legal practice, the research paper implores a paradigm shift and a considerable shift in mindsets as well.

# THE COMMUNAL ANGLE OF INDIAN CITIZENSHIP

*Mansi Singh Tomar[1] and Sourav Sharma[2]*

***Abstract***

*India has a complex history of citizenship which starts with the partition of dominion of India into West Pakistan, India, and East Pakistan. This partition was made on communal grounds. Thus, some discussion on religious lines can also be traced in the Constitutional Assembly Debates in the Citizenship chapter of the Indian Constitution. Although this communal tone was never reflected in the bare text of the constitution, its existence constantly affected the politics of both the nations, leading to the creation of the concept of Best Citizen and Proxy Citizen. A Muslim male became the best citizen of Pakistan and a Proxy citizen for India whereas; a Hindu male became the best citizen for India and a proxy citizen for Pakistan. An impression of this concept is visible even today, in the recent Citizenship Amendment of 2019. The discussions of coupling this amendment with the National Register of Citizenship, as used in Assam, will actually lead to an increase in this communal bias and will enhance the Islamophobic politics of the nation with respect to citizenship. The paper will trace this communal history and the Islamophobic politics in the citizenship law of the country emphasising on the state of Assam to show how the implementation of NRC with CAA 2019 can cause havoc in the nation. Analyzing the constitutional principles and precedents, the paper will present how the position of State through constitutional law has become Secular and thus how the correct interpretation of constitutional principles can help prevent communal havoc.*

***Keywords:*** *Best Citizen, Citizenship, Citizenship Amendment Act, 2019, Constitution of India, Islamophobic Politics, National Register of Citizens, Proxy Citizen, Secular.*

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## 1. INTRODUCTION

The story of citizenship in India dates back to the time of partition of the Indian mainland into Pakistan, India, and East Pakistan (present-day Bangladesh); various provisions were made in the Constitution of India to give Citizenship to people who were born in the dominion of India and to those who migrated from Pakistan on or before a certain specified date.[3] This partition was based on religious lines and thus, a presumption arose in the minds of the people that Pakistan belongs to Muslims, and India belongs to Hindus. A hierarchy of Citizenship was created based on various categories in which Muslim males became the best citizens of Pakistan. Hindu males became the best citizens of India.[4] This hierarchy made Hindus proxy citizens of Pakistan as they were presumed to belong to India and Muslims as proxy citizens of India as they were presumed to belong to Pakistan.[5] This concept of the best citizen and proxy citizen was constantly reflected in the politics of both nations and also has its space in the constitutional debates of the Constitution of India, relating to Article 6 and Article 7.[6] Though India declared itself as 'secular.' country in the Preamble to its Constitution through 42nd Constitutional Amendment Act, 1976,[7] still the bias related to proxy citizens is visible in its policies, and the contemporary space was reflected in the 2019 Citizenship Amendment Act. This paper will trace the existence of this bias and the rise of Communal politics in India, which is visible in its present-day citizenship laws. It will analyze the historical disadvantage faced by Muslims in the state of Assam and how the coming of CAA and talks of extension of NRC to the whole of India will lead to a rise of this bias and Islamophobia creating a situation similar to that of Assam in the entire country. Finally, the paper shall highlight how a correct interpretation of Article 14 of the Constitution of India can help prevent the havoc that this implementation may cause.

## 2. THE RELIGION-CENTRIC POLITICS

Politics based on religion is not new in India and can be traced back to the colonial period, post the 1857 mutiny, when both the Hindus and Muslims joined forces against the Britishers.[8] This led to the British administration forming a divide and rule policy, the impact of which is visible till date in the present day India in which partition of India and Pakistan on religious lines

[3] INDIA CONST, Part 2.
[4] Nirja Gopal Jayal, *Citizenship and its Discontents: An Indian History* (Harvard University Press, 2013).
[5] Willem Van Schendel, 'Stateless in South Asia: The making of India- Bangladesh Enclaves', 16 (1) The Journal of Asian Studies, 115, 2002.
[6] Constituent Assembly Debates, 10 August 1949, Vol. ix.
[7] INDIA CONST, 42nd Amendment Act 1976.
[8] Neil Stewart, 'Divide and Rule: British Policy in Indian History,' 15 (1) Science and Society, 49 (1951).

played one significant contributing role. The impact of partition reflects in its worst form in the citizenship law of the country, where at the beginning of citizenship allotment via the Constitution of India, different standards of assignment can be traced on the ground of religion. The methods of granting Citizenship to migrants from Pakistan showcase these standards. The influx from West Pakistan was more related to Indian Muslims who were migrating back after analyzing the poor state of West Pakistan. Thus, various filters were created under the Constitution of India for granting them Citizenship, such as issuance of a permit of permanent settlement, which was not an easy process.[9] Whereas, the influx from East Pakistan was mainly related to Bengali Hindus who were facing troubles related to forced conversion, in which case no filtering provision such as a permit of permanent settlement was required.[10] This policy discrimination shows the intention of ousting or limiting Muslim migration and accepting Hindu migration.

Even though it belonged to the time when the Constitution of India did not specify itself as a 'secular' state, there was always a the presumption in the mind of the framers at the time of the Constitutional Assembly Debates that India will be open to diversity and welcome everyone with open arms as was its traditional precedent.[11] In spite of this backdrop the most outstanding leaders behind the Constitution, such as Nehru, Vallabh Bhai Patel and Ambedkar agreed to this religion-centric politics due to their genuine concerns regarding the economic resources of India.[12] However, these concerns were not expressly documented in religious terms in the Constitution of India, and there was no the visible distinction between Hindu and Muslim migrants from Pakistan, a cover up language was used under Articles 6 and 7 by setting specific dates in a manner that Muslims who wanted to return were undoubtedly at a disadvantage when compared to Hindus.[13] The provisions contained in Part II of the Constitution of India related to Citizenship were temporary, and the power to make a proper law vested with the Parliament under Article 11,[14] in furtherance of which Citizenship Act, 1955 was enacted, which provided four grounds for acquiring Citizenship, by birth, by descent, by registration and by naturalisation.[15] But later, through the Amendment Act of 1986 *jus soli* (by birth) citizenship

[9] Abhinav Chandrachud, 'Secularism and the Citizenship Amendment Act,' 4 (2) Indian Law Review, 138, (2020).
[10] Abhinav Chandrachud, 'Secularism and the Citizenship Amendment Act,' 4 (2) Indian Law Review, 138, 142, (2020).
[11] *Ibid.*
[12] Abhinav Chandrachud, 'Secularism and the Citizenship Amendment Act,' 4 (2) Indian Law Review, 138, 141, (2020).
13 INDIA CONST 1950.
14 INDIA CONST. art. 11.
[15] The Citizenship Act 1955, No. 57, Act of Parliament (1955).

was only recognized for persons born before 1986, and anyone born after had to acquire *jus sanguinis* (by descent) citizenship only.[16] This amendment added a layer to the acquisition of Citizenship in India by ultimately moving from *jus soli citizenship* to *jus sanguinis* citizenship.[17]

## 3. THE ISLAMOPHOBIC POLITICS OF ASSAM

While this law of Citizenship was applicable to the whole of India, a significant problem arose in the state of Assam; the large amount of migration seen by the state due to migration without any permit from East Pakistan further increased in 1971 during the independence war of Bangladesh and resulted in protest in the state, whose economic resources were getting affected due to this population influx.[18] This plight of foreign influx in Assam was not new and pre-dated to colonial times when Britishers conquered Assam in 1826 and put it under the administrative control of Bengal province, after which they forced Bengali peasant-class Muslims to work in tea Plantations of Assam.[19] This migration was followed by migration post 1947 partition and the 1971 liberation war. They led to early discussions about citizenship regulation in the state and gave them a communal face.

As early as in 1931, census officer C.S. Mullan in his report laid down the foundation stone of communal politics in Assam by stating that "land hungry immigrants mostly Muslims from the districts of east Bengal... are likely to permanently alter the whole feature of Assam and destroy the whole structure of Assamese culture and civilization."[20] This communal politics became clearer in the protests by All Assam Student Union, All Arunachal Pradesh Student Union and the All Assam Gana Sangram Parishad, which were based on the premise that Assamese population is becoming a minority in Assam and thus all outsiders should be treated as foreigners, this was evident from the demand made by these unions of making the cut-off date as 1961 which shows that they didn't have a nationalist agenda, instead an agenda where they wanted to keep the diversity of Assam restricted.[21] If their demand would have been to oust

[16] *Supra* Note 2, 14.
[17] *Ibid.*
[18] Abhishek Saha, *No Land's People: The Untold Story of Assam's NRC Crisis* (HarperCollins Publisher India).
[19] *Assam Sanmilita Mahasangha v. Union of India*, (2019) 9 SCC 79.
[20] C.S. Mullan, 'Census of India, 1931, Vol iii: Assam, Part I: Report, https://dspace.gipe.ac.in/xmlui/handle/10973/37319. (Last accessed 26th May 2022).
[21] Navine Murshid, 'Assam and the Foreigner Within' 56 (3) Asian Survey, 581, (2016).

illegal immigrants from Bangladesh, the logical cut-off date would be 1971 when Bangladesh was declared independent. As Murshid in his article says,

"*The significant change which resulted from the Assam Movement's six years of mobilisation against the ''illegal Bangladeshis'' was the conflation of the identities of ''foreigner,'' ''Bangladeshi,'' and ''Bengali Muslim'' in the public consciousness Thus, from a post-partition ''understanding'' of the need to accept migrants, the political climate shifted to one that was openly xenophobic*."[22]

In order to establish a balance between this Xenophobic and Islamophobic climate and to address the claims made by AASU, AAPSU and AAGSP, Assam Accord was signed by the then Prime Minister Rajiv Gandhi in 1985 to regulate citizenship in Assam and to deport back foreigners from the state, but the cut-off date was set at 24th March 1971 instead of the 1961 date which was demanded by the unions.[23] In consequence of the accord 1986 amendment was brought in the Citizenship Act 1955, adding section 6A in the Act which specifically dealt with citizenship in Assam. With the addition of this section, while provision related to birth under section 3 of the Act still remained valid for other states of India, it became redundant for the state of Assam as anyone who entered the state after 1971 was to be automatically treated as a foreigner.

## 4. CAA AND THE CONTEMPORARY COMMUNAL POLITICS

This religious politics, which started with the British policies and was enhanced by partition, shifted for a while in the state of Assam, where politics was taking the colour of Xenophobia and Islamophobia.[24] These politics took a nationalist face with the coming of the Citizenship Amendment Act, 2019 which is made applicable to the whole of India and has seen large protests across the country, as it made religion-based provisions for the grant of Citizenship to certain migrants, specifically excluding Muslims from the list.[25] Although the Amendment Act looks like a reflection of the concept of proxy Citizenship and the older politics of India which

[22] *Id*, 597.
[23] Accord between AASU, AAGSP and the Central Government on the Foreign National Issue (Assam Accord), 15th August 1985, https://peacemaker.un.org/sites/peacemaker.un.org/files/IN_850815_Assam%20Accord.pdf., ( last accessed 27th May 2022).
[24] Manoj Kumar Nath, 'Muslim Politics in Assam: The Case of AIUDF', 7 (1) Studies in Indian Politics, 33 (2019).
[25] Ali Khan, 'Indian Muslims and the Anti-CAA Protests: From Marginalisation Towards Exclusion' (*Open edition journals*, 2020), https://journals.openedition.org/samaj/6701, (last accessed 26th May 2022).

was discussed in the CAD[26] at the time of framing citizenship provisions, specific religious terms were never used in any legislation until this Amendment Act. Through the explicit inclusion of religious communities and exclusion of the Muslim community, the action has given a defined form to religion-centric unsecular politics, the hidden structure of which existed in the country for centuries.[27] This express description gave backing to all the people possessing a communal mindset to treat the legislation as a government backing in favour of their collaborative spirit, which they saw as the policy-making way toward a *'Hindu Rashtra'*.

Various problems came to be associated with this amendment when it was read with the government declaration of extending the applicability of the National Register of Citizens to the whole of India. The NRC was for the first time introduced in 1951, along with the census to acknowledge the citizens and non-citizens of India, but it was never used as a public document and was not updated until 2015, when the Supreme Court of India through an order in the case dealing with the constitutional validity of section 6A of Citizenship Act, 1955, directed for updating the NRC in the state of Assam.[28] This updating of NRC is not an easy process and requires residents to prove their citizenship by way of various documents which can establish a linkage of their presence or their ancestors' presence in the state of Assam before 24 March 1971.[29] Due to various reasons such as natural disasters, poverty, and illiteracy, many people are unable to produce these documents and, as a consequence, are kept out of NRC and are required to appeal before the Foreigners' tribunal on the failure of which they are thrown into detention centres explicitly made for them.[30] In the updated Assam NRC, which was published in 2019, more than 19 lakh people have been declared foreigners.[31]

This in itself is a huge problem where such a vast population is practically declared stateless, with no place to go and no place to seek rights, which is clearly in violation of the fundamental rights of the Constitution of India, which are available to all persons, whether citizen or not and in violation of basic Human Rights treaties of which India is a signatory.[32] As a solution to

[26] *Supra* Note 4.
[27] *Supra* Note 7.
[28] *Supra* Note 17.
[29] Priya Pillai, 'India's Cruel Exercise in Exclusion Could Leave Millions Stateless' (*The Washington Post*, 1st August 2019, https://www.washingtonpost.com/opinions/2019/08/01/indias-cruel-exercise-exclusion-could-leave-millions-stateless/, (last accessed 26th May 2022).
[30] *Ibid.*
[31] *Supra* note 16, 3.
[32] Andrea Marilyn Prahasini Immanuel, 'The Meaning of 'Life' under the Indian Constitution and the Obligation Not to Render Persons Stateless: With Reference to the NRC in Assam', 3 Statelessness & Citizenship Rev 186 (2021).

this problem comes from the unsecular CAA 2019, which states that any a person who is a Hindu, Buddhist, Jain, Sikh, Parsi, or Christian belonging to Afghanistan, Bangladesh, and Pakistan and who came to the territory of India on or before 31 December 2014 and has been residing in India for a period not less than five years may acquire the Citizenship of India by naturalisation.[33] This implies that all those non-Muslim persons who have been excluded from NRC as of now, if they fulfil the above-mentioned conditions, they can easily apply to be citizens of India, whereas the Muslims who have been declared foreigners fall into absolute statelessness. This state in Assam is only a tiny picture of what will follow with the extension of this NRC process when read with CAA 2019 in India. It is a complete picture showing the exclusion of the Muslim a population who might be unable to produce records of their birth or their ancestors in the territory of India under section 3 of the Citizenship Act and portrays the spread of contemporary Islamophobic and communal politics in the citizenship law of the country.

## 5. THE LENS OF CONSTITUTION

On direct analysis of this policy through the lens of the Constitution of India, where through the 42nd amendment in 1976, the word 'secular' has been added to the preamble of the Constitution, the provisions made by the CAA 2019 specifically providing communities who may receive citizenship benefits seem unconstitutional. Even when the government argues that they have given specific rights to minorities suffering religious persecution in particular states, still the state is liable to fulfil its obligations under Article 14 and Article 21 of the Constitution, which provides the right to equality and the freedom to live to every person whether a citizen or not.[34] If the state is willing to violate these rights it must fulfil the proportionality test principle given by the Supreme Court of India in the Puttaswamy (privacy) judgement,[35] showing that the exclusion of categories from CAA would bear some rational nexus with the object sought to be achieved.[36] If the thing sought to be performed, is protection of minorities under religious persecution from neighbouring states, then why only three neighbouring countries and not all its neighbouring countries.[37] If the argument is that, it is only for countries that were under colonial rule and which were part of the partition, then why Afghanistan? And

[33] Citizenship Amendment Act 2019, Act No. 47, Act of Parliament (2019).
[34] INDIA CONST. art. 11, 14.
[35] *K.S. Puttaswamy (Privacy-9J) v. Union of India*, (2017) 10 SCC 1.
[36] *Supra* Note 7.
[37] *Ibid.*

even if these countries are adopted, then what about Ahmadiyya Muslims who are a persecuted community in Pakistan, and what about Muslim women in Afghanistan who are under constant threat of persecution and are living a right-less life.[38] There are many such questions that arise when we look at CAA through the lens of Article 14 and the tests developed for its interpretation, and all of this show how if CAA is put through the examination of constitutionality, the presumption of legislative constitutionality will break, and it will fail Article 14 and the tests made there.

The Indian Union Muslim League filed a petition challenging the constitutionality of this law the very next day of its commencement. Today approximately 140 petitions have been filed in the apex court of India challenging CAA.[39] Still, even after three years of its inception, the Supreme Court thinks it is something other than a matter worth considering. A reason behind this may be the country's current political scenario where the supreme court is side-lining all the questions related to government administration of the country, whether it be related to CAA or about making extremely harsh laws in matters related to Muslim personal rules such as Triple Talaq. All these laws and policies and the abstinence of the Supreme Court of India to act on the challenges against such policies show the constant rise of Islamophobia in the state, the most fearful of which is the current citizenship law of the country in which "the production of legacy papers as proof of citizenship" has been called by activist and journalist Arundhati Roy as an "upturned version of Nazi Germany."[40]

## 6. A NECESSARY DEFENCE

The arguments of this paper can be critiqued by asserting that a significant part of the fundamental rights chapter does not apply to foreigners therefore, there is no interrelation between the National Register of Citizens and the Citizenship Amendment Act. In this part, the authors will attempt to refute those claims and argue that the Indian Constitution has an application to NRC issues.

[38] Sussannah George, 'Taliban orders head-to-toe coverings for Afghan women in public' (*The Washington Post,* 27 May 2022), https://www.washingtonpost.com/world/2022/05/07/taliban-orders-head-toe-coverings-afghan-women-public/, (last accessed 26th May 2022).

[39] Apoorva Mandhani, 'CAA case comes up just thrice in 1 year in SC despite 140 pleas, including from UN body' (*the Print,* 6 January 2021), https://theprint.in/judiciary/caa-case-comes-up-just-thrice-in-1-year-in-sc-despite-140-pleas-including-from-un-body/579837/, (last accessed 26th May 2022).

[40] 'Efforts being made to normalise Islamophobia, says Arundhati Roy on CAA, NRC' (*Indian Express,* 24 January 2020), https://www.newindianexpress.com/nation/2020/jan/24/efforts-being-made-to-normalise-islamophobia-says-arundhati-roy-on-caa-nrc-2093976.html, (last accessed 26th May 2022).

The argument that can be made against the authors' opinion in this paper is that there is no interrelation between Article 14 and Article 15[41] of the Indian Constitution. Furthermore, Article 14, although applicable to non-Indian citizens, imposes a reduced burden upon the state to justify the constitutionality of an Act in contrast to Article 15 of the Constitution.[42] Therefore, the argument that NRC and CAA violate the equality clause of the Indian Constitution generally equates adjudication under Article 14 to adjudication under Article 15.

The authors will refute this view on two fronts. First, we will assert that Citizenship is a question of entry into a group. Therefore, these claims must be adjudicated similarly to a share of the members of that group. Secondly, we will favour judging these laws in light of intersectional discrimination.

In the Indian Constitution, the equality clause has been inserted through multiple Articles. One of them is Article 15, which prohibits state discrimination on specific grounds.[43] Then there is Article 14; this Article imposes a burden upon the state not to indulge in discriminatory activity. An essential question is why two separate Articles in the Constitution impose similar responsibilities upon the state. The answer to this question lies in India's historical past.

When the constituent assembly was debating the equality clause in the community, they felt that specific grounds of discrimination were responsible for significant discriminatory activities in India. If the Indian administration can restrict discrimination on these grounds, they will be able to bring some equality to Indian society.[44] This, in centrality, means that the constituent assembly never intended to distinguish between Article 14 and Article 15 of the Constitution. What the community wanted was to focus on some specific regions or grounds of discrimination that are inherently internalised by Indian society. Therefore, the assembly did not believe there had to be any distinction between Article 14 and Article 15 discrimination.

Hence, the view that CAA and NRC must have reduced burden to justify their existence under Article 14 in contrast to Article 15 is inconsistent with the opinions presented in the constituent assembly.

[41] INDIA CONST. art. 15.
[42] Dhruva Gandhi, Locating Indirect Discrimination in India: A Case for Rigorous Review under Article 14, 13(4) NUJS Law Review, (2020).
[43] The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
[44] Constituent Assembly Debates, 10 August 1949, vol vii.

If the adjudication mechanism under Article 14 and Article 15 is the same; it cannot be argued that a non-citizen must be treated differently from a citizen. Hence, the adjudication mechanism in the context of CAA and NRC must be similar to any other legislation introduced by the government of India.

Even under Article 14 of the Constitution, the new approach of intersectional discrimination makes CAA and NRC unconstitutional. The concept of intersectionality has become an essential part of discrimination law. Intersectionality[45] means considering various facets of prejudice as one. For example, if A discriminates against a woman who is black. Then while considering this case, the court must not look upon the victim's identity as a woman or black. The court must consider these identities together. It will help the court appreciate discrimination aptly. In the last few years, the Indian Supreme Court has recognized intersectionality in its equality jurisprudence.[46]

The concept of intersectionality enhances the approach of any adjudicatory body to cover complex cases in a Dworkinian sense. It ensures that those cases which are marginal and can escape the wrath of the law due to their marginality can be covered under the equality clause. Intersectionality assures that ground 'plus' something cannot become a reason for inequality to continue. As can be argued while relating gender and religion in the context of CAA and NRC.

In the present paper, we have earlier argued that the CAA and NRC are violative of Article 14 due to the extension of extensive adjudication of Article 15 to Article 14. However, here we will argue that CAA and NRC are violative of Article 14 by itself due to the intersectional discrimination done by the Act based on religion and gender. The impact of CAA and NRC can be seen in the lives of women. There are numerous cases where names of women have been left out of the NRC list because they could not present appropriate documentation.[47] This occurred because, in a traditional Indian family, women are not considered equal to men. Due to this, on many occasions, no one assures that women have proper documentation. When we think about this scenario and the people to whom the law applies, we find that a significant population of Muslim women may lose their Indian Citizenship. Therefore, using CAA and NRC results in discrimination against Muslim women. However, without involving

[45] Shreya Atrey, Intersectional Discrimination, (Oxford University Press, 2019).
[46] Navtej Singh Johar v. Union of India, AIR 2018 SC 4321.
[47] Designed to Exclude, Amnesty India, https://learn.nls.ac.in/pluginfile.php/12947/course/section/8411/Amnesty%20India%2C%20Designed%20to%20Exclude%20%282019%29.pdf. (last accessed 31 July 2022).

intersectional discrimination, the court will check the validity of legislation based on gender or religion. Due to this, the burden on the petitioner to prove discrimination will increase. However, if the courts use the concept of intersectionality, it will be much easier for them to find the bias in these complex scenarios.

The Citizenship Amendment Act and the National Register of Citizens create a complex discrimination scenario. Therefore, to resolve this complicated case, the court needs to increase its approach towards definition of equality including intersectional discrimination within it. This will help them improve equality in Indian society and in better recognition of rights.

## 7. CONCLUSION

India always had some divisive policies in place historically and even during the framing of the Constitution. Still, these policies were never explicit and were always made calmly. The circumstances and conditions of today's India are very different from those that existed at the time of Independence; the country is more stable and resourceful now than it was before, and the reason for the divisive policy at the time of Independence was ordered to maintain peace and order and to avoid communal violence in a compassionate, newly divided India. But, today, with changed circumstances and the promise of a secular state imbibed in the preamble of the Constitution of India, it is necessary that the rising Communal atmosphere of the country be regulated. The judiciary is the guardian of the spirit of the Constitution, and thus it must prevent the failure of the Constitution. The creation of a law such as CAA looks like an open weapon in the hands of the state, which can be very quickly used for untoward purposes. Thus, the judiciary must come forward to control this arbitrary weapon.

Although CAA 2019 is not the only problem in the country's citizenship law, there are various other significant issues, such as the reverse burden of proof, rights of children who are declared foreigners, etc., which pose big questions and need to be addressed. But CAA 2019 is one such problem that can shape into a dangerous form of religious persecution.

# ETHNIC PLURALISM: A STUDY OF WOMEN'S RIGHTS AND CUSTOMARY LAWS IN NAGALAND

*Muskan Lalwani*[1]

***Abstract***

*The political landscape of Nagaland presents a colourful tapestry of policies, tribal leanings, and shrewd politicking amid the problems of insurgency and social conflict. The cultures, values, and systems of governance among the tribes are so different. The interface between the state and customary law in Nagaland is quite intriguing. It has its share of inconsistencies, contradictions, inherent tensions, and movements.*[2] *In 2017, the government of Nagaland decided to impose 33% reservation for women in urban local bodies. Men from different parts of the state came out to protest against the reservation and it eventually turned violent leading to burning down of government offices in the capital, deaths, and finally resignation of the then Chief Minister. Even after the apex court's order, the elections are yet not held and are not going to happen anytime soon. And in the name of customary freedom, Naga women will be again denied their rights granted to them under Indian Constitution. This is the prominent reason to study the customary freedom granted to Nagaland under Article 371A, its implications on women's rights, and the present status of women in Nagaland, and why there has been a protest against the rights of women.*

***Keywords:*** *Naga, Customary Law, Art. 371A, Women, Election.*

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[2] Avitoli Zhimo, *"Indigenous System of Governance and its Implication: The case of Nagaland"* 49, INDIAN ANTHROPOLOGIST, 41, 42 (2019).

## 1. INTRODUCTION

The 16th state of India, A land of immense beauty, 16 major tribes, and a land with a rich cultural heritage- Nagaland. Each "Naga tribe" is distinct from the others in customs, traditions, dress, and language. The village still continues to be the centre of all social, cultural, and political activities of the village. The village headman is elected by members of the village, who act as a government and judiciary of the state.

The Nagas practices a rudimentary practice of delivering justice based on simplicity and truthfulness.[3] Personal matters like divorce, marriage, and adoption are initially settled by the clan elders and an appeal lies in the village council, the final adjudicating authority. [4]

The ideas of cooperative and asymmetric federalism that see an interplay between the Centre and the states in the world's largest democracy are embraced in the Constitution of India itself. This supreme charter is the sole instrument governing the fate of a diverse population spread across a vast geographical area. Asymmetric federalism is not foreign to constitutional democracies around the world. Louise Tillin's essay titled 'Asymmetric Federalism'[5] in The Oxford Handbook of The Indian Constitution, mentions that "the granting of differential rights to certain federal sub-units, and the recognition thereby imparted for distinct, territorially concentrated 'ethnic' or 'national groups', is a common feature of federalism in pluri-ethnic or pluri-national settings".[6] In Indian Republic, the founding fathers specifically accommodated this feature in Part XXI[7] of the Constitution, which provides for 'Temporary, Transitional and Special Provisions'. The prominent state of Jammu and Kashmir held special status under Article 370 was conferred through part only. Later, through constitutional amendments, parliament accorded the special status to various states including Nagaland, under article 371A in 1962, through the Constitutional (Thirteenth Amendment) Act.

Article 371[8] (A) states that no act of parliament shall apply to the state of Nagaland in respect of the religious or social practices of the Nagas, its customary land, and the procedure

[3] Moatoshi Ao, *Naga Customary Law vis-à-vis the advent of administration*, RESEARCH GATE (Feb.2, 2023, 1:55 PM), www.researchgate.net/profile/Moatoshi-Ao/publication/328943252_Naga_Customary_Law_Vis-a-vis_the_Advent_of_Administration_Historical_Legal_Frame_Work_and_Impact_on_Adjudication/links/5bec823c4585150b2bb60c4c/Naga-Customary-Law-Vis-a-vis-the-Advent-of-Administration-Historical-Legal-Frame-Work-and-Impact-on-Adjudication.pdf.

[4] *Id*. at 3.

[5] Louise Tillin, "*United in Diversity? Asymmetry in Indian Federalism*." 37, JO PUBLIUS, 45, 47 (2006).

[6] Mahalaxmi Pavani, *"A Curious Case*", DECCAN HERALD, (Aug.31, 2020, 2:04 PM) www.deccanherald.com/opinion/main-article/a-curious-case-880268.html.

[7] INDIA CONST. part 21.

[8] INDIA CONST. art. 371, cl. (A).

administration of civil and criminal justice involving decisions according to Naga customary law and ownership. Any act would only be applicable if the Nagaland state assembly passes a resolution to do so. Nagaland was created in 1963 after the Centre and the Naga people's convention was held in 1960, through which Article 371A was inserted in the Constitution of India.

However, the constitutionally granted Fundamental rights of Naga Women, stand denied by the Legislative Assembly of Nagaland under the purview of Art.371A. A Naga woman is not allowed to inherit immovable properties, and most importantly, has *absolutely no say in the public domain*. In the history of the state of Nagaland, so far not even a single woman has been elected to the legislative assembly.[9] The Nagaland government decided in 2017 to implement a 33% reservation for women in urban local bodies. Men from all walks of life came out to protest against the reservation which eventually turned violent resulting in the burning down of government offices in the capital, a few deaths, and finally resignation of the then Chief Minister.[10]

This paper attempts to study the legal history and constitutional recognition given to the state of Nagaland in its religious or social practices and to see the impact of conflict between customary law and formal law, and the status of women under the same.

## 2. STATUS OF WOMEN

Men and women share the same geographical space, but women are treated less favourably than men everywhere in the world. In reality, women's access to education, health care, physical and financial resources, and opportunities in political, economic, social, and cultural fields is unequal. The civilization's progress is judged on the basis of worth given to women in society, and India's ancient culture has always granted an honourable place to women. It was mostly after Independence that Indian women gained considerable importance in social and political spheres within the country.[11]

[9] Angana Chakrabarti, Just 2 women MPs, no MLAs since 1963: Why women's representation in Nagaland continues to lag, The Print, (Feb.5, 2023, 2:13 PM) https://theprint.in/politics/just-2-women-mps-no-mlas-since-1963-why-womens-representation-in-nagaland-continues-to-lag/892793/.

[10] Linda Chhakchhuak, Demand for Women-Reservation in Nagaland Is Only One Reason for a Spate of Violence in the State, The Outlook, (Feb.5, 2023, 5:00 PM) https://www.outlookindia.com/website/story/demand-for-women-reservation-in-nagaland-is-only-one-reason-for-a-spate-of-viole/297853.

[11] Dr. Ira Das, *Status of Women: North Eastern Region of India versus India*, 3 IJSRL, 1, 1 (2013), https://www.ijsrp.org/research-paper-1301/ijsrp-p1322.pdf.

Women were substantially involved in the Indian independence movement in the early 20th century and advocated for independence from Britain. Independence brought gender equality in the form of constitutional rights, but historically women's political participation has remained low.[12] The Constitution of India establishes a parliamentary system of government and guarantees its citizens the right to be elected, freedom of speech, freedom to assemble and form associations, and vote. The Constitution of India attempts to remove gender inequalities by banning discrimination based on sex and class, prohibiting human trafficking and forced labour, and reserving elected positions for women.[13] The Government of India directed state and local governments to promote equality by class and gender including equal pay and free legal aid, humane working conditions and maternity relief, rights to work and education, and raising the standard of living, but these benefits remain only on paper.[14]

There is no denial that women in India have come a long way in the past fifty years, but they still have to battle many societal ills and evils in a male-dominated society where enacting laws is one thing, but assimilating them into society's collective consciousness is quite another. They are fighting hard to free themselves from the bonds of slavery and superstition in order to prove that they are worthy of the dignity and status accorded by the Indian Constitution.

Women's lower status is manifested in women's low wage rates than men in all occupational fields and industries, in their limited upward mobility, and their greater family responsibilities due to divorce, abandonment, etc. in developed countries.[15] In developing countries, women's lower status is reflected not only in their work being underpaid and unrecognized but also in their limited access to productive resources and support services such as health and education.[16]

**Position of Women under the Indian Constitution:** Gender equality means a society wherein both women and men enjoy the same opportunities, rights, and obligations in different spheres of life. Equality in decision-making, economic and social freedom, equal access to education, and the right to practise an occupation of one’s choice. Gender equality is enshrined in the Indian Constitution in its Preamble, Fundamental Rights, Fundamental Duties, and Directive

[12] Bijoy Prasad Das, *Empowerment of Women in India: The Changing Scenario and its Implications*, 4 NSOU-OPEN JOU.8, 8 (2021), http://www.wbnsou.ac.in/openjournals/Issue/2nd-Issue/July2021/2_Bijoy.pdf. (Last visited May 2,2023 7:56 PM).
[13] *Id.* at 12.
[14]DR. P. THAVITHATHULASI, WOMEN IN DIFFERENTIAL FIELDS - ISSUES AND CHALLENGES, (Archers & Elevators 2016).
[15] IRA DAS, *supra* note 11, at 1.
[16] *Id* at 1.

Principles. The Constitution not only grants equality[17] to women but also empowers the State to adopt measures of positive discrimination in favour of women.[18] Within the framework of a democratic polity, our laws, development policies, Plans, and programmes have aimed at women's advancement in different spheres.[19] India has also ratified various international conventions and human rights instruments committing to secure equal rights for women[20].

The Constitution of India not only grants equality to women but also empowers the State to adopt measures of positive discrimination in favour of women for neutralising the cumulative socio-economic, educational, and political disadvantages faced by them.[21] Fundamental Rights, among others, ensure equality before the law[22] and equal protection of the law; prohibits discrimination against any citizen on grounds of religion, race, caste, sex, or place of birth,[23] and guarantees equality of opportunity to all citizens in matters relating to employment.[24] Even in the political sphere, women are provided with reservations to achieve equality.

To further achieve the objective of gender equality and equal representation, the Constitutional 73rd, and 74th Amendments were passed by Parliament in December 1992. These were done to achieve the objective of local self-governance. The Acts came into force as the Constitution (73rd Amendment) Act, 1992 on April 24, 1993, and the Constitution (74th Amendment) Act, 1992 on June 1, 1993. These amendments added two new parts to the Constitution, namely, the 73rd Amendment added Part IX titled "The Panchayats" and the 74th Amendment added Part IXA titled "The Municipalities". The Local bodies– 'Panchayats' and 'Municipalities' came under Part IX and IXA of the Constitution after 43 years of India becoming a republic.[25] These provisions paved a way for women to enter into local governance as well and created for reserving seats for women.

17 INDIA CONST. art.14.

18 INDIA CONST. art.15.

[19]MINISTRY OF WOMEN & CHILD DEVELOPMENT, https://wcd.nic.in/womendevelopment/national-policy-women-empowerment (last visited Feb.7, 2023).

[20] *Id.*

[21] *Id.*

[22]*Supra note* 17.

[23] *Supra note 1*8.

[24] INDIA CONST. art.16.

[25]PANCHAYATI RAJ SYSTEM IN INDEPENDENT INDIA, https://www.pbrdp.gov.in/documents/6205745/98348119/Panchayati%20Raj%20System%20in%20Independent%20India.pdf. (Last visited on Feb.7, 2023).

Article 243,[26] provides for:

a. Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Panchayat to be reserved for women and such seats to be allotted by rotation to different constituencies in a Panchayat (Article 243 D (3)).
b. Not less than one-third of the total number of offices of Chairpersons in the Panchayats at each level to be reserved for women (Article 243 D (4)).
c. Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Municipality to be reserved for women and such seats to be allotted by rotation to different constituencies in a Municipality (Article 243 T (3)).
d. Reservation of offices of Chairpersons in Municipalities for the Scheduled Castes, the Scheduled Tribes, and women in such manner as the legislature of a State may by law provide (Article 243 T (4)).
e. Further Article 243M (1) provides that this Part shall apply to the Scheduled Areas referred to in clause (1) and the tribal areas referred to in clause (2) of article 244.

(2) This Part shall apply to (a) **the States of Nagaland, Meghalaya, and Mizoram;** (b) the hill areas in the State of Manipur for which District Councils exist under any law for the time being in force.

This amendment was to ensure that one-third of the total seats are reserved for women in all elected offices in local bodies whether rural or urban, to achieve the objectives of gender equality. The amendment specifically also applies to the state of *Nagaland and Mizoram* but has not been implemented by the State Legislature of Nagaland yet.

Also, when it comes to ground reality, the situation is very different and in villages, women are made nominal head/ sarpanch while their husbands work on their behalf and enjoy the title and benefits (sarpanch pati), and then there are states like Nagaland, ironically hiding behind the veil of constitutional privilege, to override the constitution. So, in the later part of the paper, we will look at the present status of women in Nagaland.

[26] INDIA CONST. art 243.

**a. Status of Women in Nagaland:** Colonel McCullock described the Naga women in 1854: "In the grey of the morning the females of the family are astir and the village resounds with the blows of the long pestle in the wooden mortar beating out the rice from the husk. When finished, lunch is cooked both for the family and the pigs. Later, the women proceed for water, which they fill into bamboo tubes and bring on their backs in baskets. Then they go for firewood, and this brought, they set about the internal economy of the house; that is, .to see to their husbands' drink being in proper quantity and quality, to their spinning or their weaving, or any of the other household occupations, an act in which they have no pride."[27]

Naga society lacks the rigid hierarchical structure of Hindu society, which is based on caste and class. Despite its vibrancy, the Hindu class/caste system has yet to infiltrate the Naga social system. Naga society is classless and casteless. It has a strong sense of equality founded on community participation, regardless of gender. Everyone has equal rights in social, cultural, and religious matters. In some communities, women hold a higher social status than men. Indeed, the Nagas have the most unprejudiced social structure.

Many women in more civilised parts of India may well envy the women of the Naga Hills for their high status and their free and happy life; and if you measure the cultural level of a people by the social position and personal freedom of its women, you will think twice before looking down on the Nagas as 'savages'.[28]

A majority of the Naga population lives in villages. The Naga village is a well-defined entity having its own village land with distinct demarcation.[29] The village is held together by social, economic, political, and ritual ties. They have always lived peacefully but are also ready to fight for their customs and traditions. Nagaland saw the torching of dozens of government buildings by tribal organisations in February 2017.[30] The protest was in response to the 33% reservation for women in municipal elections. As a result, the state government was forced to postpone the elections. But then the protesters demanded that the chief minister resign.

There is a *paradox* regarding the position of women in tribal societies of Nagaland and it must be seen in the light of their social status vis-à-vis political status. The social status of women in Nagaland is so high that it has created a false perception of "matriarchy" in the rest of India. The state has high female literacy rates, high female enrolment in higher education, and women

[27] U. A. SHIMRAY, *Equality as Tradition: Women's Role in Naga Society*, 37, Econ. & Pol. Weekly 375, 377(2002).
[28] CHRISTOPH VON FURER-HAIMENDORF, THE NAKED NAGAS 101, ((Methuen & Company Ltd. 1939).
[29] *Id*. at 101.
[30] *Supra note 9.*

are well-represented in government jobs. The women in Naga tribes enjoy higher respect, safety, and security, and the National Crime Records Bureau (NCRB) figures, reveal that women in Nagaland are the *safest in the country* with only 54 crimes registered against women in 2021[31] and the practices like dowry, sati, female foeticide, and infanticide are almost missing in Naga tribes.

However, in terms of political status, there is an underlying gender bias and inequality in women's political participation. The first Assembly election in Nagaland was held in 1964 and to date, no woman had won any MLA seat. The Tribal societies of Nagaland are very much *patriarchal in nature*, characterised by male-dominated tribal bodies. In a patriarchal society, opposition to women's participation in decision-making is a centuries-old practice. Customary laws of Nagaland prohibit women from inheriting land as well.

Article 371(A)[32] protects the social, cultural, and customary practices of the Nagas. It states that 'no Act of Parliament in respect of religious or social practices of the Nagas, Naga customary law, and procedure, administration of civil and criminal justice involving decisions according to Naga customary law, ownership and transfer of land and its resources, shall apply to the State of Nagaland unless the Legislative Assembly of Nagaland by a resolution so decides.'[33]

However, Article 371(A) is contradictory to Article 243(D) which guarantees reservations for women. The Legislative assembly of Nagaland rejected the Women Reservation Bill which guarantees reservation to women in the local bodies, on the ground that Naga customary law does not allow women to participate in decision-making and justified it under Art.371A of the Constitution of India.[34] The Naga Customary Law also does not give women the right to inherit ancestral property. No female can inherit the family landed property, except in some exceptional cases where landed property is given to the daughter as a marriage gift. However, no ancestral property can be given to the daughter(s). In case there is no male in the household, the property goes to the nearest among the clan members.[35]

[31] NATIONAL CRIME RECORD BUREAU, https://ncrb.gov.in/sites/default/files/CII-2021/CII_2021Volume%201.pdf., (last visited on Feb. 7, 2023).
[32] INDIA CONST. art. 371A.
[33] *Id.*
[34] *Supra* at 3.
[35] *Supra* at 29.

Article 14 and 15 of the Constitution prohibits gender and sex discrimination, Article 13[36] declares that any law, regulation, custom or usage, etc. inconsistent with the fundamental rights, shall to the extent of such inconsistency be void. So, the denial of women's participation in the customary authority prima facie appears to be violative of Articles 13, 14, and 15 of the Constitution of India.

So, the question here arises is, "Can Article 371A override the Fundamental rights?"

In the case of *State of Nagaland v. Rosemary Dzuvichu and others,*[37] the Kohima Bench allowing the petition ordered the state to hold the Municipal and Town Councils elections in accordance with the reservation of seats for women as provided under Article 243T of the Constitution of India and Section 23A of the Nagaland Municipal Act, 2001 as amended in 2006.

On appeal by the state against the order of the Kohima Bench, the Guwahati High Court reversing the Kohima Bench order held that: "In contradistinction, the proposition that an Act of Parliament in respect of the themes set out in Article 371A(1)(a) would apply to the State of Nagaland only if the Legislative Assembly of the State by a resolution so decides not only accords with the tenor, temper and sentiment of the architects of this constitutional provision with the singular outlook of ensuring maximum autonomy to the Naga community and the tribal State comprised of it, but also the language applied in harmony with the spirit and psyche thereof. The plea that in this unique contextual premise the framers of the Constitution had visualised the innate obligation of the Legislative Assembly of the State of Nagaland to scrutinise every Act of Parliament bearing on the fields of the legislation envisaged in Article 371A (1)(a) comments for acceptance. The impugned resolutions of the Nagaland Legislative Assembly to this effect, therefore, in our view, cannot be repudiated to be incompetent and/or constitutionally barred."[38]

The judgment of the Guwahati High Court was challenged before the Supreme Court and after almost a decade, the Supreme Court in February 2022 in an impleadment application[39] giving the state government a six weeks' time to submit the report of the Committee formed to further the object of holding elections in terms of the prayer made by the petitioner remarked with a

[36] INDIA CONST. art. 13.
[37] State of Nagaland v. Rosemary Dzuvichu and Others, (2012) 3 Gau. LR 817: AIR 2012 Gau. 6.
[38] State of Nagaland v. Rosemary Dzuvichu and Others, (2012) SCC Gau. 289.
[39] People's Union for Civil Liberties (PUCL) v. The State of Nagaland, Civil Appeal No. 3607/2016.

note of regret that "gender equality issue is getting postponed which is difficult to accept and if the state fails to do so, it will get it done judicially by the judiciary."

But the same was not complied with and again in July 2022, Supreme Court slammed Nagaland Government for delaying reservation to women in local bodies and refused to dispose of the matter, saying "we have no trust in the way the State government is doing things". [40] Further the court has directed the State Election commission to finish the conduct of election by January 2023.[41]

Let's assume that the Supreme Court's final decision goes in favour of women's reservation and it orders the state to effectively implement the provisions of Article 243T, still the issue of gender equality will not end here. Customary law would still conflict with other issues such as representation in customary authorities and inheritance of ancestral properties. In terms of political status, there is an underlying gender bias and inequality in women's political participation.

The most important reason behind the opposition is the economic connotations inherent in politically empowering women through reservations. There is a fear that if women are allowed to function in Urban Local Bodies (ULBs) then they would finally have a say in how resources are used and shared in towns, which can then easily spill over to the villages. The assumption is that the political powers give way for economic powers and this will disrupt the status quo of the patriarchal society which has successively marginalised women politically and economically for centuries.[42]

**Response of the State:** The first civic body elections were held in 2004, in accordance with the Nagaland Municipal Act of 2001. In 2006, the Nagaland Municipal Act of 2001[43] was amended to include a 33 per cent reservation for women in line with the 1992 Constitutional amendment. Many Naga groups contended that the reservations are in contravention with Naga customary laws as enshrined in Article 371(A) of the Constitution — which accords the state special status and protects its traditional way of life[44]. Elections to ULBs in Nagaland was due

[40] THE HINDU, https://www.thehindu.com/news/national/other-states/supreme-court-nagaland-govt-delay-notifying-elections-urban-local-bodies/article65638965.ece, (last visited Feb 8, 2023).
[41] NORTHEAST NOW, https://nenow.in/north-east-news/nagaland/sc-directs-nagaland-election-commission-to-complete-local-body-election-process-by-january-2023.html, (last visited on Feb.8, 2023).
[42] GK TODAY, https://www.gktoday.in/topic/nagaland-issue-status-of-women-and-opposition-to-33-reservation/, (last visited on Feb.8, 2023).
[43] The Nagaland Municipal (First Amendment Act, 2006) § 23A- 23B, No.4, Acts of Nagaland State Legislature, 2006 (India).
[44] IASBABA, https://iasbaba.com/2022/04/33-reservation-for-women-in-civic-bodies-in-nagaland/, (last visited on Feb 8, 2023).

in 2010 but could not held due to legal wrangles and opposition against the 33% women reservation.

When the Nagaland state government decided to conduct the 2017 municipal election and implement the 33% reservation for women, male tribal bodies began protesting. Initially, church elders and civil society leaders were called upon to mediate a temporary truce. The government agreed to postpone the elections, and tribal organisations agreed to end their opposition campaign. The administration did, however, allow elections to be held in certain districts that were not opposed to the reservation. The male protestors responded by calling for a return to the streets.

On 5 March 2017, the Central Nagaland Tribal Council (CNTB) issued an order to "restrain" youth and women who were speaking up for 33% reservation.[45] State security forces killed three male protesters who were attending public meetings organised by male tribal bodies.[46] During the weeks to come, mobs organised by tribal associations burnt down public property.[47] In an attempt to quell the unrest, the government resorted to censorship of social media and the internet. The protesters blamed the government of Nagaland for failing to consult 'the people', in other words, the male tribal bodies and authorities.[48] Condemning the government of Nagaland for being 'anti-Naga people' and disrespecting customary practices and culture, the violent protests intensified. As a result, the urban local bodies' election was postponed indefinitely and the Chief Minister of Nagaland, Mr. T.R. Zeliang was forced to step down and hand over power to his colleague Dr. Shurhozelie Leizitsu.[49]

It is extremely unfortunate that the state government could not put an end to the violent protests against women's reservations. Equally heinous is the failure of the state's civil and police bureaucracies to uphold the rule of law. The issue has also highlighted the law-and-order situation and poor infrastructure in India's north east. *The Supreme Court has currently directed the election commission to complete the election process by January 2023.*

[45] Dolly Kikon, *Nagaland and the fight for a women's quota*, OPEN DEMOCRACY, (Feb.8, 2023, 6:40 PM), https://www.opendemocracy.net/en/5050/nagaland-fight-for-women-quota/.
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*

**What is the Way Forward?**

In the present time customary law must accommodate women's fundamental rights. Not all customary law, which was mostly codified during the colonial era, can meet the aspirations of Naga women in the twenty-first century. Since the first elections in 1964, no woman has been elected to the state assembly. Half of the state's population cannot be denied democratic representation in the name of customary laws and traditions. Nagaland must amend its customary law to end women's subordination. The customary freedom granted by Article 371A could thus be used to the benefit or detriment of women, and the Parliament can amend or repeal the provision to balance the competing interests.

The Bombay Prevention of Hindu Bigamous Marriages Act, 1946 was challenged as violative of the Fundamental Rights under Articles 14, 15 and 25 of the Constitution in the State of *Bombay v. Narasu Appa Mali.*[50] The Bombay High Court observing that marriage is a social institution in which the state is vitally interested and it is a measure of social reform of the state and therefore the state is empowered to legislate under Article 25 Clause (a) and (b) of the Constitution, held that, "A question has been raised as to whether it is for the Legislature to decide what constitutes social reform. It must not be forgotten that in democracy the Legislature is constituted by the chosen representatives of the people. They are responsible for the welfare of the State and it is for them to lay down the policy that the State should pursue. Therefore, it is for them to determine what legislation to put up on the statute books in order to advance the welfare of the State."[51]

The Muslim Personal Law that permits polygamy, the Muslim Women (Protection of Rights on Divorce Act, 1986 and Section 2 of Dissolution of Muslim Marriages Act, 1939 was challenged as infringing Articles 13, 14 and 15 of the Constitution and therefore void in *Ahmedabad Women Action Group v. Union of India.*[52] The Hon'ble Supreme Court refusing to take cognizance of the matter held that "the issues raised involve questions of State policy with which the court does not ordinarily have any concern. The remedy lies somewhere else (meaning the Legislature) rather than the courts."[53]

[50] State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84.
[51] *Id*. at para 7.
[52] Ahmedabad Women Action Group v. Union of India, AIR 1997 SC 3614.
[53] M.P. JAIN, INDIAN CONSTITUTIONAL LAW, 868 (7th Edition, 2014).

The Chota Nagpur Tenancy Act, 1908 was challenged as discriminatory and ultra vires Article 14 of the Constitution in *Madhu Kishwar v. State of Bihar*[54] on the ground that the Act denied succession of property to women. The Supreme Court observed that though the Act was validly enacted by the Legislature and has the force of law, any customs repugnant or inconsistent with the fundamental rights are no law and therefore void. However, the Supreme Court did not strike down the Act as unconstitutional for it will lead to chaos in the tribal society. The Supreme Court therefore instead of giving an adversarial order, harmonised the conflict by making male succession subject to the right of livelihood of the female dependent. Justice Ramaswami harmonising the conflict held as follows: "In this manner alone, and up to this extent can female dependents/descendants be given some succour so that they do not become vagrant and destitute. To this extent, it must be held. We would rather, on the other hand, refrain from striking down the provisions as such on the touchstone of Article 14 as this would bring about chaos in the existing state of law. The intervening right of female dependents/descendants under section 7 and 8 of the Act are carved out to this extent, by suspending the exclusive right of the male succession till the female dependent/descendent chooses other means of livelihood manifested by abandonment or release of the holding kept for the purpose."[55]

Thus, as observed by the Supreme Court in *Pannalal Bansilal v. State of A.P.*,[56] that in a democracy governed by rule of law, change has to be gradual and application of uniform law may not be possible in all times and cases. Judicial intervention in such grey areas may put the judiciary in a difficult position for giving an adversarial judgment for it may lead to social chaos and frustration of the order. Therefore, the legislative policy has to be applied carefully after studying the fabric of the society.[57]

An overview of the above-mentioned judgments reveals that the judiciary has refrained from interfering in the tribal legislative and policy-making processes, and has instead resolved the conflict by incorporating the essence of state legislation and customs, restoring peace in the society.

[54] Madhu Kishwar v. State of Bihar, 1996 AIR SC 1864.
[55] *Id.*
[56] Pannalal Bansilal v. State of A.P, (1990) 2 SCC 498.
[57] DR. MATOSHI AO, *On the Dispensation of Justice by Customary Courts in Nagaland*, 9 IJRR 504, 514 (2022).

As in the case of women inheritance rights and reservation rights are concerned the State should adopt a policy consistent with the fundamental rights enshrined by the Constitution of India and Universal rights without undermining the Article 371A of the Constitution.

## 3. CONCLUSION

The Naga people have been granted special status in the administration of justice under the Constitution. Every state in the country does not have such constitutional status. It is an additional right granted by the Constitution. These special status, privileges, and rights can be used to the benefit of the society as well as to the detriment of a specific section of the society or the entire society. If obsolete and irrational customs are obstinately adhered to and followed, it can also restrain societal growth and lead to the state's backwardness.

The words “unless the Legislative Assembly of Nagaland by a resolution so decides” in Article 371A of the Constitution, therefore has cast a special responsibility upon the legislators of the state in making policy decisions that would not offend the customary rights of the people nor infringe other fundamental provisions of the Constitution. Where policymakers and administrators have failed to reconcile the conflict, the judiciary has played a critical role in engineering the Naga society where conflict has arisen, either by appreciating or disapproving the customs. However, the only way forward is for tribal bodies and the people of the state to accept policy; otherwise, the law will remain a policy on the books.

Our Constitution gives equal rights to both men and women in every field. Today, women enjoy voting rights, the right to inheritance and property. In fact, the Constitution lays down that the government should promote with special care the interests of the weaker sections of the people. Several laws have been passed since independence to promote the interests of women. These laws relate to marriage, inheritance of property, divorce, dowry, etc. Though constitutionally men and women are equal, socially men are given priority and importance sometimes to the disadvantage of women. There are various areas wherein this discrimination is apparent.

Women empowerment is a part of strategic development. Women should be educated and should be given the opportunity to participate in the political process alongside with the male domain. The role of women outside the family has become an important feature in the social, political and economic life in the state of Nagaland.

In traditional Naga society women are highly respected, educated and hardworking and their safety is generally given utmost importance by the members of the society; however, Naga women have minimal decision-making power in household matters and no hereditary rights. The men of the family are the head of the households and it is believed that the son must take the family name forward. Due to household and cultural barriers, women may have not been given the opportunity to step into politics. Though with changing times, participation of Naga women in politics has for sure has improved. In 2018, a total of five women out of 195 contestants participated for a seat in the assembly. However, no woman was elected. The reservation would have brought in some gender diversity in the assembly and given recognition to their contributions to society.[58]

Even though the literacy rate is higher in Nagaland, when it comes to the right to be a decision-maker and to be a representative in legislative assembly or customary council the right is still not given by the rigid traditional system. Even after so many movements, the reservation of 33% is given to women, still it is deplorable to see only one-woman representative, Rano M Shaiza, who was elected to Lok Sabha in 1977.

Naga women have a long way to go to achieve the same status as men, especially in the field of politics. There have been slow developments in their status over the years as even with minimal support, women are coming forward, voicing their opinions and struggling for their rights. Naga women are educated but not given enough opportunity to apply their knowledge to work in the manufacturing or service sectors. In spite of it, many Naga women are working in different fields such as doctors, engineers, entrepreneurs, art, music, sports, media, research and other professions and are also the bread earners of the family, living in the patriarchal society which has its deep roots in the tradition of the state.

The Apex Court is the last resort for these tribal women and there is a hope that the Court's decision would grant these women their rights which they have been denied for their entire life.

[58] STATUS OF GENDER EQUITY IN NAGALAND, https://cnpr.in/wp-content/uploads/2022/02/Status-of-Gender-Equity-in-Nagaland.pdf, last visited on Feb. 8, 2023).

# NEED OF DATA PROTECTION LAWS IN INDIA

*Radha Meena*[1]

***Abstract***

*The Supreme Court of India declared access to the internet as a fundamental right. The judgment provides a boost to the surging demand for the internet. Demand will create an influx of data for the online services provided to consumers by big businesses. The result creates uneasiness and fear in the civil society when cyberattacks become a daily occurrence. In India, the laws regarding data protection need urgent attention from the legislature. The author suggests that further delays will result in frequent cyberattacks and as a result, it will impact the privacy and economy and internal security of society.*

*The author mainly relies on the Srikrishna Committee, Report of the Joint Committee on the Personal Data Protection Bill, 2019, The Personal Data Protection Bill, 2019, and the Digital Personal Data Protection Bill, 2022 in the Indian context. The author compares India's laws and policies with the General Data Protection Regulation (GDPR), 2016 the only global data protection policy available. The comparison provides that the Draft Data Protection Bill published by the Ministry of Electronics Industry needs to uphold the recommendations of the Srikrishna committee and GDPR. It is essential for India to further its data protection with global standards, but it is not suggested that the needs of India are forsaken to maintain such standards. The analysis reveals that a Bill must include the policies which should follow all stakeholders of the data produced in the online services. The laws must favour citizens thereby creating healthy cyber ethics in businesses, so that responsibility is undertaken by the businesses. The author also suggests that that legal measures are necessary to maintain the safety and security of the nation but the interests of citizens should not be harmed.*

*The author suggests that the awareness of the citizens regarding online services should be attained before levying penalties on them. Service providers and states apart from the centre should be encouraged to store data but the preservation of such data should be allowed only for a limited period. A balance is required between the global standards and India's own interest to improve the advantages of the new oil i.e. data.*

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***Keywords****: Data Privacy, Digitalization, Cyber-attack, Constitutional Mandate.*

## 1. INTRODUCTION

Digital transformation from being analogue to digital in a decade and post COVID world has brought long leap in the digital era. The limitless virtual world lies ahead with technologies such as internet of things (IoT), robotics, Artificial intelligence, etc. The technological innovations result in the formation of immense data which is analysed by the companies through computing and Internet Communication Technology (ICT).[2] The analysed data allows to provide the products according to the needs of consumers. The businesses earn profits and consumers can avail the facilities/product which stand up to the standards of their requirements.

## 2. RECENT TRENDS OF DIGITISATION

The Data has an enormous role in the economic sector/digital economy, political matters/e-governance, social relationships, educational sector, health sector, security, and sovereignty of nations. It is considered to be the lifeblood of our growing digital existence. By 2025 there have been several trends[3] that intensify the role of data.

*First*, the evolution of data from *business background to life critical* as estimated by IDC, that nearly 20% of data in the "global data-sphere"[4] will be critical to our daily lives and nearly 10% of that will be hypercritical.

*Second*, an average connected person anywhere in the world will interact with connected devices nearly 4,800 times per day-basically one interaction every 18 seconds.

*Third*, more than a quarter of data created in the global data sphere will be real-time in nature, and real-time IoT data will make up more than 95% of this.

*Fourth*, cognitive/Artificial Intelligence (AI) systems change the landscape by converting data analysis from an uncommon and retrospective practice into a proactive delivery of strategic decisions and actions.

*Fifth*, almost 90% of all data created in the global data sphere will require some level of security, but less than half will be secured.

[2] David Reinsel, Data Age 2025: The evolution of Data to Life-Critical Don't Focus on Big Data; Focus on the Data That's Big, IDC white paper, https;//www.import.io/wp-content/uploads/2017/Seagate-WP-DataAge2025-March-2017.pdf., (last visited: Jan. 10, 2023, 8:30 PM).
[3] *Id.*
[4] The digital existence, as defined by the sum of all data created, captured, and replicated on our planet in any given year which is growing rapidly.

The trends predict the importance of data in the coming times. It is to be emphasized that the timeline for changes predicted is not far in the future. The *'embedded devices'*[5] to Big Data Analytics, cloud applications, and real-time data requirements are pushing faster growth in core and edge platforms.[6] The data collected through the platforms are used for various purposes such as e-governance, businesses, service delivery, etc.

By 2035, India is set to become the world's third economic superpower.[7] According to recent figures, India overtook the United Kingdom to become the world's 5th largest economy.[8] [9] [10] India being one of the most populated countries in the world, has over 700 million internet users and over 400 million smartphone users.[11] Data generated by the Indian population on a daily basis is immense. The data generated is vital for India's digital economy. With the recent trend in the global data sphere and the importance of India's citizens as data producers, an urgent need for regulating the data arises. Thereby, substantive legislation is necessary to regulate the data for providing protection to the privacy to 'data principal',[12] regulate 'data fiduciary',[13] and maintain the 'security and sovereignty' of the country. The author emphasises for holistic legislation framed upon cyber ethics and speedy redressal in instances of a data breach is the need of the hour. Though, speedy redressal can be achieved by creating innovative digital literacy among the youth of the country for the same objective.

The author argues that the need for data protection is urgent in India due to the following reasons.

*First,* the constitutional mandate emphasises the 'right to privacy' as a fundamental right as observed by Supreme Court in judicial precedents.[14] 'Right to access the internet' is also

[5] Devices such as security cameras, smart meters, chip cards, and vending machines which produces data in small signals.
[6] *Supra* note 1.
[7] World Economic League Table 2023 *'Macroeconomic Forecasting'*, CEBR, (Jan 09 2023, 10:00 AM), https://cebr.com/reports/world-economic-league-table-2023/.
[8] *Id.*
[9] Martin Armstrong, *'This Chart Shows The Growth of India's Economy'* World Economic Forum, (2022), (Jan 08 2023, 06:00 AM), https://www.weforum.org/agenda/2022/09/india-uk-fifth-largest-economy-world>.
[10] Lok Sabha Secretariat, *Report of the Joint Committee on the Personal Data Protection Bill, 2019*, 17th Lok Sabha, (Dec. 08, 2021 10:20 AM).
[11] *Id.*
[12] Committee of Experts under the Chairmanship of Justice B.N. Sri Krishna, *A Free and Fair Digital Economy Protecting Privacy, Empowering Indians,* Ministry of Electronics and information Technology, Government of India, (Jan. 8 2023, 7:30 PM), https://www.meity.gov.in/writereaddata/files/Data_Protection_Committee_Report.pdf>.
[13] *Id.*
[14] K.S. Puttaswamy and Anr. v. Union of India, (2017) 10 SCC 1.

considered under the right to expression by Supreme Court.[15] Moreover, the Right to the Internet has been declared as a fundamental right by Kerala High Court.[16] The challenges to the claim are digital divide/digital illiteracy, lack of inadequate infrastructure, linguistic diversity leading to non-availability of digital services in local languages, cybercrime, breach of privacy, gender divide, statutory obligations/public law and order, etc. The Direct Benefit Transfer (DBT), promoting education and knowledge creation through the promotion of scientific temper, and AIIMS Delhi Telemedicine, etc. The right to privacy must be aided by the right to be forgotten.

*Second*, Digital economy guides contemplate the shift from Industrial Revolution 3.0/digital revolution[17] to Industrial Revolution 4.0. It increases productivity, competition, employment opportunities, quality of life, transactions, and innovation. Everything is attained through reduced costs, for instance, manual tasks have been replaced with automated processes. Digi-Locker, MyGov, Baharat-Net, Smart cities, digitisation of Post offices, Startup India, and Digital India are instances of government initiatives to promote the digital economy. The challenges such as digital divide, cybercrime, data security, unemployment, privacy concerns, heavy investments, monopoly, addictive nature (designed to keep people hooked/leading to depression, addiction, anxiety, etc.), and potential environmental impacts. A comprehensive law for the grievances faced by the stakeholders of the digital economy is sought to be formulated.

*Third*, E-health is accessible, and efficient, empowers all stakeholders/patients and consumers, and leads to better coordination. For instance, telemedicine, online solutions by certified doctors, etc. The challenges to e-health are lack of infrastructure, data security, trained manpower in ICT, etc. The Ayushmann Bharat Digital Mission, Mswasthya-CDAC- Mobile App, 1mg, and National Health Portal India are some of the initiatives of the Government of India to promote e-Health. Digital Information Security in Healthcare Act,2017 (DISHA) is a draft law and guidelines under different ministries and departments such as Telemedicine Practice Guidelines, 2020,[18] Guidelines for Tele-medicine in Ayushman Bharat-Health and

[15] Anuradha Bhasin v Union of India, AIR 2020 SC 1308 [1].
[16] Faheema Shirin v. State. of Kerala, WP(C) 19716 OF 2019, Kerala High Court.
[17] Refers to the changes that happened in the late 20th Century with the transition from analogue electronic and mechanical devices to digital technologies.
[18] Board Of Governors in Suppression of the Medical Council of India, *Telemedicine Practice Guidelines Enabling Registered Medical Practitioners to provide Healthcare Using Telemedicine* Ministry of Health and Family Welfare, Government of India (Jan. 12 2023 6:03 PM), https://www.mohfw.gov.in/pdf/Telemedicine.pdf.

Wellness Centres (HWCs).[19] However, comprehensive central legislation is not framed for the purpose.[20]

*Fourth,* cross-border data transfer is an important aspect of globalisation. Cross-border data flows improve global businesses and the free flow of data. Financial data, Defense-related data, citizens' personal data, critical information infrastructure, etc., require protection for a nation's security and sovereignty from cyberterrorism, cyber frauds, etc. The protection of data is termed as *data localisation*. Data localisation is considered to be an important aspect to maintain privacy and sovereignty from foreign surveillance. The challenges to data localisation are splinternet,[21] inefficiency in the economy, etc. India tilts towards data localisation however, the same has been unspecified in any provisions. Banning of Chinese Mobile Apps, a boycott of Osaka Track, and control of data by the government under Draft National E-Commerce Policy[22] are the traces to realize the Indian stand towards data localisation. All data is divided into different categories as per its importance. The recommendation of Sri Krishna Committee comes in handy which suggests the protection of critical data and not all data.

The constitutional mandates, digital economy, e-health, and security of the nation are the important areas that assert the importance of data protection. The importance imposes urgent passing of comprehensive legislation for data protection. There are several guidelines of different ministries and departments, and the drafts have been created. However, one central legislation is yet to be enforced. The trends of technological development provide an urgency towards the regulation of data. But India lacks a law that covers all the important aspects of data regulations. Though the limit of digital transformation is difficult to ascertain. But the existing experience and the laws and guidelines implemented can become a source for framing a comprehensive law for data protection. The author suggests that a comprehensive law will provide legal awareness to the citizens about their rights, the development of standards on the part of businesses, and good governance by allowing transparency and accountability. This will

[19] Ministry of Health & Family Welfare, Government of India (12 Jan 2023, 9:00 AM) https://nhm.gov.in/New_Updates_2018/NHM_Components/Health_System_Stregthening/Comprehensive_primary_health_care/letter/Telemedicine_Guidelines.pdf>.

[20] Deepika Saluja and Ors., *The Urgent Need for Actionable and Comprehensive Data Protection Legislation in India*, 57 EPW, (2022), https://www.epw.in/journal/2022/53/special-articles/urgent-need-actionable-and-comprehensive-data.html. (Last visited May 2,2023 7:56 PM).

[21] Where the domino effect of protectionist policy can lead other countries following suit.

[22] Draft National E-Commerce Policy India's Data for India's Development, Department For Promotion of Industry And Internal Trade, https://dpiit.gov.in/sites/default/files/DraftNational_e-commerce_Policy_23February2019.pdf>. (Last visited January 22 2023).

further enhance the digital economy of the country by the ease of transfer of data as per standards set by the legislation.

## 3. CONSTITUTIONAL MANDATE

The Constitution of India provides economic equality as a directive principle of state policy. Equality is sought to improve the livelihood of the citizens. The right to access to the Internet becoming a fundamental right establishes an opportunity for citizens to acquire economic equality through access to education through the internet, disposal of medical facilities in backward areas of the country, and to vulnerable citizens of the country. The adjudications emphasise the importance of citizens' rights in the digital transformation taking place in global and domestic spheres. For instance, the social media where individuals post their data, the responsibility of the social media sites to store and manage data. Their responsibility extends to the security of such data. It further enhances the importance of digital infrastructure. The digital infrastructure needs regulation that provides consistency in the management and storage of data. The same has to be decided through common legislation so that confusion regarding different policies, and guidelines can be restricted. The Information Technology Act,2000 as amended does not withstand the fast pace of digital transformation.

Moreover, SC's observation regarding the internet shutdown emphasised that the "fundamental right to freedom of speech and expression and the right to carry on trade or business using the internet are constitutionally protected."[23] The judicial precedent interpretation throws light on the importance of digital world/internet intervention not at the group level but also in all spheres of an individual's life. The importance can also be emphasized through the policies, guidelines, and reports published in the executive sphere. Additionally, international organisations through conferences, conventions, research, and development, emphasises on the importance of the digital world and the production of data.

The author argues that it is imperative from the given facts and circumstances that a law must be passed for the regulation of the data produced. The transition of India towards a digital India requires tackling the challenges to its' citizens' right to access to the internet and privacy through well-defined/comprehensive legislation. The legislation must provide offences, remedies, and punishment in a structured manner. This would keep the citizens informed about

[23] Apurva Vishwanath, *The Laws being used to suspend Internet, and What SC laid Down,* The Indian Express (Jan. 11, 2020 07:15 IST), https://indianexpress.com/article/explained/kashmir-supreme-court-internet-shutdown-sec-144-how-to-read-judgment-6209676/.

their rights in advance. The author argues that to establish the right, central legislation is essential. This will ensure_accountability_on the part of the state for the disposal of internet facilities to inaccessible parts of the country. While ensuring accountability it simultaneously lay down the remedies with procedural safeguards in administrative mechanisms in case a breach of the right is committed.

## 4. DIGITAL ECONOMY

The G20 defines the digital economy as…[24]

"*…refers to a broad range of economic activities that include using digitised information and knowledge as the key factor of production, modern information networks as an important activity space, and the effective use of information and communication technology (ICT) as an important driver of productivity growth and economic structural optimisation. Internet, cloud computing, big data, Internet of Things (IoT), fintech and other new digital technologies are used to collect, store, analyse, and share information digitally and transform social interactions. Digitised, networked and intelligent ICTs enable modern economic activities to be more flexible, agile and smart*."

International organisations such as Organisation for Economic Cooperation and Development (OECD), European Commission, United Nation (UN), G20 has emphasised over the taxation of the digital economy.[25] The taxation of the digital economy impacts the previous reliance on domestic production and enhances the income/revenue of the countries.[26] The tax reforms will cover companies beyond domestic territories as well. The rapid economic and social development of a country as seen in China is a significance of digital economy.[27]

The significant role of ICT. in India are the following;[28]

**1.** ICT sector and digital economy contributes over 13 percent to India's GDP,

[24] G20 2016, China, *G20 Digital Economy Development and Cooperation Initiative (FINAL),* Ministry of Foreign Affairs of Japan, https://www.mofa.go.jp/files/000185874.pdf. (Last visited :12 Jan 2023).

[25] Ray P Singh and Anr, *Taxation of Digital Economy In India The Way Forward* (March, 2019) https://vidhilegalpolicy.in/wp-content/uploads/2020/06/DesignedReport_TaxingDigitalEconomyinIndia TheWayForward.pdf. (Last visited May 2,2023 7:56 PM).

[26] Nella Hendriyetty and Ors., *'Taxation In The Digital Economy New Models In Asia And The Pacific'* Routledge Studies in Development Economics, Asian Development Bank, (2023), https://www.adb.org/sites/default/files/publication/822701/taxation-digital-economy.pdf. (Last visited May 2,2023 7:56 PM).

[27] *Id.*

[28] India-Country Commercial Guide, International Trade Administration , Department of Commerce, United States of America, https://www.trade.gov/country-commercial-guides/india-information-and-communication-technology (Last visited Jan. 09, 2023 9:11 AM).

2. India aims to grow the ICT sector to $1 trillion by 2025, or 20 percent of GDP,
3. India's technology industry recorded its highest rate of growth by reaching $227 billion in revenue in 2021, from $200 billion in 2020,[29]
4. Double-digit growth was recorded in all sub-sectors of the technology industry,
5. IT spending in India will increase by 7 percent to $101.8 billion in 2022.
6. Indian telecommunication sector is the second largest in the world.

The continuous rise in spending and importance of the ICT is foreseen. However, the challenges such as uniform taxation, curtailing base erosion and profit shifting (BEPS), and inclusivity of developing countries persist.[30] The rise in cybercrimes and misuse of data by technology companies for their own benefit is a negative side that needs to be tackled. Different/many guidelines, rules and policies, etc., provides an opportunity for the persistence of cybercrimes and unaccountability on the part of businesses. Thereby, the author suggests that cyber ethics must become an essential part of the regulatory mechanism for businesses to curtail challenges.

In 2022, the Reserve Bank of India (RBI) announced the digital rupee[31] in consonance with the trends of the digital economy. National Internet Exchange of India launched the 'Digital Payment Gateway' with an aim to provide accessibility of the Internet to everyone.[32]

In the domestic sphere, the regular policies by the government further substantiate the need of digital laws. Different guidelines and rules provide an opportunity for the persistence of cybercrimes and unaccountability on the part of businesses. The laws will provide a work culture among the data tech to function within limited boundaries and respecting cyber ethics simultaneously. The main constituents of the legislation framed will be becoming a guiding factor for the companies that are ready to work within the prescribed limits. Defined misuse can also attract foreign investors to the country. Thereby, the global image from a 'challenging regulatory environment'[33] to a more *comfortable and predictable regulatory environment*.

[29] NASSCOM, https://nasscom.in/ (Last visited Jan. 07 2023).
[30] *Supra* Note 26.
[31] RBI Announces Launch of First Pilot For Retail Digital Rupee on 1st December, News Services Division All India Radio, All India Radio News, (Nov 29, 2022, 6:51 PM), https://newsonair.gov.in/News?title=RBI-announces-launch-of-first-pilot-for-retail-digital-Rupee-on-1st-December&id=451534.
[32] National Internet Exchange of India launches 'Digital Payment Gateway', PIB Delhi (10 Nov 2021, 6:14 PM) https://www.pib.gov.in/PressReleasePage.aspx?PRID=1770652.
[33] *Supra* note 28.

## 5. E-HEALTH /DIGITAL HEALTH

E-health/digital health is the accessibility of health care using modern electronic ICT when providers and patients are not physically interacting rather digital interaction is mediated.[34] The 2030 Agenda for Sustainable Development[35] emphasises the role of digital health to accelerate human progress, bridging the digital divide, and to develop knowledge societies.[36]

As suggested by WHO…

*"Digital transformation of health care can be disruptive; however, technologies such as the Internet of things, virtual care, remote monitoring, artificial intelligence, big data analytics, blockchain, smart wearables, platforms, tools enabling data exchange and storage and tools enabling remote data capture and the exchange of data and sharing of relevant information across the health ecosystem creating a continuum of care have proven potential to enhance health outcomes by improving medical diagnosis, data-based treatment decisions, digital therapeutics, clinical trials, self-management of care and person-centered care as well as creating more evidence-based knowledge, skills and competence for professional to support health care."*

High safety and security standards are required for health data as they are considered to be sensitive personal data by the global digital strategy.[37] The health data can be used for the purposes of blackmailing an individual or a country as a whole.[38] Any breach caused to such data results in an immense threat to the privacy of an individual and to the nation as well. The health data can also be significant according to the personality involved. The health data of a Prime Minister will be more important than a normal citizen. To restrict such compromises on personal data, the health and medical sector must be defined as critical information (CI) infrastructure.[39]

[34] Alvin B. Marcelo and Ors., *'A Framework For Regional Health Information Systems Interoperability: The Asia eHealth Information Network (AeHIN) experience*, Roadmap to Successful Digital Health Ecosystems, Science Direct (Jan. 15 2022, 09:06 AM), https://www.sciencedirect.com/topics/medicine-and-dentistry/e-health.
[35] General Assembly resolution 70/1 (2015).
[36] Global Strategy on Digital Health 2020-2025, WHO, (Jan. 19 2023, 08:01 AM), https://www.who.int/docs/default-source/documents/gs4dhdaa2a9f352b0445bafbc79ca799dce4d.pdf.
[37] *Id.*
[38] As seen in the AIIMS Ransomware attack, where the hackers demanded ransom through cryptocurrency.
[39] NCIIPC, https://nciipc.gov.in/> (Last Visited Jan 06 2023).

All India Medical College (AIIMS) of India located in the capital of the country became the victim of a ransomware attack.[40] The attack resulted in havoc for over two weeks in the hospital. The importance of the institution is well-established. It holds the data of significant dignitaries of the country such as even former Prime Ministers of the country.[41] The attack resulted in "distress, delays in treatment, and risks to the life of patients."[42] Access to the files, databases, and applications was halted.

The impacts of the investigation process as quoted in a newspaper report:

*"The Indian Computer Emergency Response Team within the Ministry of Electronics and Information Technology, Delhi cybercrime special cell, Indian Cybercrime Coordination Centre, Intelligence Bureau, Central Bureau of Investigation (CBI), National Forensic Sciences University, National Critical Information Infrastructure Protection Centre and NIA, among others, are investigating the cyber-attack."*[43]

It is to be noted that the specialised authority for the purpose of investigation in the matters of cyber attacks is lacking. The result impacts the matters of cyber attacks but it simultaneously increases the burden that already existed on the Central Bureau of Investigation (CBI), National Investigation Authority (NIA), Intelligence Bureau (IB), etc. The author argues that coordination among the authorities is an essential task of the investigation. However, the absence of specialised body to investigate cyber crimes creates delays in resolving the issues at hand. As the authorities involved stand on same footing but in their individual domain, there may arise the issue of lack of coordination.

The significance of digital health as mentioned by WHO are;

*"Digital health should be an integral part of health priorities and benefit people in a way that is ethical, safe, secure, reliable, equitable, and sustainable. It should be developed with principles of transparency, accessibility, scalability, replicability, interoperability, privacy, security, and confidentiality."*[44]

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[40] Express news Service, *'For Second Day In a Row, Services at AIIMS hampered following Ransomware Attack'* The Indian Express, (Nov. 24 2022, 20:57 IST) https://indianexpress.com/article/cities/delhi/aiims-services-hit-ransomware-attack-8288149/.

[41] K.K. Mookhey, *'AIIMS Ransomware Attack: What it Means For health Data Privacy', ETCISO.in* (Dec 27 2022 13:57 IST) https://ciso.economictimes.indiatimes.com/news/aiims-ransomware-attack-what-it-means-for-health-data-privacy/96538957.

[42] *Id.*

[43] *Supra* note 40.

[44] *Supra* note 36.

To achieve the goals of WHO standards in India, the legislators must reform their stand on digital laws. The 'vague laws'[45] can be made more substantive by collaborating all the existing guidelines and draft laws/Bills to formulate uniform legislation. The standards of the legislation must adhere to the basic principles of good governance and the welfare of the citizens. Furthermore, investigating authorities should be formulated for prompt redressal of future cyber attacks.

## 6. SECURITY

The demand for safe cities is huge,[46] leading to surveillance and smart projects in Indian cities. Emerging technologies, AI, CCTV, and face recognition technologies involve the ice from the foreign market. The financial sectors, and banking, stimulate the demand for surveillance.[47]

As emphasised earlier the growth of the IT sector in India is on the rise.[48] The demand involves the import of foreign emerging technologies. The owners of the technologies hold the data of the citizens of India. The data of Indian citizens will be under the handholding of foreign companies. It is important to create liabilities in matters of misuse of data when a conflict arises in international politics. To regulate such services and data collected through the technologies of foreign companies' comprehensive legislation is essential. The services provided through the foreign market can be regulated through a well-established law with essential procedural safeguards. One common procedure can be followed for all the departments unless specific requirements come in specifically.

In India, access to the internet differs according to the geographical distribution. The geographical of ICT centres are in Bengaluru, Hyderabad, Chennai, New Delhi, Gurugram, Mumbai & Pune. The ICT centres are distributed along the important cities of the country. The centres also empower the stand of India at a global platform through innovations.

The larger the innovations/businesses in the country more is the demand and penetration of technologies in the public. The regulatory requirement of intellectual property, and strengthening cyber-security laws comes with the increasing significance of innovations.

[45] *Supra* note 41.
[46] India's Surveillance and Security Market, International Trade Administration, Department of Commerce, USA, (Jan. 08 2023, 08:17 AM), https://www.trade.gov/market-intelligence/indias-surveillance-and-security-market.
[47] *Id.*
[48] *Supra* note 29.

The challenges of cyberterrorism, fraud, etc., are sought to be curtailed through data localisation by the Indian government. Data localisation has been promoted through various acts of India however, explicitly India does not endorse data localisation for strategic concerns.

The importance of data was recognised by the Indian government when it banned Chinese apps[49] in India. The ban amounted reduce the spread of China-dependent technologies in both critical and military domains.[50] Moreover, the surveillance equipment provided by the Chinese companies has also been debarred.[51] The legitimate claims of India can also be understood from the recent attack on AIIMS ransomware attack explained earlier. As the investigations revealed that the attack by committed by Chinese hackers.[52]

The Osaka Track put forth by PM Shinzo Abe at G20 Sumit in Osaka, Japan, sought to promote global rules on digital trade.[53] The Osaka Declaration on digital economy promotes national and international policy discussions for harnessing the full potential of data and the digital economy to foster innovation to maximise the benefits of digitalisation and emerging technologies.[54] Whereas, India stresses on data localisation by rightly considering, data as the 'new form of wealth.'[55] Such a stand of India is directed towards its own needs. The draft of the Digital Personal Data Protection Bill, 2022 also hinted towards such a stand of India.[56] RBI also directs under the Payment and Settlement Systems Act 2007 to store the end-to-end transaction details within India.

[49] Divya Bhati, *'Full List of Chinese Apps Banned In India So Far: PUBG Mobile, Garena Free Fire, TikTok and Hundreds more'* (Aug 21 2022, 08:11 IST), https://www.indiatoday.in/technology/news/story/bgmi-garena-free-fire-tiktok-and-more-banned-in-india-check-the-full-list-1990048-2022-08-19.

[50] Suchet Vir Singh, *'China Cyberwar: Beijing's Dominance in IoT & Smart Technology & Vulnerabilities for India'* The Print, (Jan 09 2023, 08:30 AM IST), https://theprint.in/india/china-cyberwar-beijings-dominance-in-iot-smart-technology-vulnerabilities-for-india/1304015/.

[51] *Id.*

[52] Harshit Sabarwal, *'Delhi AIIMS Ransomware Attack Carried Out By hackers From China, Hong Kong: Report' WION* (Dec 14 2022, 11:57 PM IST), https://www.wionews.com/india-news/attack-on-aiims-delhi-server-carried-out-by-chinese-hackers-report-543044.

[53] Azevedo Joins Prime Minister Abe and Other Leaders to Launch "Osaka Track" on the Digital Economy, World Trade Organization (2019), https://www.wto.org/english/news_e/news19_e/dgra_28jun19_e.htm (Last visited Jan 07 2023).

[54] World Trade Organization, *'Osaka Declaration on Digital Economy'* https://www.wto.org/english/news_e/news19_e/osaka_declration_on_digital_economy_e.pdf (Last visited Jan 08, 2022).

[55] Scroll Staff, *'G20 Summit: India Does Not Sign Osaka Declaration on Cross-Border Data Flow',*Scroll.in (Jan 29, 2019, 08:00 AM), https://scroll.in/latest/928811/g20-summit-india-does-not-sign-osaka-declaration-on-cross-border-data-flow.

[56] BS Web Team, *'Personal Data: All You Need To Know About Data Localization Rules In India',* Business Standard, (January 06, 2023, 17:12 IST), https://www.business-standard.com/article/current-affairs/personal-data-all-you-need-to-know-about-data-localisation-rules-in-india-123010600429_1.html.

The stand taken by the Government of India is sought to tackle the challenges of the digital economy. However, the stand must align with the other requirement of data localisation. To create a digital infrastructure that consists a well-established framework regarding the laws and administrative framework. The guidance would be available to clearly distinguish between the different forms of data localisation. To emphasise here that all data is not critical data neither it possibly threatens the security of the nations. Therefore, categorisation of the data will reduce expenditures and further enhance the policy of ease of doing business. It is high time that legislations are to be framed regarding the specific needs of digitisation considering taxation of e-commerce, competition regulations among big tech companies to regulate monopolies, ICT laws, etc.

## 7. CONCLUSION

A free and fair digital economy[57] is aided by a legal framework that is comprehensive by laying down equal emphasis on citizens' rights, businesses ease, and national security with global principles is essential in India. It can be implemented by inculcating the experiences of existing laws, policies, guidelines, and rules in the country in parity with global conventions and laws. A strong view on data localisation can become harmful to India's economy, therefore, categorisation of data can benefit in reducing the expenditures in regulating and storing of such data. A balance between domestic interests' vis-a-vis international regulations is essential.

The Recommendation made by B.N. Srikrishna Committee must be followed to benefit all the stakeholders of the digitisation. The data protection laws lay down specific importance to different stakeholders. The conflict does arise between the interest of stakeholders but a universal approach benefit all should be the way forward. The legislation can provide inclusivity, awareness, and better governance in the future.

The State's roles would aid in mitigating confusion created by the fast pace of technology. A decade of experiences from analogue to digital has created immense importance of data and more than that the benefits of technologies reaped are fruitful for the development of humankind. However, non-voicers such as environmental, and animal rights must also be kept in mind while legislating on the matter.

[57] *Supra* Note 12.

# ROLE OF LOCAL SELF BODIES IN INDIA IN PROMOTION OF CITIZEN'S CHARTER

*Subham Mishra*[1]

***Abstract***

*"On 26th January 1950, India will be an independent country."*

*- Dr B.R. Ambedkar, in his closing speech to the Constituent Assembly (1949).*[2]

*On 26th January 1950, the Constitution of India came into force. The subjects of the alien colonial regime were now free citizens of a republic. India was no longer subservient to the British Empire. However, it is pertinent to note that unlike the nation states of the West, the State had never been the sole power centre in India. There were many other factors which occupied power in the Indian society. For example- Dominant Caste Groups and Gender. As a result, the Constitution of India was tasked with two things. Firstly, to transform the political status of the Indians and secondly to transform the existing social relationships which prevailed in the Indian society.*[3]*Fundamental Rights were supposed to play a crucial role in this socio-political revolution. However soon it was realized that despite the Constitution and the Fundamental Rights, the dominant caste groups or other related groups in the rural areas of the country were still able to deny liberties and other rights to the marginalized section of the society.*[4] *As a result, it was soon realized that in order to ensure the percolation of the fundamental rights in the lower strata of the society, we need to have effective local bodies. This resulted in the passage of the 73rd and the 74th Constitutional Amendment Acts.*

*In the light of the above facts, the authors in this article have studied about the objectives behind the framing of the Citizen's Charter. Post this the authors have studied about the need of the local bodies and the role which the local bodies play in the promotion of citizen's charter in the rural area. Lastly the authors have suggested some measures which if implemented would improve the efficiency of the local body.*

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2 Gautam Bhatia, *The Transformative Constitution* xvii (Harper Collins, Noida, 1st edition, 2019).

3 *Id*.

4 Granville Austin, *The Indian Constitution: Cornerstone of a Nation* xviii (Oxford India Press, New Delhi, 34th edition, 2019).

***Keywords:*** *Fundamental Rights, Marginalized.*

## 1. INTRODUCTION

*"India must have a socio-economic revolution to achieve the real satisfaction of the fundamental needs of the common man and a fundamental change in the structure of Indian society."*

-Dr. Sarvepalli Radhakrishnan.[5]

Post-First World War, there were a couple of revolutions running parallelly in Colonial India. First was a National Revolution which was being carried out by the Indian nationalists and freedom fighters with an aim to attain freedom from British rule. Second was the Social Revolution which was also carried out by the Nationalists and unlike the National Revolution it was to continue even after the independence of the country.

Now the question which arises is when will this Social Revolution be achieved? Social revolution will be achieved only when every Indian will have the opportunity to develop to the fullest as per his/her capacity.[6] The Social Revolution will be achieved when the Indian Society will be out of medievalism based on the factors like birth, religion, gender, caste, community, etc.… and will reconstruct itself on the modern foundations of law, individual merit, and secular education.[7] Furthermore, the Economic Revolution will be achieved when the Indian Economy will shift from a primitive rural economy to a scientific and planned agricultural industry.[8]

The framers of the Constitution were also aware of the fact that if there is a delay in the fulfilment of these objectives then the Constitution will become useless and purposeless. In the words of Pandit Jawaharlal Nehru, *"If India goes down, all will go down; if India thrives, all will thrive; and if India lives, all will live."* As a result, the members of the Constituent Assembly were assigned the task of framing a Citizen's Charter which would result in a socio-economic revolution throughout the territory of India.[9]

[5] Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* 11 (Oxford India Press, New Delhi, 33rd edition, 2021).
[6] *Supra* note 3 at 32.
[7] *Ibid*.
[8] *Supra* note 3 at 33.
[9] *Ibid.*

## 2. CONSTITUENT ASSEMBLY'S VISION FOR FREE INDIA

*"As a state undergoes political change, legacies of injustice have a bearing on what is deemed transformative."*

-Ruti Teitel[10]

The members of the Constituent Assembly were required to produce a document that would transform Indian society politically, socially, and economically. Furthermore, the document was to be such it would not only transform the legal relationship between the State and the individuals, but, also the legal relationships between the individuals.

However, it is pertinent to note that prior to independence it was not only the Colonial Government which trampled the rights of the citizens, but the same was also done by the dominant caste groups and other traditional authorities. Hence if India was to be truly a free country, then it was necessary that the Indians get out of the clutches of these traditional authorities which suppressed the marginalized section for centuries.[11]

The same was also realized by the Indian Nationalists who by their works and methods tried to bring a change in the Indian society. Bankim Chandra Chattopadhyay in his work "Samya" advocated for the constitutional guarantee of equality before the law and equal protection of laws. The Indian Women Leaders in the late 19th century and in the 20th, century tried their best to ensure gender equality in society. They demanded the prohibition of child labor, the right to vote, etc. Congress leaders like Motilal Nehru, C.R. Das in their speeches vehemently opposed the arbitrary British rule and demanded rights for Indians. Dr. B.R. Ambedkar through his book, "Annihilation of Caste" and by launching various reformative movements tried to eliminate the hierarchies which existed in society. Mahatma Gandhi vies his national movements and other social service programs not only advocated for Swaraj (Independence from the British Raj) but also civil liberties for every Indian which would transform the lives of the Indians. Hence it can be said that India Freedom Fighters were very much aware of the economic, social, and political inequalities which existed in the society. As a result, they were determined in framing such a constitution that would transform the Indian Society politically, socially, and economically.[12]

[10] *Supra* note 1 at xxiv
[11] Pratap Bhanu Mehta, *The Burden of Democracy* 7 (Penguin India, Gurugram, 1st edition, 2003).
[12] Christopher Bayly, *Recovering Liberties: Indian Thought in the Age of Liberalism and Empire* 35-36 (Cambridge University Press, Cambridge, 1st edition, 2011).

In order to create a liberal democracy, the concepts of parliamentary democracy and the Universal Adult franchise were introduced in India. The concept of Universal adult franchise was introduced which implied that now every Indian had voting rights irrespective of sex, caste, place of birth, etc. Apart from the universal adult franchise and parliamentary democracy, every Indian was given certain fundamental rights so that limited government can be ensured. Prior to independence, Indians did not enjoy these rights and they were mere subjects of the Colonial Rule. Hence these measures were some radical steps taken by the members of the Constituent Assembly to transform Indian society politically.[13]

The Fundamental Rights Chapter of the Indian Constitution was an attempt made by the framers of the Constitution to provide equality in a society that was highly unequal. For centuries invidious discrimination existed in Indian society and the same was enforced by the means of community sanctions. However, the Constitution of India tried to erase this existing inequality.[14]

Article 14 of the Constitution provided for equality before the law and equal protection of laws. The concept of equality before the law ensured that everybody is treated equally and there is an absence of special privilege. Whereas Equal protection of laws ensured that equals should be treated equally in equal circumstances.[15] Article 15 of the Constitution prohibits discrimination on the basis of religion, caste, sex, place of birth, etc.…[16] Furthermore Articles 15 (3) and 15 (4) provided for special treatment to women, children, Scheduled Castes, Scheduled Tribes, and those who are socially and educationally backward. For centuries these groups faced discrimination in some form or the other. Hence it was necessary that State took some special measures for their upliftment. Article 16 permitted the State to provide for reservation to the members of Scheduled Castes, Scheduled Tribes, and those who are socially and educationally backward.[17]

Article 17 of the Constitution abolished the practice of untouchability and practicing untouchability in any form was now an offence.[18] Article 18 of the Constitution provided for the abolition of titles.[19] This was done to promote egalitarianism in the Indian society. Article

[13] *Ibid.*
[14] *Supra* note 3 at 63.
15 INDIAN CONST. art. 14.
16 INDIAN CONST. art. 15.
17 INDIAN CONST. art. 16.
18 INDIAN CONST. art. 17.
19 INDIAN CONST. art. 18.

23 of the Constitution prohibited human labor and trafficking.[20] Whereas, Article 24 of the Constitution prohibited child labor in factories.[21]

Furthermore, the Framers of the Constitution in the Directive Principles of State Policy directed the State to ensure that there is no economic concentration of wealth and that the Indian Society as a whole develops and prospers economically.[22]

Hence it can be said that the Framers of the Indian Constitution provided us with a constitution that could usher in social-economic as well as political revolution in the Country. However, the success of the Constitution now depended upon the future governments of the country.

## 3. HISTORY OF VILLAGE INSTITUTIONS IN INDIA

India has a comprehensive long history of Panchayati Raj institutions. These institutions were present in our cultural and social norms since the Vedic period.[23] Although these institutions did not follow the democratic principle of participation, they acted as a messenger between the individuals and the state. These institutions were initially desponded by the colonial government but later on to gain control over the resources of the rural area and increase the income of the state they allowed governance at the village level. These methods of governance are in no way similar to political representation or democracy. But the governance method adopted by the colonial government paved the way for democracy in the smallest political unit of the state.

The tradition of village government was liked by the Indian leaders as well. Gandhi was of the view that it could lead to better governance and utilization of resources at the basic level of the state.[24] All of this led to the passing of the 73rd [25] and 74th [26] Amendment Acts in the Indian Constitution which ensured the implementation of democracy in governance at the village level.[27] But there was and is something more to the Panchayati Raj institutions which has redefined the rights jurisprudence of this country. It has ensured the participation of individuals

20 INDIAN CONST. art. 23.
21 INDIAN CONST. art. 24.
22 MP Jain, *Indian Constitutional Law* 1420 (Lexis Nexis, New Delhi, 7th edition, 2014).
23 Mario D. Zamora, A Historical Summary of Indian Village Autonomy, https://www.asj.upd.edu.ph/mediabox/archive/ASJ-03-02-1965/Zamora.pdf., (last visited on June 2, 2022).
24 *Ibid.*
25 INDIAN CONST. Amended by The Constitution (Seventy Third Amendment) Act, 1992.
26 INDIAN CONST. Amended by The Constitution (Seventy Fourth Amendment) Act, 1992.
27 INDIAN CONST. Amended by The Constitution (Seventy Third Amendment) Act, 1992.

not only in representative democracy and the rule of law but in the actual decision-making process of the state as well.

## 4. PANCHAYATI INSTITUTION: A METHOD OF POLITICAL PARTICIPATION

Indian Constitution provided rights to its citizens. This in itself was a radical change. But, since at the time of independence, it was a poor underdeveloped country. It must have been a little unjustified to expect the participation of individuals in the centralized politics of the state. Hence, it was necessary to develop institutions where there would be no constraints on participation in decision-making on issues of state policy, not only politically but economically and socially as well.

The question is why participation is necessary for the state's policy-making. This question takes us closer to the idea of justice propounded by Dworkin. According to Dworkin, any valid policy or legislation has to satisfy two principles.[28] Firstly Inherent dignity and secondly Political participation. Inherent dignity is achieved when we consider morality as an essential part of the law. But the Dworkinian idea of morality is deeper than earlier natural law thinkers and thinkers of the utilitarian school.[29] For Dworkin morality means the dignity of the individual. That is in the name of social needs and welfare individuals must not suffer. To achieve this goal, it was essential that an individual has the opportunity to participate in the political workings of the state. If a person holds access to the law or policymaking process then he can stand for his rights against the might of the community.

Nagel too agrees with Dworkin. Nagel[30] believes it is political participation in the drafting of basic documents of the state which will assure justice to the members of the state. Stammler too has similar views on political participation. Stammler[31] argues that we can tell what is the ambit of the Kantian Imperative only when each and every individual participates in determining what is the purpose of society.

Hence, political participation is an essential part of all the theories of the just state. In Western states, these theories have been applied comprehensively to representative democracy. But in our state, we need a more grassroots-level approach to the application of these theories. The best possible explanation for that argument would be, in European nation-states democracy is a pretty old concept. The European states have seen and gone through severe conflicts between

[28] Ronald Dworkin, *Taking Rights* Seriously 199 (Harvard University Press, Harvard, 1st edition 1978).
[29] *Ibid.*
[30] Thomas Nagel, "The Problem of Global Justice",33(2) *Philosophy & Public Affairs*, 113 (2005).
[31] Julius Stone, Human *Law, and Human Justice,* 167-184 (Universal Law publishing Co., 1st edition, 2008).

subjects and states to reach this point of representative democracy. But in our republic application of the democratic principle was a radical event. Post-independence we do agree on representative democracy but our representatives were in no way near the ground realities of the people. We can buttress this point with the example of the Untouchability Offenses Act of 1955.[32] This legislation was passed to end the suffering of the marginalized section of Indian society. In this legislation restriction upon the temple entry of marginalized sections of the society has been prohibited. But there was a flaw in the legislation. It allowed access to the temple to the extent the temple has allowed access to the member of the upper class of society. This meant that temples can still regulate the question of temple entry if they regulate the entry of upper caste members of the society.[33]

This tells us representative democracy is good but in circumstances where our state was incorporated, merely providing a charter of rights to the citizens was not enough. We needed a regulator who understand the realities at the grass-root level. An institution that is accessible to all members of the community. The accessibility of the institution will ensure the participation of members on the grass-root level of policymaking. Therefore, Panchayati Raj institutions are needed in the Indian Republic state.

## 5. PANCHAYATI INSTITUTION: BRINGING FUNDAMENTAL RIGHTS TO THE GRASSROOTS

The founding of the Indian Constitution and the formation of a new republic was a big change in the history of the Indian subcontinent. The Constitution was a document of social change.[34] It was incorporated in the light of the political and economic foundations of this country. Therefore, the chapter on the fundamental right was made with the intention of making Indian citizens conscious of their rights. It was made to end the suffering and oppression of the weakest members of our community.

The question is what kinds of oppression does the Indian Constitution intend to end? Do we have a definition of oppression? Iris Young[35] distinguishes oppression in five ways, it includes exploitation, marginalization, powerlessness, cultural imperialism, and violence. All these methods of oppression impose stronger members of the community upon the weakest members of the community. It forces them to live their life according to the whims and fancies of

[32] The Protection of Civil Rights Act, 1955, sec 3 Act No. 22, Act of Parliament 1955.
[33] *Ibid.*
[34] *Supra* note 3 at xviii.
[35] Iris Young, Five Faces of Oppression, 64, In George L. Henderson & Marvin Waterstone (eds.), *Geographic Thought: A Praxis Perspective*. New York, USA: Routledge (2009).

powerful members of the community. Therefore, when our Constitution was drafted it intended not only to provide a charter of rights to its citizens but to end these kinds of oppression as well.

Since the authors are arguing about the role of local bodies in the implementation of the Charter of rights, we have to first understand how these institutions can end the oppression that the makers of our constitution always intended to terminate.

When Young defines oppression as exploitation or marginalization, it means that the persons who are oppressed do not have sufficient access to resources. She takes the example of labours working in the factory and how these workers are dependent upon their employers to live their life.[36] This makes them vulnerable to exploitation and marginalization. Similar scenarios can be seen in India as well. Here resources were restricted to a few hands. Many people did not have access to any land. They didn't have any education as well. Therefore, they were forced to work for those who had access to the resources. This scenario couldn't have been changed by merely providing basic rights to the citizens. There was a need for positive action from the side of the state as well. The Indian state introduced land reforms, but due to less knowledge and the unavailability of grass-root level institutions, these reforms failed.[37] Many people still do not have access to the resources. But one state defined all odds. It was Kerala. Here state not only made laws for the distribution of land but implemented them by going to the grass-roots level.[38] Therefore, merely providing positive rights to the citizens is not enough. Citizens do need the support of properly implemented policies to access the basic rights provided to them. Hence, it is quite difficult for a representative central government to look into the implementation of policies at the ground level. They do need the support of regulators at the grass-root level to assure that basic rights are accessible to all.

The best example of this could be the NREGA[39] scheme implemented by the Central Government. When the scheme was debated for the first time in the committees of the government there were two basic questions. Firstly, whether the scheme is universal or is it targeted, and secondly, who shall regulate the scheme? While discussing the first question, a few prominent social workers argued that this scheme will provide employment to the most

[36] *Ibid.*
[37] G.K Liten, 'The Human Development Puzzle in Kerala', 32(1) *Journal of Contemporary Asia, 47(2007).*
[38] *Ibid.*
[39] Deepta Chopra, "The Mahatma Gandhi National Rural Employment Guarantee Act, India: Examining Pathways towards Establishing Rights-Based Social Contracts", 26(3), *European Journal of Development Research*, 355 (2014).

vulnerable members of our society. It will give them access to the basic necessities of life. Therefore, we do not need errors of exclusion. If the scheme is open to all then it will limit the dependency of landless upon the landlords. This in essence destroys the policy of oppression.[40] The most important aspect and question to be answered regarding the law was who shall implement the law. On this question, initially, everyone was in favor of bureaucracy. But many NGOs were in favor of Panchayati Raj institutions. Their simple argument was that these institutions are run by those who live in those villages. They know who needs the support of this scheme. They argued that, if the scheme gets implemented by the Panchayati institutions then it will be highly accessible to the beneficiary population. One problem with the social welfare schemes is that generally, bureaucracy is not as answerable and accessible to citizens when compared to Panchayati institutions. Therefore, if schemes are implemented by this Panchayati institution, then the beneficiaries will actually participate not only in the scheme but in the working process of the scheme.

This is the kind of participation that Dworkin and Nagel expect from a political order. In this participation, individuals are not merely the subjects of the state following the whims and fancies of the state. In this mechanism, they are equal stakeholders in the policies of the state. They did not merely follow what the state says, instead, they express their views as to what would be the best method to incorporate and apply the law.

Indeed, the Panchayati Raj institutions are the basic and best method of governance for a country like India. But they have their own limitations. This limitation includes hierarchies and accessibility to resources based on the historical past. These limitations may suggest to anyone that the Panchayati Raj institution is not much different from other political institutions in this country. But the authors that they are different and they are our greatest hope in increasing political participation in the Indian state.

The Panchayati Raj institutions represent the smallest possible population group. This means a large number of populations can participate in policy-making decisions. This openness makes them more accessible to both governed population as well as the state. This means both citizens, as well as the state, can question the working of these institutions. It will force the institution to change from within. It will force them to apply policies that are closer to the basic charter of rights when compared to other state institutions. Therefore, it is the Panchayati Raj institution that can apply the Charter of rights at the ground level. They can implement the basic rights

[40] *Ibid.*

because they are the sole institution in this country that can make changes from within to abolish oppression at the ground level.

## 6. CONCLUSION

When the Indian state adopted its constitution, it transformed the residents of this region from subjects of the state to the citizen of the state. It provided the citizens with some basic fundamental rights against the state as well as against their fellow citizens. But merely adopting these rights was not enough. We needed institutions that can implement these radical ideas at the grass-root level. There couldn't have been any institution in our political order which is as accessible to the citizens of this country as the Panchayati Raj institutions. Therefore, limited power has been given to these institutions to implement some basic policies.[41] They have performed reasonably well to implement the schemes when compared to other institutions. As a result, the time has come when the Panchayati Raj system should be given more responsibility. Firstly, to end the oppression from the society and secondly to apply the basic rights of our constitution more properly at the grassroots level.

These institutions have shown their worth in the implementation of schemes like NREGA at the ground level. Hence, more opportunities should be provided to these institutions to implement more important accessibility schemes of the government. It will make schemes more accessible to the vulnerable population and will also increase political participation.

[41] Deepta Chopra, "The Mahatma Gandhi National Rural Employment Guarantee Act, India: Examining Pathways towards Establishing Rights-Based Social Contracts," 26(3), *European Journal of Development Research*, 355 (2014).

# CONDITIONS OF WOMEN WORKERS IN THE TEA GARDENS OF ASSAM AND THE LAWS FOR THEIR PROTECTION

*Ms. Sushma Kharka[1] & Dr. Veer Mayank[2]*

***Abstract***

*There are around one million women workers engaged in the tea gardens of Assam.[3] As nearly 50% of the workforce is women, they are considered as backbone of the tea gardens. Although Assam tea "a popular beverage" received geographical indication (GI) tag but the working and living condition of the workers is a matter of concern. Women workers are always considered as cheap labour force and consigned on the bottom strata of the society. A study by the UN and by various other international organizations it was found that women workers experience sexual, physical, verbal abuse and gender-based violations in their workplace and outside the plantation too.[4] Women workers are overworked and underpaid because their primary work is to pluck tea leaves but they are also engaged on other works such as pruning the bushes, sprinkling pesticides etc. Besides the poor working condition, the women workers also face various issues such as trafficking, forced labour, sexual violence etc. During the colonial time, the Tea District Emigrant Labour Act, 1832 and Workmen Breach of Contract Act, 1859 were enacted to the interest of the immigrant workers and labourers. In 1951, the Plantation Labour Act was enacted to regulate a minimum standard of working as well as living condition of the workers of the tea plantation.*

***Keywords:*** *Women workers, tea plantation, low wages.*

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[3] IDH SUSTAINABLE TRADE, https://www.idhsustainabletrade.com/publication/addressing-gender-based-violence-in-tea-gardens-in-india/., (Last visited November 30, 2022).

[4] *Id.* at 3.

## 1. INTRODUCTION

Assam is the second largest tea-producing country in the world where around 1 million women work in the tea gardens and produce more than 50% of tea in India. As the tea gardens require a large workforce, better wages and living condition for the workers has always been compromised by the tea planters. Despite forming the largest workforce in the industry, they receive low wages and also experience gender discrimination, sexual, and physical issues, etc.

Since the tea plantation is an agro-based industry that requires low skills and limited mechanization, therefore the physical strength of women workers is suitable for the plantation. In terms of reproductive activities, the planters give much preference to women workers because of their long-term benefit of self-reproducing nature and stable workforce. They are also considered more efficient in plucking tea leaves due to their nimble fingers and also a commitment to their work in comparison to their male counterparts.

### Background of the Study

The tea plantation was introduced by British traders in the mid of the 18$^{th}$ century. At that time, there was a huge demand for tea in the world market and the British traders found the land of Assam suitable for tea production. The workers in the tea gardens were brought from different parts of the country such as Chota Nagpur, Madhya Pradesh, and Bihar. The migrated workers were brought with the false hope of providing better jobs and living conditions but were subjected to inhuman treatment. Being women, women workers have to remain within the limitations and had to face several issues such as low wages, gender discrimination, etc. They also receive low wages in comparison to their male counterpart and had to face other sexual exploitations from the European Burasahibs who physically exploit the newly married wives of the tea garden workers. Thus, these different forms of violence against women workers were in existence since the colonial time period.

## 2. LITERATURE REVIEW

Mr. Mohan Pathak (2020), in his journal, termed women as the most important part of the society and their status depends on various factors such as level of education, economic development as well as the attitude of people towards them. The maximum numbers of workers from the tea garden are women and they are considered as the backbone of the tea gardens of Assam. They are termed as a subordinate class of society and are discriminated against in every

sphere of life. Women workers face various challenges in their day-to-day life such as rape, human trafficking, poor health care facilities, maternal immortality, early marriage, etc. The author provides various recommendations to eradicate these challenges such as organizing awareness programs on child marriage, and education, NGOs should be involved to look after these issues.

M. Bhadra (1985), in her paper discusses the matter of women workers in the tea gardens and the challenges faced by them. The main issue faced by them was wage differentiation between the male and female workers. Besides the heavy workloads in the tea gardens, women workers used to receive meagre wages than male workers. To solve this issue, the Equal Remuneration Act, of 1976 was enacted but the Act failed to fulfil its objectives, as some of the provisions of the Act were not applied properly.

Mamta Gurung & Sanchari Roy Mukherjee (2018) in their journal mention the women workers and their role in the tea plantation with reference to a case study of Darjeeling Hills. Though a majority of the workforce in the tea plantation are women, they remained socially and economically backward in the tea gardens. Women used to carry heavy workloads in comparison to other male workers in the tea gardens yet they receive low wages. Besides receiving low wages, the women workers are also exploited sexually and trafficked from one region to another. In this paper, the author also focuses on how to uplift the poor condition of women workers and recommended that providing better skills and education and providing leadership qualities among the workers will improve their living conditions.

Porag Pachoni (2016) in his journal discusses various labour welfare practices which are prevalent in the tea gardens with special reference to Harmutty Tea Estate of Assam. The tea industries can be termed as labour-intensive industries because it requires a greater number of labour forces in the production process. To provide protection to the workers, the Central and State Governments formulated various labor welfare measures such as the Workmen Compensation Act, of 1923, the Payment of Wages Act, of 1936, the Minimum Wages Act, of 1948 and the Plantation Labour Act, of 1948, etc. Besides these, the Assam Tea Plantation Provident Fund and Pension Scheme Act, 1955 were enacted to provide social security and social justice to the workers especially those who were engaged in the tea plantation. These labour welfare practices are an integral part of the tea gardens because of the favorable work environment, better productivity, better living conditions, and other securities, etc. To enlighten

the workers of the tea plantation, the author recommends organizing awareness programs in terms of drama, and street play in the tea gardens.

## 3. IMPORTANCE OF STUDY

In the present era, a study of the working condition of women workers in the tea garden areas is of utmost necessity. It is already known that the majority of the workforce in the tea garden are women, so better wages and living condition is a matter of concern for the tea planters, as the condition of the tea estates at present are not in good shape. From the colonial era, the women worker plays a pivotal role in the tea gardens besides looking after their children and supporting their families.[5] Though the primary job of women workers is to pluck leaves they are also engaged in other manual jobs such as cleaning the bushes, sprinkling the pesticides or the dry white powders on the tea plants etc. Women were engaged to work for the whole week and sometimes they have to work even on Sundays in other informal sectors for extra earnings. The "Drain of Wealth Theory" as postulated by various nationalist leaders during the time of the independence movement is quite visible in the form of exploitation of women workers in the tea estates of India. These estates in the initial period were mostly owned by the Britishers and the tea grown was mostly exported. Thus, due to low wages, the production costs were minimized while obtaining the highest value for the tea planters.

Besides working during the seasons, the women workers are also engaged in the tea gardens for pruning the tea bushes when the season is off. Due to a lack of protective gear, the women workers get affected in their eyesight while sprinkling the pesticides (urea) on the tea bushes.[6]

## 4. GENDERED LABOUR CHALLENGES IN THE TEA GARDEN

The tea plantation was introduced in the mid-18$^{th}$ century and the workers in the tea garden migrated from different parts of the country. The workers of the tea industry were considered as socially and economically backward, especially women workers who form the majority of the workforce in the tea gardens. The male workers of the plantation are considered to be the privileged ones while the women workers have to remain under certain limitations.

In the plantation sector, the planters create a gender division of work among the workforce. The male workers are placed in higher positions and received better wages in their workplace.

[5] INDIA WATER PORTAL, (9$^{th}$ Aug, 2020), https://www.indiawaterportal.org/articles/think-you-have-your-cup-tea., (Last visited May 02, 2023).
[6] *Id.* at 5.

On the other hand, the female workers are engaged in plucking tea leaves and other work such as pruning and cleaning the bushes. They receive low wages than male workers and also face heavy work burdens, for example: working for eight hours a day. Moreover, they also use to work extra work hours in their holidays but they received meagre payments.[7]

Besides this, our Indian society follows the patriarchal system and the tea industry is not an exception to this. In the tea garden communities, the male member of the family is the head of the family. Though both the male and female members of the family used to work and earn but the female members also had to look after their family and children.

To solve these increasing issues, the Government enacted the Plantation Labour Act, of 1951. Its specific legislation was mainly enacted to provide welfare to the labour as well as to regulate working conditions in the plantation sectors. The Act provides various provisions for the welfare and benefit of the workers but on the contrary, such acts were not made available by the planters or management. According to a study (2018), it was found that in eight tea gardens in four districts of Assam, women workers in tea gardens especially suffer from anaemia due to the non-availability of proper nutrition and health care facilities during their pregnancy.[8] The hospitals in the tea garden do not provide proper medical equipment, no local ambulance are available during emergencies.

## 5. RESEARCH OBJECTIVES

The objective of this paper is to evaluate the working condition of the women workers and legislation for the protection and welfare of women workers in the tea gardens of Assam. To attain these objectives the author has posed the following questions:

- What is the status on the working condition of the women workers in Assam?
- What are the legislations enacted to benefit the workers of the tea gardens?
- Whether the enacted laws provide proper protection to the women workers of the tea gardens?

The methodology adopted to research the question is doctrinal legal research. Here the researcher uses both primary and secondary sources. The primary source includes the labour

[7] Mita Bhadra, *Women workers in tea gardens*, 2 IND. ANTHR' L ASSO'N. 99, 93-114, (1985).

[8] Sanskrita Bharadwaj, *In Assam's Tea Gardens, Low Wages Women Workers Struggle to Access Maternity Care*, WOMEN'S MEDIA CENTER, (Mar. 24, 2021), https://womensmediacenter.com/women-under-siege/in-assams-tea-gardens-low-wage-women-workers-struggle-to-access-maternity-care., (Lat Visited: May 2,2023).

laws, the Plantation Labour Act of 1951, the Equal Remuneration Act, of 1976, and the State legislations, etc. The secondary source includes books, articles, journals, newspaper reports as well as other government reports.

## 6. WOMEN WORKERS OF TEA GARDENS AND THEIR WORKING CONDITIONS

It is already mentioned that half of the workforce in the tea garden consists of women because of their efficiency. Large numbers of women workers are engaged in the tea plantation because of the following reason.

- First, the tea planters wanted cheap labour on the plantation and for that, they use to encourage individuals to migrate with their families and settle down permanently in the plantation area. Later, the planters used to engage the entire family i.e. their wives and children and other family members in the tea plantation with their own determined rates on wages.
- Second, due to their nature of reproduction the numbers of workforce doubled within a couple of decades, and later on migration from outside the state was not required as the tea garden became self-sufficient in the number of workers.

Thus, the major reason behind the employment of women workers was to expand the family-based employment system within the tea gardens.[9]

Generally, the women workers are engaged in the activities such as plucking, pruning, transplanting, weeding, etc. Women workers work during the peak time of the working season and continue it for the rest of the time. They are also engaged in other activities in the garden such as transplanting, and cleaning the tea bushes while the male workers used to take leisure when the season is off. Sometimes, the women workers used to work for longer hours than the male workers.

Different activities in plantations are conducted in groups which are to be supervised by the Sardars and Dafadars. The Sardars and Dafadars is an official position that was secured by the male workers to supervise the women workers of the plantation. Thus, the male workers were

[9] Kanchan Sarkar & Sharit K. Bhowmik, *Trade Unions and Women Workers in Tea Plantations*, 52 ECO. & POL'L WEEK., 50-52, (1999).

placed in privileged positions and easily get promoted while the women workers remained degraded and overworked in the tea gardens.

The wages of the workers are low since the British era. The planters compelled the children and women to work for low wages and with this little amount, they have to look after their children and support the family. According to the Oxfam report, "On an average, women workers earn only 80% of what men earn, women worker's average monthly income is just Rs.3745 as compared to Rs.4672 for men."[10]

The Plantation Labour Act, 1951 which was enacted to regulate the welfare and safety of the workers with better work conditions. The Act provided safety measures, medical facilities, welfare provisions, limited working hours, accommodation and educational provisions, etc. According to this Act, the workers can avail the housing facilities but in contrary to it the workers live in only one room without no proper sanitation and other household facilities. The Act has also prescribed the tea garden management to provide other welfare benefits such as the establishment of canteens, crèches, and educational and housing facilities to the workers. But these basic facilities are made available to only the permanent workers and not to the temporary or casual workers.[11]

In the tea gardens of Assam, healthcare facilities have always remained a major concern. Lack of a sufficient number of healthcare facilities and if at all it is available then there is an absence of basic medical amenities such as medical practitioners, nurses, medicines, and other medical equipment. The major issues among the workers are Maternal Mortality Rate, Infant Mortality Rate, Malnutrition among children and women, malnutrition, etc. Diseases like anaemia and malnutrition mostly arise among women workers and children due to lack of proper food and nutrition in their daily diet. According to the report from the Annual Health Survey (2012-13), "MMR in the districts of Upper Assam was 404 per 100,000 live births as opposed to the State average of 301 which is due to non-availability of labor rooms in the tea gardens."[12] Most of the workers also lose their eyesight while sprinkling pesticides in the tea plants as the planters do not avail the facility of protective gear to the workers.

[10] Oxfam India, *Living Wages for Tea Plantation Workers*, (9th July, 2021), https://www.oxfamindia.org/press-release/living-wages-tea-plantation-workers., (Last Visited: May 2, 2023).

[11] Sentinel Digital Disk, Healthcare in Tea Gardens, SENTINAL ASSAM, (9th December, 2019, 10: 27 AM), https://www.sentinelassam.com/editorial/healthcare-in-tea-gardens/., (Last Visited: May 2,2023).

[12] TIMES OF INDIA, https://timesofindia.indiatimes.com/city/guwahati/healthcare-gaps-ail-tea-gardens/articleshow/58390329.cms. (Last visited Jan 2, 2022).

## 7. LEGISLATIONS FOR THE PROTECTION OF WORKERS IN TEA GARDENS

From the working condition, we came to know that women workers have to face various gender divisions in their workplace, exploitations, low wages, etc. To solve these issues and to protect the workers, the Government has enacted various legislations which were in existence since the pre-independence time.

During colonial times, the Tea District Emigrant Labour Act, of 1832 was enacted to amend the existing laws on emigrant labourers within the district of Assam. Similarly, the Workmen's Breach of Contract Act, 1859 was enacted to protect the interest of employers and provide punishment for breach of contract by the workers. Some of the major legislations are: the Transport of Native Labourer's Act, of 1863, the Inland Emigration Act, of 1882, the Assam Labour and Migration Act, of 1901, the Workers Compensation Act, of 1923, the Trade Union Act, of 1926, the Payment of Wages Act, of 1936, the Factories Act, of 1948, the Equal Remuneration Act, 1976, etc. were also enacted.

- **The Plantation Labour Act, 1951**

After independence, the Plantation Labour Act, 1951 was enacted and it's the only legislation to deal with the workforce of the tea garden. The objective of the Act is to provide benefits and welfare to the workers and also better working conditions in the plantation sectors. The Act defines the term; 'workers' under Section 2(k) of the PLA, 1951, such as "a person employed in a plantation for hire or reward, whether directly or through any agency, to do any work, skilled, unskilled, manual or clerical but it does not include;

a) A medical officer at the plantation,
b) Any person whose monthly wages exceeds three thousand rupees,
c) A person employed in a plantation primarily in a management capacity notwithstanding his monthly wages to exceed rupees three hundred."[13]

Section 8-10 of the Act deals with various provisions such as health, welfare, hours and limitations of employment, leave with wages, etc. Section 8 of the Act provides a sufficient supply of drinking water for all workers which should be made mandatory by the employer and Section 9 provides that in every plantation separate sanitary facilities must be provided to both

[13] Plantation Labour Act, 1951, § 2(k), No. 69, Acts of Parliament, 1951 (India).

male and female workers. The Act also provides for medical facilities in every plantation as prescribed by the State Government.

Every plantation which consists of fifty or more women workers should avail the facility of crèches with suitable rooms which can be used by the women whose children are below six years of age. The room should have adequate accommodation facilities, sufficient light with ventilation, and must have a trained woman in charge to take care of such children and infants. The employers should provide housing facilities and educational facilities to children aged between six to twelve years where the number of workers exceeds twenty-five. No children or women should be employed in the plantation between 6 AM to 7 PM without the permission of the State Government. Under Section 32 of the Act, the State Government may amend rules to regulate the payment in terms of sickness and maternity relief of the workers.

Though the Act was enacted there was no adequate implementation of the provisions of the Act. The number of healthcare centres is also less and the pregnant workers have to face several issues in their crucial time. Due to the lack of proper equipment in the hospitals, sometimes the women workers have to face complications during childbirth. Similarly, the lack of adequate crèches in the tea gardens results in a major issue for the women workers during their working hours.[14]

According to the reports found by the Labour Bureau, Ministry of Labour and Employment, Government of India, New Delhi (1980), "there were only 66.1% of tea gardens which provided educational facilities to the workers and the remaining 33.9% of tea gardens had no schools. The tea management provided the establishment of only primary schools and no schools beyond primary level were established in the tea gardens. The study found that no fee was collected from the students."[15] Children in the tea gardens are deprived of their education due to their poor financial condition as a result the parents forced them to work in the tea gardens. Moreover, girls are unable to complete even the primary level of education due to a lack of schools, poverty, early marriage, and remaining dropouts.

[14] Dr. Putul Borah, *Tea Garden Labour Situation in Assam*, SCHO. JOUR'L OF ARTS, HUMAN'S, AND SO. SCIE'S, 985-989 (2017).

[15] Dipali Bosumatari and Phanindra Goyari, *Educational Status of Tea Plantation Women Workers in Assam: An Empirical Analysis*, 1 ASI'N JOUR'L OF MULTI DIS'Y STUD'S, 17-26 (2013).

- **The Assam Tea Plantation Provident Fund and Pension Fund Scheme Act, 1955**

The Act came into force on 15th June 1955 to make provisions of the Compulsory Provident Fund Scheme for the benefit of the employees in the tea plantation of Assam.[16] The Act was enacted for the socio-economic upliftment of the labours as well as to provide social security and social justice to the workers of the tea gardens of Assam.

- **The Assam Tea Plantation Employees Welfare Fund Act, 1959**

This was another landmark legislation that was enacted for the welfare of the tea garden workers. It came into force on 6th May 1960 and its aim is to benefit the tea employees of Assam. The Preamble of the Act provided to constitute a fund to handle all the financial activities as well as to promote the welfare of the tea employees of the State. Section 3 of the Act deals with the welfare fund and Section 4 states about the Constitution of the Board.[17]

- **The Equal Remuneration Act, 1976**

The Act was enacted to provide equal remuneration and eliminate the discrimination of wages between men and women workers in terms of employment. The objective of the Act was to provide 'equal pay for equal work for both men and women workers.' The Act was rectified in ILO Convention No. 100 by India which was also enforced in plantation sectors.[18]

During the Colonial period, the planters used to differentiate in terms of wages between male and female workers. With the minimum number of wages, women workers have to remain within certain limitations in society. To eliminate discrimination among the working class, the Equal Remuneration Act was enacted. Though the Act was enacted, the Act was not properly implemented in the tea gardens. The planters were against the implementation of the Act which continued the discrimination of women workers. As a result, the Act failed to safeguard the interests, privileges, and rights of the women workers of the tea garden.

## 8. CONCLUSION AND SUGGESTION

Despite the majority workforce in the tea gardens, the women workers used to be treated as bonded as well as cheap labourers. They have to face exploitation both physically and mentally

[16]Assam Tea Plantation Provident Fund and Pension Fund Scheme Act, 1955, No. 10, Acts of Assam State Legislature, 1955 (India).
[17] The Assam Tea Plantations Employees Welfare Fund Act, 1959, No. 16, Acts of Assam State Legislature, 1960 (India).
[18] Equal Remuneration Act, 1976, No. 25, Acts of Parliament, 1976 (India).

in their day-to-day life. During the colonial era, the planters and Burasahibs used to treat the women workers as a means of pleasure. Gender discrimination also existed in their workplace and they have to remain within certain restrictions and limitations. Article 15 of the Constitution of India provides that the State shall not discriminate in terms of sex, caste, religion, place of birth, or any. But still, sexual exploitation, violence against women workers, and gender discrimination in their workplace are on increasing trends in the tea gardens of Assam. Crimes and violations against women should be made punishable and the accused should be given harsh punishment.

Though the legislation was enacted under British rule, they were not implemented properly. The Plantation Labour Act, of 1951 was enacted to protect the workers, but the Act failed to provide benefits in fulfilling its objectives. The rights of the women workers were being violated by the society and planters of the tea gardens. The women workers also failed to raise their voices against the increasing exploitation and violence. Thus, women workers need to be empowered in their life and also should be made aware of their rights and privileges. The Government had to enact more stringent laws for the upliftment of the women workers in the tea gardens of Assam.

**Suggestions**

- The differentiation of wages between men and women workers should be abolished and reasonable salaries must be paid.
- Women workers should be made educated enough to make aware of their rights and laws which are enacted for their protection.
- Awareness camps should be organized in tea gardens to create awareness among women workers.
- There is an urgent need to amend the existing laws and new laws to be enacted especially for protecting the rights of women workers.
- The Government had to create a healthy environment to abolish the various exploitations which are faced by the women workers of the tea garden.
- The community and individuals of the society have to change their patriarchal mindsets and beliefs. Women workers in the tea garden should be given their due position in society. Moreover, freedom should be given to them in various decision-making process.

# THE MENANCE OF FRONT-RUNNING IN INDIAN CAPITAL MARKET: A CHALLENGE FOR SEBI

*By Ujjawal Anand[1] and Prof. S.P. Srivastava[2]*

***Abstract***

*With the advent of internet in the late 1990s, a new tech revolution started in India. The following decade, financial market in India saw a new kind of trading emerge - Algorithmic Trading[3] (AT). On 3rd April 2008, SEBI started allowing Direct Market Access facility. Today, algorithmic trading in India stands at around 50% of the daily trading volume at both NSE and BSE.[4] But, with this swift growth in the usage of algo – trading, financial market regulators saw the advent of manipulative trade practices like 'front – running'. The growing malpractice of Front-Running has not only impacted the market dynamics where the small traders are being exploited by High-Frequency Traders, but it can have major economic impact for our country. The article tries to provide new insights in the applicability of proposed measures by analysing the loopholes and suggesting improvements in the implementation of the measures. The research-paper uses the doctrinal research methodology. The relevant conclusions drawn are that the measures proposed by SEBI in its Discussion Paper contain loopholes and need improvements. Comparative study with measures adopted by similar markets around the world can be looked into to add new dimensions to the measures suggested. Also, they do not give an execution plan to any of its proposals. In addition, it comprises of genuine dangers like winding down off traders and adverse selection costs. This article also provides new insights in the applicability of the proposed measure in containing the menace of front-running, as it has gone through a number of cases and comparative studies, which have shown diverse results of the application of the proposed measures in different stock markets around the world.*

***Keywords:*** *Algorithm, Algorithmic Trading (AT), High Frequency Trading (HFT), Front Running and Co-location.*

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[3] Algorithmic trading (automated trading, black-box trading, or simply algo-trading) is trading by using computers programmes, which follow a defined set of instructions for doing a trade to generate fast and frequent profits.
[4] The Hindu Business Line , https://www.thehindubusinessline.com/blexplainer/why-is-sebi-seeking-to-regulate-algo-trading/article37942656.ece., (last accessed on: May 2,2023).

## 1. INTRODUCTION

The research work is a critical analysis of the regulation of algorithmic trading in India with a special focus on the issue of front-running and the role of the Securities and Exchange Board of India (SEBI) in controlling the menace of front-running.

It tries to analyse critically the measures that have been adopted to date by SEBI to control the problem of front-running, analyse the effectiveness of those measures and will try to put forward suggestions and recommendations to improve the scenario wherever required.

To this end, a study has been done to understand how the practice of front-running used by High-Frequency Traders is problematic. Also, the research work will look into the measures adopted by SEBI to regulate high-frequency trading in India.

At the end, an attempt will be made to give some viable suggestions and recommendations for the betterment of the algorithmic trading regulatory framework in India.

For this research work, it is important to understand some basic elements of algorithmic trading. These include **algorithms,[5] Algorithmic Trading (AT),[6] High-Frequency Trading (HFT),[7] Front Running,[8] and Co-location.[9]**

## 2. IMPORTANCE OF THE STUDY

Algorithmic trading in India across the cash and derivatives market as a percentage of total turnover has increased up to more than 50% in 2022 from merely 9.26% (average) in 2010.

[5] An algorithm is a set of ordered instructions or commands used to carry out a particular work in a pre-defined manner. A trading strategy is basically a plan or a set of rules which are defined to conduct the process of buying and selling while trading in order to achieve a particular outcome like increasing profitability, better execution, etc.

[6] Algorithmic trading is trading by using computer programmes, which follow a defined set of instructions for doing a trade to generate fast and frequent profits.

[7] High Frequency Trading (HFT) is a subset of Algo-Trading. It is done within time-frames of nano & milli seconds. Some HFT strategies depend on price discrepancies & make profit taking their advantage. Others function by forecasting movements based on trends, using Machine Learning & Artificial Intelligence.

[8] Front-running is described as utilizing the information on a big, incoming order to take a trading decision which can put the trader in a better position than others in respect of that incoming order. The two principal methods by which HFT firms obtain a speed, and thus informational advantage, is by utilizing direct data feeds and co-location.

[9] A co-location is a data centre facility in the exchange premises where the exchange's servers are on the same network. It is used to rent space to trading firms to locate their servers and other computing hardware. Co-location facility provides the power, bandwidth, IP address and cooling systems. Space is generally rented in terms of racks and units. Co-location helps in reducing the latency by minimizing the travel time between your server and the exchange's matching engine.

But, in the past few years, we have seen tremendous growth in fraudulent and manipulative trade practices, as evidenced from the following news reports:

1. Axis Asset Management Co., which is India's seventh-largest mutual fund manager and partly owned by Schroders, in May sacked two employees, including its chief dealer, amid an ongoing internal probe.
2. Regulator SEBI has passed a confirmatory order barring 19 entities, including individuals, from the securities market till further orders in a case of front-running activities related to Reliance Securities.[10]
3. Markets watchdog SEBI on Monday ordered impounding unlawful gains worth over Rs 2.06 crore from 11 entities for front-running trade activities with respect to Fidelity Group.[11]
4. Regulator SEBI on Friday barred 16 entities from the capital markets for up to seven years for indulging in front-running activities.[12]

This calls for urgent attention to it. The growing malpractices in the Indian stock market have not only impacted the market dynamics where the small traders are being exploited by institutional and other High-Frequency Traders but, if left unaddressed, it can have a major economic impact on our country by resulting in a scenario where the small investors may leave the market altogether to move to market of other countries.

## 3. REVIEW OF LITERATURE

**High-frequency trading, stock volatility, and intraday crashes (2022)** The study examines the effect of high-frequency trading (HFT) on the price volatility of listed stocks and shows that under stable market conditions, greater HFT intensity is associated with decreased stock price volatility.

[10] The Economic Times, https://economictimes.indiatimes.com/markets/stocks/news/sebi-confirms-market-ban-on-various-entities-in-front-running case/articleshow/84016071.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst, (Last accessed on : December 25th, 2022)

[11] The Economic Times, https://economictimes.indiatimes.com/markets/stocks/news/sebi-orders-impounding-of-rs-2-06-cr-illegal-gains-in-front-running-case/articleshow/83319002.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst. (Last accessed on: December 25th, 2022).

[12] The Economic Times, https://economictimes.indiatimes.com/markets/stocks/news/sebi-bans-16-entities-for-front-running-activities/articleshow/79809459.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst. (Last accessed on : December 25th, 2022).

**Vivek Rajvanshi, Samit Paul (2022)** The study shows that the front-runners can achieve 5%–7% returns within a week around the event day. Lagged cumulative abnormal returns, change in volume, and change in delivery explain the abnormal returns. The results are robust after controlling for Bullish and Bearish Periods.

**Aritra Pan, Arun Kumar Misra (2021)** The researchers explore determinants of bid-ask spread significantly for low-frequency datasets in many developed markets. The study found a positive relation between market–capitalization and spread, supporting the theory that a higher trading volume cannot decrease the bid-ask spread.

**Mousumi Bhattacharya, Sharad Nath Bhattacharya, Sumit Kumar Jha (2021)** This article examines variations in illiquidity in the Indian stock market, using intraday data. Panel regression reveals prevalent day-of-the-week, month, and holiday effects in illiquidity across industries, especially during exogenous shock periods. Illiquidity fluctuations are higher during the second and third quarters. The study suggests that the impact of illiquidity is more severe during periods of extremely high and low returns.

**Dubey, R.K., Babu, A.S., Jha (2021)** This study focuses on the decriminalization of algorithmic trading by giving algorithmic trading credits regarding its contribution to the improvement of market quality.

**Ernawati & Herlambang (2020)** The study demonstrates a positive illiquidity-return relationship. It shows that decreased liquidity in markets due to front-running and other manipulative practices results in investors leaving markets which decreases liquidity and in turn decreases the returns from the market.

**Anagnostidis and Fontaine (2018)** study finds evidence that between 75% and 80% of a substantial common (market) liquidity element can be accounted for by the liquidity-supplying activities of HFTs. The market portfolio's HFT-driven liquidity covaries strongly with the supply of firm-specific liquidity. Furthermore, compared to non-HFT firms, HFT firms' unique liquidity supply is more vulnerable to market-wide liquidity swings, particularly during inter-day and intra-day periods of elevated price volatility.

**Varousis, Perotti, Sermpinis (2018)** This article provides an organised review of the empirical literature on the effects of changing tick sizes for exchanges. A modification in the minimum tick size could have two main effects on market quality, so this is the primary focus. The consequences of modifications to the minimum tick size on market structure are also of

relevance. According to the study, there is a substantial body of empirical literature that suggests that transaction costs fall when the minimum tick size is lowered. Although market liquidity rises, there is less motivation to engage in market-making operations. It shows a direct correlation between the recent rise in high-frequency trading activity and the minimum tick size rules. The price discovery is enhanced by a smaller tick.

**Linton and Mahmoodzadeh (2018)** This study looks at how HFT might develop and, by gaining a thorough understanding of its effects, identifies potential risks and possibilities that it might provide in terms of financial stability, and other market outcomes including volatility, liquidity, pricing efficiency, and price discovery. Contrary to widely held misconceptions, the data suggests that HFT and algorithmic trading (AT) may have a number of positive effects on markets. In certain situations, nevertheless, they can contribute to market instability. Concerns must be addressed in the short term with carefully designed regulatory actions. However, further research is required, particularly in light of the probable uncertainties and data shortage, to inform longer-term policy. This is crucial to enable evidence-based regulation in this contentious and quickly changing field.

**Hirschey (2018)** This study gives proof that high-frequency traders (HFTs) spot patterns in previous trades and orders that enable them to predict and execute deals ahead of other investors' order flow. HFTs' aggressive purchases and sales specifically lag behind those of other investors, and this effect is stronger at times when it is more challenging for non-HFTs to hide their order flow. This study demonstrates that trades from a subset of HFTs regularly exhibit the strongest ability to forecast non-HFT order flow, which is consistent with some HFTs having higher levels of expertise or being more interested in anticipatory techniques. The outcomes cannot be accounted for by HFTs responding to news or prior returns more quickly, by non-HFTs being contrarian or trend-chasing, or by misclassifying traders. These results confirm the presence of an anticipatory trading channel through which HFTs increase non-HFT trading costs.

## 4. REVIEW OF LITERATURE

(i) Analysis of the viability and finding the pros and cons of the measures suggested by SEBI to control the menace of front-running in its 2016 discussion paper.
(ii) Bringing out the issues involved and determining the liability of SEBI in addressing the problem of front-running.

(iii) Offering viable suggestions for improvement of the trading mechanism of the stock market, so as to strengthen the mechanism for investor protection.

## 5. HYPOTHESIS

The measures proposed by SEBI in its 2016 Discussion paper titled "Strengthening of the Regulatory Framework for Algorithmic Trading and Co-location" for tackling front-running are although good, not enough to curb the *front-running.* And hence, improvements are still required.

## 6. RESEARCH METHODOLOGY

This research work has been prepared by using the 'doctrinal' research methodology. The researcher has gone through existing legislation and the SEBI discussion paper of 2016 titled "Strengthening of the Regulatory Framework for Algorithmic Trading and Co-location" as the primary source and different existing literature as a secondary source.

## 7. MEANING OF FRONT-RUNNING

Front-running is described as utilizing the information on a big, incoming order to take a trading decision which can put the trader in a better position than others in respect of that incoming order. Set forth plainly, realizing that a big order is approaching, front-running comprises purchasing and quickly relisting that specific stock at a greater price, before the order is executed. It is one of the most prevalent frauds of the capital market, and is made possible with the help of 'High-Frequency Trading'. The two principal methods by which HFT firms obtain speed, and thus informational advantage, is by utilizing direct data feeds and co-location.[13]

## 8. WHY IS FRONT-RUNNING PROBLEMATIC?

Smart utilization of information (like direct data feeds) and superior machinery acquired by specific individuals employing High-Frequency Trading and co-location services have pepped up a two-layered arrangement that works so that the advantaged class is capitalizing and is essentially hunting the ones with not all the top tier resources, employing practices like 'front – running'. This effectively creates a 2-layered pattern of 'haves' and 'have-nots'. Consequently, the traders start to lose their confidence in the market, and in some not-so-exceptional cases,

[13] Purba Mukerji, Christine Chung, Timothy Walsh and Bo Xiong, *The Impact of Algorithmic Trading in a Simulated Asset Market*, 12, Journal of Risk and Financial Management, 68 (2019).

they even quit the market. Disappeared reliance of traders in the potential to trade at foreseeable prices, diminishes their zest to trade. This after-effect results in illiquidity. Illiquidity depreciates the securities on trade and makes a collection of capital inconvenient. This is very much evident in the United States of America. As for illustration, the normal figure of firms opening up to the world per annum was 530 from 1990-2000. This figure has fallen since 2001 to 125 generally, a fall of more than 400%. This impacted the economy instantly.

A contrary claim is that any person who wishes to pay for these services can get benefited equally. Regardless, this claim is illogical simply taking into account the fact that these are high-priced facilities that are more suited to High Frequency Traders.

## 9. SEBI'S ATTEMPTS TO CURB THE MENACE OF FRONT-RUNNING

SEBI has taken a number of actions to provide regulatory rules for algorithmic trading, in line with the initiatives of other international securities market regulators. SEBI has issued the following circulars to control algorithmic trading:

i. The March 30, 2012, Circular No. CIR/MRD/DP/09/2012, titled "Broad Guidelines on Algorithmic Trading," among other things, instructed Stock Exchanges to make sure that specific safeguards are in place when allowing Algo trading.[14]

ii. In order to ensure that the requirements set forth by SEBI/Stock Exchanges with regard to Algo trading are effectively implemented, Circular No. CIR/MRD/DP/16/2013, dated May 21, 2013, advised Stock Exchanges to ensure that trading members who provide the facility of Algo trading subject their system to a system audit every six months.[15]

iii. Stock Exchanges were advised, among other things, to provide fair and equitable access to their co-location facility in Circular No. CIR/MRD/DP/07/2015, dated May 13, 2015.

iv. Direct communication between two Stock Exchanges' co-location facilities was made possible, among other things, by Circular No. CIR/HO/MRD/DP/CIR/P/2016/129, issued December 1, 2016.

**9.1. Discussion Paper on Algorithmic Trading and Co-location: -**In order to level the playing field for both algo and manual traders, and to give rid off to the manual traders of their

[14] SEBI, https://www.sebi.gov.in/legal/circulars/apr-2018/measures-to-strengthen-algorithmic-trading-and-co-location-proximity-hosting-framework_38605.html. , (Last accessed on: December 27th, 2022).
[15] *Id.*

difficulties, on August 5, 2016, SEBI issued a discussion paper inviting the inputs of market participants on the suggested mechanisms and the requirement of any further mechanisms for the purpose of constraining the problem of front-running. Taking into consideration the responses, the underneath measures were suggested:

i. Stock Exchanges may be advised to introduce Shared Co-location Services.
ii. All trading members may receive a free tick-by-tick data stream, provided that they build the appropriate infrastructure to receive and handle it. In addition, stock exchanges may be urged, after consulting with trading members, to deepen the picture of the five best bids and ask for quotes.
iii. The mechanism for imposing a penalty for a high Order-to-Trade Ratio may not apply to Algo orders placed within 0.75% of the LTP (OTR). Additionally, orders placed in the equity cash section and orders issued under LES may be included in the OTR framework.
iv. Stock Exchanges might be encouraged to assign each algorithm a special identifier.
v. It could be advisable for stock exchanges to share more information on the delay experienced within their trading infrastructure. Exchanges could also be instructed to broadcast the reference latency between a reference rack in the co-located space and the exchange's core router.

As a result of the foregoing, it is suggested that Exchanges be permitted to offer a simulated market environment for software testing, including algos. A facility of this kind might be made available in addition to the fake trading system that is already in place. The decision to phase out with monthly mock trading may be made after evaluating the facility's robustness and after consulting with the relevant technical SEBI committees.

## 10. ANALYSIS OF THE MEASURES PROPOSED BY SEBI

### 10.1. Minimum Resting Time for Orders

It is the timeframe between the getting of an order by the Stock Exchange and its correction or cancellation from that point. By and large, the resting time ensures that the speed at which markets work is managed. As indicated by the proposition, orders got before the pass of a specific time span would not be permitted, in order to hold under control, the 'fleeting' or 'vanishing' liquidity.

Benefits: a) It may lessen the extortionate quantity of traffic produced by the surplus cancellation and resubmission orders.

b) The estimation regarding the current price becomes more accurate.

Risks: a) There is a possibility of some orders becoming subject to adverse selection if they become stale and don't get cancelled.

b) The bid-ask can get increased as a consequence of less liquidity caused due to adverse selection, which can further shoot up the transaction costs.

c) The investors not using HFT, like the retail investors may suffer a loss due to the enhanced bid-ask and cost of the transaction.

d) This can alter the dynamics of the market and can draw in more High-Frequency traders, who can exploit the fee options.

Example from Global Markets: No regulators around the globe have ordered this mechanism. Australian Securities and Investment Commission (ASIC) was considering it a couple of years back, however, at last, quit the thought and didn't proceed with this mechanism.

**10.2. Frequent Batch Auctions (Periodic Call Auctions)**

This is an option put forward to the as-of-now in-use 'continuous matching system', under which continuous matching of purchase and sell orders occurs. The suggested option collects the orders for a determined time frame (around 100 milliseconds), and afterward, toward the finish of such time spans, matches the orders. The hope is that the proposition, whenever actualized, will stop the latency edge of co-located traders.

Benefits: a) The speed of trading could be diminished, in consequence of which, the competition between the traders to wing themselves with speed-increasing technologies will get eradicated.

b) Manipulative trade practices, like spoofing and layering, may decrease.

Risks: a) The risks involved in the execution of orders may get enhanced, if the traders are not sure about the auction-time.

b) Batch Auctions may not mirror the market conditions, and this may result in a shortage of mirror-orders matching.

c) Presently, a wide range of trading mechanisms are permitted, which can get constrained if this proposition is to be implemented.

d) Flawless time synchronicity would be needed in between exchanges to avert arbitrage risk.

e) At times of high traffic, it may result in an increment in adverse cost selection.

f) Transparency in real-time price updates and price discovery may get decreased.

Example from Global Markets: This way of auction has been adopted by the Taiwan Stock Exchange (TWSE) which was earlier using the mechanism of continuous auction.

Example from Indian Markets: Since April 2013, trading at BSE, NSE, and MSEI is being done in illiquid stocks only through a periodic call auction mechanism.

**10.3. Speed Bumps in order processing**

This mechanism includes the utilization of randomized order processing deferral of milliseconds. Investors engaged with HFT don't feel it to be ideal because of evident reasons.

Benefits: The proximity benefit of traders using co-location services can get frustrating by it to a considerable degree.

Risks: a) The randomness component can boost vulnerability with respect to the nearing of orders to the exchange and henceforth, can enhance the adverse selection costs.

b) In the case of the products traded on foreign markets, liquidity from Indian markets can get driven away by such a measure.

c) Expanded vulnerability and decreased investment would increase cross-market arbitrage and will exacerbate price efficiencies across market segments.

Example from Global Markets: a) ParFX applies it.

b) It has got the approval of the Securities Exchange Commission of the USA.

**10.4. Randomization of orders received over a period of time**

Under this mechanism, orders are revised with randomized time priority first and are then transmitted for matching.

Benefits: a) Diminishes the benefit of latency.

b) Ever-changing behaviour will diminish the benefits accessible to fast traders.

Risks: a) Higher unpredictability can result in adverse selection costs.

b) There is a possibility of traders moving to other markets, where this mechanism is not in use. This can cause a reduction in liquidity.

c) Cross-market arbitrage may get decreased.

d) It might lessen the market quality, as a result of which, motivation to supply liquidity may get lowered.

Example from Global Markets: European exchanges use randomization usually in opening and closing auctions, but there has been no such analysis of its impact.

**10.5. Maximum order message-to-trade ratio requirement**

It requires that for every set of orders sent; at least one must be executed.

Benefits: a) Accepting, processing, and keeping messages is an expensive business. This will decrease the number of trivial messages.

b) The traffic may also get decreased due to the dissuasive effect of undesired executions.

Risks: a) It can discourage the traders from putting in new orders and can result in a decrease of liquidity.

b) This may badly influence the depth and competition in bid-ask, particularly during unstable periods.

c) Dropped competition can lead to the bid-ask spread.

d) It will bring about less pinging, on account of which, more non-visible orders will be sent, resulting into lowered transparency.

Example from Global Markets: There has been no publication of any academic research yet in this respect. A decrease in liquidity was observed in the initial results of commissioned research.

Example from Indian Markets: Similar mechanism was used by NSE in 2009; and by SEBI in 2012.

**10.6. Separate queue system.**

The requests will be a time marked and transmitted through 2 order queues (1 for co-location orders and 1 for the non-colo orders) to the order book by applying the round-robin technique. Round Robin is an algorithm that is commonly utilized for process and network planning.

Benefits: The advantage may not be a lot, as the co-location traders will in any case be the first to get the market data feeds and seal a deal, with the help of better facility.

Risks: a) The 2 queues can result in varied prices for the same security simultaneously. Since the co-located traders will react to prices quicker, their prices will start prevailing. It will draw in liquidity from the non-colo market, which can ultimately put an end to non-colo trading.

b) Chances are that this can drive off liquidity from domestic exchanges to foreign exchanges.

**10.7. Review of Tick-by-Tick Data Feed**

The TBT data feeds give particulars relating to on a real-time basis. Tick-by-tick data is required by the traders doing HFT, to exploit the market developments at the soonest. The suggestion is to give organized data to all the traders at the expiry of the prescribed time-spans.

Benefits: This can eliminate the informational advantage, using which the High-Frequency Traders perform manipulative trade practices like 'front-running'.

Risks: This mechanism can influence the price-discovery procedure since the data feeds are being provided at prescribed time intervals, which will dispense with the advantage of real-time data feed.

Example from Indian Market: BSE distributes TBT for free to all the co-location traders given that they can process it with the help of appropriate infrastructure.

## 11. CONCLUSION AND SUGGESTIONS

The Discussion Paper analyses concerns identifying with market quality emerging from HFT and looks to address these issues with its propositions. While it is understood that it is just a starting point in the exercise of updating SEBI's regulatory framework, it doesn't include a lot of significant worth and isn't considerably more than a general emphasis of measures and components, presently under the thought at other places. Its key failings are by virtue of the fact that it doesn't contain particulars of the proposals; or give subtleties of the nature, degree, and range of the issues dealt with by Indian markets; isn't grounded on India-centred experimental proof (as we can understand by their criticisms done by BSE and NSE); furthermore, doesn't give an execution plan to any of its proposals. This has brought about an at-first-sight assessment of these recommendations in a vacuum.

Also, the measures, albeit acceptable, comprise genuine dangers like the winding down of traders and adverse selection costs, which can additionally bring about diminished liquidity and expanded bid-ask. Concerns like adverse selection, execution faults, shortage of mirror-orders matching, cross-market arbitrage, etc. also need to be addressed. Additionally, the BSE and NSE are exceptionally disparaging of certain measures like the creation of separate queues for algo and non-algo traders. Batch auctions may be a good measure. Batch auctions and randomization would amplify the pre-execution order exposure and essentially lessen, if not wipe out, the speed advantages enjoyed by algorithmic traders and accordingly discredit the importance of co-location. However, the revised market structure should be carefully conceived through and upheld by robust strong examination.

Taking into consideration every one of these contradictions, it is concluded that the hypothesis stands true and it's essential to invest some more amounts of energy in drawing measures, as an experimentation strategy can have serious consequences on the market, and henceforth, the economy all in all.

Given the issues pointed out above, more profound control of SEBI might be basic in regulating HFT. In the event that SEBI wishes to assign regulatory powers to the exchanges, it ought to require earlier approval of SEBI to rules encircled by the exchanges before they are executed. It is suggested that SEBI may consider mandating exchanges to look for approval from SEBI before such exchanges execute any new regulations. On the other hand, SEBI may consider a different licensing system for High-Frequency Traders, which would force constant 'fit and proper' criteria to be kept up by licensees. For instance, the U.S. Budgetary Industry Regulatory Authority ("FINRA") plans to issue non-open report cards to HF Traders dependent on the authenticity of their trading methodologies. SEBI may likewise consider setting up an independent supervisory body to administer HFT, which works under the aegis of SEBI. This upcoming body ought to be enabled to look for data from algorithmic traders in confidentiality, including depictions of HFT strategies and subtleties of trading on a regular basis. This body must continually screen the market for manipulative and fraudulent practices and report any genuine or suspected deceitful, manipulative, or ill-conceived practices to SEBI.

Additionally, further investigation should be possible in the field of measures, for example, HFT transaction tax, as in use in France; and charging fees to traders dependent on a number of messages, as done in Canada; regarding their appropriateness for Indian Stock Market. However, the negative side of these measures is that it would probably wipe out HFT’s slim profit margins. It likewise has the detriment of not having the capability to demarcate between fair and out-of-line HFT practices.

Finally, these measures can have across-the-board disruptive impacts on the market, including winding off traders overseas. The intricacy of these measures may bring about expanded operational expenses and dangers. Moreover, few of the recommendations e.g., randomized speed-bumps are in view of encounters of market microstructures, which may have totally different characteristics than the Indian markets. All of these should be remembered when SEBI finalizes these measures.

# JUDICIAL REMEDIES AS A LEGAL RESPONSE TO RECESSION IN INDIA AS A CONSEQUENCE OF COVID-19 PANDEMIC

*Yogi Chaudhary*[1]

***Abstract***

*The world is not globalized merely because of the actions of the sovereign states but also because of certain uncontrollable agents such as the Great Recession and the COVID-19 Pandemic. One thing is economically common between them- a fall in aggregate demand. The Great Recession of the 2000s originating from the United States shattered the economies throughout the world and transformed into the Great Depression of 2008. The pandemic led to the stagnation of the states itself- economically and physically. The traditional measures of monetary and fiscal policy were applied but proved to be a failure. Then what should be the solution? In his book Law and Macroeconomics- Legal Responses to Recession Yair Listokin*[2] *proposes the application of legal measures on the failure of monetary and fiscal policy to address falling aggregate demand, what he calls as "Expansionary Legal Policy". One of the three tools of Expansionary legal policy propounded by him is judicial remedies. In the present paper the researcher addresses the scope of judicial remedies as a tool of legal response to the falling aggregate demand. Firstly, the researcher analysis the scope of the tool. Secondly, the researcher elaborates the judicial remedies which have the potential to increase aggregate demand and their inclusion in the law. Finally, the researcher addresses the feasibility of applying the remedies in the Indian judicial system at the time of COVID-19 and its limitations. It is concluded that certain judicial remedies have the potential to increase aggregate demand however their scope is limited.*

***Keywords****: Monetary Policy, Fiscal Policy, Aggregate Demand, Recession, Expansionary Legal Policy, Judicial Remedies, Damages, Injunctions, Specific Performance*

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[2] Yair Listokin, *Law and Macroeconomics- Legal Responses to Recession* (Harvard University Press, 2019).

## 1. INTRODUCTION

One economic variable affects the other. A falling price leads to a reduction in demand as the demand law provides or the price reduces when the supply increases as the supply law provides. On the same line, the solutions to economic crises are economic tools in the form of monetary and fiscal policy. The two macroeconomic measures - monetary and fiscal policy measures are used to address the changing business cycles. The monetary policy aims at keeping the interest rates low so that the borrowers are attracted and there is more spending. The fiscal policy aims at easy tax policy so that the after-tax income or the "disposable income' is increased. The ultimate aim of both policies is to increase aggregate demand. However, the policies do fail, the US Recession of 2000 is an example of the same which further served to transform into "The Great Depression" in 2008. On the failure of these policies, Yair Listokin in his book, *Law and Macroeconomics- Legal Responses to Recession* (2019) (Listokin 2019), presents a very novel argument that law can control the business cycle, it is novel because before him no one has attempted to study the role of law in handling changing business cycles.[3]

This paper will try to further ideas from his book to find legal remedies to the recession caused by COVID-19 in India. Firstly, it is explained as to what is the role of law in macroeconomics, then the legal remedies are analysed with respect to the Indian scenario and finally, the potential of judicial remedies to stabilise the recession caused by COVID-19 in India is analysed.

## 2. LAW, MACROECONOMICS AND LEGAL REMEDIES: A NOVEL IDEA

A business cycle in an economy has four different phases including boom, recession, trough, and prosperity. Each of these phases of the business cycle has a different impact on the economy; while the boom and prosperity reflect positive change, recession, and trough on the other hand, reflect a negative one on the Gross Domestic Product.[4] According to the Keynesian Model, each of these phases has an impact on the aggregate demand which comprises four components namely consumption expenditure, government spending, investment expenditure, and net exports.[5] The economic activities in each phase are

[3] Orli Oren-Kolbinger, *Do Tax Judges Think About the Economy?* 52 Loy. U. Chi. L. J. 437, 440 (2021), Available at: https://lawecommons.luc.edu/luclj/vol52/iss2/6 (last accessed on: November, 21 2021).
[4] N. Gregory Mankiw, *Macroeconomics* 258 (7th ed., 2010).
[5] John Maynard Keynes, *The General Theory of Employment, Interest and Money* (London: Macmillan, 1936).

controlled through two macroeconomic policy measures- monetary policy and fiscal policy.[6] These policies help to control private consumption and investment expenditure. In the case of boom contracting monetary and fiscal policy is used whereas an expansionary policy is used in recessionary conditions. During the recession the interest rates are reduced so as to provide cheap borrowing, to ultimately increase the income for consumption. Similarly, a lenient fiscal policy is used by reducing the taxes, it leads to more income in the hands of the taxpayer thus his disposal income increases, and thereby his demand for consumption expenditure also increases. However, a very high disposable income leads to more increase in investment activities than consumption.

When the 2008 Depression occurred in the United States the same policy was adopted. The "zero bound" monetary policy was used to boost borrowing and massive government spending was initiated through the American Recovery and Reinvestment Act, with the initial relief from the crisis the economy was again trapped in the same economic and organizational structure that contributed to the crisis. The low value of the collateral in the form of house properties did not help in getting much borrowing. The solution of "zero lower bound" interest rates itself created the problem of no money and valueless house properties with the financial institutions. Then fiscal stimulus was applied which too did not work well. It is also said that among these two policies, the fiscal policy was less effective.[7] The reason is that the monetary policy reaches at a higher speed as compared to the fiscal policy. Listokin (2019) suggests institutional reforms to improve fiscal policy-making like the abolition of constitutional deficit restrictions (he argues for abolishing the requirement of a balanced budget as it reduces government spending), rule-based instruments of fiscal stabilization, creation of an independent agency for fiscal stabilization policy— the fiscal equivalent of a central bank and education of macroeconomics to lawyers. He also suggests changes in Administrative fiscal policy– coordinating offices within government. According to him, the legal responses are useful because it facilitates better monetary and fiscal policy and also shift demand without requiring monetary and fiscal policy.

Now on the failure of both the traditional tools of macroeconomic policy, Listokin (2019) advocates the use of legal measures. He proposes the application of legal measures on the

[6] Rudiger Dornbusch Et Al., *Macroeconomics* (11th ed., 2010).

[7] Christina D. Romer, *Back from the Brink*, http://www.whitehouse.gov/administration/eop/cea/. , (last accessed on: November, 21 2021).

failure of monetary and fiscal policy to address falling aggregate demand, what he calls as "Expansionary Legal Policy". In the last chapter, *Expansionary Legal Policy Options*, he proposes three options namely (1) countercyclical utility- rate regulation, (2) adjusting debtor– creditor law for the business cycle, and (3) changing the law of remedies with the business cycle.

Under the first legal remedy, he talks about controlling the rate of essential utility services with the changing business cycle. This is believed to increase disposable income with the payer. Like (for example) if the electricity charges are reduced then much income would remain with the consumer. This income would go on to increase the demand. Masur (2016) has dealt with the issue of whether the regulations can be countercyclical and arrives at the conclusion that the regulation should be adopted on an experimental basis due to uncertainty of the empirical premise of countercyclical regulations. He identifies certain limitations- firstly that there would be saving of only variable costs and not the fixed cost, secondly regulatory cuts which provide permanent savings are effective as compared to temporary ones, thirdly, the numerous options to utilize the saving are a threat to the assumption of their potential to increase demand, the same applies to the options available for compliance with the regulation and that suspending certain regulations will lead to more social harm which would be irreparable during the boom.

The second measure talks about controlling the insolvency law which requires writing off debts at times of recession. Finally, under the last measure I address here is how the Judicial Remedies can be used differently in the changing business cycle. He has tried to explain the concept with the help of judicial remedies available when a nuisance is committed against an individual due to a construction project near his premises and how the judicial remedies of – damages and injunctions can be differently used in this setting. He goes on further to say that if there is a recessionary phase in the economy a court must lean in favour of granting damages instead of injunctions (specifically preliminary injunctions) and the infrastructure project should be continued. This will provide monetary relief to the individual and the continuation of the project will keep on generating employment and demand for raw materials by the respondent. Whereas if an injunction is granted the demand for raw materials will stop and so the employment generation which would further worsen the situation of recession.

## 3. COVID-19 AND INDIAN ECONOMY

It is well established that a recession in the economy leads to a fall in aggregate demand. When the news of the COVID-19 pandemic reached economies around the world the first measure used- was to ensure social distancing and regular sanitization. In India, a complete lockdown was ordered by the Central Government on March 25, 2020, for an initial period of 21 days which was further extended.[8] The unlocking was done in different phases gradually opening up the movement of the public. The Central government allowed only the sale of essential commodities and that too for a specific duration in a day. There was no movement of masses for work, education, or leisure for months only allowing access to medical facilities.

The COVID-19 had a severe negative impact on the Indian Economy. The Gross Domestic Product (GDP) for the year 2020-21 was projected to contract by 7.7 as compared to a growth of 4.2 percent in 2019-20.[9] The aggregate demand for 2020-21 contracted by 8% and it is the severest ever contraction of the aggregate demand.[10] The private consumption and investment demand together constitutes 85% of the GDP. Private consumption contracted for the first time in the past four decades. The government expenditure continued to provide support to aggregate demand however it got waned in 2020-21 due to stress on government finances. The capital formation also marked a contraction and it was only net exports that rose. The government measures could not improvise the fall of the aggregate demand and the hesitation in expanding the budget, due to fear of a rise in fiscal deficit; the early revival of the economy was dismal. The government announced financial stimulus to revive the economy in mid-2020 and later.[11] A study of the impact of the stimulus suggested that they were effective in reviving the economy but the impact was insignificant and it is only by proper monitoring of the implementation of the economic stimulus that they could revive the economy.

[8] Ministry of Home Affairs, https://www.mha.gov.in/notifications/circulars-covid-19, (last accessed on: November, 21 2021).

[9] Macro-Economic Framework Statement 2021-22, https://www.indiabudget.gov.in/doc/frbm1.pdf., (last accessed on: November, 21 2021).

[10] Annual Report of Reserve Bank of India, https://m.rbi.org.in//scripts/AnnualReportPublications.aspx?Id=1315, (last accessed on: November, 21 2021).

[11] The Hindu, https://www.thehindu.com/business/Economy/nirmala-sitharaman-unveils-new-covid-recovery-package-expands-credit-relief/article35020572.ece. , (last accessed on: November, 21 2021).

## 4. JUDICIAL REMEDIES AND COVID-19 CAUSED RECESSION

Listokin (2019) has focused on two remedies namely injunction and damages. Under Indian Law, the provisions related to a temporary injunction and damages[12] are specifically available for civil disputes and contractual obligations. Additionally, there is a remedy of specific performance of the contract which is also available in addition to the above remedies, in case of breach of a contract.[13] The major argument of Listokin (2019) is the use of these remedies for increasing aggregate demand in recession business cycles. Now in a dispute, the judge will decide the appropriate remedy; it becomes essential to understand the role of judges in enforcing the appropriate judicial remedy suitable to recession.

Orli (2021)[14] who is inspired by Listokin (2019) aims at identifying the potential of judicial decisions in stabilising the economy. He studies the concept with respect to tax disputes in lower courts in Israel. He has argued that the taxation policy has a stabilising potential and the judges have the role of an economist in tax disputes. Further, a judicial decision as compared to legislation on tax disputes is faster in its impact on the economy though their contribution in the total economic activities is very low. He identifies this as a limitation to his hypothesis but he saves himself by saying that such disputes also affect non-parties as the parties tend to anticipate outcomes and may go for other forms of settlement. Another limitation is the binding nature of judicial decisions which makes them unsuited to changing business cycles. His findings reflect the just opposite of his hypothesis, i.e., judicial decisions in tax disputes destabilize the economy. The judges tend to support the authorities in times of recession and the taxpayers' prosperity which is against the Keynesian Model. From the failure of Orli (2021), it can be said that the judges cannot provide judicial remedies in accordance with the changing business cycle.

The researcher takes a slightly different and optimistic angle to find the potential of judicial remedies specifically with respect to the COVID-19 situation. During COVID-19 the performance of the contract became physically impossible as the COVID-19 protocols did not allow movement. This led to a reduction in economic activities and the aggregate demand fell. Thus, a remedy for such recessionary conditions required ensuring that the contracts are performed although at a later stage. The question of delayed performance of a contract

[12] Indian Contract Act, 1872, $ 73, No. 9, Acts of Parliament, 1872 (India).

[13] Specific Relief Act, 1963, $10, No. 47, Acts of Parliament, 1963 (India).

[14] Orli Oren-Kolbinger, *Do Tax Judges Think About the Economy?* 52 Loy. U. Chi. L. J. 437 (2021), https://lawecommons.luc.edu/luclj/vol52/iss2/6., (last accessed on: November, 21 2021).

depends upon the intention of the parties. Section 55 of the Indian Contract Act, of 1872 provides that a contract where time is the essence becomes voidable at the option of the promisee when not so performed. Thus, such contracts would depend upon the wishes of the promisee to keep the contract or repudiate the same. Such contracts are partially out of the scope of this research as it is based on finding remedies for the contracts where the contract would not be repudiated for the delay in performance and it is only in such cases that the question of "aggregate demand stimulating" remedy will arise. Because in the former cases, the contract would be hit by Section 55 and the affected party has two options either to treat the contract void or act according to the contract and waive the right to compensation. It is more dependent on the party rather than the judge. In the latter case, the effective role would be to grant specific performance or as Listokin (2019) suggests granting damages instead of injunction.

With respect to treating the contract as void under Section 56 of the Indian Contract Act, of 1872, it is the judicial trend that mere delay does not nullify the contract. It is the subsequent impossibility of the contract which makes them void.[15] Now the question arises whether contracts are really impossible or they are merely temporarily suspended. The concept of impossibility of performance is embedded under Section 56. It provides that subsequent impossibility makes the contract void and their performance is excused by virtue of their impossibility.

In *Satyabrata Ghose v. Mugneeram Bangur & Co.,*[16] where the appellant filed an application for specific performance of purchase of a plot of land which was acquired by the government for defence purposes due to the outbreak of war leading to stoppage of necessary work on the plot. The question for determination was whether the requisition of the government led to the frustration of the contract. The court said that "*the evidence only on which the court has to form its own conclusion whether the changed circumstances destroyed altogether the basis of the adventure and its underlying object."*[17] It was further observed that the doctrine of frustration would not apply where there is a contemplation of an intervening circumstance affecting the performance. With regard to the issue at hand, it was observed that since there was no stipulation of time, the unwarranted delay will not fundamentally affect the contract. It was held that such a delay has not made the performance impossible. In this case, the

[15] Indian Contract Act, 1872, $ 56, No. 9, Acts of Parliament, 1872 (India).
[16] Satyabrata Ghose v. Mugneeram Bangur & Co., 1954 AIR 44.
[17] *Ibid,* p. 10.

court's inquiry the contemplation of time is pertinent. They have accepted that the notification made the contract delayed but it did not make it impossible to perform.

It is not only the physical impossibility that makes the contracts void but a contract becomes frustrated due to change in circumstances also.[18] In *Sushila Devi v. Hari Singh*[19] it was observed that Section 56 not only applies to cases of physical impossibility but also where the performance becomes impracticable or useless. In this case, a lease agreement with respect to a land situated in Gujranwala district was entered into by the parties. The partition of India and Pakistan followed and both the parties migrated to India. it became impossible for the lessee to collect the rent or take possession. It was held that due to subsequent impossibility, the contract was frustrated.

In *Energy Watchdog v. Central Electricity Regulatory Commission,*[20] the Supreme Court held that force majeure would operate as part of a contract under Section 32 and independently it can be invoked under Section 56 of the Act. However, the case laid down a subjective criterion for the applicability of the force majeure clause depending upon the nature of the contract.

With respect to the contracts which changed due to COVID-19, a question arose before the courts as to whether the lockdown situation was an "impossibility" in light of Section 56 or not. In *Standard Retail Pvt. Ltd. v. G. S. Global Corp and Ors*., the Bombay High Court dealt with a contract containing force majeure clauses and the petitioner pleaded that the contract cannot be enforced as it has become impossible due to lockdown and thus hit by Section 56 of the Indian Contract Act. The Court disagreed with the argument and it was observed that the lockdown is for a "limited period" which cannot rescue the petitioner from avoiding his contractual obligations. It is important to note that the force majeure clause contained the provision for non-performance as well as a delayed performance of the contract. In *Halliburton Offshore Services Inc. v. Vedanta Ltd and Anr*.,*[21]* the Delhi High Court agreed that though COVID-19 is a force majeure event, it posed a question as to whether COVID-19 would rescue non-performance in all cases. It was held that it was a subjective consideration and every case cannot be uniformly excused on the ground of COVID-19. The court must consider the conduct of the parties and the deadlines imposed in the contract. It was further

[18] Krell v. Henry, (1903) 2 K.B. 740.
[19] Sushila Devi v. Hari Singh, AIR 1971 SC 1756.
[20] Energy Watchdog v. Central Electricity Regulatory Commission, (2017) 14 SCC 80.
[21] Halliburton Offshore Services Inc. v. Vedanta Ltd and Anr, O.M.P. (1) (COMM) & I.A. 3697/2020.

observed that force majeure should be narrowly interpreted and non-performance would be an exceptional circumstance. For the contracts disrupted by COVID-19, force majeure could be claimed provided that it was the direct cause of the disruption.

As previously stated, the researcher is concerned with those contracts where time is not the "essence" and in such a situation the court has not declared the contract as void. However, it has been pointed out that it is a "case-to-case" decision. In the cases decided above by the Bombay and Delhi High Court, the court has given a remedy that would lead to a continuation of the contracts, and for the performance of the contract there would be demand for "man and material", this is similar to what Listokin (2019) emphasised when he gave the "nuisance" example and how the judicial remedy of granting damages and continuing the construction project would further the goal of increasing aggregate demand for construction material and continued wages to labourers.

In the former, the court will not grant such a remedy as Listokin (2019) has argued because the idea of "remedy for wrong" will be defeated. The reason why the plaintiff brought the suit is that he did not get monetary compensation; rather he wanted an injunction on the construction project, although damages could have been claimed additionally. The judge cannot make a selection of remedy on economic grounds instead he is bound by legal principles of just and equity.

In the latter example, although there may come up contracts where the COVID-19 pandemic has caused a delay in the performance, in such cases the parties may not be willing to perform the contract. The court cannot force the remedy of specific performance of the contract in such a situation but can only grant damages for the loss for breach of contract.[22] The promise may alternatively waive his right to get the contract performed, here also damages can be granted. Thus, both situations will fall short of the expectation Listokin (2019) has made i.e., the expectation of increasing the aggregate demand.

The law has to provide for the remedy of specific performance or damages for breach of contracts to make it pro-economic. Kumar et.al. (2021) studies the role of force majeure on contracts disrupted by COVID-19 and concludes that even though force majeure could be claimed in such cases however it would still be open to the parties to continue to perform the

[22] *Supra* note 12.

contract or end the contract.[23] He further recommends that instead of claiming force majeure under Section 32 of the Contract Act, there must be clear and distinct law on the subject dealing with diverse aspects of a contract.

Here the researcher proposes the role of the legislature in providing a normative form to prevent breach or voidability of the contracts which are merely delayed by an uncertain event like COVID-19. The law can limit the choice of remedy available. For example, In the Indian context, it is worth mentioning that restriction on the remedy of injunction is restricted in certain cases, in the case of infrastructure projects that are already included in the Specific Relief Act by the Amendment of 2018.[24] This amendment was brought to make "specific performance a rule rather than an exception" and the rising economic activities become a consideration for passing of this amendment.[25] The amended Section 20 of the Specific Relief Act, 1963 has removed the word "discretion" of judges in granting specific relief. For the purpose of enforcing the contracts which may be delayed, the law must provide the bar on claiming damages and for the judges, there should not be discretion in such cases.

To increase the aggregate demand, remedies have to be such which leads to more economic activities. A specific performance of a contract requires doing all the acts necessary under the contract. Thus, for the specific performance of a contract to supply certain "X" goods, the supplier would be required to produce the goods or purchase them from the manufacturer, thus the demand for the goods will increase the manufacturing process, leading to income for the manufacturer and wages and salary for his employees. This increase in income will lead to more consumption activity leading to an increase in the overall aggregate demand.

## 5. LIMITATIONS OF JUDICIAL REMEDIES TO RECESSION

Orli (2021) with respect to his research identifies certain limitations including the limited number of tax disputes due to which their contribution to economy would be low, secondly with respect to judicial remedies in general is their binding nature, that they will be uniformly applied irrespective of the economic condition and they will be binding whether it comes from judicial decision or the law itself. Apart from judges Listokin (2019) advocated the role

[23] Kumar, Dr. Raj. Deshwal, Seema, *Principle of Force Majeure - An Assessment of Commercial Contracts in India in Context of COVID-19*, Cambridge University Press (2021), available at: https://www.cambridge.org/engage/coe/article-details/60ba5a4db04fe7eb825cb210, last accessed on: November, 21 2021.

[24] Specific Relief Act, 1963, $ 41(ha), No. 47, Acts of Parliament, 1963 (India).

[25]Prsindia,https://prsindia.org/files/bills_acts/bills_parliament/2017/Specific%20Relief%20(A)%20Bill,%202017.pdf, (last accessed on: November, 21 2021).

of plaintiffs in specifically asking for damages instead of injunctions. This is itself a limitation of choice making.

There is also a limitation on the premise of granting judicial remedies itself, the maxim "*ubi jus ibi remedium*" mandates that illegal or harmful projects cannot be granted permission to continue. Damage will not suffice the continued tort committed against a person. The court cannot simply grant damages and let the plaintiff suffer the harm. Once the damages are granted the respondent is required to change according to the property principle which protects the rights of individuals. For example, in *Donoghue v. Stevenson*[26] when the damages were granted, and the Wellmeadow Café where the snail was found was closed in 1931. Had the Listoking (2019) model of damages applied, the business would have continued but that is not the case with the judicial remedies as it is inconsiderate of economic consequences. Listokin (2019) has generalised a narrow concept. The idea of damages instead of injunction may suit in case of infrastructure projects but it will not equally in every civil wrong.

## 6. CONCLUSION

It is apparent that the COVID-19 causes serious economic damages. The fall in the aggregate demand in India showed a recessionary cycle. The Keynesian model addresses falling demand by increasing disposable income. The idea has been extended by Listokin (2019) and he suggests use of law as a means to increase the aggregate demand. He gave three legal remedies including (1) countercyclical utility- rate regulation, (2) adjusting debtor– creditor law for the business cycle, and (3) changing the law of remedies with the business cycle.

The present paper further extends his idea and tries to find the potential of judicial remedies to increase aggregate demand in a recessionary situation caused by COVID-19. The findings suggest that the judicial remedies are not as dynamic as macroeconomic policies are. So even if certain judicial remedies are useful in a recession, they will be harmful in a boom. Even for the COVID-19 caused recession the judicial remedies would have a binding effect. The research has dealt with the role of judges in providing COVID-19 effective remedies. The remedies of injunction, damages and specific performance are available in civil cases. The COVID-19 led to impossibility of performance of contract and the parties took the excuse of force majeure. The judiciary seems to not treat COVID-19 an "impossibility" within Section 56 of the Contract Act. However very few cases are currently decided yet and they also

[26] Donoghue v. Stevenson, (1932) UKHL 100.

suggest a case specific finding. Even if they provide the remedy of specific performance rather than damages it would be case specific. Also, it is the choice of the plaintiff and not the discretion of the court in granting remedies. Thus, no judicial trend seems to be created. The limitations identified by Orli (2021) would also apply. The researcher also analysed the role of the legislature in bringing law which restricts the remedies during certain economic conditions but this plan is also grappled by limitations of binding nature although it is more feasible.