VOLUME VIII ISSUE – II (Apr – Jun 2022)

QUEST

A Quarterly Journal of the Students published by the Indian Institute of Legal Studies

INDIAN INSTITUTE OF LEGAL STUDIES

UG & Post Graduate Advanced Research Studies in Law
Approved under Section 2(f) & 12B of the UGC Act,1956
Accredited by NAAC
Affiliated to the University of North Bengal
Recognized by the Bar Council of India, New Delhi
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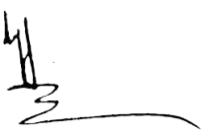
QUEST EDITORIAL BOARD

MESSAGE

FROM PRINCIPAL'S DESK

Big thanks to the Quest Editorial Board and its contributors for giving their valuable time. I believe this edition will enrich the reader's knowledge. I would also like to thank the students who, through various mediums, have presented their ideas, views, emotions and expressions. I believe they are going to be the flag bearers of the legal fraternity in India. I would also like to thank and congratulate to all the editors and the contributors of this edition. I am sure, that the readers will be enhancing their knowledge base with this edition of Quest.

Thank You
Prof. (Dr.) Ganesh Ji Tiwari



Principal,
Indian Institute of Legal Studies

MESSAGE

FROM REGISTRAR'S DESK

"No thief, however skillful, can rob one of knowledge, and that is why knowledge is the best and safest treasure to acquire."

L. Frank Baum

I am grateful to the Quest Editorial Board and its contributors for encouraging us to complete the journal which will help the readers in many ways. Every edition brings new challenges as well as new opportunities for the contributors.

I believe this journey of Quest has been a cause of reflection, full of unlearning old habits and adopting new ones. The journey was challenging but it was worth it. I hope this opportunity not only helped the students to sharpen their minds but also to represent the principles of Indian Institute of Legal Studies.

I would also like to thank and congratulate the entire Board who helped

in putting together this journal.

This journal will positively help us to rekindle the inner student in us.

We assure to give our best efforts in making this journal a grand success.

Thank You

Shri Sanjay Bhattacharjee
Registrar,
Indian Institute of Legal Studies

EDITORIAL MESSAGE

FROM EDITOR-IN-CHIEF

Dear readers,

We hope you are doing well!

As Albert Szent-Gyorgyi rightly said *"Research is seeing what everybody else has seen and thinking what nobody else has thought".*

It gives us immense joy and satisfaction to introduce our very own student journal 'QUEST'.

The objective of this journal is to promote, develop and enhance the research skills of creative minds. We are proud of our contributors who present you with write-ups dealing with various legal issues, and engage other disciplines with law. Further, this journal gives a platform to showcase talent, and also it stokes curiosity and improves the way one expresses.

A lot of effort has gone into the making of this issue. Amidst the hectic schedule of semesters, examinations, assignments, and internships, we tend to lose track of all the simple things we are capable of. Often, we tend to procrastinate and lose grip over things that could make a proud moment for us and give a sense of satisfaction.

We hope you enjoy reading this issue as much as we have enjoyed making it!

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LONG ARTICLE

POLICE REFORM IN INDIA- A NEED OF THE HOUR

-Bibhash Kumar Nandi & Sahara Rai[1]

ABSTRACT

The Police system in India was an initiation of the colonial government. Initially, this humongous administration had a primary duty of maintaining the British oppression among the local Indians. More than law and order, the British policing system focused on favoring the colonialists in every sphere of life. But as India got its independence in 1947, many things changed. In 1950, the Government of India Act of 1935 was replaced by a new constitution, and India was finally a newly born republic in the world. But even with these dazzling changes very little has changed in the Police administration in India. It is not about the uniform or the technology but rather it is about the very attitude of this system. Even today, after completing 75 years since its independence from the tyrannical administration of the Britishers, the Police administration in India has, unfortunately, made very little progress in terms of efficiency and public image. Recommendations were suggested but they have not yet been reflected or translated into reality. Hence, this research article will mainly emphasize on the

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issue of Police inefficiency and brutality. It will also dwell on Articles 21 and 22 of the Constitution of India and the Indian Police Act, 1861.

KEYWORDS: *Colonial Policing, Policing History, Framework, Accountability, Brutality, Recommendations.*

1. INTRODUCTION

1.1. Pre – Independence

The history of the Police system on the modern lines dates back to the dawn of the 19th century. In the year 1774, Warren Hastings under the East India Company's regime recommended many reforms to the existing old native-styled Police system, which later formed a backbone for the Indian Police Act of 1861. This Act constructed a system of Police administration that we see today, and to a greater surprise, this act is still in force.

The Indian rebellion of 1857 was a whammy for the British administration in India. Britishers realized the threat of losing power and were determined to ensure complete suzerainty and suppression of all challenges to their power. Thus, a Police Commission was appointed in 1860, to make the Police an efficient instrument for the prevention and detection of crime.[2]

The Indian Police Act was finally drafted and enacted in the year 1861: it was authoritarian, and under this act, various new changes were made to the existing Police system. Some of the well-known changes are as follows:

i. Their range of functions was narrowed and tightened;

[2] Aditya Singh, *Police and Policing in India-A Historical Perspective*, IPLEADERS (Apr. 22, 2022, 1:30 PM), https://blog.ipleaders.in/Police-policing-india-historical-perspective/.

ii. The changes were such to enable the British government to keep the natives in check and prevent any future revolt and this was done by making the Police administration directly accountable to the executives.

The newly created Police administration did its job and was largely successful in continuing the colonial atrocities until 1947 when India finally got its independence.

1.2. Post – Independence

India got its independence on the 15th of August, 1947. After 3 years of its independence, the Constitution of India was enacted in the year 1950. The newly formed Constitution emphasized many changes; it created, abolished, and modified laws. Article 256 of the Constitution of India kept the subject "Police" under the State list.

Hence, it gave the States the power and grip over the Police administration. After independence, the present government of those times created many additions to the Police organization at the national level.

For instance, the CRPF was created in 1947 followed by CBI, CISF, and BSF in 1963, 1964, and 1965 respectively. Only CBI has the power to investigate and prosecute criminal matters. The rest of the national-level Police institutions are paramilitary institutions and enjoy no investigative functions.

There were many changes in the political system of India after the enactment of the Constitution of India. But the central act of Police administration in India, i.e., the Indian Police Act continued.

2. LEGAL FRAMEWORK OF POLICE ADMINISTRATION

The Police administration in India on the central level is mainly based on one legislation, the Indian Police Act of 1861. Different States have their own enactments, which are solely based on the Indian Police Act of 1861. Over time many States enacted their own Police Acts, keeping the interest of their respective States. Some of them are as follows:

I. Bombay Police Act of 1951- This act governs the Police administration of Maharashtra & Gujarat.
II. Kerala Police Act of 1960- It governs the Police administration of Kerala.
III. Karnataka Police Act of 1963- It governs the Karnataka Police.
IV. Delhi Police Act of 1978 for NCT.

Along with the Indian Police Act, the Indian Penal Code of 1862, the Code of Criminal Procedure 1872, and the Indian Evidence Act of 1872 also govern the Police administration in India. These laws collectively form the major part of the guidance for the criminal justice system. Hence, they confer certain power and duties to the Police administration in India. The criminal laws in India recognize the State Police force as the primary institution for the investigation and prosecution of any criminal matter. For instance, Section 2(s) of the Criminal Procedure Code defines the word "Police station" as: *"Any post or place declared generally or specifically by the State Government, to be a Police station, and includes any local*

area specified by the State Government in this behalf".[3] Hence, the word "State Government" has been greatly emphasized in this act, creating a serenity with the Constitution of India, which kept the subject "Police" in the State list.

Legally the State Police has the primary legal obligation to carry on with investigations and maintain law and order in a State.

3. ACCOUNTABILITY OF POLICE

3.1. What is Accountability and Why is it Important?

In simple terms, accountability can be understood as the obligation of those in power to have responsibility and justification for their action. The concept of the doctrine of accountability is that "the *power and discretion held by the administrative authorities is subjected to the public trust which is placed in their hands and the same must be exercised only in the realisation of such a conviction*."[4]

Democracy in its truest form means a form of government in which the people have the authority to deliberate and decide legislation, or to choose governing officials to do so. If we look properly, then the meaning of democracy itself stresses a need for all of its institutions to be accountable to the people at large. In a democratic form of governance,

[3] The Code of Criminal Procedure, 1971, § 2(s), No. 02, Acts of Parliament, 1971 (India).
[4] Haritha Malepati, *Doctrine of Public Accountability in Administrative Law*, LAW COLUMN (Apr. 23, 2022, 3:30 PM), https://www.lawcolumn.in/doctrine-of-public-accountability-administrative-law.

it is the people who are the rulers as well as those who are being ruled. People in a democratic system of governance should know what their government is doing, and how a particular governmental institution is performing, and only after analyzing every aspect of governance, a right government can be elected by its people. Our forefathers, while drafting the constitution, adopted the "doctrine of separation of power". Hence, preventing the accumulation of power on one hand, and dividing it into three branches, i.e., Legislature, Executive and Judiciary. All of these institutions have specific as well as overlapping duties to perform and are accountable to each other, which is also termed the system of checks and balances. This is proof that even the drafters of our constitution strongly supported the idea of accountability in the Indian political system.

In the case of *SP Gupta v. President of India*,[5] it was held by the Hon'ble Supreme Court that the government should be transparent and accountable while discharging its functions. The need for such openness was stressed with support from the fact that it is the people who have the right to vote and elect their government every 5 years. Lack of openness in governance may result in inactive participation of its people in the electoral sphere which would defy the spirit of democracy.

3.2. Judicial Approach

Being mainly a State subject, Police in India are controlled by their respective State governments. Public law liability in India finds its roots

[5] SP Gupta v. President of India, AIR 1982 SC 149.

in the Constitution of India. Part III of the Constitution of India specifies various fundamental rights that citizens, as well as non-citizens of India, enjoy. The State must uphold the fundamental rights of its subjects. Apart from some exceptions, States can never take an executive or legislative action which is violative of the fundamental rights conferred by the constitution to its citizens.

Courts in India have repeatedly held the government liable for the violation of the Fundamental Rights stated in Part III of the Constitution of India. The most common violations that surface in our day-to-day life are illegal detention, arbitrary arrest, self-incrimination, etc. Courts have mostly held the State liable and have provided the victim with compensation.

In the case of *Rudul Sah v. State of Bihar*[6], the petitioner, Rudul Sah was arrested for the murder of his wife. On completion of his sentence, he was acquitted by the Sessions Court in Muzaffarpur, Bihar, on 3rd June 1968. Even after his acquittal, Rudul Sah was kept in jail for 14 more years and was finally released on 16th October 1982. Rudul Sah filed a writ petition of habeas corpus in the Supreme Court, under Article 32 of the Constitution of India. In his petition, he sought compensation for his wrongful detention along with the request for *ex-gratia* payment for his recovery and State-funded medical treatment.

The court held that the petitioner was wrongly detained hence

[6] Rudul Sah v. State of Bihar, (1983) AIR 1086.

violating his fundamental right. Court also held that under Article 32 of the Constitution of India the court is empowered to entertain the petition as this case surfaced around the violation of Article 21 of the Constitution of India. The State was held liable and was directed to pay Rupees 30,000 in addition to Rupees 5,000 which was already paid by it. Interestingly, the court also held that its judgment would not stop the petitioner from filing further lawsuits against the State and its officials for appropriate damages regarding his unlawful detention. Interestingly, the case of *Rudul Sah v. the State of Bihar*[7] became the precedent for numerous other cases to come in the future.

4. POLICE BRUTALITY

4.1. Rule of Law and Police

Rule of law is the *Magna Carta* for any modern democratic society to exist in serenity. It states that no one is above law and everyone is equal before the law. It is mainly a guiding principle for a government that is exposed to various legal machinery and it prevents an individual's interest to prevail over the law. Hence, the Rule of Law is equally applicable to the Police administration as it cannot step out and prevail its interest above the law.

The Constitution of India is one such supreme document that inculcated the doctrine of Rule of Law. Rule of Law as administered in India is interpreted to be embodied within several provisions of the

[7] *Id.* at 6.

Constitution.[8] There is no fixed articulation of the rule of law in the Constitution of India, but the courts in India have repeatedly made various judgments with support to the spirit of rule of law.

The three principles of rule of law and its relevance to the Constitution of India are as follows:

I. Supremacy of Law

Supremacy of law indicates that law is supreme. No one is above law and even the ruler is to be subjected to the law of the land and Article 13(1) states that any law framed by the legislature should be per the Constitution, if found unconstitutional it can be declared void. Article 14 clearly states that everyone is equal before the law and equally protected by the law. The right to life and personal liberty under Article 21 of the Constitution of India is yet another golden article for the citizens of India. It explicitly states that no person shall be deprived of his personal liberty. Hence, this Article protects a person's right to life and says that no State action can take away this right except for a procedure established by law. From the above analysis, we can conclude that the State has to abide by the Constitution while discharging its duties and failure to do so would result in the nullity of its actions. The Constitution and the obligation of the State to abide by the Constitution is yet another example of "Supremacy of law".

[8] Abhisek Mehrotra, *Rule of Law in India- An Analysis*, IPLEADERS (Apr. 25, 2022, 11:29 AM), https://blog.ipleaders.in/rule-of-law-india-analysis.

II. Equality Before Law

The principle of equality is one of the basic structures of the Constitution of India. Thus, the dogma of equality before law is embodied in the Constitution of India under Article 14 from the doctrine of "*Rule of Law*", which is an important part of the British Jurisprudence. *The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.*[9] Hence, the State cannot refuse equality before law or equal protection of law to its citizens within the territory of India. Moreover, no person shall be discriminated against on grounds of his/her religion, race, caste, or place of birth. If any of the State actions create such discrimination it shall be unconstitutional.

III. The Predominance of Legal Spirit

Rule of law can only survive if the rights conferred to the citizens by the constitution are enforceable in the court of law. Rule of law as established by Dicey requires that every action of the administration must be backed and done in accordance with the law.[10] Article 32 in the Constitution of India, provides citizens with the right to directly approach the Supreme Court if any of their Fundamental Rights as mentioned in Chapter III of the Constitution of India are violated. It

[9] INDIA CONST. art. 14.

[10] Subham Mongia, *Rule of Law*, LEGAL SERVICE INDIA (Apr. 25, 2022, 3:41 PM), https://www.legalserviceindia.com/legal/author-1887-qwerty9729.html.

further empowers the Supreme Court to issue writs in the form of Habeas Corpus, Mandamus, Prohibition, Certiorari and Quo-Warranto to protect the Fundamental Rights of the citizens from arbitrary State actions. Furthermore, Article 226 of the Constitution of India empowers the High Courts as a protector and guarantor of the Fundamental Rights.

The Constitution of India implicitly shows that its most basic structures are woven by the thread of the Rule of Law. It guarantees certain rights to its citizens which cannot be violated by the State. The Constitution makes it clear that arbitrary actions by the State are nothing but a mere nullity. The Police in India come under the definition of the State. Hence, they are under the Constitutional obligation of sustaining the rights of citizens and discharge their function as per the guidance of the Constitution.

4.2. Extrajudicial Killing

I. Custodial Death and Torture

In simple terms, custodial death and torture can be defined as the death or torture of a person when he/she is under someone's custody, and in this case, the custodian is the Police. This kind of Police brutality is neither new nor uncommon in India. Incidents of custodial deaths and tortures very often hit the news channels in India. There is no legality to custodial death and torture. The criminal justice system in India is well versed and describes each step that Police should follow when dealing with a person in concern. Human rights are the rudimentary

part of the criminal justice system. But when these kinds of atrocities occur, it results in a gross violation of human rights, principles, and the rule of law.

In the book "*Permission to shoot*", Jyoti Beylur says "*There is a formal emphasis on the rule of law and due process, but these are viewed by Police officers more as obstacles to be overcome in the ultimate quest to tackle crime and law & order problems. The "heroes" or "model cops" to be emulated are those who have proved their "bravery" or "toughness" in the field through dealing with one or more "dreaded criminals" in encounters*."

In most cases, a custodial human rights violation occurs due to the lack of faith in the criminal justice system by the Police, and sometimes it is accompanied by political and public pressure. According to a report of 2019 released by the National Campaign Against Torture, Human Rights Commission recorded 1,723 custodial deaths.[11] Another report of the National Human Rights Commission stated that a total of 1,067 custodial deaths occurred within the first 5 months of 2021.

Most custodial deaths in India are a result of the routine torture of Police inside lockups, and correctional homes. The mentality of the Police in this regard is highly questionable. Police are primarily

[11] National Campaign Against Torture, *India: Annual Report on Torture 2019*, 2020 (Apr. 29, 2022, 5:25 PM.), http://www.uncat.org/wpcontent/uploads/2020/06/INDIATORTURE2019.pdf.

responsible for investigating a crime, hence most of the time to save the whole process of investigation, torture becomes the most suitable tool for extracting confessions from a person accused of a crime. In many high-profile cases, the Police administration faces huge pressure from the public as well as the political sphere for speedy justice. Hence, they detour from the criminal justice system and take the law into their hands which is highly unfortunate. According to a compiled record from the National Crimes Record Bureau for the year 2001-2020, over 1,888 custodial deaths were reported over the last 20 years, in which only 893 cases were registered against the Police personnel and 26 Policemen were convicted in this period. The data may vary from source to source but it indicates that there exists a grave problem in Police administration in India. The low rate of conviction for custodial death is yet another matter of deep concern. Due to its integrated role in the criminal justice system, most Police personnel easily escape conviction.

The Universal Declaration of Human Rights in 1984, which markets the emergency of a worldwide trend of protection and guarantee of certain basic human rights, stipulates in Article 5 that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[12]

[12] D.K Basu v. State of West Bengal, AIR 1997 SC 160.

To maintain law and order in a democratic society, people should have faith in its Police administration and if such faith is lost, it will affect public order in a harmful manner.[13]

The Constitution in India does not have any specific articulation for torture or custodial death. But the Supreme Court in various cases has kept its emphasis on Article 21 as a way of preventing any kind of custodial torture by the Police. In the case of *Yashwant and Others v. State of Maharashtra*[14], Supreme Court upheld the conviction of nine Police personnel from Maharashtra in connection with a 1993 custodial death case. The Hon'ble Court extended their jail term from three years to seven years and held that such criminal actions from Police personnel tend to erode people's confidence in the criminal justice system.

In DK Basu's case[15], Supreme Court issued some guidelines for the Police, the Court directed:

a. That the Police officer carrying out the arrest shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter-

[13] J. Prabhavathiamma v. The State of Kerala & Others, (2008) Cri LJ 455.
[14] Yashwant And Others v. State of Maharashtra, (2018) 4 MLJ (Crl) 10 (SC).
[15] D.K Basu v. State of West Bengal, AIR 1997 SC 160.

signed by the arrestee and shall contain the time and date of arrest.

b. The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon he is put under arrest or is detained.

c. An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the Police officials in whose custody the arrestee is.

d. The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the Police officer effecting the arrest and its copy provided to the arrestee.

Hence, the court issued this guidance on account of the increasing cases of custodial violence across India. The Court expressed deep concern on the matter of the human rights crisis being brought up by illegal Police action and focused on the broad implication of Article 21.

II. Fake Encounters

In December 2019, there was a mixed reaction among the people of India. All media channels were flooded with headlines that read “Four

people accused of rape and murder killed in Police encounter". This happened in Hyderabad, where four people, were arrested on charges of murder and rape of a 27-year-old veterinarian in Hyderabad. Initially, the then Commissioner of Police V.C Sajjanar praised the Police department and cited self-defense as the rationale for the encounter. The Police department was initially successful in creating a sense of faith among the public. Many saw it as an accurate step for achieving justice without having to go to court and wait for decades. Six days after the incident, the Supreme Court took cognizance of the matter and appointed a three-member committee to probe into this incident. The committee started its inquiry in the first week of February 2020.

The committee examined and cross-examined many witnesses. The witnesses included executive and judicial magistrates, doctors, forensic experts and civilians associated with the case.[16] In the course of the inquiry, the committee found some major official coverups in the incident. For instance, on November 30, 2019, the executive magistrate remanded the accused to jail for 14 days while he can only order for seven days.[17] More shockingly, the judicial magistrate confessed before the Commission on October 11 that he did not insist on the physical production of the accused when he ordered Police

[16] Maurali Karnam, *Hyderabad 2019 'Encounter': Inquiry Panel Exposes Cover-Up, Lies in Official Narrative*, THE WIRE (Apr. 26, 2022, 10:50 PM), https://thewire.in/law/hyderabad-2019-encounter-inquiry-panel-exposes-cover-up-lies-in-official-narrative.
[17] *Id.*

custody to them on December 2, 2019. His order was completely based on the order of the executive magistrate.[18]

Various other ambiguous statements were produced from the part of the Police while they were being examined by the committee in this regard. Police were found to be careless on their part in the investigation. And in most cases, during the interrogation session, Police personnel refrained from answering questions by using excuses like “I do not remember”, “I do not know” and “I cannot say”. Many of the Police statements conflicted with each other.

This is just a small story of a bigger book. In fact, according to a report by the National Human Rights Commission, there were 1,782 cases of alleged fake encounters between the years 2000 and 2017.

The National Human Rights Commission is an autonomous statutory body that was established on 12 October 1993. It is governed as per the Protection of Human Right Act, 1993. It must protect and promote human rights. Section 12 of the Protection of Human Rights Act sets up the functions of this Commission and apart from holding inquiries into the complaints of human right violation, the Commission also studies treaties and acts as an international instrument, it makes recommendations on the implementations of human rights treaties to the government.

[18] *Id.*

These incidents of brutality and illegality from the hands of those, who are entrusted with law and order are perilous. The duty of the Police in any democratic country is of serious importance, laws are merely words if they aren't executed and followed by everyone. Hence, the Police are one such administration that has to execute such laws. But what happens when these very Police administrations, who are responsible for executing law & order, step outside the ambit of law and illegitimately discharge their duties?

5. RECOMMENDATIONS FOR REFORMS

Ever since the independence of India in 1947, various incidents of Police brutality have been witnessed in India. One of the darkest phases in Indian history was the emergency imposed by Mrs Indira Gandhi for the period of 21 months between the years 1975 to 1977. During the emergency, freedom of the press was curtailed and elections were suspended. Various human rights violations surfaced. The ruling government, keeping the Police as a political instrument, arrested many influential political opponents during this phase. Police became an important tool for the ruling government to sanction its atrocities during the emergency period. Hence, the Police administration came into the light and a need for reformation was realized.

5.1. National Police Commission

After the emergency, Mrs. Indira Gandhi lost the election. A new government at the union level was formed by the Janta Party. The government soon appointed the National Police Commission (NPC) in 1977. The Commission was entrusted with the duty of suggesting reforms in various spheres of policing which included misuse of power, political control on its work, accountability, its role, and function, etc. It was an important attempt to reform the Police in India. The Janta Party government could not last long and once again Mrs. Gandhi gained power in 1980. But the Commission continued to do its work till 1981 and submitted 8 reports and made far-reaching recommendations on Police reform.

According to the National Police Commission, "*the basic role of the Police is to function as a law enforcement agency and render impartial service to the law, without any heed to wishes, indications or desires expressed by the government which either come in conflict with or do not conform to the provisions contained in the constitution or laws. This should be spelt out in the Police Act. The Police should have duly recognized a service-oriented role in providing relief to people in distress situations. They should be trained and equipped to perform the service-oriented functions*."

Some of the important recommendations of the Commission in this regard were:

I. First Report

The Commission recommended that the present system of work of constables, which consists of 85% of the Police force, be radically changed. They should be so recruited and trained that they could be deployed on duties involving the exercise of discretion and judgement. The Commission also suggested machinery for redressal of grievances within the Police organisation.[19]

II. Second Report

In the second report, the Commission made some observations in the function of the Police. They held that the basic role of the Police is to function per the law and act as an impartial institution. It expressed concern over the misuse of the Police by politicians and held that the authority of the State over the Police administration should be minimized. Police should be given some independence so that they can function efficiently without any external influence.

III. Third Report

The Commission kept its emphasis on how the Police dealt with the socially and economically weaker sections of the society. It highlighted some loopholes in the criminal procedural law. The Commission emphasized that the posting of officers-in-charge of Police stations should be the exclusive responsibility of the district Superintendent of Police and similarly the selection and posting of

[19] Prakash Singh, *Police Reforms in India – A Historical Perspective*, PEOPLE'S POLICE MOVEMENT (Apr. 26, 2022, 12:04 PM), http://www.peoplePolicemovement.com/history_Police_reforms.html.

Superintendents of Police should be the exclusive responsibility of the Chief of Police.[20]

IV. Fourth Report

The Commission suggested some changes in the procedural law to improve coordination between investigating staff and prosecuting agencies. It also laid down some parameters of Police involvement in the enforcement of social legislation. This step would ensure that the relationship between the Police and the public is strengthened.

V. Fifth Report

It emphasized the need for proper training of the Police personnel and laid down the suggestions for recruitment of sub-inspectors and constables.

VI. Sixth Report

For better and effective administration, this report suggested the formation of Police Commissionerate in cities with a population of five hundred thousand and above. It laid down some suggestions for the proper handling of communal violence cases.

VII. Seventh Report

[20] *Id.*

This report dealt with the internal management of the Police force and emphasized that this should be entirely under the purview of the Chief of Police.[21]

VIII. Eighth Report

This was the final report which suggested that a State Security Commission should be provided which would evaluate the overall function of the Police without interference from the State Government.

5.2. Prakash Singh & Ors. v. Union of India

This case[22] is considered to be one of the landmark cases, through which the Judiciary in this country realized the urgent need for reform in the Police administration. The Supreme Court in this case passed various guidelines to the Government on the matter of Police reform and management.

In this case, a retired IPS officer Prakash Singh filed a writ petition, intending to free the Police from political interference and bring autonomy to the Police administration mainly in the matter of transfers and postings.

The court ruled out various recommendations in this matter. In one of its recommendations, it held that each State should form a Police Establishment Board (PEB), which would look into the matter of transfer and postings. This board would consist of senior Police officers and bureaucrats. There was a recommendation of setting up the State Police

[21] *Id*. at 15.

[22] Prakash Singh & Ors. vs Union of India, 2006 8 SCC 1.

Complaints Authority (SPCA) to give a platform where common people aggrieved by Police action could approach.[23]

The Supreme Court also directed the fixture of tenure and selection of the DGP, to avoid a situation when an officer who is about to retire in a few months is given the post. The Police directed that the PEB shall be insulated from any political interference, to constitute a free and fair mode of transfers and postings.

Apart from the above-mentioned directives, the Court called for the formation of the State Security Commission (SSC), which would comprise of members from the civil society and also the formation of a Security Council at the national level. These members of civil society were to be politically independent and impartial to bring their expertise for the betterment of the Police administration. It would have the duty to set policies for monitoring the Police administration. The Commission must be designed so that it cannot be captured by any single party or regime of the day and be able to balance powerful interests. The main contention of this Commission would be that the State government does not exercise unwanted influence on the Police. According to the Status of Policing in India report 2019, one in every three Police personnel in India experiences political pressure while investigating a crime.

[23] Mohamed Thaver, *Explained: The 2006 Supreme Court Ruling on Police Reforms; How States Circumvent it to Influence Postings*, THE INDIAN EXPRESS (Apr. 27, 2022, 2:38 PM), https://indianexpress.com/article/explained/explained-2006-sc-ruling-Police-reforms-states-circumvent-influence-postings-7251526/.

Even after the court's contention, none of the States in India, are found to be following the directives of the court. This was mainly because the present framework of the Police is advantageous to the State government. The State can use this administration for political as well as governmental functions and no State in India wants to lose its grip on the Police administration from their hand.

6. CONCLUSION

Growing numbers of Police brutality is a matter of grave concern. Political interference and control, along with corruption is an important issue that needs to be dealt in with prime importance. A reform in the policing system is a must and cannot be skipped. For saving the true ethics of modern democracy, Police reform is as important as an independent judiciary or an accountable government. A democratic country runs in the ethos of the Rule of Law, people are free to contest elections and form a government but they cannot alone work on their political principle and jeopardize the Constitution for their gain. Hence, no State has the authority to step out of the Constitutional demarcation and use Constitutional and Statutory institutions for its political benefit. Change in this scenario can only appear when the States realize their constitutional obligations and join hands for bringing a chance to this age-old problem of the colonial era. Maybe the barbarity of the Police was justifiable in the colonial era, but how will you justify it in today's democratic India?

The State shall also comply with the recommendation of the NPC and the directives of the Supreme Court in the case of Prakash Singh & Ors. vs Union of India. It is high time that the people of this democratic society raise their voices against this issue and make political parties enclose this issue in their manifestos. Lastly, there seems to be only one solution to this problem and the solution comes with the words “Police Reform”.

THE HIJAB CONTROVERSY EXPLAINED

-Mighangma Subba Samba & Pratyush Sharma [1]

ABSTRACT

The recent controversy sparked a fire in Karnataka which, reflecting the times we live in, again involved the issue relating to religion. Like any other religious group, Muslims are entitled to practice their faith and religious traditions. Several interpretations in the holy Quran itself ask Muslims to dress modestly and decently. It is not only Islam that requires its follower s to be modest with their clothing, but other religions and practices as well.

The issue was raised when women from the Udupi district, Karnataka were denied entry into their classrooms wearing hijabs. The issue has proved highly inflammatory. The matter reached the court, and petitions seeking the right to wear hijab under articles 14 and 25 of the Constitution of India were filed. An interim order was passed by a three-judge bench to restrain all the students from wearing saffron shawls, scarves, hijabs, and any religious flag within the classroom, until further orders. The court delivered its verdict on 15th march 2022 upholding the restriction on the hijab.

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But now that the ban is upheld in Karnataka what logical possibilities could be followed by the Muslim community and what caused the students change of mind on wearing the hijab to classes?

KEYWORDS: *Hijab Ban, Freedom of Religion, Essential Religious Practice, Dress Code, Government Order.*

1. INTRODUCTION

The Arabic word hijab means to cover. The common knowledge we have of the hijab is that it is a cloth used by Muslim girls to cover their heads. In reality, the hijab is used to cover their hair and neck because it is believed that a woman's beauty lies within it. For some Muslim women today, wearing a hijab is a way of demonstrating their religiousness by submitting to God.

There are several interpretations in the holy Quran itself that ask Muslims to dress modestly and decently. QURAN SURAH AN-NOOR verse 31 says "And tell the believing women to lower their gaze and guard their chastity, and not to reveal their adornments except what normally appears. Let them draw their veils over their chests, and not reveal their ˹hidden˺ adornments except to their husbands, their fathers, their fathers-in-law, their sons, their stepsons, their brothers, their brothers' sons or sisters' sons, their fellow women, those ˹bond women˺ in their possession, male attendants with no desire, or children who are still unaware of women's nakedness. Let them not stamp their feet, drawing attention to their hidden adornments. Turn to Allah in repentance all together, O believers, so that you may be successful.''[2]

However, Muslim women's clothing isn't entirely about adherence to faith. It has been used as an assertion of identity in the past and the present. Wearing a hijab is more like identification as Muslim, just as the

[2] QURAN.COM, https://quran.com/an-nur/31 (last visited Mar. 18, 2022).

turban is for Sikhs and the sacred ash or tilak on the forehead for Hindus. The hijab signifies the purity of the woman wearing it. It represents that she is away from all the evil acts of the world and is pure towards her religion. For women who choose to wear the hijab, it allows them to retain their modesty, morals, and freedom of choice. They choose to cover because they believe it is liberating and allows them to avoid harassment. They choose to wear the hijab so that they can be protected from prying eyes.

Hijab is an indispensable tradition or culture of the Muslim religion. It is mentioned in the Indian Constitution that every citizen has the right to practice and promote their religion peacefully.

2. KARNATAKA HIJAB ROW

In the wake of the hijab controversy, the issue that began in January came forward when six female students from the Udupi district of Karnataka claimed that they were not allowed to enter the classroom wearing the veil (hijab) in Government PU College as it was in violation of its uniform policy. The girls insisted on wearing the hijab to classes arguing that the hijab was part of their faith and their constitutional right but the college denied.[3] There were protests against college authorities which was very soon encountered as a statewide issue.

[3] HINDUSTAN TIMES, https://www.hindustantimes.com/cities/bengaluru-news/teacher-threatened-to-push-us-out-students-barred-for-hijab-101642545268020.html (last visited May 17, 2022).

One of the students told BBC News they need to wear a hijab to cover their hair because they have few male teachers.[4]

The principal of the Udupi college, Rudra Gowda said that students used to wear Hijab to the campus and entered the classroom after removing the scarves. Gowda said, "The institution did not have any rule on Hijab-wearing as such and since no one used to wear it to the classroom in the last 35 years. The students who came with the demand had the backing of outside forces".[5]

Muslim women held protest events at different locations in Karnataka demanding the protection of their constitutional rights, including religious freedom. Following this incident, a group of boys protested against some girls attending classes wearing hijab in the Kundapur government pre-university by supporting saffron shawls.[6]

Hijab-wearing students in the state are facing challenges from Hindu extremists. Hindutva groups have made Muslim students' head scarves an issue in several Karnataka colleges in recent days and organized their

[4] Imran Qureshi, *Udupi Hijab Issue*, BBC NEWS (May 17, 2022, 6:54 PM), https://www.bbc.com/news/world-asia-india-60079770.

[5] Sreeja MS, *Explained: Karnataka Hijab Row and Timeline of Events*, NDTV (May 17, 2022, 7:00 PM), https://www.ndtv.com/india-news/explained-karnataka-hijab-row-and-timeline-of-events-2774140.

[6] TIMES OF INDIA, https://timesofindia.indiatimes.com/city/mangaluru/hijab-saffron-shawl-controversy-enters-more-colleges-in-karnataka/articleshow/89358401.cms (last visited May 17, 2022).

members and sympathizers among the students against young Muslim women.[7]

2.1. Petitions Filed

The matter reached the court, and several petitions were filed in the Karnataka High Court on 31st January. The petition sought the right of wearing a hijab under Article 14, and article 25 of the Constitution of India. The petition was argued by senior advocate Ravivarma Kumar and other lawyers.[8] On February 8 the court heard it for the first time.

One of the petitions was filed by five Muslim students from Karnataka's Udupi district, who were among the six stopped from entering classrooms in December because they were wearing hijabs.[9]

The second petition was filed by a student from Kundapura on 4th February, seeking a directive to permit Muslim students to wear hijab to classes. The petitioner was represented by senior advocate Davadatt Kamat.[10] Two students from the Bhandarkar's arts and science college in

[7] THE NEW INDIAN EXPRESS, https://www.newindianexpress.com/states/karnataka/2022/feb/11/blamed-for-mishandling-hijab-row-udupi-college-principal-says-he-tried-to-resolve-issue-2418005.html (last visited May 16, 2022).
[8] DECCAN HERALD, https://www.deccanherald.com/state/top-karnataka-stories/hijab-row-students-seek-karnataka-hcs-nod-to-use-uniform-stole-to-cover-their-head-1081535.html (last visited May 16, 2022).
[9] THE HINDU, https://www.thehindu.com/news/national/karnataka/hc-to-hear-petitions-of-muslim-students-questioning-hijab-restriction-in-college/article38372231.ece (last visited May 16, 2022).
[10] INDIA TODAY, https:///india/story/karnataka-hijab-row-high-court-hearing-turkey-south-africa-heckler-veto-religion-1913481-2022-02-15 (last visited May 16, 2022).

Kundapura also filed a petition, who were represented by senior advocate Yusuf Muchhala.[11]

With Justice Krishna S. Dixit presiding, hearings began on 8th February. After hearing the initial arguments, the judge concluded that the chief issue was whether wearing the hijab is an essential religious practice, and, if it is so, why the state should interfere in the matter.[12] Given its public importance, the judge decided that the case should be heard by a "full bench" (consisting of three judges).

A full bench consisting of Chief Justice Ritu Raj Awasthi, Justice Dixit, and Justice Khazi Jaibunnisa Mohiuddin was constituted the next day. There were said to be five petitions representing 18 students in front of the court by this stage. Hearings resumed on 10 February.[13]

2.2. Interim Order

The three-judge bench passed an interim order dated 11 February. The court requested the State to re-open the educational institutions and restrained students from wearing any sort of religious clothes in

[11] *Id.* at 8.
[12] Sharana Poovanna, *Hijab row: Maintain Peace Says Karnataka High Court as Tempers Flare*, HINDUSTAN TIMES (May 16, 2022, 2:45 PM), https://www.hindustantimes.com/india-news/hijab-row-maintain-peace-says-karnataka-high-court-as-tempers-flare-101644345793053.html.
[13] T A Johnson & Apurva Vishwanath, *Hijab Plea Goes to Three Judge Bench Including Karnataka Chief Justice*, THE INDIAN EXPRESS (May 16, 2022, 2:50 PM), https://indianexpress.com/article/cities/bangalore/karnataka-hijab-row-hc-three-judge-bench-woman-judge-7764966/.

classrooms until the court decided the matter.[14] The judges said that *"it is a matter of a few days only,"* even as senior advocate Devdatt Kamat submitted that it would amount to a suspension of the right to practice one's religion under Article 25 of the Constitution.

2.3. Arguments

I. Petitioners

Challenging the government order, perhaps the key arguments made by the petitioners' lawyers pertain to essential religious practice, freedom of conscience, and hostile discrimination.

Senior advocate Kamat had, on his part, pointed out that the Muslim girls are being compelled to give up what they perceive as an essential religious practice even when there is no threat to public order.

"The State is an outside authority; it cannot say that wearing a headscarf is essential to practice or not. It has to be seen from the viewpoint of a believer," Kamat explained.

On the other hand, the state's advocate general Prabhuling Navadgi argued that the wearing of a hijab is not an essential religious practice. After taking the judges through the key judgments of the Supreme Court on this matter, including most recently in the Sabarimala case, the Advocate General culled out the following principles which had

[14] TA Johnson & G Ananthakrishnan, *Hijab Ban: Karnataka HC Asks Students Not to Wear Religious Dress till Verdict*, THE INDIAN EXPRESS (May 16, 2022, 3:00 PM), https://indianexpress.com/article/cities/bangalore/hijab-ban-karnataka-hc-asks-students-not-to-wear-religious-dress-till-verdict-7766673/.

to be followed to determine whether any particular practice is an essential religious practice (ERP):

i. That practice has to be fundamental for the religion.
ii. If not followed, the religion would change.
iii. Not every activity associated with religion can be characterized as an essential religious practice – when it comes to food or dress this has to be conclusively demonstrated to the court.
iv. The practice in question should be something that has been part of the religion from the start, it should not be a subsequently developed practice.
v. The binding nature of the practice – is it optional or compulsory, and will a person face consequence for not following it.

According to the state of Karnataka, if these principles were applied to the wearing of hijabs, then it was clear that the practice was not an ERP, as, according to them, it was not expressly prescribed in the Quran, and the religion of Islam was not fundamentally affected by not practicing it.[15]

[15] Mekhala Saran, *'Hijab Case' Verdict Today: What Did Petitioners Argue? What Did State Say?*, THE QUINT (May 16, 2022, 3:15 PM), https://www.thequint.com/news/law/hc-verdict-due-in-hijab-case-what-did-petitioners-argue-what-did-state-say-explainer.

II. State

The key argument of the Karnataka government through advocate general Prabhuling Navadgi, as noted earlier, was that wearing hijabs was not an essential religious practice in Islam.

Quoting from the apex court judgment in *Mohd. Hanif Quareshi and Others v. The State of Bihar*[16] to establish that *"the very fact of an option seems to run counter to an obligatory duty,"* Navadgi said: *"What is optional is not compulsory. What is not compulsory is not obligatory. What is not obligatory is not essential."*

Further, citing the judgment in the *Sabarimala* case, the advocate general had asked: *"In light of the law laid down by the Supreme Court in the Sabarimala case, would it be possible to accept the wearing of hijab in light of constitutional morality and individual dignity?"*.

In the Sabarimala case, the constitution bench of the Supreme Court had ruled that all Hindu pilgrims of any gender could enter the temple, and held that *"any exception placed on women because of biological differences violates the Constitution."*[17]

2.4. Judgment

After a hearing of about 23 hours spread over 11 days, the court delivered its verdict on 15 March 2022 in favor of the state, upholding the restrictions on the hijab.[18] The court ruled that the hijab is not an essential

[16] Mohd. Hanif Quareshi & Others v. The State of Bihar, 1958 AIR 731.
[17] *Id.* at 15.
[18] THE SIASAT DAILY, https://www.siasat.com/live-updates-karnataka-hc-upholds-hijab-ban-2290825/ (last visited May 16, 2022).

religious practice under Islam and is not protected by article 25 of the Constitution.[19]

Thereby underlining the Basavaraj Bommai government's restriction on the use of headscarves by Muslim women in educational institutions. It justified the ban on hijab inside classrooms invoking 133(2) of the Karnataka Education Act,1983.[20] It's further said that the colleges that fall under the Karnataka board of education should follow the dress code prescribed by the development committee or the administrative supervisor committee. If the administration does not fix a dress code, clothes that do not threaten equality, unity and public order must be worn.

Y-category security has been provided to the Karnataka High Court judges who delivered the hijab verdict and two people were arrested for threatening speeches.[21]

3. CURRENT SCENARIO

Unhappy with the verdict, students had to approach the Supreme Court. The apex court rejected the petitions demanding an urgent hearing of the

[19] Mustafa Plumber, *'Hijab Not Essential Religious Practice in Islam': Karnataka High Court Dismisses, Muslim Girls' Petitions Against Hijab Ban in Classrooms*, LIVE LAW (May 16, 2022, 4:35 PM), https://www.livelaw.in/top-stories/hijab-not-essential-religious-practice-in-islam-karnataka-high-court-dismisses-muslim-girls-petitions-against-hijab-ban-in-colleges-194192.

[20] ABP LIVE, https://news.abplive.com/karnataka/karnataka-govt-issues-fresh-order-amid-hijab-row-says-uniform-that-affects-ha2022rmony-must-be-banned-1511101 (last visited May 16, 2022).

[21] THE INDIAN EXPRESS, https://indianexpress.com/article/cities/bangalore/y-category-security-karnataka-hc-judges-hijab-ban-cm-bommai-7820326/ (last visited May 17, 2022).

case. The advocate requested the court to urgently hear the case so that the girls can appear in the school exams to prevent the loss of progress made over the previous year.

The Chief Justice of India N.V. Ramana rejected the request stating that the exams have nothing to do with this matter and this issue must not be sensationalized.[22]

4. REASONS FOR UPHOLDING THE HIJAB BAN

Upholding the High Court's verdict, it has been argued by the hijab's critics that it should be banned for two reasons: one, it is a symbol of male chauvinism; two, it allows Muslims a unilateral concession. But the main issue here is: Can religious rights be enforced in any institution with its own set of rules?

The Indian constitution guarantees the right to practice religion but is subject to several restrictions and rules of public morality. One of them: individual rights can't override the rules and regulations of an institution, especially if it is a public place like a college. If the institution proscribes symbols of religious identity, like a hijab or a saffron shawl, the rules have to be followed. The spirit behind a dress code is to ensure homogeneity in a classroom and for the visible class or caste divide to be obliterated. It aims to ensure equality among the students, even if they are not. Like in

[22] THE INDIAN EXPRESS, https://indianexpress.com/article/india/supreme-court-karnataka-hc-hijab-ban-urgent-plea-7834033/ (last visited May 17, 2022).

many other countries, such a forced code would reflect in the real society and its diversity. But, if a code is in place, it has to be adhered to in letter and spirit, without seeking concessions based on religion. This applies not just to the hijab or the saffron shawl but to every item that violates the code.

4.1. The Prescription of School Uniforms Being Excluded

a. The dress code for the students that too within the four walls of the classroom as distinguished from rest of the school premises does not offend constitutionally protected category of rights, when they are religion-neutral and 'universally applicable' to all the students. This view gains support from Justice Scalia's decision in *Employment Division v. Smith.*[23]

b. School uniforms promote harmony & spirit of common brotherhood transcending religious or sectional diversities. This apart, it is impossible to instill the scientific temperament which our Constitution prescribes as a fundamental duty vide Article 51A(h) into the young minds so long as any propositions such as wearing of hijab or bhagwa are regarded as religiously sacrosanct and therefore, not open to question. They inculcate secular values amongst the students in their impressionable & formative years.

[23] Employment Division Department of Human Resources of Oregon v. L Smith, 1990 SCC OnLine US SC 54.

c. Given the above, we are of the considered opinion that the prescription of school uniforms is only a reasonable restriction constitutionally permissible to which the students cannot object.

The Indian constitution allows everyone the freedom to practice their religion. It is part of their fundamental rights. But this freedom is based on the concept of religion and is a contract between an individual and their deity. It can't be altered to claim that this freedom should extend also to the contract between an individual and an institution.

The hijab has only one place in the Indian society: in the homes of the chauvinistic, atavistic Muslims who want to protect their women from the male gaze based on some distorted version of Islam. But this ideology should be kept out of the Indian gaze, at least in schools, colleges, and institutions that have a set dress code.

5. REASONS FOR OPPOSING HIJAB BAN

Hijab, a headscarf does not wholly talk about faith, it is a way of being. If we are looking to live and survive in the real world then practical advice is always preferential over idealistic advice. Islam is practical in its advice to women giving guidance for the real world and not an imaginary one. Will the hijab prevent you from always being harmed by the reckless actions of others? No. But it can decrease the risk. Islam teaches women to take their safety into their own hands. Some might say that the hijab is mandatory and wearing it is their fundamental right while others might say

it is their personal choice. The veil is an old age symbol of patriarchy for progressive reform-minded Muslim communities.

Women should be free and empowered to choose to wear hijab if that's what they want. The other concern about the ban on wearing the hijab is that it affects the larger context of education, employment, and empowerment of women.

It is believed by the Muslim community that the ban on Hijab will result in a drop in Muslim women's hard-won participation in education. This somehow proves how Hijab improved the enrolment of Muslim women in higher education. According to some reports, the number of Muslim women and girls in schools and colleges has increased. The Gross Attendance Ratio (GAR) of Muslim women in higher education in India increased from 6.7 percent to 13.5 percent between 2007 – 08 and 2017 – 18 according to a unit-level data analysis of the 64th and 75th rounds of the National Sample Survey (NSS) by Khalid Khan of the Indian Institute of Dalit Studies.[24]

Hijab gives some of them a sense of security and belongingness and for others, it is their way of showing their respect for their faith. What needs to be acknowledged is that the hijab is a symbol of "empowerment" for many Muslim women who are pursuing the education of their choice. Banning wearing hijab on educational premises is a disguised effort to

[24] Babra Wani, *Hijab and Education of Muslim Women*, GROUND REPORT, https://groundreport.in/hijab-and-education-of-muslim-women/amp/ (May 17, 2022, 7:30 PM).

prevent Muslim girls from getting educated. The students are made to stay in a dilemma in choosing between their studies and the hijab.

To sum up, the hijab may not be a reason for increasing enrolment of Muslim women in higher education but depriving them of this right will definitely cause a decrement in their participation. Stating that veiled women can simply take off their hijab, implies the empowerment of women to be in control of their own.

6. OPINIONS OF EMINENT BODIES AND PERSONALITIES

a. Union minister Pralhad Joshi, the Parliamentary Affairs minister, welcomed the verdict. *"I appeal to everyone that the state and country have to go forward… Everyone has to maintain peace by accepting the order. The basic work of students is to study. So, leaving all this aside they should study and be united."*[25]

b. *"I'm happy that the government's stand has been upheld by the Karnataka High Court. I request the girls who went to the court should follow the judgment, education is more important than any other things,"* state education minister BC Nagesh said.[26]

[25] DECCAN CHRONICLE, https://www.deccanchronicle.com/nation/current-affairs/150322/pralhad-joshi-welcomes-karnataka-hc-verdict-on-hijab-appeals-for-peac.html (last visited May 16, 2022).

[26] Megha Rawat, *Karnataka Minister Nagesh asserts 'Education must be students' priority, not hijab'*, REPUBLIC WORLD.COM (May 16, 2022, 5:45 PM),

c. Commenting on the controversy around hijab in Karnataka's educational institutions, the United States (US) has said that hijab bans in schools *"violate religious freedom",* and Karnataka should not *"determine the permissibility of religious clothing."*[27]

d. The situation also drew condemnation from the Nobel peace prize winner Malala Yousafzai, who said the situation was *"horrifying"* and called on Indian leaders to stop the *"marginalization of Indian women".*[28]

e. Kerela CM Pinarayi Vijayan condemned the hijab row in Karnataka, stating *"This shows how dangerous communalism is for our country. Educational institutions should be places to nurture secularism. Instead, efforts are made to inject communal venom in young children."* He tweeted a picture of schoolgirls in Kerala wearing hijabs.[29]

f. Human Rights Watch (HRW) criticized the ban as a violation of the right to education without discrimination.[30]

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https://www.republicworld.com/education/news/karnataka-minister-nagesh-asserts-education-must-be-students-priority-not-hijab-articleshow.htm.

[27] THE HINDU, https://www.thehindu.com/news/national/karnataka/hijab-ban-violates-religious-freedom-us-on-karnataka-hijab-issue/article38416850.ece (last visited May 17, 2022).

[28] INDIA TODAY, https:///india/story/malala-yousafzai-karnataka-hijab-row-muslim-women-1910558-2022-02-09 (last visited May 16, 2022).

[29] THE NEWS MINUTE, https://timesofindia.indiatimes.com/city/bengaluru/how-karnataka-hijab-row-unfolded-spread/articleshow/89443877.cms (last visited May 17, 2022).

[30] Jayshree Bajoria, *Hijab Ban in India Sparks Outrage, Protests,* HUMAN RIGHTS WATCH (May 17, 2022, 7:50 PM), https://www.hrw.org/news/2022/02/09/hijab-ban-india-sparks-outrage-protests.

g. Pakistani Foreign Minister Shah Mahmood Qureshi accused India of denying Muslim girls their right to education. He claimed that India is depriving Indian Muslim girls for education just because they want to attend their classes in religious headgear.[31]

h. Aaditya Thackeray, state minister of Maharashtra, told journalists, *"If there is a uniform at schools, there should not be a place for any other dress other than that. school and colleges are the centres of education, only educated should be imparted there."*[32]

7. CONCLUSION

A society in strife can never progress. Ridiculing and mocking each other's culture and religion will only create millions of disengaged and disgruntled people, which will further lead to internal law and order problems.

What is very saddening about this entire situation is that there have been several instances of violence. Videos have been posted where heckling of women was seen. Religious slogans were used to provoke each other. It is very depressing that in schools and colleges where we form bonds for our entire lives, religion, and minor misunderstandings are

[31] THE ECONOMIC TIMES, https://news/india/ghettoisation-pakistan-foreign-minister-shah-mahmood-qureshi-jumps-into-indias-hijab-row/articleshow/89458779.cms (last visited May 16, 2022).

[32] THE NEW INDIAN TIMES, https://www.newindianexpress.com/nation/2022/feb/09/prescribed-school-uniforms-should-be-followed-maharashtra-minister-aaditya-thackeray-on-hijab-row-2417387.html (last visited May 17, 2022).

creating rifts between the students. Students go to schools and colleges to make friends and learn together not debate over clothing issues.

As an aftermath of this situation, communal riots broke out in a number of places, a shopkeeper in Davangere was dragged out of his shop and was attacked and stabbed by a mob. A man Naveen and his mother Sarojamma were also attacked, by an angry mob in the village of Nallur of around 300 masked people bearing deadly weapons. Both were alleged by the victims' families to be a result of posting an anti-hijab status on WhatsApp.[33]

Hazra Shifa, one of the petitioners in the Karnataka High Court, alleged in her social media post that her brother Saif was beaten up by a group of intoxicated people, who opposed the statements made by their father to a local news channel in support of the hijab and the attacks were *"Sangh Parivar goons".*[34]

Yes, banning *"any visible form of expression of political, philosophical or religious beliefs"* goes against basic human freedom, especially when such rules are only for one community while the public displays all kinds of beliefs that are acceptable from other quarters. There is something more fundamental about the veil that she needs to come to terms with for a Muslim woman. That, however, has to be her own choice,

[33] DECCAN HERALD, https://www.deccanherald.com/state/storekeeper-uploads-controversial-whatsapp-statusattacked-1079855.html (last visited May 17, 2022).
[34] MS Sreeja, *Karnataka Student Alleges Brother Attacked, Links Violence To Hijab Row*, NDTV (May 17, 2022,7:36 PM), https://www.ndtv.com/india-news/karnataka-student-alleges-brother-attacked-links-violence-to-hijab-row-2781440.

and not something forced. But now that the ban is upheld in Karnataka two logical possibilities could be followed which is either the Muslim community accepts and normalcy is restored without wearing hijabs, or there is a backlash against it, and women are forced to either discontinue their studies or enroll in private institutions that allow this practice.

CHILD LABOUR IN INDIA

-Soham Kundu[1]

ABSTRACT

According to data from Census 2011, the number of child labourers present in India are 10.1 million of which 5.6 million are boys and the rest 4.5 million are girls. In India, 3.9% of the children population are seen to work as child labour. There are many reasons which contribute to this topic, child labour. Even what was the impact of covid-19 on child labour. As child labour, what children go through is beyond imagination and also a violation of human rights. What children suffer, when they are subjected to labour work on a daily basis. These states consist of half of the county's total child labour population. Children as young as five years old go to work in factories for more than twelve hours a day. The root of this issue is mainly faced due to poverty. Child labour is the result of poverty, social norms, lack of decent work opportunities, migration and emergencies. The problem of child labour has always been a huge challenge for the government. Government has been taking many steps to eliminate the situation and have enacted various laws containing the same issue and ways it can be undone, giving punishments. However, the reality is something different.

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KEYWORDS: *Child Labour, Covid-19, Suffering, Legal Provisions, Poverty.*

1. INTRODUCTION

Article 21A[2] of the Constitution of India provides for the right to education which states that every child from the age of 6 to 14 years should receive a mandatory education. Education is an important aspect of upbringing of a child as it allows them to develop necessary skills which will help them in the future. However, not all children are privileged to receive education, rather they work forcefully in order to earn. Child labour is a major barrier standing in between a child and his right to education. Even in some cases child labour affects both performance and attendance of the child in school.

Child labour is practiced not only in India but also in other countries like, America, Africa, and Europe. Labour at such an early age restrains a child from receiving the necessary education they are obliged to. The International Labour Organization defines child labour as the children who are deprived of their childhood because of work. Their potential, their dignity is completely deprived and leaves a harmful mark to the child's mental and physical development[3].

There can be many reasons for a child being forced into labour, but it connects to only one main cause and that is poverty. India's 25.01 percent population suffers from poverty. The unemployment rate is also growing rapidly, especially after Covid-19[4]. So, in this situation, a child at

[2] INDIA CONSTI. art. 21, *amended* by The Constitution (Eighty- sixth Amendment) Act, 2002.
[3] HUMANIUM, https://www.humanium.org/ (last visited Apr. 20, 2022).
[4] THE GLOBAL STATISTICS, https://www.theglobalstatistics.com/ (last visited Apr. 21, 2022).

his tender age is being forced to do some heavy-duty labour work, ending that child's dignity and moreover his liberty to enjoy his childhood.

Social norms, poverty, a lack of decent work opportunities, migration, and emergencies may all contribute to child labour and exploitation.

In India, child labour is practiced on a large scale. In our daily lives only, we can see a child working but the thing is only some of us choose to see this, and the rest choose to 'ignore'. A child working as a labourer might be doing so due to many reasons such as poverty, exploitation, trafficking, etc. Today, in India 10.1 million children, i.e., 3.9% of the total child population, aged between five to fourteen years are working as labour, be that 'main worker' or a 'marginal worker'[5].

Children are being used in severe forms of child labour such as bonded labour, child soldier, and trafficking. Children are also at risk with many forms of exploitations which includes sexual exploitation and child pornography. Some are exploited into domestic service including prostitution at a very young age.

Child trafficking is also somehow connected to child labour. Trafficked children are seen to be forced into marriage, or illegally adopted, put on cheap labour or work as free labour and are forced to work as even beggars. We all sometimes see children at traffic signals going from car to car and asking for money, some even begging for just a coin;

[5] SAGE JOURNAL, https://journals.sagepub.com/ (last visited Feb. 26, 2022).

it can be traced to this child labour, the condition it does to a child is that it leaves a scar of physical, mental, sexual and emotional abuse.

Child labour extends into many different activities such as agriculture, fisheries, manufacturing, mining, and domestic service, food refreshment services such as in tea stalls and in many other restaurants. Children are forced into labour because of migration, emergencies, the lack of decent work available and poverty which is known as the most influencing factor.

The children are put under a lot of stress and forced into work to provide for their own families since there is normally no other mode of income.

2. LEGAL PROVISIONS

Each problem is dealt with its own solution. Similarly, this rising problem of child labour is also dealt under various legal provisions-

2.1. Constitution Of India

Well, various articles are laid down in the constitution where various rights of children are reversed. Firstly, Article 21A[6] provides free and mandatory education for all the children in the age group of 6-14 years. Article 24[7] prohibits the working of children in a dangerous factory, where it is clearly mentioned that working of a child below the age of 14 years is strictly

[6] INDIA CONST. art. 21.
[7] INDIA CONST. art. 24.

prohibited because that may cause harm to them physically as well as mentally. Article 51[8] provides a fundamental duty that is to educate a child between the age of 6-14 years. Also, forcing a child into labour deprives him from the right to dignity implied under Article 21.

2.2. Year 1881-1938: Early Stages

Child labour was acknowledged as early as 1881. The Factories Act 1881[9] sets the minimum age of seven years for children to work with a minimum hour of work being nine hours only. With various amendments each time it took a turn like in the 1892 amendment it said that the minimum age of a child working is nine years, while the 1911 amendment prohibits the employment of children in certain dangerous processes. The device of a "certificate of fitness" was introduced which survives till today. It means the certifying surgeon is entrusted with whether a young person who has completed the age of 14 years is physically fit for work or not. In 1922, the minimum age in the factory act was again changed to 15 years and restricted work hours to six hours only. In 1929, the Royal Commission on labour, had a significant impact on the recognition and legislative treatment of child labour. They reported child labour coming from various industries such as carpet, textile, match and plantation too. As a consequence, a series of laws was followed thereafter. The Indian Port Act of 1931 set twelve years as the minimum age for handling goods in ports. The Tea Districts Emigrant Labour Act of 1932 provided that no children

[8] INDIA CONST. art. 51.
[9] The Factories Act, 1881, No. 15, Acts of Parliament, 1881 (India).

below the age of sixteen years shall be employed, or be allowed to be migrated. Mines Act, 1935[10] amendment provided children employment at minimum age of fifteen years and it requires a fitness certificate. The Children (Pledging of Labour) Act of 1933[11], was the first act to acknowledge the child bondage. This act even imposes a penalty of Rs. 50 to Rs. 200 for various breaches of unamended.

2.3. 1938-1986 - Subsequent Development

In 1938, the employment of children act was the act to address the issue of child labour. Despite this act, the child labour sadly continues, especially in the carpet, tobacco making, glass and other small industry as it was found by the labour investigation committee (also known as the Rege Committee). Child labour continues in to match industry in southern parts of India, the cement industry in Rajasthan, the spinning industry in cochin and a large number in the plantation sector. The committee stated that in the tea sector merely 15% children of the total workers of Assam, 20% in Bengal and about 10% in south India were being recruited and were working. These numbers were found mostly because of the reason for recruitment on "family basis". In the case of coffee and rubber, the numbers were 10% and 4% respectively in India as a whole.

In 1969, National Commissioner of labour, observed that child labour is widely being practiced in India in the agriculture, plantations sector and in shops as well. In the meantime, the Factories Act of 1948

[10] The Mines Act, 1935, No. 35, Acts of Parliament, 1935 (India).
[11] The Children (Pledging of Labour) Act, 1933, No. 2, Acts of Parliament, 1933 (India).

prohibited a child under fourteen years of age from working in a factory and required that a child aging between fourteen and fifteen years with a certificate of fitness before being employed. The Factories Act of 1948 prohibits children below the age of 14 years from working in any factory. This act also laid down a few provisions on who and for how long pre-adults aged 15–18 years could be employed in any factory. The Plantation Labour Act, 1951[12] prohibits children below the age of 12 years from working; a child above the age of 12 years can be employed only when an appointed doctor issues a fitness certificate for that child.

The Mines Act of 1952 prohibited children below 18 years of age from working in a mine. The Apprentices Act, 1961[13] lays down that unless a child attains the age of 14 years and satisfies the standard of education and physical fitness test, he or she must not undergo apprenticeship training.

The government enacted the Bonded Labour (Abolishment) System Act of 1976 and in the 1980s, the court struck down the practice of bonded labour.

In 1979, the Government formed the first committee, namely Gurupadaswamy Committee, that studies the issue of child labor and suggested various measures. And the result was Child Labour Prohibition and Regulation Act 1986[14]. However, in 2016 Child Labour (Prohibition

[12] Plantation Labour Act, 1951, No. 69, Acts of Parliament, 1951 (India).
[13] The Apprentices Act, 1961, No. 52, Acts of Parliament, 1961 (India).
[14] Child Labour Prohibition and Regulation Act, 1986, No. 61, Acts of Parliament, 1986 (India).

and Regulation) Amendment Act 2016, was amended, introducing the concept of adolescent labor for the first time for children aged between 14 and 18 years. This act was the result of the drawback which 1986 had.

In 1988, the National Child Labour Project initiative was formed and under this legal and development initiative, the Government has currently issued funding targeted solely to eliminate child labor in India.

2.4. 1988- 2022: Still Going On

The Juvenile Justice (Care and Protection) of Children Act of 2000[15] made Child Labour a punishable crime with a personal term for anyone who employs a child in hazardous work areas or in bondages.

The Right of Children to Free and Compulsory Education Act of 2009[16] mandates education free and mandatory for all children aged between 6 and 14 years. Further, the legislation also provides that 25% of seats in every private school must be allocated for children who belong to any disadvantaged groups or are physically challenged.

India formulated a National Policy on Child Labour in 1987 which seeks to adopt a sequential approach with a focus on the rehabilitation of children working in hazardous occupations. It mandates the strict

[15] The Juvenile Justice (Care and Protection) of Children Act, 2000, No. 56, Acts of Parliament, 2000 (India).

[16] The Right of Children to Free and Compulsory Education Act, No. 35, Acts of Parliament, 2009 (India).

enforcement of Indian laws on child labour and also combined it with developmental programs to address the root causes of child labour[17].

3. PROBLEMS

Despite having these rights and laws protecting and helping in the process of extinction the concept of child labour, it does have some loopholes. Not everything can go as planned, not everyone or everything is perfect, even these provisions present some loopholes. Even after the implementation of all these laws and rights, lack of awareness is the root cause leaving these acts untouched. Even after having these acts, lack of awareness, or different measures in a family can serve the child as labour. Eventually what child labour does to a child is that it creates a psychological effect as critical as the physical effects, which can lead to long lasting trauma. The children who have suffered horrific acts of violence may grow up to develop mental illness, depression, guilt, anxiety, loss of confidence and hopelessness.

There are even children who in most cases are abducted and then forced into labour by the dominant. The child suffers from starvation as the food provided is meagre. They have to put in long hours of work and failure to comply with the imposed conditions often costs them their life. That child is left with nothing but a life of trauma to deal with. Children

[17] Adriana Lleras-Muney, *Were Compulsory Attendance and Child Labor Laws Effective? An Analysis from 1915 To 1939*, 45(2), THE JOURNAL OF LAW AND ECONOMICS 401-435 (2002), https://www.jstor.org/stable/10.1086/340393.

as young as 5 years old work in factories in 12 hours a day shifts and seven days a week with a low wage and sometimes no wages. With all these laws even there to help children, they fail many times. Child labour in India holds a strong firm. The problem is, the child labour law is hard to enforce particularly in the rural area, where most of these cases are seen. Officially each sate of India is responsible for enforcing child labour laws within its own jurisdiction however owing to lack of funds administration fails to put these to work. Even when cases of child labour are seen in the judiciary, and when prosecuted, the penalties are of less severe nature with fine and 3 months in prison.

However, in India if child labour is given up then an entire family's income would be lost, and the family would plunge into absolute poverty. As for employers, in still under-developed areas, they will lose the only way of creating local products at a cheaper cost enough to be competitive with international mass-produced goods. If the employers are in this view of making a competition, then they should be brought to book. It's true that the system is flawed.

3.1. Government Initiative

Government has been always taking proactive measures to tackle this problem. Considering the magnitude and extent of the problem and that it is essentially linked to poverty and illiteracy. The first Government initiative was taken in 1979, when the committee named Gurupadaswamy Committee was formed to study the issue of child labour and to suggest measures to tackle it. It far reached many recommendations making even

a law. It has been observed that as the poverty level in the underdeveloped country rises, child labour would remain a prominent feature. Thus, as a result, attempting to abolish such an issue through legal resources will be practical but not up to the extent. It will barely reach the mark.

National policy on child labour, in 1987, seeks to adopt a gradual and sequential approach with a focus of rehabilitation of children. This action was followed in the Legislative Action Plan for strict enforcement of the Child and Adolescent (Prohibition and Regulation) Act, 1986. There were schemes which followed thereafter.

It is wrong to say that the government has not been taking steps, rather it is taking adequate measures to tackle such a problem. Since the root cause is traced back to poverty, it is hard to solve this problem.

There are several non-governmental organizations (NGOs) across India which help in rescuing children and helping the one in need. One of such organizers is Care India, that fights for child rights and another is Hand in Hand which has been set up to help the government in this fight.

On top of that the ministry of labour and employment has also set up numerous projects to rehabilitate such children who are a victim of child labour since late 1980s.

The problem of child labour needs more than one solution. Despite the government trying to overcome the situation, it is overlapping in numerous ways. There is a need for better policy. Meanwhile, the common people should also address this issue, not activists, not NGOs, but the common people. Social awareness in any social problem eventually lacks,

the government policy should be stricter, and also, they should consider the poverty in making such policy. The punishment of child trafficking must be more severe and the state should provide policy in that regard strictly restricting it, as child trafficking is a more serious issue in child labour.

4. CAUSES OF CHILD LABOUR

In India, one can say the famous root cause of children working as a labour is the factor of poverty. Although it is one of the main reasons for child labour there are various other reasons also contributing to this factor[18].
Some children would still like to take part in productive activities. This is exemplified by children who work on family farms, and applies both to children seeking part-time work in industrialized countries and children in developing countries.

Parental education and occupation are other important factors which contribute in child labour. The more the parents are educated, the less is the burden of children to work. Families with occupations such as farming, are more likely to have many children to start to contribute economically from an early age, with the income from labour exceeding the costs of raising them. So, the burden falls upon the children more. When the security of a family's livelihood is threatened by job losses, or

[18] Moehling, C. M. (1999). *State child labor laws and the decline of child labor*, 36(1), EXPLORATIONS IN ECONOMIC HISTORY, 72-106 (1999), https://econpapers.repec.org/article/eeeexehis/v_3a36_3ay_3a1999_3ai_3a1_3ap_3a72-106.htm.

the death of a bread earner then the children are forced to enter the workforce having no choice.

Some children run away from home to look for a job because they have been mistreated. This happens mostly, when a child moves in with a member of the extended family or when they live with their step-parents. Most of the children who run away from home, end up being the subject of trafficking. Also, in remote places of India, there are parents who sell their children to work as a slave at a tender age, just for little money. Also in plantation work, when labour is sick for a day, then also the burden falls upon the children considering the daily wages and no benefits on the side of labour. Thus, a child has to suffer not because of the financial crisis, but because of factors of many variations[19].

5. EFFECTS OF CHILD LABOUR

With causes contributing to child labour comes in the effects too. Where there are causes, there are consequences. This effect mostly deals with a child who is said to be suffering from various health hazards[20]. Working in a factory, or doing heavy intensity work, a child's health is affected as those ages are for the child to grow, not to work. Hazardous child labour

[19] Dessy, S. E., & Pallage, S. (2001). *Child Labor and Coordination Failures, 65(2)* JOURNAL OF DEVELOPMENT ECONOMICS,469-476 (2001), https://econpapers.repec.org/article/eeedeveco/v_3a65_3ay_3a2001_3ai_3a2_3ap_3a469-476.htm.

[20] John H Tyler, J. H. (2003), *Using State Child Labor Laws to Identify the Effect of School-Year Work on High School Achievement*, 21(2) JOURNAL OF LABOR ECONOMICS, 381-408 (2003), https://www.journals.uchicago.edu/doi/abs/10.1086/345562?mobileUi=0&journalCode=jole.

constitutes the most harmful activity, with an estimated 73 million children, aged 5 – 17 years, working in dangerous conditions in a wide range of sectors, such as in the agriculture sector or in mine or in a construction site, or in hotels, restaurants as waiter, or in any form of domestic service[21]. Hazardous child labour refers specifically to work in dangerous or unhealthy conditions that could result in a child being killed, injured, or made ill as a consequence of poor safety and health standards and working arrangements. It can easily result in permanent disability, mental health, and psychological damage. Health problems caused by working in hazardous environments may not develop or manifest until the child is an adult. International labour organization estimates that some 22,000 children are killed at work every year[22]. The numbers of those injured or made ill because of their work are unknown. For instance, in a construction site, there are few to no safety measures and many children even work there providing many causes, now with nothing in their head, and working as a 32-year-old man rules the possibility of what that child will be suffering from.

In mining, children may have to handle dangerous chemicals, face the risk of mine collapse, be exposed to mineral dust, and sometimes work with explosives.

[21] *Id.*

[22] SAGE JOURNAL, https://journals.sagepub.com/ (last visited Feb. 26, 2022).

In domestic situations children risk physical, mental and sexual abuse, work long hours, and often live in isolation from their families and friends.

Working can significantly have a negative impact upon the social development of a child as they spend most of their time labouring instead of interacting with peers in communal play and learning how to socialize appropriately.

6. IMPACT OF COVID-19

According to International Labour Organisation (ILO), the pandemic has threatened to reverse the trend of child labour. An estimation of 60 million people is expected to fall into poverty during the pandemic, and that inevitably drives families to send children to work. A joint report by the ILO and United Nations Children's Fund estimates that a 1%-point rise in poverty leads to at least a 0.7%-point increase in child labour[23].

In India, reports show that children continue to be exploited for child labour, even as the COVID-19 pandemic was followed by the lockdown[24]. While the coronavirus pandemic forced India's children out

[23] K. Sarkar, *India Faces a Lost Generation as Covid-19 Pushes Children to Work*, HINDUSTAN TIMES (Apr. 21, 2022, 8 PM), https://www.hindustantimes.com/india-news/india-faces-lost-generation-as-covid-19-pushes-children-to-work/story-hIbEkV1pEhQAmkWwR9S8rO.html.
[24] S. Sunil, *India Faces a Lost Generation as COVID Pushes Children Out of School and Into Jobs*, THE PRINT (Apr. 21, 2022, 8:30 PM), https://theprint.in/india/india-faces-lost-generation-as-covid-pushes-children-out-of-school-and-into-jobs/478424/.

of school as they were officially closed, many children were relocated to farms and factories to work forcefully without any choice.

7. CONCLUSION

To sum it up, child labour is a practice, followed not only in India but also in the whole world. Countries like Africa, South America and Europe, a number of victims can be seen there. Child labour affects the child's childhood, leaving them a life followed by trauma especially for those who have suffered the violence, was a victim of child abuse. They suffer from mental, physical and emotional health which is hard to forget. In India, there are many facilities where child labour can be found however those facilities abuse children to work for free and manufacture goods for them. In Bihar, Uttar Pradesh, Rajasthan, Madhya Pradesh and Maharashtra, are the main states in India where child labour is found the most. With the government and NGOs trying to tackle the issue, it is a long journey to end such fights. Strengthening the child protection system as well as addressing poverty and inequity, improving access to and quality of education and mobilize the public support for the rights of children can be some of the ways with which child labour could be resolved, but it will take a much longer process.

SHORT ARTICLE

CITIZENS RIGHT TO TRANSPARENCY IN PUBLIC ADMINISTRATION

-Angikar Sengupta[1]

ABSTRACT

One of the buzzwords in today's government is transparency. Transparency offers better democratization and economic performance, yet the two may be mutually exclusive. We have seen a rapid global dispersion of information access legislation, coinciding with the right to transparency as a symbol of responsible government. Access to public information is also a part of government transparency. Surprisingly, transparency is frequently demanded in order to hold the government frequently responsible for their use of this data. The right to information (hereinafter referred as RTI) is a fundamental right of every Indian citizen as this Act was passed in order to consolidate the fundamental right to freedom of speech and expression as provided under Article 19(1)(a) of the Indian Constitution.[2] *The Supreme Court held that in Indian democracy, people are the masters and they have the right to know about the working of the government. The Act was criticized by the public and social activists on the fact that few provisions have been manipulated and molded in a manner to refrain from furnishing the*

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[2] INDIA CONST. art. 19, cl. 1, sub cl. a.

information associated with the government offices, explicitly to the information seeker and hiding the information behind the virtual layer of national security and the tag 'not public authority' under the ambit of the Act. Furthermore, higher transparency is frequently expected to lead to greater citizen-trust in government, although trust and transparency are more complicated in reality.

KEYWORDS: *Right to Information, Transparency, Accountability, Democracy, Good Governance.*

1. INTRODUCTION

"A lack of transparency results in distrust and a deep sense of insecurity"

-Dalai Lama

The word transparency means something we can see through, so as to be clear about what we are looking at. An example can be a simple glass. In reality, the word transparency holds a deeper meaning to it. People seek transparency in every stage of their life because they are being aware of their rights, being a citizen of the country.

Transparency is one of the keywords of contemporary governance. It holds promises for increased democratization and economic performance, but these may also stand in contradiction. Coinciding with the rise of transparency as a token of responsible governance, we have witnessed rapid global diffusion of information access laws. Transparency of public administration also implies access to public information. Interestingly, to hold public administration accountable for its use of this information, transparency is often called for. Moreover, increased transparency is often assumed to lead to increased citizen-trust in government, but in reality, the relation of trust and transparency are more complex.[3]

Coming towards citizen's right to transparency, every person has the fundamental right to know what the administration is doing for their

[3] Aditya Vikram Yadav & Rahul Chaudhary, *Right to Information Act, 2005*, DOPT (Mar. 2, 2022, 4:15 PM), https://rti.gov.in/aditya_and_rahul.pdf.

welfare. Afterall, the administration is alive because of its citizens. In a country like India, having the largest democracy in the world, the right to transparency is must and obvious. If there is no transparency in administration, it will lead to distrust among the citizens of the nation.[4] Also, the proper access to public information must be linked to democracy and political rights. Its recognition and effectiveness are related to the exercise of other fundamental rights in so far as it is configured as an assumption or instrument of facilitation.

Excessive secrecy can undermine the quality of public decision-making and prevent citizens from checking the abuses of public power.[5] This can have a corrosive effect on all aspects of society and governance. Transparency, in terms of both information disclosure, and dissemination and access to decision-making, is very important as it better enables civil society to:

a. Hold government and/or key decision-makers accountable.
b. Promote good governance.
c. Improve public policy and efficiency.
d. Combat corruption.

[4] LEGAL SERVICE INDIA E-JOURNAL, https://www.legalserviceindia.com/legal/article-63-open-government-and-right-to-information.html (last visited Jan. 15, 2022).
[5] FOREST TRANSPARENCY, http://www.foresttransparency.info/background/forest-transparency/32/transparency-and-the-right-to-information/ (last visited Apr. 11, 2022).

2. IMPORTANCE OF THE RIGHT TO TRANSPARENCY

In doing the right thing, everything is permitted, which is not prohibited expressly or by clear implication. The State organs allow citizens to know why and how they act, and what decisions they adopt. Thus, it will be possible to directly evaluate and control whether the principle of probity is respected. Moreover, they can participate in public management.

In *Life Insurance Corporation v. Professor Manubhai D. Shah*[6]**,** the Supreme Court of India stated: *"In a government of responsibility like ours where the agents of the public must be responsible for the conduct, there can be but a few secrets. The people of this country have a right to know every public act, everything that is done in a public way by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearings."*

Transparency is an important principle of good governance. Openness towards the citizens will strengthen our democracy, and promote effectiveness and efficiency of the administration or government. The trust of the citizens of the nation is most important in order to run the administration.

The *Chilean Constitutional Court*[7] (2012, Cons. 26) has said that: *"The mysterious or secret nature of a matter is not something perverse,*

[6] Life Insurance Corporation v. Professor Manubhai D. Shah, AIR 1993 SC 171.
[7] Constitutional Court of Chile, (2012) Judgment TC-782-072012, Cons. 26.

reprehensible or suspicious in itself. The Constitution contemplates the possibility that the law directly or the administration, based on certain specific legal grounds, declare something as secret or reserved."

Transparency makes sure that people are aware of what decisions are being taken by the administration at different levels for their betterment. The administrative system must also be accountable and responsive. The more every decision of administration is known and open to the people, the more it will keep the pillars of democracy intact.[8]

3. INITIATIVES ENHANCING THE RIGHT TO TRANSPARENCY

3.1. Right To Information

In a democratic nation, every person has the right to know every decision taken by their administrative system. It can be better called the right of public access to the key information. Whenever people find the decisions or actions manipulative, they have the right to seek the details. It is to be noted that the administrative system is for the betterment of the people.

The system should work in accordance with the needs of the people. Therefore, the right to information is not a need of the nation, it can be better termed as the right of the citizens to demand transparency in administration.

[8] ICMA, https://icma.org/transparent-governance-anti-corruption (last visited Jan. 18, 2022).

In the year 2005, the legislature of India enacted the Right to Information Act, 2005.

There are two separate bodies to hear complaints and appeals under the RTI Act, 2005. At Central level, there is Central Information Commission (CIC) and at State level there are State Information Commissions (SICs). CIC deals with the matter pertaining to Central level public authorities and SICs with State level public authorities.

3.2. Elimination of Corruption

Corruption causes misuse of government treasury, administrative inefficiency and obstruction in the path of national development. Transparency is the fundamental element of abolishing corruption. Corruption leads to the misuse of power and authority or funds being used for private purposes by officials. The administration is a part of the life of every person residing in a nation. It cannot be allowed to run by corrupt officials as it is meant for the welfare and betterment of the people. It creates an environment of distrust and insecurity between the citizens of the nation and its government. The existing corruption in the administration can be solved only when the right to access information is provided to the people i.e., the right to transparency among the people. Transparency is the key to comprehensive public involvement and also the indication of elimination of corruption.

3.3. Systematic Process to Access and Degree of Credibility[9]

Transparency must be there between people and administration. It is necessary that the people are provided with correct data. The data should be proper in terms of authentication and quality. It must be open for every person but should not go into the wrong hands. Unauthorized access or tampering is a loss of the public. It is the duty of the government to properly administer it.

Also, the public has to know how the funds commonly known as tax are used for the development of their standard of living. Tax is the right of the government but that money has to be used for the betterment of the people. Transparency in administration will allow the public to know where the money of the taxpayers is being used. As it is a matter of credibility, the public can get selected information related to it.

4. COMPARATIVE RIGHT TO INFORMATION AS A FUNDAMENTAL TOOL OF GOOD GOVERNANCE

Every citizen has the right to freedom of speech and expression. The Apex Court held that the right to information is an integral element for the

[9] *Id.* at 6.

purpose of Article 19 of the Constitution of India.[10]

The right to access public information implies the prerogative that a person has to access and know the information that is in the power of the State bodies and of the private persons that manage public resources or provide public services, with exceptions that are exhaustively established by the Constitution or other laws, and that is necessary for the success of the democratic process or guarantees the fundamental rights of the people. The Act is a path-making legislation which brings to light the secrecy of administration. It is an effective means to promote democratic ideology. The Act is a powerful instrument to fight against corruption.

The landmark case regarding freedom of press in India is *Bennett Coleman & Co. & Ors. v. Union of India & Ors.*[11], where the right to information was held to be included within the ambit of the right to freedom of speech and expression. The Supreme Court held that in Indian democracy citizens are the masters and they have the right to know about the working of the government.

In the case of *Indira Gandhi v. Raj Narain*[12], it was explicitly stated that it is not in the interest of the public to 'cover with a veil of secrecy, the common routine business. The responsibility of the officials to explain and to justify their acts is the chief safeguard against oppression and corruption.'

[10] INDIA CONST. art. 19.

[11] Bennett Coleman & Co. & Ors. v. Union of India & Ors., AIR 1973 SC 106.

[12] Indira Nehru Gandhi v. Shri Raj Narain & Anr., AIR 1975 SC 2299.

In the case of *SP Gupta v. Union of India*[13], the right of the people to know about every public act and the details of every public transaction undertaken by public functionaries was described.

Thus, the government enacted the Right to Information Act in 2005 which provides machinery for exercising this fundamental right. It is one of the most important Acts which empowers ordinary citizens to question the government and its working. This has been widely used by the citizens and media to uncover corruption, progress in government work, information related to expenditures, etc.

Section 4(1)(b) of the Act[14] provides that the government has to maintain and proactively disclose information, which creates an obligation upon the government to fulfill its duty.

Section 6 of the Act[15] prescribes a simple procedure for securing information which can be done by filing a written request to the Public Information Officer, who is appointed by the authority covered under this Act.

Section 20 of the Act[16] deals with the penalties in case of failure to provide information on time. The information must not be incorrect, incomplete, misleading or distorted.

The lower courts are barred from entertaining suits or applications.

[13] S.P. Gupta v. Union of India, AIR 1982 SC 149.
[14] The Right to Information Act, 2005, § 4, sub § 1, cl. b, No. 22, Acts of Parliament, 2005 (India).
[15] The Right to Information Act, 2005, § 6, No. 22, Acts of Parliament, 2005 (India).
[16] The Right to Information Act, 2005, § 20, No. 22, Acts of Parliament, 2005 (India).

However, the writ jurisdiction of the Supreme Courts and High Courts under Articles 32 and 226[17], respectively, allows the same, which is stated under Section 23 of the Act.[18]

There is a famous saying that 'power corrupts and absolute power corrupts absolutely'. Therefore, no right can be absolute in nature. Every right is subject to certain reasonable restrictions. Hence, the right to information is also subject to reasonable restrictions stated under Article 19(2) of the Indian Constitution[19]. Certain exemptions from disclosure are stated under Section 8 of the Right to Information Act, 2005[20], which are as follows:

a. The information which tends to prejudice the international relations, integrity and national security of the country.
b. The information which is expressly forbidden from disclosure by Tribunals and Courts.
c. The information which relates to personal details and is not in the interest of the public. If there is access to such information, it may lead to the violation of the right to privacy.
d. Information related to trade secrets, commercially confidential information and intellectual property.

[17] INDIA CONST. art. 32 & 226.
[18] The Right to Information Act, 2005, § 23, No. 22, Acts of Parliament, 2005 (India).
[19] INDIA CONST. art. 19, cl. 2.
[20] The Right to Information Act, 2005, § 8, No. 22, Acts of Parliament, 2005 (India).

e. Confidential information received from foreign governments, etc.[21]

The amendment of the Right to Information Amendment Bill, 2013 removes political parties from the ambit of the definition of public authorities and hence from the purview of the RTI Act, 2005.

The Amendment Bill, 2019 seeks to amend these provisions to state that the salaries, allowances, and other terms and conditions of service of the Central and State Information Commissions will be determined by the Central government.

Under the Act, the Chief Information Commissioner (CIC) and Information Commissioners (ICs) are appointed at the Central and State levels to implement the provisions of the Act. The Act states that the CIC and other ICs (appointed at the Central and State level, respectively) will hold office for a term of five years. The Act states that at the time of the appointment of the CIC and ICs, if they are receiving pension or any other retirement benefits for previous government service, their salaries will be reduced by an amount equal to the pension.

The Bill removes these provisions relating to previous government service including:

a) The Central government.
b) State governments.
c) Corporation established under a Central or State law.
d) Government companies owned or controlled by the Central or

[21] Richa Goel, *Analysis of the Right to Information Act, 2005*, IPLEADERS (Apr. 17, 2022, 5:29 PM), https://blog.ipleaders.in/analysis-of-the-right-to-information-act-2005/.

State governments.

Good governance and the right to information are complementary to each other. A nation, whatever form of government it pursues, must fulfill the aspirations of the common man. Good governance is characterized by political accountability, availability of freedom, bureaucratic accountability, availability of information, effectiveness, efficiency, law abiding citizens and cooperation between government and society. As such, the Right to information is a natural corollary of good governance. The enactment of the RTI Act, 2005 introduces an open and transparent government, and gives every citizen the right to seek and receive information to make administration more responsible and transparent.

It plays an important role from getting a poor slum dweller his ration card through RTI to unearthing massive scams like 2G Spectrum, Adarsh Society Scam, Commonwealth Games Scam, Indian Red Cross Society Scam, etc.[22]

5. CAN TRANSPARENCY OR THE RIGHT TO INFORMATION BE FULLY IMPLEMENTED

We are clear about the importance of transparency and accountability. But, when it comes to its total implementation, then I believe that it cannot be totally implemented as:

[22] LEGIT QUEST, https://www.legitquest.com/legal-guide/right-to-information-act (last visited Apr. 13, 2022).

I. Firstly, our literacy rate is low due to which people are unaware of their rights, guaranteed to them by the Constitution. The government has failed to fulfill its responsibility to make people aware of such rights.

II. Secondly, there is less participation by the government itself when people actually recognize their rights and raise questions relating to it. It has also been reported that sometimes wrong information has been provided and many times information has not been given claiming it to be private. The author believes, people have the right to know where their money is being utilized. If the income of a person and its usage has to be transparent to the government, similarly, the usage of the tax by the government should also be transparent to the public.

III. Thirdly, the ultimate objective of the Act is transparency and accountability in governance. The PM Cares Fund is an apt example of how certain information can be made private, although it contains public funds for the welfare of the society at large. This molding and manipulation of private-public information is a safe haven for corrupt bureaucrats and politicians to curtail all the illicit and corruption laden deals.[23]

IV. Fourthly, the Act provides for the public authority to publish the

[23] Aman Singh, *Criticisms of the Right to Information Act, 2005*, IPLEADERS (Apr. 16, 2022, 5:15 PM), https://blog.ipleaders.in/criticisms-right-information-act-2005-subjected/.

information suo motu as prescribed under Section 4(1)[24] through various means of communication, but not all public offices display the complete information. Most of the PIOs do not have any training to deal with the RTI applications.

V. Fifthly, it is mandatory for the Commission to levy a penalty under Section 20[25] if the information is not provided within 30 days. The process of appealing two times and then approaching the Commission in case of non-furnishing of information without any proper reason or with unfair intentions takes too much time and goes completely in disregard to the very objective of the RTI Act.

VI. Sixthly, Section 27 and 28 of the Act[26] empowers 'State governments" and "competent authorities" to make their own rules. This in many contexts counters the RTI Act. This provision is excessively misused by many competent authorities, State governments and corrupt bureaucracies or officers.

VII. Seventhly, the Act guarantees only that information which comes wholly or partially under the public authority, but some 'private' information that we need to know or some information that looks private but is public in its true nature, remains unaddressed. This private information is that which, directly or indirectly, affects the governance and ultimately influences the public at large. In India,

[24] The Right to Information Act, 2005, § 4, sub § 1, No. 22, Acts of Parliament, 2005 (India).
[25] The Right to Information Act, 2005, § 20, No. 22, Acts of Parliament, 2005 (India).
[26] The Right to Information Act, 2005, § 27 & 28, No. 22, Acts of Parliament, 2005 (India).

many politicians and bureaucrats are linked with big businessmen in such a way that their relationship directly affects the governance, administration and public structure.

VIII. Lastly, one of the major set-backs to the Act is that poor record-keeping within the bureaucracy results in missing files. There is a lack of staffing to run the Information Commissions. The supplementary law viz, The Whistle Blowers Protection Act, 2011 is diluted, which reduces the effect of the right to information law. Since, the government does not proactively publish information in the public domain as envisaged in the Act, it leads to an increase in the number of the RTI applications. There have been reports of frivolous RTI applications and also the information obtained have been used to blackmail the government authorities. As a first step, there would be less need for a citizen to file complaints. Public authorities must implement the RTI in its true spirit. Such information would be so exhaustive that it would include most of the essential information. As a consequence, it would also help the Public Information Officers (PIOs) in lessening their task and eventually help reduce the burden of appeals or complaints. If the expansion of information is throttled, it is very likely to cause the death of freedom of a free and fair society.

6. CONCLUSION

Democracy, precisely as it is situated in the sphere of politics and public affairs, would have a general rule i.e., transparency. Secrecy would be a rule in the order of the private.

The public is able to participate in the democratic process when they have complete knowledge about the decisions and activities of the administration and are aware of the benefits they are entitled to. Whether they are receiving what they are expected to get, for that transparency is the biggest tool. It will remove the corrupt rule of officials and allow democracy to rise.

The citizen, being the owner of the information, must know about it. It is unfortunate that one has to seek the RTI. As an inherent right, one should not beg for the information. It should be available to the citizens without demanding or requesting it. The more transparency in the information, the better is the accountability in governance.

Therefore, access is a subjective right of a fundamental legal nature to the extent that it constitutes or should constitute part of the necessary legal status of every citizen as a consequence of its connection with the democratic principle. Its content can be formulated based on doctrinal constructions and approved international legal documents on the subject.

At the end, we should remember that the administration or the government is in power because the citizens have given it. Indeed, the trust has to be maintained at its full.

SOCIO-LEGAL ASPECTS OF SURROGACY IN INDIA

-Heena Kabir[1]

ABSTRACT

Every woman in her span of life has a beautiful experience of motherhood but some may face difficulties in living this experience due to some physiological issues in either the woman or even their male counterpart. In order to sort this issue of infertility, science and technology have come up with various methods by way of which a couple can bear children, one among which is "surrogacy". Commercial surrogacy is one such form of surrogacy where the surrogate mother is paid for her services in double the amount by the intended parents but since this whole procedure cannot be performed without medical supervision, clinics are attached to it. However, it has been found that most of the monetary benefit is reaped by the middlemen and the clinics, whereas, a surrogate mother is left only with some amount, and this ignited the flame in various women's welfare organizations which finally led to the government banning this form of surrogacy in India. Although it is banned, commercial surrogacy is continuing in some way or the other through other forms under the blankets, therefore, along with the

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types and evolution of surrogacy in India, the researcher will be discussing whether this ban is imposed to obtain the true sake of its purpose, or whether it is the government who is incapable of protecting the surrogate mothers from being exploited.

KEYWORDS: *Surrogacy, Surrogate mother, Intended parents, Commercial surrogacy, Altruistic surrogacy.*

1. INTRODUCTION

Surrogacy is a process through which infertile couples can bear the happiness of having a child. Surrogacy in simpler term means when a woman consents to bear someone else's baby in her womb and carries it throughout the 9 months of pregnancy and at last delivers it in exchange of some financial benefits. This process is done by infusing eggs and sperm of the intended parents in the laboratory and then transferred into the uterus of the surrogate mother. Most of the countries in the world have made this practice legal, including India.[2] There are different types of surrogacies and in the year 2002 commercial surrogacy was permitted but after witnessing flow in commercialization this practice got banned and only altruistic surrogacy is allowed.

2. TYPES OF SURROGACIES

There are different types of surrogacies such as traditional surrogacy and gestational surrogacy, which are the techniques of surrogacy, and then there are altruistic surrogacy, independent surrogacy, and commercial surrogacy, which are subsets of the two aforementioned techniques of surrogacy.

[2] Rishabh Manchanda, *Commercial Surrogacy in India*, LAW COLUMN, (Apr. 20, 2022, 10:00 PM), https://www.lawcolumn.in/commercial-surrogacy-in-india/.

2.1. Traditional Surrogacy

Traditional surrogacy involves the infusion of the surrogate mother's egg and the donor's or the intended father's sperm, which is then injected into the ovaries of the surrogate mother.[3] It is the oldest form of surrogacy which has been in practice for a long period of time but it has been observed in the recent past that this form of surrogacy was causing issues between the surrogate mother and the intended parents because in this procedure the surrogate mother shares a genetical relation with the baby, thus, there is no emotional and legal barrier between the two.

2.2. Gestational Surrogacy

In this type of surrogacy, the surrogate mother is injected with the fusion of the intended parents' egg and sperm, following which she carries the baby in her womb for nine months and is paid after the delivery of the child.[4]

Although these are the two techniques of surrogacy, surrogacy is further classified into three additional forms based on the aspect of monetary compensation for surrogacy- altruistic surrogacy, independent surrogacy, and commercial surrogacy.

In altruistic surrogacy the surrogate mother bears the child without being compensated for it; she is provided with a minimum amount for her

[3] *Id.*
[4] *Id.*

time, effort, and general cost of pregnancy.[5] This is because, in this form of surrogacy, the child is mostly borne by someone who is known to the intended parents due to their familial or friendly relations, etc.[6] This is the only type of surrogacy that is legal in Canada and the UK.[7]

Independent surrogacy is slightly similar to gestational surrogacy where the surrogate mother is someone who is already known to the intended parents but in this form, it is done without the guidance and assistance of any clinic or agency.[8] Now, this proves to be quite fatal medically and legally because, in the event of being faced with adverse circumstances or complications in the process of surrogacy, the intended parents and/or the surrogate mother will not have easy recourse to medical or legal assistance.

Lastly, in commercial surrogacy, the surrogate mother is paid beyond the reimbursement amount of her medical expenses.[9] This is one type of surrogacy that was allowed and legal in India, but in the year 2016 the government banned commercial surrogacy, now, only paying medical

[5] Sambhu Charan, *Genetic and Gestational Surrogacy: An Overview*, RESEARCHGATE (Aug. 16, 2012, 12:00 PM), https://www.researchgate.net/publication/235788278_Genetic_and_Gestational_Surrogacy_an_Overview.
[6] *Id*.
[7] BRILLIANT BEGINNINGS, https://brilliantbeginnings.co.uk/surrogacy-in-canada/ (last visited Apr. 20, 2022).
[8] LAW COLUMN, *supra* note 2.
[9] *Id.*

reimbursements and general expenses were allowed and this also happens to be an attribute of altruistic surrogacy.[10]

3. HISTORY OF SURROGACY

When conducting an in-depth study on any socio-legal topic, it becomes essential to know about the history of the concerned subject matter which will further enhance the reader's understanding of the same. Surrogacy sounds to be a very new topic but it dates back to the time of gods and goddesses. In the case of Abraham & Sarah from biblical times, Sarah and Abraham were married to one another for a long time but they were not able to conceive a child of their own so, Sarah turned to her servant Hagar to carry their child through traditional mode of surrogacy.[11]

Glimpses of surrogacy can also be found in Indian mythology, in one part of Bhagavata Purana it is written that when Vishnu Ji heard Vasudev begging Kansa not to kill his children, Vishnu Ji immediately transferred the embryo from Devika's womb to the womb of Rohini and it was Rohini who gave birth to Balram, Lord Krishna's brother.[12]

The history of surrogacy can also be traced back to the time of Mahabharata; one of the chapters of Mahabharata talks about Gandhari giving birth to a lump of immovable flesh after a prolonged gestation

[10] *Id.*

[11] SURROGACY.COM, https://surrogate.com/about-surrogacy/surrogacy-101/history-of-surrogacy/ (last visited Apr. 20, 2022).

[12] SHE THE PEOPLE, https://www.shethepeople.tv/news/surrogacy-in-mythology/ (last visited Apr. 20, 2022).

(pregnancy for a period beyond the time of 9 months) and Maharishi Vyas divided the lump of flesh into 100 pieces and placed them into 100 different jars with butter in it and left them for incubation.[13] In due course, one by one 100 Kauravas were born. [14] As is evident, this narrative of Mahabharata attracts the IVF mode of fertilization which is so common in today's time. On March 3rd, 1978, the first baby was born in India through IVF mode; it was the result of the efforts put in by Dr. Subhas Mukherjee in Kolkata.[15] With an increase in the various modes of fertilization, India is now regarded as one of the top-most countries in providing cheap IVF facilities because an entire market has been established for this purpose.

4. COMMERCIALIZATION OF SURROGACY IN INDIA

In the year 2002, after witnessing a huge flow in this process the Indian government legalized commercial surrogacy,[16] after which India became a huge market for surrogacy agencies and clinics. Due to the easy availability of surrogate mothers, couples from around the world started visiting India to avail themselves of these services. According to the observations made by the National ART (Artificial Reproductive

[13] *Id.*
[14] *Id.*
[15] Abantika Ghosh, *The Test Tube Baby: 40 Years ago, and Today,* INDIAN EXPRESS (Apr.20, 2022, 10:00 PM), https://indianexpress.com/article/explained/the-test-tube-baby-40-years-ago-and-today-ivf-5289207/.
[16] *Id.*

Technique) Registry of India, there has been a jump of 300 percent in the cases of surrogacy during the period of a year (2004- 2005).[17] Many experts are of the opinion that this commercialization is giving rise to new problems in buying and selling of human bodies which is an unethical act and a gross human rights violation.[18] This act of commercialization is contradictory to the Human Organs Act of 1994 which bans the trading of human organs for commercial purposes.[19] The 228th Law Commission Report recommended prohibiting the practice of commercial surrogacy in India and allowing altruistic surrogacy.[20] In the year 2005, the Indian Council of Medical Research (ICMR) espoused some guidelines regarding compensation that is to be paid to the surrogate mother which will be based on the decision arrived at by both the surrogate mother and the intended parents, and the surrogate mother cannot donate her eggs for this process. This is to eradicate the possibility of a biological relationship between the surrogate mother and the baby.[21]

[17] R.S. Sharma, Social, *Ethical, Medical and Legal Aspects of Surrogacy: An Indian Scenario*, 140 IJMR 13, 14 (2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4345743/.
[18] *Id.*
[19] Human Organs Act, 1994, § 19, No. 42, Acts of Parliament, 1994 (India).
[20] Sneha Banerjee, *The Law Commission and Surrogacy: A Critical Look at the 228th Report*, ACADEMIA (Apr. 20, 2022,11:53PM), https://www.academia.edu/37359282/The_Law_Commission_and_Surrogacy_A_Critical_Look_at_the_228th_Report.
[21] ICMR, https://main.icmr.nic.in/sites/default/files/guidelines/a.pdf (last visited Apr. 20, 2022).

5. LEGISLATION OF SURROGACY IN INDIA

The Surrogacy Regulation Bill was introduced in the Lok Sabha in the year 2016, and in 2017 a report regarding the same was passed in the House. In 2019, the Lok Sabha passed this Bill and in the year 2021 the Rajya Sabha passed the Bill which ultimately formed into an Act and it came into effect on January 25th, 2022.[22]

This enactment created an entire market for renting wombs by providing its jurisdiction only to married infertile Indian couples.[23] The main contention of this Act was to ban commercial surrogacy and regularize altruistic surrogacy. There is a proper set of rules and regulations in the Act directed to the clinics that perform surrogacy (Section 3 of the Act)[24] for the surrogate mother and the intended parents who approach them.[25]

The Act clearly states the eligibility criteria for a woman to become a surrogate mother as per the law:[26] the woman should be married and between the age of 25 to 35,[27] she should be a close relative of the intended

[22] Bhumika Indulia, *Surrogacy (Regulation) Act, 2021*, SCC BLOG (Apr. 24, 2022, 2:14 PM), https://sccblog-linux.azurewebsites.net/post/2021/12/27/surrogacy-regulation-act-2021/.
[23] *Id.*
[24] Surrogacy (Regulation) Act, 2021, § 3, No. 47, Acts of Parliament, 2021 (India).
[25] *Id.*
[26] Surrogacy (Regulation) Act, 2021, No. 47, Acts of Parliament, 2021 (India).
[27] *Id.*

parents,[28] she should have given one surrogate birth in her lifetime and should also possess a medical and psychological fitness certificate.[29]

There are also rules laid down for the intended parents, such as the age of the woman should be between 23 to 50 years and of the man should be between 26 to 55 years, and they should be Indian citizens having completed 5 years of their marriage with infertility and shouldn't have had any child before, except if with a child suffering from life-threatening disease with no cure.[30]

6. ISSUES REGARDING SURROGACY

There are several issues regarding surrogacy that caution us to tread the ground carefully, but the two most prominent issues are of commoditization of a child and the exploitation of surrogates.[31] International agreements and legal jurisprudence on "human life with dignity" are rife with mentions of how the human body should not be commodified, in addition, based on such International Conventions and jurisprudential aspects many courts have delineated in their judgments that no human body or parts should be commoditized without the "independent

[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] Mehpara Haq, *Ethical and Moral Issues Concerning Surrogacy*, RMLNLU LAW REV. (Apr. 24, 2:30 PM), https://rmlnlulawreview.com/2015/07/31/ethical-and-moral-issues-concerning-surrogacy/.

will" of the person whose body or parts are at issue.[32] But the practice of surrogacy in India does not always adhere to the facet of "independent will" and this violates the very basic norm of human rights. As has been expounded in the Convention on Human Rights and Biomedicine, "the human body and its parts" should not be a source of or "give rise" to people making undue "financial gains".[33] It has been observed that commercial surrogacy has become more of "renting the womb" of third-world women to fulfill the desires of economically privileged women.[34]

Various High Courts in India have raised this concern of Indian surrogates being exploited and most instances of exploitation in surrogacy were recorded in international commercial surrogacy, especially when the surrogates belonged to poor families and their in-laws forced them into surrogacy to meet the ends of the family.[35] So, this basically, raises the issue of whether the surrogate mothers agree to carry the child for 9 months with their free consent or because they are compelled by their relatives to do so, and the latter stands in violation of the law of surrogacy.[36] For the entire duration of the process of surrogacy, the clinics are attached to both the intended parents and the surrogate mother, but due

[32] *Id.*

[33] Brian Clowes, *Surrogate Motherhood*, HUMAN LIFE INTL. (Nov. 19, 2021, 12:00 PM) https://www.hli.org/resources/surrogacy-ethical-issues/.

[34] MODERN FAMILY SURROGACY, https://www.modernfamilysurrogacy.com/the-ethical-issues-of-surrogacy (last visited Apr. 20, 2022).

[35] *Id.*

[36] S. Bhattacharya, *Magical Progeny, Modern Technology: A Hindu Bioethics of Assisted Reproductive Technology*, 30 NY PRESS 1, 3 (2006).

to the lack of awareness among the intended parents and the surrogate mothers, most of the profits are taken by the clinics and the surrogate mother is only left with some amount which is not even equal to what she had to bear for 9 months. In the documentary "The Google Baby", a surrogate mother has been seen accepting the fact that all the care and nourishment of the surrogate mother is done only for those 9 months when she is carrying the baby and no one cares for her after the delivery, and the hardest part that she has to go through is giving away the baby which she had borne in her womb for so long.[37] Although there is no genetic relation between the surrogate mother and the baby but the feeling of being biologically connected somewhere makes the difference.[38] Commercial surrogacy has also been seen as "reproductive trafficking" because it is similar to what the terms signify, i.e., using the womb of a woman to carry a baby, paying her for the same, and then selling it to a buyer.[39]

7. AFTERMATH OF BANNING COMMERCIAL SURROGACY

After witnessing a huge flow of the international commercial market and many instances of exploitation, commercial surrogacy has been banned in India and only altruistic surrogacy is allowed to Indian couples,[40] now,

[37] *Id.*
[38] SCC BLOG, *supra* note 22.
[39] *Id.*
[40] *Id.*

since this was a huge market that was going on for a long time a direct ban on it affected many, but above all, it impacted the surrogate mothers, then the clinics that help in the procedures, and then the intended parents who visit India from different corners of the world with the hope of gaining some positive results. As a result, we cannot conclude that this practice has stopped but it will be befitting to state that it has moved underground now. Although this practice is limited only to Indian couples after the law was passed, in the name of adoption and altruistic surrogacy, commercial surrogacy is ongoing behind the curtains and the exploitation of the surrogate mothers is still the same.[41]

The main contention behind the banning of commercial surrogacy was to stop the exploitation of poor women and the commoditization of human embryos. After passing the new law, only altruistic surrogacy is legal in India and it isn't easy to get a near relative or friend for such a process, therefore, most of them have to go with the prior, the mode of commercial surrogacy.

However, since commercial surrogacy is banned now, the surrogate mothers are only paid for medical expenses and other extra reimbursements; taking advantage of this chance, the clinics and the middlemen get an upper hand and the legal excuse for not paying anything to the surrogate mothers because in altruistic surrogacy only a bare minimum amount of medical expenses is all that is to be paid, so the rest

[41] Sonia Malik, *Surrogacy: Ethical and Legal Issues*, 37 INDIAN J. COMMUNITY MED 211, 211-213 (2012).

of the profits are usurped by them.[42] The Surrogacy (Regulation) Act of 2021 states the penalties that are to be imposed if commercial surrogacy is practiced which is imprisonment of 10 years with a fine of up to 10 lakh rupees, and it also proposes a range of offenses and penalties for contravention of any provision of the Act.[43]

8. CONCLUSION

The desire of parenthood by infertile couples lead to the creation of alternative solutions but at the same time, using of the human body for the purpose of gaining one's interest is also unethical and immoral, be it for the surrogate mother or the child who is born out of her and as has been stated by various human rights forums, *"no human body or parts should be used for the purpose of financial gain".* Even though there is proper legislation regarding it, which is the Surrogacy (Regulation) Act of 2021, the provisions governing the offenses and penalties are not uniform for all the stakeholders.

Section 38(1) of the aforementioned Act, states various grounds on which one can be punished under the Act, one among them is about carrying on commercial surrogacy and if any person, clinic, or organization is found indulging in that, then the punishment for it is an imprisonment of 10 years and a fine up to 10 lakh rupees.[44] Similarly,

[42] *Id.*
[43] SCC BLOG, *supra* note 22.
[44] Surrogacy (Regulation) Act, 2021, § 38, No. 47, Acts of Parliament, 2021 (India).

Section 39(1) underlines the penalty for 'registered medical practitioner', 'gynecologist', 'pediatrician', 'embryologist' or 'any person who owns a surrogacy clinic or is employed with such a clinic or center or laboratory and renders his professional or technical services to or at such clinic or center or laboratory,' if found in contravention of this provision, could be 'imprisoned for a term which may be extended up to 5 years and with a fine which may extend to 10 lakh rupees',[45] and Section 40 asserts that any of the parties involved in the whole procedure that doesn't follow altruistic surrogacy and opts for commercial surrogacy, shall be punished with an imprisonment of up to 5 years and with a fine of up to 10 lakh rupees,[46] and lastly, Section 41 states that whoever contravenes any of the provisions of the Act, and the rules or regulations made thereunder, for which no penalty has been provided in this Act, shall be punished with an imprisonment for a term which may extend to three years and with a fine which may extend to five lakh rupees, and in the case of continuing contravention, with an additional fine that may extend to ten thousand rupees for every day during which such contravention continues after conviction for the first such contravention.[47] So, on one hand, the Act provides with provisions on offenses and penalties, and on the other hand, it is also provides the offenders with other ways of saving themselves

[45] Surrogacy (Regulation) Act, 2021, § 39, No. 47, Acts of Parliament, 2021 (India).
[46] Surrogacy (Regulation) Act, 2021, § 40, No. 47, Acts of Parliament, 2021 (India).
[47] Surrogacy (Regulation) Act, 2021, § 41, No. 47, Acts of Parliament, 2021 (India).

under the grey area of Section 41 which we can state is one of the loopholes of this act .

Until the time we have uniformity in the penal provisions of the Act, there is no possibility of people taking laws seriously and, in some way, or the other, exploitation of surrogates and commoditization of human embryo will continue. We cannot deny that only providing some amount of expenses to the surrogate mothers is not enough compared to the gains that is made by the intended parents in the process of surrogacy, thus, even in altruistic surrogacy, there should be some guidelines governing the expenses that the surrogate mother will be receiving eventually which should be more than the amount of general medical expenditure, and even proper “pre” and “post” nutritional necessities of the surrogate mothers should be focused upon.

The intention of the law makers when enacting the legislation on surrogacy was to stop the exploitation and the commoditization of surrogate mothers and the babies, but the Act isn’t serving the true purpose of its enactment, leaving the surrogate mothers in their continued state of helplessness, and cementing gains for both the clinics and the intended parents.