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INDIAN INSTITUTE OF LEGAL STUDIES

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ABOUT INDIAN INSTITUTE OF LEGAL STUDIES

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

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

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

Even during this pandemic, the Indian Institute of Legal Studies was the first of its kind in this region that had undertaken the initiative of conducting online classes for the students of both UG and PG courses to reach out to the students through online teaching learning mechanism from the very initial period of lockdown. Also, the college has successfully conducted internal examinations through online mode so that the continuous evaluation of students does not come to a halt.

The Institution's vital location, its active participation in imparting knowledge and moulding its students into sensible and responsible individuals has brought to its credit to serve as the nucleus for education in the North Bengal region. The emphasis in academic development with

Its adoption of inter-disciplinary and practical approaches has aided its students to gain a deeper understanding of the learning process and value for education. Additionally, it has not merely laid the importance for the value and the need to be educated individuals, or to serve as efficient lawyers, but more essentially, to be reborn as socially viable and responsible beings to construct appropriate mechanisms for building a better society for the coming future.

MESSAGE FROM THE PATRON

SHRI JOYJIT CHOUDHURY

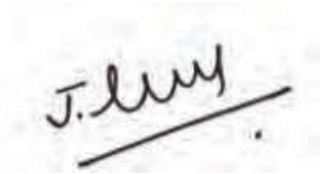
Founder & Chairman
Indian Institute of Legal Studies

In the wake of the Covid-19 pandemic, the world has embarked on a journey of healing, where each passing day brings renewed hope and resilience. Amidst the shadows of personal and professional losses, humanity emerges, forging new pathways of strength and perseverance. As the adage goes, "When one door closes, another opens," the darkness that enveloped us has sparked in us an indomitable spirit, empowering us to craft our destinies amidst adversity.

In the face of great challenges, we, as members of the esteemed Indian Institute of Legal Studies, Siliguri, have persevered to uphold the noble spirit of education and academic pursuit. With unwavering determination, we have ignited the flames of research, inspiring students, scholars, academicians, and passionate contributors to delve into the vast realms of knowledge.

It fills me with profound joy and a sense of pride to bear witness to the remarkable journey of the IILS Law Review, crafted by the esteemed members of the Indian Institute of Legal Studies, Siliguri.

I extend my heartfelt appreciation to all those who have contributed tirelessly, transforming invaluable ideas into meticulously crafted pieces of intellectual excellence. Together, we continue to uphold the noble tradition of scholarly inquiry and dissemination, enriching the legal landscape with our collective wisdom and insight.



JOYJIT CHOUDHURY

MESSAGE FROM EDITOR IN CHIEF

Dr. Trishna Gurung

Principal-in-Charge

Indian Institute of Legal Studies

It is with immense pleasure that I present to you the latest issue of the *IILS Law Review*. This journal remains committed to fostering high-quality academic discourse in the legal field, offering a platform for rigorous analysis, critical evaluation, and thoughtful commentary on contemporary legal issues.

As we continue to steer the evolving legal landscape, this issue echoes our journal's dedication to addressing both traditional and emerging areas of law. From discussions on constitutional and environmental principles to explorations of nuanced legal challenges concerning digital evidences, surrogacy, and socio-economic policy, the *IILS Law Review* strives to provide its readers with thought-provoking scholarship.

We take great pride in featuring valuable contributions from academicians, legal scholars, practitioners, and students. Their research not only augments our understanding of law but also sparks evocative debates that shape the future of legal practice and jurisprudence.

I extend my heartfelt gratitude to the authors, reviewers, and the editorial board for their persistent efforts and dedication in maintaining the high standards of this journal. I am self-assured that the diverse perspectives presented in this edition of the journal will inspire, educate, and challenge our readers.

Thank you for your continued support and engagement with the *IILS Law Review*. We look forward to your feedback and contributions in future editions.

Best Regards,

Dr. Trishna Gurung

Editor-in-Chief

IILS Law Review

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DIGITAL EVIDENCE: A CHALLENGE FOR THE PROSECUTION IN INDIA

Prof (Dr.) Rajesh Kumar Chopra[1]

Abstract

It is a fact that in recent times, technology plays a vital role, and with the upcoming usage of the internet as well as the "Over the Top (OTT") platform, there is a need to examine whether the traditional system of admissibility of evidence is applicable in E media under the given provisions of applicable laws or there is a need to use new tools to make legal system synchronized with new technologies. The over usage of these technologies also comes up with so many banes compared to boon, and the Government of India also made certain amendments to the Evidence Act in 2000 to create a balance between the evidence deposition and i.e., available on any electronic media. Nowadays, a person's life is an open book on social media accounts, and there are many instances where the evidence is directly or indirectly available on their accounts, but the only thing is to look out properly. In this article, an attempt has been made to understand the issues and challenges which may arise while using the new technologies in the courtroom while presenting the evidence in any case, moreover, special training is also required while using electronic evidence and presenting before the court without any tempering. This article also suggests a way forward as a planned action to make the best use of evidence to support the prosecution in succeeding in its viewpoint. It is expected that new tools no doubt will help in the effective administration of justice backed by the sanction of law.

Keywords: *Digital Evidence, WhatsApp, Evidence, OTT, Analysis.*

[1]Professor, at School of Law at University of Petroleum and Energy Studies (UPES) Dehradun.

1. PROLOGUE

In a technology-driven society, a virtual world has taken a front seat, which is nothing but a mirror reflection of the real one, where virtual evidence plays a vital role. However, unlike real evidence, virtual evidence can be in abundance, as multiple copies can be generated by using the facilities available. Such information in the form of data creates a network that provides a variety of facilities on various facets like online shopping, gaming, blogging, news, money transactions, and many more of similar nature. It is therefore essential to understand and appreciate the fact that what happens in the event of breach of contract in a commercial contract through online transactions or the information decoded or misused without a right such as copyright infringement, patent claims, etc., which may give rise to issues of trespass, theft, fraud, including making defamation statement; as well as using such unauthorized information in offences like cyber-attack. The current business scenario also justifies that the number of users in the virtual world are much large and therefore, the quantum of damages is multifold. Therefore, the value of evidence in the virtual world becomes critical.

In this article, an emphasis is made to understand the electronic evidence and its nature including admissibility its issues and challenges; additionally, the evidence obtained through WhatsApp as an intermediary and to suggest the way forward.

To proceed further on the subject, the term 'electronic data' refers to a technology where existing data is changed into binary numeric form. Any evidence which is digitally accessible, or computer generated, which includes any relevant information stored or transmitted in digital form that a party to the contract may use during trial is called electronic evidence. It's a court discretion to accept, check the validity and authenticity of the digital evidence, i.e. the fact is either it is hearsay or if a copy of evidence is preferred to the original.

It is well established fact that the evidence(s) in such cases is not only limited to the information available on computers but also extends to any evidence stored on any electronic devices such as phones or multimedia devices.[2]

[2]P. Mali, LinkedIn, *Electronic Evidence/ Digital Evidence & Cyber Law in India.*. available at: https://www.linkedin.com/pulse/electronic-evidence-digital-cyber-law-india-adv-prashant-mali- (last visited Jan 20, 2023).

Taking into consideration the fact that most of the transactions are increasingly electronic in nature, the courts do consider electronic evidence taking cognizance of primary evidence based on the source or in cases where authenticity of source is verified by the certifying authority. Say for instance, sources like information on Facebook or Twitter, which is dynamic in nature, but if downloaded on a personal computer can be treated as a static source. The same holds good for the information captured through CCTV. Even though such evidence sometimes is the only evidence and has strong evidentiary value, but still these are being challenged before the judicial authorities on various grounds.

It is a matter of fact that electronic records have certain inherent challenges which are not faced in the case of physical record(s); because with the help of technology electronic data is easy to generate, duplicate, modified, mutilated or deleted, and send it to one medium or device to another, and hereby for this reason, their accuracy and reliability are often questioned.

This also hinders the relevancy and admissibility of its which is a globally accepted concern for all countries.[3] Having emphasized the fact that electronic evidence is fragile and can easily be destroyed[4], it is also to be kept in mind that it is not easy to remove or delete an electronic record totally from a device. Such evidence mostly remains on the hard drive of the computer even after the deletion of the information. Copies of original record may remain in hidden places, where the offender(s) may attempt to destroy this crucial evidence, but this can also be recovered by debugging through IT experts even the data was deleted long back from the device. It is with this background; one can say that the electronic evidence is unique and valuable for investigation purposes, whereas paper evidence can easily be destroyed.

To understand issues and challenges which come up in electronic evidence, there is a need to examine Section 65-A & 65-B of the Evidence Act for the purpose of admissibility along with an assessment of whether the existing provisions are sufficient or require a revisit.

[3] A. Vaidialingam, (2015). "Authenticating Electronic Evidence: §65b, Indian Evidence Act, 1872". *NUJS Law Review*. Available at: http://nujslawreview.org/wp-content/uploads/2016/11/04_ashwini-vaidialingam.pdf (last visited on Jan 21, 2023).

[4] Cybercrime: Digital Cops in a Networked Environment, available at: https://www.tandfonline.com/doi/abs/10.1080/15533798.2007.10855811 (last visited on March 10, 2023).

2.Indian Evidence Act

Section 65 outlines the conditions under which secondary evidence may be produced when the primary evidence is existence but difficult to obtain or bring before the court for examination. The term "existence" pertains to whether a document is admissible as evidence, while its "contents" are relevant only after admissibility has been established. Section 65-A specifically addresses the proof of the "contents" of electronic records, whereas Section 65-B governs the "admissibility" of such records, ensuring that both their existence and contents are verified once they are accepted as evidence.

These sections establish the framework for presenting and admitting electronic records in legal proceedings. The heading of Section 65-A suggests that it provides "special provisions" concerning electronic evidence, while the heading of Section 65-B highlights the conditions required for their admissibility. Notably, the term "may" in Section 65-A implies that the provision is not rigidly mandatory; courts retain the discretion to impose alternative or additional requirements for proving the contents of electronic records.

Many a times there is a confusion between digital and virtual evidence. For a person with common parlance, there is no difference as digital information is not real but virtual, but it may not mean that it's vice-versa. Therefore, the distinction between Digital Evidence and Virtual Evidence becomes necessary for better understanding of the subject.

Some of the fine points between digital and virtual evidence are as below: -

i. **Accessibility:** An electronic record that is accessible through an offline mode is digital evidence and an electronic record accessible through an online mode is virtual evidence. However, if something is downloaded from the internet and stored on a computer and is no longer available online, it becomes digital evidence. Therefore, it can be said that ***"All virtual evidence(s) are digital evidence, but all digital evidence(s) are not virtual evidence."***

ii. **Nature of electronic data:** If an electronic record is stored in an electronic device in its digital form and remains static, it is called digital evidence. Whereas, if the evidence is online, keeps on multiplying and modifying, and is not static, it is called virtual evidence.

In recent times, the miscreants plan to commit an offense in a closed setup using the internet, WhatsApp, telegram, etc., as it is felt by miscreants that these can be manipulated. Moreover, it is felt by miscreants that it is not using the state-controlled network. This means that virtual evidence does play a vital role in this electronic world.

Coming back to S. 65, one finds that S. 65-B does not clarify the responsible authority, which will form the incident response team and lay down the procedure for investigation by the investigator(s). Moreover, there is no mention of a specific standard that needs to be followed during the investigation and how to come to a consensus on that standard is based on facts and circumstances of the case and where the standard of care is not mentioned, the courts take its own decision, taking cognizance of the requirement of S. 65-A to B treated as an electronic record.[5] In this regard, the Karnataka High Court laid down certain conditions in *Twentieth Century Fox Film Corporation v. NRI Film Production Associates (P) Ltd.*[6], where the contents were procured through video conferencing of a witness who could not make himself physically present in the courtroom as his place of residence was at a remote distance. This was later relied on in *Amitabh Bagchi v. Ena Bagchi*[7]. These decisions shows that the Courts have the discretion to introduce conditions required for proving electronic evidence. Say, if the output is taken from a computer as a printout on paper, or in an optical or magnetic media then it can be considered as a document provided it fulfills the conditions for a "computer output" provided under S. 65-B (2) of the Evidence Act.

To have better clarity on electronic evidence, a question was raised in *Shafhi Mohammad v. State of Himachal Pradesh*[8]; whether videography of the scene of crime or scene of recovery during the investigation should be necessary to inspire confidence in the evidence collected.

A key legal question regarding electronic evidence arose in *Shafhi Mohammad v. State of Himachal Pradesh*, where the court examined whether videography of crime scenes or recovery sites during an investigation should be necessary to ensure the reliability of the evidence collected. It was contended that when electronic evidence is relevant but originates from a device not in the possession of the individual presenting it, the requirement of a certificate under Section 65-B should not be deemed obligatory. It was further asserted that Section 65-B serves as a procedural mechanism for validating admissible electronic records, establishing that any data contained within such records, as governed by this provision, is to be treated as a document and can be accepted as evidence without requiring the original.

The court, while analyzing prior rulings and principles of American jurisprudence, held that the certification requirement under Section 65-B(4) applies only to the party possessing control over the

[5] Section 65-B being a non-obstante provision and therefore, any information contained in an electronic record in a printed-on paper stored, recorded, or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions specified under sub-section 65- B (2) are satisfied without further proof or production of the original.

[6] Twentieth Century Fox Film Corporation v. NRI Film Production Associates (P) Ltd AIR 2003 Kant 148.

[7] Amitabh Bagchi v. Ena Bagchi AIR 2005 Cal 11.

[8] Shafhi Mohammad v. State of Himachal Pradesh Civil Appeal No. 4226 Of 2012.

electronic device from which the evidence is derived, and not to the opposing party. Additionally, the court clarified that when the electronic evidence is presented by an individual without access to the device, enforcing the production of a certificate would not align with the principles of justice. The ruling emphasized that Section 65-B primarily concerns procedural aspects, and thus, the absence of a certificate should not lead to the exclusion of crucial evidence that may determine the accuracy or falsity of a claim.

In another landmark case, *Arjun Panditrao Kotkar v. Kailash Kushan Rao Gorntyal*[9], the Supreme Court dealt with an election dispute wherein the petitioner's nomination was challenged on the basis that it was submitted beyond the stipulated deadline. [10] Video footage was presented as evidence to support this claim. The Election Commission provided a compact disc containing the recording, but the required certification under Section 65-B(4) was not submitted, despite repeated requests by the petitioner. During cross-examination, an official from the Election Commission testified that the video evidence was genuine and unaltered, leading the court to admit the evidence without the certificate. The court held that a competent authority's testimony confirming the authenticity of the video satisfied the principle of "substantial compliance" with Section 65-B.

The Supreme Court, in adjudicating this matter, addressed two critical questions:

1. Whether a certificate under Section 65-B(4) is required even when the original electronic record is available, or only when a secondary copy is presented.
2. Whether compliance with Section 65-B(4) is mandatory in situations where obtaining the certificate from the appropriate authority is impracticable.

The court ruled that Section 65-B(1) establishes a clear distinction between primary and secondary electronic records—primary records being those stored on the original device, and secondary records being copies derived from them. In this case, the primary evidence would be the Election Commission's computer where the recording was initially stored. Secondary copies, such as compact discs, require certification before being admitted as evidence, whereas the original does not. If presenting the original record is unfeasible, the individual responsible for the device must provide testimony regarding its ownership and operation. In situations where producing the primary evidence is impossible, secondary evidence, along with the requisite certification under Section 65-B(4), becomes admissible.

The Supreme Court also revisited *Anvar P.V. v. P.K. Basheer*[11], reaffirming that Section 65-B

[9] Arjun Panditrao Kotkar v. Kailash Kushan Rao Gorntyal Civil Appeal Nos. 20825-20826 Of 2017.
[10] Civil Appeal No. 4226 Of 2012.
[11] Anvar P.V. v. P.K. Basheer Civil Appeal No. 4226 Of 2012.

exclusively governs the submission of secondary electronic evidence and operates independently of other provisions in the Indian Evidence Act. The court clarified that electronic records used as primary evidence under Section 62 do not require compliance with Section 65-B, but this reasoning should be understood without relying solely on the phrasing in Section 62. Furthermore, the court noted that previous rulings in *Tomaso Bruno (2015)* [12] and *Shafhi Mohammad (2009)* [13] incorrectly concluded that Section 65-B is not comprehensive. These cases failed to consider *Anvar P.V. v. P.K. Basheer (2014)* [14], which firmly established that the certification requirement under Section 65-B(4) could only be relaxed when accessing the original device was impossible. [15]

The court also rejected arguments that obtaining a certificate is impractical, pointing to provisions in the Evidence Act (Section 165), the Civil Procedure Code (Order XVI) [16], and the Criminal Procedure Code (Sections 91 and 324)[17], which empower courts to compel the production of necessary documents or records. The ruling emphasized that if a party cannot independently obtain a certificate, they may petition the court to issue an order requiring its production. However, complications arise when the competent authority refuses to provide the certificate, forcing the affected party to seek judicial intervention.

Ultimately, the Supreme Court concluded that the requirement under Section 65-B(4) is not discretionary but a mandatory precondition for admitting secondary electronic evidence. The obligation to present electronic evidence begins before the trial commences and extends throughout the proceedings, meaning that courts may require certification at any stage before the conclusion of the trial. In *Arjun Panditrao Khotkar*[18], despite the High Court admitting uncertified electronic evidence, its decision was upheld because the ruling was also based on additional supporting evidence. Nevertheless, the Supreme Court reiterated that secondary electronic records cannot be admitted without the necessary certification, except in situations where the original is presented or is entirely inaccessible.

With these judicial interpretations providing greater clarity on the evidentiary framework of electronic records under Section 65, an emerging area of concern is the treatment of communications on digital platforms, such as WhatsApp. Given the increasing reliance on mobile networks for communication, it is essential to analyse the admissibility and evidentiary weight of such records in

[12] Tomaso Bruno v. State Of U.P Criminal Appeal No. 142 Of 2015
[13] Special Leave Petition (Crl.) No.2302 Of 2017.
[14] Civil Appeal No. 4226 Of 2012.
[15] Arjun Panditrao Khotkar v. Kailash Kishanrao Goratyal (2020) 7 SCC 1.
[16] The Code of Civil Procedure, 1908. (Act No. 5 of 1908)
[17] Code of Criminal Procedure Act, 1973 NO.2 OF 1974.
[18] Arjun Panditrao Kotkar v. Kailash Kushan Rao Gorntyal Civil Appeal Nos. 20825-20826 Of 2017.

light of these precedents.

3. Analysis of Evidence obtained through WhatsApp.

One of the critical questions, which need to be analysed is whether the evidence obtained through WhatsApp as a source can be termed as primary or secondary evidence. If one looks at WhatsApp as a tool, wherein there is a camera icon on the platform. If a sender uses the camera provided by the platform to send a part of the evidence, then it will fall under the category of primary evidence. However, if the sender captures a video through the mobile camera itself and sends the video using the platform, then it can be termed as secondary evidence, even though the video itself forms primary evidence, but a copy of primary evidence falls under clauses (2) & (3) of S. 63 of the Evidence Act. One of the requirements for primary and secondary evidence is to give "notice" to the opponent, before producing the evidence in the court of law. There is no notice required to be given while producing primary evidence, whereas, in the case of secondary evidence, a notice must be given to the opposite party.[19] Nonetheless, it is a well-established principle that primary evidence is the best evidence in all cases.[20]

3.1 Madras High Court's Ruling on Electronic Records

In the case of *Chinnasamy v. Deputy SP of Police, Udumalpet Subdivision*[21], the Madras High Court established key principles regarding the admissibility and evidentiary weight of electronic evidence. The case arose from an election petition challenging the victory of the first respondent on the basis that campaign-related songs, announcements, and speeches amounted to corrupt practices. These materials were recorded using electronic devices and later transferred to computers.

The Court outlined specific conditions that must be met for such electronic records to be considered admissible in legal proceedings:

- A certificate must identify the electronic record that contains the statement.
- The certificate should describe the process through which the electronic record was created.
- It must include details of the device used in the production of the electronic record.

These requirements are crucial in ensuring the authenticity and reliability of electronic evidence in court.

3.2 Judicial Approach to WhatsApp Communications

In *Rakesh Kumar Singla v. Union of India*[22], the Punjab & Haryana High Court ruled against the

[19] K. D. Gaur, K.D. Gaur - *Textbook on The Indian Evidence Act (*Universal LexisNexis, 2nd edn., 2020).
[20] *Ibid.*
[21] Chinnasamy v. Deputy SP of Police, Udumalpet Subdivision Crl.A.Nos.162 to 165 & 183/2018.
[22] Rakesh Kumar Singla v. Union of India CRM-M No.23220 of 2020.

prosecution in a narcotics-related case due to the absence of a certification from WhatsApp verifying the authenticity of chat messages. The court relied on the Supreme Court's ruling in *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal*[23], which held that a certificate under Section 65-B of the Indian Evidence Act is mandatory when presenting electronic records as evidence.

A significant challenge in cases involving WhatsApp conversations is obtaining the required certification under Section 65-B. WhatsApp LLC has specific procedures for providing such certifications, which include:

- Submitting a formal request to the WhatsApp Law Enforcement Response Team.
- Paying necessary fees and providing relevant legal documentation.

However, a major hurdle is that WhatsApp will not release data unless the individual whose information is being sought provides explicit consent. If the concerned person refuses to grant permission, the authorities cannot secure the required certification, which may weaken the prosecution's case.

3.3 WhatsApp's Data Disclosure Policies

When handling legal requests for data, WhatsApp follows specific guidelines based on:

1. **Its Terms of Service and Local Laws** – Compliance with the applicable legal framework of the jurisdiction in question.
2. **International Standards** – Ensuring that requests align with recognized principles such as human rights, due process, and the rule of law.
3. **Formal Legal Requests** – Authorities may be required to submit a Mutual Legal Assistance Treaty (MLAT) request or a letter rogatory to compel disclosure of account details.

Additionally, WhatsApp retains account records related to official criminal investigations for 90 days, allowing law enforcement agencies to request data preservation. If necessary, authorities can request an extended hold on specific messages. [24] However, any deleted content remains inaccessible unless a prior request for preservation was submitted before deletion.

The difficulty in obtaining WhatsApp certifications underscores the complexities of using electronic communication as evidence in legal proceedings. Courts must navigate these challenges while ensuring that justice is not compromised due to procedural constraints.

To understand the issues pertaining to the value of information relating to WhatsApp and its utility

[23]Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal (2020) 7 SCC 1.

[24] WhatsApp, *Information for Law Enforcement Authorities*. (n.d.). WhatsApp Help Center, available at: https://faq.whatsapp.com/443752211197967/?helpref=uf_share (last visited on March18, 2023).

as evidence; can be seen from an illustration i.e., If 'A' misbehaves with 'B' using WhatsApp as a medium, and A deletes the conversation from both devices using the option "delete for everyone", then an official who is investigating the issue has to send a request to **WhatsApp law enforcement online request system** (hereinafter referred to as "WLORS"). WLORS then sends a request to "A" seeking consent of "A" for providing the information to the investigating officer. It is possible that "A" may refuse to provide the information taking reliance on Article 20 (3) of the Indian Constitution as he is being compelled to give consent to incriminate himself. If he does not give consent, then no data will be provided by WLORS to the investigating officer. Due to this approach, there is a likelihood that the offender may be acquitted as the information is well within the domain of WLORS but cannot be used against A by sharing with a third party and thereby weakening the prosecution case.

While using WhatsApp, there could also be a situation wherein the forwarded messages may relate to the facts of the case. The real challenge will be with a "forwarded" WhatsApp message. There could be two ways in which this can be interpreted. One way of interpretation can be labelled as "hearsay". Another way is technical, a copy of the original message. It is being crossed by a platform and WhatsApp usually reduces the size of a photo or a video. The file will be resized once it is sent through WhatsApp.[25] As a matter of fact, a document loses its evidentiary value once it is modified or edited. However, the defence may use it as an object that once the file is modified or a copy of the file is modified or altered, then the veracity of file is questionable and not reliable.

On the basis of above, one may look into the information technology rules[26] 2021 (hereinafter referred to as IT Rules 2021), which were drafted after a number of issues both in the OTT platform as well as social media, Facebook, Twitter as well as WhatsApp and Telegram, etc. in order to have a better insight concerning the digital or virtual evidence. It is, therefore, necessary to understand the terms "originator", "intermediary", and "addressee". As, it is possible for a person to be the creator of one electronic communication while being the addressee of another. Say, for instance, A writes an e-mail to B. The e-mail is delivered to B. In this case, A is the originator, and B is the addressee. Now B responds to A. In this case, B becomes the creator and A becomes the recipient. The function of the middleman remains constant in this process of e-mail interaction between A and B. An intermediary serves as a mediator and a third-party service provider. The Act also mentions

[25] WhatsApp, *How to send pictures on WhatsApp without losing quality: Follow these simple steps*. Available at: https://www.bgr.in/how-to/how-to-send-pictures-on-whatsapp-without-losing-quality-follow-these-simple-steps-1032713/ (Last visited Jan. 29, 2023,)

[26] IT (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.

the concept of "intermediary" to establish the required difference between originators or addressees and third parties.[27]

4. Evolution and fading out of End-to-end encrypted (E2EE).

In the current decade, End-to-end encrypted (hereinafter referred to as "E2EE"), which is nothing but a method of secured communication which prevents the third party from accessing data while it is transferred from one end system to another. Here the content or communication through these channels is accessible even to providers of the service. But this channel should be flexible/loosened in some cases to help the prosecution to take this piece of information as material evidence to support its case in order to secure justice for the victims of crime.

4.1 Obligations on Online Platforms Under the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021(IT rules 2021)

The IT Rules, 2021, place certain regulatory responsibilities on online intermediaries, particularly digital news platforms and content-curation services. One of the key provisions, Rule 4(2), mandates that online messaging service providers—such as WhatsApp—must ensure traceability of the original sender of messages upon legal request.

Despite offering end-to-end encryption (E2EE), platforms like WhatsApp still process unencrypted metadata to counteract harmful content. For example, WhatsApp actively monitors publicly available data to identify and prevent the dissemination of material related to child exploitation and other forms of abuse. Similarly, Matrix, another encrypted communication service, has developed mechanisms that allow both users and administrators to regulate content based on metadata, enabling better content moderation.[28]

Additionally, the IT Rules stipulate that tracking the source of digital messages is permitted only under specific circumstances. This includes cases where a judicial directive is issued or when a competent authority invokes Section 69 of the Information Technology (Procedure and Safeguards for Interception, Monitoring, and Decryption of Information) Rules, 2009, as provided under Rule 4(2). This ensures that the requirement for traceability is applied strictly within the legal framework, preventing unauthorized surveillance while maintaining compliance with national security and law enforcement objectives. However, this poses Significant risks on the data and the private messages of individuals to be used illegally by hackers and people with mala fide intention to commit crimes.

[27] Vakul Sharma, *Information Technology Law and Practice*. Google Books (Universal Law Publishing, 3rd edn., 2011).
[28] Matthew Hodgson Matrix.org. *Combating abuse in Matrix - without backdoors.* Available at: https://matrix.org/blog/2020/10/19/combating-abuse-in-matrix-without-backdoors (last visited on Jan 30, 2023).

Therefore, there is a need to examine Rule 4(2); A significant social media intermediary (hereinafter referred to as SSMI) providing primarily messaging services shall validate the spotting of the primary pioneer of the information generated in its computer resource requires a judicial order to be passed by a competent court having jurisdiction to pass an order under s. 69 or by the competent authority , as mentioned in the IT Act, 2000.

Rule 4(2) requires the SSMI providing services primarily as messaging applications are required to provide the identity of the message's originator if required to do so by the competent authority. According to SSMI, this clause has the potential to throw their whole business model into question. For starters, E2EE makes it difficult for the intermediary to determine what information was sent and who shared it. Secondly, to comply with the instructions of competent authority, the intermediary must maintain track of all accounts, not only the account user against whom the order is (indirectly) directed.

As an abundant caution, Rule 4(2) provides safeguards to ensure that authorities do not misuse the authority vested in them. However, according to the K.S. Puttaswamy-test[29], Although the first condition is met, the second criterion of a 'legitimate state interest' must consider the policy goal underlying the statute. In this scenario, a variety of interests may be discovered that are represented in the second requirement listed, such as the preservation of public safety and order, which may also encompass the distribution of dis/misinformation under specific conditions that have become a source of societal issues. As a result, there is unquestionably a 'legitimate state interest'. Concerning the third criterion of proportionality, Justice Sikri in K.S. Puttaswamy-II[30] explored several parts of the proportionality test, although much of his views were borrowed from the *Modern Dental College & Research Centre v. State of M.P*[31]. Three characteristics were recognized in this judgment as concretizing the first sub-criterion, which must be understood within the social context of the grievance that the statute is designed to rectify. There is no dispute that the messaging programs in India have been used for undesirable reasons. Incidences of mob lynching, which are frequently associated with the spread of disinformation, has grown in the recent times. A tragic example of dissemination of stories about a bunch of child abductors spreading havoc in India via messaging platforms, resulted in the deaths of many people. This is also encouraged by end-to-end encryption methods of messaging programs, in which users engage anonymously. As a result, there is undoubtedly an urgent need to address this expanding threat.

[29] K.S. Puttaswamy v. Union of India AIR 2017 SC 4161.
[30] *Ibid.*
[31](2009) 7 SCC 751.

4.2 Understanding Traceability Obligations Under Rule 4(2) of the IT Rules, 2021

Rule 4(2)[32] of the Information Technology Rules, 2021, establishes the requirement for traceability, which applies in situations where the government already has access to a message's content but needs to determine its **first originator**. Due to end-to-end encryption (E2EE), the content of messages cannot be directly accessed unless an investigating authority gains entry to an involved user's device or a recipient voluntarily discloses the message.

Since the term **first originator** lacks a precise legal definition, the individual who initially publishes a particular message on a platform can be considered its **absolute originator**. However, multiple individuals may create or circulate the same message independently, leading to different forwarding chains. In such cases, each chain would point to a separate **relative originator**, rather than a single source.

For any regulatory measure to be effective, it must pass a **suitability test**, ensuring that the intended goal is realistically achievable. Theoretically, tracking the origin of a message may assist law enforcement agencies in identifying individuals responsible for spreading unlawful content or inciting criminal activity. However, as discussed earlier, existing traceability mechanisms have significant limitations that create practical difficulties for messaging platforms while failing to guarantee the identification of the actual originator.

Metadata, though constantly evolving, can provide valuable insights into user activities and communication patterns. By analysing this data, investigative bodies can better track and understand potential criminal behaviour.[33]

In addition, Rule 5(6) of the IT Rules[34] outlines that service providers must grant all users access to their data and ensure that any incorrect or incomplete information is corrected or updated whenever feasible.

However, it does not specifically mention deletion of data, which may be incorrect. Subsection 1 of rule 5 casts a duty on corporate and their authorized representatives to obtain written consent from the data subjects with regards to the sensitive information provided by them. This in other words means that the data subject must keep themselves confidential information and should use it for the

[32] The Information & Technology Rules, Rule 4(2).
[33] David Cole, *"We Kill People Based on Metadata" available at:* https://www.nybooks.com/online/2014/05/10/we-kill-people-based-metadata/ (last visited March 20, 2023).
[34] IT (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.

purpose specified.

5. Epilogue

Based on the above discussion, one finds that online communication has become a prominent part of individuals and businesses mainly with the usage of the Internet. With the rate at which the Country is moving in this digital age, it is critical, how law enforcement agencies fully comprehend today's technology trends and train their personnel to meet the legal challenges, collaborate with experts from various fields to understand the nuances of each technology and educate the prosecution and judicial systems if tangible results are to be seen; otherwise, it will be a case of the left hand not knowing what the right hand is doing. Therefore, it is felt prudent that there is an urgent need for improvement in law and law enforcement both in domestic and international setups is equally relevant and significant in this direction. It has also been observed during the trial, that the presiding officers of the court are often bombarded with the questions of admissibility of electronic evidence, as this has impacted the judgment in civil and criminal suits.

It is therefore suggested that the court should consider this evidence with a microscopic eye as it is the ease with which it may be manipulated that provides a barrier to admissibility that other types of evidence do not. All the forms of electronic evidence available on digital media have their own challenges. Sometimes it’s very difficult to analyze to figure out how much evidence and the required documents is required for testifying specific piece of evidence. However, brainstorming on electronic evidence at all levels continues to formulate a law consistent globally.

COHERENCE OF MOTOR VEHICLES ACT, 1988 IN THE ERA OF ARTIFICIAL INTELLIGENCE (AI) DRIVEN AUTOMATED VEHICLES

Mr. Rituraj Bhowal[35] *& Dr. Pallavi Devi*[36]

Abstract

Technological innovation and development in the discipline of Artificial Intelligence (AI) have poured cognition to inanimate machines. This coded cognition has enabled machines to perform intelligent tasks which were only human's cup of tea. Initially, though AI was deployed to perform mediocre tasks, such as solving algebraic problems, playing games etc., it indeed fascinated humans. However, such fascination has turned into fear as AI was assigned to perform complex cognitive tasks. One of such tasks is being performed by AI powered vehicles which is capable to drive without any human dependence. These vehicles are assigned with the crucial responsibilities such as reading traffic signals, analyzing the external environment, abiding traffic rules etc. These tasks might sound uncomplicated to a human being but are likely to raise legal concerns in case of an AI vehicle. Given this technological feat attained in the discipline of AI, this article analyses the coherence of Motor Vehicles Act, 1988 to deal with the automated vehicles. Researcher also throws light upon the legislative measures brought by countries like U.S.A, China and Japan to deal with this AI-dilemma.

Keywords*: Artificial Intelligence, Motor Vehicles Act, Automated Vehicles.*

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1. THE CANVAS

Mankind has been using machines or tools since the age of stone to perform tasks in easiest way using less force. Using axe to hunt animals, applying pulleys and levers to reduce force etc. are some basic instances of such tools. Along with the progress of time these tools were also modernized to accomplish various complex tasks. Impact of machines were visible with the emergence of Industrial Revolution in eighteenth and nineteenth century, which caused machines to penetrate multiple sectors like textile, transportation, iron industry etc. These newly developed sophisticated machines though met the growing demands of humans, it did increase the machine-caused causalities or injuries too. The scenario is evident from the data given by US National Safety Council which stated that in the year 1912 near about twenty-one thousand labourers lost their lives due to work-related injuries.[37] In 1913, US Bureau of Labor Statistics also reported almost twenty-three fatalities out of thirty-eight billion workers.[38] Artificial Intelligence (AI) is one of such areas of recent technological sophistication that has summoned severe socio-legal disruptions.

Such disruption is evident with the unfortunate incident of 49-year-old lady named Ms. Elaine Herzberg who was killed by an autonomous vehicle in the year 2018.[39] Under normal circumstance had the incident been committed at the instance of any human being, there would not have been much dilemma in holding the human driver responsible. However, in the case of programmed vehicle that functions without human dependence locating the liability becomes daunting due to several factors. That is to say, whether the glitch was triggered due to fault of the developer or due to any faulty instruction of the driver or owner of the vehicle cannot be easily deciphered due to inexplicable and automatic function of AI. In other words, why the AI system took the decision to kill the pedestrian cannot be decoded with enough ease and convenience. Therefore, it is necessary to examine the existing laws of man-driven vehicles to determine their coherence for automated

[37] Centre for Disease Control and Prevention, Achievements in Public Health, 1900-1999: Improvements in Workplace Safety-United States, 1900-1999, 48 CDC MORBIDITY & MORTALITY WEEKLY REP. 461, 461 (1999), https://www.cdc.gov/mmwr/preview/mmwrhtml/mm4822a1.htm#top.
[38] *Id.*
[39] Associated Press, Backup Driver for Self-Driving Uber that Killed Arizona Pedestrian Pleads Guilty, THE GUARDIAN (Aug. 1, 2023, 1:28 PM), https://www.theguardian.com/technology/2023/aug/01/uber-self-driving-arizona-deadly-crash.

vehicles. For that purpose, present paper is bifurcated in five heads. At first, the paper introduces the dilemma of AI vehicles that are posed upon the traditional legal principles. Then the provisions of the Indian motor vehicles law are examined in the light of the highlighted AI disruptions. At last the paper examined the AI-specific laws for automated vehicles of U.S., China and Japan and proposes necessary amendments to be brought in Indian legal regime.

2. LEGAL DISRUPTIONS OF AUTONOMOUS VEHICLES

As already discussed, that the legal disruption of AI driven entity is much different in comparison with that of human beings. Such difference could be illustrated well by looking into three following hypothetical situations.

> *Situation 1: A human driver, while running his car above the speed limit, hits a person in the road.*
>
> *Situation 2: A human driver, while abiding all the traffic rules, hits a person due to sudden break failure despite due care & maintenance taken by the driver.*
>
> *Situation 3: AI-driven car misapprehends the situation and meets with an accident.*

Scrutinizing these three situations would entail that, in the first instance the driver's conduct was negligent, whereas in the second case it seems that the vehicle was faulty. In these two scenarios the car was used as a tool by humans and law could possibly hold someone responsible for the damage caused. That is to say, in the first situation the tort-feasor is the driver and in the second case, strict product liability holds the manufacturer responsible. But a tort committed by an independent AI system is distinctive than traditional torts in two terms as can be determined from the third situation. First, the car in last case is not used as a mere tool rather an *autonomous* entity which has the liberty to make decisions in real time. Secondly, unlike other two scenarios damage caused by the AI-driven car is much more *unpredictable*. Thirdly, the process of decision making of AI is so complex that even the developer or the manufacturer cannot possibly identify reason of such fatality, i.e., *inexplicability*. These factors, viz., *autonomous*, *unpredictable* and *inexplicable* behavior of AI poses a legal question upon both civil and criminal legal systems as briefly discussed hereunder. These questions would be addressed by the researcher analyzing various principles of tort law.

Considering the third situation, as discussed earlier, one could reasonably argue that can the owner of automated car be held vicariously liable by treating the car as an agent of owner? Or should the manufacturers be held strictly accountable for defective products or they are to be considered negligent? However, for holding the manufacturers liable for their negligent conduct it is necessary to establish that damage or fatality is foreseeable and there is adequate proximity between defendant and plaintiff.[40] However, due to lack of transparency and inexplicability of AI function, the issues of foreseeability of damage and proximity become difficult to establish. As foreseeability is judged on the basis of the capacity of an ordinary person with his prudent sense; but under no circumstance it could be argued that an AI entity would be judged on the basis of traditional human centric principles of tortious liability. Further, to render the manufacturer strictly liable by invoking the product liability it is necessary to establish that product was manufactured with some significant fault in it. If it is practicable for a developer to use an algorithm in an AI system which would cost less than the cost of damage, likely to occur without the algorithm; then the product must be developed along with the algorithm. If, however, the developer does not include such algorithm which was feasible for him to do, such product will be said to have a design defect.[41] Furthermore, if an AI product is developed with faulty algorithm or with knowledge base having incorrect inputs which does not comply with the intended design of the product, then such fault can be categorized as manufacturing defect.[42] That apart, failure of the manufacturer to intimate the consumer about the limitations and most probable risks associated with an AI product would also render the product as defective. However, due to the unpredictability and self- development feature of AI it is not practicable even for the manufacturer or the programmer to specify the risk associated with AI entities.

Unlike negligence and strict product liability, application of the principle of vicarious liability seems to be less daunting. According the principle of vicarious liability, if an auxiliary/agent commits a tort then in such case the principal shall be held accountable for any loss incurred for such tort.[43] Such type of liability does not necessarily arise on principal-agent relationship rather

[40] John Murphy & Christian Witting, Street On Torts 27 (13th ed. 2016).
[41] F. Patrick Hubbard, Allocating the Risk of Physical Injury from "Sophisticated Robots": Efficiency, Fairness & Innovation, in ROBOT LAW 35 (Ryan Calo, A. Michael Froomkin & Ian Kerr eds., 2016) (ebook).
[42] George S. Cole, Tort Liability for Artificial Intelligence and Expert Systems, 10 COMPUTER L. J. 127, 167-168 (1990).
[43] Expert Group On Liability And New Technologies, Joint Res. Ctr., European Union, Liability For Artificial Intelligence And Other Emerging Digital Technologies 24 (2019).

the same could be seen in the relationships of master-slave, parents-children and also teacher-student. French Civil Code has gone one step further as it does not limit the applicability of vicarious liability on the persons but it also covers inanimate objects. That is to say, the person is liable not only for the for the conduct of his agent or servant but also for the things in his own custody.[44] Having said that, the principle of vicarious liability can possibly be applied to determine the liability for the damage caused due to AI. For instance, the owner of the automated vehicle can be said to be vicariously liable for the damaged caused due to the vehicle. Application of the principle of vicarious liability is different from the principles of strict-product liability and negligence. As in the latter cases AI is treated as an inanimate object whereas in former case AI has been given the status of agent of human being.[45] Further, vicarious liability holds the owner or user of AI entity as liable; whereas, in cases of product liability and negligence liability may be incurred upon the user or developer. However, holding the owner or use of AI vicariously liable does not obliterate all ambiguities. It is true that not all actions of the auxiliary will be ascribed to the principal. Principal/employer is liable only for the act of his agent/employee which is done under his supervision or during the course of employment. Similarly, if AI independently deviates from its assigned task or behaves unpredictably then genuinely the user must not be held vicariously liable.

In the foregoing discussion the researcher attempted to analyze both traditional and modern concepts of tort in the light of scenarios involving AI entities. However, the discussion will not be completed unless the question regarding liability to pay unliquidated damages is addressed. It is undoubted that under any circumstances, be it strict-product liability, negligence or vicarious liability, AI entities cannot be held to be financially liable. The reason being, AI entities do not have proprietary rights rather they are owned as properties; as a result of which they cannot pay the damages for tort committed by them.[46] That apart, holding the manufacturer solely liable seems unreasonable as manufacturer does not develop the AI system individually but along with the members of supply chain.[47] Similarly, only holding the user or owner liable is also not pragmatic as manufactures are still in the best position to ensure AI-product safety weighing the possibility

[44] Jacob Turner, Robot Rules: Regulating Artificial Intelligence 99 (Palgrave Macmillan 2019).
[45] *Id.* At 101.
[46] Ryan Abbott, The Reasonable Robot: Artificial Intelligence And The Law 63 (2020).
[47] David C. Vladeck, Machines Without Principals: Liability Rules and Artificial Intelligence, 89 WASH. L. REV. 117, 148 (2014).

of risk.[48]In response to this dilemma there are two possible ways as discussed hereunder.

First possible way, as extended by *David C. Vladeck*, is known as *Common Enterprise Liability Doctrine*. This doctrine proposes a strict no-fault liability regime in which all the all enterprises which are involved in the process of manufacturing or developing AI, e.g., manufactures, designers, all members of supply chain are jointly and severally liable for the harm/damage caused due to their AI-based product.[49] Therefore, entities having common end to develop an AI program will have to undertake the responsibility to indemnify the plaintiff for the losses without invoking the question of fault.[50] The second way, is to ascribe the AI entity a legal personhood with the burden of compulsory self-insurance. That is to say, at the time of developing an AI system a compulsory insurance pool has to be created for that AI which will be funded by not only creators but also the owner.[51] Therefore, in the event of damage caused by AI, the plaintiff will be in a position to directly sue the AI and claim damages from the pool.

3. EXAMINING THE COHERENCE OF THE MOTOR VEHICLES ACT, 1988

The World Health Organization (WHO) in its Global Status Report on Road Safety, 2018 disclosed that in every year on an average almost 1.35 million people across the globe are killed due to road accidents.[52] In the year 2020, India alone recorded 1,33,201 fatalities in road accidents,[53] i.e., almost 10 percent of the total causalities of the entire globe. To put it differently, in every hour almost 15 persons die in India due to road accidents. Statistics highlight that the most of the accidents are caused due to the error on the part of human, viz. drunken driving, over-speeding, violating traffic rules etc.[54] The troubling data of huge number of road accidents makes the way of for AI to intervene in the field of automobiles. It is beyond doubt that Automated Vehicles driven

[48] ABBOTT, *supra* note at 64.
[49] Yaniv Benhamou & Justine Ferland, *Artificial Intelligence & Damages: Assessing Liability and Calculating the Damages, in* LEADING LEGAL DISRUPTION: ARTIFICIAL INTELLIGENCE AND A TOOLKIT FOR LAWYERS AND THE LAW (Pina D'Agostino, Carole Piovesan & Aviv Gaon eds., 2020).
[50] David C. Vladeck, *Machines Without Principals: Liability Rules and Artificial Intelligence*, 89 WASH. L. REV. 117, 149 (2014).
[51] *Id.* at 150.
[52] World Health Organisation [WHO], *Global Status Report on Road Safety, 2018*, at 23, CC BY-NC-SA 3.0 IGO (June 21, 2021).
[53] Ministry of Home Affairs, Govt of India, *Number of Persons Injured and Died in Road Accidents (Culpability/Fatality) by Mode of Transport in India (2020)*, INDIA STAT, https://www.indiastat.com/table/crime-and-law/number-persons-injured-died-road-accidents-culpabi/1416507 (last visited on Mar. 1, 2022).
[54] Murali Krishnan, *India Has the Highest Number of Road Accidents in the World*, DW.COM, https://www.dw.com/en/ (last visited Mar. 1, 2022).

by AI will cut down the number of road accidents as AI is subject to human errors. Though safer, AI cannot be said to be perfect substitute of human driver. Automated vehicles use AI driven methods such as computer vision, light detection and ranging (LIDAR) etc. which are not completely insusceptible to errors. This machine error raises the legal dilemma regarding the liabilities which are likely arise due to automated vehicles. Different jurisdictions across the world have introduces new set of rules or guidelines to regulate the AI-vehicles, such as, United Kingdom, France, Germany and various states of U.S. In India, there is no specific legislation or policy framework regarding AI driven vehicles despite the fact that AI is about to penetrate in the automobile sector of India. Therefore, it is necessary to determine whether the existing laws relating to motor vehicles in India is sufficient to cover autonomous vehicles.

Laws relating to vehicles in India was introduced for the first time in colonial period, i.e., in the year 1918. Later on, in 1939 another law was which replaced the previous Act of 1918. Finally, in the year 1988 the Parliament of India passed a comprehensive legislation for governing motor vehicles within India.[55] This Act was legislated keeping in mind various relevant factors such as increase in number of vehicles, pollution control, no-fault liability of the owner, unrestricted flow of goods and freights etc. Recently in 2019 the Act of 1988 was amended with an aim to ensure better road safety.[56] However, there is not a single provision in the Act of 1988 which explicitly talks about automated vehicles.

3.1 Meaning of Motor Vehicle

The term *motor vehicle* or *vehicle* as defined in *section 2(28)* of the Motor Vehicles Act, 1988 covers only mechanically propelled vehicles which are used in roadways and also includes chassis and trailer.[57] The definition, however, excludes such vehicles which run on fixes rails or which are used in factories or vehicles with less than four wheels and whose engine capacity is not more than 25 cubic centimeters.[58] The definition neither explicitly includes nor excludes the automated vehicles. The term *mechanically propelled vehicles* as used in the definition is not sufficient to bring AI-driven vehicles within the purview of the definition. Automated vehicles are not only mechanically propelled but also driven by the computers enabling them to function without human

[55] The Motor Vehicles Act, No. 59 of 1988, 34 A.I.R. MANUAL 1 (6th ed. 2016) (India).
[56] The Motor Vehicles (Amendment) Act, No. 32 of 2019, Acts of Parliament, 2019 (India).
[57] The Motor Vehicles Act, § 2(28), No. 59 of 1988, 34 A.I.R. MANUAL 1 (6th ed. 2016) (India).
[58] *Id.*

drivers.

3.2 Meaning of Driver

The Act of 1988, though does not define the term driver, but only considers a person to be driver of a vehicle. This is evident from Section 2(10) of the Act which defines the term *Driving License*. According to the section the appropriate authority by way of issuing driving license authorizes a person to drive motor vehicles.[59] It is evident that only a person can hold a driving license and only a person having an effective driving license can drive a car.[60] An AI mechanism as incorporated in an autonomous vehicle cannot be considered to be a person and hence it does not qualify to be a driver. Further, Section 2(9) states that a driver, in respect of vehicle which is pulled by another vehicle, is the steersman of the drawn vehicle. In every situation the provisions of the Act of 1988 presuppose that vehicle must always be steered and controlled by a human person. Thus, letting an autonomous vehicle to drive without any human persons is not within the scope of Motor Vehicles Act.

But the question still remains, i.e., *whether it is permissible to drive an autonomous vehicle in its auto-driving mode under supervision of a human driver?* To find answer to this question reference can be made to section 109 of the Act of 1988. Sub-section (1) of section 109 provides that every vehicle has to be constructed and maintained in such a manner that the vehicle remains within the effective control of the person driving it.[61] Contravention of this provision is backed by the sanction imposed under section 182A as amended by the amending Act of 2019. This Section provides punishment for the manufacturers, importer or dealers of vehicles for manufacturing or selling or altering any motor vehicle in violation of section 109.[62] Therefore, section 109 clearly indicates that even if autonomous vehicles are approved, substantive control over the vehicle must remain in the hands of human driver. In other words, it can be said AI vehicles cannot be driven in India without effective human supervision.

[59] *Id*. § 2(10).
[60] *Id*. § 3.
[61] *Id*. § 109(1).
[62] *Id*. § 182A.

3.3 Liability for AI Vehicles

The Act of 1988 under Section 140 incorporated the principle of no-fault liability of the owner of vehicle in cases of death and permanent disablement caused due to the accident by motor vehicles.[63] In cases of autonomous vehicles imposing strict liability only upon the owner might be unfair to the owner as manufacturers are also in position to ensure safety in their product. However, the Amendment of 2019 has repealed provision regarding the no-fault liability of owner and instead enhanced the liability of insurer. Section 146 of the Act makes it obligatory for the owners of vehicles to insure themselves against third party claims arising out of accidents caused by their vehicles.[64] This section too suffers from similar problem as in the case of section 140. For self-driving cars, not only the owner but also the manufacturer including every member of supply chain must be required to insure themselves against third party claims.

3.4 Protection of State-Of-The-Art Technology

The Motor Vehicles (Amendment) Act, 2019 has inserted a new provision in the Act of 1988, i.e., section 2B, which aims to incentivize innovation and research in the field of engineering of motor vehicles.[65] According to this section, the Central Government is empowered to exempt any specific kind of mechanically propelled vehicle from the subjectivity of the Act. AI mechanism, being a state-of-the-art technology might also qualify for the incentives as provided in section 2B of the Act. However, such protection must be given keeping in mind the safety and reliability of the automated vehicles.

4. LEGAL POSITION IN UNITED STATES

Regarding the automated regulation of automated vehicles multiple attempts were made by both the federal and state governments. In the year 2017, for the first time the House of Representatives has passed a bill (Safely Ensuring Lives Future Deployment and Research in Vehicle Evolution Act) that governs highly automated vehicles.[66] The proposed legislation aims to ensure safety and security of automated vehicles by encouraging testing and deployment of such vehicles.[67] Several

[63] *Id.* § 140 (Repealed).
[64] *Id.* § 146.
[65] *Id.* § 2B.
[66] H.R. 3363, 115th Congress (2017-2018): SELF DRIVE Act, H.R. 3363, 115th Cong. (2017), https://www.congress.gov/bill/115th-congress/house-bill/3363.
[67] *Id.* § 2.

measures such as, establishing standards,[68] safety assessments,[69] ensuring cyber security[70] and privacy protections,[71] establishing HAV Advisory Council[72] etc. were adopted in the legislation. However, the companion bill in the Senate (American Vision for Safer Transportation through Advancement of Revolutionary Technologies Act) was failed as the Senators opined that the legislation was pre-mature in nature.[73] The SAFE DRIVE Act was further introduced in the House in 2020 and again in 2021, but the bill is currently pending before the Sub-committee on Consumer Protection and Commerce of the Congress.[74]

Apart from federal initiatives, different States of U.S. have enacted laws regulating the automated vehicles. Regulation of automated vehicles in States of U.S. have been started since 2011. Nevada was the first State to authorize deployment of automated vehicles and endorsement of driving license for automated vehicles. Since 2011, total 41 States of U.S. and District of Columbia have enacted legislation or issued executive orders regarding automated vehicles.[75] The legislations of the states are not uniform in nature but provide different provisions and stipulations for deployment of automated vehicles. For instance, the meaning of vehicle operator varies from one state to another. The Legislation of Tennessee considers the autonomous driving system as the vehicle operator,[76] whereas, the law of Texas indicates towards natural person riding the vehicle.[77] Georgia, on the other hand, states that the person who causes the vehicle to move is the operator of such vehicle.[78] That apart, the governance and requirements of automated vehicles are strict in a few States, whereas in other states the regulation is lenient.[79] Most states have striven to create a welcoming environment for HAV development. However, the lack of consistency creates much

[68] *Id.* § 4
[69] *Id.* § 7.
[70] *Id.* § 5.
[71] *Id.* § 12.
[72] *Id.* § 9
[73] S. 1885, 115th Congress (2017-2018): AV START Act, S. 1885, 115th Cong. (2017), https://www.congress.gov/bill/115th-congress/senate-bill/1885.
[74] H.R. 3461, 117th Congress (2021-2022): SELF DRIVE Act, H.R. 3461, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/3461.
[75] National Conference of State Legislatures, Autonomous Vehicles, Self-Driving Vehicles Enacted Legislation, NCSL.ORG (Feb. 18, 2020), https://www.ncsl.org/research/transportation/autonomous-vehicles-self-driving-vehicles-enacted-legislation.aspx#database.
[76] Tenn., S.B. 151 (2017).
[77] Tx. S.B. 2205 § 545.451(4) (2017).
[78] Ga. S.B. 219/AP § 1(38) (2017).
[79] Bryan Gibson, Kentucky Transportation Centre, Analysis Of Autonomous Vehicles Policies 37-49 (2017).

more complexities for the manufactures to comply with different set of rules.

5. LEGAL POSITION IN CHINA

In 2018, the Ministry of Industry and Information Technology (MIIT), Ministry of Public Security (MPS) and Ministry of Transport (MOT) jointly issued National rules that pave the way for road testing of autonomous vehicles in China.[80] The National Rules contain requirements for test vehicles and test drivers.[81] The Rules also specify the testing procedures. For example, a test driver must always sit in the driver's seat of the test vehicle during the test, monitor the status of the test vehicle and the driving environment, and get ready to take over the vehicle anytime.[82] Local authorities at the provincial level will formulate implementation rules applicable in their own areas.[83] The Rules also requires for a temporary license plate is required for road testing of autonomous vehicles.[84] By the end of 2018, at least eight cities of China, including Beijing, Shanghai, Shenzhen and Chongqing had published their local rules and started issuing temporary license plates for the road testing of autonomous vehicles in their areas.[85] Again in 2021, MIIT, MPS and MoT jointly released *Management Specifications for Road Testing of Intelligent and Connected Vehicles (Trial)* which replaced the Rules of 2018.[86] These 2021 Rules mainly add demonstration applications on the basis of road testing, allowing safe and reliable vehicles that have passed a certain time or mileage road test to carry out manned and loaded demonstration applications, and extend the test demonstration roads to highways, urban roads and areas including expressways.[87]

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[80] Zhineng Wanglian Qiche Daolu Ceshi Guanli Guifan [智能网联汽车道路检测管理办法 (试行)] [Administrative Rules on Intelligent and Connected Vehicle Road Testing (Trial)] (promulgated by MINISTRY OF INDUS. AND INFO. TECH. (MIIT), MINISTRY OF PUB. SEC. (MPS) AND MINISTRY OF TRANSP. (MoT), Apr. 11, 2018, effective May 1, 2018) (China).

[81] *Id*. § . 6 & 7.

[82] *Id*. § 18.

[83] *Id*. § . 4.

[84] *Id*. § 13

[85] Chen Xiaotong, *Autonomous Driving Can Run at High-Speed Next Year and Beijing's Autonomous Driving Development Leads the Country*, LEIPHONE (Oct. 23, 2018, 11:18 PM), https://www.leiphone.com/category/transportation/PuctiHzojQTpjvoh.html.

[86] Zhineng Wang Lian Qiche Daolu Ceshi Yu Shifan Yingyong Guanli Guifan (Shixing) [智能网联汽车道路测试与示范应用管理规范 (试行)] [Management Specifications for Road Testing of Intelligent and Connected Vehicles (Trial)] (promulgated by MINISTRY OF INDUS. AND INFO. TECH., MINISTRY OF PUB. SEC. AND MINISTRY OF TRANSP., July 27, 2021, effective Sep. 1, 2021) (China).

[87] Mark Schaub et. al., *Regulating Self-Driving Cars: China*, THOMSON REUTERS (Apr. 9, 2018), https://us.practicallaw.thomsonreuters.com/w-013-7484.

Further, on March 24, 2021, the Ministry of Public Security of China issued the *Draft Proposed Amendments of the Road Traffic Safety Law*.[88] The Proposed Amendments clarify the requirements related to the testing of and access by the vehicles equipped with automated driving functions. It stipulates that road testing of vehicles equipped with automated driving functions should be conducted at designated times, areas and routes in accordance with the law. That apart, the proposed rules also allocate the liability for violation of traffic rules and accidents. It states that when vehicles equipped with automated driving functions and manual operation modes are involved in road traffic violations or accidents, the responsibility of the driver or the automated driving system developer shall be determined in accordance with laws. However, it is unclear as to how the issues of liability in respect of automated vehicles will be dealt with. Further, the amendments state that liability for the vehicles, that are only equipped with automated driving without manual operation, shall be dealt with by relevant departments of State Council.

Apart from these national laws, in 2021, the Standing Committee of Shenzen Municipal People's Congress issued the *Draft Regulations of Shenzhen Special Economic Zone on the Administration of Intelligent and Connected Vehicles* for public comment. The proposed regulation stipulates requirements for testing, registration of autonomous vehicles, measures for cyber security and data protection. The Shenzhen Draft Regulations distinguish between liability for autonomous cars which are driven with and without drivers. The liability of an autonomous car with a driver will be dealt under existing laws and regulations. Whereas, for an autonomous car without a driver, the Draft Regulations identify the controller or owner of the vehicle will be responsible for any traffic violation or accident. However, if the accident is caused by a defect in the autonomous car, then such controller or owner of the vehicle may claim compensation from the manufacturer or distributor of the vehicle. Further, the Regulations divides liability of controller or owner for vehicle without a driver as follows:

a) For traffic violations and accidents which occur during the continuous execution of all dynamic driving tasks by the automated driving system and during the time when taking over of the dynamic driving task, then the controller of the vehicle shall bear corresponding liability;

[88] Daolu Jiaotong Anquan Fa (Xiuding Jianyi Gao) [道路交通安全法(修订建议稿)] [Road Traffic Safety Law (Revised Proposed Draft)] (promulgated by MINISTRY OF PUB. SEC., Mar. 24, 2021) (China).

b) In other cases, the owner of the vehicle shall bear corresponding liability for any traffic violations and accidents caused by improper management, use or maintenance of the vehicle.

6. POSITION IN JAPAN

Apart from U.S.A. and China, Japan had also brought regulatory measures to bring AI driven vehicles within the purview of legal regulation. The aim of Japanese government is to regularize fully autonomous driving vehicle to be deployed at specific areas and also to introduce them in a market as commercial products by 2025.[89] Not only policy framework, Japanese government has also brought noteworthy changes in their road traffic legislations. For instance, in 2019 revisions were made in Road Transport Vehicle Act which allowed the deployment of autonomous vehicle up to level 4 which permits deployment of completely unmanned AI vehicle. Prior to this, permissibility was limited to level 3 which allowed deployment of AI vehicle along with human assistance to evade any damage. Further, the revised law has also made the AI vehicles subject to prescribed standards keeping in mind the road safety. That apart, the Road Traffic Act was also revised which amended the definition of driving and made it inclusive of autonomous driving. The amended Act also prescribes the necessary conditions for deploying autonomous vehicles of different levels. Further, specific duties were also imposed upon the drivers of autonomous vehicle of every level. However, the revised legislations do not provide specific mechanism for locating the liability in the event of any damage caused due to an autonomous vehicle.[90]

7. THE WAY AHEAD

It is certain that emergence of Artificial Intelligence (AI) cannot be evaded since it has become the matter of necessity. Humans encounter with AI systems in his every footstep. From browsing news in the internet in the morning till asking SIRI to set alarm at night for the next day, human uses AI techniques. It is obvious that AI has ameliorated human lives to a considerable extent. But being fascinated with mesmeric abilities of AI, humans have been ignoring the darker side of it. Such ignorance has put us in confrontation with abundant legal challenges in multiple domains. It is

[89] Strategic Headquarters For The Advanced Information And Telecommunication, Gov't Of Japan, Public-Private Its Initiative/Roadmaps 103 (2019).
[90] Takeyoshi Imai, *Legal Regulation of Autonomous Driving Technology: Current Conditions and Issues in Japan*, 43 IATSS RES. 263, 264-265 (2019).

unequivocal that these legal challenges are to be addressed with stringent policies and regulatory mechanism without any unnecessary delay. Taking into account developments made in U.S. and China, it can be argued that in the matters of regulating automated vehicles the Indian legislation is not AI-coherent. Nor there are no specific legislation or bye-laws that govern the automated vehicles. Albeit, the use of automated vehicles is not explicitly forbidden in the existing laws, the several issues relating to automated vehicles such as, testing, liability for damage, data protection, cyber security etc. are not covered in the current laws of India. Therefore, it is the need of the hour to bring legislative measures ensuring the regulation of AI vehicles at one hand and the sustainable sophistication of the technology for greater good of humans on the other.

RIGTH TO PRIVACY IN INDIA: LEGISLATIVE AND JUDICIAL STUDY

Nishant Kumar[91]

Abstract

In India's judicial system, the debate over whether privacy is a fundamental right has persisted for over 50 years and has finally been settled. Historically, humans have always strived for respect, social status, and affection. Over time, the concept of privacy has evolved from physical to psychological and now to digital privacy. Data protection rights have also evolved in tandem with technological advancements. As social media has proliferated, privacy has become a necessity. Linking Aadhaar cards to individuals, for instance, poses a threat to their privacy. Those who exercise their Right to Privacy (RTP) can better create an environment conducive to their religious practices. In this context, the "value of secrecy" is a cornerstone of our democratic society, as confidentiality upholds freedoms of expression, association, and individual autonomy, even as the RTP is encroached upon by government actions.

To broaden the scope of Article 21 and infer rights aligned with international human rights charters, the Supreme Court adopted a methodology closely tied to these charters. When interpreting Article 21 alongside Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights, 1966, the Court determined that privacy is essential, as both international documents acknowledge the importance of privacy protection.

This paper mainly deals with different aspects of privacy, privacy under different laws, absence of express provision of right to privacy and constitutional safeguard related to right to privacy.

Keywords: *Privacy, Article 21, Digital Privacy, Aadhaar, Secrecy.*

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1.1 Introduction

In India's judicial systems, the question of privacy not being considered a basic right has been debated for over 50 years and has been resolved. Humans fought for their respect, social standing, and affection during prehistoric periods. A person's privacy has been transferred from physical privacy to psychological privacy, and then to digital privacy as a result of several transitions. When it comes to data protection rights, they evolve over time and with technological improvement. With the expansion of the social media business, privacy has become a requirement. Aadhaar cards, among other things, would be tied to people, violating their privacy. Individuals who exercise their RTP are better able to establish an environment suitable to their religious practice. In this context, the "value of secrecy" is also a cornerstone of our established democratic society, because confidentiality protects freedoms of expression and association, as well as individual decision-making autonomy, while the RTP is being violated by government officials.

For the purpose of expanding the scope of Article 21 and inferring certain rights that are not too far removed from those guaranteed by international human rights charters, the SC adopted a methodology that was closely aligned with international human rights charters in order to decipher Article 21.

When interpreting Art. 21 in accordance with Article I2 of the Universal Declaration on Human Rights and Article 17 of the International Covenant on Civil and Political Rights, 1966, the Court concluded that privacy is appropriate because both of those global reports recognise the legitimate significance of privacy protection.

1.2 Indian Aspect of Privacy

Disregarding the way that the RTP isn't unequivocally expressed in the Indian Constitution, the SC has deciphered the right as a part of two Fundamental Rights: “the right to opportunity ensured by Article 19 of the Constitution, and the right to life and individual freedom ensured by Article 21 of the Constitution”.

For the purpose of diving further into the privacy jurisprudence developed by courts under the power granted by each of these Articles, it would be necessary to offer a brief historical background

to each of them. Articles 12 through 35 of the Indian Constitution, which is titled "Fundamental Rights," provide for several rights that are deemed fundamental to all citizens of the country "(some fundamental rights, such as the right to life and liberty, are applicable to all persons in India regardless of whether they are 'citizens.')" Article 13 of the Constitution protects fundamental rights by prohibiting the state from making "any legislation that takes away or abridges" them.

In the ongoing time, the subject of RTP was talked about without precedent for the setting of constituent social occasion, where a change was proposed by K.S. Karimuddin and the RTP was excluded into the Indian Constitution. Since the 1960s, the subject of insurance has been dealt with both as a critical right under the Constitution and as a right to point of reference based guideline. The SC initially held that security was not a fundamental directly in the year 1954 in the case[92], which managed the capacity to check out and hold reports from the Dalmia Group. The court pardoned the shortfall of a right to security because the Constitution's designers didn't expect for it to be so.[93]

It is difficult to include the quantity of examples wherein Indian courts have deciphered the RTP as fundamental right. In the accompanying segment, you will observe a rundown of milestone choices that have extended the extent of the right to security, as well as brief synopses of the Court's decisions in these cases:

The first ruling was by a seven-judge bench in a case[94] where the court made the decision in 1964. For this situation, the RTP was perceived as a fundamental right by a minority of the SC in a choice gave by a minority of the Court. The RTP, according to the minority justices, is right to individual freedom, as well as the right to freedom of movement, are both safeguarded by the Constitution.

The question that was brought before the court in this case was whether "surveillance" under Chapter XX of the UPPR[95] constituted a violation of any of the fundamental rights protected by

[92] M.P. Sharma v. Satish Chandra AIR 1954 SCR 1077.
[93] Evolution of RTP, India,:https://www.lawteacher.net/free-law-essays/constitutional-law/evolution-of-the-right-to-privacy-constitutional-law-essay.php(last visited on April 02, 2022).
[94] Kharak Singh V. The State of Uttar Pradesh, AIR 1963 SC 1295.
[95] Uttar Pradesh Police Regulations .

Part III of the Indian Constitution. Regulation 236(b), which allowed for monitoring by "domiciliary visits at night," was found to be in violation of Article 21 of the European Convention on Human Rights. With regard to the interpretation of the words "life" and "personal liberty" in Article 21, this court went into great detail about the definitions of these words and the term "personal liberty." Despite the fact that the majority decided that the Constitution did not contain an express guarantee for the "RTP," they stated that the right to personal liberty includes the right to dignity as part of it. "An illegal entry into a person's house, and the resulting disruption to him, is as if it were an infringement of his common law right, an absolute vital to ordered liberty, if not to the very notion of civilization," the court said. The minority ruling in this case was written by Justice Subba Rao, who said that "the right to personal liberty includes not only the right to be free from limits put on his movements, but also the right to be free from encroachments on his private life." While it is true that our Constitution does not directly proclaim a right to property ownership as a basic right, the right to property ownership is an essential component of human liberty. Every democratic society reveres the domestic sphere; it is intended to provide him with relaxation, physical enjoyment, mental tranquilly, and privacy, among other things. In the end, a person's home, where he or she lives with his or her family, serves as his or her "castle," and "it serves as his or her rampart against encroachment on his or her personal liberty." The views made by Justice Subba Rao in this case, in particular, paved the ground for following elaborations on the right to sovereignty under Article 21.

In another case[96] "the SC affirmed that the RTP is a fundamental right. It characterized the right to protection from both the right to life and individual opportunity as well as the option to talk unreservedly of discussion and progress. The RTP was accepted to incorporate and safeguard the private warm gestures of the house, the family marriage, nurturing, augmentation and youngster rising". Regardless, the right to protection depends on "persuading state interest".

In another case[97], the issue was whether or not monitoring of a person constituted a violation of his "RTP." Specifically, the petitioner's name was included into the surveillance record by the police under "Section 23 of the Punjab Police Act" without his having been given an opportunity

[96] Govind v. State of M.P, (1975) 2 SCC 148.
[97] Malak Singh v. State of Punjab, AIR 1981 SC 760.

to be heard. He claimed that he had been denied the opportunity to be heard and that the inclusion of his name on the registry had violated his RTP under Art. 21. According to the Court, "organized crime cannot be successfully combated unless suspects are kept under constant surveillance." While reconnaissance can be valuable in certain circumstances, it can possibly be nosy and to truly infringe on a resident's privacy to the place where it disregards their "fundamental right to individual freedom", ensured by Article 21 of the Constitution, and their right to "freedom of movement", ensured by Article 19(1) of the Constitution. This sort of conduct won't be permitted.

In a case[98], which was decided nearly fifteen years after this case, the SC expounded on the RTP. In particular, the court was concerned with striking a balance between the right of people to protect their privacy and the freedom of journalists to critically investigate and comment on the conduct and behavior of public authorities, among other things. In a newspaper, an autobiography of "Auto Shankar", who had previously been convicted and sentenced to death for committing six murders, was published, and a lawsuit was filed against that publication. In his book, he discussed his interactions and relationships with several "high-ranking police officers", who would have made for incredibly dramatic revelations if they had been made public. He appears to have been obliged to compose a letter denying that he was the author of the autobiography before it was published at some point before it was published. Understanding this rationale, the "Inspector General of Prisons" gave a letter excepting the distributing of the personal history in any paper, expressing in addition to other things that it would abuse the detainee's on right track to mystery assuming his life account was distributed. Surprisingly, "neither Shankar nor his family" were incorporated as this appeal's signatory.

The Court found that he had "never authored nor approved the publishing of his memoirs," and that this was a reasonable assumption. The court then proceeded to inquire if he had any privacy interests that would be violated if his life narrative was published without his permission, based on this premise of his innocence. The SC addressed "the right of citizens to privacy in the following ways": -

[98] R. Rajagopal vs. State of Tamil Nadu, (1994) 6 S.C.C. 632.

(1) The RTP is implied in the right to life and liberty given to inhabitants of this nation by Article 21 of the Constitution. The "right to be left alone" is a legal concept. Among other things, a citizen has the right to preserve his or her own personal information, as well as information about “his or her own family, marriage and reproduction, maternity, childbirth and education”. No one is allowed to print anything on the aforementioned subjects without his permission, whether it is true or not, and whether it is laudatory or critical. This would be a violation of the person's RTP, and he would be responsible in an action for damages if he did so. Those who actively plunge themselves into controversy, as well as those who voluntarily encourage and increase controversy, may find themselves in a more favorable position.

(2) Any distribution including the previously mentioned angles becomes unobjectionable assuming the distribution depends on openly available reports, for example, those obtained by means of a courtroom, dependent upon the special case set out in passage (2). Because of the way that once an issue becomes freely available report, the right to security is not generally safeguarded, and it turns into a genuine subject for banter by the press and different media sources, in addition to other things, this is the situation. In light of a legitimate concern for respectability, in any case, we accept that an exemption for this standard ought to be made “Article 19(2)”, specifically, that a female who has been the casualty of a rape, capturing, kidnapping or a comparative offence ought not be exposed to the further insult of having her name and the episode broadcasted in the press or media. This justification was used to support a newspaper's “right to publish” “Shankar's autobiography”, even without his permission or license, to the extent that this story could be cobbled together from publicly accessible facts, as was the case in this case. The court said they "may be infringing his right to private," and "they will be accountable for the consequences in line with law" if they went any farther than that. A significant finding by the court was that "the remedy available to the aggrieved public officials/public figures, if any, is after the publication of the decision."[99]

In a landmark case[100] the SC extended the extent of the RTP to remember trades for which the court was approached to assess whether wiretapping comprised an attack on an occupant's widely inclusive “RTP”, and assuming the public authority was mishandling the sacred safe-gatekeepers.

[99] *Ibid.*
[100] People's Union for Civil Liberties v. Union of India AIR 1997 SC 568.

As per a report given by the Central Bureau of Investigation on the "Tapping of Politicians Telephones", which uncovered various peculiarities in the tapping of phones, the examination was opened. As per the Court, the accompanying detectable realities with respect to 'one side to assurance' in India: "The RTP without the help of others has not been recognized under the Constitution. As a thought, it may be unnecessarily wide and moralistic to portray it judicially. Whether the right to assurance can be ensured or has been infringed in a given case would rely upon the ongoing real factors of the said case."

1.2.1 The Privacy Case[101]

The SC of India delivered its choice in the notable established case known as *"K.S Puttaswamy v Union of India"* on the 24th of August, 2017. The case was heard by a nine-judge bench. In an alarming and exhaustive 547-page judgment, the SC of India perceived that privacy is an intrinsically safeguarded squarely in the country. Due to this milestone administering, sacred difficulties against a wide scope of Indian regulations will likely be recorded from now on.

Background

"For this case, a test was brought against the dependability of the Aadhaar project, which means to make a data set of individual ID and biometric data for each Indian resident. Aadhaar is a 12-digit distinguishing proof number that is connected to specific biometric information like as eye outputs and fingerprints. In excess of a billion Indians have so far been selected under the plan, which has been executed starting around 2010. Enlistment has now been made expected for movements of every sort like as submitting charge reports, making financial balances, acquiring advances, buying and selling land, and in any event, making acquisition of 50,000 rupees or more in esteem".

Based on the "RTP", Retd. Justice K.S. Puttaswamy (Retired) documented a suit in the SC in 2012, challenging the authenticity of Aadhaar in light of the fact that it disregarded the constitution.

[101] Justice K.S. Puttaswamy (Retd.) v Union of India, (2017) 10 SCC 1.

The Government argued that there was no constitutional right of privacy in view of a unanimous decision of eight judges in *M.P. Sharma case*[102] and a decision by a majority of four judges in *Kharak Singh case*[103]. The case was heard by a three-judge Bench of the Court, which ruled on the subject on August 11, 2015, and directed that it be sent to a larger Bench of the Court for consideration. On the 18th of July, 2017, a "five-judge Constitutional bench" ruled that the dispute be considered by a "nine-judge Constitutional bench". A temporary injunction against forced linkage of Aadhaar with benefits distribution was issued by the bench hearing the constitutional challenge against Aadhaar while it waited for clarity on the RTP to be provided to it.

Judgment

This brought about what must be a possibility for the qualification of the longest contemplated judgment at any point composed by a court, since every one of the nine individuals from the Court wrote six separate perspectives. A couple of key examples can be found in these outcomes, which make it difficult to concisely sum up them.

It is the fundamental judgment, which was conveyed by Dr D Y Chandrachud J in the interest of four different judges in a 266-page masterpiece of a decision. Regarding Indian homegrown case regulation, it digs into the center of protected privileges as well as the idea of private freedoms in extensive detail. It additionally thinks about International and Comparative Law on Privacy (from England, the US, South Africa, Canada, the European Court of Human Rights and the Inter-American Court of Human Rights). Various issues with the protection teaching are tended to, including those raised by Bork, Posner, and women's activist adversaries, as well as those raised by others.

Indian Constitution doesn't explicitly safeguard individual's privacy, there was an issue for the Petitioners for this situation. Notwithstanding, the Indian Constitution, then again, is a living report that changes with time. Although, the Constitution contains "values," courts have tried to give impact to them by perusing indicated major freedoms assurances as covering a wide assortment of additional privileges what's more allowed by the Constitution. "No individual ought to be denied

[102] M.P. Sharma v. Satish Chandra , (1954) SCR 1077.
[103] Kharak Singh v. State of Uttar Pradesh, (1964) 1 SCR 332.

of his life or individual freedom except if in accordance with the method approved by regulation," as per Art. 21, which is the most fundamental arrangement in this regard.

This provision was recently interpreted to encompass rights to a timely trial, legal help, housing, a healthy environment and freedom from torture as well as the right to make a livelihood, according to the most current interpretation[104]. On this point, the Hon'ble Chandrachud J. observes that this clause has been understood to include, among other things, the rights to a quick trial, legal assistance, housing, and a healthy environment; freedom from torture; reputation; and the right to make a livelihood. Privacy is an unassailable right in the context of basic freedom or liberty. With regard to the "essential nature of privacy," Chandrachud J analyses "the concept of privacy as being founded on autonomy and serving as an essential element of dignity"[105], finding that it is "based on autonomy and serving as an essential component of dignity."

"Dignity cannot exist in the absence of privacy. Both are rooted in the intrinsic rights to life, liberty, and freedom that have been recognized by the United States Constitution. Individual sanctity is exemplified at its highest level by the RTP. A constitutional principle that cuts across the spectrum of fundamental rights and safeguards an individual's zone of choice and self-determination."[106]

As to the possibility of "Informational Privacy," Chandrachud J. examining a scope of scholastic composing styles in the other part of the judgment. He finishes up with a suggestion. The judgment contains a data realistic from a book by Bert-JaapKoops named "A Typology of Privacy," which portrays the accompanying standards to convey the crucial thoughts of security: "It is noted in the judgment as endorsing the 2012 Report of the Expert Group on Privacy, which characterizes nine standards for defending individual data and is perceived as point of reference (which share a lot of practically speaking with the EU information assurance standards)"

On pages 260-265 of the text, the discoveries of the joint choice are spelt out exhaustively. It has been observed that the right to security is an unavoidably shielded right that stems fundamentally from Article 21 of the US Constitution and that it ought to be regarded. Notwithstanding, any

[104] Justice K.S. Puttaswamy (Retd.) v Union of India, (2017) 10 SCC 1 (for a list see Pg. 150).
[105] *Ibid*.
[106] Justice K.S. Puttaswamy (Retd.) v Union of India, (2017) 10 SCC 1 (At Pg. 169).

mediation should finish the three-section assessment of (ii) lawfulness; (ii) the need of accomplishing a genuine point; and (iii) the proportionality prerequisite before it tends to be thought of as defended (p.264). As recently expressed, since instructive security is viewed as a part of the RTP, the public authority will be constrained to set up a broad information insurance system. A number of other important problems are addressed in the joint judgement as well.

Initially, the court reaffirms that sexual direction is a principal component of privacy, discouraging a past choice that upheld Section 327 of the Indian Penal Code, which basically condemn same-sex connections between consenting grown-ups in specific circumstances. Suresh Koushal's case[107] is presently being heard by a Constitution Bench of the SC, which is discussing the decision about whether to topple his past conviction.

For the second time, Chandrachud J overturns his father's (Chandrachud CJ) judgement in the well-known case[108], which determined that essential rights may be suspended during the Emergency. Despite the fact that "the 44th Constitutional Amendment proclaimed the ADM Jabalpur judgement null and unconstitutional, the matter has now been legally resolved". According to Sanjay Kishan Kaul J, in his concurring judgement, "the ADM Jabalpur case... was an aberration in the constitutional jurisprudence of our country, and the desirability of burying the majority opinion ten fathoms deep, with no chance of resurrection" was "an aberration in the constitutional jurisprudence of our country."

On the merits, R F Nariman J handed down a 122-page decision, with four other justices providing relevant concurring opinions. According to the Court's decision, the RTP is guaranteed by Art. 21 as "a component of the right to life and basic liberty". It was concurred that the case ought to be dispatched back to the first three-judge bench for a choice on the benefits.

Comment

A considerable deal of legal and political significance has been placed on this ruling, which has been widely acknowledged. According to the head of the Opposition Congress party, it "would go

[107] Suresh Kumar Koushal v. Naz Foundation (2014),
[108] ADM Jabalpur v Shivakant Shukla (1976).

down in history as one of the most significant judgements issued by the SC since the inception of the Indian Constitution." According to the Hindustan Times, "the country could not have received a finer present from the court on the occasion of its 70th anniversary of independence." The case has been seen as a huge defeat for the “BJP administration”.

In particular, the extensive examination of problems of digital privacy, which are becoming increasingly significant both in India and abroad, is a standout element of the joint opinion.

The Aadhaar program's long-term viability has been called into question, and in light of the statements of the majority, there is a considerable likelihood that the SC will now strike down legislation criminalizing same-sexual relationships. The joint ruling makes it abundantly plain that the Indian government is now under a responsibility to develop a data protection system in order to preserve the privacy of individuals in the country.

1.3 Different Aspects of Privacy

Having an actual asylum where we might be liberated from interference, interruption, disgrace, or responsibility is an objective common by us all, similar to an undertaking to direct the timing and way of revelations of individual data around oneself. There are many aspects of privacy where an individual’s privacy could be infringed, some of them are discussed below.

1.4 Privacy With Respect to Medical Profession

In 2002, the “Indian Medical Council (Professional lead, behavior, and morals)”, regulations, which contain “moral constraints” that are maintained by disciplinary activity in case of a pass, were educated regarding the work done on clinical practice standards and the assembling of the clinical get-together of India.

Some of the items in these recommendations are concerned with privacy, such as the following: Each doctor is required to maintain clinical records pertaining to indoor patients for a period of time that is at least as long as the time from the date of the commencement of the treatment. Upon request by the patients, authorized experts, or authentic specialists included, these documents should be provided within 72 hours of the request being received.

Doctors ought to know about patient's confidences about their own or home resides that they have put in the possession of a specialist for security. With regards to patients who are seen during clinical inclusion, deserts in their mentality or character ought to never be uncovered except if such divulgence is expected by state regulation. The rules additionally propel the specialist to consider if "his job to society expects him to utilize information, got by means of conviction as a specialist, to safeguard a sound individual from a transferable infection to which he is going to be uncovered." This is a combative issue. In such a case, the guidelines address the doctor to "go about as he would wish one more to act toward one of his own family in like conditions".[109]

"An enlisted clinical master ought to examine the secrets of a patient that have been learned over their calling, except for the accompanying circumstances:

1. in an authority court requested by the Presiding Judge;
2. in circumstances where there is a dead serious and recognized hazard to a particular individual and additionally neighborhood;
3. notifiable diseases.[110]"
4. American specialists are likewise restricted from distributing photos or case reports of patients without their understanding in any clinical or other diary in a way that might be utilized to decide their character. On the odd opportunity that the personality of the person wouldn't be uncovered, the authorization isn't required.[111]

In a case,[112] the inquiry under the watchful eye of the SC to decide whether the expert's exposure that his patient, who was going to be hitched, had tried HIV positive would comprise an infringement of the patient's general right to security. The SC discovered that the right to protection was not outright and that it very well may be appropriately confined to forestall bad behavior, disarray, or protection of one's own or others' prosperity or morals, or to guarantee the benefits and chances of others. That the suitable for life of a lady with whom the patient was to be hitched would vehemently incorporate the choice to be educated that a person with whom she was

[109] Indian Medical Council (Professional conduct, Etiquette and Ethics) Regulations 2002.Article 2.2
[110] Indian Medical Council (Professional conduct, Etiquette and Ethics) Regulations 2002Article 7.14 .
[111] *Ibid.*
[112] Mr. 'X' v. Hospital 'Z',AIR 1999 SC 495.

proposed to be hitched was an overcomer of a deadly disease that was genuinely adaptable, was perceived by the court as sensible. Since the right to life contained the right to a solid life, which incorporated the option to take an interest in every one of the elements of the human body in the most ideal condition, it was resolved that the specialists had not abused their right to protection.

1.5 DNA And Other Forensic Technologies & Privacy

Definitely, the huge number of legal innovation and data accessible, like fingerprints, penmanship tests and photos, and DNA information, is immensely gainful in the examination of wrongdoings. This is particularly valid for savage wrongdoings. Since the human body continually takes the stand self-implicates itself, it is possible for an individual to be indicted for a wrongdoing in view of these numerous real indications while never having articulated a word. Concerns have been raised about whether the utilization of penmanship and finger engravings would go against Art. 20(3) of our Constitution, that's what which gives "No individual blamed for any bad behavior ought to be compelled to affirm in his own protection."

The SC of India considered this issue in the ***Kathi Kalu Oghad Case***[113]**.** An individual blamed for a wrongdoing is compelled to "be an observer against oneself," as per the solicitor, since proof is gotten through regulations, for example, the "Identification of Prisoners Act", which disregards Art. 20(3) of the Constitution. As a mark of correlation, that's what the court established "requiring a charged individual to give their example penmanship or mark, as well as impressions of their thumb, fingers, palm, or foot, to an examining official or compelled of a court, didn't abuse Article 20(3)." "There was no inborn impulse in the receipt of data from a denounced individual who was in the authority of a cop; rather, it will be an issue of reality for each situation, which not entirely set in stone by the court in view of the proof before it, with regards to whether impulse had been utilized in the procurement of the data," the court expressed.

When it comes to the validity of DNA, there is some debate. In the case of *Thogorani Alias K. Damayanti case*[114], the Orissa High Court, after taking into consideration the concerns regarding

[113] State of Bombay v. Kathi Kalu Oghad and Others, AIR 1961 SC 1808.
[114] Thogorani Alias K. Damayanti versus State of Orissa and Ors, 2004 Cri L J 3753.

privacy, laid down the following principles, which are applicable in the following instances or for the following reasons:

- the degree to which the denounced may have partaken in the commission of the wrongdoing, if by any means, in the examination of the wrongdoing
- The gravity of the offense and the conditions where it is committed are both thought of.
- The idea of the offense that was committed.
- The age, state of being, and psychological wellness of the charged are completely referenced to the degree that they are known.
- Consider assuming a not so much intrusive but rather more practical methodology of gaining proof that will in general confirm or deny the cooperation of the charged in the wrongdoing might be used to assemble proof for the situation.

What are the accused's justifications, if any, for declining to give consent?

The rules that support such 'advances' range from changes in breath to planning the electrical movement in various region of one's cerebrum; in any case, what they all share for all intents and purpose, as per Lawrence Liang, is that they "keep up with that there is an association among body and brain; that physiological changes are characteristic of mental states and feelings, and that data about a singular's subjectivity and personality can be gotten from the information.".[115]

The Bombay High Court upheld these technologies in the *Ramchandra Ram Reddy case*[116] by adopting the rationale of the *Kathi Kalu Oghad case*, which was previously explored. It was found by the court that main 'statements' made under coercion by a charged were dependent upon the limitation contained in Art. 20(3), and that main 'declarations' were dependent upon the forbiddance. Since "any of these tests brings about the creation of a guide of the mind," That's what the court verified " brain mapping and falsehood locator tests, in which a guide of the cerebrum is shaped, too as polygraph tests, can't be considered to comprise an assertion."

[115] Keynote address given to the 93rd Indian Science Congress.:http://www.sarai.net/publications/readers/07frontiers/100-110_lawrence.pdf (last visited April 21, 2022).

[116] Ramchandra Ram Reddy v. State of Maharashtra, (2205) CCR 330 (DB).

According to the court, It might just be alluded to as "the data procured or removed from the observer" probably, the Court rules.

In the landmark decision[117], the SC overturned the lower court's ruling. The SC, rather than the Bombay High Court, obviously referred to one side to protection in its judgment proclaiming these advancements to be illegal under the Indian Constitution, and this was whenever this first had occurred. Nonetheless, regardless of the way that these are painless activities, that's what the court verified "the significant issue isn't such a great amount with how they are directed for all intents and purposes with the repercussions for the people who are exposed to them." Numerous worries have been raised about the utilization of procedures, for example, "Mind Fingerprinting" and "FMRI based Lie-Detection," including the assurance of mental protection and the outcomes that might result from deductions drawn about a subject's veracity or information comparable to the conditions of a wrongdoing.

Following that end, the court established that such strategies attacked the informer's psychological protection, which was a fundamental part of their own freedom, and were accordingly unlawful.

1.6 Privacy In Digital World

During the composition of the ever-evolving paper by Samuel D Warren and Louis D. Brandeis, they perceived the need of keeping up with protection standards in the middle, particularly despite new mechanical turns of events. Data sent through worldwide organization might go through various PCs agreeable to directors might catch and store online data. Further, an individual's exercises might be observed by the specialist co-op to which the individual have bought in and by the sites visited by him.[118]

In the perspective on quick development of protection annihilating advancements and time of 'dataveilliance' there are no essentially online administrations that ensure outright privacy.[119]

RTP is consistent to the interests of the state. This engages the policing to get to individual data of any individual through web, block their correspondence and put any individual under reconnaissance. Digitization of data has helped policing in checking an individual. With

[117] Selvi v. State of Karnataka, AIR 2010 SC 1974.
[118] T Basanth, Impact of USA Patriot Act on Cyber privacy: A Revisit, (2006), Vol V IJCL 23, P. 24.
[119] A Micheal Froomkin The Death of Privacy,52 stan.l.Rev.1461,1468(2000).

digitization, besides the fact that recorded data be can held endlessly at little expense, yet additionally the data held by traders, safety net providers and government offices can be promptly be shared, opening the best approach to gathering all the recorded data concerning a person in a solitary computerized document that can without much of a stretch be recovered and looked.[120]

The Indian Telegraph Act of 1885 fills in as the essential legitimate supporting for observing and capture attempt in India, and it was passed by the Indian Parliament in 1885. Assuming a public crisis happens or then again assuming the overall population's security is risked, any official extraordinarily approved for this sake by the Central Government or a State Government may, whenever fulfilled that it is important or practical to do as such in light of a legitimate concern for India's power and respectability, protection of the State, cordial relations with outside nations, public request, or for some other explanation might arrange the disintegration of Parliament.

1.7 Privacy Under Different Laws

1.7.1 RTP in ADR (Alternate Dispute Resolution)

The SC of India by a 9-Judge bench has delivered a landmark judgment in "*Justice K S Puttaswamy (Retd.) and another v. Union of India and others*"[121] on 24th August 2017, where it was held that the RTP is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution of India (hereinafter referred as "privacy judgment").

The appointed authorities were of consistent view that Privacy, in its easiest sense, permits every individual to be abandoned in a center which is sacred. This was tolerating the perspective on Warren and Brandeis, "*The RTP*"[122], where it is expressed that as legitimate freedoms were widened, the right to life had "come to mean the option to appreciate life - the option to be let alone".

The nature of fundamental rights has been examined in the ruling, and it has been determined that fundamental rights, in other words, are primordial rights that have historically been regarded as

[120] Richard A. Posner. Privacy, Surveillance and Law, 75 U. Chi. L. Rev. 245, 248(2008).
[121] Writ Petition (Civil) No. 494 of 2012.
[122] Harvard Law Review (1890), Vol.4, No. 5.

natural rights have been acknowledged. In that sense, these rights are inextricably linked to the existence of humans. This is an acknowledgment of their existence previous to the adoption of the Constitution, which is why it has been protected by the Constitution. It was determined that the RTP is a necessary corollary of the individual's ability to exert control over his or her own personality. In the view that certain rights are inherent in or natural to a human being, it has its origins in the concept of natural law. Natural rights are inalienable because they are inextricably bound up with the existence of the human being. Without the existence of natural rights, it is impossible to imagine the human element in any given situation.

According to the SC, the RTP is an element of human dignity, and that the sanctity of privacy is derived from its functional link with dignity. Individual autonomy and the right of every person to make critical decisions that determine the path of their lives are recognized under the concept of privacy. The privacy movement acknowledges that living a life of dignity is necessary for a human being to be able to exercise the liberties and freedoms that are the foundation of the United States Constitution.

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This decision opens the door of scholastic and scholarly discussions concerning what this truly means and how can it influences our lives?

It is recognised by the ACA that an individual's autonomy in deciding the way in which a disagreement must be resolved is respected. It grants him the authority to make decisions on all of the fundamental tenets of dispute resolution, including WHO should resolve the dispute (choosing the mediator or arbitrator), HOW it should be resolved (law/rules applicable to the process),

[123] Advoacte Anil Xavier, The RTP In Alternative Dispute Resolution, (August 27, 2017).

WHERE it should be resolved (venue and seat), and WHAT should be resolved (what should be resolved), among other things (matters referred for dispute resolution). The fact that the concerns that may be resolved via alternative dispute resolution are fundamentally rights in personam means that ADR gives the parties with the possibility to choose a technique that assures total anonymity of both the subject matter and the procedure in question. It is necessary for the parties' voluntary choice to participate in an alternate dispute resolution method that they be assigned a private place and that they be granted the right to be left alone throughout the process, both of which are required by law.[124]

As per the Privacy governing, this freedom of the individual is attached to issues that might be kept mystery. These are worries about which there is an authentic assumption for security as well as insurance from unwanted interferences of one's life.

The gatherings are picking the course of ADR to ensure that messy material isn't washed openly. They need complete classification and privacy about current realities or items in the question. As per the SC, privacy safeguards an individual from being investigated by means of the radiance of public openness in issues that are private to him. As a matter of fact, assurance fills in as the establishment for all opportunity, since privacy permits every individual to pick how opportunity ought to be best practiced in their own life.

If a settlement understanding under Section 73 of the ACA or an arbitral choice under Section 31 of the American Arbitration Act, which addresses the end result of an intercession or mediation methodology, are tested in court under Section 34 of the ACA, what occurs straightaway? Is this singular's more right than wrong to protection regarded?
The SC has said that like the “right to life and freedom”, “privacy isn't absolute”. Any shortening or trouble of such honor would need to happen inside the structure of an administrative framework. The arrangement illustrated by the guidelines ought to be evenhanded, just, and sensible. The regulation that is ordered to oblige the edited version of the right should be dependent upon the very established securities as the law that sanctioned it.

[124] Advocate Anil Xavier, The RTP In Alternative Dispute Resolution, (August 27, 2017).

Not entirely set in stone by the SC in its assessment of privacy prerequisites that the demonstration of associating with others is inseparably connected to the demonstration of shielding one's privacy, whether straight forwardly or in a round about way, by impact on the ways of behaving are tried to be safeguarded from obstruction. Accordingly, when a dispute resolution procedure is chosen with the expectation of confidentiality, bringing the matter up for discussion in the judgement and making it available to the public will undoubtedly infringe on the parties' right to private. As previously noted, any reduction or denial of that right would be subject to a legal process that would be established by the government. Is there a method under the Affordable Care Act for restricting that RTP?

As indicated by my perceptions, this isn't true. There are just seven purposes behind challenging the honor under Section 34. A party's insufficiency, the legitimacy of the intervention arrangement, whether the party was given satisfactory notification of the arrangement of a judge or the initiation or continuation of discretion procedures, and whether the organization of the arbitral council or arbitral method was as per the gatherings' understanding are the four grounds on which they can depend. The gatherings can depend on any of these four grounds to help their cases. As per these four reasons, it isn't fundamental for the court to assess current realities or question that was settled; rather, it is simply expected to audit the arrangement between the gatherings and any procedural papers relating to the beginning and progress of the assertion cycle. Other than that, a court has the position to consider whether the arbitral honor manages a question that was not pondered by or didn't fall inside the conditions of the accommodation to mediation, or whether it contains choices on issues that were excluded from the accommodation to assertion, whether the topic of the debate is equipped for settlement by intervention under Indian regulation, and whether the arbitral honor is in struggle with Indian public arrangement. To maintain these contentions, the court will likely need to investigate current realities of the case or the conflict. Whether they ought to dissect and analyze current realities as though they were managing the matter as though it were an allure wherein the court might mediate with the verifiable finishes of the lower court is at issue here. There have been an extraordinary number of situations where the SC has decided that the mediator is the selective adjudicator of the quality and amount of proof, and that not the court's must capacity as an appointed authority of the proof gave to the person in question by the gatherings.

As the SC has explicitly ruled, the "RTP of any individual" is basically a natural right inherited by every human being at birth and that such right continues with the human being until he or she breathes his or her final breath. One of those cherished rights that every civilised society regulated by the rule of law constantly recognises in every human being and is under an obligation to recognise such rights in order to maintain and preserve the dignity of an individual is the right to bear arms in self-defense. This is particularly significant because the RTP is rapidly being recognised not only as a valuable right, but also as a fundamental right in constitutional interpretation.

Consequently, while dealing with an issue under Section 34 or 9, the court must be cautious not to go into detail into the facts of the case, but must instead restrict itself to considering the legal features of the case as specified under Section 34.

While it is basically a murky perspective, I am persuaded that this judgment has generated a large number of groundbreaking insights. Moreover, as the SC has expressed, "the old request changeth, preparing for the new".

1.7.2 Aadhar Act Vis-À-Vis RTP

RTP is a vital Human Right. The UID claims itself to be a deliberate plan. Nonetheless, thoroughly examining to the complex functional construction that the UID Scheme takes on, the genuine assignment of enlistment lies altogether in the possession of outsider 'Recorders' who incorporate a mass of Central and State government backed retirement and government assistance offices (counting the Ministry of Rural Development which controls the Rural work ensure plot), banks and insurance agency. There isn't anything in the Aadhar Scheme that forbids these Registrars from gaining admittance to their administrations gave, one's agree is acquired to UID enlistment. Practically speaking, a significant number of them have and will keep on making UID enrollment a fundamental custom before access is conceded to their administrations. So the resident's 'opportunity' to oppose UID enlistment relies upon their capacity to surrender, say, least assurance of the right to work, cooking gas, banking and protection administrations, food proportions and so forth.

The Aadhaar system has been hailed as one of the most ambitious undertakings undertaken by the Indian government. With the passage of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits, and Services) Act, 2016, the Aadhaar programme received formal legitimacy for the first time since its inception in 2009. There have been several privacy rights challenges in India as a result of the Aadhar scheme's goal of providing each person with an individual identifying number. When it comes to the Aadhar programme, privacy rights issues are based on questions of dignity, informational self-determination, and informed permission. On September 26, 2018, a five-judge panel affirmed the constitutional legality of the Aadhaar Act, but knocked down certain clauses that have resulted in a significant diminution in the functional nature of the statute.[125]

The RTP proclaimed as a fundamental right by the SC of India in the Justice K.S. Puttaswamy case[126] structures a significant triumph for the privacy banter in India. The information insurance and privacy privileges based authoritative system is additionally seeing significant advancement with the B N Srikrishna council postponing the report as well as the draft data protection bill.

The advancing acknowledgment of the RTP warrants an unambiguous response to the inquiry: Whether the Aadhar scheme is in predictable inside the structure of sacred assurance of RTP and right to life? In such manner, the 2016 regulation was exposed to judicial review by the five-judge bench.

1.7.3 Concerns With Respect to Majority Judgment

The majority judgment written by Justice A K Sikri, while declaring the Aadhaar Act to be constitutional, has struck down provisions such as section 33(2) [allowing for disclosure of information in case of national privacy exception] as well as section 57 [which allows the private entities to use Aadhaar for identification]. The majority judgment relied on the important judicial review principle of proportionality of government action in evaluating the Aadhaar Act. The three –factor test as provided in the RTP case, Justice K.S. Puttaswamy (Retd.) v. Union of India[127] was

[125] Dr. Deva Prasad And Suchithra Menon, Aadhar Judgment: Certain Concerns, Sept. 30, 2018
[126] K.S. Puttaswamy v. Union of India (2017) 10 SCC 1
[127] *Ibid.*

also relied in the majority judgment. Justice Chandrachud in the RTP case mentions about three-fold requirement for any reasonable assessment for discounting the privacy rights:

- The essential precondition for the presence of a guideline approving an intrusion on protection is an express necessity of Art. 21.
- The prerequisite of a need, from a true State viewpoint, guarantees that the nature and content of the law forcing the limitation fall inside the sensibility zone.
- The third condition guarantees that the administering body's activities are predictable with the thing and prerequisites looked to be achieved by the law.

However, a variable that requires appropriate consideration was the weighty dependence of greater part choice in the accommodation made by UIDAI under the steady gaze of the SC. The subject of conceivable state observation as well as plausibility of information break and prohibition of resident from taxpayer supported organizations and plans was alleviated based on that reality that UIDAI has asserted the framework to be generally secure. Edge of RTP and established standards of proportionality as well as respect prerequisites were constricted while maintaining the protected legitimacy of the Aadhaar Act as reasonable restriction.

Despite the fact that the majority has struck down Section 33 (2) as well as Section 57, the larger rationale for upholding the Aadhaar Act as constitutional fails to meet the test of reasonable objective and reasonable means to impinge on the RTP, as set forth in the SC of India.

1.8 Absence Of Express Provision for RTP

Art. 21 of the Indian Constitution expresses that "No individual will be denied of their life or individual freedom besides as per the strategy laid out by regulation," and the expression "life" is meant include an expansive scope of parts of an individual's life that add to making it significant, complete, and, most importantly, significant. Each achievement of mankind anytime in its set of experiences has consistently had a positive and negative part. As per the Indian Constitution, the right to security isn't perceived as a Fundamental Right. The extent of this honor was recently challenged in the Kharak Singh Case, which brought up issues about the authenticity of specific rules approving the surveillance of suspects. This is overseen by SUBBA RAO J's. minority choice,

and the SC assessed the right to security by and by in 1975 under Article 19(1) (d). JEEVAN REDDY J. expressed at one point that under Article 21 of the Constitution, the fundamental right to security is invulnerable. This right alludes to the capacity to quit an agreement. In the system of perception, it has been observed that observation might abuse the right to improvement, as safeguarded by Articles 19(1) (d) and 21 of the Constitution, assuming it interferes and considerably imperils the private of occupants. The Supreme Court of India verified that the right to insurance is "normally got from life and opportunity." The idea of protection depends on late innovation leap forwards that have brought about emotional changes in the existences of everybody in the world. In the present globalized society, all public corporations and people have fostered a strategy for checking routine human way of behaving that is exceptional ever. Also, all kinds of people in the public eye can utilize contemporary cell phone cameras to catch their own considerations or decisions, as well as their affiliation or organization decisions, as well as unwittingly talking or dialing while not connected to the web, etc. Incidentally, clients of cell phone cameras are indifferent about others' security, as there are no extra prerequisites to follow. Individuals are turning out to be progressively acquainted with utilizing media innovations, yet many know nothing about the constraints related with their utilization.

1.9 Constitutional Safeguards Related to RTP

There has been an extremely interesting development in India's constitutional status since the assassination of Sonia Gandhi in November of last year. Countless judgments have been decided by the SC that Art. 21 is the cornerstone of India's fundamental rights, hence it is fair to say that Art. 21 has multiple dimensions. It broadened the scope of the discussion and clarified the meaning of two key words: "life" and "freedom." The definitions of these two concepts should be quite specific. The RTP is one of the rights that have been eliminated as a result of the extension of Art.21 of the Constitution. In this regard, the Constitution, in particular, does not provide for the creation of any privacy interests. There are numerous advantages to Art.21 that have been highlighted.

In accordance with Art. 21 of the Indian Constitution, "no one shall be deprived of his life or personal freedom unless required to do so by the law." Individual adjustments to the legislation fix the problem, and ordinary people are well aware of the importance of physical safety, as well as

their own otherworldly selves, as well as their emotions and intelligence, in their daily lives. Today, the scope of the right to life has been broadened to encompass privileges, in addition to the freedoms and liberties that are guaranteed by the right to life. A broad variety of public welfare activities and the performance of "property" are determined to include any type of property. "Property" is defined as any type of property. The immateriality exceeds the unmistakable, and the court dissolves it by analogy with Art. 12 and 17 of the Indian Constitution, thereby providing the privacy advantage afforded by Art. 21 of the Constitution of India.

The ***Kharak Singh Case***[128], for example, demonstrates just how significant this is. Specifically, he is concerned about the legitimacy of the particular address, which will enable the interviewee to locate an answer, and the privilege in question is the privilege that is not explicitly stated. When it came to the confession, this observation was reinforced when it jeopardized, if not outright violated, the protection of the residents. It has the potential to have an impact on the development possibilities given by Art. 19, and Art. 21. “From now on, I'm taking it easy. Art. 21 of the Indian Constitution will be the subject of my presentation. It has been possible to read the cherished privilege of life in Art. 21 to a significant extent, exposing more than trivial existence and the presence of living things, as well as their existence and the existence of other living things”. It encompasses every aspect of life that increases the importance of a person's life, such as the end of a person's life, the value of a person's life, and the observation of safety. The Kharak Singh case was the first time this problem was brought up. The SC declared that Rule 236 of the Uttar Pradesh Police Department is unconstitutional since it violates the requirements of the Constitution. As a result of its ruling, the court determined that the RTP is the best alternative for protecting life and private freedom. In this case, the court made a comparison between "privacy and personal freedom." The following are examples of legal evidence of restriction of personal freedom:
(1) The technology must be supported;
(2) the technique must at the very least meet the requirements of the test; and (3) Withstand In this case, one of the most important rights provided, particularly number 19, may be reasonable, and
(3) the Article 14 judgment must be overturned. Laws and procedures that safeguard human liberty and freedom must be equally correct, fair, and reasonable, rather than being specialised in their application or scope.

[128] Kharak Singh v State of Uttar Pradesh 1963 AIR 1295.

"As an illustration, consider the NAZ Foundation Case"[129] The Delhi High Court reached a unanimous decision on the issue of homosexuality. In the given scenario, IPC S.327 as well as Articles 14, 19, and 21 of the Code of Civil Procedure were examined. "A person can create and maintain his or her own intimate relationship with any other," says the law. The craving for a place of refuge where individuals can be liberated from social oversight, where they can lift their cover and break for a concise measure of time, is advanced by some as an approach to expecting the picture they should introduce to be perceived on the planet.

It is possible that the image reflects peer judgments, and that textiles are used instead of expectations. It is now widely recognised that the "right to life and freedom guaranteed by Article 21 of the Constitution" includes the "RTP." According to the author, "the RTP is a privilege that must be mentioned." Residents have the right to maintain the privacy of their lives, families, marriage, births, paternity, children's behaviour, and instruction in a variety of fields, among other things.

1.10 Conclusion

After conducting the comprehensive study, the researcher plans to close with different discoveries, ideas and suggestions to draw an unmistakable image of What are Privacy Rights? Prerequisite of Privacy Rights as the essential piece of major right as well as a natural common freedom' What are the impacts of always changing innovation in this computerized period on information protection?' and the conceivable outcomes to control potential privacy worries in the domain of shielding arrangements for insurance of privacy in this advanced time, broadly and universally.

In this world of 195 countries only 71% out of those have privacy legislations; 9% of the countries with draft legislation; 15% countries with no legislation. This shows that privacy hasn’t been considered as vital as it should be.

[129] Naz Foundation v. Government of NCT of Delhi and Others, 2009, Delhi High Court.

People themselves are not aware that a particular sect of their lives can be kept private and no one, even the state, has the right to cross the border of privacy. Exceptions are there like public order and National Privacy. But, generally no-one can infringe your privacy. Nowadays in this digital era privacy is infringed on daily basis and no proper mechanism is present to take action for the same.

In India, we have e-transaction laws & cyber laws – like Information Technology Act, 2000, but when we talk about Consumer Protection and Data Protection and Privacy Laws, there are no legislations as such.
In 2019, a bill was introduced in the Parliament in the name of PDPB[130], 2019. It is in the process of getting enacted by the Parliament. If this bill is passed then it will be the first legislation in the history of India, which deals exclusively with protection of privacy.

Individual or group privacy alludes to the capacity of an individual or group of people to separate themselves or their data about themselves and uncover themselves expressly. The limits and content of what is viewed as private vary between friendly orders and people, yet they are generally worried about similar key topics, like culture and values. Anonymity and privacy are now and again connected with one another, because the craving to remain unseen or unnoticed openly is connected with one another. When something is private to an individual, protection, generally speaking, infers that there is something inside them that is seen as naturally excellent or really sensitive. If we have any desire to know how much private information is uncovered, these lines depend upon how the public will get this information, which contrasts among places and for a really long time. Protection somewhat meets privacy, comprehensive of for instance the standards of reasonable use, notwithstanding assurance, of realities. A critical rule of the privacy legislation in different nations, as well as in certain constitutions, is the right not to be exposed to unannounced interferences of privacy by open specialists, associations, or people. Essentially all countries have regulations which to a great extent limit privacy of individual; a representation of this would be regulation concerning charge assortment, which conventionally requires the sharing of information about up close and personal compensation or pay. In certain countries, single affirmation might struggle with the option to talk unreservedly despite prohibitive discourse regulation, and a couple

[130] Personal Data Protection Bill, 2019.

of regulations might compel the public openness of data that would be viewed as private in different nations and social orders. Privacy may be determinedly relinquished, normally as a trade-off for clear benefits and much of the time with unequivocal dangers and disasters; but this is a fundamental viewpoint on human associations. Individual information which is unyieldingly shared anyway likewise taken or manhandled can provoke discount extortion.

The protection guideline was found in the old Indian works and was accessible to assorted pieces of assertion underneath the codes. In any case, much accepted was not given to such pieces of defend of individual flexibilities. Accepted was not paid even by the Indian topic subject matter experts. Right when we go to the state and the course of progress of the advantage to security and assurance, we track down the condition unacceptable in all centers; as for its definition, its accreditation, its area, its confinement, its need, etc anyway by some luck, the advantage which made as a piece of the overall guideline was all along and seen as a piece of the private guideline. Accordingly, the regular craving for security clashed with everybody's wellbeing. This inquiry regarding the probability of getting an addition from security is evident in the United States and, less significantly, in England. For an out of the blue significant stretch of time, the directing body didn't offer any viewpoints on the most proficient method to characterize the constraints of protection of security guidelines or how to determine its inquiries, and the issue was left to be talked about in the scholarly local area and settled through legitimate choices. In the end, the issue was settled through legitimate choices. The advancement of Warren and Brandeis in 1890 was not a long way from showing up as a reaction to worries relating to security; in any case, it sent point by point bargains on a few pieces of certification and pulled with respect to resulting scientists instead of being an entire reaction. During the 20th century, there was a self-evident gamble to protection presented by the state, because of the progression of radio, recording contraptions, observation and listening gadgets, TV, and PCs, in addition to other things. With the new Supreme Court choice in the *Puttaswamy case,* the right to protection of insurance has been raised to the situation with a central right.[131]. In the current scenario the lawful chief drew nearer to propel a right to insurance of privacy in Article 21. The authentic pioneer was at first hesitant to proclaim a focal right to security, yet as the made to order advanced, the right to confirmation of insurance turned out to be progressively related with the right to life and the right to individual open door. It

[131] KS Puttaswamy v Union of India (2017) 10 SCC 1.

is essential to accentuate now that the UDHR which was taken on in 1948, is the most exhaustive archive to report assurance as a central right. It is likewise accentuated and portrayed in the resultant overall fundamental opportunities certifications and instruments that are set up. India is a gathering of individuals who have met up to advance a piece of these general and crucial opportunities instruments, which have been supported by the Indian government. This is one reason why India has at long last remembered the RTP for its constitution. Thinking about everything, the authoritative decisions in our nation closely relate to police perception, cozy freedoms, sexual independence, lady's haughtiness and self-assurance, the travel of private information, and the affirmation of phone conversations. There are a few examples where you might be qualified for assurance or security under isolated regulations.

When we talk about India, we may have laws which may be excellently drafted and passed by the Parliament but when those revolutionary laws are not implemented properly then the motive, intention and the purpose behind the law is defeated and in consequence to this the public at large suffers and injustice is served indirectly.

Without a solid and experienced common society bunch attempting to arrive at an agreement on major questions going from excessively huge scope reconnaissance to privacy and also, the prerequisite to get lawful authorization prior to gathering individual information stays basic to arriving at agreement. Privacy, in the computerized age, need to have a solid voice in the conversation. As significant individuals from common society, Government can co-work with accomplice associations in this field to propel information insurance privileges in the computerized age, not exclusively to progress important regulations yet additionally to give clients the information and abilities expected to safeguard themselves. To do this, they need to get the help of the data innovation area as the need might arise to stay aware of the developing innovation and its effect on privacy with common freedoms, and to help clients. Consequently, the public authority should continuously follow privacy laws. Measures to forestall the speculative and inappropriate assortment of information by privately owned businesses are gladly received, yet when privacy turns into a reason for an unbalanced assortment of data those organizations should become government offices.

VICTIMIZATION OF THE WOMEN BY SEXUAL HARASSMENT AT WORKPLACE

Ms. Dichen Bhutia [132]

Abstract

This research paper aspires to study about the "Victimizations of the Women by Sexual Harassment at Workplace . Sexual harassment of the women at workplace is a common affair. As rightly said by Late Chief Justice VS Verma in Vishaka V State of Rajasthan "The meaning and the content of the fundamental rights guaranteed in the constitution of India are sufficient amplitudes to encompass all facets of gender equality"[133]*. Likewise this research paper aspires to study the "Victimizations of the Women by Sexual Harassment at Workplace as to how a safe workplace is women 's legitimate legal right . Sexual harassment of women in workplace is a common affairs nowadays .All over the universe, females are being harassed sexually verbally or physically in their workplace. The scale of problem is huge. The Internal Complaint Committee which was established under the POSH ACT 2013 with the view that women do not have to daunt under this Criminal Justice System to get justice. The Question here is how efficiently this mechanism is working.? Despite these measures the problem still subsists. The inability of the women to approach the IC power dynamics that exist between the respondent and the aggrieved person makes the situation more grave .Therefore this research paper delves into analyzing the widespread menace of sexual harassment of women at workplace and to see how restorative justice model help curb the menace.*

Keywords: *Sexual harassment, POSH Act 2013, Internal Complaint committee, Restorative justice model.*

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[133] Handbook on Sexual Harassment of women at workplace (Prevention ,Prohibition and Redressal) Act 2013 , Government of India ,Ministry of women and Child Development Nov 2015.

1. INTRODUCTION

"There is no chance of a welfare state unless the condition of the women is improved, because it is not possible for a bird to fly on one wing "[134]

'Swami Vivekananda'.

In India, the Supreme Court landmark decision of Vishaka V State of Rajasthan[135] laid the foundation for the Sexual harassment laws in India. In the year 1992, Bhanwari Devi a social and child rights activist appointed by Rajasthan's Government Rural Development Programme when she was campaigning against child marriage in her village she was gang raped by a group of 5 men. The Vishaka Guidelines demanded that the word 'Sexual Harassment 'needs to be defined. With this India taking into account the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) General Recommendation 19 defined sexual harassment as -Reaching out and making physical contact: A request for or demand of sexual favors, Comments with a sexual undertone, displaying explicit content, anything more unwanted that is sexual in nature, whether it be verbal, physical, or nonverbal, any sexual activity that the victim engages in that is specifically connected to their job or career, that could be degrading to the female, any sexual activity that puts a woman's health and safety at risk. Sexual harassment includes both the establishment of an antagonistic work climate and unwelcome sexual advances or requests. With this initiation, India also came up with laws that specifically protect women against the menace of sexual harassment at the workplace i.e. The Sexual Harassment of the Women at Workplace Act of 2013. The POSH ACT OF 2013 requires the institution or an organization to form an Internal Complaint committee so that women can file a complaint when faced with such unwanted conduct from their male counterparts. But to what extent does this institution /organization have the data of the harassment complaint?

Sexual Harassment of a woman at the workplace is one of the impediments towards women's proper growth and development[136]. It is the violation of women's Right to development, Right to life , liberty, and Right to nondiscrimination enshrined under different statues, thereby hampering

[134]Safety and Health at Work ;A Study of cases of Sexual Harassment at Workplace in Kosovo in the Public and Private Sector, available at http//.www.unwomen.org.

[135] Vishaka V State of Rajasthan AIR 1997 SC 3011.

[136] U.S Equal Employment Oppurtunity Commission ,*Sexual harassment in our Nations's Workplaces*, available at https://www.eeoc.gov/data/sexual-harassment-our-nations-workplaces.

the overall growth of women. With the advent of globalization the world is changing and entering into the era of the global community women are stepping forward and making progress. But the world is not fair as it looks from the outside. Women have to go through lots of suffering in life, and Sexual Harassment is one of them.[137] This violence against women should be taken not as a private wrong rather it is a form of discrimination and gender inequality that persists in this present day world.

The journey for the Protection of victims of workplace Sexual Harassment evolved as an outcome of the brutal gang rape of a rural development social worker Banwari Devi in front of her husband when she was fighting for the cause to stop child marriage. Patriarchy and gender stereotyping which is not uncommon in India that let the men folks superiority complex to come into play .The violence against women happening on a day to day basis is the expression of male dominance over the depressed women. Sexual violence in most of the cases are not only done for the sexual gratification rather it is often being used as a tool to keep the women under constant fear . As the result of this gang rape ,the guidelines have been developed by the Supreme court in 1997 , so called as 'The Vishakha Guidelines ' that mandated all the private and the public organization to developed a framework and policies to curb the menace of sexual harassment and to provide women safer and the compatible environment for work. .After 16 years which of this framework a special legislation known as the Sexual Harassment of Women at Workplace (Prevention and Prohibition)Act of 2013 came into existence.[138]There are other numerous legislation that guarantees a check on women sexual harassment such as the various constitutional safeguards provided under the Constitution, Indian Penal Code , Indecent Representation of a women (Prohibition)Act 1987, Factories Act 1948 CEDAW (Convention on Elimination of Discrimination of Women) and so on but the problem is how they are be implemented .Cultural bar ,Stigmatization and taking it casually often stop women to speak against it .With this background, this research work attempts to study the current criminal justice system whether it provides adequate Protection to the victims of sexual Harassment at the workplace and how well they are implemented and to show if the Restorative Justice Model would help to overturn the

[137] Anushul Agrawal ,*Sexual Harassment of Women at Workplace in India*, LEGAL SERVICE http ://www.legal serviceindia.com>Sexual_harassment_workplace//[last visited on 15.01.2023].

[138] Sexual Harassment of women at workplace(Prevention, Prohibition and Redressal Act 2013) available at http://www.indian.nic.in

problem of the Sexual harassment .In a country like India where a women are treated in par with the goddesses the violence that they faced on a every day basis is disheartening. With the advent of Globalization, India is advancing rapidly in all spheres of life and women also started working hand in hand with their male counterpart, but the situation of a women at workplace is a dismal. Harassment that have to go through at workplace creates an unfavorable environment for a woman, that demoralize women and hinder the overall development of a woman. Part III of the Constitution of India under Art 14,15,21,19 assured that all citizens to have equality without any classification and discrimination , but even after more than decades of the existence of the fundamental Right, the condition of women is stagnant. They are constantly being deprived of the basic equal social and economic equality status and opportunities . The NCRB data on reported cases of women sexual Harassment at the work premises /office is on a hike, but the NCRB data don't tell us the full story; there are many multitudes of cases that went unreported because of various reasons, be it the fear of losing the jobs, fear of taunt and humiliation, lack of supports from others disbelief in the Criminal Justice System and so on.

1.1 Introduction To the Subject Matter : Definition and Meaning

The United States of America, for the first time, discovered the word "Sexual Harassment "in its legal sense. In India, the term 'sexual harassment ' has been expressed in the Judgments delivered on the Vishakha V State of Rajasthan[139] in 1997 Supreme court for the first time defines the term Sexual Harassment as any inappropriate or unprofessional attitude ,asking or requesting any sexual favors ,making sexually unsuitable remarks , showing pornography , or any other unwelcome Physical ,verbal ,non-verbal conduct of a sexual nature and any allurement of preferential treatment in the premises of the office combined with an act of touching ,criticizing ,cracking jokes will be considered as sexual harassment.

The General Recommendation no 19 of the United Nations Committee on Elimination of Discrimination of women (CEDAW) to which India is the party to it defined Sexual Harassment as 'sexual Harassment' includes such sexually determined behavior as physical touching and advances, sexually colored remarks, showing pornography sexual favors whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is

[139] Vishakha v State of Rajasthan, AIR 1997 SC 3011.

discriminatory when a woman has reasonable grounds to believe that her objection would disadvantage her regarding her employment, including appointment or promotion, or when it creates a holistic environment.

Sexual Harassment at Workplace has been categorized into different categories the relevant among them is:

- Quid Pro Quo: which can be understood as something in return, if you do this I will do that . Its a form of consideration. For example granting promotion /preferential treatment if the women got sexually involved with the respondent or any detrimental threat /blackmailing if she did not cooperate sexually with the respondent.
- Hostile Work Environment:- which means creating an environment which makes women feel awkward like cracking dirty jokes ,Humiliating ,criticizing ,stalking , that have an effect of detoriating her health.[140]

1.2 Existing Laws on The Sexual Harassment of a Women At Workplace In India

Vishakha Guidelines[141] first landmark judgement that sets the guidelines that needs to followed by the organization having more than 10 employees .It sets the roadmap for preventing and redressing of the complaints of a women who are sexually harassed at the workplace as a duty of the employer who appoints them .Developed by the Supreme Court in the year 1997 after the infamous case of Bhanwari Devi, a sathin of Rajasthan who was working as a social worker of the Government against curbing the menace of child marriage in the village. At the time when she was engaged on the on the issues concerning child marriage and to stop the child marriage of a 9 months old child , in which the influential gujaras of the village was also involved She was brutally gang-raped in front of her husband from which we can get an outlook as to how sexual violence has been used by the male to keep the women under their dominance .Workplace sexual harassment is not only a misconduct but its form of gender inequality that needs to accessed.

The Supreme court after the Vishaka Judgement, applies the guidelines in "*Apparel Export Council*

[140] Govt of India ,"Handbook on Sexual Harassment [Prevention ,prohibition Redressal]Act 2013",nov 2019
[141] Vishaka and Ors. v. State of Rajasthan & Ors., AIR 1997 SC 3011.

v A.K Chopra [142] held that sexual Harassment is a type of gender discrimination and upholds the discharge of the higher officer of the Delhi based apparel Export support council who was found blameworthy of sexually harassing a lower women employee .In this case the S.C. expanded as to what amounts to sexual Harassment and held that physical contact it is not necessary to constitute a sexual harassment.

In another case *Medha Kotwal Lee& others V Union of India &Others*[143] where a letter written on behalf of the NGO Dr. Medha Katwal of Alochana have highlighted the issues that in number of cases stating that the Vishakha Guidelines has not being implemented in the manner it was supposed to be implemented .Transfer the letter into writ petition and the S.C. took cognizance of the matter and undertook to have a watch on the performance of the Vishakha guidelines across the nation .At last Supreme Court asserts that incase of the non-performance of the Vishakha guidelines , it would be open for the corned worker to moves towards the concerned courts .[144]

The Vishakha Guidelines that was developed in the scarcity of the laws in India which later on after 16 years enacted the legislation for redressing the issues , the [Sexual Harassment of the Women at Workplace [Prevention ,Prohibition and Redressal]Act 2013 POSH to give effect to Art 11 of the UN Assembly Convention on Elimination of all form of Discrimination against Women [CEDAW].The prime purpose of this Act is to provide an environment that is safe and healthy for women without taking into consideration the age /employment status of a women.

1.3 Victimization Of the Women by Sexual Harassment at *the* Workplace

In the U.N. Fourth World Conference on Women held in Beijing in 1995 observed that violence against women is one of the evils that persist in the Society under which women are being subjected to the subordinate position as compared to men and also adopted a plan for action and strategies and action to be taken and also to contain the provision of the sexual Harassment at workplace.[145] In a place where women are being treated like goddesses, Sexual Harassment is also

[142]Apparel Export Council v A.K Chopra ,AIR 1999 SC 625.
[143] Medha Kotwal Lee& others V Union of India &Others, 2013 1 SCC 297.
[144] Prof. Dr. D .Ramakrishna ,"*Victimization of the Women by Sexual Harassment at Workplace in India :An Overview* ,JOURNAL OF XI AN UNIVERSITY OF ARCHITECTURE & TECHNOLOGY ,also available at ISSN No .1006-7930.
[145]UN .Fourth World Conference on Women Rights are human rights (2014) ISBN 978 -92-1-154206-

prevalent in such Society. Sexual Harassment at the workplace is also a kind of violence against women in which victims suffer a trauma that has the effect of hampering the overall growth of the victims.

1.3.1 Definition of a Victims:

The Phrase “Victims of Crime “ is defined under Article 1 and 2 of the U.N. General Assembly Declaration of the" Basic Principles of Justice for the Victims and abuse of Power "adopted in November 1985 .Victims according to Article 1 means those who individually or collectively, have suffered harm such as physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omission that violate the criminal laws operative within the member states including those prescribing criminal abuse of power.[146]

Article 2: Under this Declaration, a person may be considered a victim regardless of whether the accused is identified apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.[147]

1.3.2 Reporting Behaviors of the Victims:

Sexual Harassment is a kind of violence against women. There is a natural tendency for women to keep silent when it comes to reporting cases. There are multiple reasons, first and the prime cause is the general culture of secrecy when it comes to reporting others be it social stigma of questioning the women's character , fear of losing the job, humiliation to the victims, lack of support from others, disbelief in the criminal justice system and they do not want to report to the police and the court ." "jus ignore" is what is the standard response women get when they shared their experience of sexual Harassment. Because of these multiple reasons, women do not report the cases to the authority, which gives impetus to harasser to harass more. A study that was conducted in [2015-16] by the National Family health Survey reported that only 0.9 % of the cases are reported .

According to the survey done by the NCRB data in 2014, when it for the first time started collecting the data on sexual Harassment it was only 54 cases which increased in 2016 with 119

[146] Definition of the victim of Crime ,UN Declaration of Basic Principle of Justice for the Victims of Crime and Abuse of Power (1985) ,Article 1 & 2.
[147] *Ibid.*

cases followed by 530 in 2017 , 570 in 2018, 970 in 2019 (Aakarsh Saluja)[148]and 438 in the year 2020.

These reports confirmed that women are reporting the cases of sexual Harassment. But these are only the dark figures of the crime. There are end issues that women do not report at all, and even if they say the crime, they do not get justice, or the judge has been delayed or denied. Many victims of Harassment often do not report because they see no light at the end of the tunnel. Several reports have mentioned that most of the workplaces have not set up the Internal Complaint Committee (ICC) to deal with the issue of workplace harassment. And the places where the ICC exists, the members of the Committee are not well aware and trained in the ICC.[149]This is due to the unequal distribution of the power relation between men and women. Deep-rooted patriarchal culture and attitude of the Society are often considered to be the factor responsible for the Harassment being done in the workplace because the men often have a thought that the working men are the threat to them and cannot digest the fact that women being termed as the breadwinner of the home. The report of the study conducted during the year 2015 on "Fostering Safe Workplace by FICCI showed that 36% of the Companies in India have not yet set up the ICC[150]The result also showed that one in every three women are being sexually harassed, and 71% of the women they do not report [151]. Another reason for the non-reporting is that the ICC, which is supposed to be the Independent body, is the toy in the hand of the mighty bosses.

Many women are not even aware of what constitutes sexual Harassment because of the lack of awareness among the women .So the proper training programme and awareness campaign needs to be set up so that the women do not feel helpless and can boldly take a step against the ongoing Harassment against them.

Gender also plays a significant role in the Harassment of women at the workplace because men often consider a specific behavior to be normal and thinks that was a joke which may not be

[148] Aakarsh Saluja ,Mudit Gosain and Pranav Mahajhan *,"Prevention of Sexual Harassment of a women at workplace (POSH ACT 2013)* ,SUPREMO AMICUS,VOL 21,also available at www.supremoamicus.org ISSN-2456-9704.
[149] Shayani Sarkar," Why does Underreporting of Sexual Harassment continue to prevail in the workplace in the 21stCentury", Jindal School of Government and Public Policy.
[150] Charcha Mishra ,*Prevention of Sexual Harassment of a women at workplace (POSH ACT 2013)* BUSINESS STANDARD "http;//www.businessstandard-.com/aricle/current affairs , -70 %working-women/do/not/report/sexual/harassment]
[151] *Ibid.*

appropriate or be considered to be suitable for the women. Even after world by achieving the heights of success, women are still considered to be lesser than women.

1.4 National & International Obligation on Combating " Sexual Harassment Of Women at Workplace in India

1.4.1 Constitutional Safeguards:

To fulfill the legal obligation, India has enacted legislation in order to address the problems of Sexual Harassment of a woman at the workplace. PART III of the Indian Constitution provides the human basic Fundamental Rights without which a true self could not be realized. Numerous provisions in the constitution guarantee equality being the prime factor for the fundamental development of the individual and sexual harassment Act as a deterrent for the enjoyment of such rights.

ARTICLE 14[152] guarantees that all the citizens should be granted equal rights and opportunities without any discrimination of their caste creed, sex, color, and place of birth in every sphere of life, and even after the existence of this fundamental right women are still deprived of the basic socio-economic and political justice as well as the inequality in the status and opportunity. Discrimination based on sex still exists in Indian Society more specifically the Sexual Harassment at workplace is a form of Discrimination that provide inequality between the sex.

ARTICLE 19[153] of the Constitution provides every individual the Right to practice any profession or to carry on any occupation ,trade, or business enshrined in art 19 (1)(g). Everyone is entitled to carry on any profession, and it is a fundamental right to participate in public employment, and this Right is deprived in the process of sexual Harassment.

ARTICLE 21[154] which guarantees everyone the Right to life and personal liberty by the law and sexual Harassment is the violation of the women basic Right. As we know, the Right to work is based upon providing safer working conditions for the women at the workplace. Only then the

[152] INDIA CONST, art 14.
[153] INDIA CONST, art.19 (1) (g).
[154] INDIA CONST, art.15,21,51,253.

rights provided under the constitution would have real meaning.

ARTICLE 15[155] prohibits Discrimination on the basis of the caste ,creed ,sex ,religion and place of birth, and 16 prohibits Discrimination in the matter of appointment in public employment.

ARTICLE 51: The State shall endevour to foster respect for the international law and treaty obligations.

ARTICLE 253:-The Parliament has the power to give effect to the international agreements or decision made at the international conference .

1.4.2 Indian Penal Code 1860:

Section 209: that deals with the obscene acts and songs and lays down anyone who in order to annoyance to other a) does any act in public or b) recites or utters any obscene songs bailed or word in or near any public space shall be punished for either description for the term which may be extended to 3 months or with fine or both.[156]

Section 329[157]: provides of assault or criminal force on any woman with the intent to outrage her modesty.

Section 329A [158]: The Criminal Law Amendment Act 2013 inserted this section, which recognizes and clearly defines sexual harassment and provides punishment for the offense related to it.Section 329 B : Any person who disrobes with the use of force .It also broadened the scope of the Sexual Harassment.

Section 329C; Any man who view or takes the image of the women engaged in a private act in circumstances where she would normally expect of not being observed either by the perpetrator or by any person at the behest of the perpetrator ,or disseminates such image ,guilty of voyeurism.[159]

Section 329D (Stalking): -Any man is said to commit the offence or stalking when he, 1. Follows

[155] INDIA CONST. ART. 15.
[156] .Indian Penal Code, 1860, Section 209
[157] Indian Penal Code, 1860, Section 329A
[158] Indian Penal Code, 1860, Section 329 Section 329 B, Section 329 C, Section 329 D
[159] Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India).

a woman and contacts or attempts to contact such a woman or foster personal interaction repeatedly despite a clear indication of disinterest by such women or it monitors the use by a woman on internet, email, or any other form of electronic communication. 2. watches or spies a woman to foster a relationship in any manner that results in fear of the violence or serious alarm or distress in the mind of such women.

Section 509: deals with the word, gestures, or acts intended to insult the modesty of a woman.

1.4.3 Global Initiative:

Resolution 48/104 of the United Nation General Assembly on the Declaration of the Elimination of the Violence Against Women defines 'a Violence against women to include the sexual Harassment which is forbidden at work, in educational Institution and elsewhere. Article (2b) and stimulate the establishment of penal, civil or other administrative sanction as well as preventive approaches to end violence against women.[160]

- The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) directs the State to take measures to eliminate Discrimination against women in all the fields, specifically to provide equality under the law, in governance and politics the workplace, education, healthcare and in other areas of Public and Social life.[161]
- PARA 178 OF THE BEIJING PLATFORM FOR ACTION: recognize sexual Harassment as a form of violence against women as a form of Discrimination and also call for multiple actors, including Government, employers, and civil Society, to ensure that Government enacts and enforce laws on sexual Harassment on that employers develop anti-harassment policies and prevention techniques.[162]
- Article 7 of the ICESCR guarantees right to fair condition of work also reflects that women not be subjected to the sexual Harassment at workplace which has the potential to obstructs the socio ,economic ,political status and opportunity. [163]

[160] United Nation General Assembly on the Declaration of the Elimination of VAW ,Resolution 48/104.
[161] Convention on Elimination of all forms of Discrimination Against Women (Art .7-16).
[162] Beijing Platform for action ,PARA 178.
[163] 1966 the United Nation General Assembly enacted the International Covenant on Economic, Social, and Cultural Rights (ICESCR).

- The International Labor Organization Committee (ILO)of experts on the Application of Convention and Recommendation has been confirmed that Sexual Harassment is constitute sex discrimination covered by the Discrimination (employment& occupation) Convention (no 111) of 1958.The ILO's Indigenous and tribal people convention (no 169) also specifically prohibits sexual Harassment in the workplace.

1.5 An Analysis of The Implementation of The Sexual Harassment of A Women at Workplace (Prevention And Prohibition) Act, 2013

The POSH Act is the epitome of success for the India's progress towards creating a environment safer for the women. Sexual harassment is fraught with intricate power dynamics that frequently silence women. So, this existing mechanism are there to overturn this power imbalance between the man and the women. We live in a society that is subjugated by the male and often our justice system take workplace harassment as merely a misconduct which is not supposed to be taken seriously. These issues are often tend to be viewed as a personal matters. There is a dire need to reevaluate this concept not as a private matter rather ,as structural inequality having its root in gender discrimination. After the Vishakha Judgement, when a Dalit woman was raped at her workplace, SC explicitly recognized that this issues should be dealt by the Internal committee within the organization so that women do not to cross through the barrier of the Criminal Justice System. As the outcome of this verdict, guidelines were issued to formulate the IC to adjudicate this charges. To enact this guidelines POSH ACT 2013 come into existence .This Act basically provides Protection to every woman irrespective of age or employment status. All the women working on a temporary basis, permanent or daily, are under one umbrella of the act. The Act provided for setting up the Internal Complaint Committee (ICC) in the company consisting of more than ten employees. It also necessitates the employer to set up the Internal Committee at each office or branch of an organization employing more than ten employees and to redress the problem of Sexual Harassment at the workplace. The Act also imposes a fine if there is a failure to constitute the internal committee ICC. (2019)[164]Despite of the legislative reforms our system failed to create a appropriate working condition for the women force .The structural inequalities that exists make

[164] Nithin Desai & Associates ," *Prevention of Sexual Harassment on Workplace (POSH) LEGAL AND HR CONSIDERATON* ,Dec 2020.

this Internal Complaint Committee inaccessible for the women.[165]

1.5.1 Challenges of the Posh Act 2013:

The Internal Complaint Committee was established under the POSH ACT 2013 with the view that women do not have to daunt under this Criminal Justice System to get justice. The Question here is how efficiently this mechanism is working. Despite these measures the problem still subsists. The inability of the women to approach the IC is because of the power dynamics that exist between the respondent and the aggrieved person. Yet the ink has not dried yet to remember the recent case of the *harassment at the workplace of an intern of the National University of Juridical Sciences who alleges that Supreme Court judge A.K Ganguly harassed her while she was interning at his chamber*. On being asked about the reason for such hesitation to complain she replied by saying that she did not think that it would be right for her to complain because of the position the harasser held. A.K Ganguly was the Sitting judge of SC at that point in time. But her inner voice compelled her to complain after which in 17th July 2013 Supreme Court ordered establishing a committee to probe sexual harassment in the court premises after some women lawyers moved to the court citing this case. Another case was when Chief Justice Ranjan Gogoi was accused of sexually harassing a women. It is one of the examples of how the redressal mechanism is insufficient in curbing this menace when the cases are involved in the face of the big power gap between the respondent and the aggrieved party. In 2000, a survey was done in the USA to determine why they do not report they underlined the four main reasons first one being the fear of being exposed, followed by the embarrassment and aftermath effects of the complaint third, they don't want to hurt the harasser, lastly, they know that inquiry process is faulty and they know that they will not get justice.[166] The of data available is very scanty to know how this IC is working. No consolidated data is available to know the harassment of women in the workplace. The data are published in a scattered way. According to India 95% of women work in the informal sectors which is a paradoxical factor of hindering the complaints. It is difficult for them to use the legal process to report such incidents to the Local Complaint Committee. The IC they cannot address the menace for the women working

[165] Sharvari Kothawade ,*Sexual harassment at workplace :what kind of change do Internal committee need*? ,EPW ,ISSN (ONLINE) 2324-8846.
[166] *Ibid.*

in the informal sector and most of the cases go unreported. The inquiry methods often tend to act as a barrier for the women who wants to complain. As the Act and the Rules provided therein gives a few guidelines as to how the inquiry is to be conducted it also provided that it should be done with regards to the principle of natural justice. The need is to revised the ways that IC are dealing with the cases. The restorative justice model should be adopted by the IC, which aims to provide a suitable working condition for women. This model focuses on the rehabilitation of both the respondent and the offender in the society. It must be take into account that women do not hesitate to complaint the issues because of the fear that she might get retaliated after complaining.[167]

1.6 What Statistics has to Say

According to the survey done by the NCRB in the year 2014, when it for the first time started collecting data on sexual Harassment at the workplace. The data shows that it was only 54 cases that was instituted which later on increased to 116 cases in the year 2016 followed by 530 in 2017, 570 in 2018, 970 in 2019 (Aakarsh Saluja)[168]and 438 in the year 2020. [169].These data are nothing but a mark of the prevalent problem of sexual harassment of women at the workplace. [170]The National Commission for women has shown a staggering reality about the notable increase in sexual harassment cases over the past few years. In the year 2019 a total number of 894 cases has been reported against sexual harassment and as of 2020,741 cases have been documented. [171]The sexual harassment of the women at workplace has been increasingly reported over the last few years. If we take the data from 2019-2023 the State of UP has top the list with 2069 cases reported, followed by Delhi with 422, Madhya Pradesh [242], Maharashtra [231] , Haryana [199], Bihar [188], Rajasthan [173] ,Karnataka [163] ,and West Bengal with [136] cases.[172]

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[167] Sharvari Kothawade ,Sexual harassment at workplace :what kind of change do Internal committee need? ,EPW ,ISSN (ONLINE) 2324-88469 ,available at http://www.Prevention of Sexual Harassment of a women at workplace/EPW/2023/what kind of change do Internal committee need.

[168] See, Aakarsh Saluja ,Mudit Gosain and Pranav Mahajhan ,*Prevention of Sexual Harassment of a women at workplace (POSH ACT 2013)* ,SUPREMO AMICUS,VOL 21,also available at www.supremoamicus.org ISSN-2456-9704.

[169] NCRB DATA 2014,2015,2016,2017,2018,2019,2020.available at http://www.ncrb.gov.in/en/search/sexualharassmentatworkplace/20%.

[170] Ankita Tiwari Women Safety Crisis ,Rise in the sexual harassment ,assault complaints in India ,available at http://www.indiatoday.in/diu/story/womens-safety-crisis-rise-in-sexual-harassment-assualt-complaints-india2384074-2023-21.

[171] National Commission for women , Sexual harassment of women at workplace ,available at http://www.ncw.nic.in.

[172] *Ibid*

1.7 Restorative Model of Justice: As A Measure of Delivering Justice

Restorative model as the names suggests to 'bring back 'the women in the condition which she was before the victimization. Sexual harassment is the kind of violence based on the gender discrimination. The reason we need this model is because our Criminal Justice System do not provide adequate safeguards to the aggrieved women facing the abuse. As the victim in most of the cases do not report at all and even if they report they have to face with the detrimental consequences like the humiliation if the enquiry system does not work and retaliation . This is just an alternative methods or a parallel methods that emphasizes on the idea of communication and mediation curb the problem. The procedure used by the IC needs to be checked in order to lower the hurdle that shuts the voice of the victim. The feminist techniques of due process to be used so that this techniques will ease the fear of the women to approach the IC. Restorative model should be adopted with the focuses on restoring or reintegrating both the victims and the respondent in the society and many a times we have seen this model to be successful .This model particularly focuses on the victims ,Offender and the community at large by bringing the productive conversation between the aggrieved party and the respondent so that the problem is solved .[173]

However this paradigm should not be taken only as a mediation oriented where parties negotiate to solve the issue .This pattern can be used by taking the harsher techniques with the prime goal of effective restoration .The value of this paradigm comes with the purpose of reforming of respondent and on the basis of their consequences the punishment should be taken as the restorative measures. The Restorative model is usually victim centered which can be advantageous for both the parties of the cases. Restorative approach should be integrated in the Workplace & can take the restorative way of delivering justice to the victim .The workplace can provide the option for the employees to complaint the harassment and focuses more on the reparation rather than punitive measure [174]

[173] P. Chaudhari, *Sexual Harassment at workplace: Experience of the Complaint Committee*, EPW, VOL 43 no 172008available at http://www.*Prevention of Sexual Harassment of a women at workplace/EPW/2023.*
[174] *Ibid* .

2. CONCLUSION

Sexual Harassment constitutes one of the evils of modern day society for the over all growth of the women. The Patriarchal mindset of the Society that take women just as object which should be under them this mind set cannot see women being working in par with the men even better then those of the men; they think of it as a fear of losing their job. After coming into existence, the Vishakha Guidelines provided specific steps to follow by the organization to have a look that no women are being subjected to any kinds of violence while working. After almost 16 years of the passing of the Vishakha Guidelines, the Parliament enacted the POSH ACT 2013 as a step to do away with workplace harassment of women. It mandated setting up the Internal Committee for every organization having more than ten employees and also provided for the implication of the fine if they fail to take the measures. But even after the passing of the Act, there is a number of cases that women do not report at instances because of multiple reasons like the social stigma, fear of losing their job, lack of support, and so on. Also, the positive step initiated by the Government cannot be forgotten, the "She Box," which allows the women victims to file the complaint online in this platform. Later on, after assessment, the WCD will forward it to the I.C.But this She box is only benefitting those women who are working in the good facilities for others the situation is the same .

There are several cases that women do not report because lots of surveys have found that there are several companies/organization that still do not have the ICC, and in the companies where there exists the ICC, the members of the ICC are either not well trained or are aware of their work. So the need of an hour is to create awareness program, training are to be conducted in the organization so that women do not feel left out or their problems are not being heard off. The restorative justice to be adopted which focuses on the rehabilitation of the victim and the offender. Gender sensitization is needed so that the power relation between men and women should be equal, and gender stereotyping should not act as the hurdle for the development of women.

THE NATIONAL GREEN TRIBUNAL OF INDIA AND ITS ADOPTION OF THE "POLLUTERS PAY PRINCIPAL."

Mr. Monish Cheriyadth Purushotham[175]

Abstract

The Indian legislature and the Government of India adopted the National Green Tribunal Act (NGT ACT) 2010. Its primary goals were environmental preservation and conservation, and it dealt with instances involving water and air pollution, deforestation, waste management, and other related environmental concerns. The National Green Tribunal took an enormous leap by introducing the Polluters Pay Principle (PPP), which primarily assists the government in holding individuals, businesses, and other entities accountable for their actions that contribute to environmental degradation and motivates people and organizations to adopt sustainable, safe practices. In the Supreme Court Judgement of Indian Council for Enviro-legal Actions v. Union of India, the Supreme Court acknowledged that PPP was a crucial component of sustainable development and a remedy for the harm caused to society by environmental degradation. This article first draws theoretical insights on the fundamental ideas behind and practical applications of the PPP model and, secondly, discusses how the NGT determines compensation for lawbreakers. Thirdly, I want to examine the NGT's justification for using the PPP. I want to emphasize the overall uncertainty in India's concept and implementation of the PPP in this study.

Keywords: *National Green Tribunal, Polluter Pay Principle, Environmental Degradation.*

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1. INTRODUCTION

One of the main concepts in environmental economics and policy is the "Polluter Pays Principle." It means that the person who produced it should bear the cost of clearing or reducing the pollution or ecological damage. Essentially, it shifts the cost of fixing rot from society or taxpayers to the polluter. Two of the primary keys of the PPP model are the Environmental Impact Assessment (EIA) and Extended Producer Responsibility (EPR). The EIA is a notion that is sometimes put into practice via procedures like Environmental Impact Assessments (EIAs), where project proponents are expected to evaluate the possible environmental effects of their actions and create measures to mitigate them. Usually, the project proponent is responsible for paying for these analyses and mitigating measures. The Programs known as Extended Producer Responsibility (EPR) compel producers to assume liability for every stage of a product's lifespan, including recycling and disposal. Holding manufacturers financially accountable for the environmental effect of their goods is consistent with the Polluter Pays Principle. The idea is to provide polluters with financial incentives to lessen their negative environmental impact. Polluters are more willing to invest in cleaner technology and practices when they know they will be held accountable for their conduct. The definition of pollution and identifying one or more polluters are prerequisites for implementing PPP. The purpose of "pollution" in three critical Indian legislation on pollution (The Environment Protection Act, 1986) [176].

The polluter pays principle is crucial for encouraging environmental sustainability and deterring pollution. The strength of environmental rules and enforcement mechanisms may impact how well it is implemented and enforced across jurisdictions.

1.1 HISTORICAL CONTEXT OF THE POLLUTERS PAY PRINCIPLE

“Our Common Future,” a report released by the World Commission on Environment and Degradation, reported that a company may internalize the expense of restoring the environment. The polluters would be paying the cost of polluting the environment directly and not assigned to any third-party agency; that is the meaning of Internationalization which is being refereed in the PPP. According to the article, the company would be urged to spend money on implementing preventative, restorative, and compensating actions. The "Polluter Pays Principle" (PPP) idea first

[176] The Environment Protection Act, 1986, S. 2(c), No. 29, Acts of Parliament, 1986 (India).

appeared in environmental economics and policy. The environmental deterioration and pollution that occurred due to the industrialization and urbanization processes of the 19th and 20th centuries gave rise to it. The United Nations Conference on the Human Environment, which took place in Stockholm in 1972, significantly impacted the development of international environmental standards. The United Nations Conference on the Human Environment's Declaration emphasized the need to avoid environmental harm and urged for the implementation of the Polluter Pays Principle. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal and the Aarhus Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters both include the Polluter Pays Principle as a core tenet.

In 1972, the polluters pay principle concept was first proposed and explained by the OECD or The Organization for Economic Cooperation and Development (OECD). According to this, the polluter is mainly responsible for limiting and preventing pollution caused by the factory's operations, and the pollutants released by the factories were formally acknowledged by The World Commission on Environment and Development as “waste,” which is harmful to both the environment and the lifeform. Hence, to prevent and avoid the spread of deleterious effluents and control the pollution issue, the "polluter pays principle" was implemented as a powerful economic, administrative, and legal weapon [177].

1.2 INDIA'S LEGAL PRINCIPLE OF PPP

The primary concept behind the application of the Polluters Pay Principle is based on the idea of cost internalization and cost of allocation. Simply put, the polluter was responsible for bearing the expense of the external and extra costs of producing the products and services rendered rather than the government or the public [178].

The Government of India formally recognized the concept of PPP in 2010 when the NGT Act/National Green Tribunal Act was introduced in 2010. The first instance in which the SC used PPP was in the Supreme Court judgment of the Indian Council for Enviro-Legal Action v. Union

[177] Problems of Environmental Economics. (1971). Record of the Seminar, held at Paris by the OECD June August1971.
[178] INDIA CONST. art. 35, 36, 37.

of India ("Bichhri")[179]. This lawsuit was primarily concerned with the detrimental impact of untreated wastewater and sludge on the environment by the chemical industry and manufacturers on the soil and water quality in Bichhri and the nearby villages in the Rajasthan state.

In Vellore Citizens' Forum v. Union of India and Ors., the Supreme Court then referenced the constitutional duty to preserve and enhance the environment [180], a lawsuit that argued that the PPP is an integral part of Indian domestic environmental law, contesting the tanneries' untreated effluent discharge into a neighboring river and land in the State of Tamil Nadu[181]. In addition, the Court saw PPP as an essential element of sustainable development and referenced customary international law[182]. The principle has been incorporated into India's internal environmental legislation, as seen by the court's citation of both cases in later rulings.

2010 the Indian legislature established a specialized legislative body called the National Green Tribunal, or the NGT Act 2010, to address the environmental dispute. In this instance, PPP received official legal backing. The NGT Act expressly states that the PPP concept would serve as the foundation for all orders, judgments, and awards made by the NGT. Relief, compensation, and restitution are payments to victims of pollution and environmental harm and compensation for property loss and environmental damage that the NGT may offer under this A ct[183]. Relief, compensation, and restitution are payments to victims of pollution and environmental harm and compensation for property loss and environmental damage that the NGT may offer under this Act[184].

How have the terms "pollution" and "polluter" been interpreted when using PPP are pertinent concerns relating to the lived experience of the concept. What techniques were used to calculate the amount of compensation? Whether the primary goal of PPP has been mostly reparative or punitive? What procedures have been implemented to guarantee that victims of environmental degradation or worthy persons get compensation? How has the money paid by the polluters been used for ecological restoration? The remainder of this essay critically examines and examines a

[179] Indian Council for Enviro-Legal Action v. Union of India, (1996) 3 SCC 212.
[180] Vellore Citizens' Forum v. Union of India and Ors., (1996) 5 SCC 647.
[181] INDIA CONST. art. 48-A & 51-A(g),
[182] *Ibid*
[183] The National Green Tribunal Act, 2010, No. 19, Acts of Parliament, 2010
[184] *Ibid*

few of these issues, considering instances that the NGT has determined.

2. A BETTER IMPLEMENTATION OF THE POLLUTERS PAY PRINCIPLE: A GREEN APPROACH

An approach to environmental policy known as the Polluter Pays Principle (PPP) seeks to hold the person who produces pollution accountable for the expenses associated with controlling it to protect human health and the environment. Even though the PPP is a well-acknowledged idea, its application may constantly be improved. The idea is to ensure that the business or the individual responsible internalizes the expenses for reducing environmental damage rather than allowing them to be externalized.

It is also essential to address health hazards to the general population caused by environmental pollution. The concept can significantly alter how profitable industries and businesses operate and compel them to adopt green practices. In this essay, I try to focus on the working procedure of the NGT and how the NGT uses the Polluter Pays Principle to evaluate environmental violations and set a charge for such acts. The cases address various concerns, including community injury, violations of pollution standards resulting from industrial operations, regulations for statutory clearances and permits that hurt the environment, violations of permits, violations of clearance rules, and other pollution-related issues.

The Tribunal uses the term "natural justice" to refer to procedural rights in English law-based legal frameworks; these requests stem from profound ideas, such as the law of "Audi Alterum Partem," which mandates that both parties to a dispute have a right to have the Court hear their case. Chapter Nineteen of the N.G.T. Act[185] clarifies that the N.G.T. disregards the C.P.C. principles and goes against natural justice requirements.

In the Supreme Court judgment of Jan Chetna v. Ministry of Environment and Forests, according to the Brundtland Report on Sustainable Development guiding principles, the NGT again emphasized the PPP as an essential element of Indian environmental legislation. According to the ruling, PPP was suitable and effective in areas covered by common environmental law, i.e., nation-states via domestic frameworks. Global law, on the other hand, had advanced to the point that local

[185] The National Green Tribunal Act, 2010, No. 19, Acts of Parliament, 2010 (India).

institutions were increasingly embracing it.

Furthermore, the matter that was brought before the NGT in the State of Himachal Pradesh v. P.N. Khatna case [186] was the noise and air pollution caused by a large number of vehicles entering the motorable roads near Shimla's Rohtang Pass glacier. The NGT broadened the scope of who should pay by levying a fee on each car to support the State Government's Green Tax Fund, rather than asking polluting businesses to pay. In addition, it eliminated the requirement for a precise assessment of harm and a compelling argument for damages by requiring a preemptive payment that reflected unavoidable injury rather than providing harm post-arbitration.

The NGT further refined the PPP in the case of water pollution in the Yamuna River. India's national capital area, Delhi, is located on the banks of the Yamuna River. According to an NGT ruling, each Delhi family must pay a minimum of Rs. 100 for environmental compensation. The amount is directly inversely related to the water bill or property tax the home settles. This causes PPP, beard by individuals, to be distorted in a stimulating environment. This program is similar to taxes but uses PPP to justify itself unjustly. As was previously said, there is no logical connection between pollution and the "payers" since this bending of the PPP makes individuals responsible for re-establishing the ecosystem.

The "Polluter Pays" concept may be put into action when someone is caught tossing or dumping trash, waste, including C & D waste, channeling effluent, or engaging in any other activity on railway property that damages the environment and causes pollution (of the air, water, and soil, for example). According to the Hon'ble Tribunal's judgment dated 18.03.15, compensation may be recovered in this case up to Rs. 5000[187].

3. FLAWS IN THE PPP

Although the Polluter Pays Principle is a cornerstone of environmental economics and policy, it has difficulties and detractors. It is accurate to say that the polluter pays approach helps to minimize pollution. Even while the system is still ineffective regarding historical contamination, it appears to be highly applicable to pollution that arises during industrial activity. The PPP,

[186] Sanjeev & Anr. v. State Of Himachal Pradesh, Criminal Appeal No.870 Of 2016.
[187] Sagar Kantilal Devre vs State of Maharashtra, NO.43 OF 2023 (WZ).

however, has not been embraced by the majority of poor countries as their main environmental policy direction. Some legal experts point out that this is the outcome of adverse economic conditions. Legal scholars have discovered few exceptions to this rule.

First, there is ambiguity in determining accountability, making it difficult to agree on who is the "polluter" and what constitutes pollution. Environmental issues can have several causes, making assigning blame and expenses reasonably tricky.

Second, many low-income families, unincorporated businesses, and subsistence farmers cannot pay increased electricity or trash disposal costs. Administrative effort, compliance expenses, and legal liabilities may make it difficult for firms to comply with environmental laws and demands to manage pollution. This sometimes serves to deter innovation, economic growth, and regulatory burden.

Third, formal small- and medium-sized businesses that primarily cater to domestic consumers have difficulty passing on additional expenses to those consumers.

Fourth, because of elastic demand, exporters in developing nations often cannot transfer the burden of cost internalization to overseas clients.

Lastly, The Polluter Pays Principle may be rendered ineffective as some polluters may dodge consequences or neglect their duties towards protecting the environment, a pattern which the tax enforcement has closely observed over the years.

Due to all of these issues, it is challenging for poor nations to use the PPP as a framework for environmental policy. Even though early environmentalists promoted the Polluter Pay Principle to lessen ecological damage, many today see it as a "vague idea.".[188] Some claim that the Polluter Pays Principle is satisfied when a polluter pays at least part of the administrative costs of the organizations that govern polluting operations. The finest illustration of this standard is the Exxon Valdez case.[189] Others claim that the issue can only be resolved if the polluters pay the total cost

[188]The International Institute for Sustainable Development (IISD), https://www.iisd.org/, (last visited June. 6, 2008).
[189]Shamseer Mambra, *The Complete Story of The Exxon Valdez Oil Spill*, *Marine* INSIGHTS,(Mar. 22, 2022) https://www.marineinsight.com/maritime-history/the-complete-story-of-the-exxon-valdez-oil-spill/.

of de-pollution. The remaining individuals agree that consumers of natural resources who contribute to atmospheric dangers should be subject to a fee (such as "Carbon Taxes")[190].

The Polluter Pays Principle is a valuable environmental economics and policy tool, notwithstanding these challenges. Many countries and organizations are still working to develop and modify it to address these problems and balance environmental preservation and commercial interests.

4. PPP AS A SANCTIONING MECHANISM

4.1 ENVIRONMENTAL RESTORATION AND RESTITUTION

The tribunal decided that it was the obligation of the polluter to pay for the damages caused to the environment and not only pay for the fines but also to help restore the environment by developing sustainable environmental projects which not only a res integra, about the legal proposition," emphasizing that PPP is a fundamental component of sustainable development."[191]. When defining PPP's scope, the Green Tribunal pointed out that it included the cost of environmental repair and reparation. According to the paper, "restoration" refers to returning anything to its previous condition, including rebuilding a devastated environment. Simultaneously, "restitution" refers to providing an equal or suitable replacement for any hurt, damage, or loss [192]. In the following examples, I try to bring about the fact the NGT was not only up to the task of punishing those who broke the law and making sure the compensation is paid to those who were affected but also address one of the main questions of the definition pollution is, who is a polluter, and to whom the necessary compensation must be given to.

During the execution of a project by Mr. Naim Sharif Hasware v. M/s Das Offshore, an offshore engineering company, was mainly accused of causing damage to the environment by the destruction of the surrounding flora and fauna, especially the aquatic wildlife, It was not only damage to the environment, but there were also acquisitions of criminal offense like misbehavior with other companies and the public, illegally acquiring land for construction. The case was finally notified to the tribunal, but it was a bit too late as the project was near completion, and the damage

[190] Barrister Abu Hena Mostofa Kamal, "Polluter pays principle and its limitations", LSI.
[191] Hindustan Coca-Cola Beverages Pvt. Ltd. vs. West Bengal, AppealNo.10 of 2011 (PB).
[192] Ajay Kumar Negi vs. Union of India, Civil Writ Petition No. 8171 of 2011.

was already to the environment. It was decided that bringing down the infrastructure would cause substantial damage to the environment, and the company would incur heavy financial damages. so it was agreed by the NGT that it would be fair for the company to pay up a remuneration or fine, which was a penalty of INR 25 crores or approx. of 250 Million Dollars, which was directed to a mangrove plantation project and an additional INR 20 crores or approx. Of 200 million had to be paid to the State's Environment Department to improve the State's environment. [193]

In the Indian state of Uttara Pradesh, a sugar and distillery facility was accused of polluting the surface water and groundwater with toxic chronic waste and even ignored the State Pollution Control directives for remuneration restoration for the victims of the damaged environment, which was mainly to the surrounding water bodies like the Ganga river. The Green Tribunal directed the Companies Union to pay a total compensation of INR 5 crores or approx. of 50 Million dollars for causing damage to the environment directly or indirectly. The company was ordered to pay the fine within 30 days of passing the order to the Uttara Pradesh Pollution Control Board. The Green Tribunal stressed the reason that "such harsh directions and decisions are fully substantiated and are based on the Polluter Pays Principle"[194].

4.2 PPP AS A PREVENTIVE ACTION

The Green Tribunal has been using preventative measures, including taxes, charges, fees, and spot fines for non-industrial pollution like vehicle, construction, sewage, and plastic pollution. Additionally, the State authorities have been directed to create long-term policy measures to compel polluters to pay according to PPP.

It can be argued that the NGT has applied the concept of PPP, which entangles the polluters to make them accountable for the damage caused to the environment and is directly responsible for paying the remuneration to the victims and should abide the law by paying the fixed taxes, fines, etc. by the government for future inevitable polluting actions. In the case of Union of India & Ors. v. Vardhman Kaushik[195], the industry was responsible for being one of the polluters and causing serious health hazards which had a severe negative impact on the public health and decreased the ambient air quality in Delhi and the surrounding area. The NGT took note of the incident, and to

[193] Application No 15 (THC) / 2014.Dated Jan 1, 2014.
[194] Krishan Kant Singh Anr v.National Ganga River Basin &ors. Application No 299 of 2013.Dated Oct 16, 2014.
[195] Vardhman Kaushik v. Union of India & Ors, AIR 21 SC 2014.

encourage people to use public transport, the government of Delhi increased the toll price for all automobiles entering Delhi by an "environment compensation charge" in reaction to the "environmental emergency." In another incident to prevent and combat the Yamuna's water pollution in Delhi, the Tribunal forbade dumping Pooja offerings or any other material into the river, which the Tribunal considered as pollutants, except at the designated sites. The offender was fined Rs. 5,000. [196]

4.3 PPP AND INDIAN JUDICIARY

The "Polluter Pays Principle" has been upheld and strictly enforced by the Indian court in several environmental disputes throughout the years. Several rulings and court decisions have incorporated the idea that people who pollute or harm the environment should pay for their own acts into the Indian legal system. The verdict in writ petition no. 657 of 1995 by the Supreme Court of India shows that the Indian legal system recognizes the Polluter Pays Principle. [197].In February of 2005, it was declared by the Supreme Court that the "Polluter Pays Principle" shows that full responsibility for environmental harm includes paying damages to those harmed by pollution and the costs associated with halting the ecological decline. One component in the process of sustainable development is environmental rehabilitation.

- M.C. Mehta, an environmental activist, and Kamal Nath, who was the Chief Minister of the Indian state of Madhya Pradesh at the time, engaged in a landmark ecological court conflict in India that is known as the Supreme Court Judgement of "M.C. Mehta vs. Kamal Nath" case [198]. The lawsuit dealt with the problem of illicit mining in the Hoshangabad and Harda districts of the state and the ensuing environmental damage brought on by such mining operations. The mining activities allegedly broke several environmental laws and regulations, notably the Mines and Minerals Act of 1957 and the need for environmental impact assessments. The PIL addressed significant ecological issues, such as the impairment of riverbeds, the loss of productive agricultural land, and harm to local ecosystems due to unrestrained mineral and sand exploitation.

[196] Vardhman Kaushik v. Union of India &Ors, AIR 21 SC 2014.
[197] Indian Council for Enviro-Legal ... vs Union Of India And Ors. Etc, 1996 AIR 1446, 1996 SCC (3) 212.
[198] M. C. Mehta v. Kamal Nath, (1997) 1 SCC 363.

Because it emphasizes the function of public interest litigation in resolving environmental challenges in India, the case "M.C. Mehta vs. Kamal Nath" is notable. The judiciary's aggressive approach to implementing environmental laws and holding government officials responsible for their failure to stop unlawful mining and safeguard the environment is also highlighted. Considering the PPP as the supreme law in Kamalnath's case, the court ruled that [199].

- The "Vellore Citizens' Welfare Forum vs. Union of India [200] and Others" case, also known as the "Vellore Citizens' case," is a notable environmental lawsuit in India that greatly impacted how water bodies, especially rivers, were protected and restored after being contaminated. The court was primarily concerned with the contamination of the Palar River and the adverse effects of industrial effluents on the environment and the general public's health. The situation sparked concerns about how governments and businesses should work together to avoid and reduce environmental contamination. The case was critical in developing and establishing the "Polluter Pays Principle" in Indian ecological law. It emphasized that people accountable for causing environmental contamination should pay for cleaning up after themselves and minimizing the harm they do. In its decision from 1996, the Supreme Court of India issued several significant directions to remedy the contamination of the Palar River and stop future occurrences of this kind. Before release, industrial effluents must be treated in common effluent treatment plants (CETPs), according to the judgment. The Water (Prevention and Control of Pollution) Act of 1974 and the Environment (Protection) Act of 1986, among others, were asked for stringent execution by the court. It emphasized the responsibility of the state government and regulatory bodies to safeguard and restore the environment and make sure that businesses adhered to environmental standards.

  The Vellore citizens case established crucial legal precedents for India’s environmental protection. It created the polluter pays principle and emphasized how both businesses and the government had a duty to protect the environment. This case exemplified the judiciary’s

[199] *Ibid.*
[200] Vellore Citizens Welfare Forum v Union of India & Ors, 1996 5 SCR 241.

proactive approach to tackling environmental problems and holding polluters responsible for their conduct in India.

On the issue, there are several post-independence legislations. However, for our purposes, the Environment Protection Act of 1986, the Air Act of 1981 (Prevention and Control of Pollution-the Air Act), and the Water Act of 1974 (Prevention and Control of Pollution-the Water Act) are more relevant. These statutes supplement the constitutional responsibility to preserve and enhance the environment. According to the Water Act, the country's State Governments are responsible for establishing SPCB-State Pollution Control Boards. At the same time, the Central Government is responsible for verifying the CPCB-Central Pollution Control Board.

The relevant Governments have an impact on the Boards' functioning. Discharging hazardous chemicals into streams and wells is prohibited under the Water Act. It also restricts outlets and forbids the discharge of effluents without the Board's consent. One of the possible charges and penalties is a prison term. The government of India set up the Central Pollution Control Board, and the State Pollution Control Boards created under the Water Act are required under the Air Act to perform the tasks and use the authority specified in the Air Act. The Air Act states that the Board's primary duties are improving air quality and preventing, managing, and lowering air pollution nationally. The portions that follow in the judgment will address the Environment Act.

Given the above constitutional and legislative criteria, the precautionary principle and the polluter pays concept are contained in the nation's environmental policy. In India, adopting these concepts into local law is generally considered challenging if recognized as components of customary international law. It is an almost universally accepted legal principle that the rules of customary international law that do not conflict with municipal legislation are presumed to have been integrated into domestic law and are upheld by legal tribunals. For evidence, we might cite Justice H.R. Khanna's ruling in Additional District Magistrate of Jabalpur v. Shivakant Shukla[201], the cases of Jolly George Varghese[202] and Gramophone Company[203].

[201] ADM Jabalpur v. Shivkant Shukla, AIR 1976 SC 1207.
[202] Jolly George Verghese & Anr vs The Bank of Cochin, AIR 1980 470, 1980 SCR (2) 913.
[203] Gramophone Company Of India Ltd vs Birendra Bahadur Pandey & Ors, AIR 1984 667, 1984 SCR (2) 664.

5. RECOMMENDATIONS AND SUGGESTIONS

In the end, compensatory orders are necessary to fulfill the objectives of the "Polluters Pay principle." Not only must parties be held accountable for environmental and ecology damage, polluter companies must also be effectively deterred, and damaged communities must get justice. The National Green Tribunal may pursue and guarantee an efficient and appropriate process by evaluating compensation, carrying out awards, and averting potential harm. We have created recommendations for the NGT to abide by to more effectively accomplish the goals of the Polluter Pays Principle based on our examination of NGT cases. Here are some of the recommendations:

1. The NGT must explore the concept of arbitration before the NGT assures acceptable, satisfactory or environmental compensation. Even while it is vital to make the polluter pay, the punishment shouldn't only be in the form of a one-time payment or seem capricious. The Tribunal has sometimes shown awareness of the possibility of arbitrary application of the "Polluter Pays Principle." The bench A.S. presided over in 2012 was Naidu, the NGT's acting chairman. He had cautioned against enforcing the "Polluter Pays Principle" in a unilateral manner.
2. One possible strategy for deciding compensation would be consulting more people. The court should encourage parties to discuss a settlement price while maintaining exclusive control over the procedures to ensure that all parties get equal treatment and that due diligence is carried. If a settlement or remedy is not reached, the Tribunal will begin deliberating on the amount of compensation. On the other hand, when players are allowed to work out their own compromise agreements beforehand, better solutions emerge.
3. The NGT panel comprises skilled individuals as one of the Tribunal's founding objectives was to provide expert information for environmental disputes, often including scientific evaluation. Thus, an appropriate method has to be developed. Professionals with expertise in related fields are helpful at different stages of the compensation process. To begin with, experts such as law enforcement officials and police officers possess all the information and documentation required for conducting an environmental impact assessment, such as images, videos, testimonies, etc. Second, since they can consider emissions' whole and potential effect on people and ecosystems, scientists are more qualified to undertake risk assessments than legal experts. Thirdly, experts advocate using intricate statistical formulas

or economic evaluations to determine fair remuneration. Rarely has the Tribunal believed that a committee should be established to investigate a matter, assess the harm, and decide on possible sanctions? The National Green Tribunal may first want to create a commission to determine how the expert committee's recommendations must be implemented before an acceptable or environmental compensation is assessed. This will stop parties from perpetually delaying payment and ensure the penalty or bonus is appropriately given.

4. In several circumstances, general guidelines may be established as precedent due to the kind of issues the Tribunal often deals. When there is pollution, cleaning or overall pollution costs may be used to calculate the harm incurred and the amount to be paid. In the same way, the profit the organization makes from the violations should be considered when deciding on the appropriate penalty in situations of clearance breaches.
5. Even with technical criteria, it is impossible to calculate the penalty amount with any degree of accuracy; still, some judgment must be used. This decision should be made based on a numerical estimation. Most of the time, a method or an approximation may be used. It is possible to follow the NGT's knowledge and an approximated assessment with the assistance of other experts in relevant fields. Even if the damage or loss estimate is inaccurate, the main goal should be to provide a measurable estimate.

More proactive actions must be taken to achieve this aim and help people understand the benefits of a clean environment and the adverse effects of pollution.

6. CONCLUSION

The adoption of the PPP is considered an erratic practice by the public regarding how new of a commission the NGT was. On the other side, the legal definition of "pollution" was challenged, and the primary disagreement was over the fact that pollution was considered as a fact rather than pollution in the context of the law. In other cases, even though the NGT has not found any evidence of contamination, compensation has been ordered via PPP.

Deciding how much compensation to provide someone is another highly contested issue. Analyzing NGT decisions shows that expert panels are now used to evaluate the loss and remediation costs, replacing the previous purely speculative method of determining damages. In addition, the NGT has often opted for a different tactic to compel payment by outlining the

polluter's conduct. A way to do that was that the NGT devised a way to ensure policies encourage people to protect the environment as the NGT agreed to provide a 10% house/property tax rebate to those who followed the environmental requirements or enforced the policies to those who violate the law like implementing fine, spot penalties, etc.

Even while such an approach is applauded, it is up to the National Green Tribunal to determine the compensation; hence, a consistent system needs to be set up to determine the remuneration and reparation that needs to be paid to the victims harmed by the damage environment. The NGT's decision to assign experts, like giving the environment cases to an expert panel of judges for the compensation evaluation, is another improvement, as the primary purpose of the NGT's establishment was to allow specialist individuals in the area to bring their expertise in cross-disciplinary problems linked to the environment on board.

PPP seems to be used broadly and for a variety of objectives. Nonetheless, there is some question about its beneficial effects in repairing harm to people and their property and environmental rehabilitation. What PPP claims to have accomplished and what seems to be lacking appears to be a big difference.

THE BROKEN WINDOWS THEORY: EVALUATING THE SIGNIFICANCE OF ENVIRONMENTAL CUES ON CRIME RATE

Ms. Aishah Afreen Misbah[204]

Abstract

The Broken Windows Theory is a criminological paradigm that examines the impact of environmental cues on crime rates in urban contexts. The theory had a considerable influence on police policy during the 1990s, and it has remained relevant into the twenty-first century. This paper explores the theory's significance in understanding the correlation between visible signs of disorder and the occurrence of criminal activities. This theory posits that visible signs of disorder, neglect, and minor offences in a community can lead to an increase in more serious crimes. However, the theory has come under increased criticism, with some opponents claiming that its use in law enforcement and other contexts has done more harm than good due to the prevalence of bias and stereotypes. The research incorporates the examination of diverse case studies that showcase the application of the Broken Windows Theory. Through case studies of Garner v State of New York (2015), the strategy developed by the New York City Police for better policing called "Quality of Life", Prakash Singh v. Union of India (2006), and the Mumbai Police's "Operation Clean-Up" initiative, the paper explores the implementation of innovative crime prevention strategies that address both socio-cultural and physical factors, contributing to the evolving landscape of crime rates. The findings of the study lend credence to the Broken windows theory in the American and Indian contexts, implying that both environmental factors in the social and cultural circumstances have a role in the perceived rate of crime. This research contributes to the evolving discourse surrounding the Broken Windows Theory and its practical application in contemporary society. Understanding the role of environmental cues in influencing criminal behaviour can provide valuable insights for policymakers and law enforcement agencies in shaping more effective strategies to address and reduce crime rates in urban environments.

Keywords*: Crime rate, Physical factors, Policies, Socio-cultural context, Urban environment*

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1. INTRODUCTION

Criminal behaviour is dynamic - a possible perpetrator does not need to exhibit doubtful traits 24/7, but the environment in which they live may lead them to develop recessive behavioural tendencies that come out when the constraint factor previously governing them dissolves for reasons such as liberty, wisdom, or a lack of it, among others. Research in criminology suggests that certain social and physical features are related with a greater risk of participating in criminal activities.[205] A common adage "effect of the company is evident" is an excellent example to comprehend the effect of the social environment on not just crime but practically every other human behaviour. A negative social environment with a much higher crime rate than usual increases the chances of an individual following in the footsteps of others. Crime has been proven to be highly connected with social and economic deprivation, particularly the most serious acts such as assault, robbery, and homicide.[206]

According to the broken windows theory[207], there is a link between a person's physical surroundings and their chance of committing a crime. The theory, developed by Philip Zimbardo and popularised by George Kelling and James Wilson, contends that apparent markers of disorder, such as graffiti, loitering, and broken windows[208], encourage criminal conduct and should be penalised as a result. The hypothesis has a significant impact on current police techniques and leads subsequent study in urban sociology and behavioural psychology.

Although broken windows theory received moderate attention and support following its inception, it fell into disuse over time.[209] The theory has come under increased criticism, with some opponents claiming that its use in law enforcement and other contexts has done more harm than good due to the prevalence of bias and stereotype. Fairly recently, the theory has reemerged within contemporary neighborhood-based studies. The key question the paper aims to address is to how the social and physical environmental factors have a substantial impact on crime and the manner

[205] Vincent Sacco And Leslie Kennedy, *The Criminal Event: Perspectives In Space And Time 39* (Wadsworth/Thomson Learning, 2002).
[206] *Ibid*
[207] Kelling, George L., and James Q. Wilson, *"Broken windows."*, 3 ATLANTIC MONTHLY 9, 30 (1982).
[208] *Ibid.*
[209] National Research Council, *Fairness and Effectiveness in Policing: The Evidence*, NATIONAL ACADEMIES PRESS: WASHINGTON, DC, USA (2004).

in which the broken windows theory works when put into practice.

2. THEORETICAL FRAMEWORK

Environmental Criminology, defined as the examination of crime, criminal behaviour, and victimization concerning specific locations and how individuals and organizations adapt their actions in response to spatial factors, encompasses several theories elucidating how the physical attributes of a city influence criminal conduct.[210] It is established through prior research that crime is not haphazardly dispersed across urban areas; instead, various types of crime tend to concentrate in specific places and times.[211] To elucidate this phenomenon, scholars in this field have identified four key theories aimed at elucidating the decisions potential offenders make when assessing their surroundings before engaging in criminal activity: (1) Broken Windows Theory; (2) Routine Activities Theory; (3) Crime Pattern Theory; (4) Rational Choice Theory. The Broken Windows Theory will be thoroughly examined and discussed in the third section of the article.

Routine Activity theory, developed by Felson after it was initially proposed by Lawrence E. Cohen and Marcus Felson in 1979 is one of the most extensively referenced and significant theoretical constructions in the area of criminology and principles of criminal law.[212] The theory suggests that social and economic factors play a role in motivating potential offenders. It posits that for a crime to occur, three key elements must come together: a motivated offender, a suitable target, and the absence of capable guardians.[213] Offenders, much like ordinary individuals, have their own daily routines, such as going to work, attending school, shopping, and seeking entertainment. Within these routines, they may encounter or actively seek out potential targets. Because motivation, opportunity, and suitable targets are the key factors in considering criminal behaviour, the mere presence of guardians can discourage potential criminals from taking the initial steps toward targeting victims.[214] Conversely, when there is a lack of guardianship, combined with the

[210] Paul Michael Cozens, *Urban Planning and Environmental Criminology: Towards a New Perspective for Safer Cities*, 26 PLAN. PRAC. RSCH. 481, 485 (2011).
[211] *Ibid.*
[212] Fernando Miró, *The Encyclopedia Of Theoretical Criminology 4* (Blackwell Publishing Ltd 2014).
[213] Kevin D. Herndon, Broken Windows, *Broken Theory: How City Planning Actually Affects Crime*, 12 ARIZ. J. ENV'T L. & POL'Y 158, 162 (2022).
[214] *Ibid.*

availability of a target and the motivation and opportunity for criminal action, the likelihood of a crime occurring increases.

Crime Pattern Theory aims to identify recurring patterns in how criminals choose their targets. The theory's creators observed two primary patterns.[215] First, crimes against individuals tend to occur in or around residences and near places where people gather for socializing, like bars. Second, property-related crimes typically happen in or near areas where people congregate, such as shopping centres, sports venues, parks, and the routes leading to these locations. Research based on this theory has identified certain settings as particularly high-risk.[216] These include public pathways like sidewalks and parking facilities, recreational settings like bars and certain parks, facilities that offer round-the-clock human support such as hospitals, and industrial locations that store valuable goods.

Rational Choice Theory suggests that most opportunistic criminals make decisions based on rational assessments and consider various environmental cues. These cues are related to their perceptions of the risks, rewards, and effort involved in committing a crime, and they play a central role in the criminal's decision-making process.[217] Empirical research supports this theory, particularly in cases of crimes that present opportunities, such as drug and property offenses. In essence, if potential offenders come across an opportunity to commit a crime but believe there's a high likelihood of getting caught, they are likely to abstain from committing the offense. This theory argues that individuals engage in criminal behaviour when they perceive it to be personally advantageous and when the potential benefits outweigh the expected costs of being apprehended.[218] Consequently, potential offenders can be discouraged from committing crimes by increasing the chances of being caught and by making the punishment for the offense more severe.

The theories of Routine Activities, Crime Pattern, and Rational Choice shed light on the decision-making processes of potential offenders when assessing their surroundings and the factors that influence criminal conduct. It recognizes that crime isn't randomly distributed across urban areas

[215] Sabine E. M. van Sleeuwen, Stijn Ruiter & Wouter Steenbeek, *Right Place, Right Time? Making Crime Pattern Theory Time-Specific*, 10 CRIME Sci. 1, 1(2021).
[216] *Ibid.*
[217] Richard Moran, *Bringing Rational Choice Theory Back to Reality*, 86 J. CRIM. L. & CRIMINOLOGY 1147 (1996).
[218] Richard Warner, *Impossible Comparisons and Rational Choice Theory*, 68 S. CAL. L. REV. 1705 (1995).

but tends to concentrate in particular places and times. These theories emphasize the importance of socio-economic conditions, opportunity, and the presence of capable guardians in shaping criminal behaviour. In the next section of this article, we will delve deeply into the broken windows theory, exploring how it addresses the impact of urban environments on crime and social disorder.

3. THE BROKEN WINDOWS THEORY: CONCEPT

The broken windows theory sets benchmarks in the history of criminology as one of the most mentioned publications. Because a large number of cities throughout the world have embraced Wilson and Kellings' concepts under the broken windows theory of law enforcement as incentive for zero balance, it is also known as the Bible of policing, where even the most minor offences are harshly punished. Wilson and Kelling were not the first to recognise the negative impacts of disorder on societies, but they were the first to accuse disorder of generating crime. They hypothesised that if a single incident of disorder is not corrected promptly, it might set off a chain reaction of communal deterioration.[219] Broken windows policing tries to keep minor criminality under supervision in order to prevent larger-scale turmoil. From a theoretical standpoint given by Charlotte Ruhl[220], the following variables best explain why the state of the urban environment may influence crime levels:

1. societal standards and conformance
2. the existence or absence of routine monitoring
3. signal crime and social signalling

Using the metaphor that a broken window that is not fixed will soon lead to the breaking of the other windows, Wilson and Kelling were inspired by Philip Zimbardo's[221] field experiment, which proved how supposedly abandoned vehicles, left without licence plates and with hoods up, were vandalised in the Bronx, New York, and Palo Alto, California. The abandoned automobile in the Bronx's high-crime neighbourhood was vandalised in 10 minutes and entirely dismantled in 24

[219] Wesley G. Skogan, *Disorder and Decline: Crime and the Spiral of Decay in American Neighbourhoods*, NEW YORK: FREE PRESS, 218 (1990).
[220] Charlotte Ruhl, *Broken Windows Theory of Criminology*, SIMPLY PSYCHOLOGY, (Aug. 27, 2023, 8:03 PM), https://www.simplypsychology.org/broken-windows-theory.html.
[221] Zimbardo, *A Field Experiment in Auto Shaping*, LONDON: ARCHITECTURAL PRESS 85, 87 (1973).

hours. The abandoned automobile in expensive Palo Alto sat for a week until Zimbardo personally destroyed it with a sledgehammer. The abandoned automobile was then vandalised, stripped, and handed over within just a couple hours. The Zimbardo experiment[222] showed Wilson and Kelling that vandalism and more serious crimes may take place anyplace when the perception of reciprocal regard and the responsibilities of civility are diminished by behaviours that appear to convey that "no one cares." Thus, the underlying concept of broken windows theory is that strong punishment of small offences (such as disorder) will deter more severe criminality.

There are many different types of structural disorders that might contribute to the notion that a location is a prime target for crime. Litter, boarded-up or unoccupied dwellings/structures, graffiti, overgrown lawns, and broken windows on houses/buildings are all signs that a neighbourhood is deteriorating or is a "bad area."[223] Furthermore, disorder has been dubbed a "epidemic." What begins as little episodes of disorder within a limited geographic region can soon spread to neighbouring places, and finally throughout the whole neighbourhood.[224] Sampson and Raudenbush[225] evaluated the impact of both physical and social disorder on predatory crimes such as robberies, killings, and residential burglaries. The researchers discovered that residents' perceptions of physical disorder were extremely predictive of observed indicators of physical disorder recorded by researchers, and that witnessed disorder had a positive and significant effect on police reported robberies, even when other neighbourhood structural factors were controlled for.[226]

The theory of broken windows has inspired a variety of policing projects that call for forceful police measures to reduce small crimes and disruption. These policing practises have been variously referred to as "zero tolerance policing," "order maintenance policing," and "quality of life policing." Increased arrests for disruptive behaviour and loitering, increased code enforcement, and graffiti removal are examples of aggressive enforcement. Many of these policing tactics

[222] *Ibid.*
[223] L. Garis, L. Thomas, & A. Tyakoff, *Distressed Properties: Pathways of Decline and the Emergence of Public Safety Risk*, UNIVERSITY OF FRASER VALLEY (2016).
[224] Malcolm Gladwell, *The Tipping Point: How Little Things Can Make A Big Difference* (Little, Brown & Company 2006).
[225] Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighbourhoods*, 105 Am. J. Sociol. 603, 621 (1999).
[226] Brandon C. Welsh, Anthony A. Braga & Gerben J. N. Bruinsma, *Reimagining Broken Windows: From Theory to Policy*, 52 J. RES. CRIME & DELINQUENCY 447, 540 (2015).

expressly seek to reduce fear and crime while also improving quality of life. The central policy paradigm is founded on the assumption that epidemics may be reversed. By managing with volatile circumstances, neighbourhoods can be "tipped" into safer surroundings.[227] Skogan[228] identifies two sets of research that have investigated the disorder-crime relationship: One focuses on communal parameters associated with crime, while the other on the direct link between disorder and crime. His study, on the other hand, did not investigate whether disorder leads to more serious crimes in the progression of development outlined by Wilson and Kelling.

But other researchers have discovered evidence for the idea that disorderly conditions lead to more serious crime in longitudinal study of crime and disorder in various neighbourhoods. However, the outcomes differed depending on the sort of disorder and crime. Keizer, Lindenberg, and Steg performed six field tests in the Netherlands on the relationships between disorder and more serious crime and determined that dealing with disorderly situations was critical to preventing the development of more crime and disorder.

4. FROM THEORY TO POLICING IN THE UNITED STATES

The validity of broken windows theory is important from a policy standpoint since it has had a significant influence on the profession of police. In the twentieth century, William Bratton and Mayor Rudy Giuliani established policing methods that popularized the theory. They believed that putting this theory into practice would result in a fall in crime rates.[229] The most visible application of this philosophy happened in New York City as a response to crime and disorder. In the 1990s, New York Mayor Rudolph Giuliani enacted a policy in which minor offences were swiftly targeted by the police, and this message was effectively channeled, sending a strong social signal that "crime isn't acceptable."[230] As Chief of New York City Police from 1990 to 1992, William Bratton put the idea into practice. Officers were assigned to apprehend social order breakers in squads wearing plainclothes without uniform, leading in a significant drop in criminal activity across the entirety of the city.

[227] *Supra* note 224.
[228] *Supra* note 219.
[229] Pooja Ganesh, *Broken Window Theory in India*, LEXFORTI (Sep. 01, 2023, 4:34 PM), https://lexforti.com/legal-news/broken-window-theory-in-india/
[230] Lauren Kirchner, *Breaking down the broken windows theory*, PACIFIC STANDARD (Sep. 01, 2023, 5:56 PM), https://psmag.com/news/breaking-broken-windows-theory-72310.

Wilson and Kelling[231] proposed that efforts to address disorder in policing should be integrated into community policing and problem-oriented policing approaches. However, it's worth noting that the research findings on the effectiveness of comprehensive disorder policing strategies, like quality-of-life programs and enforcing order maintenance, have yielded somewhat mixed results. For instance, a research used misdemeanour arrests as an indicator of order maintenance efforts and discovered that the disorder policing strategy implemented by the New York City Police Department during the 1990s led to a noteworthy decrease in violent crime. This reduction held true even after taking into account economic, demographic, and drug-related factors. Another study employed a different analytical approach, they examined homicide trends in 74 precincts in New York City from 1990 to 1999 and found that misdemeanour arrests were linked to significant declines in overall homicide rates, particularly in gun-related homicides. Studies evaluating policies, including randomized controlled trials conducted in different cities, have provided evidence supporting the idea that addressing disorderly conditions can lead to positive outcomes in terms of crime control.[232]

Therefore, we can state that the primary measure used to gauge the effectiveness of broken windows policing has been misdemeanor arrests. This is because the data for such arrests are readily available, and it requires officers to make judgments about whether an arrest is warranted or not. Therefore, the question of whether the New York Police Department successfully implemented this model remains open for debate. However, it's evident that the intervention is intricate, and assessing its impact is challenging. There have been extensive debates about the influence of this policing theory and its tactics on reducing crime and disorder. It's been noted that the reduction in crime rates cannot be solely attributed to broken windows policing but that the police likely played some role in the process.[233]

Additionally, it's worth noting that the broken windows theory has been applied in various states across the USA. In Albuquerque, New Mexico, the Safe Street Program was implemented based on the broken windows theory. The primary objective of this theory was to encourage police officers to be vigilant in areas with high crime and accident rates. The program's approach revolves

[231] *Supra* note 207.
[232] *Supra* note 226.
[233] Shyamantak Misra & Prabir Kumar Pattnaik, *Lilliputian Neglected Happenings Call For Snafu: "Theory of Broken Windows*," 20 MEDICO-LEGAL UPDATE 141, 143 (2020).

around utilizing deterrence theory to prevent criminal activity. Harvard University collaborated with local law enforcement in Lowell, Massachusetts, in 2005 to identify 34 crime hotspots. In these hotspots, efforts were made to improve street lighting, address sanitation issues, and organize mental health programs for the homeless population, aiming to create a cleaner physical environment. Following the program, there was a 20% reduction in reported incidents that required police intervention. The impact of this theory extended to the development of Ontario's Safe Streets Act[234], resulting in legislative responses to address issues such as panhandling and noisy neighbours, as well as other forms of antisocial behaviour. This legislation even led to the creation of bylaws aimed at tackling social and physical challenges.

The broken windows theory has also been invoked in situations concerning the use of force by law enforcement officers. In the case of Garner v. City of New York[235], the family of Eric Garner, an unarmed black man who tragically died after a white police officer employed a chokehold, contended that the NYPD's application of broken windows policing played a role in the excessive use of force, not only in this instance but in others as well. Eventually, the case was resolved through a settlement of $5.9 million in 2015.[236] The case had a significant impact on discussions about police reform, use of force policies, and the relationship between law enforcement and minority communities in the United States. It also contributed to calls for greater transparency and accountability in cases of alleged police brutality.

5. APPLICATION IN INDIA

A significant portion of the incarcerated population in India comes from disadvantaged and economically marginalized backgrounds. Discrimination against specific groups is rooted in deep-seated historical and traditional notions of hierarchy and stereotypes. This discrimination hinders their access to various opportunities, which can drive them towards engaging in criminal activities. Many individuals involved in offenses like robbery, dacoity, and theft view this path as an easier option because they lack the social support systems needed to obtain financial resources and other essentials.[237] Additionally, some of these individuals have a history of criminal behavior and have

[234] Safe Streets Act, 1999, S.O. 1999, c. 8.
[235] Eric Garner v. State of New York (U.S. District Court Southern District of NY, 2015).
[236] *Ibid.*
[237] The Theory of Broken Window and Crimes in India – A Socio-Legal Analysis, KNOWLAW, (Sep. 06, 2023, 7:45 PM), https://knowlaw.in/index.php/2023/01/13/the-theory-of-broken-window-and-crimes-in-india/

successfully evaded law enforcement by targeting victims who struggle to provide evidence of their involvement.

The Nirbhaya Case[238] shed light on the fact that even juveniles can be involved in the most heinous crimes and may even play a central role in such acts. The participation of a minor in this case led to the enactment of the Juvenile Justice (Care and Protection of Children) Act[239], 2015. This law allows for juveniles aged between 16 and 18 years to be tried as adults for serious crimes, but only after a comprehensive assessment of their mental and physical capabilities, as outlined in Section 15(1) and Section 18(3) of the Act.

The amendments made to the Act were introduced with the intention of keeping juveniles out of the adult justice system. These amendments reflect the relevance of the broken windows theory, as they consider the welfare and rehabilitation of the offender rather than condemning them to severe punishment. The theory emphasizes creating an environment that helps individuals reconnect with the norms of civil society. Despite its limitations, the broken windows theory is quite applicable to studying the diverse demographics of Indian offenders. This is because the theory provides detailed information about individuals who commit specific types of offenses. Instead of focusing on when an offender might commit a crime, it prioritizes identifying those who are vulnerable to causing harm to others. For instance, when considering minor offenses, India faces significant challenges in maintaining roadside cleanliness. Despite efforts through posters and pamphlets discouraging such behavior, people still urinate or spit on public and private property walls. Implementing effective methods to identify wrongdoers and imposing strict penalties would likely lead to a reduction in such acts. This approach would encourage people to take an active role in protecting their property, thereby enhancing social control and restoring order in civil society.

An instance of applying the broken windows theory in India is exemplified by Mumbai Police's "Operation Clean-Up" campaign, introduced in 2015[240]. This initiative was designed to address the issues of littering and public urination within the city. Collaborating with municipal authorities

[238] Mukesh v. State (NCT of Delhi), (2017) 6 SCC 1.
[239] Juvenile Justice (Care and Protection of Children) Act, 2015, No. 02, Acts of Parliament, 2015 (India).
[240] Archak Das, *The Theory of Broken Windows – How Environment Influences Crime Rate*, LEGAL VIDHYA (Sep 06, 2023, 3:56 PM), https://legalvidhiya.com/the-theory-of-broken-windows-how-environment-influences-crime- rate/

and various partners, the police department worked to augment the availability of public restrooms, install additional waste bins, and implement routine sanitation efforts in public areas.[241] Furthermore, individuals caught littering or urinating in public were subjected to fines by the police, conveying a clear message that such conduct would not be accepted.

6. CRITICISMS FACED BY THE THEORY

Because numerous cities worldwide have drawn inspiration from Wilson and Kelling's concepts within the broken windows theory of policing, it has come to be known as the guiding principle for a strict, zero-tolerance approach. This approach entails even the most minor offenses facing severe penalties, earning it the moniker of the "Policing Bible."[242] The broken windows theory also has its drawbacks. This theory tends to categorize individuals experiencing poverty and homelessness as disorderly, assessing them based on their appearance and lifestyle. Homeless individuals are often unfairly stigmatized as potential criminals, with the theory emphasizing socio-economic conditions as the sole cause of criminal behavior. Unfortunately, this mindset is difficult to change, and the theory offers only a temporary solution to crime rates. It tends to label anyone displaying disorderly behavior as a criminal, and this presumption may not hold true in the long run; it's a short-term approach. Additionally, the theory fosters discrimination against minority communities, wrongly assuming that crime is primarily committed by these groups.[243] The zero-tolerance policy may result in a higher incarceration rate, branding individuals as criminals in society even for minor infractions.

The broken windows theory has sparked significant controversy and disagreement within the legal field. Some advocates argue that if implemented correctly, it can be an effective strategy for crime prevention. However, critics raise concerns about the potential for excessive policing and violations of civil rights. It's worth noting that aggressive order maintenance approaches, such as "zero-tolerance policing" initiatives, do not appear to have a positive impact on reducing crime. Additionally, these policing practices can create a disconnect between law enforcement and the communities they serve.[244] They have also been linked to various adverse consequences, including

[241] *Ibid.*
[242] *Supra* note 234.
[243] *Supra* note 229.
[244] Charles C. Lanfear, Ross L. Matsueda, and Lindsey R. Beach, Broken Windows, *Informal Social Control, and Crime: Assessing Causality in Empirical Studies,* 3 ANNU. REV. CRIMINOL. 97, 110 (2020).

a rise in complaints against police officers, increased racial disparities in the criminal justice system, and the criminalization of homeless and mentally ill populations.[245]

A notable case in point is the controversy surrounding the New York Police Department's utilization of stop-and-frisk tactics, which were introduced in the 1990s as part of a broader strategy to combat crime. Critics contended that stop-and-frisk, a practice involving the stopping, questioning, and frisking of individuals suspected of criminal involvement, unfairly targeted minority populations and infringed upon their constitutional rights. In 2013, a federal judge declared the NYPD's stop-and-frisk policy as unconstitutional.[246] This ruling was based on evidence demonstrating that the policy had been implemented in a manner that disproportionately affected minority communities and violated their Fourth Amendment protections against unwarranted searches and seizures. The judge also highlighted that the policy ran counter to the principles of community policing and the broken windows theory. Instead of fostering positive relationships between law enforcement and communities, it focused on minor infractions, detracting from the theory's intended goals.

7. CONCLUSION AND THE WAY FORWARD

The broken windows theory and its impact on policy and policing require reform due to the controversial approach it has engendered within marginalized communities. To be more effective in policy and policing, the theory should shift its focus towards engaging in direct dialogue with these communities to address their problems. Most researchers studying the broken windows theory believe that it has been more successful as a concept than as an accurate representation of the real world or when practically applied.[247] One significant issue with the theory is the perception that "disorder is more closely linked to the racial makeup of a neighborhood than to the presence of broken windows." As a result, it becomes evident that its effectiveness was limited to a certain extent, especially when it gained prominence through practical implementation in New York City. Subsequent research on the theory's practicality demonstrated that it alone was not responsible for reducing crime rates, as numerous factors were at play simultaneously.[248]

[245] *Ibid*
[246] Floyd v. City of N.Y., 959 F. Supp. 2d 540 (S.D.N.Y. 2013).
[247] *Supra* note 234.
[248] *Ibid.*

In conclusion, the broken windows theory has been a pivotal concept in the realm of criminology and policing for several decades. It posits that the physical and social environment plays a crucial role in influencing crime rates. While it has sparked numerous debates and discussions, its significance in understanding the dynamics of crime cannot be denied. The theory underscores the importance of addressing minor signs of disorder and neglect in a community to prevent the escalation of more serious criminal activity. It emphasizes the need for proactive policing that goes beyond simply responding to major crimes. Ultimately, the broken windows theory serves as a reminder that the environment in which we live can have a profound impact on our behavior. While its practical application may have limitations, it remains a valuable concept for policymakers, law enforcement agencies, and communities to consider as they work together to create safer and more inclusive neighborhoods. The ongoing dialogue surrounding the theory's merits and shortcomings will undoubtedly continue to shape the future of crime prevention and policing strategies.

INNOVATION AND MERGER DECISIONS IN THE PHARMACEUTICAL INDUSTRY

Ms. Pooja Bansal and Ms. Smriti Shah[249]

Abstract

We are currently witnessing a surge in health care costs, which has led to an escalation in the research and development budgetary requirements, liberalization, and globalization, this is giving rise to multiple mergers and acquisitions deals which are being observed in recent times. The Indian Pharmaceutical Industry is often referred to as the pharmacy of the world, as it contributes to over 10% of the World's Pharmaceutical demand every year. Mergers and Acquisitions enable the industry to upgrade its global competitiveness, move up the value chain, find new markets, expand its product line, and compensate for stagnant sales in its home market. The Pharmaceutical industry is currently amongst the most aggressive overseas investors of all Indian Industries, but adverse financial effects, antitrust actions that delay or prevent a proposed merger, limited flexibility, sophisticated structure, and a lengthy process must not be overlooked. The future has so much to offer as the trend is expected to continue with many companies from developing countries, particularly India. This research paper will shed some light on the dynamics of Indian Pharma and the core competencies of the merging parties, based on an interdisciplinary approach using insights from competition law, economics, and corporate strategy and at the time would try to figure out that whether organic growth can improve efficiency by enabling parties to draw on their key strengths and seek out growth in new relevant product and geographic markets. The Sun Pharma/Ranbaxy merger was India's top and the World's top 10 Pharma Merger and Acquisitions deal in 2014. Given the significance of this merger, this research paper discusses the theory of harm and remedies in all the Pharma mergers evaluated to date.

Keywords: *Indian Pharma, Pharmaceutical mergers, generics, Competition Commission of India, Drugs, Innovation, Sun Pharma /Ranbaxy, Lupin Ltd- Gavis.*

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1. INTRODUCTION

India is widely recognized as a major global supplier of affordable medicines, all thanks to its pharmaceutical industry's efforts to ensure access to medicines for disadvantaged populations at competitive prices. This has led to some significant decisions by the Indian patent office and judiciary. The Pharma industry of India has contributed significantly for achieving Sustainable Development Goal 3 by providing affordable medicines globally, not merely confined to India. The pharmaceutical industry is not only about static competition based on price and quantity, but also dynamic innovation-based competition. However, the role of merger control in promoting innovation has not received much attention, in India particularly. Yet, this article aims to fill this gap by evaluating the impact of Indian merger control on competition and innovation in the pharmaceutical sector. Basically, the article highlights three significant contributions to the competition policy literature. First, it examines the impact of mergers on competition, innovation, and access to generics, which is a unique contribution. Second, it employs an interdisciplinary approach towards drawing on corporate strategy, competition policy, and economics to assess the merits of inorganic growth for parties seeking to leverage their core competencies to grow in new markets. Finally, it analyzes one of the largest conditional clearance decisions by the Indian CCI, the three-to-two merger between Sun Pharma and Ranbaxy, using a case study methodology. Due to the constantly evolving business environment and rising competition, companies must strive for constant growth for which two expansion strategies are available to companies i.e., internal (organic) and external (inorganic). External restructuring, such as mergers and acquisitions, may be necessary when a firm's inherent growth rate slows down. The Companies Act, 2013 defines a merger as the combination of two or more entities into one, not solely for accumulating assets and liabilities, but to form one business entity. An acquisition takes place when a company purchases the assets or stocks of another firm in majority, exceeding 50% ownership, in order to take control of it. While Internal restructuring, is a strategy that eliminates liquidation and instead ensures an internal reorganization of the financial structure of the company.

2. INDIAN PHARMACEUTICAL INDUSTRY

To be able to understand the Indian Pharmaceutical industry, we first need to understand and differentiate the Indian pharmaceuticals value chain from that of the developing world, followed by a discussion of the nature of competition between innovators, generics, and branded generics. This highlights the different substantial challenges of India and other developing economies from those

of developed economies where the citizens have an extensive health insurance system and the healthcare sector is highly regulated and well-supervised. A good place to start pointing out these differences is the pharmaceuticals value chain in the European Union and the United States, which may closely mirror those of other developing economies. In India, the pharmaceutical value chain is highly regulated and well-organized, with regulators responsible for ensuring the quality of the product, while in developed Economies; the industry is well-organized and highly regulated. However, the doctors who prescribe the drug are largely unaware of the price of the medication, along with those Pharma companies who often bribe doctors to prescribe their products in exchange for cash and non-cash benefits, which may include international conferences and exotic vacation locations. If we shed light on its prices and quality, Prices are controlled by the National Regulator, the National Pharmaceutical Pricing Authority (NPPA); but quality is under no adequate regulatory control, as the brand and price are seen as major indicators of quality in India. In a developing country like India, doctors prescribe medicine, pharmacies dispense it, and the end user uses it.

But when we compare it with developed countries, like the US and EU, they have the presence of insurers, as well as pharmacy benefit managers (PBMs) in the latter, which are deemed to be responsible for keeping generic prices under control. In fact, this has been cited by the generics industry as one of the contributing factors for the highly competitive prices of generics, along with a critical factor that has triggered a series of consolidation waves in the US generics industry. Individual consumers tend to suffer from the classic tragedy of commons and cannot negotiate for the best price. Insurance companies and PBMs work together to solve the collective problem and ensure that the price of the products remain competitive. The Pharma industry of India is dominated by two kinds of players: multinationals who rely on their well-recognized brand name and innovative products which control over 30% of the market. The domestic Pharma industry controls more than 70% of the market, including Sun Pharma, Lupin, Cipla, Dr Reddy's, and others. The Pharma industry of India has emerged as the largest supplier of generic drugs in world, with the United States as the key market. The Pharma industry of India has become a major player in the US generics market too, with over 30% of the market in terms of volume and 10% in terms of value. The Indian market has a good control in branded generics which play a key role in this generics-driven market in which companies sell drugs with the same molecular composition but different brand names. Because they are based on the same molecule, these different brands, leaving aside consumer perception and brand differentiation, possess the same chemical properties and therapeutic effects and therefore can be considered substitutes for one another.

The pharmaceutical industry of India is a large contender when it comes to cross border M&A because such acquisitions are productive in-house fast growth strategies. Another important motivation for such mergers is the desire to gain a foothold in another country's market. Such transactions are a way for a company to save itself from the headache of establishing a nouveau in an alien country. M&A are often used as ego boosters of multinational companies if they gain access to a domestic market. Lack of research and development, productivity, expired patents, and generic competition are all other factors that could affect such deals. The pharmaceutical industry of India is well known for its generics, cost effectiveness, and competition. The nature of diseases in India is vast, and the market is growing at an increasing rate. Global pharmaceutical companies are keen on establishing a low-cost base outside the country. With the expansion of the worldwide pharmaceutical industry with Indian companies investing in a variety of companies, the domestic drug sales of the nation amounted to $5 billion which also have created a considerable service industry for the global pharmaceutical market. Domestic pharmaceutical companies have completed 32 cross border transactions worth $2000mn.

3. MERGER AND ACQUISITIONS IN INDIAN PHARMACEUTICAL INDUSTRY

Indian companies were able to market generic drugs to the United States and other Western European countries after liberalization. Indian drug companies export their products to more than 65 countries around the world, with the United States being the largest. GSK and Pfizer alone faced seven patent expirations in 2010. At the same time, over $80 billion in drugs will be generic by 2012. These large pharmaceutical firms' R&D pipeline is falling off the wagon in the last several years, and large economies are cutting health care expenses. The pharmaceutical market of India is changing because of the following three factors which are:

- Developed countries are implementing cost-effective manufacturing
- Increasing significance of emerging markets
- The changing importance of India's domestic market.

However, Indian firms face challenges, including non-tariff barriers, declining profits in the generics market, and threats from giant pharmaceutical MNEs. Indian companies are seeking to move up the value chain by developing capabilities to produce super generics and branded generics. Indian companies have now understood that, if they have to compete with the global pharmaceutical

companies, even in a domestic domain; we will require new strategies/planning and more innovation/creation. Though India has a large domestic market, it is also home to the world's highest number of FDA-approved plants outside of the United States, which contribute to a low-cost manufacturing base, and it is attempting to exploit this opportunity through strategic alliances and M&A. Indian companies in their drive have to gain competitive advantages, and at the same time, increase their R&D investment and focus on building a product pipeline. Indian Pharmaceutical Industries are now involved in mergers and acquisitions with the aim of complementing the strengths of two entities to obtain market access, new technologies, and new products. The drive to expand size and thus attain greater economies of scale could be considered one of the key reasons for M&A in the pharmaceutical sector. According to KPMG (2006), Indian pharmaceutical companies are considering foreign acquisitions with the following goals: Enhance their global competitiveness; Move up the value chain; Create and enter new markets; Increase their product portfolio; Acquire assets (including research and contract manufacturing companies in order to improve their outsourcing capabilities) and new products; Compensate for the Indian pharmaceutical industry, 264 M&A deals were completed in the period 2001-2010, with 99 mergers and 165 acquisitions accounting for the majority of the deals. During this period, the pharmaceutical industry also dominated the M&A portfolio of all the other industries. The number of mergers was highest in 2004 (16 deals) and the number of acquisitions was highest in 2008. Out of the total acquisitions in the pharmaceutical industry during the study period of 2001–2010, 51.51 percent (85 deals) involved the substantial acquisition of shares, 17.57 percent (29 deals) the minority acquisition of shares, and 30.9 percent (51 deals) the acquisition of assets. The possible explanation for this type of behavior could be that, in contrast to minority share acquisitions, which only give the firm voting rights, purchasing significant shares of the target firm makes it easier for the acquirer to change management control of the firm in its favor.

4. COMPETITION AND INNOVATION

As opposed to new molecular entities (NMEs), which are value driven, the generics market is volume driven. The various cost structures for originators and generics are the cause of the different competitive dynamics. The average cost to effectively launch an NME after a patent expires is $2.6 billion, but it only costs $1 to $2 million to launch a generic equivalent. Additionally, there is a typical delay between an NME's finding and its successful launch. Generics have a much lower comparative time lag, ranging from one to three years on average. Generics place a greater emphasis on cost-saving innovation than original manufacturers, who typically concentrate on product

innovation through the introduction of novel products or materially improving the standard of already-available goods. The policy goal and the pre-2005 Patents Act, which only permitted process patents, are directly responsible for the Indian pharmaceutical industry's emphasis on cost-reducing invention in this area. One of the main justifications for providing patent protection is that innovators effectively market their innovations, and after the patent period has passed, the innovations' products are readily available for a reasonable price. From that vantage point, dynamic competition also encourages price and quantity-driven competition in the long term. The benefits of the innovation, once they are off-patent or reverse-engineered (as was the case with the former patent regime), are successfully delivered to the end consumer at reasonable prices thanks to competition among generics. Therefore, in the context of merger control, maintaining a certain number of rivals is essential for encouraging quantity and price-driven competition. Actual potential competitors, as opposed to perceived potential competitors, are manufacturers who are far along in the development of a generic equivalent and have obtained the necessary regulatory clearance. Both the Indian CCI and the Federal Trade Commission of America, have placed a high value on these real potential competitors in the case of generic mergers and have approved mergers after the submission of remedies that ensured the successful entry of these players who had an "entry advantage" over the other players in the industry.

5. PHARMA MERGER: AN ANALYTICAL STUDY

In merger control, the competition authorities must first consider the reason why the two companies decide to merge. As with businesses needing to understand the principles of antitrust law and competition policy to make better strategic decisions, understanding the business community's reasoning for particular business decisions better the authorities to take decisions that foster competition in innovation. Among the questions that affect a company's strategy in the event of a merger is whether there are potential efficiencies which can be achieved through the merger, that could lower costs and, consequently, increase static and dynamic efficiency; or do the parties compete closely in a given competition space and, as a result, the merger will reduce competition in the relevant market.

5.1. Strategic Rationale for Sun Pharma/Ranbaxy Merger

The Pharma industry saw plenty of M&A activity in 2014/2015, both for the big Pharma and generic

manufacturers.[285] A patent cliff and a weak R&D pipeline were factors that caused the big Pharma to consolidate and look for alternative growth avenues.[286] There are over 100 generic players that compete for market share in the world's largest pharmaceutical market, which accounts for half of global sales.[287]

The generics market in the United States is a very competitive one, as manufacturers have to negotiate prices with wholesalers, retailers, and insurers. In addition, Merger & Acquisitions have also been used to 'corner niche markets' in the generics market and to significantly increase prices of certain drugs.

In India, following Piramal Healthcare's acquisition by Abbott Laboratories, the prices of Gardenal 60 mg tablets40 increased from ₹16 in May 2009 to about ₹35.250 in May 2011, indicating a post-merger 121% increase in prices.[288] Likewise, the Haemaccel Injection 300 ml increased from ₹99.02 to ₹215, which is a 117% price increase during the same time period.[289] Indian generics supply more than 40% of all generics and over-the-counter medications to the United States of America. Even after there was a ban imposed by the FDA on imports from Ranbaxy's four India production sites[290] at the time because of the company's inability to comply with the current Good Manufacturing Practice requirements, Ranbaxy sold generics in the US in 2014 worth $ 1 billion.[291] After Sun Pharma acquired Ranbaxy from its Japanese parent company Daiichi Sankyo for $4 billion in 2014, it became India's largest and world's largest Pharma Merger & Acquisition.[292] Sun anticipated a foothold in the Japanese market with this transaction. Second, Dilip Shanghvi, Sun's founder and

250 Marc-André Gagnon and Karena D. Volesky, Globalization and Health (2017) 13: 62 <https://globalizationandhealth.biomedcentral.com/articles/10.1186/s12992-017-0285-x> accessed 23 Nov 2018.

[251]Patricia Danzon, Mergers and Acquisitions in the Pharmaceutical and Biotech Industries, *28 Managerial and Decision Economics*.

[252] Robert Wessman, CEO and founder Alvogen, Alvogen Founder: Generic Drug Prices will Drive Consolidation, (Online, 7 December 2017) *World Finance* <https://www.worldfinance.com/videos/alvogen-founder-generic-drug-price-wars-will-drive-consolidation> accessed 23 Nov 2018.

[253] Gardenal 60 mg is used for the treatment of Epilepsy.

[254] Latha Jishnu, Curing the ills of Pharma FDI (Online 15 August 2012) *Down to Earth* <http://www.downtoearth.org.in/news/curing-the-ills-of-pharma-fdi-36287> accessed 23 Nov 2018.

[255] These included Ranbaxy's plants at Toansa, Paonta Sahib, Dewas and Mohali in India.

[256] Jennifer Thompson and Andrew Ward, Ranbaxy shares sink on US FDA product ban, *Financial Times* (Online 24 January 2014) <https://www.ft.com/content/bb89aa0e-84c5-11e3-a793-00144feab7de> accessed 7 May 2018; U.S. Food & Drug Administration, Questions and Answers on Drugs Manufactured at the Dewas and Paonta Sahib Facilities of Ranbaxy Laboratories Ltd. <https://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/EnforcementActivitiesbyFDA/ucm118442.htm> accessed 23 Nov 2018.

[257] [1] EJ Lane, Ranbaxy-Sun U.S. approval hinges on selling antibacterial drug as FTC notes reach of Indian generic unit *FiercePharma* (Online 2015) < https://www.fiercepharma.com/sales-and-marketing/ranbaxy-sun-u-s-approval-hinges-on-selling-antibacterial-drug-as-ftc-notes> accessed 23 Nov 2018.

CEO, identified Ranbaxy's brand equity in the Indian market and its strong foothold in the United States, where it owned a very large portfolio of Abbreviated New Drug Applications and first-file opportunities as important sources of shareholder value creation. Sun Pharma also gained a more global footprint with additional operations in 65 countries and 47 manufacturing facilities across five continents, as the merger was an all-stock deal whereby Ranbaxy shareholders received eight shares of Sun Pharma for every 10 shares of Ranbaxy they owned.[293]

5.2. The Competition Commission of India on Sun Pharma/Ranbaxy

In Sun Pharma/ Ranbaxy, the Competition Commission of India described the relevant product market at the molecular level, meaning that the medicines that were based on the same API were identified as distinct relevant product markets.[294] The CCI considered forty-nine relevant markets for generics and two relevant markets for formulations.[295] The CCI found no competition in 38 relevant markets out of forty-nine markets and four more molecules were included in the National List of Essential Medicines and were therefore subject to price control by the National Pharmaceutical Pricing Authority, a government agency.[296] Competition concerns were found in the remaining seven markets. The factors that influenced CCI's conclusion were that the other 38 markets did not cause any competition. In many of these markets, the presence of three, four, and in some cases five other significant players, meant that these other generics' manufacturers would continue to exert an important competitive constraint on the merged entity, even if the combined entity owned 40-50% of the market.[297] The Commission also analyzed the merger effect on potential competition in any of these markets, it was felt that during that time, Ranbaxy had two pipeline products with the Sitagliptin formulation, which was categorized as 'Oral Anti-diabetics' under the Therapeutic category. Sun Pharma had already licensed MSD to sell Sitagliptin formulations under the brand names Istavel and Istamet. Glenmark was the only other active player in this product market outside of these two. The Commission examined the merger effects on Ranbaxy's incentive to release the pipeline product.[298] As the patent license by MSD was currently being judiciously

[258] Knowledge Wharton, India's Sun Pharma Takes over a beleaguered Ranbaxy Labs (11 April 2014) *Wharton Business* <http://knowledge.wharton.upenn.edu/article/indias-sun-pharma-takes-beleaguered-ranbaxy-labs/> accessed 23 Nov 2018.
[259] Combination Registration No. C-2014/05/170 *Sun Pharmaceuticals Industries Limited/ Ranbaxy Laboratories Limited*, Order under Section 31(7) of the Competition Act, 2002, at paras 13-15.
[260] *Ibid.*, at paras 19-20
[261] *Ibid.*, at paras 23-24.
[262] *Ibid.*, at para 24
[263] *Ibid.*, at paras 25.

reviewed, the CCI was worried that other players may make an entry in the market to launch a generic version of the molecule in case the patent was found invalid, but the Commission decision did not discuss the counter-factual, which is what would happen if the patent were found invalid and the courts granted MSD's injunction against the infringing parties.[299] Glenmark and the merged entity would have been the only two active producers in the relevant product market in such a case, which could have led to competition concerns in the market, and, possibly, would have required a remedy to alleviate the resulting anti-competitive effects. In the seven relevant product markets, mergers are likely to cause an appreciable adverse effect on competition. As noted above, generics in India are marketed by different brands for the same molecule. Accordingly, the CCI identified the Sun Pharma and Ranbaxy brands available for each of these drugs. Lupin Ltd- Gavis Lupin, a transnational Indian pharmaceutical company, manufactured biotechnology products, branded and generic formulations, and APIs around the world. GAVIS, a well-known pharmaceutical company based in New Jersey, was focused on manufacturing, formulation, development, marketing, retail, packaging, and distribution of pharmaceutical products. Lupin Ltd. purchased GAVIS Pharmaceuticals LLC and Novel Laboratories Inc. (GAVIS) in the United States for $880 million, in an effort to increase its presence in the United States. This is the largest acquisition by any Indian pharmaceuticals company in the United States. The acquisition was expensive, as Lupin paid 9.2 times annual revenue to fund it. Lupin's biggest market was the United States, and the acquisition of the US-based company increased its market penetration in the US. Gavis had a highly skilled New Jersey manufacturing site that Lupin turned into its first manufacturing site in the USA after the acquisition, complementing Lupin's inhalation R&D center in Coral Springs, Florida.

6. CURRENT SCENARIO

When it comes to cross-border M&A, the pharmaceutical industry of India is a favorite, because such takeovers are useful for internal rapid growth strategies. Another important reason behind these mergers is the desire to establish a foothold in the market of other countries. Such transactions help the company avoid the painstaking process of establishing a new entity in an alien country. Entry into a domestic market is a key driver of cross-border mergers, as it saves companies valuable time that may be needed to establish new eminent businesses of similar size. Merger & Acquisitions also serve as ego boosters of MNCs at times. Non-research and development, productivity, expired patents, and generic competition are among the other factors that contribute to such transactions.

[264] *Ibid.*, at paras 26.

The pharmaceutical industry of India is known for its generics, cost effectiveness, and competitiveness; India's diseases landscape is diverse, and the market is ever-growing. Large global pharmaceutical companies want to establish a low-cost base from India; and a number of Indian companies have made acquisitions in the international market. Indian pharmaceutical companies have also developed a vast service industry for the global pharmaceutical market, with almost $5 billion in domestic drug sales. Domestic pharmaceutical companies have completed around 32 cross border transactions worth $2000 million. As the world fought the COVID-19 pandemic for two years, the industry showed its strength and determination by supplying essential medicines to more than 120 countries. The Indian pharmaceutical industry continues to improve health outcomes for patients worldwide, despite some limitations. The Indian pharmaceutical industry responded to COVID-19 by evaluating the potential utilization of available drugs (repurposing drugs) and investigating innovative approaches to combat the pandemic. The Pharma industry has developed indigenous vaccines to combat COVID-19 and exported more than 6 crore vaccine doses. The pandemic created an unprecedented situation for the healthcare industry as a whole, and the pharmaceutical sector has responded to the challenges it raised. After establishing itself as one of the leaders in the generic space, the industry is now poised to enhance its innovation and research and development (R&D) capabilities to bring you cutting edge products at affordable prices.

7. CONCLUSION

The aforementioned paper gives an overview of radical changes in mergers and acquisitions trends in the pharmaceutical sector that were caused by policies of Liberalization, Privatization, and Globalization, changes in Monopolies, and myriad other reforms. It also invites researchers to look at two famous pharmaceutical mergers, Sun Pharma-Ranbaxy and Lupin-Gavis. Cross-border mergers put Indian companies on the global map. Being a prominent player in the global pharmaceutical sector will allow Indian companies to take further steps towards achieving international pharmaceutical standards, which basically would be beneficial to them in all sectors, including exports, increased profits, increased investment in R&D laboratories, additional funding received by the companies, a greater number of patented products, and an increase in their market share. This in turn will be beneficial to global pharmaceuticals, since the cost-effective techniques used by Indian companies and the immense market India provides for this sector can support the development of newer Although it is inevitable that such companies may lose their individual identity or expose the industry to rampant takeovers, Mergers in general enrich the country's economy. The complexities of an M&A transaction are enormous and often break down midway

through. It will reduce the pain of an M&A if both the SEBI (Securities and Exchange Board of India) and the RBI (Reserve Bank of India) establish effective legal units capable of quickly answering questions upraised by the parties to a merger. In the Pharmaceutical Industry of India, cross-border mergers are only healthy till the time they do not disrupt the innovation revolution. The pandemic provided valuable insights into the potential of this important industry sector to mobilize resources, and more importantly, it served to accelerate the realization that innovation depends on scale and reach. In the global pharmaceutical space, the pharmaceutical industry of India is already taking advantage of scale and reach. To offer affordable, but innovative products that can cater to the unmet needs of patients globally, our country must now move up the value chain, by scaling up R&D and innovation. The key drivers will be continuous regulatory reforms, innovation funding, industry-academia collaboration, and innovative infrastructure with a focus on patients. The multiple industry stakeholders can work together to transform India into an innovation hub and deliver Innovative, Quality, and Affordable medicines to patients in our country and around the world, as part of Vasudhaiva Kutumbakam's message that "the world is one family".

LIVE-IN RELATIONSHIPS IN INDIA: LEGAL RECOGNITION, PROTECTION AND STATUS

Kumari Srishti Agrawal[265]

Abstract

*A "live-in relationship" is an arrangement whereby two adult individuals decide to cohabit under one roof in a long term emotionally and sexually intimate relationship**.** In case of India, there is no legislation in place that talks about live-in relationships or its legal status. However, with the course of time judiciary has given various judgments which has provided some kind of clarity to the subject. It is now clear that live-in relationship between two consenting adults is not considered illegal in India and now with the passage of time several rights and protection have been granted to the parties involved in such kind of relationships. This paper talks about the legality of live-in relationships in India and covers various legal aspects surrounding it including the legality of children born as a result of those relationships and rights available to them. This paper has identified the logic and reason behind why couples in the current world opt for live in relationships instead of marriage and has also stated the benefits available to them in this case which are not available to them in cases of marriage. It also talks about various statutes that overtime have taken live-in couples under their ambit and now provide rights and protection to couple involved in such relationships.*

This paper has thrown some light to the situation of the same sex couples and how the system of live-in allows them to have some kind of marriage like situation as marriage for them is still not allowed in the country.

Key Words: *Live-in relationship, Marriage, Same sex couple, Absence of legislation, Protection of women, Rights of partners.*

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1. INTRODUCTION

In the contemporary times, the younger generation is somewhat inching away from the concept of marriage and is more and more attracted towards the concept of live-in. To understand this, first it is important to understand the concept itself i.e., **what is live-in?**

It can be defined as a "continuous cohabitation for a significant period of time, between partners who are not married to each other in a legally acceptable way and are sharing a common household."[266]

In India living together of two people without marriage is considered to be a contempt to the societal rules. Since ancient times marriage here is treated as a basis into which the institution of family and society as a large is based. It is also known to be an important samskara which a person must perform to enter their Grihasta stage of life.

The new generation of people however have a very different opinion about it altogether. With the onset of modernisation and the influence of western ideas, the younger generation do not consider marriage in the manner it was done in the traditional Indian society. People having their own different reasons are opting to not get married and stay together as a live-in couple. This kind of relationship is especially prevalent in the among the homosexual couples as not being able to get married in the country, this is the only recourse available to them. In India there is no specific legislation or statute talking about the legitimacy of live-in relationships but the judiciary in the course of its various decisions has provided considerable clarity in the subject matter and has answered the questions surrounding it.

This paper explores various facets of a live-in relationship and has tried to explain how it is different from marriage. It also covers various legal aspects surrounding this topic including the protection provided to women under this relationship, legitimacy of these kind of relationships and legal aspects regarding children which are produced as a result of these relationships.

2. CONCEPT OF "LIVE-IN RELATIONSHIPS" IN INDIAN CONTEXT

A "live-in relationship" is a situation whereby two adult individuals decide to cohabit under one roof in a long term emotionally and sexually intimate relationship. Till date no particular legal definition has been accorded to it either by the legislature or by the judiciary. It is a concept that

266 Choudhary Laxmi Narayan, Mridul Narayan & Mridul Deepanshu, *Live-In Relationships in India- Legal and Psychological Implications,* 3(1) JOURNAL OF PSYCHOSEXUAL HEALTH, (2021), https://doi.org/10.1177/2631831820974585.

evolved in the western society and has been gaining prominence in the Indian society as well. To provide some degree of clarity, the Supreme Court has over time delivered various judgements covering the topic.

In the case of **Velusamy v. D Patchaiammal**[267] the Supreme Court laid certain conditions for a relationship to qualify as a valid live-in relationship:

1. "The couple must hold themselves out to society as being akin to spouses
2. They must be of legal age to marry
3. They must be otherwise qualified to enter into a legal marriage, including being unmarried
4. They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time."[268]

The Supreme Court was of the view in *Indra Sharma v. VKV Sarma*[269] that not every live-in relationship can be said to possess the characteristics of marriage. In the case at hand, the appellant had full knowledge about the marital status of the respondent and thus this case does not qualify to called as a live-in with character of marriage as it has no ingredients of marriage.

The real concept of live-in does not confine itself to heterosexual couples. This means that unlike the legal condition in India which requires a couple to be of opposite gender i.e., a man and woman to get legally married, live-in relationships do not only include the heterosexual couples but also the homosexual couples and the individuals from every sexual orientation. This concept is all inclusive and does not associate itself with the age old and orthodox definitions and constraints that are involved in the institution of marriage in India.

2.1Poins of distinctions between the institution of marriage and live-in

One of the most important differences between a marriage and the situation where a couple cohabit without marriage i.e., "live-in" is the legal backing behind it. Even though a live-in relationship in India is not illegal, it is still does not contain all the legal backings and all the legal protections and remedies that are available to a couple who have been married. For example: a spouse is considered as next of kin after an individual dies and as a result gets a part in the inheritance of the person intestate and also gets various other benefits after the spouse's death however these benefits are not accorded to a live-in partner as these are not even considered as a family member of their

[267] Velusamy v. D Patchaiammal, (2010) 10 SCC 469.

[268] *Id.*

[269] Indra Sharma v. VKV Sarma, AIR 2014 SC 309.

partner after their death.

Marriage is considered to be a huge commitment. In Hindu religion it is considered that once a couple gets married, they remain inseparable for seven births **"Saat janmon ka Saath".** This do seem too superficial but even in reality once a person gets married, it is not a cakewalk for him or her to get out of that marriage. To dissolve the marriage a person has to go through divorce which can be a very stressful procedure especially when you have a spouse who is not willing to get out of the relationship and hence the proceedings itself could stretch out for years together. However, in live-in relationship, this is not at all the case. People now a days prefer it over a marriage mostly because one can easily take a way out in these relationships without the strenuous legal proceedings and all the legal hassles that are involved in case of a marriage.

2.2Why do people opt for a live-in relationship

Live-in relationships are getting more and more common nowadays as many of the new generation couples are choosing to live in such kind of relationships instead of marriage either altogether or just for testing out their compatibility before making a more permanent commitment. Similar to this there are various other and major factors that are making the couples opt for live-in relationships some of which have been mentioned below:

1. **Responsibility:** With marriage comes a huge load of responsibilities which both the partners have to bear. It not only includes each-others responsibilities but involves burdens related to family of one's partner also. Specially in case of women these responsibilities tend to increase many folds after marriage. That is one of the major reasons that the couples do not want to get married.
2. **Easy way out:** as it has been already discussed, to get out of a marriage a couple has to get divorced which can be a very lengthy procedure as our laws are designed to save the institution of marriage. To get out of a marriage a person has to show some definite grounds. It is only recently that a new ground has been introduced under Hindu law by which a couple get divorced mutually without any definite ground but this also has certain conditions attached to it.In case of a live-in relationship if a person does not want to continue the relationship, he/she can simply walk out of the relationship without having to go through the tiring procedure of divorce which makes it desirable for certain people.

3. **Testing one's compatibility/relationship:** Live-in can be said to be a perfect concept to test out a couple's compatibility for each other as it helps them to live under marriage like situation where they can test it out whether in the long run, they would be able to continue their relationship and are compatible to live together or not. That is why most if the new couples first spend some time in live-in before deciding whether they want to get married with each other or not.
4. **Freedom:** one of the best things about Live-in is the freedom associated with it. It does not have huge rights and liabilities which comes with a marriage. It also gives the freedom to get out of the relationship easily in case it does not work out.
5. **Commitment issues:** Nowadays a lot of people have commitment issues. They dread committing to a serious relationship. Even committing to a live-in relationship may also be a huge thing to them. Once they get sure of their relationship, they still choose live-in over marriage as for them it is very big commitment which they cannot ever make.
6. **No legal hassle:** there are no legal hassles involved in live-in relationships unlike in marriage. Whether it be a start of a marriage or its dissolution, there is always some or other formalities that need to be taken care of however same is not the case with live-in as it is completely free from any such legal procedures.
7. **Financial independence:** in case of a marriage the finances of the couple gets mixed up. Troubled finances of one partner messes up the finances of another too. However, live-in relationships do not involve this problem. It has also been seen that after getting married a partner has somewhat less of a control over one's earnings however there is some kind of freedom related to one's finances in a live-in relationship.

3. LEGAL STATUS OF LIVE-IN RELATIONSHIPS IN INDIA

3.1 *Legality of "live-in" relationships*

A lot of time has passed since couples in India have started to go for live in relationships and still there is a lot of ambiguity relating to the legal status of these kind of relations. In India there is no legislation in place which talks about live-in relationships. Even now, no concrete definition of "live-in" relationship that has been given by any competent authority. To provide some clarity, the Supreme Court of India has talked about live-in relationships in various instances in various cases and finally declared that *live-in relationships are legal.* This chapter will deal about the legality of

live-in relationship and its legal status in India as it has been made clear in the course of various judicial pronouncements.

Taking the fundamental freedoms into account which are provided to the citizens of India as part of Fundamental Rights, it was not too hard for the courts to settle the confusion regarding validity of live-in relationships as these rights are flexible allowing the courts to interpret them liberally and broadly. In the case of "*S. Khushboo v. Kanniammal and Anr."*[270], a south Indian actress, Khushboo filed a Special Leave Petition before the Supreme Court for taking down 22 criminal cases that were institutes against her for interview in which she supposedly promoted "pre-marital sex". The court in this case sided with her and held that there is no law prohibiting "pre-marital sex or live-in relationships". It further said that "living together is a right to live" which is an apparent reference to Article 21 which grants a person the freedom to live and have personal liberty.

In "*Badri Prasad Vs Dy. Director of Consolidation"*[271], the highest Court gave a very important judgement in which it declared that "live-in relationships in India are legal but subject to caveats like age of marriage, consent and soundness of mind". The Allahabad High Court in a case[272] held that "a lady of about 21 years of age being a major, has the right to live with a man even without getting married, if both so wish". In a case[273] Supreme Court even said that even without marriage a couple would be considered to be a married one and the resultant children would be considered legitimate they it could be prove that they have been living together for a long time.

In a 2001 judgement Allahabad High Court in a case[*274*] held that for a man and woman to live together is not illegal. Allahabad high court while delivering this judgement also pointed out the difference among law and the concept of morality. It said "Hence, she is a major [adult] and she has the right to go anywhere and live with anyone. In our opinion, a man and a woman, even without getting married can live together if they wish. This may be considered immoral by society but it is not illegal,"[275]. This statement by the court clearly legitimises live in relationship and keeps it separate from the notions of morality. Similarly in a 2006 judgement[276] given by Supreme Court

[270] S. Khushboo v. Kanniammal and Anr., 2010(4) SCALE 462.
[271] Badri Prasad Vs Dy. Director of Consolidation, 1978 AIR 1557.
[272] Payal Katara v. Superintendent Nari Niketan Kandri Vihar Agra and Others, AIR 2001 All. 254.
[273] Radhika v State of MP, (AIR 1966) MP 134.
[274] Payal Sharma v. Nari Niketan, AIR 2001 All 254.
[275] *Id.*
[276] Lata Singh v. State of UP, (2006) 5 SCC 475.

it was held that living together of two individuals of opposite sex is not illegal.

Earlier, extramarital sex between two people that amounted to adultery was considered as an offence but now even this caveat has been removed after the judgement given in the case of *Joseph Shine v. Union of India*[277] which decriminalized adultery.

3.2 *Legitimacy of Children born of live-in relationships*

The rise of the trend in people opting for live-in relationships pose an important concern regarding the future and legitimacy of the offspring born out of such relations and also raise questions related to the rights available to such children. This chapter has covered all these concerns regarding the topic.

In the case of "*S.P.S. Balasubramanyam v. Suruttayan"*[278], legitimacy was provided to the children born to a couple in a live-in. It was held in a case by supreme Court held that[279], in a case when a couple cohabit for a long time in the same house it creates a "presumption of marriage" under "Section 114 of the Indian Evidence Act, 1872". As a result of this presumption, their children would be considered to be legitimate and eligible to inherit a part of the family estate. *Bharatha Matha v. Vijaya Renganathan*[280] is an important case in which the court entitled the children out of such relations to a part of their parents' property. It was also observed that[281] these children may not be considered to be illegitimate if the live-in relationship lasts long enough.

"*A supreme Court bench headed by Justice Arijit Pasayat declared that children born out of live-in relationships would no longer be considered as illegitimate.*"[282] *"Law inclines in the interest of legitimacy and thumbs down 'whoreson' or 'fruit of adultery'."* All these judgements clearly makes it certain that if a live-in relationship lasts long enough, the children born out of it would not be termed illegitimate and would get several rights.

3.3 *Inheritance rights*

Indian law does not say anything about the "inheritance rights" of couples living in a "live-in" relationship. As of now, they do not come under the bounds of "*Class-1 or Class -2 heirs*" under

[277] Joseph Shine v Union of India, AIR 2018 SC 4849.
[278] S.P.S. Balasubramanyam v Suruttayan, 1994 AIR 133.
[279] *Id.*
[280] Bharatha Matha v Vijaya Renganathan, AIR 2010 SC 2685.
[281] *Id.*
[282] Gopal Swathy, *Live-in relationship- it's position in India and abroad- pros and cons-legitimacy of child-inheritance of property, Legal Services India* LEGAL SERVICE (Aug. 24, 2023), https://www.legalservicesindia.com/article/211/Live-in- Relationships.html.

Hindu Succession Act, 1956[283]. Similarly, nothing has been mentioned about them under Muslim law. However, in case of inheritance rights of children out of such relationships some kind of clarity has been provided by judicial pronouncements and legislations over the course of time.

The Supreme Court in 2022 in the case of "*Kattukandi Edathil Krishnan v. Kattukandi Edathil Valsan"*[284] provided legitimacy to children out of a live-in relationship. There is one pre-requisite though that the relation must not be short term and a "walk in and walk out" kind of relationship. Similar judgement was also given in the case of *Tulsa v. Durghatiya*[285]. It gave those children rights related to property. The Supreme Court said, "the law presumes in favour of marriage and against concubinage". Rights to ancestral property cannot be refused to a child when the relation of its parents was consensual and lasted for a long time.[286]

In earlier judgements the Supreme Court has made it clear that in case of Hindu ancestral coparcenary property i.e., undivided Hindu joint family property, children out of marriage are or live-in are not given property rights and can only lay claim to their parents' own property. Justices B.S Chauhan and Swatanter Kumar while re-emphasizing an earlier decision has observed that, "*In view of the legal fiction contained in Section 16 of the Hindu Marriage Act, 1955 (legitimacy of children of void and voidable marriages), the illegitimate children, for all practical purposes, including succession to the properties of their parents, have to be treated as legitimate. They cannot, however, succeed to the properties of any other relation on the basis of this rule, which in its operation, is limited to the properties of the parents."*

4. RIGHTS AND PROTECTION PROVIDED TO COUPLE IN A LIVE-IN RELATIONSHIP

In 2008 a proposal was approved by the Government of Maharashtra which provided a woman in a live-in relationship the status of a wife in case the relationship lasted for a reasonable period of time. If further stated that 'reasonable period' for the abovementioned purpose would be determined based on each case and its surrounding circumstances.

[283] Hindu Succession Act, 1956.Section 8.
[284] Kattukandi Edathil Krishnan v. Kattukandi Edathil Valsan, 2022 LiveLaw (SC) 549.
[285] Tulsa v. Durghatiya, (4) SCC 520.
[286] Jheelum Basu & Madhur Sharma, *Live-in Relationships In India: Legal But Do They Have Enough Safeguards?*, OUTLOOK (AUG 26, 2023), https://www.outlookindia.com/national/live-in-relationships-in-india-legal-but-do-they-have-enough-safeguards--news-236338.

A *2008 recommendation by The National Commission for Women* to the Ministry of Women and Child Development asked "for the definition of 'wife' under Section 125 CrPC to include women involved in a live-in relationship. The aim of the recommendation was to harmonise the provisions of law dealing with protection of women from domestic violence and also to put a live-in couple's relationship at par with that of a legally married couple". *The Malimath Committee* had given the recommendation that "if a man and a woman are living together as husband and wife for a reasonable long period, the man shall be deemed to have married the woman." The Committee had also made a recommendation for amendment of word "wife" under CrPC to include under its ambit, "a woman living with the man like his wife" so as to make women in live-n also eligible to receive alimony.

4.1 *The Protection of Women from Domestic Violence Act, 2005*

The law has recognised live-in relationship partners to be covered under the ambit of "The Protection of Women from Domestic Violence Act, 2005"[287] by providing rights and protection to women who are not in a marital but a live-in relationship i.e., they do not qualify exactly as a wife but are in a relationship where they are equivalent to a wife. Section 2(f)[288] of the act defines domestic relationship as:

"*a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family*."[289]

Marriage and live-in relationship have various similar characteristics as in both of them a couple cohabit together in the same house for a long period of time. That is why the purview of this act was extended so that women in a live-in relationship could come under its ambit.

4.2 *Code of Criminal Procedure, 1973*

Section 125[290] Code of Criminal Procedure, 1973 provides a way for the wife to seek maintenance from her husband in case he refuses to do so. If the woman is able to prove a marriage like connection with her partner, then the court would take presumption of marriage and the partner would be made liable to pay for her maintenance. This step to include women in live-in

[287] Protection of Women from Domestic Violence Act, 2005.Section 2(f)
[288] Protection of Women from Domestic Violence Act, 2005 Section 2(f).
[289] *Id.*
[290] Code of Criminal Procedure, 1973, Section 125.

relationships under the ambit of this section was a step in the right direction as now it provides monetary security to women involved in such kind of relationships.

This step can be seen as a result from the recommendations of the *Malimath Committee* that was appointed by the home ministry, headed by Justice Malimath. In 2009 the committee proposed for modification in the definition of alimony/maintenance under Section 125 CrPC[291] and also for the word 'wife' under this section to include 'women under live-in relationships' as well so that they would also be able to demand alimony from their partners with the help of this section.

This was also made evident by a Bombay High Court judgement in "*Abhijit Bhikaseth Auti v. State of Maharashtra and Anr"*[292] where it was said that to seek maintenance under Section 125 CrPC a woman is not required to prove her marriage with her partner. This judgement can be taken to mean that judiciary has indicated that a woman under live-in relationship can also take the benefit of this provision.

5. SUGGESTIONS AND CONCLUSION

Live-in relationships provide a great opportunity to a couple to test their compatibility as it allows them live under a marriage like situation which helps them to plan their future together. It also provides an alternative option for a couple who does not want to get married altogether. With times social values have changed and even though the importance of marriage still remains intact for the society, it can also not be denied that the instances of live-in relationship among the young generation have been increasing and now it has also been gaining some kind of acceptance in the society specially in the large metropolitan cities. To cover the problems that may arise out of these relationships the judiciary has also kept itself active and has given several decisions for the protection of women in such kind of relationships and has provided legitimacy to children produced out of it so as to protect the interest of these vulnerable groups which could have been negatively exploited in a live-in relationship.

To improve the condition of women and children involved in these relations even further it is essential that the legislature of country also some take some steps. A special legislation dealing with women involved in these relations and providing them protection and financial assistance in case of separation in much needed. There is also a need for a legislation explicitly giving

[291] *Id.*
[292] Abhijit Bhikaseth Auti v. State of Maharashtra and Anr, Crl. W.P. No. 2218/2007 MANU/MH 1432/2008 (Bom. H.C. Sept. 16. 2009).

legitimacy to the children out of such relations. These steps would ensure that no one in future would be able to question the legitimacy of such relations and provide much needed security and a sense of peace to people involved in such relationship.

REVERSE CIRP: A NEW PARADIGM FOR REAL ESTATE ENTITIES IN THE RESOLUTION OF INSOLVENCY IN INDIA

Ms. Baibhabi Tripathi [293]

Abstract

The Insolvency and Bankruptcy Code, 2016 (IBC) has undergone revisions aimed at addressing deficiencies encountered in the resolution of insolvencies involving corporations, partnerships, and individuals since its inception. The insolvency resolution mechanism in India has been aided by the judiciary's criticism of the Code and recommendations for fast fixes. In order to promote IBC's primary objectives, the growing body of legal literature on the subject frequently creates and construes CIRP rules. The judiciary has implemented novel regulations, a few of which are geared towards the reversal of IBC provisions. Reverse CIRP is used to solve insolvency in real estate entities. Reverse Corporate Insolvency Resolution Process (CIRP), which is not acknowledged by the IBC Code, supplants CIRP and certain other IBC provisions in order to safeguard the objectives of the IBC and the CIRP mechanism. The legality and conformity of the procedure with the IBC's plan are subject to dispute. The present composition scrutinizes the objectives of the Reverse CIRP's IBC, divergences from extant IBC procedures, and its potential to fulfil the requirements of the real estate industry. Additionally, it describes how Reverse CIRP might be integrated into the IBC design.

Keywords: *Reverse CIRP, IBC, Bankruptcy, Insolvency, Consumer.*

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1. INTRODUCTION

Real estate investment has been a longstanding practice. The swift growth of India's real estate sector was facilitated by the processes of industrialization and urbanization. In 2014, the establishment of Real Estate Investment Trusts[319] served as a catalyst for the industry's consolidation. The expansion of the housing market was concomitantly marred by the inability of builders to promptly provide homes to buyers, diversion of funds, and misappropriation of homebuyer funds for extraneous ventures. This led homebuyers to pursue legal recourse under different statutory provisions.

The **Consumer Protection Act of 2019 ("CPA")[295]** enables buyers to get their money back. **The Real Estate (Regulation and Development) Act of 2016**[296], commonly referred to as RERA, allows for a refund of the amount paid. Once banks filed for CIRP, the slow enforcement of RERA across the country and the issuance of a moratorium on the enforcement of remedies given under RERA and CPA against the corporate debtor made things worse for homebuyers.

The judiciary intervened and determined that individuals who purchase homes are deemed financial creditors in accordance with **section 5(7) of the IBC**. This is due to the fact that the funds obtained by builders through guaranteed return schemes have the commercial implications of a loan. Furthermore, it was determined by the Supreme Court in **the Chitra Sharma case** that the representative of purchasers is eligible to partake in the **Committee of Creditors ("CoC")[322]**.The aforementioned determinations led to the incorporation of purchasers as financial creditors pursuant to the First Amendment of Code **section 5(8)(f).[323]** The validity of the First Amendment was contested, and subsequently upheld by the Supreme Court. It was observed that the funds acquired from homebuyers play a significant role in the execution of projects, thereby rendering their representation in CoC indispensable[324].

Due to the First Amendment, a number of lawsuits were initiated by individual homebuyers, some

[319] SEBI (Real Estate Investment Trusts) Regulations, 2014, published in the Indian Gazette, Part III, September 26, 2014.
[295] Consumer Protection Act of 2019 (No. 35).
[296] The Real Estate (Regulation and Development) Act of 2016 (No. 16).
[297] Chitra Sharma v. Union of India, 2018 (18) SCC 575 (Ind.).
[298] Second Amendment to the Insolvency and Bankruptcy Code Act (No. 26 of 2018).
[299] Pioneer Urban Land and Infrastructure Limited v. Union of India, (2019) 8 SCC 416 (Ind.).

of which were based on trivial grounds and malevolent motives, leading to an increased workload for the judicial system. In 2020, an amendment was made to the IBC which stipulated that a minimum threshold of **10% or 100 allotees** of a project must be met in order to commence CIRP[300].

There are presently three statutes available to provide recourse for homebuyers, namely the **Insolvency Bankruptcy Code (IBC)**, **RERA,** and **the Consumer Protection Act (CPA).** The efficacy of the remedy provided by the IBC was considered insufficient in addressing the insolvency of real estate entities due to its inability to adequately safeguard the concerns of homebuyers. This prompted the Court to test a novel procedure that it termed the Reverse CIRP.

2. REVERSE CIRP: WHAT IS IT?

The NCLAT initially employed the Reverse CIRP in the context **of Flat Buyers Association Winter Hills.**[301] Upon receipt of a CIRP application from the homebuyers of the project, the bank that provided funding initiates the implementation of reverse CIRP. The aforementioned process involves the promoter presenting a resolution proposal that mandates the expeditious resolution or finalisation of a project pertaining to the corporate debtor. The promoter is required to infuse funds from alternative sources in their capacity as a lender. The CoC evaluates the presented resolution plan's viability. The CoC is made up of banks and homebuyers who have a stake in the project's successful completion.

Under reverse CIRP, third party applicants for resolution are not required to present a resolution plan. In accordance with **section 7 of the IBC**, the Resolution Professional ("RP") is required to move an application requesting the dismissal of a CIRP application if the project is effectively finished. Nonetheless, in the event of delays that exceed the designated timeframe or insufficient funding, the RP will proceed with the CIRP.

The court formulated this procedure while taking into account several factors, including: **(a)** the limited business knowledge of homebuyers; **(b)** the necessity of safeguarding the interests of homebuyers by ensuring project continuity; **(c)** the need for a prompt resolution within a time-

[300] Act 1 of 2020, Insolvency and Bankruptcy Code (Amendment).
[301] Association of Flat Buyers in Winter Hills v. Umang Real tech Pvt. Ltd., by way of IRP and Others(2020) SCC OnLine NCLAT 1199.

constrained framework; and **(d)** the necessity of debtor management assistance[302]. The NCLAT and the Apex Court have recently upheld the resolution of real estate corporations on a project-wise basis in **Supertech Ltd.[303] and Anand Murti v. Soni Infratech Private Limited and Ors**.,[304] respectively.

3. CONCERNS EXPRESSED ABOUT REVERSE CIRP

The implementation of Reverse CIRP is facing opposition on multiple grounds. The IBC is being challenged for exceeding its limits due to judicial activism and overreach. Due to the ambiguity surrounding the moratorium, preferred transactions, undervalued transactions, and fraudulent transactions, its legality is questioned. The Supertech case has brought into question the Adjudicating Authority's power to enforce Reverse CIRP in the event of a refusal to grant the applicant's request for CIRP under the Code (IBC).

The idea that using Reverse CIRP would violate section 29A of the IBC is another reason for concern. **Section 29A** prohibits promoters from participating in a corporate debtor's settlement procedure. Reverse CIRP empowers promoters to oversee the resolution of a particular project within the real estate company[305].

As per the report, the use of **section 14 of the IBC** indicates that the reverse CIRP confers greater advantages upon builders as compared to purchasers. After the CIRP has been started, Section 14 forbids the corporate debtor from becoming the subject of further judicial action. It is claimed that extending the moratorium to this mechanism will disfavour project purchasers who are not a part of the Reverse CIRP if the Reverse CIRP is conducting resolution project-by-project rather than for the entire firm.

The legitimacy of the Reverse CIRP may be subject to debate, however, the Amendment made to **Section 7** of the Code which permits homebuyers to apply project-by-project could be construed as an implicit approval by the legislature of the judiciary's suggestion. Furthermore, the Supreme

[302] Palak Kumar titled "Is the Reverse CIRP a Tailor-Made Solution for Homebuyers?" (May 24, 2020). url://gjle.in/2020/05/24/is-the-reverse-cirp-a-tailor-made-remedy-for-homebuyers/.
[303] M/s. Supertech Ltd. Director Ram KishorArora v. Union Bank of India, 2022 S. C. C. ONLINE NCLAT 239.
[304] 2022 SCC OnLine SC 519.
[305] AnkitTripathi, "Reverse CIRP: Reflections on NCLAT's Legal Experimentation", INDIACORPLAW (March 2, 2020). www://indiacorplaw.in/2020/03/reverse-cirp-reflections-on-nclats-legalexperimentation.html.

Court has neither rejected nor overturned the Reverse CIRP. Reverse CIRP is widely recognised as a necessary remedy for the real estate sector. The aforementioned factors collectively indicate the viability of Reverse CIRP among individuals seeking to purchase a home, as well as legal and business experts.

Deviation of the judiciary from the Bankruptcy Code in the establishment of the Reverse CIRP and its reasonableness

The preamble of the IBC outlines three objectives, namely: **(1)** the resolution of insolvency to enable the Corporate Debtor (CD) to recommence operations; **(2)** the optimisation of the value of CD's assets; and **(3)** the equitable consideration of the interests of all stakeholders to foster entrepreneurship and facilitate credit availability. In **the Chitra Sharma case**, the Supreme Court determined that the protocols established by the IBC should not be supplanted by a mechanism that is susceptible to judicial directives.[306]

Notwithstanding, the courts have often circumvented the regulations of the IBC to attain their objectives. In the case of **Rajesh Goyal v. Babita Gupta**[307], the NCLAT authorised external financing from the promoter to finalise the project, with the aim of safeguarding the welfare of all parties involved, including the homebuyers. In order to safeguard the objectives of the IBC, the judiciary has also embraced a purposive construction of its clauses. As an illustration, the judiciary in the **P. Mohanraj case** rendered a verdict that section 14 of the IBC ought to be construed in a manner that is advantageous to the Corporate Debtor (CD)[308].

In the **Aditya Kumar Tibrewal case**, the NCLAT concluded that the time period outlined in **Regulation 35A of the CIRP Regulations 2016**, as denoted by the term "shall," is considered to be directory in nature[309]. This determination was made on the basis that imposing a mandatory requirement would create additional inconvenience for the Corporate Debtor (CD), essentially compromising the code's goal of optimising the CD's resources. Moreover, the Supreme Court has consistently upheld the notion that in situations where the law lacks clarity or does not address a specific matter, the judiciary may resort to common law or equitable principles.

[306] *Supra* note 297.
[307] Rajesh Goyal v. Babita Gupta 2021 SCC OnLine NCLAT 533.
[308] "P. Mohanraj &Ors. v. Shah Brothers" , (2021) 6 SCC 258 (Ind.).
[309] "Om Prakash Pandey v. Aditya Tibrewa"l, 2022 S.C. OnLine NCLAT 142 (Ind.).

In the **Swiss Ribbons case**, the Apex Court emphasised the importance of not impeding economic experimentation, stating that preventing such experimentation carries significant consequences for the nation[310]. However, it should be noted that the court did exclude MSMEs from the purview of section 29A of the IBC. The aforementioned observation was reiterated by the Committee of Creditors in the **Essar Steel India Ltd. case[311]**. The NCLAT's Reverse CIRP legal innovation was utilised in the Flat Buyers case to safeguard the rights of homebuyers, resulting in the affirmation of both rulings.

The analysis of the aforementioned cases indicates that the courts have engaged in deliberate interpretation and experimentation of IBC regulations to ensure the achievement of IBC's objectives. The overall judicial system is exhibiting this common inclination, and the procedure of Reverse CIRP is not an anomaly.

The integration of Reverse CIRP with the IBC is contingent upon its alignment with the objectives of the IBC. The justification for judicial experimentation lies in its ability to ensure the attainment of the IBC's goals. An alternative approach to the current CIRP, known as Reverse CIRP, has been suggested to address the unique needs of real estate enterprises. This proposal emphasises the need for a distinct procedure tailored to the specific requirements of such entities. Consequently, the incorporation of the proposed alternative to the process of CIRP in the IBC Code would require a valid rationale that addresses the shortcomings of the CIRP and provides a more efficient mechanism for resolving insolvency.

Do Reverse CIRP and the IBC Code of 2016 share common objectives?

This part of the article analyses the intended benefit of Reverse CIRP and its purported benefits over CIRP in order to fulfil the specific demands of a Real Estate CD and its stakeholders. In order to ensure that Reverse CIRP achieves the objectives of the IBC, it also highlights the shortcomings of the procedures and makes recommendations for possible changes.

[310] Swiss Ribbons Pvt. Ltd. v. Union of India, (2019) 4 SCC 17 (Ind.).
[311] Essar Steel India Limited v. Satish Kumar Gupta &Ors., (2020) 8 SCC 531(Ind.).

I. SEEKING TO ENSURE THAT REVERSE CIRP IS STARTED TO REACH THE OBJECTIVES OF THE 2016 IBC

Instead of recovering debt, the IBC seeks to resolve CD's insolvency and enable its revival and survival as a continuing concern. Therefore, if homebuyers applied to the AA with the desire to get specific performance of their contracts or to recover compensation for delays through refunds of amounts paid, they would be utilising the IBC contrary to its original purposes.

A. REFUND CLAIMS ARE RESTRICTED: In order to discourage people from utilising the Reverse CIRP to recover the money they spent buying the property, the AA denies requests made by homebuyers for a return of the money they spent on it. This stage also ensures that refunds that result in inadequate funding do not prevent the project from being completed and, consequently, the CD from functioning.[312] The Reverse CIRP provides resolution in this way, assisting the **CD's objectives of survival and operational continuity**.

B. REVERSE CIRP: NOT INTENDED TO COERCE FULFILMENT OF PURCHASE AGREEMENTS: According to the IBC, CIRP must be initiated when the creditors agree that the incumbent management of the CD is no longer capable of paying the CD's debts and they support a change in management. Homebuyers who initiate CIRPs may insist that the project's construction be completed solely by the present promoter and that they do not want the involvement of third-party resolution applicants. In these situations, where homeowners are merely looking for the promoter's commitment to follow a revised construction timetable, the IBC is neither necessary nor appropriate.

Instead, the RERA could be used to allow for a mediation procedure (with a court-enforceable binding settlement) in the early stages of settling issues surrounding the promoter's delay in building housing developments because it is specialised to the real estate business.[313]

[312] Understanding The IBC: Key Jurisprudence and Practical Considerations - A Handbook 11 (2020), https://ibbi.gov.in/uploads/whatsnew/e42fddce80e99d28b683a7e21c81110e.pdf, published by the Insolvency and Bankruptcy Board of India.

[313] IBC Cases on the Rise, Realty Plus, Legal Opinion & Counsel, May 9, 2022, https://www.rprealtyplus.com/rising-cases-of-ibc-worrisome-for-the-sector106083.html.

II. MAXIMISING ASSET VALUE AND ENSURING CORPORATE DEBTOR SURVIVAL

The Reverse CIRP outlines the measures necessary to sustain the operational viability of CD and optimize the worth of its resources. These measures include:

A. DEBTOR IN POSSESSION AND PROJECT-BASED RESOLUTION: The aim is to minimize the duration of conflict resolution by confining it to particular projects. By utilizing the debtor-in-possession strategy, the current CD management is able to continue with their operational endeavors, which in turn allows non-essential initiatives to continue in a seamless manner alongside core business operations. Continued operations that increase CD's worth prevent the value of its assets from depreciating.

B. THE PROMOTER MAY SUBMIT A CD RESOLUTION PLAN: The CD gives the promoter the chance to present a resolution plan from the point of view of a lender, taking into account things like how hard it is to get homebuyers together to evaluate plans, how little business sense homebuyers have, and how well the promoter knows all the project-related details.51 Moreover, the participation of the promoter enhances the probability of the corporate debtor's revival, in contrast to a situation where the CIRP is unsuccessful, leading to the abandonment of the project[314].

C. REVERSE CIRP SHOULD REVIVE THE INSOLVENT CD FOR A PROJECT: Banks, homes, transactions, and stakeholders pay into each project's bank account. Thus, focusing on certain initiatives may streamline real estate CD insolvency. IBC wants CD survival and continuity. This shows that the IBC is meant for a non-temporal legal body. Thus, only the real estate Company may be sued under the IBC, not a CD project that would disappear after completion. Reverse CIRP should handle the CD's insolvency project-by-project, not single-project activities.

[314] Chiranjivi Sharma, *More Uncertainty Than Clarification on Reverse CIRP for Real Estate Firms,* INDIA LAW JOURNAL https://www.indialawjournal.org/reverse-cirp-on-real-estate-firms.

Therefore, AA should not restrict the insolvency resolution procedure to the project when actions are brought against the CD[315]. The CD should be put on hold while gathering and compiling data on , the CD's financials and creditworthiness, and all CD projects. Then select the optimal method of insolvency. Reverse CIRP is best for few insolvent projects. The moratorium should only apply to CIRP initiatives. If delays and funding are foreseeable, most CD projects should employ conventional CIRP. If significant financial irregularities indicate fund syphoning, government officials can execute delayed projects to avoid CD liquidation, as in Amrapali group[316]. After assessing the CD's finances, reverse CIRP can be utilised instead of CIRP. The IBC's objectives take precedence. If such were the case, Reverse CIRP wouldn't stand in the way of IBC's objectives.

III. HARMONISING STAKEHOLDERS' INTERESTS

Balancing the interests of the various stakeholders in the CD to support credit accessibility and entrepreneurship is **the objective of Section 58 of the IBC. The measures adopted by Reverse CIRP to achieve its objective are as follows:**

A. RESOLUTION OF PROJECT-BY-PROJECT INSOLVENCY: Reverse CIRP allows insolvency to be resolved project-by-project because implementing CIRP for every project would needlessly impede or delay other effectively operating projects, impacting the financial difficulties of non-project stakeholders.

B. SECURING THE PROPERTY FOR HOMEBUYERS: Reverse CIRP prohibits secured financial creditors from demanding payment of their obligations from the CD's secured assets that are intended to be sold to homebuyers. This is intended to protect the interests of homebuyers, who collectively pay enormous quantities to builders relative to other financial creditors, yet continue to be denied a place to live despite spending their entire lifetime earnings on it. However, purchasers' rights over their assigned property are contingent upon the repayment of their mortgages. If homebuyers default on their mortgage payments, the lending institutions would have

[315] Vipul Ganda, "IBC: Reverse Coporate Insolvency Resolution Process", www://www.vipulganda.com/blogs/IBC-Reverse-Corporate-Insolvency-Resolution-Process.html.
[316] "Bikram Chaterjee v. Union of India", 2019 SCC Online SC 901 (Ind.).

a claim on the property under construction.

In addition, if loan disbursement is contingent upon construction, banks would refuse to release additional funds. If the homebuyer abandons the property or expresses an inability to discharge liability (even after loan restructuring), the lending institutions should be permitted to participate in the CoC. In addition, banks should be compelled to disburse remaining loan amounts to finance the construction.[317] The banks will then recoup their losses through the transfer of the newly constructed property to a new buyer.

C. ENHANCING CREDIT ACCESSIBILITY BY ENCOURAGING BANK LOAN RECOVERY: While protecting the interests of homebuyers, one must ensure that the banks' interest in loan recovery is not disregarded. Since the cumulative amount owed to homebuyers would be significantly greater than the amount owed to banks, banks would hold a minority voting share in the CoC. To ensure that banks have a voice in the resolution process, a minimal percentage of approval from the classes of both banks and homebuyers should be required for the resolution plan's approval. Moreover, homebuyers who have selected construction/possession linked payment plans (whole amount for flat not paid up front) may not be considered financial creditors because there is no time value of money in these transactions. This action would enhance the voting power of banks within the CoC. Additionally, there are instances in which banks or operational creditors have transacted with multiple CD initiatives[318].

In such cases, the promoter of the CD must issue an undertaking for payment of the outstanding debts over a period of time, following the completion of other projects, even if the AA chooses to restrict the resolution process to a single project (from which the majority of the dues are to be recovered). Similar conditions may be imposed on the CD's promoter if, according to the promoter's approved plan, the bank is only able to recover a small amount (the funds remaining after construction is complete) upon completion of the project's CIRP.

[317] Jeevan Prakash Sharma in Amrapali Mess, url://www.outlookindia.com/website/story/india-news-amrapalimess-two-and-half-years-after-sc-verdict-no-succour-for-home-buyers/372313.
[318] Uday Khare, "Insolvency in Real Estate: A Complex Balancing Act," Jindal Global International Law School. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3661840.

5. THE DIFFERENTIATION AND RESEMBLANCE OF REVERSE CIRP FROM THE CURRENT IBC MECHANISMS.

This part provides a comparison between the reverse CIRP and the current Insolvency resolution processes. This would facilitate the determination of whether the integration of reverse CIRP into the existing system with minor modifications is feasible or if it warrants a novel approach. Furthermore, it would be beneficial to ascertain the extent of judicial innovation involved in the formulation of Reverse CIRP.

5.1 REVERSE CIRP AND CIRP: Facilitating the corporate debtor's revival is the goal of the CIRP. On the other hand, the reverse CIRP seeks to guarantee project completion in order to protect homebuyers' interests. The implementation of Reverse CIRP is conducted on a project-specific basis, whereas CIRP is implemented across the entire organisation. The Insolvency Resolution Professional (IRP), acting with the consent of creditors, is required by the IBC to supervise the operations of the corporate debtor. This is because the CIRP is based on a creditor-in-possession model for the resolution of distressed companies.[319] By using a debtor-in-possession framework to resolve projects, the Reverse CIRP approach allows corporate debtor management to maintain operational control.

The Reverse CIRP appears to be in violation of the directive outlined in **section 29A of the Code**, which is in contrast to the approach taken by CIRP. In the event of an unsuccessful Reverse CIRP, the conventional CIRP may be initiated for the corporate debtor. Nonetheless, the tribunal retains the authority to mandate the corporate debtor's liquidation if the resolution plan is not carried out during the CIRP within the allotted time frame.

5.2 THE REVERSE CIRP AND THE PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS ("PPIRP"): Both PPIRP and reverse CIRP adhere to the debtor-in-possession model, whereby the corporate debtor assumes responsibility for self-management. Also, PPIRP, like Reverse CIRP, requires that the CD's promoter present a resolution plan. Furthermore, it can be observed that the PPIRP bears resemblance to the reverse CIRP in that the consideration of third-party resolution plans is not entertained unless specifically requested. **PPIRP, on the other hand,**

[319] Faqs On Corporate Insolvency Resolution Process 21, Insolvency And Bankruptcy Board Of India (2017), https://ibbi.gov.in/en/publication/information-brochures.

is conducted for MSMEs, as opposed to reverse CIRP, which is primarily available to homebuyers. Moreover, the initiation of the PPIRP is contingent upon the approval of creditors representing at least 66% of the total debt value. The absence of a requirement in reverse CIRP necessitates the promoter to solely obtain the tribunal's approval for its intervention application.

The implementation of PPIRP across all real estate entities, irrespective of their MSME classification, and the circumvention of the commencement procedure (with the promoter's consent from creditors) can enable the adoption of reverse CIRP through the PPIRP mechanism.

5.3 ONE-TIME-SETTLEMENT ("OTS") AND REVERSE CIRP: The acronym OTS pertains to a promoter settlement scheme that, upon acceptance, would preclude the CD from being subjected to the CIRP. If the promoter's resolution plan is approved, no resolution plans from third party applicants for resolution will be requested to participate in Reverse CIRP. The approval of a majority of homebuyers is a prerequisite for the implementation of the promoters' plan, whereas the OTS necessitates authorization from creditors who possess **90% of the CoC's voting shares**.

If approval conditions in OTS are relaxed for real estate businesses, the AA would reach the same conclusion as adoption of OTS when limiting insolvency resolution to CD projects.

6. CONCLUSION

The Insolvency and Bankruptcy Code (IBC) is presently undergoing experimental implementation as a novel element of the country's bankruptcy resolution mechanism, with the aim of tackling any emerging issues that may arise during the process of utilising the framework for dispute resolution. Judicial experiments are only permitted if they are consistent with the IBC's goals. The experimental implementation of Reverse CIRP is a commendable endeavour that appears to align with the IBC's goals.

In order to align with the International Building Code's current framework and provide evidence for the superiority of its adoption over the extant resolution procedures within the IBC, certain modifications may be required for the elements outlined in the composition. Furthermore, it is feasible to integrate the aforementioned process as a minor modification to the existing insolvency resolution technique.

SURROGACY WHO HAS THE 'RIGHT 'TO HAVE A CHILD?

Ms. Monjima Sengupta[320]

Abstract

Surrogacy is a legal agreement, through which a woman delivers a child for an intending couple. This delivery is done with the intention to transfer the baby to the couple. While controversial, it is of no doubt that such an agreement is a blessing for those people who are unable to conceive, but still want to raise their own child. Usually, it is availed by couples who have issues with fertility. However, this process is highly restrictive and what is meant to be a lawful way for people to have children is extremely exclusionary. In India, surrogacy and other forms of Assisted Reproductive Techniques are encoded in the Surrogacy (Regulation) Act of 2021. This relatively recent act deals with the technical and legal aspects of the procedure. Section 2 (h) of the Act defines the intending couple as being comprised of a legal married Indian man and woman. Further, the Act highlights that such a couple should have gestational issues to be eligible for surrogacy. What is encoded in these two sentences of the Act excludes a plethora of other people who would like to become parents through surrogacy. This includes a large amount of the population, from those in a live-in arrangement to those in homosexual relationship. Not only are these provisions in contravention of Article 14 of the Indian Constitution, but they also set up a problematic social narrative. By excluding such couples from their ambit, the current surrogacy regime indicates that they are outliers in society, and not capable of maintaining happy and stable families. This note aims to take a comprehensive view of the social and legal situation regarding the same. It delves into rationalizations behind such restriction, and whether they have to revised owing to the changes in society. It also considers the evolution of surrogacy over time, and the corresponding provisions.

Keywords: *Surrogacy, Assisted Reproductive Techniques, Surrogacy (Regulation) Act, 2021.*

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1. INTRODUCTION

The surrogacy regime of India, as legalized in 2002, has always been under great controversy. In the 2000s, it was regarding the ethical question of commercial surrogacy. Best described as a 'womb for pay', it consisted of women bearing the children of couples for compensation, which was decried as stripping the surrogate mother of her dignity. Other than the marked immorality of using a woman's womb and the resultant child as a product which can be bought and sold, controversy also erupted over the attachment of surrogate to the child. The Gujarati village of Anand was the hotspot for commercial surrogacy, and any exploitation thereof.

As a counter to this, commercial surrogacy was banned in 2015[321]. In 2021, the Surrogacy 'Regulation' Act put further restrictions on the procedure. While the ban was quite controversial in itself, notice also went to the restrictions stipulated by the act. In a gist, the procedure of surrogacy could only be availed by married, heterosexual Indian couples with fertility issues. This effectively alienated live-in couples, NRI marriages, and, perhaps most prominently, those in homosexual relationships.

In a petition filed before the Delhi High Court[322], it has been alleged that these stringent laws go against Article 14[323] and Article 21[324] of the Constitution, which enshrine right to equality and right to life respectively. These petitions filed before the Delhi High Court enquired about the criteria to grant couples the service of surrogacy. Amongst their allegations was the fact that the criteria of gender and nature of relations were completely arbitrary and that a substantial portion of society was excluded from claiming their human right of establishing a family with a child.

This article considers the above allegations, as well as the question of any reasonable nexus to uphold such discrimination. It also determines the scope of right to life to include such a procedure under its purview. The impact of such regulations upon society and the social acceptability of such

[321] Manya Gupta, The Indian Ban on Commercial Surrogacy, Gender Policy Journal, Harvard Kennedy School Publications, https://gpj.hkspublications.org/2020/06/19/the-indian-ban-on-commercial-surrogacy/ (last accessed on 3rd September, 2023).
[322] Ramya Kannan, The Debates around the Surrogacy Act, The Hindu, https://www.thehindu.com/sci-tech/health/the-debates-around-the-surrogacy-act/article65500108.ece (last accessed on 3rd September, 2023).
[323] INDIA CONST, art 14.
[324] INDIA CONST, art 21.

couples is also considered.

2. RESTRICTIONS ON SURROGACY- A BRIEF OVERVIEW

To comprehensively understand the impact of the restrictions on the rights of people, one must analyze the restrictions themselves. In India, surrogacy is regulated by the Surrogacy (Regulation) Act, 2021. The eligibility of the intending couple is stipulated in Section 4 of the Act. These can be enumerated as follows:

- As per subsection (a), the couple must have some medical problem, usually infertility[325]
- As per the explanation, the gestational surrogacy must be carried out by a surrogate mother. It is later elaborated upon that the surrogate must be known to the couple, and should be doing it for altruistic reasons only.
- As per (iii) (c), the couple should be married[326].
- They must be between the ages of 23 to 50, or 26 to 55 for the female and male respectively[327]
- They have no other surviving child[328]
- The couple must be of Indian origin[329]

In light of the above provision, the current surrogacy regime completely removes from its ambit the following class of people:

- Couples in a live-in relationship
- Homosexual couples
- Couples where one or both are not of Indian origin
- Married Indian couples who do not fall within the age range

Quantitatively, these provisions exclude a vast percentage of citizens. In 2020, it was determined

[325] The Surrogacy (Regulation) Act, No.47, & 4(ii)(a), Acts of Parliament, 2021.
[326] The Surrogacy (Regulation) Act, No.47, & 4(iii)(c), Acts of Parliament, 2021.
[327] The Surrogacy (Regulation) Act, No.47, & 4(c)(I), Acts of Parliament, 2021.
[328] The Surrogacy (Regulation) Act, No.47, & 4(c)(II), Acts of Parliament, 2021.
[329] The Surrogacy (Regulation) Act, No.47, & 4(ii)(a), Acts of Parliament, 2021.

that only 45 percent of the Indian population was married[330]. Even within this percentage, there are many who do not fall within the age gap, and hence are excluded from surrogacy.

More pressingly, it has been recently determined that marriage is falling out of favor with most Indian youth. While the percentage of women married at 20 to 24 years of age is 69, for men it is a measly 30 percent. Live-in relationships are much more popular amongst the youth, with about 80 percent of all millennials being in support of the concept, and 45 percent say it is a test of compatibility before marriage[331].

While the importance of legislation and precedent in granting legitimacy to these groups of people cannot be understated, it is apparent that these are not enough to grant them wider social acceptability. Indian society has certain nuances and idiosyncrasies which are deep-set and are often the product of centuries old traditions and ideals. In such a scenario, the power of court judgements, although binding, are hardly sufficient in performing their wider exemplary functions.

3. THE EXCLUDED MASSES

The above-mentioned sections are restrictive in their functioning and, perhaps most unfortunately, exclude a wide mass of citizens. As it so happens, these citizens tend to be the most marginalized and vulnerable in society. Their rights, while consolidated by judicial pronouncements, continue to deteriorate in society. This rings particularly true for Live-In arrangements and Homosexual couples.

Recently, in Goa, a scheme has been propounded whereby the state will provide free in-vitro fertilization process to government-run hospitals. Greatly increasing the accessibility of the expensive process, the Goa administration has taken a progressive step towards realizing the human right of establishing families and having children, as in the UDHR guidelines[332]. Here,

[330] Manya Rathore, Distribution of married population in India in 2020, by age group, Statista.com, https://www.statista.com/statistics/1345016/india-distribution-of-married-population-by-age-group/#:~:text=Married%20Indians%20made%20up%20over,during%20the%20same%20time%20period.

[331] https://www.outlookindia.com/national/are-indian-youngsters-giving-up-on-marriage--news-209792.

[332] In a first in India, Goa to give free IVF treatment in govt hospital, Economic Times, https://economictimes.indiatimes.com/news/india/in-a-first-in-india-goa-to-give-free-ivf-treatment-in-govt-hospital/articleshow/102744887.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (last accessed on 2nd September, 2023).

there is a dichotomy wherein one class of people are given free ART services, while another class remains completely excluded from its ambit.

3.1 Live in relationships

The concept of live-in relationships was discussed in the case of Lata Singh v Uttar Pradesh. Here, the court went on to validate such relationships and bring them under the ambit of the prevalent family law, saying that any consenting adult is free to marry a partner of their choice[333]. Another landmark case was that of Indira Sarma v VKV Sarma[334], whereby protection against domestic violence was granted to women in a live-in relationships, thus giving more security. This also ascribed more legitimacy to such arrangements.

The Lata Singh judgement was pronounced in 2006. The court admitted that society may find such relationships as immoral, but they remain protected by law. Even 17 years later, live-in relationships do not enjoy the same tolerance and protection in society as a marriage would. In fact, many see them as immoral. One of the key aspects of this is the association it shares with premarital sex.

However, even premarital sex is not punishable by law when it is between two consenting adults. This was stated in the case of S. Khushboo vs Kanniammal & Anr, where the court went on to determine that expressing an unpopular social opinion is not punishable by law[335].

3.2 Opinions on live-in relationships- social commentary

Despite being allowed by the law of the country, it is of no doubt that such arrangements have not achieved mainstream acceptance in society. Looking at popular media and films about the subject, one might be led to believe that live-in relationships have been normalized in mainstream society.

However, when considering the actual facts and figures, it is evident that cultural acceptance of the same is not yet prevalent. In the same survey where 80 percent of the Indian youth were in agreement with the concept of live-in relationship, 45 percent of them stated that Indian society constantly judges this arrangement.

[333] Lata Singh v. State Of U.P. & Another, (2006) 5 SCC 475.
[334] Indra Sarma v. V.K.V.Sarma, (2014) SC 309.
[335] S. Khushboo v. Kanniammal, (2010) 5 SCC 600.

3.3 Opinions on Live-In Relationships- Case of Shraddha Walkar

Contemporary opinions about live-in and their legitimacy in society are best exhibited through the relative recent case of Shraddha Walkar. A young woman who was in an interfaith live-in relationship, she was murdered by her live-in partner[336]. Despite the brutality of the act, all the public could comment about was how distasteful the relationship was, due to being both interfaith and in a live-in arrangement. Public opinion has vilified both the victim and the perpetrator[337].

This case and the narrative around it are a demonstration of the opinions and ideals of the majority of the Indian public, which is yet to fully integrate the concept of live-in relationships in mainstream society.

4. HOMOSEXUAL COUPLES AND LGBTQ+ RIGHTS

Another contentious issue in the socio-legal sphere is the right of homosexual couples, whether it be to marry, to adopt or even to live together as consenting adults.

In a report, it was determined that 3 percent of the Indian population identified as homosexual, 9 percent as bisexual, 1 percent as pansexual, and 2 percent as asexual[338]. While 15 percent of the population might seem like a small amount, in the context of the large population of India this actually amounts to a great number of people, most of whom are still marginalized by mainstream Indian society.

4.1 Judicial Pronouncements

Scholarly perception of homosexual rights have been expanded upon in judicial pronouncements made by the Supreme Court. The landmark amongst these was that of the Naz Foundation in 2009[339], which alleged that criminalization of homosexual relationships in society was a violation of the Constitutional ideal of equality as enshrined in Article 14. Further, it was held that article

[336] Court frames charges in Shraddha Walkar murder case, The Indian Express, https://indianexpress.com/article/cities/delhi/court-frames-charges-in-shraddha-walkar-murder-case-8600806/.
[337] Vamsee Juluri, Shraddha Walker's gruesome murder: The dismal consequences of Hindu reactions to a tragedy, Firstpost, https://www.firstpost.com/opinion-news-expert-views-news-analysis-firstpost-viewpoint/shraddha-walkers-gruesome-murder-the-dismal-consequences-of-hindu-reactions-to-a-tragedy-11665621.html .
[338]Global Pride Survey,https://www.ipsos.com/sites/default/files/ct/news/documents/2021-06/LGBT%20Pride%202021%20Global%20Survey%20Report_3.pdf (last accessed on 2nd September, 2023).
[339] Naz Foundation v. Govt. of NCT of Delhi, 160 Delhi Law Times 277.

327 prevents anti-HIV schemes and is an impediment to Article 21, which aims to protect public health. In this way, the court holistically dealt with the issue of homosexual relationships in society and gave it judicial legitimacy.

4.2 Opinion on Homosexuality- In Courts

Indian culture seems to be very reluctant to accept or even acknowledge LGBTQ+ rights. This extends to all the members, including homosexuals, bisexuals, transgenders and people who fall within the label of queer. This is despite the fact that the ban on homosexuality is largely a subset of Victorian morality, and that section 327 of the Indian Penal Code is a remnant of the British Raj. India has had a rich history of accepting LGBTQ+ people and portraying them through mythology and folklore.

Even with such a comprehensive and progressive judgement in place, Indian society has been reluctant to accept homosexual relations. This is most prominently displayed in the case of Sushil Kumar Koushal, where the primary allegation was that the population of LGBTQ+ individuals constituted only a small or even negligible amount of the general citizenry of the country[340]. It is on these allegations that they argue that homosexuality should be criminalized. Although the judgement was explicitly overturned in another case, the fact that such opinions were still mainstream even in 2017, are concerning in and of themselves.

4.3 Opinion on Homosexuality- In Data

There is no conclusive data on the acceptance of homosexual relationships in Indian society. For instance, the World Value Survey purports that only 24 percent of the general population believes that a homosexual relationship is never justifiable. However, the sample size used for this was composed of just 1500 people. Although the survey claims that this is demographically representative, it is nonetheless extremely small[341].

As per a survey conducted by Centre for the Study Developing Societies (CSDS), about 19 percent

[340] Suresh Kumar Koushal & Anr. v. NAZ Foundation & Ors., Civil Appeal No. 10972 OF 2013.
[341] Rukmini S, Homosexuality in India: What Data shows, LiveMint, https://www.livemint.com/Politics/nlqippl5uicajldxetu3eo/Homosexuality-in-India-What-data-shows.html.

of the population believes that homosexual relationships should be accepted by society[342]. The sample size for this survey was 24,000. The statistics revealed by the survey show that society still skews towards rejecting homosexual relationships, to a great extent.

4.4 Opinion on Homosexuality- The Government

Another credible way to gauge societal reactions to homosexual relations is through the comments of the government itself. For instance, during the recent trial on the legality of homosexual marriages, the government made some comments regarding homosexual acceptance in society. As per these comments, such acceptance was 'elitist' in nature. While these claims were turned away on the basis that they were not supported by any evidence or data, the fact that they were made at all has wider social implications[343].

The situation at hand is such that the government of the country is bigoted against such relationships, even more than a decade after the judicial pronouncement decriminalizing them.

4.5 Reason for the Dissonance

The above facts and circumstances are indicative of wider troubling trends in society, where the law provides for the acceptance of such relations but the society is hesitant or unwilling to do the same. The court has declared these to be in the 'nature of marriage' and treated it as such in law. However, the same cannot be said for the majority of society.

The reason for this dissonance between judicial pronouncements and social opinion can be traced back to the notions that people hold about such relations. Marriage is considered a sacrament, as it is entered into with a view to have children.

In this way, it is differentiated from both homosexual and live-in couples in the eyes of society. Social morality dictates that a relationship will gain legitimacy, respect and acceptance when the

[342] Neither 'urban' nor 'elitist' — what data shows about Indians' views on same-sex relationships, The Print, https://theprint.in/india/neither-urban-nor-elitist-what-data-shows-about-indians-views-on-same- sex-relationships/1529820/ (last accessed on 2nd September, 2023).

[343] Same-sex marriage hearing Updates: No data to show it is 'elitist concept' – CJI, The Hindu, https://www.hindustantimes.com/india-news/same-sex-marriage-supreme-court-hearing-live-updates-today-april-19-2023-101681861367643.html (last accessed on 2nd September, 2023).

aim of producing children is at its core.

Hence, the law, which does consolidate the rights of such unconventional relationships, falls short of doing so holistically because of greater social factors.

5. CONSTITUTIONALITY AND SOCIAL EFFECTS OF THE PROVISION

The provisions of the Surrogacy Act which restrict the right of surrogacy to a certain section of society can be analyzed in the light of Article 14 and Article 21 of the constitution. Both of these encode ideals which form the basis for human rights in the Indian scenario. The right to life and right to equality are subject to extensive judicial interpretation, by which their scope is determined in relation to the changes and evolution in modern society.

5.1 Right to Equality

Article 14 deals with equality amongst citizens, which also includes an equality in the eyes of the law. Hence, it holds that the provisions of the Surrogacy Act should cater to all sections of society, without taking into account the nature of the relationship they are in.

However, Article 14 is also subject to certain reasonable restrictions in law. One of these is the doctrine of reasonable nexus[344]. The principle states that distinction between certain classes of people is permissible in the law. This is applied when there is a substantial difference between them in terms of the object of the legislation. Hence, in the case of surrogacy, one must determine whether there is any substantial difference between the narrow section of society which can avail such rights and those who cannot, in the context of the welfare of the child born out of such a procedure.

In the case of Indian society, there is hardly any rule of thumb which dictates that the welfare of the child will be affected adversely when the intending couple in question is not within the confines of the provisions of the act. Further, the welfare of the child differs on a case to case basis amongst the intending couples, with the nature of their relationship having little to no bearing on their treatment of the child.

[344] The State of West Bengal vs Anwar All Sarkarhabib, 1952 SCR 284.

Interestingly, the parliament has not laid down the basis for these criteria, nor is there anything in the parliamentary debates to indicate the nature of such differentiation. Hence, the reasoning of the law makers remains an enigma, to the detriment of several hopeful couples.

5.2 The Doctrine of Intelligible Differentia

Article 14 is a means of levelling the playing field for various sections of society. The situations of these segments are seldom the same, and are often not even comparable. In this case, the law cannot be applied in the same manner to all of them.

In the case of Dr Saurabh Chaudhary[345], the Supreme Court took a comprehensive view of the principle of right to equality, and laid down to exceptions to the same. On of these was the presence of an intelligible differentia in relation to the subjects at hand. As the name suggests, intelligible differentia refers to any difference in circumstances which is capable of being understood in relation to the wider application of the law at hand.

In family law, the welfare of the child is of paramount consideration[346]. Their mental and physical welfare, growth and other similar factors are given prevalence. While this is primarily a tenet of guardianship, it is also applicable in a wider sense to a child born out of surrogacy. The doctrine of intelligible differentia is applied, by saying that children raised by couples in an unconventional or socially marginalized relationship will be discriminated against in society. It is argued that the welfare of the child is compromised, when they are raised by a homosexual couple or a couple in a live-in arrangement.

Upon closer examination however, research shows that children who are born out of Surrogacy are nonetheless subject to wider social discrimination, and UNICEF has specifically mandated that states ensure that such children are treated fairly[347]. While the quantum of discrimination may differ, the presence of the same indicates that there little to no substantial difference in the experience of being a child conceive through surrogacy. Hence, the question of intelligible

[345] Dr. Saurabh Choudhary And Ors. vs Union Of India, (2004) 3 AWC 2637.
[346] Gaurav Nagpal v Sumedha Nagpal, (2009) 1 SCC 42.
[347]https://www.unicef.org/media/115306/file#:~:text=Regardless%20of%20individual%20State%20positions,protect%20and%20promote%20their%20rights. (last accessed on 2nd September, 2021).

differentia does not arise.

5.3 The Right to Life

Another important provision which the bill violates is the right to life as encoded in Article 21 of the Indian constitution. The scope of this right is largely determined by various judicial pronouncements. Right to life also includes a right to livelihood, which goes beyond mere animal existence. In the context of family law, it was the seminal case of Lata Singh v State of UP, which first established the right to marry.

Since then, the right to life has been expanded by judicial pronouncement and the evolution of the society as a whole. It is assumed that the right to marry and to establish a family, also includes within its ambit the right to have and raise children, by means of natural birth or by surrogacy and use of ART services.

The right to life is also greatly tied to the Universal Declaration of Human Rights. It is article 16 of the same which protects the right to marry and form a family. It goes on to say that the family unit should be protected by law[348]. It can be discerned that this includes the right to have children, by means such as adoption and surrogacy. Hence, the provisions of the act are in direct contravention of the ideals enshrined in the constitution.

5.4 Judicial Pronouncements

To this extent, the case of Baby Manji Yamada[349] and the progressive principle enshrined therein can be analyzed to gauge the intents of the court and whether or not they have been fulfilled. The material facts and opinions of the case can be enumerated as follows:

- Revolving around the surrogacy agreement of a Japanese couple, this case laid down the prohibition on commercial surrogacy and instead encouraged altruistic surrogacy.
- Along with this stipulation, the court also referred to several principles which would form the basis of the Surrogacy Regulation Act of 2021. These included the definition of the

[348] Universal Declaration of Human Rights, &16, United Nation Declaration (1948).
[349] Baby Manji Yamada vs Union of India, Writ Petition (C) No. 344 Of 2008.

different types of surrogacies, as well as the sentiment that certain agencies should be set up to ensure that no malpractice is indulged in.

- However, not imbibed in the parliamentary enactment were the progressive ideals on who could avail these services.
- The opinion of the court stated that fertility issues or other medical grounds were not a mandate to employ the surrogacy process. In the obiter dicta, it was said that a reproductively healthy women may be unwilling to undergo pregnancy and can be allowed to opt for surrogacy.
- Perhaps most significantly, the pronouncement affirmed the rights of a single male and a homosexual couple to be the intended parents.
- Live-in relationships were not mentioned in the judgement. However, in the year of 2008, these arrangements had not entered the cultural zeitgeist, and were yet to achieve any form of legitimacy or acceptance in India.
- The purpose of the pronouncement was to the process, and do so holistically. While the restrictions on commercial surrogacy were rigid, the court emphasized controlled accessibility on the process.
- Above all, the court championed for child rights and wanted to curb rampant child exploitation. As in the entrenched principle of family law, the welfare of the child was of paramount consideration and no other factor could supersede it.

These principles were upheld in the more contemporary case of Jan Balaz, where the international parent was allowed to adopt the child born out of surrogacy, due to lack of agreement with their home nation. Here, the court upheld this agreement as a way to bolster the right of having children and establishing a family[350].

There is no doubt that the ideals so enshrined comprehensively dealt with the issue of surrogacy. However, these ideals have never been implemented in the form of law.

Also of particular note is the fact that this pronouncement was dated 2008, a time before the widespread acceptance of any unconventional couples in society. In 2021, a time in which both homosexuality and live-in relations have been legalized and treated in the nature of heterosexual

[350] Jan Balaz v Anand Municipality, (2010) Guj 21.

married couple in law, the primary legislation regarding surrogacy excludes them from its ambit almost entirely.

5.5 Role of Children in Relationships

Despite the landmark cases upholding the rights of marginalized couples, Indian society is slow to accept them into the mainstream. The reason for this is quite complex and multifaceted. In the case of live-in relationships, they are associated with pre-marital sex. This is still a taboo topic in Indian society, and is discouraged as a great social evil.

Another reason is that many perceive line-in relationships to be less binding than marriages. Thus, it is less deserving of respect in their eyes. Many people also mention the fact the live-in relationships are considered a stepping-stone or the trial phase leading up to a marriage. They are not entered into with the explicit purpose of procreation. Hence, it is considered to be of lesser social value than a conventional marriage. However, there is no evidence which states that people in live-in arrangement are less serious about marriage or their relationship. Such a discrimination and social ostracization is simply a matter of public perception, which remains popular despite judicial pronouncements on the topic.

Homosexual relationships also suffer the similar scrutiny from the masses. Many people think that such couples are inherently immoral and that they are living in sin. One of the main reasons for opposing homosexual acceptance is the fact that such couples cannot have children or further their line of descent.

Marriage is a sacrament in many religious personal laws[351]. In Hindu law, it is considered a bond for seven lifetimes of the married couple. In Muslim law, marriage or nikkah is considered an honored contract which binds the man and the woman[352]. In all cases, the end result or goal of such a bond is to production progeny and extend the familial line.

Here, live-in arrangement and homosexual relationships are considered outliers, anomalies, or even as ‘unnatural’. The former is not entered into with a view to have children, whereas in the latter having natural children is a biological impossibility. Many homosexual couples and those in

[351] Tikait v. Basant, (1901) ILR 28 Cal. 758.
[352] Abdul Rahim v. Salima, (1886) ILR 8 ALL 149.

live-in relationships are willing to adopt children, but are spurned on account of lack of tolerance in society.

Hence, it can be said that having biological children may give these couples a greater degree of legitimacy and respect in mainstream society.

5.6 Social Value of Instituting such Rights

While the question of constitutionality of the provisions can be contended in court, the social impact of such provisions cannot be ignored. While judicial pronouncements have a role to play in destigmatizing certain concepts, it is the actual rights of the people involved which allow them to live with dignity in society, and be treated on par with their counterparts. In the case of live-in arrangement and homosexual couples, it is the right to have children and start a family which entrenches them in mainstream society. This can be by the means of surrogacy, or any other means of Artificial Reproduction Techniques (ARTs).

The social value of surrogacy cannot be stated. Extensive research analysis has been conducted in relation to the motivation for surrogacy. From the point of view of the surrogate mother, one of the chief considerations for bearing a child for the intending couple is sympathy of the childless family[353]. This indicated that beyond a legal utility or a moral consideration, the practice of surrogacy also has profound sociological implications.

6. CONCLUSION

In the context of Indian jurisprudence, the social impact of any enactment cannot be understated or ignored. Rather than a monolith, India is a rainbow of cultures and cultural attitudes towards a multitude of phenomenon. However, the resistance to change is what remains consistent throughout. This can be indicated through statistical research as well as isolated cases.

It is often said that law changes in accordance with society. However, the same is also true vice versa. From the protestant reforms of Henry, the Eight to the personal laws of secular India, it is of no doubt that legislation plays a pivotal role in impacting and shaping society. In these turbulent

[353] Elly Teman, *The social construction of surrogacy research: An anthropological critique of the psychosocial scholarship on surrogate motherhood*, SOCIAL SCIENCE AND MEDICINE, Vol. 67 Iss.7, (2008).

times, the need of the hour is to consolidate acceptance and broaden the minds of the laymen.

Homosexuality has been a pressing issue since the early 2010s. Live-in relationships are slightly more recent. Despite the judicial pronouncements and opinions surrounding them, they continue to be stigmatized and looked down up in the eyes of the mainstream society. In this case, the law comes to the aid of the marginalized, and has proven to be an effective tool in ensuring them their rights in a holistic way.

Earlier, adoption was relegated to the service of childless couples who were looking for a male heir to continue their family lineage. However, process has been significantly widened in scope, and allows couples of different types to adopt and raise a child as their own. This can be replicated in the case of surrogacy. The ability to avail the process will grant these couples both legal and social legitimacy, which is the need of the hour in India.

THE ROHINGYA MUSLIMS: AN UNWANTED MINORITY THAT DEATH'S A COUNTRY TO CALL HOME

Apurva Ranjan[354]

Abstract

In the contemporary landscape of the twenty-first century, few issues have captured global attention and stirred international discourse as profoundly as the plight of the Rohingya refugees. This marginalized minority group, hailing from Myanmar, has emerged as a central focus of both electronic and print media worldwide. The tragic narrative of the Rohingya's struggles has been shaped by a series of displacements and forced migrations, with their journey of suffering spanning decades. This article endeavors to illuminate the methods and strategies employed by the Burmese government to suppress and oppress the Rohingya population. Through comprehensive research, it aims to expose the intricate web of mechanisms that have perpetuated the marginalization of this ethnic minority. The focus is not only on the stark human rights violations suffered by the Rohingya but also on the numerous humanitarian challenges they encounter daily. Additionally, this research casts a critical eye on the responses of the international community to the Rohingya crisis. By analyzing the ways in which the global stage has engaged with this issue, the study hopes to contribute to a nuanced understanding of the complex dynamics at play. One of the primary motivations behind this research is the recognition that a significant disparity often exists between legal theory and the actual implementation of legal safeguards. Through a meticulous examination of the Rohingya predicament, this study seeks to bridge the gap between the principles outlined in legal doctrines and the practical realities faced by the Rohingya community. By delving into the root causes of this discrepancy, the research aspires to lay the foundation for more effective strategies, policies, and interventions that can alleviate the suffering of the Rohingya people.In conclusion, the article represents a dedicated effort to amplify the voices of the Rohingya population and to cast a spotlight on the human rights violations they endure. By exploring the multifaceted dimensions of their struggles and by critically assessing the global response, this

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research strives to pave the way for a more informed and compassionate approach to addressing the challenges faced by the Rohingya community.

Keywords: *Refugee's, Crisis, Legal Instruments, Framework, Rohingya's Case-Study, Disparity, Comprehensive Analysis, Theory and Practice.*

1. INTRODUCTION

The Rohingya people, regularly persecuted since 1978, are called "the most mistreated minority on the earth." The tribe resides in Buthidaung and Maungdaw, two communities in the northern Arakan province of Myanmar, close to the Naf River, which serves as the boundary between Bangladesh and Myanmar. According to history, decades-long violent breakouts in Myanmar have compelled thousands of Rohingyas to escape, with the most recent waves occurring in 2012 and 2016. Others have since made their way to India, Malaysia, or other surrounding countries.

Kutupalong and Nayapara in Cox's Bazar are two Rohingya camps in Bangladesh run by UNHCR and under the jurisdiction of the BD government. But more crucially, just 12% of registered refugees reside here; the majority are dispersed around Cox's Bazar district and dwell in various locations because of fear of police brutality, detention, and lack of access to food and other necessities. Some neighborhood gangs persecute even individuals residing in UNHCR camps. They are among the most persecuted groups in the world due to them, which causes them unimaginable agony in their daily lives. These 1.1 million resilient people remain stateless in every meaningful sense since Myanmar has refused to grant them citizenship since 1982. The Rohingyas' freedom of movement in Myanmar is severely restricted, as is their ability to advance.[355]

Given this, the Rohingyas' living conditions have been compared to apartheid by the UN and Human Rights Watch. On October 9, 2016, a group of extremists claiming to fight for the rights of Rohingyas attacked several police stations simultaneously, killing nine officers. The Burmese military responded by launching a sweeping crackdown on the towns in Rakhine State and abandoning human rights. This marked the start of the most recent Rohingya crisis. The military is said to have used helicopters to shoot down civilians and throw children into eating houses. Since November 2016, neither the media nor human rights organizations have been allowed access to the oppressed areas. Therefore, there is no way to ascertain the precise number of losses by natural means. Data dark gap is the term used to describe the location.

The Rohingyas have been forced to flee because of these appalling conditions, and according to the UN, more than 600,000 of them have taken a chance on crossing the ocean or traveling on foot

[355]https://heinonline.org/HOL/Page?public=true&handle=hein.journals/ijlmhs10&div=197&start_page=2221&collection=journals&set_as_cursor=0&men_tab=srchresults.

to reach "more safe seas." Although Bangladesh temporarily offers its safe home and charitable advice, the Rohingya population is too large for sustained assistance. No other country has expressed interest in contributing to the burden. While for the unendingly oppressed Rohingyas, this is one more knock in their long history of anguish that the state cannot accept Indians alongside the evacuees, there has been growing opposition to the Rohingya in India.[356]

1.1 SIGNIFICANCE

The Rohingya crisis is a significant worldwide issue and is not simply a South Asian problem as a result of numerous abuses of fundamental human rights. Several nearby nations including India, Indonesia, and Bangladesh have also been impacted by the Rohingya problem in addition to Myanmar and Bangladesh.

During British dominance in the Indian Subcontinent, which included Burma, this issue has grown. Individuals began moving to Myanmar in search of jobs and other opportunities.

This is why, after gaining independence from British Control, it assumed the form of a population problem. Therefore, there was an anti-Muslim sentiment that spread throughout the whole state of Myanmar, and as a result, Myanmar began to discriminate against Rohingyas based on their ethnicity.

1.2 ISSUES

The Rohingyas left the Rakhine province of Myanmar and sought sanctuary in Bangladesh following the significant crackdown supported by the Burmese military and administration in 2017. As a result, the number of refugees kept growing. Now, there are an estimated 1 million Rohingya refugees living in Bangladesh. Rohingyas are afraid to return to their homes because they believe another military-backed crackdown may be waiting for them there, even though the Burmese Government has consented to repatriate Rohingyas with the Bangladesh Government.

Bangladesh has hosted the largest Rohingya refugee camps; however, due to their existing

[356] ilabour.eu, https://www.ilabour.eu/blog/a-case-study-on-how-and-why-rohingya-refugees-are-neglected-in-bangladesh/. (Last visited April 26, 2024).

crowded population and limited resources, they are still unable to sustain all of them for an extended length of time.

- As Rohingyas arrived in Bangladesh, various confrontations occurred. Intergroup confrontations have killed almost 20 individuals. ARSA (Arakan Rohingya Salvation Army) recruitment of Rohingyas who have suffered severe mental trauma due to Burma military crackdown is also alleged.
- Women and children who survived Burmese military abuses didn't realize what was coming. In refugee camps, forced prostitution is common. Under dubious pretexts, young girls are purchased and sold or coerced into prostitution.[357]
- Crises of Rohingya marginalization and human rights
- The Rohingya suffer psychological hurdles.
- Social sorrow and anguish among Rohingyas.

2. THEORETICAL FRAMEWORK

The study of law is called jurisprudence. The Latin term "juris prudential," which means "legal understanding," is where the word "jurisprudence" originates. It also refers to the legal framework that guides our understanding, development, application, and enforcement of the law. Jurisprudence is, in other words, the study of legal theories and philosophies. It is easier to comprehend our legislation if you have a thorough comprehension of the theories and ideologies. The three important areas of jurisprudence listed below will be the subject of this research paper:

2.1 INSIDE-OUTSIDE

This conundrum applies to more than just legal theory. Several academic fields are aware of and working to solve the issue. There is an instructive parallel in the history and theory of welfare economics; here is a stylized version. The internal/external split also effectively captures a powerful intuition. Others offer descriptions or critiques from the outside, such as empirical studies of court behavior. The internal/external distinction has largely satisfied this criterion, contributing to its general adoption. Nonetheless, it has partially accomplished this

[357] National Center for Biotechnology Information, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8715339/ ,(Last Visited March 26,2024).

by taking advantage of a fundamental ambiguity between a substantive distinction and other methodological distinctions.

2.2 OTHERIZATION

Otherization occurs when an individual "perceives or treats (a person or group of people) as essentially unique and alien to oneself." It propels identity politics, as was already said. Othering "works on several levels to reinforce the idea of a better "Self" and a worse "Other." A devalued and dehumanized other is created as a result of this decision, "dividing us from the other and ourselves. This significantly impacts the way we view these people's wants and interests. The principles of Catholic Social Thought that I just outlined serve the purposes the law should promote. The law may be a great tool in the struggle against othering rather than contributing to it. Like how the law may encourage othering, it can also uphold and further anti-othering principles like human dignity and solidarity.

2.3 JUSTICE AS A DIFFERENCE

Political and legal thinkers have debated whether justice is a part of the law or just a moral assessment of the law since Plato's day. The informational foundation of a judgment identifies the information immediately supporting it and, more importantly, maintains that the truth or falsity of any other information cannot directly affect whether the judgment is legitimate. A community or government creates the law as a set of guidelines to control behavior, whereas justice is the attribute of being fair. The main distinction between justice and the law is this. Most notably, justice is a concept that embraces everything just and decent, whereas the law supports justice.

3. ANALYSIS

- **Relevance of the topic in contemporary scenario**

Bangladesh is one of the world's most populous nations, and the COVID-19 epidemic has taken a heavy toll on the country, as seen by the one million refugees. Because of overcrowding and a lack of adequate drinking water, these refugee camps are perfect for the spread of the coronavirus that causes severe acute respiratory syndrome (SARS-CoV-2). The lack of

sufficient personal protective equipment (PPE) and face masks has exacerbated the challenge of providing relief in these locations. Despite this enormous danger, the WHO and the Bangladeshi government have collaborated to reduce harm, and just 10 fatalities have been documented throughout all refugee camps in the year after the pandemic's start. Like in the rest of the globe, the pandemic has exacerbated other shortcomings such as food shortages, access to education, obstetric care shortfalls, and no communicable illnesses. The lockdown and subsequent closure of local companies have left many people (about 85%) jobless. Gender-based violence was also on the increase in this country. In terms of psychological morbidity, records indicate that there was an increase in sadness, anxiety, and sleep difficulties during the pandemic's uncertain periods. According on the social stress hypothesis, the epidemic has intensified the pressures suffered by this population. A comprehensive public health programme has been requested for unique refugee groups, such as the Rohingyas, in order to address their increased vulnerability during the COVID-19 crisis. The proposed methods include medical protection, sickness awareness, social separation, and the provision of fundamental necessities for life. And now, in the post-COVID 19 vaccine age, the glaring divide between the Rohingyas and the rest of the world is exposed once again. As the rest of the world races forward, the Rohingya wait in line for their turn to get vaccinated.[358]

- **Relevance and Arguments substantiated with logical corollary and linkage with the theme**

When we examine the issue of migration through the prism of the **inside-outside theory**, we notice that the laws established obstacles between the Rohingyas and the majority. Despite this, however, politicians refused to recognize the claims of the victims because they favored the majority. For the course of the inspection, Rohingya people were not even allowed to exercise their most fundamental human rights. The inside-outside idea states that there are walls that separate the different groupings. Throughout the administration of justice, the government failed to recognize the Rohingya as a part of their country. As a result, the Rohingya were forced to flee, which created a severe refugee and immigration crisis for the

[358] DevX, https://www.devex.com/news/when-will-rohingya-refugees-be-vaccinated-100061.(Last Visited March 15,2024).

nations that are neighbouring Myanmar.[359]

Several legal vantage points become apparent when the Rohingya Muslim problem is assessed through the prism of jurisprudential ideas. By emphasizing the Rohingyas' marginalization and persecution in both their home country and the countries where they apply for refuge, we may avoid the problem of **otherization**. The rights of the Rohingya are only being partially recognized by Myanmar. Rakhine is still one of Myanmar's least developed provinces. They are stateless because the government of Myanmar sees them as immigrants who are Bengalis. By limiting their access to employment and education, succeeding regimes have disenfranchised these minorities. According to 2017 research by Mahmood et al., access to healthcare and humanitarian services provided by international organizations like the United Nations and Médecins Sans Frontières (MSF) is restricted and depends on the current geopolitical environment. Also, the Rohingya have been economically and politically oppressed by the government of Myanmar. There are rumors that the government has limited the availability to school for Rohingya youngsters. Consequently, they have an almost 80% illiteracy rate.

In addition, religious prejudice, particularly anti-Muslim racism, and Islamophobia, has been brought on by the global events of the last two decades. By evaluating these difficulties through the lens of otherization, we concluded that the Rohingya have been marginalized owing to their ethnicity. The dominant group on the western islands of the country does not acknowledge the assertions that the population is of indigenous heritage, and as a result of the Rohingyas' forced migration to neighbouring Asian nations in search of safety, there is a catastrophic humanitarian and economic crisis. The public's inability to exercise fundamental human rights and the absence of support for the judicial system only made their suffering worse.[360]

The definition of a refugee is given in detail in Article 1 of the 1967 Protocol pertaining to the Status of Refugees. The UNSC did not adequately address the Rohingya refugee situation. Due to the threats of vetoes from Russia and China, it issued a worthless non-binding presidential proclamation between Bangladesh and Myanmar. On the other hand, in the beginning of 2017,

[359] https://jhumanitarianaction.springeropen.com/articles/10.1186/s38418-021-00098-4.
[360] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8715314/.

the Human Rights Commission authorized Resolution 34/22 to launch a private investigation into the crisis's actual circumstances. The end of 2017 saw the release of a report detailing the Rohingyas' dire humanitarian situation. China organized a loosely-organized gathering with Bangladesh and Myanmar to discuss a repatriation agreement in response. Bangladesh subsequently revealed, however, that none of the Rohingya are eager to go back to Myanmar due to their loss of citizenship and security worries.

Since both Myanmar and Bangladesh have ratified the Genocide Convention, the International Court of Justice may consider a genocide complaint in accordance with Article 9 of the Genocide Convention. The International Criminal Court will mainly examine individual liability, while the International Court of Justice will look at state-level legal responsibility. The UNHCR is supposed to provide long-term solutions, such relocation, when it designates a vulnerable group as a "refugee" under its guidelines.

Restitution is the process of bringing displaced people back to their original homes, as was previously mentioned. The Burmese government cannot be trusted given the present situation in Burma, where the military is perpetrating genocide.

- **Repatriation**

  It refers to relocating displaced individuals to their original location of living, as previously addressed in the article. But, given the present scenario in Myanmar, where the Burmese military is complicit in genocidal crimes, there is no reason to believe that the Myanmar government would take efforts to allow the Rohingya people to live a healthy and dignified existence.

- **Local Integration**

  To assimilate refugees into the host nation as citizens, local integration and assimilation must take place. Given how difficult it is for locals to communicate with them, this is a massive task. New civil conflicts could break out if it is not carefully investigated.

- **Resettlement**

  When the original nation is unsafe due to the threat of more persecution, refugees are moved to a third country.

The above-mentioned problem is examined from the standpoint of **Justice as a difference**, and what we find is that the law is very important in erasing disparities between perpetrators and victims. The Rohingyas sought assistance from outside because of the atrocities they had experienced. In other allegations, the Burmese government not only failed to defend the Rohingya but took part in their persecution. There was minimal need for the Rohingyas to contact the national government, but the country's commitment to the Geneva Convention and other agreements permitted the oppressed community to voice international concerns.

Due to the widespread acceptance that there is a continuum of agency rather than a voluntary/forced dichotomy, the phrase "forced migration" has been debatable on a global scale. The phrase "forced migration" has been used to refer to the travels of refugees, internally displaced people, and sometimes human trafficking victims.

Many Rohingya have been forced to flee the nation as a result of ongoing human rights abuses by the military dictatorship in Burma. Many more left for countries like Malaysia, Singapore, and the Middle East. Surprisingly, Bangladesh became the shelter for a big number of people. Their pain was mitigated, nevertheless, by receiving sanctuary in Bangladesh.

These Rohingya populations are seen as outsiders by the Burmese government. The Rohingya community in Bangladesh also opposes deportation to Myanmar because they fear retaliation from the local authorities. The Bangladeshi foreign minister expressed similar worries when visiting Myanmar, echoing the fears of refugees who have long feared persecution. The Bangladeshi government has been accused of participating in forced repatriation, even though they want the Rohingyas to return because they are worried about the depletion of their national resources. The term "involuntary repatriation" is used instead. [361]

- **Relevance of law**

  Most nations recognize legislation or administrative acts to apply refugee protection principles, but extra care should be taken to ensure that these notions are appropriately incorporated into the legal system. All these areas of legislation have the potential to degrade the rights of asylum

[361]https://heinonline.org/HOL/Page?public=true&handle=hein.journals/ijlmhs10&div=197&start_page=2221&collection=journals&set_as_cursor=0&men_tab=srchresults.

seekers and refugees; thus, the state should exercise caution when proposing legislation and administrative affairs concerning extradition, temporary or permanent nationality, expulsion, and criminal laws. In practice, governments have prioritized tightening immigration controls or addressing national security issues.

- **International Legal Instruments of Rights**

  International refugee law is derived from the 1951 Convention, the 1967 Protocol, and other international/regional legislation. It's complemented by international war and criminal law. These legal systems are interlinked but not sequentially implemented. These asylum seekers, immigrants, and vulnerable groups have the same rights as citizens that Governments must respect, preserve, and fulfill under international law. As said, the refugee accords cooperate with other human rights agreements including the Convention against Torture. This treaty is unusual in refugee law since it defines and bans torture and other forms of inhumanity and prevents forced repatriation if it is reasonably suspected that the individual would be tortured. Non-refoulment is a convention norm with no exceptions.

  Other non-derogable conventions include Rights of the Child. All refugee small children are covered. It guarantees them the right to appropriate safety and humanitarian support, protection from abuse and exploitation, special family reunion, and governmental responsibility for children who have been separated from their families, whether temporarily or permanently.

  Throughout time, nations have embraced many regional instruments. Countries signed the 0AU Convention and Cartagena Declaration for refugee protection. Similar regional mechanisms were approved by the Middle East, Africa, Europe, America, North Africa, and Asia to guarantee other rights including refugee rights.[362]

- **More Instruments of Human Rights**

  International human rights treaties with optional protocols protect refugees. Some of the major protection treaties that inherit refugee law substances like, the rights and protection

[362] Executive Committee 55th session, Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees No. 101 (LV) -2004, available at: https://www.refworld.org/docid/417527674.html

rights described are about to be enjoyed without discrimination, and practically all of its provisions are applicable to all those who live within the state's territory or are subject to the state's authority. Non-discrimination is enshrined in the other covenant. Refugees and asylum seekers who may suffer racial intolerance are protected. The CEDAW permits escalating forms of discrimination against women. In perilous circumstances like armed war and humanitarian catastrophe, States Parties must protect individuals with disabilities. Another treaty defines coerced disappearance a crime and prohibits it persecuted under the 1951 Convention.[363]

- **Judgment of courts**

  A writ petition was filed in the matter of *Mohammad Salimullah & Anr v. Union of India*, which challenges the deportation of Rohingya Muslims who sought sanctuary in India to avoid persecution in Myanmar. The Supreme Court ruled that the person on whose behalf the current case was submitted would not get any temporary remedy for deportation and would only be deported in accordance with the established process. The court went on to say that everyone, whether they are citizens, has access to articles 14 and 21. However the article 19 right to remain or establish in any part of Indian Territory is subsidiary or concurrent with the right not to be deported (e).[364]

4. PROTECTION AND SOLUTIONS

UNGA Resolution 1950, Annex, Paragraph 1 aims to find long-term solutions to the refugee issue. The conventional procedures, such as relocation, repatriation, and local asylum in other nations, cannot be pursued by the refugee framework and legislation in the long run. People should not be sent back against their will for voluntary repatriation operations; the UNHCR has established rules. Instead, the fundamental essence of repatriation based on voluntariness should be honored. It also means monitoring their returns and following standard safety precautions.

[363] Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969, available at: https://www.unhcr.org/about-us/background/45dcla682/oau-convention-governingspecific-aspects-refugee-problems-africa-adopted.html.
[364] Mohammad Salimullah & Anr v. Union of India, AIR 2021 SC (CIVIL) 1753.

4.1 Resettlement and Local Integration

Resettlements accomplish a variety of objectives by giving refugees who must escape their countries and are unable to return home a permanent solution. Even if the refugee is sent back to the nation where their rights are being violated and their lives are in danger, it still helps to find them a second home. It makes an effort to provide a minimal level of protection. Another goal is to lighten the burden on receiving countries by helping them reestablish strong ties with the country of origin and sometimes advancing international cooperation via political means. Integration is the actual application of the asylum legislation and the placement of the refugee on the host country's soil. the local populace and its acceptance of the refugee's residency in the area where they first make their home. [365]Non-signatory nations are also bound by the convention's non-refoulment provisions, but they are also free to decide whether to allow refugees to enter or leave their territory or whether to integrate them with the local population. When it comes to carrying out these laws, it has the highest level of sovereignty. This aspect was emphasized in the Conclusion by the UNHCR Executive Committee.[366]

4.2 Refugees and Human rights

As we have shown, applying refugee law alone is not feasible. Many human rights treaties and customary standards operate concurrently. Using this method aids in the development of substantive to procedural legislation. Because the state has a responsibility to safeguard the rights of its citizens, whether they are local or refugees. The basic concept of human rights legislation is that it does not discriminate. Regional laws, habits, and customs are crucial in ensuring that international laws be observed in this scenario. UNHCR has expanded its collaboration with all human rights organizations, including regional organizations. In recent decades, it has also integrated many elements from it into its work, such as legal rehabilitation, capacity development, policy change, and legal enforcement mechanisms, as well as humanitarian support to displaced people.[367]

[365] Conclusion on Local Integration No. 104 (LVI) - 2005, available at: https://www.unhcr.org/excom/exconc/4332a91b2/conclusion-local-integration.html.
[366] Solutions for refugees, the 10-Point Plan UNHCR, available at: https://www.unhcr.org/50a4c17f9.pdf.
[367] UNHCR, Roundtable on Temporary Protection: Summary Conclusions on Temporary Protection, IIHL, San Remo, Italy, 20 July 2012, available at: https://www.refworld.org/docid/506d908a2.html.

5. CONCLUSION AND RECOMMENDATION

A symbol of the world's refugee issue is the Rohingya community. As they are a diverse community with specific psychological problems and unmet needs due to the sociopolitical environments in which they live, it is essential to see them as such. Their social suffering results from pervasive and persistent prejudice, discrimination, displacement, and violence, which creates systemic problems and demands on many different levels. While estimates of mental issues are essential pieces of knowledge, they fall short of accurately capturing the more intricate and multifaceted psychosocial struggles the Rohingyas face, which cannot simply be seen via a "medicalized" perspective. The trauma of relocation, loss of social identity, culturally distinctive distress idioms, internal violence, and marginalization contribute to "minority stress" in this group and must be the subject of study and attention. While there has been some humanitarian relief, aid organizations have not offered significant assistance. Many institutions, including the state and social agencies, have denied them human rights. The Rohingya suffer a security problem in this global day, yet security remains a top issue for the whole globe. Although Bangladesh strives to assist in the most extraordinary manner it can for the benefit of the refugees, the Rohingya refugees are seen as a burden by the international world with little assistance. As a response to the international community's appeal, Burma should still go forward to address the issue. A more active role for non-government organizations should be played in the Rohingya situation in providing humanitarian aid. Despite the Rohingya's deteriorating predicament, more resources will presumably help the thousands of refugees living in precarious circumstances. Anybody considering Bangladesh's geography will quickly see that despite a sizable population and an effective unemployment rate, the country is not very large. The problem will thus become more severe if 500,000 refugees are settled here. Even though this is a modern-day human requirement, they will not be given jobs by UNHCR, Red Crescent, or other international groups that assist Rohingya refugees. The whole world's civilization should do a detailed understanding and analysis. Myanmar is close to certain ASEAN nations that, if an agreement is reached at the ASEAN table, may agree to take in a certain number of refugees.

Remarkably, the Burmese government continues to deny all allegations of the razing of Rohingya communities, the murder and rape of Rohingya citizens, and even the reported exodus of Rohingyas from Myanmar to Bangladesh. They saw the Rohingya as Bengalis, and the

Bangladeshi government could not identify them. In both nations, it rendered them blatantly stateless. There are 135 recognized ethnic groups in Myanmar as of 2012, according to the Citizenship Law of Myanmar; however, the Rohingya were not one of them. Due to partly reality and other complex issues stated above, they were stateless in Burma and disregarded in Bangladesh.

Thengar Char is a freshly created, 30,000-hectare silt island in the Bay of Bengal that first appeared in 2006. Recently, the Bangladeshi government chose to transfer the Rohingya refugees there. However, many expressed their concern, stating that this relocation may result in another "humanitarian disaster" due to its potential to be flooded at any time by a high tide, which would cause a severe shortage of potable water or potential for agriculture and undoubtedly raise concerns about the possibility of being attacked by pirates as well.

The decision to move the Rohingyas to another location, however, has delighted the people living in two camps in Cox's Bazar quite delighted. Interviews with certain Rohingyas by electronic and print media have made them much easier to understand. On November 12, 2014, reporters from BTV (the national television of Bangladesh) and a few print publications visited the Kutupalong refugee camps and interviewed refugees and camp committee members. For instance, the chairman of the camp committee, Mr. Sayed Alam, told NTV, "We refugees are thrilled after hearing the PM's declaration and are ready to be relocated to another secure location as we have been suffering here for more than two decades" (Rohingya Vision TV, November 14, 2014).[368]

Moreover, there was some loosening of the limitations for humanitarian organizations at the beginning of December 2016. For instance, the International Organization for Migration (IOM) announced on December 6 that it had given some basic help, including non-food items like shirts and blankets, to recently arrived refugees in Cox's Bazar, Bangladesh. Ongoing torture in Arakan is anticipated to end shortly, relieving Bangladesh of a further burden. The responsibility for identifying the weak points and formulating a strategy to end this 200-year story rests with our collective conscience.[369]

[368] BDNEWS24.com, "Bangladesh strengthens border patrol to stop the intrusion of Rohingyas fleeing Myanmar", 19 November 2016, available at http://bdnews24.com/bangladesh/2016/11/17/bangladesh-strengthens-border-patrol-to-stop-incursion-of-rohingyas-fleeing-myanmar.

[369] https://www.ilabour.eu/blog/a-case-study-on-how-and-why-rohingya-refugees-are-neglected-in-bangladesh/.

The government of Bangladesh must halt its practice of turning away Rohingyas who are in danger of dying while seeking to leave Myanmar and let all international assistance organizations, such as the UNHCR and the International Red Crescent Society (IRCS), assist refugees. Moreover, helping the government of Bangladesh in delivering humanitarian relief is something the world community should do concurrently. Of course, it is true that these may only be short-term fixes and that the real issues causing the humanitarian catastrophe must be addressed.

- ASEAN members should ratify the 1951 Refugee Convention in order to get access to the system for assessing refugee status. Furthermore, ASEAN countries should work together and help the Bangladeshi government in every manner they can to meet the humanitarian needs of Rohingya refugees.
- As a recommendation, ASEAN should ratify the 1951 Convention about the Status of Refugees and uphold the fundamental principles of the agreements governing human rights.
- The United States (US), the United Nations (UN), the European Union (EU), and all of its member nations should utilize all of their political and diplomatic resources to exert intense pressure on Myanmar to cease violating international law in northern Rakhine state.[370]
- The government of Myanmar should amend the 1982 Citizenship Act to guarantee citizenship regardless of race, color, ethnic origin, gender, religion, or language, giving Rohingya and other Muslims the freedom to peacefully practice their faith through worship, practice, and teaching in public or private.
- The Organization of Islamic Cooperation (OIC) should take a considerably more active role in resolving this issue by offering financial aid and all available political and diplomatic instruments.
- The government of Bangladesh should ratify the 1951 Refugee Convention to provide equal access to asylum seekers and the processes for determining their status as refugees. In addition, they must adhere to the non-refoulment principle, ensuring that no one escaping Myanmar is sent to a location—including Burma itself—where their lives are in danger. Also, the BD

[370] Chowdhury, Shahidul Islam. '*Humanitarian assistance for Rohingya: UN seeks govt permission'*, NEW AGE, 2 December 2016, available at http://www.newagebd.net/article/3697/humanitarian-assistance-for-rohingya-un-seeks-govt-permission.

government must ensure that refugees who have sought sanctuary in Bangladesh are not imprisoned, charged with crimes, or otherwise penalized due to how they arrived there.

MENSTRUAL LEAVE: A LAW CREATING EQUALITY AND JUSTICE FOR WOMEN

Ms. Madhura Nagesh Bhangle[371]

Abstract

Menstrual leave is now a topic of concern due to introduction of ESG principles (Environmental, social, and corporate governance) under United Nations which has caused an urgent need for gender sensitisation and inclusivity. Menstrual cycles are considered as a taboo but the same has become the need of the hour for workplaces globally to ensure that women experiencing menstrual pain and discomfort must be provided adequate leaves. It is pertinent to note that such painful menstrual cycles result in lower productivity at workplaces. The provision for menstrual leaves has been introduced by various countries such as UK, Korea etc. but India is yet to implement such provisions of law. However, inspite of no clear provisions of law, there are numerous organisations like Byjus, Zomato etc. which have taken voluntary steps to ensure that women are made to feel inclusive by granting them leave during their menstrual cycles which depicts the shift of policy pattern driven by the industry. The author proposes various amendments in existing laws such as Maternity Benefit Act,196, The Factories Act,1948, The Employees' State Insurance Act, 1948 etc. by way of introduction of concept of menstrual leaves. The author focus on the pros and cons of implementing menstrual leaves, thereby addressing the major concerns revolving around implementation of menstrual leaves resulting in creation of discrimination against women during the course of their employment.

Key Words: *Menstrual cycle, Menstrual Leaves, women, gender sensitisation, legal changes.*

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1. INTRODUCTION

The introduction of ESG (Environmental, Social and Governance) which is established by the United Nations under the Sustainable Development Goals (UN-SDGs) where all the stake holders including the employees must be considered and their needs must be ascertained to ensure governance at an organisational level. In addition to this, there are some other practices like justice, equity, diversity and inclusion which ensure women safety and comfort. Thus, there is a requirement to ensure that women needs are addressed. The menstrual period is the most pivotal time for a woman where she undergoes various physical and mental agony.[372] There is an utmost need to establish menstrual leaves for welfare of women at large. This is not just limited to women working in corporates but also to female students studying at school and University level.

Menstrual leave is a topic which is not generally spoken about, as it is considered as a taboo to discuss about menstruation in public space. The menstrual cycle not just includes cramps or contractions but also hormonal changes which causes discomfort in the body. There are various deformities which lead to aggravation of menstrual pain including cyst, dysmenorrhea and other such problems. Such discomposure in turn affects the working efficiency and ability of women during such periods. However, in India, there is a stigma in discussing menstruation related issues in public space. If India introduces menstrual leave policy, there will be comfort to women at large to discuss about their issues during menstruation period. Generally, these topics are not discussed due to fear of discrimination or embarrassment, but introducing any such policies will help develop equality and indirectly help achieve few of the UN-SDGs.

2. LEGAL FRAMEWORK FOR MENSTRUAL LEAVE GLOBALLY

Globally, in past few decades, menstrual leaves have been used to promote gender equality. However, Japan has been the first country to introduce menstrual leaves to female workers.[373] This can be traced back in 1928, in Tokyo the female bus conductors were given leaves during their menstrual time. It was later in 1947 that a valid labour law introducing compulsory paid leave for female was considered. Another Asian country, Indonesia has also introduced a

[372] Roger P Smith, M. DAndrew, M Kaunitz, , *Patient education: Painful menstrual periods (dysmenorrhea)*18, April 2023. Available *at* https://www.uptodate.com/contents/painful-menstrual-periods-dysmenorrhea-beyond-the-basics#:~:text=During%20menstruation%2C%20chemicals%20called%20%22prostaglandins,cause%20significant%20pai n%20and%20discomfort.

[373] Article 68 Labour Standards Law 1947.

legislation which can give mandatory leave for two days to female worker. This legislation was introduced in 1998 and amended in 2003. South Korea has a labour law where Section 73 states that there must be a day's leave for every women worker.[374] However, this was challenged by Asiana Airline Company where the Company stated that it was difficult to prove if the women was actually on her cycle or was merely taking a leave for enjoyment. However, the Court dismissed the petition and stated that it is every woman's right to take menstrual leave, which must not exceed 1 day per month. Vietnam has stated that every woman must be given 3 days of leave however if any women does not avail such leave due to work pressure and emergency work needs she must be given 30 minutes of break for relaxation and extra remuneration.[375]

Spain was the first nation in Europe to grant leave for menstruation. Spain, after enormous backlashes, recently introduced a 3-day leave which can be extended even for 5 days. The general backlash seen was that the employer would further discriminate against women as the employer would prefer male employee as they will not require such menstrual leave thus increasing their efficiency and reducing absences.[376] United Kingdom has not formally stated about any such leaves; however, many companies like Nike voluntarily give paid menstrual leaves. The first menstrual policy of its kind in Australia is provided to staff members by the fifteen-employee Women's Trust (VWT), a women's advocacy organization. In addition, VWT has developed an outline policy to encourage other companies to provide such leaves.

Understanding the variety of menstrual leave laws across the globe and the continuous discussion over the need to extend them, it is critical to comprehend the potential benefits and drawbacks of implementing menstrual leave.

3. LEGAL FRAMEWORK FOR MENSTRUAL LEAVE IN INDIA

In February 2023, Supreme Court dismissed a petition on menstrual leaves which called for paid leaves for women and to amend the Maternity Benefit Act, 1961. Chief Justice DY Chandrachud, however directed this matter to be taken to Women and Children Department, stating that this is a public domain issue which may lead to a negative impact on women's employment.[377] This cold response from the Court was ambiguous thereby stating that India is no way near to

[374] South Korean Labor Standards Act, 2007.

[375] Hallie Crawford, What Is Menstrual Leave?, US News , 1 Nov 2022 available at https://money.usnews.com/money/blogs/outside-voices-careers/articles/what-is-menstrual-leave. [376] Camille Bello , Laura Llach, Painful periods? Spain just passed Europe's first paid 'menstrual leave' law, EURO NEWS.NEXT available at https://www.euronews.com/next/2023/02/16/spain-set-to-become-the-first-european-country-to-introduce-a-3-day-menstrual-leave-for-wo.

[377] Shailendra Mani Tripathi v. Union of India, WP (C) No. 172 of 2023, order dated 24-2-2023 (SC).

establishing laws pertaining to menstrual leaves.

India has no stipulated laws for menstrual leaves, the labour laws are silent on this issue. However, a Bill was introduced by name of 'Menstruation Benefits Bill, 2017' which stated that every woman must be given a break of 30 minutes twice a day for 4 days of her menstruation cycle.[378] In addition, holiday of 2 days for women during her menstrual cycle without any questioning. However, it was not entertained in the legislation. Later Women's Sexual, Reproductive and Menstrual Rights Bill, 2018 was introduced for safety of women which also highlighted the issues faced by women during menstruation and how it could be reduced.

There are various initiatives taken at State level to ensure women comfort by providing menstrual leaves. This can be traced back to 1992 where in case of S. L. Bhagwati vs. Union of India was passed where the Apex Court talked about women health and menstrual leave as one of the rights of women. After this judgement, the Bihar Government in 1992, introduced a policy to give paid leave to women for 2 days for their welfare and safety. This policy was criticised to be gender stereotyped. A Menstrual Hygiene Management (MHM) plan was introduced in 2022 which ensured women hygiene during menstruation and established requirements for menstrual leaves. In addition to this, Kerala was also amongst few states who has established a policy for one-day leave during menstrual cycle. In 2021, Delhi and Uttar Pradesh introduced their ideology for menstrual leave, however it lacked execution and sanctions.

Higher Education Department of Government of India in January 2023, introduced an ideology to reduce attendance for girl student in University to 73% from 75%. SEBI has issued a circular in 2021 regarding requirements to be adhered for wellbeing of employee and to ensure safety at workplace and to address health issues of employee, which indeed has encouraged many companies in India to implement two-day leave for women during menstrual cycle. Zomato has introduced remarkable policy of 10 leaves per year (not exceeding one day per month) for women and also transgender. This was the first time the transgender community was also considered in this arena. Companies like Byju and Swiggy also introduced these menstrual leave policies where no question would be asked for grant of such leaves.

Two companies in India provide menstrual leave to their staff. The digital communications firm Gozoop initially unveiled their policy in 2017. According to this guideline, women may work one day a month when they are menstruating from home.

[378] Menstruation Benefits Bill, 2017,Section 5 .

This policy is based on the idea that a woman should be allowed to work from her comfort zone during her period because she needs to rest her body. They eliminated the pressure of traveling, crowded spaces, uncomfortable chairs, stain phobia, etc., so that women may work effectively and efficiently from home. In particular, they made sure that the policy would allow for work from home to avoid devaluing a particular gender while developing it. A good number of 76% of women used this facility and benefited from it.[379]

Subsequently major law colleges started implementing menstrual leave policies. Menstruation leave is now available to students at NLSIU, making it the first law school in India to do so.

4. JUDICIAL REVIEW IN INDIA

Shailendra Mani Tripathi v. Union of India 2023[380]*:*

This was the benchmarking case law which helped to raise concerns regarding menstrual leaves. The Supreme Court heard a public interest litigation (PIL) case calling for the implementation of period leave or menstrual discomfort leave for working women and female students across India. Menstrual cycles have been generally ignored by society, the government, and other stakeholders, according to the request, but certain organizations and state governments have paid attention. Companies that offer paid time leaves were especially mentioned in the petition there creating examples for other companies to follow.

Judgement:

The Supreme Court heard a plea on Friday that sought to grant menstrual discomfort leave to working women and students throughout India, granting the petitioners the opportunity to present their case to the Central government. A bench consisting of Justices PS Narasimha, JB Pardiwala, and Chief Justice of India (CJI) DY Chandrachud stated that the petitioner could make a submission before the Union Ministry of Women & Child Development because the issue had a policy component. The CJI stated, "The petitioner may approach the Women and Child Ministry to file a representation, having regard to the policy dimension in the case."

The Bench did, however, concur with the caveator law student's statement that mandatory leave of this kind would inherently act as a preventive to hire women.

[379] Rachel B. Levitt and Jessica L. Barnack-Tavlaris. the Palgrave Handbook of Critical Menstruation Studies, 2020.
[380] *Supra* 378.

5. NECESSITY FOR MENSTRUAL LEAVE IN INDIA

Menstrual leave may be beneficial to the well-being of women who are on their cycles, including those who have mild, moderate, or severe monthly misery and those who have illnesses linked to the menstrual cycle, such as dysmenorrhea. Menstrual symptoms can make it more difficult for a woman to participate in daily activities and interfere with her day-to-day activities. In one study, 762 contributors on average felt that their menstrual symptoms had a moderate impact on their everyday lives, and 71.5% of them thought that the pain was sever but was a natural part of women's lives. [381] Nonetheless, there may be social pressure to conceal period discomfort from coworkers and health experts due to the societal stigma associated with conversing monthly symptoms.

In India, menstruation is considered to be impure and there are a lot to superstitions involved. These superstitions even relate back to the time where women were considered untouchable during her cycle. These taboos are very often seen in rural areas however urban cities are also not far away from this.

Considering the same, there is an immediate need of creating awareness with respect to pain suffered by women during menstruation. The productivity of a women is reduced to a greater extend due to such cramps or discomfort experienced during the cycle.[382] In a recent study, it is discovered that cramps are equal to a heart attack.[383] This is not limited to the time of menstruation but even pre-cycle which termed as premenstrual syndrome (PMS). In India, 20% of the women are suffering from PCOS which causes immense pain during the cycle which is even greater than regular healthy women.

Menstrual leave not only helps to create safety for women but also ensures awareness amongst people at workplace. Women would feel more comfortable speaking up about their health concerns in the workplace since it would be more responsive to these issues.

6. CHALLENGES FACED IN INTRODUCING A LAW FOR MENSTRUAL LEAVE

There are a lot of benefits by introducing a policy for menstrual leave like ensuring productivity, safety of women, wellbeing of women at work pace, creating awareness, positive branding of

[381] Chen, Chen X., Kristine L. Kwekkeboom, and Sandra E. Ward. 2016. "Beliefs about Dysmenorrhea and Their Relationship to Self-Management." Research in Nursing & Health 39: 263–76. https://doi.org/10.1002/nur.21726 (Last visited on 18 November 2023).

[382] Giovanni Grandi, Serena Ferrari, Anjeza Xholli, Marianna Cannoletta, Federica Palma, Cecilia Romani, Annibale Volpe, and Angelo Cagnacci, *Prevalence of menstrual pain in young women: what is dysmenorrhea*? JOURNAL OF PAIN RESEARCH, Vol 5, Jun 20 2012 available at https://doi.org/10.2147/JPR.S30602.

the company and inclusivity.

However, introducing a law or even a provision in Maternity Benefit Act for Menstrual leave would include challenges which are as follows:

- **Discrimination during employment against women:** Even today, there are general bias to employ women, introducing mandatory law to give menstrual leaves will further create difficulty as the employer would generally have to give more leaves to women thereby leading to preference of male workers at the time of hiring.[383]Beed district, in Maharashtra in sugar cane industry had given a rule that any women who is menstruating then they won't be employed in cane cutting process. Hence, a lot of women in the district have undergone surgery to remove uterus.[384]Such negative discrimination will be very disadvantages for women.
- **Misuse:** A lot of female workers would abuse the law to take unnecessary leaves especially during important meetings or even to go for long vacation as this policy would be created on 'no questions' asked basis.
- **Issues of inclusivity:** The issues of inclusivity will be evident if there was a menstrual leave for women then the question appears for transgender. In addition, the women who has attained menopause but suffer from any acute ovarian issues.
- **Administrative and legal issues:** Drafting a HR Manual with accurate policy implementation would be cumbersome. Establishing clear policies regarding leave entitlement would require brainstorming and employer and employee's viewpoints.

7. RECOMMENDATION

International Labour Organization's Maternity Protection Convention, 2000 focus on Maternity leaves however it has also initiated the ideology of adding menstrual leaves to the organisations policy and inculcating it in the domestic laws.

In India, there are several laws relating to women, however none of these laws clearly speak for menstrual leaves. Following are some laws which can talk about menstrual leaves

[383] Padmakshi Sharma, Supreme Court Refuses To Entertain Plea Seeking Menstrual Leave, Says Matter Falls In Policy Domain, LIVE LAW, 24 Feb 2023.

[384] Radheshyam Jadhav, *Why Many Women in Maharashtra's Beed District Have No Wombs, Business Line*, HINDUSTAN BUSINESS LINE 11 April 2019, available at https://www.thehindubusinessline.com/economy/agri-business/why-half-the- women-in-maharashtras-beed- district-have-no-wombs/article26773724.ece.

i) **Maternity Benefit Act,1961:** The Act has provisions for pregnancy, child birth and miscarriage. However, it can also include provision for menstrual leaves especially understanding the PMS and other conditions regarding dysmenorrhea. The Act can be a better mode of envisaging the idea of menstrual leaves and it can also include maternity leave post and pre pregnancy. The Act can extend at least twelve days of leaves per year where not more than one-day leave can be entertained per month.

ii) **The Factories Act,1948:** The Act envisages an environment for safe and healthy environment for factory workers. However, menstrual leaves can be a provision in the Act considering factories require rigorous physical work and menstrual leave can act like a welfare and safety tool for women during these time where at least one day of leave can be provided to such menstruating or women suffering from menopause.

iii) **The Employees' State Insurance Act, 1948:** The Act talks about security of both job and social life including maternity benefits. Hence, it can include provisions regarding menstrual leave and monetary benefits in case of any menstrual issues.

In addition to amending laws and reforming the ideology of Indian society, the organisations must also take initiatives to incorporate rules in their Human Resources Manual to sensitises the approach of menstrual problems. This may include adoption of policies for at least one-day voluntary leave or work from home option during the menstrual cycles. The organisation can also add approaches like flexible timings during menstrual periods. In addition to this, the organisations can set up workshops and other feedback sessions to understand menstrual health of every woman in the organisation to ensure inclusivity and sensitivity towards them. This may also expand to extending monetary help to any women in need of any treatment pertaining to PCOD/PCOS or any other such menstrual issues.

8. CONCLUSION

The global awareness relating to menstrual leaves have created a platform to define policies in India. Developed countries like Spain, UK, and USA have inculcated menstrual policies to ensure women empowerment and encouraging gender equality. India, currently, has no legal framework for menstrual leaves, while many organisations are ensuring gradual increase in such menstrual friendly policies by adopting a progressive approach. These policies may not be a huge step for women safety but acts like a stepping stone to ensure work inclusivity. The management are trained a manner to ensure sensitivity towards women. Factory owners and places where rigorous activities are involved, the women working here can be assured paid 1-

day leave to ensure improved productivity.

This is not limited to corporates but must be also taken seriously by the Governments (starting with Bihar government in 1992 which has a policy of one-day leave for all women during menstrual cycle upto the age of 45 years). Conducting workshops and other such awareness activities on menstrual pain can also help Governments to ensure that the organisations understand the need of menstrual leaves. This will create open and friendly atmosphere for the women at their workplace.

Thus, there is an urgent need to not just educate people about menstrual pain symptoms but to ensure that every working woman must be given at least a day of rest during her cycle to ensure improved productivity and inclusivity.