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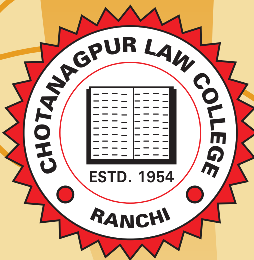

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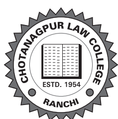

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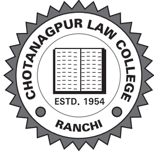

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Processual Justice, Legitimate Expectation And Judicial Approach

***Professor Sanjay Gupta & ** Ms. Alisha Sharma**

Abstract

Life of every individual is greatly influenced by the administrative action. In the Welfare State, the constitutional mandate provides for the fair treatment of the people. The judiciary has evolved different parameters for the regulation of administrative decision making and exercise of powers. The doctrine of legitimate expectation is one of such parameters. Legitimate Expectation means that a person may have a reasonable expectation of being treated in a certain pre-determined way by administrative authorities. Some consistent and constant practice of the past or an express promise made by the concerned authority gives rise to legitimate expectation. Thus, legitimate expectation pertains to the relationship between an individual and a public authority. The term legitimate expectation pertains to the field of public law and envisages grant of relief to a person when he is not able to justify his claim on the basis of law in true sense of term although he may have suffered a civil consequence. The concept of legitimate expectation is being used by the courts for judicial review and it applies the ethics of fairness and reasonableness to the administrative action. Where a person has an expectation or interest in a public body retaining a longstanding practice or keeping a promise, it is cardinal principle that the promise be kept. The courts have emphasized that legitimate expectation as such is not an enforceable right. However, non consideration of legitimate expectation of a person adversely affected by a decision may invalidate the decision on the ground of arbitrariness. Therefore in this article an attempt has been made to throw light upon the new legal order which has influenced the administrative process greatly. This doctrine is a form of a check on the administrative authority. When a representation has been made, the doctrine of legitimate expectation imposes, in essence, a duty on public authority to act fairly by taking into consideration all relevant factors relating to such legitimate expectation. It also adds a duty on the public authority not to act in a way to defeat the legitimate expectation without having some reason of public policy to justify its doing so.

Keywords: Processual Justice, Legitimate Expectation, judicial review, fair action

1. Introduction

The activities of administrative bodies involve the interference with the rights and freedoms of private entities, therefore the values of the procedural fairness must be guaranteed. It is considered highly probable that a decision-maker who follows a fair procedure will reach a fair and correct decision. As a process governance may be carried out for any size of organisation from a single human being to all of humanity, and it can be carried out for any purpose. A reasonable purpose of governance is to avoid an undesirable pattern of bad

* Professor, Department of Law, University of Jammu

** Research Scholar, Department of Law, University of Jammu

decision making.[1] Perhaps the most moral or natural purpose of governance is to assure, on behalf of those governed, a worthy pattern of good while avoiding a truly undesirable pattern of bad decision making.

The ideal purpose, of governance obviously, would assure procedural fairness in decision-making. Governance is viewed as the exercise of economic, political and administrative authority to manage a country's affairs at all levels. It comprises mechanisms, processes, and institutions, through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences.[2]

In a democracy, the citizens legitimately expect that the administration would treat the public interest as primary one and any other interest as secondary. The maxim *Salus Populi Suprema Lex*, has not only to be kept in view but also has to be revered. The faith of the people is embedded in the root of the idea of good governance which means reverence for citizenry rights, due recognition of processual fairness in decision making affecting constitutional and statutory rights in any governmental action, deference for written constitutional values, veneration for institutional integrity, and inculcation of accountability to the collective at large. It also conveys that the decisions are taken by the decision making authority with solemn sincerity and policies are framed keeping in view the welfare of the people, and including all in a homogenous compartment. In *A. Abdul Farook* v. *Municipal Council, Perambur*[3] the court observed that the doctrine of Good Governance requires the Government to rise above their political interest and act only in the public interest and for the welfare of its people. Administrative Law is overarching in nature and it is difficult to categorize its multiple functions in watertight compartments. Consequently, multiple principles and doctrines have been formulated to ensure proper functioning of the administration. Such as principles of natural justice, the principle of proportionality, unreasonableness, the judicial obligations of the local public authorities, etc. One among them is the doctrine of legitimate expectation,

2. Processual Justice

Processual Justice includes the right to be heard, the right of unbiasness, the right to equal treatment, the right to proper exercise of discretion, the right to legitimate expectation, etc. In recent years, the common law relating to judicial review of administrative action on the basis of procedural impropriety has undergone a rather remarkable transformation. The courts, using the language of "natural justice" and, more recently and more dramatically,

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1 MG Ramakant Rao, *Good Governance; Modern Global and Regional Perspective*, 1 (Kanishka Publishers, New Delhi, Ist edn., 2008).

2 UNDP Policy Document: "Governance for Sustainable Human Development" (1997) *available at* :www.undp.org (Visited on January 15, 2022).

3 (2009) 15 SCC 351.

"fairness", have brought about a situation in which a broad range of statutory authorities are subject to the observance of at least a modicum of procedural decency. Procedural fairness is concerned with the procedures used by a decision-maker, rather than the actual outcome reached. It requires a fair and proper procedure to be used when making a decision, which may be constitutionally mandated or statutorily provided.

Lord Denning asserted that an exercise of statutory power conditional on it appearing to the relevant authority that there were reasons for doubt could be overturned if the authority "plainly misdirects himself *in fact* or in law".[4] *Lord Hewart* remarked that "justice should not only be done, but should manifestly and undoubtedly be seen to be done."[5] The backbone of law and justice is embodied in the concept of procedural fairness in administrative decision making. Procedural fairness and regularity are of indispensible essence of liberty. Severe substantive laws can be endured if they fairly and impartially applied.[6] *Robert Jackson J.* well defined that procedural fairness and regularity are of indispensible essence of liberty. The rules of procedural fairness are infinitely more flexible and also being capable of adoption to accommodation whatever set of factual circumstances is in issue.

A turning point came in 1963 in *Ridge* v. *Baldwin*[7] with the decision of House of Lords wherein "fair play in action" was emphasised. It was stressed that the citizen's right to have his case properly heard, before he suffers in some way under the official rod, can cover a whole series of procedural steps from the initial objection to the final decision.[8] The rules of procedural fairness apply whenever the rights, property or legitimate expectations of an individual are affected.[9] In one of the English decisions, reported in *Local Government Board* v. *Arlidge,*[10] *Viscount Haldane* observed, "those whose duty it is to decide must act judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made.

3. Legitimate Expectation

Legitimate Expectation means that a person may have a reasonable expectation of being treated in a certain pre-determined way by administrative authorities. A consistent and constant practice of the past or an express promise made by the concerned authority gives rise to legitimate expectation. The legitimate expectation pertains to the relationship between an individual and a public authority and thus making a public authority accountable.

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4 [1972] 2 Q.B. 455, 493.

5 *R* v. *Sussex Justices, Ex parte McCarthy*. [1924] 1 KB 256.

6 *Shaughessy* v. *United States* 345 US 206(1953).

7 1964 AC 40.

8 H.W.R.Wade*, Administrative law* 416 (Lexis Nexis, 5th edn.,1982).

9 A Geoffrey Flick, *Natural justice principles and practical application* 29 (2nd edn.,1984).

10 (1915) AC 120 (138) HL.

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Governments and their agents may create expectations regarding the manner in which administrative powers will be exercised. Expectations of this nature can be generated in many different ways, such as by the issue of policies or procedures to guide the exercise of discretionary powers. Expectations regarding the future exercise of administrative powers may also be generated by public statements or representations, perhaps even promises, or by adoption and regular application of a certain practice. However the expectations so created can also be shattered.

People may be disappointed when a governmental agency has acted in breach of a promise or undertaking made to a particular person or to a class of persons. They may also be disappointed when a government agency has not applied current policy or guidelines in determining a particular case, and without good reason. In such a case, the complaint may be that the policy has been applied inconsistently, perhaps in a way which reflects improper discrimination. In other cases, an existing policy may be changed and a new one applied to the disadvantage of people who stood to benefit from the earlier policy and who may even have conducted their affairs in reliance upon it. Expectations about the exercise of administrative powers may only give rise to procedural rights. An expectation about the exercise of an administrative power might, at best, oblige a decision-maker who intends to act contrary to that expectation to notify affected people and provide them with an opportunity to argue against that course.

4. Policy Considerations

There may be cases in which a person had relied upon a policy or norm of general application but was then subjected to a different policy or norm. There may also be cases in which a policy or norm of general application existed and continued but was not applied to the case at hand. Furthermore an individual may have received a promise or representation which was not honoured due to a subsequent change to a policy or norm of general application. Even there may be cases where an individual received a promise or representation which was subsequently dishonoured, not because there had been a general change in policy, but rather because the decision-maker had changed its mind in that instance. Therefore whenever such a situation arises, the person must, at least, be provided with an opportunity of being heard. Proponents of the legitimate expectation doctrine suggested that it enabled natural justice to extend beyond 'enforceable legal rights' to 'expectations' of various sorts. This possibility provided an important bridge by which the rules of natural justice could venture into new territory. *R* v. *North and East Devon Health Authority, ex parte Coughlan*[11] became a landmark case for legitimate expectation, in which the court specified its types:[12]

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11 (2001) Q. B. 213.

12 Peter Leyland & Gordon Anthony 454 *Administrative Law* (7th edn., 2013).

1. Involving a change of policy by the decision-maker. Here, the court will deliberate whether the authority's decision not to fulfill a promise was rational and whether sufficient investigations were conducted into the consequences before choosing to do so.
2. Involving a contract-like promise. Here, the court will deliberate whether frustrating the expectation may be an abuse of power. Such cases generally involve a promise with the nature of a contract being given to one or a few people.

Lord *Diplock* observed in *Hughes v. Department of Health and Social Security,*[13]

"Administrative policies may change with changing circumstances, including changes in the political complexion of Governments. The liberty to make such changes is something that is inherent in our constitutional form of Government."

In *R* v. *Secretary of State for Transport,*[14] the learned Judge laid down that the Wednesbury reasonableness test alone applied for finding out if the change from one policy to another was justified. *Laws,J.* stated:

"The court is not the Judge of the merits of the decision maker's policy .... The public authority in question is the Judge of the issue whether 'overriding public interest' justifies such a change in policy ... But that is no more than saying that a change in policy, like any discretionary decision by a public authority, must not transgress Wednesbury principles."

It was laid down in *P.T.R. Exports (Madras) Pvt. Ltd. v. Union of India* [15] that the doctrine of legitimate expectations has no role to play when the appropriate authority is empowered to take a decision under an executive policy or the law itself and that the Government is not restricted from evolving new policy on account of 'legitimate expectations' as and when required in public interest.

5. Legitimate Expectation: Applicability

The doctrine of legitimate expectation can be invoked only[16];

a) by someone who has dealings or transactions or negotiations with an authority,
b) If there was some explicit promise or representation made by the administrative body,
c) That such a promise was clear and unambiguous,
d) where it is base upon an established practice,
e) or by someone who has a recognized legal relationship with the authority,

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13 1985 AC 778.

14 BC 1994 (1) WLR 74.

15 AIR 1996 SC 3461

16 *Madras City Wine Merchants v. State of Tamil Nadu*, (1994) 5 SCC 509

f) A total stranger unconnected with the authority or a person who had no previous dealings with the authority and who has not entered into any transaction or negotiations with the authority, cannot invoke the doctrine of legitimate expectation, merely on the ground that the authority has a general obligation to act fairly.

g) There should not be an overriding public interest,

h) The exercise must be unfair and unreasonable.

Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service*[17] laid down that doctrine of "legitimate Expectation" can be invoked if the decision which is challenged in the Court has some person aggrieved either (a) by altering rights or obligations of that person which are enforceable by or against him in private law; or (b) by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he had received assurance from the decision-maker that it will not be withdrawn without giving him first an opportunity of advancing reasons for contending that it should not be withdrawn[18].

Under English Law, the doctrine of legitimate expectation initially developed in the context of public law as an analogy to the doctrine of promissory estoppel found in private law. However, since then, English Law has distinguished between the doctrines of promissory estoppel and legitimate expectation as distinct remedies under private law and public law, respectively. Halsbury's Law of England explains the scope of "legitimate expectations", a person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice[19].

6. Judicial Approach

Legitimate expectation made its first appearance in a case where alien students of 'scientology' were refused extension of their entry permits as an act of policy by the Home Secretary, who had announced that no discretionary benefits would be granted to the sect. The Court of Appeal held that they had no legitimate expectation of extension beyond the permitted time, and so no right to a hearing, though revocation of their permits within that time would have been contrary to legitimate expectation[20].

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17 (1985) AC 374

18 Navjyoti Coop. Group Housing Society and others vs. Union of India and others, (1992) 4 SCC 477

19 Halsbury's Law of England, Fourth Edition, Volume I(I) 151

20 *Schmidt v. Secretary of State for Home Affairs,* (1969)2 Ch. 149.

In *Findlay v. Secretary of State for the Home Department*[21], it was observed as under: "The doctrine of legitimate expectation has an important place in the developing law of judicial review. It is, however, not necessary to explore the doctrine in this case, it is enough merely to note that a legitimate expectation can provide a sufficient interest to enable one who cannot point to the existence of a substantive right to obtain the leave of the court to apply for judicial review.

In *Union of India v. Hindustan Development Corporation*[22], the Court observed that it is generally agreed that legitimate expectation gives the applicant sufficient locus standi for judicial review and that the doctrine of legitimate expectation is to be confined mostly to right of a fair hearing before a decision which results in negativing a promise or withdrawing an undertaking is taken. The doctrine does not give scope to claim relief straightaway from the administrative authorities as no crystallised right as such is involved. The protection of such legitimate expectation does not require the fulfillment of the expectation where an overriding public interest requires otherwise. In other words where a person's legitimate expectation is not fulfilled by taking a particular then decision-maker should justify the denial of such expectation by showing some overriding public interest. If a denial of legitimate expectation in a given case amounts to denial of right guaranteed or is arbitrary, discriminatory, unfair or biased, gross abuse of power or violation of principles of natural justice, the same can be questioned on the well-known grounds attracting Article 14 but a claim based on mere legitimate expectation without anything more cannot ipso factor give a right to invoke these principles. It can be one of the grounds to consider but the court must lift the veil and see whether the decision is violative of these principles warranting interference. It depends very much on the facts and the recognised general principles of administrative law applicable to such facts and the concept of legitimate expectation which is the latest recruit to a long list of concepts fashioned by the courts for the review of administrative action, must be restricted to the general legal limitations applicable and binding the manner of the future exercise of administrative power in a particular case. It follows that the concept of legitimate expectation is "not the key which unlocks the treasury of natural justice and it ought not to unlock the gates which shuts the court out of review on the merits", particularly when the element of speculation and uncertainty is inherent is that very concept.

Privy Council in *A.-G. of Hong Kong v. Ng Yuen Shiu*[23] opined «when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty."

21 1985 AC 318

22 (1993) 3 SCC 499

23 (1983) 2 AC 629

In *A. G. for New South Wales v. Quin*[24], the Local Courts Act abolished Courts of Petty Sessions and replaced them by Local Courts. Under the changed system, some earlier magistrates were inducted and some were refused. It was argued on behalf of Mr. Quin that he had a legitimate expectation that he would be treated in the same way as his former colleagues considering his application on its own merits. The Mason, C.J, opined that if the courts were to define the content of legitimate expectations as something less than a legal right and were to protect what would be thus defined by striking down administrative acts or decisions which failed to fulfill the expectations, the courts would be truncating the powers which are naturally apt to affect those expectations. To strike down the exercise of administrative power solely on the ground of avoiding the disappointment of the legitimate expectations of an individual would be to set the courts adrift on a featureless sea of pragmatism. Moreover, the notion of a legitimate expectation (falling short of a legal right) is too nebulous to form a basis for invalidating the exercise of a power when its exercise otherwise accords with law. The authority of the courts and their salutary capacity judicially to review the exercise of administrative power depend in the last analysis on their fidelity to the rule of law, exhibited by the articulation of general principles. To lie within the limits of judicial power, the notion of "legitimate expectation" must be restricted to the illumination of what is the legal limitation on the exercise of administrative power in a particular case. Of course, if a legitimate expectation were to amount to a legal right, the court would define the respective limits of the right and any power which might be exercised to infringe it so as to accommodate in part both the right and the power or so as to accord to one priority over the other. But a power which might be so exercised as to affect a legitimate expectation falling short of a legal right cannot be truncated to accommodate the expectation.

For legal purposes, the expectation cannot be the same as anticipation and is different from a wish, a desire or a hope nor can it amount to a claim or demand on the ground of a right. However earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertable expectation and a mere disappointment does not attract legal consequences. A pious hope even leading to a moral obligation cannot amount to a legitimate expectation. The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in regular and natural sequence. Again it is distinguishable from a genuine expectation. Such expectation should be justifiably legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and therefore it does not amount to a right in the conventional sense[25].

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24 [1990] HCA 21

25 *Union of India v. Hindustan Development Corporation,* (1993) 3 SCC 499 at 28

The effect of 'legitimate expectation' was considered in *Breen v. Amalgamated Engineering Union*[26], wherein Lord Denning observed as under:-

If he is a man who has some right or interest, or some legitimate expectation, of which it would not be fair to deprive him without a hearing, or reasons given, then these should be afforded him according as the case may demand."

R. v. Home Secretary ex p. Asif Mahmood Khan[27], was another example of 'promise' where the Court of Appeal quashed the refusal of the Home Office to admit an immigrant when the action was contrary to the legitimate expectation created by one of its published circulars.

In *Council of Civil Service Unions v. Minister for the Civil Service*[28], the civil servants employed in secret work in the Government Communications Headquarters were prohibited from belonging to Trade Unions. Since there was a well established practice of consultation in such matters; but no consultation had been offered. The House of Lords held that the procedure would have been unfair and unlawful had there not been overriding considerations of national security. The impugned action was upheld as the considerations of national security were found to outweigh that which otherwise would have been the reasonable expectation of the applicant.

In *R. v. Secretary of State*[29], Taylor, J., however, concluded that the doctrine of legitimate expectation need not be restricted where the expectation was to be consulted or heard, but the doctrine imposes, in essence, a duty to act fairly.

In *Lalit Sehgal v. State of Goa*[30] the government issued a notification under the Goa, Daman and Diu Public Gambling Act, 1976 as amended in 1992 allowing opening of games of electronic amusement/slot machines in the State of Goa. Initially only 200 such machines were permitted to be installed in five star hotels, but later on the number was raised to 400. The petitioners challenged the increase in the total number of games of electronic amusement/slot machines in the State of Goa as arbitrary, irrational and violative of principles of natural justice and they had a legitimate expectation that terms and conditions of the Principal Notification, especially such as would affect their economic interests, would not be altered as to prejudice them.

The court held that the said restriction, in our considered view, is based on a valid foundation and it is not permissible to question the legislative wisdom in imposing such

26 (1971)1 All.E.R. 1148.

27 (1984) 1 W.L.R. 1337

28 (1985) A.C. 374

29 (1987)2 All.E.R. 518

30 *(1995)97BOMLR474*

restriction, which has a nexus with the object of the said Act, which was enacted with a view to prohibit gambling. Gambling activities from their very nature and in essence are extra-commercium although the external forms, formalities and instruments of trade may be employed and they are not protected either by Article 19(1)(g) or Article 301 of the Constitution. The power exercised by the Government of Goa in issuing the Principal Notification as well as the impugned Notification is in essence a rule making power which cannot be conditioned by principles of audi alteram partem and thus there is no scope for application of doctrine of legitimate expectation.

The Supreme Court ruled in *M.P. Oil Extraction v. State of M.P* [31]that the doctrine of legitimate expectations operates in the realm of public law and is considered a substantive and enforceable right in appropriate cases. It was held that the industries had a legitimate expectation with regards to past practice and the renewal clause, that the agreements are renewed in a similar manner.

In *National Buildings Construction Corporation v S. Raghunathan*[32] , respondents were denied the foreign allowance on the revised basic pay. It is pointed out that although arrears were paid to other employees, it was not paid to the respondents or the employees who were posted abroad despite their representations. The High Court directed for the payment of the allowances on revised scale. On appeal the Supreme Court held that the Foreign Allowance was not part of the agreement between the respondents and NBCC.

The court observed that the Government and its departments, in administering the affairs of the country are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without any iota of abuse of discretion. The policy statements cannot be disregarded unfairly or applied selectively. Unfairness in the form of unreasonableness is making to violation of natural justice. It was in this context that the doctrine of "Legitimate Expectation" was evolved which has today became a source of substantive as well as procedural rights[33].

Lord Scarman in R. v. Inland Revenue Commissioners ex p. Preston[34] laid down emphatically that unfairness in the purported exercise of power can amount to an abuse or excess of power. Thus the doctrine of "Legitimate Expectation" has been developed, both in the context of reasonableness and in the context of natural justice.

In *Navjyoti Coop. Group Housing Society v. Union of India*[35], it was held,

31 (1997) 7 SCC 592

32 (1998) 7 SCC 66)

33 ibid

34 (1985) AC 835

35 (1992) 4 SCC 477

" The existence of 'legitimate expectation' may have a number of different consequences and one of such consequences is that the authority ought not to act to defeat the "legitimate expectation' without some overriding reason of public policy to justify its doing so. In a case of 'legitimate expectation' if the authority proposes to defeat a person's 'legitimate expectation' it should afford him an opportunity to make representations in the matter.

In *Food Corporation of India v. Kamdhenu Cattle Feed Industries*[36] , the Supreme Court observed: "*This (Article 14) imposes the duty to act fairly and to adopt a procedure which is `fair play in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions.*"

7. Conclusion

Administrative decisions affect all of us. They decide everything from birth till death and all the facts of life that are enjoyed by human beings during this phase. A factor that strongly influences the degree to which the public is prepared to trust their government is the public's perception as to whether they perceive the government to be acting '*fairly*' and/or '*reasonably*'. In the context of public administration it can be expected that in most circumstances there will be no clear boundary dividing what can objectively be categorised as fair or reasonable from what is unfair or unreasonable.[37] In such cases there will be a grey area in the middle requiring an assessment as to whether something is fair and reasonable, or not, depending on such factors as the role of the person making that assessment, how well informed the person is about the relevant facts and circumstances, and quite possibly that persons perceptions, attitudes, opinions, interests and /or personal biases.

Processual fairness is in effect a human 'right' and that "…the concern of the law is to avoid some practical injustice".[38] Chief Justice Robert French in a 2010 noted that the norms of procedural fairness *"...are important societal values…"*[39] The rule of law is a common aspiration, proclaimed by international organizations and national governments as a pre-condition for acceptable modern governance. The rule of law is a higher ideal and it must be recognized by those governing the State that adherence to the rule of law is *sine-qua-non* of any society that hopes to have stability and peace to achieve social equality. In maintaining the rule of law a judiciary plays significant role as has been observed in

36 (*1993) 1 SCC 71*

37 WAFV of 2002 v. Refugee Review Tribunal [2003] FCA 16.

38 Gleeson CJ in Re: Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam (2003)214 CLR 1, at para 37.

39 Robert French CJ, *Procedural fairness – Indispensable to Justice,* Sir Anthony Mason lecture, The University of Melbourne Law School Law Students Society, 7 October 2010.

the cases of *Bachan Singh* v. *State of Punjab,*[40] *A.D.M. Jabalpur* v. *S. Shukla,*[41]*Indira Gandhi* v. *Raj Narain,*[42] *Punjab Communication Ltd.* v. *Union of India,*[43]*Sub-Committee on Judicial Accountability* v. *Union of India and Ors*.,[44]*Air India Statutory Corporation* v. *United Labour Union,*[45]etc.

It is now an established fact that Article 14 of the Indian Constitution can be enforced in cases of arbitrary 'state action'. The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision making process. For the implementation of this aspect of non-arbitrariness under Article 14, it is necessary for the administrative authorities to fairly consider the legitimate expectations of claimants while rendering a decision or passing an order, even though it is not a vested right.

The doctrine of legitimate expectation belongs to the domain of Public Law and is intended to give relief to the people when they are not able to justify their claims on the basis of law in the strict sense of the term, though they had suffered a civil consequence because their legitimate expectation had been violated. For legal purpose, the expectation cannot be the same as anticipation[46]. It is different from a wish, a desire or a hope nor can it amount to a claim or demand on the ground of a right.

However earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertable expectation and a mere disappointment does not attract legal consequences. This doctrine has been developed to check the arbitrary exercise of power by the administrative authorities. This doctrine provides a central space between '*no claim'* and a *'legal claim'* wherein a public authority can be made accountable on the ground of an expectation which is legitimate. Therefore, the doctrine is being hailed as a fine principle of administrative jurisprudence for reconciling power with liberty.

The doctrine of legitimate expectation is also one of the tools to establish procedural fairness in decision making by the administration. Every individual has a legitimate

40 AIR 1982 SC 1325.

41 AIR 1976 SC 1207.

42 1976 (2) SCR 347.

43 1999 (4) SCC727.

44 1991 (4) SCC 699.

45 AIR 1997 SC 645.

46 *Union of India* v. *Hindustan Development Corp.* (1993) 3 SCC 499.

expectation that the state shall accord protection to his rights and will not act to his detriment. In this doctrine the term 'established practice' refers to a regular, consistent predictable and certain conduct, process or activity of the decision-making authority. The expectation should be legitimate, that is, reasonable, logical and valid. Any expectation which is based on sporadic or casual or random acts, or which is unreasonable, illogical or invalid cannot be a legitimate expectation. It is a concept fashioned by courts, for judicial review of administrative action. It is procedural in character based on the requirement of a higher degree of fairness in administrative action, as a consequence of the promise made, or practice established.

The doctrine of legitimate expectation is much wider than the promissory estoppel as it can come to the rescue of a person in cases of no claim also. It is expected that the government will not change the legal position or the policy too frequently with regard to the rights of the individual; however there cannot be any restriction on the change of the policy. The change in policy can take place if the earlier policy was irrelevant to the changing times or affecting the State's interests. Merely because of change in the government with a different political ideology cannot be the reason for the change in policy. The policy considerations can also be tested on the yardstick of reasonableness. Moreover, the individual should be accorded the benefit of transitional period while the change in policy takes place.

Therefore, these parameters are ardently required to be observed in a democratic welfare state, where the governmental machinery cannot run amok and has to address the welfare of the masses.

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Understanding *in RE*: Article 370 of the Constitution: A Legal Historical Perspective

Dr. Utpal Kumar Raha* & Mr. Alok Kumar**

Abstract

The Presidential Order (C.O. 272 and 273) issued in August 2019, modified Article 367 of the Constitution of India and in effect revoked Jammu & Kashmir's special status envisaged by Article 370. It raised serious legal ambiguities concerning the constitutional validity of these Orders. The Supreme Court of India, In Re: Article 370 of the Constitution has adjudicated upon the constitutionality of these Orders and clarified the related ambiguities. This paper intends to develop understanding on this judgment arranged into several parts. In particular, its analysis part (Part E of the Judgment) can be further classified into two parts. The first part deals with the legal issues related to India and the State of Jammu & Kashmir (J&K) before the Constitutional Orders 272 & 273. The second part focuses on the legalities of these Constitutional Orders (both CO 272 & 273) and following modifications in Art 370 (the abrogation) and Art 367 (the Constituent Assembly to Legislative Assembly) and the J&K reorganisation process. The J & K's joining to India process is greatly influenced by a series of historical and legal incidents which are at the center of the very basis of Article 370 and the relevant Constitutional Orders (C.O.s) promulgated since 1947. Thus, this paper seeks to develop understanding of the present judgement from these legal historical perspectives.

Keywords : Jammu & Kashmir, Instrument of Accession, Special Status, Constitutional Amendment, Challenge, Validity,

1. Introduction

The Presidential Order (C.O. 272 and 273) issued in August 2019, modified Article 367 of the Constitution of India and in effect revoked Jammu & Kashmir's special status envisaged by Article 370. The Supreme Court of India, In Re: Article 370 of the Constitution has adjudicated upon the constitutionality of these Orders and clarified the related ambiguities. The State of Jammu & Kashmir's joining to India process is greatly influenced by a series of historical and legal incidents which are at the center of the very basis of Article 370 and the relevant Constitutional Orders (C.O.s) promulgated since 1947. Thus, this paper seeks to develop understanding of the present judgement and findings from these legal historical perspectives.

* Assistant Professor at Xavier Law School, St. Xavier's University, Kolkata (Corresponding email-id - utpal.raha@sxuk.edu.in and Phone no – 08902392361)

** 3rd Year Law Student at St. Xavier's University, Kolkata

2. Historical Background

Eons ago there existed a vast mountain lake known as "Satisar" and that lake drowned by Rishi Kashyap and became the Valley of Kashmir.[1] Prior to Partition, the state of Jammu & Kashmir consisted of the Kashmir Valley, Jammu, Ladakh, Baltistan, Gilgit, Hunza and Nagar, and it was an old central Asian trade route.[2] This state during the pre-independence era, did not have any such boundaries, which came into existence only in the 19th Century. In the 1840s Dogra Rajputs acquired the valley of Kashmir from the British by paying a consideration of Rs.75 Lakhs.[3] Initially in the valley, the prominent population were from the Brahmins, also with different sects like, Nishads, Khashas, Darads, etc.[4] This was prior to the advent of Islam in the 14th century, when the Zoji-la Pass acted as a route for successful invasions of Kashmir. The Emperor Jahangir described the Valley as "Gar firdaus, bar-ruee zameen ast, hameen asto, hameen asto, hameen ast" which means that if there is a paradise on earth, it is this, it is this, it is this.[5] In 1819, Maharaja Ranjit singh conquered Kashmir, while Jammu was ruled by the Chief of Dogra descent, known to be Ranjit Deo. Due to some conflict regarding succession of their ruler, Maharaja Ranjit Singh conquered Jammu too, and installed Gulab Singh as the Ruler of Jammu.[6] Later on Gulab Singh became an independent ruler of Jammu and Kashmir, in lieu of the treaty at Amritsar which became the evidence of making Jammu and Kashmir as a Political entity. Later on, Maharaja Ranbir Singh succeeded the throne, subsequently Maharaja Pratap Singh and in the year 1925 Maharaja Hari Singh became the ruler of jammu and kashmir and remained till transfer of power in 1947.[7]

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1 As per the *Rajatarangini* (The River of Kings) of *Kalhana* and *Nilamatpurana*, believed to be composed by Candra Deva.

2 P.N.K Bamzai, *Culture and Political History of Kashmir: Ancient Kashmir*, vol. 1, 1-2 (M.D. Publications Pvt. Ltd., New Delhi, 1994).

3 Ramachandra Guha, *India After Gandhi: The History of the World's Largest Democracy* 60 (Picador 2008); *See also* V.P. Menon, *The Story of the Integration of the Indian States* 391 (Orient Longmans Pvt. Ltd. 1956).

4 P.N.K Bamzai, *Culture and Political History of Kashmir: Ancient Kashmir*, vol. ,1, 16 (M.D. Publications Pvt. Ltd., New Delhi 1994).

5 Anita Medhekar & Farooq Haq, 'Promoting Kashmir as an Abode of Peace Tourism Destination by India and Pakistan' in Alexandru-Mircea Nedelea & Marilena-Oana Nedelea, Marketing Peace for Social Transformation and Global Prosperity (IGI Global 2019) 34.

6 Iqbal Chand Malhotra & Maroof Raza, *Kashmir's Untold Story*, 3 (Bloomsbury India 2019).

7 VP Menon, *The Story of the Integration of the Indian States* 392 (Orient Longmans Pvt. Ltd. 1956).

2.1 Later Development

During these years when Raja Hari Singh was the Ruler of Jammu and Kashmir, the State of Jammu and Kashmir which was already a part of the British India (administration) (the Princely State of Jammu and Kashmir), earned significant importance in the changing phases of India's independence movement against British rule.

With the advancement of the Independence movement across the various parts of British India, the Valley also emerged as a place for democratic reforms. In 1931 she saw the emergence of the Muslim Conference, in consequence of the worst communal riots led by Muslim leaders. Eventually Muslim Conference became two houses of debate, i.e., one was supporting the two-nation theory and was inclined toward the perspective of Jinnah and the other was trying to bring democratic reforms, women empowerment, etc. Eventually, in the year 1939, the circle that supported the democratic setup made a National Conference out of the Muslim Conference. So it was an official notification in 1939 that the Muslim Conference became the National Conference.[8]

The National Conference headed by Sheikh Abdullah effectively believed that even if we don't accede to either of these two new nations, we must be a secular democratic state, and most importantly they were in favour of constitutional setup. Whereas the Muslim Conference very clearly believes that the two-nation theory applies and therefore since it's a Muslim-majority state at the very least it must be independent of India or accede to Pakistan. They believed that the Hindu and Muslim communities cannot live together in harmony, due to the reason that we subscribe to a certain set of heroes, which according to you are enemies. They also asserted that they don't share ideas of the past, present and consequently the future, as a result, Co-existence is practically impossible. They were much inclined towards the belief of Mr. Jinnah.

After WWII, there was a significant development towards India's independence movement. The British Parliament enacted the Indian Independence Act, 1947 which in brief prescribed for two independent Dominions – India and Pakistan. The Princely State of Jammu and Kashmir was one among 565 of such States that had the choice to remain independent or to join either of these Dominions. For the dominion of India, the constituent assembly for the Indian Constitution was on the table.[9] Till Independence, almost every princely state signed the Instrument of accession and Merger Agreement, except Jammu and Kashmir, Hyderabad and Junagadh.[10] Finally, the State of Jammu and Kashmir (J&K) retained independence and the other two joined and became part of the Union of India.

8 IJIRMF Volume-8, Issue No.11, November 2022, ISSN : 2455-0620

9 The Indian Independence Act, 1947, s 8(1).

10 Bipin Chandra, Mridula Mukherjee & Aditya Mukherjee, *India After Independence 1947-2000* 92 (Penguin Books 2007).

Merging of Jammu and Kashmir into India: Post- Independence Scenario

Initially, Maharaja Hari Singh did not make up his mind to join either Dominion, as His Majesty never wanted to release his privileges of being Maharaja.[11] Due to such reasons, Raja called both the Dominions to sign a Standstill Agreement, wanting to have arms-length distance with both countries that were about to be formed. Pakistan signed the Standstill Agreement and claimed that Pakistan would not try to invade the state of Jammu and Kashmir until they don't get acceded with newly formed India. India never signed such an agreement and wanted more time to deliberate on this proposal.[12]

During this transition, in October 1947, through the North West Frontier Province of Pakistan, the Afridi lashkars along with Pakistani soldiers (on leave), swarmed into the area and occupied Gilgit, Balistan, Muzafrabad and went into conquering other areas of Jammu and Kashmir. This resulted in a massacre which led to thousands of deaths, loss of honour of people and destruction. This is when Raja Hari Singh sent a SOS to India, and asked to save the State. India was not ready to send an army until J&K signed the IoA. Eventually Raja Hari Singh to save his power submitted to accede to India with some conditions. The J&K acceded to India on 22nd October 1947 on some condition which was expressly laid down in IoA.[13] Eventually, India sent an Army to defend J&K. Pandit J.L Nehru raised this issue to the United Nations for a solution.[14] But this approach of the then Prime Minister became a blunder and produced an unfortunate outcome. The reason was, the UN was formed in 1945 and till that time, the world was having bipolar powers, i.e., USSR and USA, and the UN was accustomed to the Power of the USA. USA was in favor of Pakistan during that time, because of disharmony with India, as India changed the Inter State Trade Policy which affected the relation of India and USA. So due to such reasons, UN directed Cease Fire, and was told to hold a plebiscite, by putting a condition that both countries will withdraw their troops back, and then the people of valley will decide whether they want to accede to India or Pakistan, regardless of IoA. In precise, people of the J&K would consider acceding to India or Pakistan, regardless of IoA.[15]

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11 Iqbal Chand Malhotra & Maroof Raza, *Kashmir's Untold Story,* 46 (Bloomsbury India 2019).

12 Ramachandra Guha, *India After Gandhi: The History of the World's Largest Democracy* 63 (Picador 2008).

13 Bipin Chandra, Mridula Mukherjee & Aditya Mukherjee, *India After Independence 1947-2000,* 93-94 (Penguin Books 1999).

14 A.G. Noorani, *The Kashmir Dispute 1947-2012*, vol. 2, 77-80 (Tulika Books 2013).

15 B. Muralidhar Reddy 'We have 'left aside' U.N. resolutions on Kashmir: Musharraf. The Hindu. See <https://web.archive.org/web/20200525184656/https://www.thehindu.com/todays-paper/we-have-left-aside-un-resolutions-on-kashmir-musharraf/article27816543.ece > last accessed on March 29 2024.

Finally, India and the state of Jammu and Kashmir negotiated to give up a different constituent assembly for a separate Constitution of Jammu and Kashmir. Article 370 was added to the Indian Constitution to fill in the gap for administration till the constitution of Jammu and Kashmir came into existence, i.e., September 1956.

3. Constitutional Setup for the State of Jammu and Kashmir

Clause 3 of IoA expressly states that "I accept the matters specified in the schedules here to as the matters with respect to which the Dominion Legislature may make laws for this state" and the matters mentioned in the aforesaid Schedules are Defence, External Affairs and Communications.[16] Last shot for Other subjects matters were withheld by the state itself or were kept by the king under his belt. As per the negotiations, it was firmly established that the said state will have its own Constitution which will be made by the separate constituent assembly of Jammu and Kashmir, which contained 75 members.[17] This was decided during the ongoing debate over the Indian Constitution. The Indian Constitution came into force on 26th January, 1950. It is of utmost importance to understand that, while framing the Indian Constitution, the Constituent Assembly for the Jammu and Kashmir Constitution was just on paper, which later got into the bench in November 1951, as during this time the Constituent Assembly of Jammu and Kashmir came into being. Eventually, in September 1956, the Constitution of Jammu and Kashmir came into force.[18] So, from 1950 to 1956, by what authority, the State of Jammu and Kashmir was being governed?

So, till the commencement of the constitution of Jammu and Kashmir, the said state was being governed by Part XXI of the Indian Constitution and Instrument of Accession.[19]

4. Governing of the State of Jammu and Kashmir - Before the Commencement of the Constitution of Jammu and Kashmir

To fill in the gap, the Indian Constituent Assembly incorporated a bridge like provision under Part XXI, Article 370 of the Indian Constitution.[20] From the literal interpretation of the text and under the context of the setup done for the said State, it can be inferred that Article 370 was meant to preserve the relation between the State and the Union until September 1956, i.e., the commencement of the constitution of Jammu and Kashmir.

To understand the Judgment In its entirety, it is an immense need to understand erstwhile Article 370 of the Indian Constitution, which now stands diluted and modified.[21]

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16 Instrument of Accession, cl 3.

17 Iqbal Chand Malhotra & Maroof Raza, *Kashmir's Untold Story*, 100 (Bloomsbury India 2019).

18 The Constitution of Jammu and Kashmir, 1956.

19 Part XXI of the Indian Constitution Act 1950.

20 The Constitution of India, 1950.

21 In Re: Article 370 of the Constitution, Writ Petition (Civil) No. 1099 of 2019.

Article 370(1)(a) States that Article 238 will have no application to the State of Jammu and Kashmir. Although under Article 238 (which now stands deleted) the State of Jammu and Kashmir was incorporated as one of the States of India, provisions did not apply to the State as compared to the other States. Article 238 used to deal with the application of the provisions of Part VI to the states, which were listed in Part B of the 1st Schedule of the Indian Constitution.[22] Due to the Constitution (Seventh Amendment) Act of 1956, Article 238 was repealed in effect of the States Reorganisation Act, 1956.

Article 370 (1)(b) (i) states that the Parliament has the power to make laws for the State of Jammu and Kashmir but is only limited to such Matters which are mentioned in the Union List and Concurrent List of the Indian Constitution and most importantly only that matter which is also mentioned in the IoA, i.e., Defence, Communication and External Affairs, in consultation with the government of the state.

Article 370 (1)(b) (ii) states that The Parliament has the power to make laws for the state of Jammu and Kashmir, for the other matters (except Defence, Communications, and External Affairs) mentioned in the Union and the Concurrent list of the Indian Constitution, as with the concurrence of the Government of the state. In this same provision, it is mentioned that the Government of state means the person recognized by the president as the Maharaja of Jammu and Kashmir also known as *Sadar-e-riyasat*, which later replaced the Governor by Amending Article 367.[23]

Article 370(1)(c) states that the state of Jammu and Kashmir will only be governed through Article 1 and 370 of the Indian Constitution.

Article 370(1)(d) states the applicability of the other provision of the Indian Constitution on the state of Jammu and Kashmir through prescribed manner. It states that such provision with such exceptions and modifications as the president may by order specify, with the concurrence of the government of Jammu and Kashmir can be made applicable to the state of Jammu and Kashmir.

Article 370(2) states that the concurrence mentioned in Article 370 (1)(b) (ii) and Article 370(1)(d) shall be taken by the state government of Jammu and Kashmir until the constituent assembly was not convened. Once it gets convened, such concurrence will be tabled before such assembly, thus constituent assembly would have acted as a final authority to confirm such a presidential order.

Article 370(3) states that, the president may through public notification, declare Article 370 as Defunct provision or inoperative or as defunct provision, but it also mentions that before issuing such notification, the recommendation of the constituent assembly shall be taken.

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22 Part VI of the Constitution of India, 1950.

23 the Constitution of India, 1950, Article 367.

So, to summarize the provision of Article 370:

1. Article 1 and 370 applies to the state of Jammu and Kashmir.
2. Parliament which has the power to make laws on the subject matter mentioned in the Union list and Concurrent list for the states, will not be able to make such laws for the state of Jammu and Kashmir, except for the matters mentioned in IoA i.e., External affairs, communications, and Defense with the consultation of the government.
3. Parliament can even make laws on the other subject matter mentioned in the Union List and Concurrent List, but only with the concurrence of the state government.
4. The President by order makes the other provision of the constitution applicable to the concerned state, with the concurrence of the state government.
5. The President may by order notify the amendment or abrogation of Article 370, on a recommendation of the constituent assembly, which in 1957 got dissolved.

So through the wording of Article 370, it can be assumed that Article 370 was meant to be temporary in nature, to fill the gap of administration until the constitution of Jammu and Kashmir comes into existence.

5. Later Development

After the commencement of the Indian Constitution, the concerned State was being governed through Article 370 and on the terms of IoA. It was evident that Article 370 was much narrow in sense to govern such disputed areas and it was also debated in the Constituent Assembly by Gopalaswamy Ayyangar. After a lot of negotiations over the applicability of other provisions of the Constitution of India to the concerned State, a Presidential Order was passed on 26th January 1950 with the concurrence of the State Government, to extend a few provisions of the Constitution to streamline J&K's relationship with the Union, known as the Constitutional Order.[24] Later various meetings were held between the Union Representatives and the State leadership, which resulted in an agreement, known as the Delhi Agreement.[25]

The main outcome happened in this agreement was the concept of permanent residents, where the Union and the Constituent Assembly of Jammu and Kashmir agreed that Indian Citizenship shall be extended to all the residents of the State and the State will be empowered to make laws over the rights and privileges of such permanent residents on the subject matters like acquisition of immovable property, appointment to the State services, and like matters. Due to such an agreement between the Union and the State, the Constitution Order, 1954 inserted Article 35A, where the state legislature got the power to define the privileges of the permanent residents.[26]

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24 The Constitutional Application Order, 1950

25 The Delhi Agreement 1952.

26 Article 35A of the Constitution of India, 1950

As the making of the Constitution of the concerned State was on way, the Constitutional Application Order 1950 was replaced by the Presidential Constitutional Order of 1954 and it had the requisite concurrence of both the State Government and the Constituent Assembly of the concerned State, which was the prescribed process in the Article 370. Article 35A needs a separate space for discussion.

The Constitution of Jammu and Kashmir came into force in 1956, subsequently, the Constituent Assembly got dissolved. Subsequently, 42 Presidential orders were issued as an amendment to the 1954 Order, which resulted in the extension of 94 subjects of the Union List out of 97 and 26 out of 47 of the Concurrent List to the concerned State. Surprisingly, almost 260 articles out of 395 were made applicable to the State of Jammu and Kashmir. But it is to be noted that such an order made after 1956, was without the ratification of the Constituent Assembly, as it was not in existence.

As we discussed, the objective of Article 35A was to give extraordinary power to the State legislature to legislate over some subject matters for the permanent residents. Article 35A was incorporated under Part III of the Indian Constitution, which enumerates the Fundamental Rights. Article 35A was immune from Judicial Review if it is inconsistent with or takes away or infringes any rights conferred on the other citizens of India by any provision of this Part. So it means, Article 32 or Article 226 could not be used to challenge the legality of Article 35A. Article 35A ascertained that the State legislature will define the classes of persons, who shall be called the permanent residents, and also confer various rights and privileges to such persons, like employment under the state government, acquisition of an immovable property only by such persons, Scholarship rights, and such like matters.

There were 2 issues which were prominent while discussing Article 35A, i.e.,

1. Any Amendment to the Indian Constitution can be done through Article 368. Article 370 only used the phrase of exception and modification, in literal interpretation this is not meant to add something new to the Indian Constitution. So how can a constitutional order i.e., executive in nature, add a new provision to the Indian Constitution without using Article 368.
2. By following the text of Article 35A, it was protected from the enforcement of Part III of the Indian Constitution, but what about challenging them under Part II and Part XX of the Indian Constitution, which deals with the Citizenship and the Amendment procedure respectively.

6. The CO 272 & CO 273

In the year 2015, a coalition between the Peoples' Democratic Party and Bharatiya Janata Party formed the Government. The position of Chief Minister was occupied by Ms Mehbooba Mufti, belonging to the PDP. She resigned on 19th June 2018, as the Bharatiya

Janata Party withdrew support.[27] The governor of the state of Jammu and Kashmir issued a proclamation under Section 92 of the Constitution of Jammu and Kashmir on 20th June 2018 and assumed the power of the Government and dissolved the Legislative Assembly of the State. Following this the President issued a President's rule in the State under Article 356 and declared the President first, assumed power and functions of the Government of the State and the Governor; second, the power of the Legislature of the States would be exercised under the authority of Parliament and finally, the first proviso and second proviso to Article 3 of the Constitution stand suspended.

On 5th August 2019, the President issued Constitutional (Application to Jammu and Kashmir) Order 2019, namely CO 272. In Application to this CO *firstly*, all the provisions of the Indian Constitution made applicable to Jammu and Kashmir by using Article 370(1)(d). The essential requirement of Article 370(1)(d) was the concurrence of the Government, and during this time the President assumed the power of the Government. Secondly, Article 367(4) was modified by changing the term Constituent Assembly in the proviso to Article 370(3) to the Legislative Assembly. The Rajya Sabha on 5th August 2019 recommended to the president under Article 370(3) that all clauses of Article 370 shall cease to operate except clause 1 thereof.[28] Simultaneously, the President of India referred to the Jammu and Kashmir Reorganisation Bill, 2019 under the proviso to Article 3 to the Rajya Sabha and the Lok Sabha to express its views. Rajya Sabha passed the Act on 5th August 2019 itself.

On 6th August 2019, Parliament, while discharging the role of Legislature of the State, proceeded with some legislative business as Lok Sabha recommended to the President under Article 370(3) that the Article 370 shall cease to be operative except clause (1). Thus, the President issued CO 273 under Article 370(3) which de-operationalised Article 370 except the 1st provision to said Article. The Lok Sabha also passed the Reorganisation Act, 2019, and bifurcated the state of Jammu and Kashmir into 2 Union Territory, i.e., the Union Territory of Jammu and Kashmir with the Legislative Assembly and the Union Territory of Ladakh.

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27 *Hindustan Times* <https://www.hindustantimes.com/india-news/for-mehbooba-mufti-it-s-an-abrupt-end-to-a-tumultuous-tenure-as-jammu-and-kashmir-cm/story-QyGmYPI6IttelSArBuzbCK.html> accessed 22 february 2024.

28 which shall read as under, namely:
"All provisions of this Constitution, as amended from time to time, without any modifications or exceptions, shall apply to the State of Jammu and Kashmir notwithstanding anything contrary contained in article 152 or article 308 or any other article of this Constitution or any other provision of the Constitution of Jammu and Kashmir or any law, document, judgment, ordinance, order, bye-law, rule, regulation; notification, custom or usage having the force of law in the territory of India, or any other instrument, treaty or agreement as envisaged under article 363 or otherwise." Constitutional Order, 273

7. Dispute and Issues in Brief

The petitioners have challenged the validity of the Proclamations under Article 356, Constitutional Orders in effect abrogation of Article 370 applying the entire Constitution to the J&K and the Jammu and Kashmir Reorganisation Act 2019. Based on the submissions by Petitioners' and Respondents fowling issues are framed:

1. Whether Article 370 was Temporary or permanent in Nature;
2. Whether the modification done to Article 367, by substituting the Constituent Assembly to the State Legislature, is valid or not;
3. Whether the whole Indian Constitution could have been applied to the state of Jammu and Kashmir
4. Whether the exercise of the power under Article 370(3) was constitutionally correct or incorrect, and what about the recommendation of the Constituent Assembly;
5. Whether the proclamation was valid;
6. Whether the bifurcation of the State of Jammu and Kashmir into UTs is valid or not;

8. Understanding the analysis part of the Judgment from Legal Historical Perspectives

This segment will focus on the Part E of the Judgment- the analysis part which can be broadly classified further into two parts. The first part deals with the legal relationship issues between India and the State of Jammu & Kashmir (J&K) before the Constitutional Orders 272 & 273. The second part deals with the legalities of these Constitutional Orders (both CO 272 & 273) and following modifications in Art 370 (the abrogation) and Art 367 (the Constituent Assembly to Legislative Assembly) and the J&K reorganisation[29] process. The J & K's joining process is greatly influenced by a series of historical and legal incidents which are at the center of the very basis of Article 370 and the relevant Constitutional Orders (C.O.s) promulgated since 1947 as mentioned above. The current segment seeks to develop understanding of the present judgement underscoring these legal historical perspectives further.

The State of Jammu and Kashmir became independent in 1947 followed by foreign invasion and hostilities pushed them to accede to India however, their destabilized state '*special circumstance*' continued. Thus, unlike other Indian States whose accessions to India were prompt and smooth, the State of Jammu and Kashmir's joining to India has undergone several changes. In this context the issues concerning Instrument of Accession (IoA), birth, incorporation and abrogation of Article 370[30] and several Constitutional Orders (COs) and administrative decisions etc., can be appreciated better.

29 The Jammu and Kashmir Reorganisation Act, 2019 (Act No.34 of 2019)

30 Article 370 of the Indian Constitution Act, 1950

8.1. Regarding the Linkage Between The Dominion of India and the State of Jammu And Kashmir and the Sovereignty Issues of the Latter

The Indian Independence Act 1947 prescribed in fact the sovereignty of the British monarch over Indian States would lapse and return to the Rulers to the States including the State of Jammu and Kashmir. The Monarch of the State of Jammu and Kashmir was the sovereign and chose to remain independent or accede to either India or Pakistan. Later He acceded to India. The consequences of acceding to India by any territory meant the loss of sovereignty. It was clarified by the Objectives Resolution of the Constituent Assembly adopted on 22 January 1947. And the sovereignty of India vests with the people of this country which extends to the people of the acceding territories. The well-known special provision for Jammu and Kashmir was in no way devised to return an element of sovereignty to Jammu and Kashmir (Para 133)[31]. Further, this special power was necessitated for the time being and sought to be extinguished once and when the State of Jammu and Kashmir could be brought on par with other states. Finally, the combined effect of IoA and the 1949 Proclamation by *Yuvraj Jarn Singh*, the sovereignty of Jammu and Kashmir was surrendered fully to the Union of India (*Para 148*).[32] Further, the Constitutional schemes of both India and Jammu and Kashmir also unequivocally state that the latter surrenders their sovereignty to the former. Article 370 does not retain an element of sovereignty in favour of Jammu and Kashmir.

8.2. The Legality of The Exercise of Power During The Presidential Rule In 2018 which was Extended to 2019

Primary questions were related to the validity of the exercise of power by the President or Parliament during the pendency of the President's rule when such powers are limited to the restoration of the constitutional machinery and necessary for daily administration which could not be extended to the State's executive and legislative power as it happened in the case in hand. In this regard, this judgment has laid down certain standards to assess actions during the pendency of the President's rule under Art 356. These are first, the exercise of power must have a reasonable nexus to the object of the Proclamation, second, the President's action can't be held invalid merely on the ground of 'irreversibility' of actions; third, it must be established that the exercise of power during the Proclamation is a mala fide or extraneous' exercise of power. Finally, this rule restricts free judicial review of exercise of power by the President for everyday administration of the State.

8.3. Regarding the Nature of The Article 370: A Temporary Provision

The answer to this question may be better addressed by drawing reference to the historical context of Article 370. Following the Constitutional Assembly Debate of the Union of

31 In Re : Article 370 of the Constitution

32 A.G. Noorani, Article 370: *A Constitutional History of Jammu and Kashmir* 78 (Oxford University Press, India 2014).

India it appears that the Union of India chose to limit the power of the Union legislature to matters specified in the IoA because of the *'special circumstances'* in the State of Jammu and Kashmir. Once this State acceded to India there was no legal impediment but seeking consent of the Constituent Assembly of Jammu and Kashmir before the *full extension of India's legislative competence* was rather a message of goodwill. Therefore, Article 370 was incorporated for

> *First, an interim arrangement until the Constituent Assembly of the State was formed and could take a decision on the legislative competence of the Union on matters other than the ones stipulated in the IoA, and ratify the Constitution (the transitional purpose); and second, an interim arrangement because of the special circumstances in the State because of the war conditions of the State (the temporary purpose) (para 278).*

Then, the 'special circumstances' led to the incorporation of Article 370 were

> *'(a) the Maharaja of Jammu and Kashmir had accepted the legislative competence of the Union on three limited subjects along with certain ancillary powers; (b) the Constituent Assembly of the State had not been convened before the Constitution of India was adopted to expand the scope of legislative competence and ratify the Constitution; and (c) the impending war in Jammu and Kashmir at the time of framing the Constitution of India' (Para 224)*

Further, the Seventh Amendment to the Constitution removed distinctions between Parts A, B and C States. Therefore, the State of Jammu and Kashmir in fact became one State like other States in the Union of India completely (Para 322)[33].

8.4. Regarding 'recommendation' of the Constituent Assembly' of Jammu and Kashmir under Art 370(3)

The primary question was related to the nature of the 'recommendation' of the Constituent Assembly of Jammu and Kashmir as referred to Article 370(3). Did it mean that such 'recommendation' was binding on the President of India before a Notification' was issued in order to 'declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications…'?

An inference can be drawn from the Indian States joining the dominion of India process in relation to the nexus between the recommendations of the Constituent Assembly to the President of India as referred to Article 370(3). The Ministry of States decided that they would issue a proclamation ratifying the Constitution of India. The Proclamation could be issued on the recommendation of the Constituent Assembly if it existed or by the Ruler of the State. Their recommendations on the application of the Indian Constitution to their States

33 In Re : Article 370 of the Constitution

were a matter of 'earnest consideration' by the Union. Regarding Jammu and Kashmir, their Constituent Assembly took place after 1949 and lost such opportunity. Article 370(3) 'recommendation' referred to the 'ratification process' and was not necessarily meant to be binding on the President of India (Para 346). Thus, this Court held that

> *"the President has the power to unilaterally issue a notification under Article 370(3) declaring that Article 370 shall cease to exist or that it shall exist with such modifications and that the dissolution of the Constituent Assembly does not affect the scope of power held by the President under Article 370(3)" (Para 430).*

Regarding the validity of CO272, this judgment held that the President of India was empowered to exercise power prescribed under Article 370(1)(d) to apply all provisions of the Constitution to Jammu and Kashmir and the concurrence of the Government of the State was not necessary for the President to exercise such power (Para 428). Then, regarding the validity of CO 273 this Court held that over the last seventy years there were continuous exercises of power under Article 370(1) of the gradual process of constitutional integration of the State of Jammu and Kashmir with the Union.

> *'The declaration issued by the President in exercise of the power under Article 370(3) is a culmination of the process of integration. Thus, we do not find that the President's exercise of power under Article 370(3) wa s mala fide.' (Para 465)*

9. Concluding Remark

This work has closely studied a series of events concerning dominion of India and J & K's relationships spanning between the 1940s to till date. It reveals that during 1947 the State of J & K was reluctant to sacrifice her sovereignty in hasty. Everything however, got changed when she was invaded by the foreigners. Invaders with all brutalities inflicted severe injury to this State by mass killing and destruction, and dishonouring the innocents. This State of J & K was at the verge of losing everything and pushed her to join India. The prevailing instability was a barrier to this State's smooth joining to India and demanded additional considerations. It therefore, was responded by adopting *temporary arrangements* in particular Art 370. In reality, the Supreme Court of India has concluded that the State of J & K surrendered her sovereignty on joining India completely on the basis of a series of instances ranging from the CAD debate on this joining, the Proclamation 1949 by J & K etc. In this regard, the Judiciary, the Parliament and the Central Government of India are on the same page. This judgment pronounces that '*what is done is final and irrevocable*'. However, this judgement concluded leaving some grey areas open such as the nature of federalism in case of relation between Union and the State.

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Legal Standard of Proof: Comparative Study

***Dr. Krishna Murari Yadav**

Abstract

Crime is committed against individuals, society and State. Society and its priorities are changing very fast. Many new types of crimes are being committed with sophisticated weapons and methods. The traditional way to deal with such offences is insufficient. Justice is a triangle. It is not only for the accused but also for victims and society. 'Presumption of innocence' is obliterated by many countries. Standard of proof affects conviction rate. There are many types of standards of proof, namely, the preponderance of probability, Clear and Convincing, Beyond Reasonable Doubt and just fair and reasonable. Common-Law Countries and Civil Law Countries follow different standards of proof in civil and criminal cases. Different standard of proof is followed in Common Law Countries for civil and criminal matters, while the same standard of proof is followed in civil and criminal matters in France.[1] The standard of proof in India was very clear at the initial stage. 'Preponderance of probability' and 'Beyond reasonable doubts' were applicable to civil law and criminal law, respectively. The trend is changing. 'Preponderance of probability' is also applicable in criminal cases either through judgments or clear terms of statutes.

'Clear and Convincing' standard of proof is also in criminal cases in many countries, including the U.S. In this article, the researcher will discuss many types of the legal standard of proof, and he will try to find out the best suitable form of standards of proof in criminal law in the context of India.

Key-words : Proof, 'Presumption of innocence' 'Beyond reasonable doubts', 'Preponderance of probability' 'Clear and Convincing'

1. Kinds of Standard of Proof in Criminal Law

The concept of 'presumption of innocence' is an essential presumption in criminal law jurisprudence. There is a steady shifting of the burden of proof to tackle the new problems such as growing socio-economic offences, the emergence of new and graver crimes, poor rate of conviction, organised crimes, and terrorism, practical difficulties in securing the evidence etc.[2]

* Assistant Prof. (Sr Scale), LC-I, FOL, DU

1 Kevin M. Clermont and Emily Sherwin, A COMPARATIVE VIEW OF STANDARDS OF PROOF, 50 (*The Am. J. of Comp. Law.*250 ,2002).

2 Malimath Committee Report, *Reforms of Criminal Justice System* (March 2003), para 5.9. *Available at* https://www.mha.gov.in/sites/default/files/criminal_justice_system.pdf (last visited on April 28, 2022).

In these circumstances, it becomes necessary to understand all kinds of standards of proof and find a suitable standard of proof by which justice can be served to victims, the accused and society.

Article 14(2) of the International Convention on Civil and Political Rights, 1966 recognizes presumption of innocence of accused until his guilty is proved. In other words, though the presumption of the innocent is universally recognised as the mode of proof. However, it includes the standard of proof which is a matter and what is left to be regulated by law which made at the discretion of the respective States.

In the U.S., the standard of proof adopted in criminal cases is 'proof beyond reasonable doubt'. But in cases of fraud, some of the States in the U.S.A. They have adopted a lower standard which is called the 'clear and convincing standard'. This demonstrates which is depending upon the local conditions and the requirements of the situation, the lawmakers have prescribed standards lower than 'proof beyond reasonable doubt'.

The 'Proof beyond reasonable doubt' is not a standard of universal application. However, France has not adopted this standard. The French standard is 'in time conviction' or inner conviction, the same as 'proof on the preponderance of probabilities.[3] India has also accepted the preponderance of probabilities in criminal law to prove many things.[4] Indian Parliament has enacted many criminal laws in which standards of proof have been modified. Some of these statutes are NDPS Act, 1985[5] and the Protection of Children from Sexual Offences Act, 2012[6].

In *Cook* v. *Michael*,[7] Oregon Supreme Court stated three standards of proof: 'a preponderance', 'clear and convincing', and 'beyond a reasonable doubt'.[8]

- Proof by preponderance of evidence denotes that the court must be ready to accept that facts asserted are more probably true than false.
- 'Clear and convincing' denotes that asserted facts are highly probable.
- 'Beyond a reasonable doubt' denotes asserted facts are almost certainly true.

The ratio of *Cook* v. *Michael* was followed in many judgments, including *Riley Hill General Contractor Inc.* v. *Tandy Corp,*[9] There are three standards of proof: 'a preponderance', 'clear and convincing' and 'beyond a reasonable doubt'.

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3 *Id.*para 5.22.

4 *State (Delhi Administration)* v. *Sanjay Gandhi.*

5 The Narcotic Drugs and Psychotropic Substances Act, 2012, Section 35(2).

6 The Protection of Children from Sexual Offences Act, 2012, Section 30.

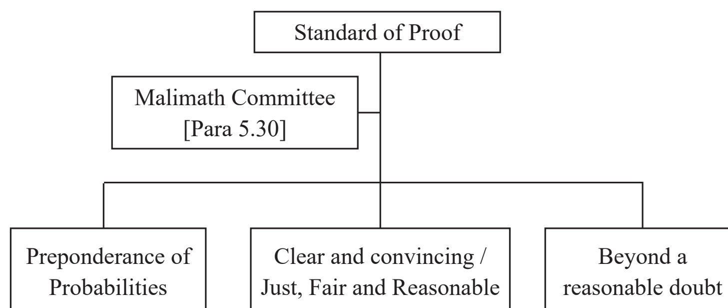
7 214 Or. 513, 526-27, 330 P.2d 1026 (1958).

8 Lee Loevinger, 'STANDARDS OF PROOF IN SCIENCE AND LAW' 333 (Jurimetrics, vol. 32, no. 3, 1992). *Available at* https://www.jstor.org/stable/29762257 (last visited on January 31, 2022).

9 737 P.2d 595 (Or.1987). *Available at* https://law.justia.com/cases/oregon/supreme-court/1987/303-or-390.html (last visited on January 29, 2022).

In the ordinary civil case, the plaintiff must meet its burden of proof by a preponderance of the evidence.[10] In a criminal case, the prosecution must establish its allegations by proof beyond a reasonable doubt.[11] In certain cases that fall between these classes, the standard is commonly articulated as one of evidence that is clear and convincing, which is often coupled with such terms as 'unequivocal' and 'cogent'.[12]

The Malimath Committee observed that a 'just, fair, and reasonable' standard of proof makes the balance between victims' rights and public interest on the one side and another side, the accused's right. This standard is the middle course. He argued in favour of a 'just, fair, and reasonable' standard and said that trial is conducted by judges who are experts in law and sensitive to the right of the accused. A layman does not try cases. Some more points are that advocates assist the accused, and judges are also bound to write reasons for their decision. This standard of proof will promote the confidence of the public and better quality of justice for victims. This is the time to search and find out truth and justice.[13]



2. Preponderance of Probabilities

2.1. Origin

'Preponderance' derives from the Latin word 'praeponderare', 'which translates to 'outweigh, be of greater weight'. The burden of proof or persuasion in civil actions is generally accepted as mean the greater weight of evidence. In the English law history, the translation which received a literal interpretation with the heads, that the witnesses are being counted on each side and each item of the testimony receiving a quantitative value or weight. The term 'preponderance' suggests to the jury that the evidence should be weighed on a scale and the trial judges will speak of weights and scales in explaining to jurors under this standard frequently. So that, they cannot speculate or guess that what happened but a party with the burden of persuasion in a civil case must prove what probably occurred.[14]

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10 *Grogan* v. *Garner*, 111 S. Ct. 654 (1991).

11 *United States* v. *Interstate Eng'g*, 288 F. Supp. 402 (D.N.H. 1967).

12 *Supra* n.8.

13 *Supra* no. 2, para 5.31.

14 *Riley Hill General ContractorInc.* v. *Tandy Corp.*

2.2. Meaning

'Preponderance of the evidence' means the greater weight of evidence. It is such evidence that, when weighed with that opposed to it, has a more convincing force and is more probably true and accurate.[15] The phrase "preponderance of probability" appears to have been taken from *Charles R. Cooper* v. *F.W. Slade.*[16&17] The observations made therein make it clear that what "preponderance of probability" means is a 'more probable and rational view of the case', not necessarily as certain as the pleading should be.[18] A prudent man's standard is of 'preponderance of probabilities'.[19] The preponderance of probabilities implies a balance of evidence. To succeed, the party must make out a balance of evidence in his favour.[20] A tilt of probability is a preponderance of probabilities. In *United States of America* v. *Daniel Fatico*[21] the Court observed that it requires proving something more than 50%.[22] For example, if there are 100 points and fifty-one points in favour of 'X', and foty-nine points favour 'Y', it will be called that preponderance of probabilities are in favour of 'X'.

There are two limbs of the definition of 'prove' and 'disprove' as defined under Section 3 of the Indian Evidence Act, 1872. Allahabad High Court observed that similar inference to *Charles R. Cooper* v. *F.W. Slade*[23]can be drawn from section 3 of the Indian Evidence Act, 1872.

2.3. Application

Civil cases in India are governed by the standard of proof prescribed by section 3[24] of the Indian Evidence Act namely, preponderance of probabilities.[25] *In P.G. Institute of Medical*

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15 *Id.*

16 (1857-59) 6 HLC 746.

17 *Rishi Kesh Singh And Ors.* v. *The State,* Para 61, A.I.R. 1970 All 51. The case was decided on October 18, 1968.

18 *Id.*

19 *Supra* no. 2, para 5.26.

20 *Supra* 17.

21 458 F. Supp. 388 (1978).

22 Dorothy K. Kagehiro and W. Clark Stanton, "LEGAL VS. QUANTIFIED DEFINITIONS OF STANDARDS OF PROOF" 9 (AP-LS 160, 1985).

23 (1857-59) 6 HLC 746.

24 "Proved" and "Disproved" word has been defined under Section 3 of the Indian Evidence Act, 1872. On the basis of these definitions, The Malimath Committee concluded that section 3 deals "preponderance of probabilities.

25 *Supra* no. 2, para 5.12.

Education v. *Jaspal Singh &Ors*[26] Supreme Court observed, "In civil proceedings, a mere preponderance of probability is sufficient, and the defendant is not necessarily entitled to the benefit of every reasonable doubt".

India has also accepted the preponderance of probabilities in criminal law to prove many things.[27] In *State (Delhi Administration)* v. *Sanjay Gandhi,*[28] Hon'ble Chief Justice Y.V. Chandrachud observed, 'In incidental matters of criminal law, there is no need to be proved beyond a reasonable doubt. For example, sections 83, 100,164 of Cr.P.C. and section 27 of Indian Evidence Act. Accused can rebut presumption against him under the Prevention of Corruption Act by proving or disproving. Standard for disproving presumption for accused is preponderance of probability. For the cancellation of bail, the balance of probabilities is sufficient. It was further observed that in case of rejection or cancellation of bail, proving facts by a preponderance of probabilities would be sufficient. In many cases, it had been accepted that the accused could get the benefit of a general exception or any exception merely by proving fact by a preponderance of probabilities.[29]

3. Clear and Convincing Standard

Initially, the clear and convincing standard of prove was applied in equity to. This demonstrates that depending upon the local conditions and the requirements of the situation, the lawmakers have prescribed standards lower than 'proof beyond reasonable doubt'.[30] It is intended to afford defendants greater protection against decisions than under the preponderance. In *United States of America* v. *Daniel Fatico*[31] the Court observed, mean probability estimates by judges of the degree of certainty require clear and convincing standard have ranged from 67% to 75%.[32]

In the U.S.A., the standard of proof adopted in criminal cases is 'proof beyond reasonable doubt'. But in cases of fraud, some of the States in the U.S.A. have adopted a lower standard called the 'clear and convincing standard'. 'Clear' shows unambiguous evidence, whether true or false. 'Convincing' represents the effect of evidence on an observer.[33]

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26 (2009) 7 SCC 330. Date of Judgment: May 29, 2009. Available at: https://indiankanoon.org/doc/824047/ (last visited on February 14, 2022).

27 The Narcotic Drugs and Psychotropic Substances Act, 1985 and The Protection of Children from Sexual Offences Act, 2012.

28 A.I.R. 1978 SC 961. Date of Judgment: May 5, 1978. This case is also known as 'KissaKursiKa'.

29 *State of U.P.* v. *Ram Swarup&Anr.* A.I.R. 1974 SC 1570.,*Salim Zia* v. *State of U.P*. A.I.R. 1979 SC 391., *Jams Martin* v. *State of Kerala* (2004) 2 SCC 203

30 *Supra* no. 2, para 5.21.

31 458 F. Supp. 388 (1978).

32 *Supra* n. 22.

33 *Riley Hill General ContractorInc.* v. *Tandy Corp.*

4. Proof beyond Reasonable Doubt

4.1. Origin –

The principle of 'proof beyond reasonable doubt' evolved in the context of the jury trial system in the U.K.[34]The courts also believe that it is better that the ten guilty persons escape rather than an innocent person suffer. It is from such concern of the courts to safeguard the personal liberty of the citizens that flows the standard of 'proof beyond reasonable doubt'. It is developed through judgments.[35]

4.2. Meaning

'Proof beyond reasonable doubt' is understood by different Judges differently. How this principle actually operates in the minds of the decision-maker is not easy to gather.[36] It is a subjective test.[37] Many jurists had criticised it.

In *Woolmington* v. *Director of Public Prisons*,[38] the House of Lords observed that "proof beyond reasonable doubt" required "a clear conviction of guilt and not merely a suspicion, even a strong suspicion, though, on the other hand, a mere fanciful doubt where it was not in the least likely to be true would not prevent conviction". Shortly thereafter, in the Summer's case,[39] the Court of Appeal ruled that the expression "reasonable doubt' ought to be abandoned because it could not be satisfactorily defined.

In *United States of America* v. *Daniel Fatico*[40] United States District Court, E. D. New York observed that judges have estimated the standard to be about 90% to prove beyond reasonable doubts.[41]

4.3. Who will Prove 'Beyond any Reasonable Doubts?

Commission of crime was being treated against State. The State was mighty and resourceful. So for giving protection to the accused, certain presumptions were drawn in favour of the accused. 'Presumption of innocence' was the most important presumption, which later on became the basic instinct of criminal law. It was recognised all over the world.[42] In

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34 *Supra* no. 2, para 5.25.

35 *Supra* no. 2, para 5.15.

36 *Supra* no. 2, para 5.23.

37 *Supra* no. 2, para 5.16.

38 1935 AC 462.

39 (1952) 36 C.A.R.14.

40 458 F. Supp. 388 (1978).

41 *Supra* n. 22, p.161.

42 International Convention on Civil and Political Rights 1966, Art.14(2).

furtherance of this, some more protection was provided. One of them is that accused of any offence shall not be compelled to be a witness against himself.[43]

Prosecutor is bound to prove beyond a reasonable doubt.

In P.G. Institute of Medical Education v. *Jaspal Singh &Ors*[44] Supreme Court observed, "In negligence under criminal proceedings, the persuasion of guilt must amount to such a moral certainty as convinces the mind of the Court, as a reasonable man, beyond all reasonable doubt". Homicide, culpable homicide and murder must be proved by the prosecutor beyond reasonable doubts. In *K.M.Nanavati*v. *the State of Maharashtra*[45] Supreme Court accepted that the prosecution had proved that the accused had intentionally shot the deceased and killed him beyond any reasonable doubt.[46] As a general rule, the accused is not bound to prove beyond reasonable doubts. According to Section 105, if the accused wants to get the benefit of 'General Exceptions' or any other exception or proviso, he can get the benefit by merely proving the preponderance of probabilities.[47]

But now the trend is changing. There are many protections for the accused. Society has changed. Offences are being committed in a very sophisticated manner, either affecting many people or committed in a gruesome manner. The standard of proof has been increased worldwide for tackling such offences. Indian Parliament had also enacted certain laws in which accused are bound to prove beyond reasonable doubts in criminal laws.[48]

4.4. Criticism of 'Proof Beyond Reasonable Doubt'

The Courts have quite often observed that though they are convinced that the accused is guilty but they have to acquit him because there is some reasonable doubt present. Chief Justice Ahmadi says that In a large number of cases, 'proof beyond reasonable doubt' virtually becomes 'proof beyond doubt' in actual practices. There is a considerable subjective element involved in coming to the conclusion that the doubt is a reasonable one. In the process, instead of focusing on discovering the truth, attention is drawn to the doubts and their reasonableness. It is common knowledge that most acquittals flow from the courts' finding that the prosecutor failed to prove case beyond a reasonable

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43 Constitution of India, 1950, Art. 20 (2). The fifth amendment of the U.S.A. Constitution also provides such protection.

44 (2009) 7 SCC 330. Date of Judgment: May 29, 2009. Available at: https://indiankanoon.org/doc/824047/ (last visited on February 14, 2022).

45 A.I.R. 1961 SC 112.

46 In this case, the accused was punished for murder.

47 *State of U.P.* v. *Ram Swarup&Anr.* A.I.R. 1974 SC 1570., *State (Delhi Administration)* v. *Sanjay Gandhi,* A.I.R. 1978 SC 961.,*Salim Zia* v. *State of U.P*. A.I.R. 1979 SC 391.,*Jams Martin* v. *State of Kerala* (2004) 2 SCC 203.

48 The Protection of Children from Sexual Offences Act, 2012, s. 30 and NDPS Act, 1985, s 35.

doubt and that therefore the accused is entitled to the benefit of the doubt. Very grave consequences flow from the large percentage of acquittals of guilty persons. The more the number of acquittals of the guilty, the more the criminals are let loose on society to commit more crimes. These persons would do with greater daring, for they know by their own experience that there is no chance of their being punished. If the loopholes are not tightened, there will, in the course of time, be more criminals in the society to cause more harm to innocent citizens. Such criminals may occupy an important and sensitive position in public life. If criminals start ruling the country, one can imagine the consequences. If crimes go unchecked, anarchy will not be a matter in the distant future. Peace, law & order situations largely depend on the efficacy of the Criminal Justice mechanism system. So, time has come to provide a fair procedure that does not allow easy escape for the guilty. In *Shivaji*v. *State of Maharashtra,*[49] Justice Krishna Iyer, while criticising the view that it is better for several guilty persons to escape than make one innocent person suffer, said that public accountability is one of the most important responsibilities of the judiciary. Therefore, if the accused is acquitted on the basis of every suspicion or doubt, the judicial system will lose its credibility with the community. Proof beyond reasonable doubt clearly imposes an onerous task on the prosecution to anticipate every possible defence of the accused and to establish that each such defence could not be made out.[50]

5. Differences among 'Proof beyond Reasonable Doubt', 'Clear and Convincing', and 'Preponderance of Probabilities'

There are the following differences between 'Proof beyond any reasonable doubt', 'Clear and Convincing' and 'preponderance of probability' –

- **Meaning –** The standard of preponderance of the evidence translates into more-likely-than-not. It is the usual standard in civil litigation, but it appears throughout the law. Next comes the intermediate standard or standards, often grouped under the banner of clear and convincing evidence and roughly translated as much-more-likely-than-not.... These apply to certain issues in special situations, such as when terminating parental rights. The standard of proof beyond a reasonable doubt means proof to a virtual certainty. It rarely prevails outside criminal law. [51]

  - **Degree –** Three standards of proof, namely 'Preponderance of probability', Clear and convincing and 'Proof beyond any reasonable doubt', require the lowest, the intermediate and highest degree of standard of proof, respectively.[52]

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49 (1973) Cri.L.J. 1783.

50 *Supra* no. 2, para 5.16.

51 Kevin M. Clermont and Emily Sherwin, A COMPARATIVE VIEW OF STANDARDS OF PROOF, 251 (*The Am. J. of Comp. Law.* v. 50, 2002.

52 Supra n. 22, p.159.

- **Application -** 'Proof beyond reasonable doubt' is applicable only in criminal cases. 'Preponderance of probability' is applicable in civil cases[53] as well as in certain cases of criminal law[54]. Clear and convincing is applicable in those U.S.A. civil cases which involve moral turpitude.[55]
- **Effect –** In the case of the application of 'preponderance of probability', the conviction rate will be lower in comparison to the application of 'Proof beyond reasonable doubt'. In case of clear and convincing, the conviction rate is normal.

6. Burden of Proof for Getting Benefit of General Exceptions or Exception

Hon'ble Supreme Court had interpreted Section 3 read with Section 105[56] of the Indian Evidence Act, 1872. In many cases, the Supreme Court held that the accused may get the benefit of General Exceptions (Sections 76 to 106), or any special exception or proviso contained in the Indian Penal Code (45 of 1860), by a preponderance of probabilities. There are many relevant cases which are relevant on these points -

6.1. State of Uttar Pradesh. v. Ram Swarup

In *State of U.P.* v. *Ram Swarup* & *Anr*.[57&58] victim had started to run away. He was shot dead. The Supreme Court in this case said that the right of private defence which constitutes a general exception to the offences defined in the Indian Penal Code. The burden that rests on the accused to prove the exception is not of the same rigour as the prosecution's burden to prove the charge beyond a reasonable doubt. It is enough for the accused to show, as in a civil case, that the preponderance of probabilities favours his plea.

6.2. Salim Zia v. State of Uttar Pradesh

In *Salim Zia* v. *State of Uttar Pradesh* (1978) Supreme Court observed that the burden of proof on the accused to get the benefit of the self-defence is not the same as the prosecutor is bound to prove. Prosecutor is bound to prove beyond a reasonable doubt, while an accused is bound to prove 'preponderance of probabilities'. The accused may prove

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53 *Supra* no. 2, para 5.12.

54 *State (Delhi Administration)* v. *Sanjay Gandhi,* The Protection of Children from Sexual Offences Act, 2012, & NDPS Act, 1985.

55 *United States of America* v. *Daniel Fatico*458 F. Supp. 388 (1978).*Available at:* https://law.justia.com/cases/federal/district-courts/FSupp/458/388/1875797/ (last visited on February 14, 2022).

56 Indian Penal Code, 1860, s. 105 deals burden of proving that case of accused comes within exceptions and proviso.

57 A.I.R. 1974 SC 1570.

58 Available at https://main.sci.gov.in/judgment/judis/6255.pdf (last visited on February 9, 2021).

'preponderance of probabilities' either by cross-examination of the prosecution witness or by giving defence evidence.

6.3. James Martin v. State of Kerala.

In *Jams Martin* v. *State of Kerala*[59]Hon'ble Supreme Court observed the following important points -

- To get the benefit of the right of private defence, an accused need to prove beyond reasonable doubts. It is sufficient for him to prove the 'preponderance of probabilities'. It means the standard of proof in civil cases and the right of private defence in criminal case is equal.
- If the accused had not taken a plea of the right of private defence, it is the duty of the court to consider it if the circumstances of the case and records show that the right of private defence was legitimately exercised.
- According to Section 105, the Indian Evidence Act, 1872 says that the burden of proof for getting the benefit of a right of private defence will be on the accused. The section also deals with a rebuttable presumption of law. The court shall presume the absence of a right of private defence.
- Accused is not bound to give independent evidence. He can establish his right of private defence by reference to circumstances transpiring from the prosecution evidence itself.

7. NEW TREND

7.1. Obliterating Presumption of Innocence

In *K.Veeraswamy* v. *Union of India*,[60] the Supreme Court has upheld the validity of Section 5(1)(e) and Section 5(3) of the Prevention of Corruption Act which places the burden on the accused to rebut the statutory presumption. In this case, It is held that this law is just, fair and reasonable and it does not contravene with Article 21 of the Constitution. In *Sodhi Transport Co.* v. *State of U.P.*,[61] the Supreme Court has held, "A rebuttable presumption which is clearly a rule of evidence has the effect of shifting the burden of proof". However, it is hard to see how this is unconstitutional when the person concerned has the opportunity to displace the presumption by leading evidence". Section 29[62] of the Protection of Children from Sexual Offences Act, 2012 recognises presumption of guilt.

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59 (2004) 2 SCC 203.*Available at* https://main.sci.gov.in/judgment/judis/25715.pdf (last visited on February 19, 2021).

60 1991 S.C.C. (Cri) 734.

61 (1986) 2 SCC 486.

62 The Protection of Children from Sexual Offences Act, 2012: s. 29 says that where a person is prosecuted under Sections 3,5,7, and 9 of the Act, the Special Court shall presume commission of the offence unless the contrary is proved. It deals rebuttable presumption of law against accused.

The presumption of innocence was rejected. In *Attorney General for India and Ors.* v.*Satish and Another*[63]Supreme Court observed that Section 29 is constitutional.

In *K.Veeraswamy* v. *Union of India*,[64] the Supreme Court has upheld the validity of Section 5(1) (e) and Section 5(3) of the Prevention of Corruption Act which places the burden on the accused to rebut the statutory presumption. It is held that this law is just, fair and reasonable and does not contradict Article 21 of the Constitution.

7.2. Lowering Standard of Proof in Criminal law

"Proof beyond reasonable doubt" is not an absolute principle of universal application, and deviations can be made by the Legislature. There are many ways for departure from traditional criminal law. Among them, shifting the burden of proof and lowering standards are very popular. These shifting are relevant increasing conviction rate without infringing right of accused. The burden of proof shifted from prosecution to defence in many cases, especially through the NDPS Act, 1985 and the POCSO Act, 2012. In some cases, it had been provided that the prosecutor may prove by 'preponderance of probabilities'. At the same time, the accused has also right to nullify presumption and evidence given by the prosecutor. Such departure will not violate Articles 14 or 21 of the Constitution. Even in England, the principle in the Woolmington case would apply only in the absence of a statutory provision to the contrary. While the concept of 'presumption of innocence' maintains its pivotal position in the criminal law jurisprudence, there is a steady shifting of the burden of proof to tackle the new problems such as growing socio-economic problems, the emergence of new and graver crimes, terrorism, organised crimes, poor rate of conviction, practical difficulties in securing the evidence etc.[65]

According to Section 30 (2)[66] of The Protection of Children from Sexual Offences Act, 2012and Section 35 (2)[67] of the NDPS Act, 1986 accused must prove his innocence beyond a reasonable doubt. The preponderance of probability is not sufficient.

7.3. Rejection of "Rule of Lenity" based on object of Statute

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63 Nov. 18. 2021. *Available at:* https://main.sci.gov.in/supremecourt/2021/2286/2286_2021_32_1501_31537_Judgement_18-Nov-2021.pdf (last visited on February 2, 2022).

64 1991 S.C.C. (Cri) 734.

65 *Supra* no. 2, para 5.9.

66 Section 30(1) creates a rebuttable presumption of law. The Special Court shall presume the existence of the culpable mental state of the accused. This sub-section says that the accused can rebut this presumption. According to Section 30(2), the accused must prove the absence of his culpable mental condition. He must prove beyond a reasonable doubt. This section provides that the 'preponderance of probabilities' will not be sufficient.

67 Section 35 (2) of the NDPS Act, 1986 is parimateria to Section 30(2) of the POCSO Act, 2012. This section says that the accused must prove the absence of his culpable mental condition beyond a reasonable doubt. A preponderance of probabilities will not be sufficient.

In *Attorney General for India and Ors.*v.*Satish and Another*[68] Mr Sidharth Luthara argued on behalf of the accused that section 29 and Section 30 imposes a strict burden on the accused. So, 'Rule of lenity'[69]must be applied.

Supreme Court rejected this argument and observed that if the intention of the legislature is clear, a court cannot create ambiguity to defeat the object of the statute. The object of the Act is to protect the interest of children. The application of 'Rule of Lenity' was rejected.

8. Conclusion

U.S.A. Supreme Court observed that the "question of what degree of proof is required . . . that is the kind of question which has traditionally been left to the judiciary to resolve…"[70] that the chance of winning and losing the case reflected by the Standard and burden of proof. There are many standards of proof have been recognised all over the world.[71] But there are mainly three categories of a standard of proof preponderance of probabilities, clear and convincing and 'beyond reasonable doubts'. 'In time conviction' or 'inner conviction' is the same as 'proof on preponderance of probabilities'.[72] 'Just, fair and reasonable' standard of proof is harder than 'preponderance of probabilities' and less hard than 'beyond reasonable doubts'. It is an intermediate standard of proof.

9. Suggestions

Standard of proof beyond reasonable doubt was accepted when cases were decided by a jury. There were many common men in the jury. They were not expert in the law. At the present time, cases are decided by an expert of law. Accused have sufficient time and opportunity to protect them. Nature and method of commission of crime had also changed. Offences related to money-laundering, corruption, terrorism, human trafficking, export, import and Socio-economy are very grave. The Standard of proof must be changed. I agree with Malimath Committee Report[73]which accepted that there are three standards of proof namely; preponderance of probabilities, clear and convincing and beyond reasonable doubts. The Committee suggested to accept middle standard of proof that is just, fair and reasonable standard of proof in criminal law. Legislative bodies and courts must accept it in grave offences which are affecting society at the large and socio-economic condition of the country.

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68 Date of the Judgment: Nov. 18. 2021.

69 Rule of Lenity is construed in favour of the accused. This rule requires that in case of ambiguity in criminal law, the law must be interpreted in favour of the accused or strictly construed against the State.

70 *Woodby* v. *I.N.S.,* 385 U.S. 276 (1966)

71 "In time conviction" or inner conviction, "proof on the preponderance of probabilities", clear and convincing, beyond reasonable doubts and just fair and reasonable

72 *Supra* no. 2, para 5.22.

73 *Supra* no. 2, para 5.31.

Indianising International Commercial Arbitration Post Amazon.com V. Future Retail Limited: A Case Study of Indian Legal Framework

Mr. Victor Nayak* Dr. Niladri Mondal Dr. G. A. Bilung*****

Abstract

Indian commercial arbitration is bound to grow leaps and bounds in days to come by and the most important reasons for that are the dynamic economy of India as international investors are flocking into Indian ventures and these initiatives always carry an arbitration clause for dispute resolution. Apart from the economy the truly exceptional talent of the advocates in this regard make it one of the most sought after career option that advocates are looking up to along with the judicial interpretation backed by some quality legal education. But in spite of that there are some challenges that the international commercial arbitration (hereinafter 'ICA') in India has to deal with before it becomes a global phenomenon. One such hurdle is the Indian legal framework which does not have express provisions dealing with challenging enforcement of foreign interim awards or emergency awards and unless the Indian judiciary is careful while exercising powers under S. 9 of the Act, 1996. In this paper the researcher aims to identify the judicial responses and the policy development to aid the growth of international commercial arbitration in India in the back drop of the issues that came up in the matter of enforcement of an emergency award in the case of Amazon.com v Future Retail Ltd. where the judiciary even though sent the matter back to the Singapore International Arbitration Tribunal, the whole saga brought out a number of glaring issues that the present legal framework dealing with ICA faces in India. The paper shall analyse the these issues such as cost, cultural differences, well drafted arbitral clauses, choosing the right seat of arbitration to name a few and their impact on the scope of ICA in India.

Keywords: International commercial arbitration, Amazon.com, arbitral award, investment

1. Introduction

The continuous growth and development of globalisation, particularly concerning international speculation, trade, and commerce, has consistently resulted in the establishment of intricate interconnections worldwide among diverse entities such as enterprises, financial institutions, investors, and nation-states. When faced with the issue of resolving a breakdown in interpersonal relationships, it is crucial for the parties involved to carefully examine the most effective approach for resolving any potential disagreements

* Assistant Professor, Department of Law, University of Engineering and Management, Kolkata

** Assistant Professor, Chotanagpur Law College, Ranchi University, Ranchi

*** Assistant Professor Chotanagpur Law College, Ranchi University, Ranchi

that may arise between them. Arbitration is a voluntary and efficient approach for resolving conflicts between two parties, offering an alternative to litigation and occurring outside the formalities of the judicial system.

The rise and attractiveness of arbitral centres and institutions in Asia have experienced significant advancements. According to a survey conducted in 2021,[1] London and Singapore were identified as the top-ranked destination for International Commercial Arbitration, whereas, Hong Kong occupied third-rank wrt arbitral seats globally in terms of popularity. This development is a significant milestone for Singapore, as it now joins London as a prominent worldwide leader in this particular domain. Singapore was designated as the most favoured location in the south Asian region, and it, together with Hong Kong, achieved a position among the top five favoured locations across all regions.[2]

According to the QMUL Survey, it is clear that there is a strong preference for arbitral institutions based in Asia. The Singapore International Arbitration Centre holds the second position as the most favoured arbitral institution, the Hong Kong International Arbitration Centre is third, and the China International Economic and Trade Arbitration Commission is fifth in terms of global preference. The study revealed a significant increase in the proportion of participants who chose SIAC and the HKIAC, with SIAC emerging as the top choice among institutions in the Asia-Pacific region. This development signifies CIETAC's inaugural inclusion on the roster of the five most favoured arbitral institutions globally.[3]

The gradual expansion of Asia's arbitration landscape is indicative of the growing inclination of Asian and other global entities to seek resolution for their conflicts inside the geographical confines of Asia. The adoption of a pro-arbitration position by the countries within the area has significantly bolstered the reputation of arbitration both inside the region and internationally.

This has resulted in the development of a robust ecosystem that continues to flourish.[4] Even though some airports or borders closed because of Covid-19, in the past few years, the share of international cases stayed high. The year 2021 witnessed the persistent impact of the COVID-19 pandemic on several aspects of global existence, encompassing the realm of arbitration as well. The ongoing pandemic has resulted in and is expected to continue

1 2021 International Arbitration Survey: Adapting arbitration to a changing world https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf.

2 *Id.*

3 Andre Yeap SC, Kelvin Poon and Avinash Vinayak Pradhan, Rajah & Tann Singapore, *The rise of arbitration in the Asia-Pacific,* (May 27, 2022) https://globalarbitrationreview.com/review/the-asia-pacific-arbitration-review/2023/article/the-rise-of-arbitration-in-the-asia-pacific

4 *Id.*

leading to the emergence of fresh conflicts. These disputes encompass several issues, such as the repercussions of business disruptions in diverse industries and the effects of COVID-19-related actions imposed by governments on investors.[5]

There was an observed rise in the volume of applications for accelerated arbitration in the processes of LCIA, SIAC, and SCAI. However, a decline in such applications was seen in the proceedings of SCC and HKIAC.

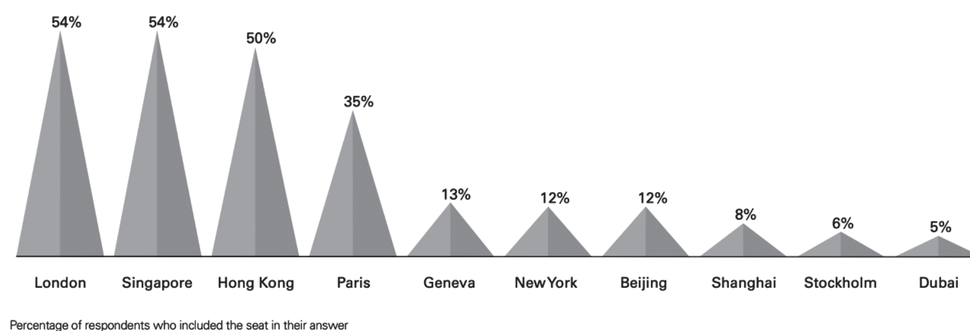

Figure 1:Preferred seat of international commercial arbitration

The frequency of arbitration challenges, however, remains relatively low, with the majority of institutions reporting less than five instances of such challenges. The most number of challenges observed in SCC sessions was 18.

2. Growth of International Commercial Arbitration

International Commercial Arbitration, has certain inherent characteristics and most importantly it is imperative that the underlying transaction of the dispute at hand need to be of a *commercial nature*. While the participation of business entities may hold significance, it should not serve as the sole guiding element in this determination.[6]

Commercial arbitration possesses numerous identifying characteristics:

1. *Arbitration offers a collaborative process where parties agree to utilize this specific method to successfully address and resolve their disputes.*

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5 Freshfields Bruckhaus Deringer, *International Arbitration in 2022: Top Trends* https://www.freshfields.com/490835/globalassets/our-thinking/campaigns/arbitration-top-trends-2022/international_arbitration_top_trends_2022.pdf

6 Speech Of Hon'ble Mr. Justice Vijender Jain, Chief Justice, Punjab & Haryana High Court, Chandigarh (India) *Key Issues On 'International Arbitration* (Jun 3, 2008), https://highcourtchd.gov.in/sub_pages/top_menu/about/events_files/InternationalArbitration.pdf.

2. *Arbitrations are handled via the involvement of non-governmental decision makers, known as arbitrators, who do not operate as representatives of the government but rather as private individuals chosen by the involved parties.*
3. *Arbitration yields a conclusive and obligatory decision, which possesses the potential for enforcement via domestic judicial systems.*

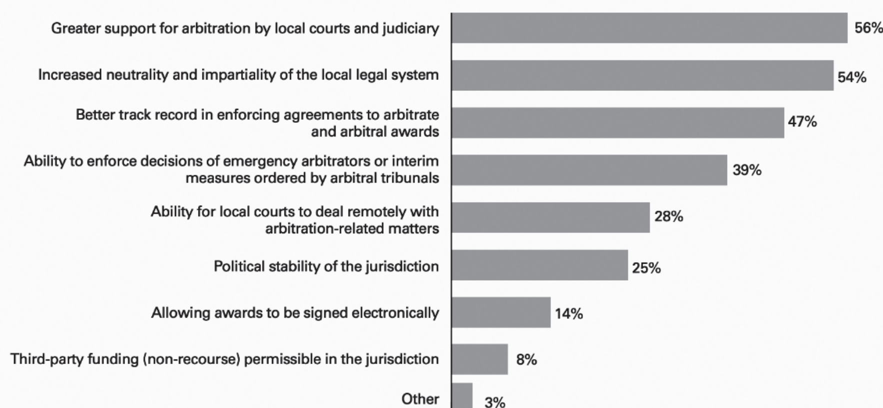

Figure 2: Reasons for choosing a particular seat for international commercial arbitration

particular seat for international commercial arbitration

During the modern era (since the World War-II), three prominent geo-political elements emerged, signifying the onset of a transformative phase for international arbitration.[7]

- Phase I: Many newly formed sovereign nations emerged in the years following World War II, with an especially noticeable concentration in African and Asian nations in the 1950s and 1960s. The conclusion of the British era transpired at this time. The potential benefits derived from engaging in international trade became evident, prompting international organisations and national governments to prioritise the creation of favourable conditions to facilitate such possibilities.
- Phase II: Furthermore, building upon the preceding point, there emerged the onset of globalisation and a growing interdependence in global commerce, marked by heightened international corporate transactions. The impetus for this phenomenon may be attributed to the advancements in telecommunications and the imperative of the corporate sector to explore novel markets and establish new business locations. Global visions superseded national concerns.

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7 Julian Lew, *The Development of International Arbitration as a Mechanism For Determining International Business Disputes*, (Feb. 6, 2021), https://arbitrationblog.kluwerarbitration.com/2021/02/06/the-development-of-international-arbitration-as-a-mechanism-for-determining-international-business-disputes/.

- Phase III: The formation and broad adoption of an impartial and worldwide framework for conducting international arbitration is a significant aspect that has tremendous relevance. Ever since the inception of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1958, the process has been formally established. Today, international arbitration has assumed a crucial role, with the participation of over 168 states.[8]

During 1960s there were a series of development[9]:

- 1961: Adoption of the International Commercial Arbitration Convention of Europe[10] is on arbitration procedures that take place between states located in the western and eastern regions. Currently, the Convention has received support from 16 Signatories and 31 parties.
- 1965: The United Nations Economic Commission for Europe (UNECE) and the Economic Commission for Asia and the Far East (ECAFE), established in 1946, played a significant role in developing arbitration rules for international commercial arbitration in various countries and regions. These rules served as precursors to the 1976 UNCITRAL Arbitration Rules.
- 1966: The International Centre for Settlement of Investment Disputes (ICSID) was established through collaboration between the World Bank and the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States. The primary aim behind its creation was to establish a formal mechanism for resolving disputes between investors and the host governments in which they had made investments. Currently, 163 countries have signed the Convention; 155 of those countries have since ratified it.
- In the early 1980s, the United Nations Commission on International Trade Law (UNCITRAL) proposed the Model Law on International Arbitration, which aimed to provide a framework for international arbitration proceedings. The purpose of this proposal was to offer a framework that individual member states may accept and incorporate into their respective national legal systems. At now, the Model Law has been partially or fully implemented in 84 states, representing 117 jurisdictions.[11]

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8 Stavros Brekoulakis, *The Evolution of International Arbitration's Scholarship and the International Arbitration Law Library Series*, (Feb. 6, 2021), https://arbitrationblog.kluwerarbitration.com/2021/02/06/the-evolution-of-international-arbitrations-scholarship-and-the-international-arbitration-law-library-series/ February 6, 2021

9 *Id.*

10 European Convention on International Commercial Arbitration Geneva, 21 April 1961, Treaty Series , vol. 484, p. 349 https://treaties.un.org/doc/Treaties/1964/01/19640107%2002-01%20AM/Ch_XXII_02p.pdf. Special Meeting was held at the European Office of the United Nations in Geneva from 10 to 21 April 1961

11 Frequently Asked Questions – Mandate and Historyhttps://uncitral.un.org/en/about/faq/mandate_composition/history

In several nations and legal frameworks, the notion of international arbitration was mostly absent. There was a limited number of legal professionals who specialised in international arbitration. While various law firms may include attorneys who possess a certain level of experience in international arbitration, only a limited number of these companies can claim to possess significant knowledge in this field.

Arbitration, in the majority of national jurisdictions, has traditionally been seen as either a component of procedural law or a commercial agreement entered into by parties.[12] In situations where the disputing parties are not citizens of the same country and the business agreement that led to the dispute occurred in a foreign location, the majority of national legal systems consider the arbitration to be associated with the country where it initially originated. This frequently denotes the legal framework and procedural rules that regulate the arbitration process and the underlying matters in contention.[13] Additionally, it empowers domestic courts to assert their authority and responsibility to scrutinise the conduct and outcome of arbitrations. Arbitration practices in many countries often closely resemble the procedural aspects used in domestic court procedures.[14] This resemblance is frequently seen in the processes, rules, and methods used during arbitration, making it appear similar to the workings of a court. Nowadays, parties have more flexibility in choosing the applicable substantive law or rules that govern their interactions as well as the protocol to follow as the legal proceedings proceed, thanks to mandatory legislation.[15]

A fundamental requirement for international arbitration was its lack of national affiliation. Therefore, it is necessary for arbitrators to possess independence and impartiality, ensuring that all parties are treated equitably within the framework of the arbitration procedure. An increasing number of people realised that national substantive and procedural laws would not be appropriate for an international arbitration involving parties from various nations. Although these notions were first acknowledged, they were subsequently transformed into essential principles of international arbitration due to a growing lack of trust among parties in the impartiality of national courts. The aforementioned principles continue to be adhered to and are widely regarded as vital to the practise of international arbitration in the

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12 P Lalive, International arbitration – teaching and research", in Contemporary Problems in International Commercial Arbitration, ed Julian D M Lew, 1986, Centre for Commercial Law Studies, at p 16.

13 *Id.*

14 Gary Born, *The principle of judicial non-interference in international arbitral proceedings*, Penn Law: Legal Scholarship Repository, (2014, U. Pa. f. Int'l L. Vol. 30:4), p 999 https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1859&context=jil

15 Justice B. N. Srikrishna, Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India, July 30, 2017 https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf

present day. Moreover, their significance has been further solidified and clarified via the rulings of domestic courts.

3. International Commercial Arbitration in India: Essential elements

There has been a consistent increase in international business conflicts involving Indian entities. The international world has shown significant interest in India's international arbitration framework.

Nevertheless, the advancements witnessed in arbitration jurisprudence throughout the past decade signify a comprehensive and revitalised approach that aligns with the globally recognised best practises.

The arbitration scene in India has undergone substantial transformation due to a succession of pro-arbitration judgements rendered by the Indian judiciary. Between the years 2012 and 2022, the Supreme Court has issued several significant judgements. Notable developments in Indian arbitration law include the declaration that the arbitration's seat serves as its central focus, the referral of unsigned parties for arbitration-mediated disputes, the acceptance of emergency arbitrator orders, the limitation of public policy objections to arbitration conducted both domestically and abroad, and the elucidation of various procedural nuances related to the arbitrability of disputes. The Indian government has taken significant steps to streamline the process of doing business in India and has shown strong support for arbitration as an effective means of dispute resolution.

The Arbitration and Conciliation (Amendment) Act of 2015, commonly referred to as the "2015 Amendment Act," officially took effect on October 23, 2015. This Amendment Act was widely praised for significantly improving the effectiveness and productivity of arbitration proceedings in India. After this incident, a top-level committee, headed by retired Justice B.N. Srikrishna, was formed.[16] This committee was given the responsibility of conducting a thorough assessment to identify the necessary steps for setting up formalized arbitration mechanisms in India.

Following careful consideration of the proposal, the Amendment Act of 2019 was officially passed on in 2019, henceforth referred to as the "2019 Amendment Act." The enactment was driven by the objective of establishing India as a prominent centre for institutional arbitration, encompassing both local and international arbitration proceedings. Nonetheless, there were objections to certain of the legislation's provisions. One of the critiques was about proposing the creation of an Arbitration Council of India and the limitation on the application of the 2015 Amendment Act. The critique in question resulted in the implementation of a restricted range of measures from the 2019 Amendment Act.

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16 *Id.*

Indian legal framework on arbitration, which is always developing, saw its most recent revisions in the year 2020. The 2020 Ordinance, also known as the Arbitration and Conciliation (Amendment) Ordinance, 2020, was put into effect on November 4, 2020. Its main objective is to introduce further changes to the Arbitration and Conciliation Act, 1996, commonly referred to as the "Act." Following that, the 2020 ordinance underwent a transformation and emerged as the Arbitration and Conciliation (Amendment) Act, 2021 ("2021 Amendment Act").

As per the provisions of the Arbitration and Conciliation Act of 1996*, International Commercial Arbitration* (ICA) is defined as:

"*An arbitration that pertains to conflicts arising from a legal association that is deemed commercial in nature*."[17]

This applies to situations involving an individual residing in another country, a foreign business entity, or an organization, association, or group of people whose central management or control is based in a foreign country. According to Indian legislation, when an arbitration takes place in India and involves a party from a foreign jurisdiction, it is considered an International Commercial Arbitration (ICA).[18]

Before the passage of the 2015 Amendment Act, a strict interpretation of Section 2(1)(f)(iii) would suggest that, even in the instance of an Indian-incorporated company, an arbitration could be considered an International Commercial Arbitration (ICA) as long as the company's central management and control were located outside of India.

In *TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd.*[19], it was determined by the Supreme Court that TDM Infrastructure Pvt. Ltd., despite being under foreign control, is considered to possess the domestic nationality only for the Act. In the context of arbitration involving Indian incorporated companies under foreign control, the Supreme Court's interpretation considers such cases as domestic arbitration, even though the Arbitration Act recognises them as International Commercial Arbitration due to the "*management and control outside of India.*"[20]

Therefore, as long as the company is incorporated in India, the prevalent position is that the significance of the "central management and control of a company" website is irrelevant in assessing the arbitration status.

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17 Arbitration and Conciliation Act, 1996, Section 2(1)(f)

18 Arbitration and Conciliation Act, 1996, Section 2(1)(f) (i)

19 (2008) 14 SCC 271.

20 ICC, *ICC India Arbitration White Paper,* available at https://www.iccindiaonline.org/ICC-India-Arbitration-White-Paper.pdf

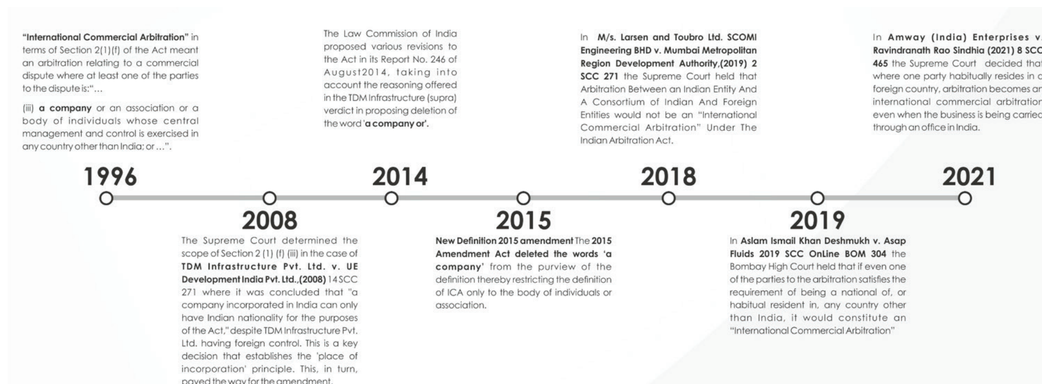

Figure 3: Understanding the complexities of ICA

In a recent case, an Indian company emerged as the lead partner in a consortium based in Mumbai, which comprised both foreign and domestic companies. The consortium had the final authority over the selection of the chairman. The Supreme Court issued an order affirming that the central management and control of the consortium were situated in India.[21]

4. Major Challenges for International Commercial Arbitration in India[22]

In the Indian context, a significant majority of arbitration proceedings are conducted in an ad hoc manner, with a gradual shift towards the adoption of institutional arbitration practices. The Indian government has put in place particular policies with the goal of making India a well-known arbitration hub.[23] The main goal of the 2019 Arbitration and Conciliation (Amendment) Act was to establish a structured system for arbitration within the Indian legal framework. This legislation was developed in accordance with the suggestions put out in the B.N. Srikrishna Committee Report.[24] The Act includes **Sections 43-A to 43-M**, which outline the provisions for setting up an Arbitration Council of India. Nevertheless, the aforementioned measures are deemed inadequate based on research conducted by the

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21 M/s. Larsen and Toubro Ltd. SCOMI Engineering BHD v. Mumbai Metropolitan Region Development Authority, 2018 SCC OnLine SC 1910

22 Ravi Singhania, Yaman Kumar, *Section 2(1)(f) "International Commercial Arbitration" – is it as simple as it looks?* (Apr. 19, 2022) https://singhania.in/blog/section-2-1-f-international-commercial-arbitration-is-it-as-simple-as-it-looks-.

23 Tariq Khan, *Making India a Hub of Arbitration: Bridging the Gap Between Myth and Reality,* 2021 SCC OnLine Blog Exp 10, (Feb. 17, 2021), https://www.scconline.com/blog/post/2021/02/17/making-india-a-hub-of-arbitration-bridging-the-gap-between-myth-and-reality/.

24 PIB, *High Level Committee on Making India Hub of Arbitration Submits Report,* (August 04, 2017) available at https://pib.gov.in/newsite/PrintRelease.aspx?relid=169621.

NITI Ayog.[25] The study reveals that the process of resolving challenges to an award in lower courts requires a duration of 24 months, while the same process takes 12 months in High Courts and a staggering 48 months in the Supreme Court. Consequently, the entire average length for resolution amounts to an astonishing 2508 days[26] and as outline below there are certain issues which need to be addressed:

- One significant issue pertains to the absence of arbitration attorneys who exclusively practice in a full-time capacity. Arbitration proceedings are frequently prioritised by lawyers, who commonly schedule them for the time window after regular court hours. Following a full day's engagement in the legal procedures, the individuals involved are already fatigued, resulting in a very brief duration of the proceedings. In some instances, individuals may request adjournments during court proceedings, while in arbitrations, they may schedule dates without the need for court hearings. Likewise, certain arbitrators, who concurrently engage in legal practice inside the court system, encounter challenges in allocating adequate time to the arbitration process.[27] It's crucial to engage arbitration lawyers and Arbitrators who can fully dedicate themselves to the arbitration process, thereby minimizing unnecessary delays. The drafting of the law lacks precision and attention to detail. Before the 2015 revision, Section 34 of the Arbitration and Conciliation Act, 1996, allowed for the submission of objections, resulting in an automatic suspension of the enforceability of the arbitral decision upon the filing of a petition under Section 34. The aforementioned issue posed a significant obstacle in the implementation of the arbitral judgements.[28] The issue at hand was effectively tackled in 2015 by the implementation of modifications to the 1996 Act. Nevertheless, the wording of the Amendment Act was sufficiently ambiguous, resulting in a three-year period of uncertainty over its applicability to pending Section 34 petitions. Despite the issuance of the judgement by the *Board of Control for Cricket in India v. Kochi Cricket Private Limited.*[29]

  Limited, the legislature subsequently inserted Section 87, which was subsequently invalidated in the case of *Hindustan Construction Co. Ltd. v. Union of India*.[30]

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25 Niti Aayog, *Designing the Future of Dispute Resolution: The ODR Policy Plan For India*, (October, 2021), https://www.niti.gov.in/sites/default/files/2023-03/Designing-The-Future-of-Dispute-Resolution-The-ODR-Policy-Plan-for-India.pdf.

26 Bibek Debroy and Suparna Jain, *Strengthening Arbitration and its Enforcement in India – Resolve in India*, NITI Ayog, available at https://niti.gov.in/writereaddata/files/document_publication/Arbitration.pdf.

27 Varsha Banta, *Is Arbitration Necessarily A Human Activity? – Technological Disruption And The Role Of Robots In Arbitration*, 1 Ind. Arb. L. Rev. 49-59, (2019).

28 Hindustan Construction Company v UOI, (2020) 17 SCC 324.

29 (2018) 6 SCC 287

30 (2019) SCC Online SC 1520

Considerable judicial resources were used in order to provide elucidation on these revisions.

- The absence of adequate legislation: The purpose of the proposed amendment to the Arbitration and Conciliation Act, 1996 is to change Section 36, which raises concerns since it provides for the complete suspension of the arbitration award's enforcement in cases involving fraud or corruption.[31] This would result in a return to the period characterised by the automatic suspension of arbitral awards, since it would provide a simple means for judgment-debtors to evade their responsibilities in relation to the award. The lack of a clear definition of fraud or corruption under the 1996 Act gives rise to an uncertainty.[32] An individual against whom a judgement has been made may petition for an unconditional stay on the enforcement of the award by alleging instances of fraud and corruption. Consequently, the enforcement of awards will become increasingly challenging, so negatively impacting the overall ease of doing commercial activities. The Government has implemented a series of successive revisions, indicating a lack of thorough consideration and inadequate drafting of the initial legislation. Despite the implementation of several amendments, the issue surrounding the distinction between seat and venue has not been effectively resolved in any of the Amendment Acts. The legislation sets out the principle of minimal court intervention in Section 5, but Section 29-A provides a contrasting illustration.[33] It is worth noting that a petition filed under Section 29-A may need a considerable amount of time, perhaps exceeding one year, to reach a resolution about the potential extension of six months.

- Despite the presence of well-known organizations like the Mumbai Centre for International Arbitration (MCIA) and the Delhi International Arbitration Centre (DIAC), the absence of institutional arbitration remains a significant challenge in India. Currently, India lacks an organization that is comparable to esteemed counterparts such as the London Court of International Arbitration (LCIA), International Criminal Court (ICC), and Singapore International Arbitration Centre (SIAC). The reliance on ad hoc arbitrations in India is a key factor contributing to the weakness in the country's arbitration framework. In order for a global arbitral institution to achieve a high level of recognition, it is imperative to have an esteemed arbitration specialist at its helm. Gary Born, a highly regarded figure in the arbitration field, played a key role in overseeing the operations of the Singapore International Arbitration Centre

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31 Ganesh Chandru *et al, The* 2021 Amendment to Arbitral Legislation in India: Is it a Step in the Right Direction?the Right Direction?, National Law School Business Law Review: Vol. 7: Iss. 2, 95-105.

32 Naresh Thacker & Samarth Saxena, Arbitration And Conciliation (Amendment) Act, 2021: The Final Word On Unconditional Stay On Enforcement Of Challenged Domestic Awards?, 4 Ind. Arb. L. Rev. 65-74, (2022).

33 In Re: Interplay Between Arbitration Agreements Under The Arbitration And Conciliation Act 1996 And The Indian Stamp Act 1899, 2023 INSC 1066.

(SIAC). Due to the demanding professional commitments of litigation attorneys in India, it is improbable that prominent legal practitioners would extensively involve themselves with an arbitration institution.[34]

- *Involvement of the judiciary*: Another concern is to the insufficient assistance provided by the judicial system. It has been observed that judicial delays arise as a consequence of the excessive workload experienced by the courts. Once an arbitration case becomes enmeshed in the court system, it experiences delays and it becomes uncertain as to the duration of time required to resolve the dispute.[35] For example, while considering a Section 34 petition, which pertains to the contestation of an arbitral ruling, the resolution process may be significantly protracted. Some courts treat the petition as an appeal even though the Supreme Court made it clear that the Court under Section 34 does not have the authority to hear appeals or evaluate cases on their merits. In several instances, the judiciary has undertaken a reassessment of the evidence and granted the attorneys the opportunity to extensively present their arguments about the substantive aspects of the case. Another issue that arises is the presence of certain judgements rendered by the High Courts that have shown to be unsound in terms of legal principles. This phenomenon arises due to the inherent impossibility of achieving complete alignment across all the courts in India. Indeed, there have been instances of regressive judgements rendered by the Supreme Court, as exemplified by the case of *Saw Pipes Ltd*.[36] The adverse consequences of these decisions necessitate a significant amount of time and effort to rectify. This impression of India as a jurisdiction that lacks arbitration-friendly policies and poses risks to investors is prevalent.
- *Retired judges as arbitrators*: It is interesting to notice that elite arbitrators have a lot of work to do because there aren't many options accessible for them to choose from. The rationale behind the practice of predominantly appointing retired Judges as arbitrators stems from the exclusion of new arbitration attorneys from such appointments. The discontinuation of this practice is imperative, and it is recommended that young attorneys be appointed as arbitrators in conflicts. The implementation of this measure will enhance the overall resilience of the arbitration procedure, while ensuring that the quality of awards remains unaffected. Maintaining the quality of verdicts becomes more challenging when faced with a substantial volume of arbitration cases. Our country has a unique tendency to select retired Judges exclusively as arbitrators, which is not commonly observed in other nations. Furthermore, the selection of youthful legal professionals as arbitrators aligns

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34 Priyanka Desai, *Strengthening Institutional Arbitration for Domestic and International Commercial Disputes in India,* (Feb. 1, 2024) available at https://www.irccl.in/post/strengthening-institutional-arbitration-for-domestic-and-international-commercial-disputes-in-india

35 *supra*, note 24.

36 2003) 5 SCC 705.

with the transparency requirements outlined in Schedule 6. As per the prescribed Schedule, it is mandatory for the arbitrator to provide information on the number of ongoing arbitrations within their purview, as well as their ability to conclude the arbitration proceedings within a one-year timeframe. Furthermore, while dealing with intricate cases, it is imperative to engage proficient arbitrators who possess specialised expertise in a certain domain, such as maritime arbitration.

- *Insufficient portrayal of the arbitration process and the necessity for a separate arbitration forum:* The heads of the Bar Associations prioritise resolving the issues the Court faces, hence they do not discuss arbitration cases. One of the primary factors contributing to the lack of attention and resolution of matters pertaining to the arbitration mechanism is the absence of emphasis or acknowledgement. Therefore, it is imperative to establish a professional organisation to effectively tackle the current challenges and satisfy the specific interests of those engaged in the field of arbitration.
- *Arbitrators' inflexibity*: One other factor contributing to the failure of the arbitration procedure is the arbitrators' adoption of an inflexible attitude. If an arbitrator in a tribunal adheres only to the procedure, which explicitly specifies that "*stringent standards of evidence not apply to arbitration*", then the fundamental objective is undermined. This phenomenon occurs due to the fact that arbitration processes in such instances resemble civil litigation. Moreover, it is often observed that arbitrators do not exercise control over the cross-examination process. Lawyers have been observed posing superfluous and repetitive inquiries, resulting in significant delays to the arbitration process. Hence, it is imperative for arbitrators to refrain from assuming a passive role during cross-examination proceedings. Rather, they should actively oversee the process and exercise control, ensuring that queries pertaining to the substance and interpretation of documents are not allowed.
- *Public Sector Undertakings (PSUs)*: It is imperative to direct our attention on Public Sector Undertakings (PSUs) due to their substantial involvement in the filing of legal disputes. Pennsylvania State University (PSU) has a longstanding reputation of demonstrating resilience and perseverance by consistently refusing to settle and actively engaging in contests until the very end. It is imperative for the Government to instruct the relevant ministries to do an analysis to determine the situations that need contestation and those that do not. If the reward is based on sound reasoning, it should not be subject to challenge.
- *Government Interference:* All global arbitration institutions, operate independently without government influence. It's crucial to recognize that both the Arbitration Council of India and the New Delhi Centre have members with ties to the government. As a result, the effectiveness of the Arbitration Council of India will have a substantial impact, making it advisable for the government to limit its involvement in arbitration matters.

Amazon.Com v. Future Retail Limited: The story unfolds![37]

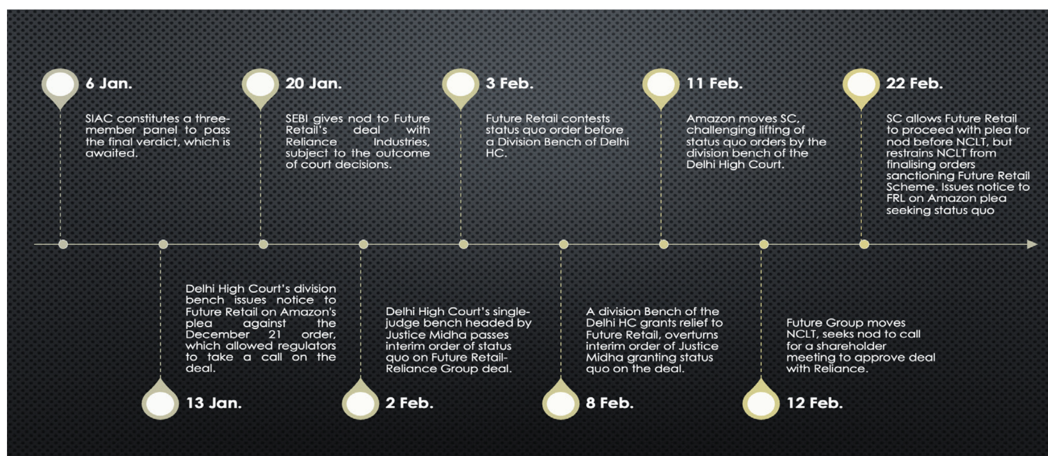

Figure 4: The time line of the arbitration dispute

Up until four years ago, Section 9 of the Act, 1996 in India granted plaintiffs the right to seek temporary remedy from the courts prior to the establishment of the arbitral tribunal. The rules of arbitration institutions in India, including the Indian Council of Arbitration and the Mumbai Centre for International Arbitration, have been updated to include emergency arbitration procedures, aligning them with those of international arbitration institutions. This method allows parties to request temporary relief within the established mechanisms before the arbitral tribunal is formed.

Facts of the case

The Indian courts acknowledged the significance of a specific ruling made through emergency arbitration proceedings in compliance with the regulations of the Singapore International Arbitration Centre (SIAC). Amazon used Section 17(2) of the Act to file a suit with the Honourable Delhi High Court in March 2021, seeking, among other things, the implementation of an emergency arbitration ruling against the Future Retail Group dated October 25, 2020.

Amazon has established three shareholder agreements with Future Retail Limited (FRL), Future Coupons Pvt. Ltd. (FCPL), and the individuals responsible for promoting and directing these companies, together referred to as the "Biyani Group.".

Amazon, FCPL, and the Biyani Group negotiated a Shareholders' Agreement on August 22, 2019, which reproduced the rights granted to FCPL in this agreement, with the intention of using it to Amazon's benefit (referred to as the "FCPL Agreement"). Amazon has entered into an agreement to make a financial investment in FCPL. The parties involved

37 Amazon.com NV Investment Holdings LLC v. Future Coupons Pvt. Ltd. & Ors., 2022 SCC OnLine Del 1057.

had an agreement that Amazon would maintain its investment in FRL's retail assets. This arrangement dictated that FRL was not permitted to transfer its retail assets without the approval of FCPL, with the condition that Amazon's approval must precede FCPL's consent.

It is important to note that Future Retail Limited (FRL) has been prohibited from encumbering, transferring, selling, divesting, or disposing of its retail properties to individuals or entities categorized as "restricted persons." These restricted persons are entities with whom FRL, Future Coupons Private Limited (FCPL), and the Biyanis are forbidden from conducting business. The FCPL Agreement includes a specific list of such restricted persons. Respondents Nos. 1 through 13 entered into an agreement with the Mukesh Dhirubhai Ambani Group on August 29, 2020, which entails the merger of FRL with the Mukesh Dhirubhai Ambani Group, the cessation of FRL's existence as a distinct entity, and the full transfer of its retail assets to the aforementioned entities.

Arbitral Proceedings by Amazon

Amazon initiated arbitration proceedings on October 5, 2020, and filed an application with the SIAC Rules for immediate interim relief from the emergency arbitrator. The relief requested pertains to injunctions against the aforementioned transaction. Amazon was granted a favourable Award by the emergency arbitrator.[38] Despite the objections raised, the Biyani Group proceeded with the disputed transaction, asserting that the Award was invalid and the emergency arbitrator lacked jurisdiction. This decision was made in order to expedite the process of obtaining approvals from statutory authorities and regulatory agencies. A SIAC Rules Schedule 1 emergency arbitrator rendered the decision.

On March 18, 2021, a knowledgeable Single Judge, Justice J. R. Midha, issued a comprehensive decision, carefully explaining the rationale for an order made under Section 17(2) and Order XXXIX, Rule 2-A of the Code of Civil Procedure, 1908 (CPC).[39]

Before a division bench of the Delhi High Court, the Future Retail Group filed a first appeal against the aforementioned ruling. By a ruling on March 22, 2021, the Delhi High Court temporarily halted the March 18, 2021 order. The Appeals, identified as Civil Appeal 4492-4493 of 2021, were filed before the Supreme Court of India in response to the order issued on March 22, 2021. The Appeals were considered and ultimately resolved by an order issued on August 6, 2021. The Supreme Court reiterated the significance of party autonomy as outlined in the Act in this ruling. In addition, the Court accepted that section 17 of the Act does, in fact, recognise awards from emergency arbitration. The Court further

38 Amazon.com NV Investment Holdings LLC v. Future Coupons Pvt. Ltd., Emergency Arbitrator's Award dated October 25, 2020 (SIAC Arbitration No. 960 of 2020).

39 Future Coupons Private Limited V. Amazon.Com Nv Investment Holdings LLC, 2022 SCC OnLine SC 188.

observed that interim decisions are essential in reducing the backlog of cases in civil courts and giving the parties concerned quick access to temporary relief.

5. International Commercial Arbitration in India *post Amazon* decision: Lessons learnt

In 2016 and 2018, the Delhi International Arbitration Centre (DIAC) and the Mumbai Centre for International Arbitration (MCIA), the two most renowned arbitral institutions in India, implemented emergency arbitration regulations within their institutional frameworks. Any agreement that involves the referral of a dispute to a specific institution would be eligible to seek emergency arbitration before the tribunal is established. The MCIA stipulates that temporary relief shall be granted within a period of fourteen days subsequent to the appointment of an emergency arbitrator.[40] The provision of DIAC is required to be made within a period of seven days following the aforementioned appointment.[41]

The Indian Supreme Court ruled in this case, marking the first time in Indian history that a contracting party's ability to include a clause allowing for the issuance of an award by an Emergency Arbitrator is unrestricted by the Arbitration Act. This has significance for two distinct reasons.

The case of *PASL Wind Solutions Private Limited v. GE Power Conversion*[42] established the principle that two Indian parties have the freedom to select a foreign jurisdiction. This decision, coupled with Amazon's actions, further emphasises the prevailing significance of party autonomy in India. Additionally, as previously said, parties now have the option to either pursue interim measures through the court system or initiate emergency arbitrations, as elaborated upon in this discussion.

After accepting its first case in 2021, the Mumbai Centre for International Arbitration (MCIA) received its second application for emergency arbitration in 2022. This is a direct result of Amazon's decision.

6. Conclusion

The growth of arbitration law in India has undergone a significant transformation with the repeal of the 1940 Act, which introduced a more favourable environment for arbitration in the country. Notwithstanding this progression, the practice of court-ordered interim remedy prior to the establishment of the tribunal continues to be regarded as a vulnerable aspect of arbitration in India. The granting of interim relief by Indian courts also gives rise to unwarranted delays in the arbitral procedure, so contradicting its essential tenet of limited court action. Hence, the inclusion of a legally acknowledged alternative recourse

40 Delhi International Arbitration Centre, DIAC (Arbitration Proceedings) Rules 2018, § 14.

41 Mumbai Centre For International Arbitration, MCIA Rules 2016, § 14.

42 2021 SCC Online SC 331

that allows for prompt relief from an emergency arbitrator would constitute a progressive measure within the arbitration system of the nation. Considering the pro-institutional arbitration position embraced by India through its 2018 amendment to the Act, alongside the significant development of the South Asian region as a commercial and arbitration centre, there is an expectation that India will conform to the increasing demand for efficient interim relief during the pre-formation stage. This can be achieved by establishing the emergency arbitration mechanism in India through legislative acknowledgment. The Supreme Court's decision is significant because it reiterates "party autonomy" as an essential Act component. The ruling also emphasises that "Emergency Arbitrations," which are now legally enforceable in India, are a respectable method of getting interim relief. The judgement has garnered significant acclaim from both litigants and legal professionals due to its potential to provide prompt access to interim relief for parties, therefore alleviating the pressure on the Courts.

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Breaking The Silence: Unmasking The Shadows of Marital Rape

Dr.Divya Sharma*
Ms.Richa Joshi**

Abstract

Marital rape remains a contentious issue in India, rooted in cultural norms and colonial-era legal traditions that prioritize the sanctity of marriage over individual rights. Section 375 of the Indian Penal Code exempts marital rape, perpetuating patriarchal notions of irrevocable consent and spousal ownership. While intimate partner violence is widespread, societal stigma and systemic barriers deter survivors from seeking justice. Judicial interventions in Kerala and Karnataka have highlighted the importance of bodily autonomy and recognized marital rape as cruelty, urging legislative reform. Despite global progress, India lags in addressing this issue, with existing remedies under domestic violence laws proving inadequate. Criminalizing marital rape is essential to uphold constitutional principles of equality, dignity, and consent, aligning India with international human rights standards. Acknowledging marital rape as a crime is vital to dismantle patriarchal structures and ensure justice for all women.

Keywords: Marital rape, Patriarchy, Consent, Indian Penal Code, Women's rights

1. Introduction

In Indian tradition, husbands are seen as being equal to God, and marriage is a sacrament. The idea of marital rape seems absurd in this context. Marriage is a social institution that mandates forced sex, but the law also considers forced or coerced sex to be rape and punishes it. As a result, it appears extremely improbable that the concept of rape will always be included in the sacrament of marriage. Globally, concerns have frequently been raised about marital rape, yet it can be difficult for people to comprehend that husbands who engage in non-consensual sex with their wives are criminally responsible. Gang rape in Delhi in 2012 led to the imposition of more severe sentences, yet the prevalence of rape occurrences continues to rise and cannot be stopped. While these changes were being made, the idea of marital rape was still disregarded and spouses were still given exception-based protection.

Sexual brutality can take a wide range of forms, including the utilization of actual power by the spouse in physically demeaning or embarrassing demonstrations, the use of weapons to coerce sex, compelling the wife to engage in sex publicly, and reprimanding or insulting the wife for or during sex. In any event, sexual savagery occurs when a woman is pregnant.[1]Sexual abuse is significantly underreported in India due to the stigma and

* Assistant Professor, Khalsa College of Law, Amritsar.
** Assistant Professor, Khalsa College of Law, Amritsar.

obstacles that survivors face when trying to connect with ideas of honour and shame.[2] Nonetheless, marital rape isn't a wrongdoing in India.

2. Evolution of Justice in Marital Rape Laws

Women did not have a legal statusdistinct from their husbands when the Indian Penal Code was formulated. The prevailing notion of fusing a woman's identity with her husband, which ultimately led to exploitation, was the foundation for exempting marital rape from criminal law. The "Doctrine of Coverture", which combined the identities of husband and wife, forbade married women from owning property and was one of the patriarchal standards of the Victorian era that excluded marital rape from the definition of rape in the IPC.[3]

In the 1890 Case of *Queen Empress v. Haree Mohan Maiti*[4]an 11-year-old girl named Phulmani Dasi died as a result of child marriage and rape by her 35-year-old husband. The Calcutta Sessions Court only sentenced the husband to 12 months of hard labour at that time because the legal age of consent was 10 and because sexual activity with a wife is not considered rape under section 375 of the IPC's exception clause.Sir Andrew Scoble, Law Member of the Imperial Legislative Council of the Governor General of India in Calcutta presented a bill to increase the age of consent from 10 to 12 years, which was passed[5] as the *Age of Consent Act of 1891*[6].

The Law Commission in its 42nd report emphasized the difference between rape and marital rape, the latter of which is considered less serious because of the presumption of permission and approval that exists when a husband and wife cohabitate.[7]In its 172nd report, the Law Commission addressed the validity of the 2nd exception under section 375 of the IPC. During the consultation rounds, it was made clear that there was no basis for rape to be exempt from legal repercussions on its own, because other forms of domestic

1 P. Madhivanan, K. Krupp, et.al., "Correlates of Intimate Partner Physical Violence Among Young Reproductive Age Women in Mysore, India" 26(2)*Asia-Pacific Journal of Public Health* 169-181 (2014)

2 G. Kalra and D. Bhugra,"Sexual Violence Against Women: Understanding Cross-Cultural Intersections" 55(3) *Indian Journal of Psychiatry*244-249 (2013)

3 Geeta Pandey, "In India, growing clamour to criminalise rape within marriage", *BBC News*, 29 August 2021, *available at:* https://www.bbc.com/news/world-asia-india-58358795 (last visited on 22 August 2023)

4 J Wilson, Indian Law Reports 18 cal. 49; July 1890

5 Ishita Pande, "Phulmoni's Body: The Autopsy, the Inquest and the Humanitarian Narrative on Child Rape in India"4(1)*South Asian History and Culture* 9-30 (2013)

6 Act X of 1891

7 Raveena Rao Kallakuru and Pradyumna Soni, "Criminalization of Marital Rape in India: Understanding its Constitutional, Cultural and Legal Impact" 11(1) *NUJS Law Review*121-150 (2018)

abuse perpetrated by a husband against his wife were rendered unlawful. This claim was dismissed because ofconcerns about undue interference with the institution of marriage.[8]

After the appalling gang rape and murder of Nirbhaya, the Justice J.S.Verma Committee was tasked with suggesting changes to India's rape laws. One of their proposals was to eliminate marital rape provision. Nevertheless,the parliamentary committee rejected this idea in 2013.The Committee observed thata man and woman cannot use their marriage or any other type of relationship as a defence against sexual offences like rape. The law should make it clear that a victim's marital status or any other type of relationship is not a legitimate excuse for sexual assault offences. The investigation into whether the complainant consented to sexual activity has nothing to do with the nexus between the accused and the victim, and the fact that the perpetrator is the victim's spouse or in a different intimate relationship, may not be seen as a mitigating factor warranting a lighter sentence for rape.[9]

3. Unraveling the Tapestry of Indian Laws

The Indian Penal Code, 1860[10] defines rape under Section 375[11]. It entails engaging in sexual activity with a woman against her approval, falsely obtaining consent, or when consent is unnecessary due to age or mental state. The "marital rape exception" is referred to under the same law. The exception waives for married couples' non-consensual sexual intercourse from the scope of rape. It was defended by Lord Macaulay in the original draft of the criminal law in 1839 as an essential exemption to safeguard the "conjugal rights" of a husband, and it has been a part of the IPC since its formulation in 1860.This was founded on the notion of "coverture" as described by Sir Matthew Hale, an English judge from the 1600s, who claimed that after marriage, a woman ceded her agency to her husband, including the right to consent to sexual activity.[12]The wife's consent has never been taken into account, and as a result, wives continue to suffer abuse in the hands of spouses or partners.

8 Ibid.

9 J.S. Verma, Leila Seth, *et.al.,* "The Report of the Committee on Amendments to Criminal Law" 67-140 (23 January 2013)

10 Act No. 45 of 1860

11 Section 375-Rape: A man is said to commit "rape" if he—
(a) … Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.
Note: In 2017, the Supreme Court held that the section should read "the wife not being under eighteen years of age. But this judgment was limited to making sure the IPC was in line with the age of consent, which is 18, and hence did not address the larger problem of the marital rape exception for adults.

12 Vakasha Sachdev,"Explained: Why Marital Rape Is Not a Crime in India (Yet)",*The Quint,*11 May 2021, *available at:* https://www.thequint.com/news/law/marital-rape-not-recognised-as-crime-in-india-explainer (last visited on 25 August 2023)

Numerous postcolonial common-law nations are aware of the existence of marital rape immunity. This is based on two assumptions. The First is consent in perpetuity, which is a presumption that a woman gives her husband her irrevocable permission upon marriage. The archaic notion that a woman is the man's property is the source of this term in colonial-era jurisprudence. The second is the expectation of sex, which is the idea that a woman in a marriage is required to satisfy the sexual expectations of the husband because the goal of marriage is reproduction. The clause suggests that a woman must acknowledge sex because the husband has an adequate expectation of it during marriage.[13]

According to the provisions of the IPC and CrPC, rape victims are categorised as married, married and separated, or single. This classification lacks an intelligible differentia between the adverse consequences they experience and a coherent connection to an aim pursued by criminal law. Relying on the Supreme Court's stance against arbitrary classification in ***Air India v. Nargesh Meerza***[14] especially those that are an open insult to womanhood, the aforementioned are prerequisites categorizing as specified by Article 14.[15]

4. The Contours of the Indian Government's Stand

When the government was questioned about marital rape in Parliament in 2015, Haribhai Parathibhai Chaudhary, the then Minister of State for Home Affairs, said that the country could not apply the law since marriage was seen as a sacrament or hallowed institution in Indian culture. The Union administration opposed eliminating the provision for an exception to marital rape. It had previously rejected the idea of marital rape in 2016, claiming it could not apply in the Indian setting for a number of reasons, not the least of which was the mindset of the culture to view marriage as a sacrament.However, the Union administration did not take a position on the issue.[16] Maneka Gandhi, the minister for women and child development, stated that the "sanctity" of marriage, societal conventions, poverty, illiteracy, and other reasons prevent "marital rape" from getting legally acknowledged in India.[17]

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13 Apurva Vishwanath,"Explained: The Debate Over Marital Rape" *The Indian Express*January 23, 2022 Retrieved from https://indianexpress.com/article/explained/explained-debate-over-marital-rape-7732470/

14 AIR 1981 SC 1829.

15 Invisible Lawyers Team. "Marital rape hearing in Delhi HC: The right to sexual autonomy and bodily integrity is derived from Article 21 of the Constitution, say petitioners [Read the written submissions]",*The Leaflet, 25* May 2018, *available at:*https://theleaflet.in/marital-rape-hearing-in-delhi-hc-the-right-to-sexual-autonomy-and-bodily-integrity-is-derived-from-article-21-of-constitution-say-petitioners-read-the-written-submissions/(last visited on 21 August 2023)

16 Editorial. "The Importance of Consent: On Marital Rape",*The Hindu,* 13 May 2022, *available at:*https://www.thehindu.com/opinion/editorial/the-importance-of-consent-the-hindu-editorial-on-marital-rape/article65407305.ece#:~:text=He%20says%20what%20is%20defined,prosecution%20for%20non%2Dconsensual%20sex(last visited on 21 August 2023)

17 V. Roy, "The Marital Rape Debate",*The Hindu,*18 March 2016,available at:https://www.thehindu.com/features/metroplus/woman-uninterrupted-the-marital-rape-debate/article8370439.ece(last visited on 21 August 2023)

Specifying the view of a parliamentary panel from 2013, Krishna Raj, the then Union Minister of State for Home Affairs, stated in 2017 that the central government was opposed to eliminating the exception because if marital rape became a legal offence, every aspect of the family system would be put under a lot of strain.[18]

The Central government favoured marital rape immunity in an affidavit. The government's justification ranged from defending males against potential legal abuse by wives to defending the institution of marriage. The rule has also been supported by the Delhi government because the married women who may be raped by their husbands have other legal options, such as filing for divorce or reporting domestic abuse. The administration has also stated that the exception for marital rape follows naturally from the law on restitution of conjugal rights[19], permits a judge to order a spouse to cohabit with the husband.[20]The lack of societal agreement on the subject is one of the government's additional justifications for not criminalizing the practice. Second, because it is impossible to define the limits of sexual activity, it is challenging to establish the crime of marital rape. Additionally, it would be useless to simply remove the exceptions listed in Section 375 of the IPC. Sadly, these defences lack coherence and reveal the government's lack of desire to make marital rape a crime.[21]

5. Debunking the Allegations of Misappropriation and Threat to Sanctity of Marriage

The Supreme Court should have considered the incidence of domestic abuse and the challenges women encounter in reporting crimes while deciding that women were increasingly abusing Section 498A of the IPC. The Court thinks that resentful wives file fraudulent cases when there is evidence of a low conviction rate rather than investigating

18 Priyali Prakash and Dhriti Mankatalia, "Explained | Marital rape in India: The history of the legal exception", *The Hindu,* 9 January 2023, *available at:* https://www.thehindu.com/news/national/explained-marital-rape-in-india-the-history-of-the-legal-exception/article65404106.ece (last visited on 15 August 2023)

19 Section 9, Hindu Marriage Act, 1955
Section 32 and 33 of the Indian Divorce Act, 1869 (For Christians)
Section 36 of the Parsi Marriage and Divorce Act, 1936
Section 22 of the Special Marriage Act, 1954
General Law for Muslims

20 Saptarishi Mandal, "The Impossibility Of Marital Rape: Contestations Around Marriage, Sex, Violence and the Law in Contemporary India" 29(81) *Australian Feminist Studies* 255-272 (2014)

21 Ishita Chandra, "Why Exception II Of Section 375 Of The Indian Penal Code Needs To Be Declared Unconstitutional"*Manupatra* (17 November 2022), *available at*: https://articles.manupatra.com/article-details/WHY-EXCEPTION-II-OF-SECTION-375-OF-THE-INDIAN-PENAL-CODE-NEEDS-TO-BE-DECLARED-UNCONSTITUTIONAL (last visited on 25 August 2023)

if the prosecution was handled poorly. Ironically, while the courts punish husbands and their kin in cases of dowry deaths, the wife is accused of being a "disgruntled wife" when she invokes Section 498A, given that she fears for her life or wants a portion of the marital house.[22]

A rape suspect argued against punishment in April 2019 because he married the victim. The offender avoided punishment by demonstrating his marriage and benefiting from the second exception to section 375 of the IPC. However, marriage should not continue if sexual or other forms of violence are present. In an ironic twist, elevating women's tolerance to an absurd pedestal to save marriage only hastens the union's irreparable dissolution. Such unions can only lead to terrible lives for married women and their children. It is worth contemplating that until some time ago, if a woman established a sexual relationship with another person with the consent of her husband (the wife's God), it did not destroy the sanctity of marriage.

6. The Dual Realities of Women's Sexual Agency

The Apex Court recognized the right to sexual autonomy and bodily integrity in *KS Puttaswamy v. Union of India*[23]. A nine-judge bench decision expressly stated that the right to life of every citizen must be defended by the state and is to be understood as not just a physical right but a right in its entirety.

The National Crime Records Bureau (NCRB) and the National Family Health Surveys were used in a study conducted by the RICE Institute, which revealed some unsettling statistics, such as the fact that 40 times as many women experienced sexual violence by intimate partners as they did by non-intimate offenders. According to the UN Women Global Database, up to 37% of women between the ages of 18 and 74 have experienced physical or sexual abuse from a partner at some point in their lives. According to a working paper comparing NFHS and NCRB statistics, less than 1% of husband-related sexual assault instances were reported to the police.[24]It wasn't till the promulgation of Criminal Law (Amendment) Act, 2013[25] that sexual intercourse with a separated wife sans her assent got criminalized.

The clause of exception to marital rape violates Article 15 of the Constitution of India since it discriminates against women and, assuming non-retractable consent, places them on an

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22 Indira Jaising,"Concern for the Dead, Condemnation for the Living" 49(30)*Economic and Political Weekly* (26 July 2014), *available at:*https://www.epw.in/journal/2014/30/perspectives/concern-dead-condemnation-living.html(last visited on 22 August 2023)

23 (2017) 10 SCC 1

24 Ashish Gupta,"Reporting and Incidence of Violence Against Women In India"*Rice Institute* 25 September 2014, Retrieved from https://riceinstitute.org/research/reporting-and-incidence-of-violence-against-women-in-india/(last visited on 23 August 2023)

25 Act No. 13 of 2013; Also Known as the Nirbhaya Act

inferior footing in marriages. According to the Supreme Court, classifications can only be used to advance equal opportunities and improve the status of women, and not to uphold their social and legal denigration. The contested provision limits a married woman's ability to say "no" in a marriage, which violates basic freedom. Her bodily integrity, ability to decline to engage in sexual activity, and freedom to make reproductive decisions are all denied, further undermining her fundamental right to life and violating her dignity. In several significant rulings, the higher judiciary emphasized the right to live with dignity, such as ***SuchitaSrivastava v. Chandigarh Administration[26], Prem Shankar Shuklav. Delhi Administration[27], Francis Coralie Mullin v. Administrator, Union Territory of Delhi[28], D.K. Basu v. State of West Bengal[29], Joseph Shine v. Union of India[30]***etc.

Indian culture considers marriage a sacred institution; nonetheless, it holds major significance as a sexual contract since it provides a man with the implication of perpetual consent to sex. It strengthens the husband's "ownership" rights to a man who is not a husband. This robs the woman of all control over her body, including its sexuality and reproductive capabilities. Refusing to make marital rape a crime requires accepting that society and the government will support sexual coercion against women as long as it occurs within a marriage. Women must have the freedom to reject their husbands without suffering societal repercussions if they are to regain control over their lives.Because marital intercourse, like all sexual activity, must be performed with mutual consent and pleasure, the illusion of the "wifely duty" and the "conjugal right" needs to be dispelled. Having sex outside marriage is frowned upon, and simultaneously men are frequently forced into marriages only for an unrestricted doorway to intercourse, putting women in grave sexual danger.[31]

7. Interim Remedies Accessible

Under Sections 354, 377, and 498A of the IPC, victims of marital rape may seek some form of redress; however, these provisions fall short of providing the necessary protection to address this severe injustice. Criminal cases typically last for several years, and the standard of proof is exceptionally high, because women frequently lack evidence of episodes of violence committed against them. Clause (a) of Section 3 of the Protection of Women from Domestic Violence Act (PWDVA) of 2005[32] recognizes sexual violence as a type of domestic violence that encompasses any sexual conduct that compromises a woman's dignity by abusing, humiliating, or otherwise degrading her. Sexual assault is a

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26 (2009) 14 SCR 989.

27 AIR 1980 SC 1535.

28 1981 SCR (2) 516.

29 (1997) 1 SCC 416.

30 (2019) 3 SCC 39

31 Supra note 15

32 Act No. 43 of 2006.

non-criminal violation of the Act. The Court may call the spouse to hear the side of the story in response to a complaint from a wronged and riled wife. A case is typically referred to as a mediator for settlement, if practicable, after being heard (lawyers are not required). If mediation is unsuccessful and the complaint is upheld, the court may issue a protection order that requires the husband to behave better. The Court's ruling is enforceable. If the directive is broken wife may return to court to complain. A brief period of incarceration may be imposed to violate the protection orders. Assistance from the police may also be sought. However, the procedure continues to be a drawn-out legal dispute between the victim, the accused, and the court.[33]

8. Pathways of Justice: Tracing the Evolving Judicial Trends

The ones that follow are the most noteworthy court decisions that have influenced how marital rape is recognized and dealt with. These show how judicial perspectives gradually changed from an aversion to prosecution to an acceptance of marital rape as a crime.

8.1. Pioneering Progress: High Courts of Kerala and Karnataka Acknowledge New Frontiers

The Kerala High Court made quite a sensation when it upheld marital rape as a basis for divorce in early August 2021. This represents a departure from Indian law on marital rape. The Kerala High Court issued a ruling in favour of the wife, who claimed that her husband of 12 years had committed marital rape and mental abuse. The court ruled that although marital rape is not regarded as a crime by the penal code, it is a valid reason for divorce.According to the ruling of Justices, A Muhamed Mustaque and Dr Kauser Edappagath, husbands and wives are recognized as equal partners in marriage, and neither of them may assert any superior rights over the other about the other's physical or social standing. Marital rape occurs when a wife's body is treated as belonging to the husband, and sexual acts are performed against her will. The fact that marital rape is not a crime does not prevent the court from viewing it as a form of cruelty and issuing divorce for that reason alone.The court looked at marital rape under the category of cruelty. Under Section 13 of the Hindu Marriage Act, 1955[34], Section 27 of the Special Marriage Act, 1954[35] and Section 2(viii) of The Dissolution of Muslim Marriages Act, 1939[36]cruelty is a pre-established reason for divorce.[37]

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33 Kiran Bedi, "The Sordid Reality of Marital Rape" *NDTV News*, 26 May 2015, *available at:* https://www.ndtv.com/opinion/the-sordid-reality-of-marital-rape-760245 (25 August 2023)

34 Act No. 25 of 1955

35 Act No. 43 of 1954

36 Act No. 8 of 1939

37 Shaju Philip,"Marital rape a good ground to claim divorce, says Kerala HC",*The Indian Express,* 7 August 2021,*available at:*https://indianexpress.com/article/india/marital-rape-a-good-ground-to-claim-divorce-says-kerala-hc-7442347/#:~:text=Marital%20rape%20is%20a%20good,of%20cruelty%20to%20grant%20divorce (last visited on 24 August 2023)

The High Court of Karnataka ruled that "*rape is a rape*",even if it is committed by a man, the "husband", on a woman, the "wife". The declaration was made as the court deliberated on a case brought forth by a lady who claimed that her husband had abused her as a sex slave from the very beginning of their marriage. She said that her husband had pushed her to engage in unnatural intercourse, even in the presence of her daughter, calling him "inhuman". The matrimonial union does not, cannot, and should not be regarded as providing any unique male privilege or permit for releasing a vicious beast, the court ruled.If a guy can be punished for something, he should be punished for it- husband, or not. The Karnataka High Court stated in its ruling that a terrible act of sexual assault on the wife without her will, even if committed by the husband, could only be described as rape. Such a husband's sexual attack on his wife will have serious effects on her mental state which in turn will affect her physically and psychologically. Such a spouse's behaviour scars the souls of the ladies. It is therefore crucial that lawmakers hear screams of silence, at least now.[38]Justice M. Nagaprasanna of the Karnataka High Court dismissed the husband's request to dismiss the charges against him in light of the marital rape exemption on February 23, 2022. The Justice J. S. Verma Committee's 2013 report, which suggested eliminating the spousal rape provision, was cited by the court. According to the court, the exception treated the woman as inferior to her husband and violated the wife's right to equality. No legal exception can be so absolute as to become a licence for the perpetration of a crime against society, the High Court ruled.On May 10, 2022, the husband Hrishikesh Sahoo contested the High Court's ruling by filing a Special Leave Petition at the Supreme Court of India under the name ***Hrishikesh Sahoo v. State of Karnataka***[39]. On July 19, 2022, a three-judge bench that included former Indian Chief Justice N.V. Ramana, Justices Krishna Murari and Hima Kohli issued an interim stay on the High Court's decision. However, the State of Karnataka filed an affidavit endorsing the judgement of the High Court. The following essential issues will be decided by a Bench consisting of Chief Justice D.Y. Chandrachud, Justices J.B. Pardiwala and P.S. Narsimha, and others:

1. Do depriving married women of the same legal remedies as single women under the exception of marital rape infringe their right to equality?
2. Does the exception to the law against rape in marriage deny married women the same rights as men?
3. Is a wife's right to privacy violated by the exception for marital rape?[40]

38 Krishnadas Rajgopal, "Sexual assault of wife can take form of rape: Supreme Court", *The Hindu,* 29 September 2022,*available at:*https://www.thehindu.com/news/national/sexual-assault-by-a-man-of-his-wife-can-take-the-form-of-rape-supreme-court/article65950173.ece(last visited on 23 August 2023)

39 SLP(Cr.) 4063-4064 of 2022

40 Supreme Court Observer, "Challenge to the Marital Rape Exception", *available at:*https://www.scobserver.in/cases/challenge-to-the-marital-rape-exception/(last visited on 22 August 2023)

8.2. Divided Ruling of the Delhi High Court

Four separate petitions contesting the legitimacy of the rape exception to Section 375 of the IPC were heard by a Bench of two judges consisting of Justices Rajiv Shakdher and C. Hari Shankar. The High Court's decision was divided, with one judge advocating the repeal of the legal provision shielding husbands from prosecution for engaging in extramarital sex with their spouses while the other refused to declare it unconstitutional. Everyone involved in the case agreed that spouses should be punished for any sexual assault they may have committed. However, they take different approaches to how crimes are classified and to what constitutes guilt.[41]

8.3. The Supreme Court's Paradigm Shift in the Judicial Terrain

The Supreme Court ruled that making a distinction between married and unmarried women for abortion regulations is artificial and constitutionally flawed, and supports the myth that only married women engage in sexual activity. According to Justice Chandrachud, women must have liberty to exercise their rights.[42]Probably, similar differentiation in the case of marital rape stands on the same footing.

Importantly, the court also ruled that marital rape would be taken as a factor when determining whether a pregnancy termination was brought on by rape. Married women could also be categorized as rape or sexual assault survivors. The term "rape" generally refers to sexual activity with a person who is not willing or has given their consent. Irrespective of whether such forced sexual activity takes place within the framework of matrimony, a woman may get impregnated as a result of her husband engaging in non-consensual sexual activity with her.Marital rape is included in the definition of rape under the Medical Termination of Pregnancy Act, 1971[43]. Thus, even though it only pertains to abortion, the verdict acknowledges marital rape.[44]

9. Navigating the Global Scene

More than 100 nations have passed laws against marital rape as of today, but India is one of the 36 nations, along with Pakistan, Afghanistan, Bangladesh, Egypt, Algeria, and Botswana, which have not done so. The majority of these nations, including China,

41 RIT Foundation v. Union of India, 2022 SCC Online Del 1404

42 *X v. The Principal Secretary Health and Family Welfare Department, Government of NCT Delhi*, Special Leave Petition (Civil) No. 12612 of 2022

43 Act No. 34 of 1971

44 Padmakshi Sharma, "Rape Includes "Marital Rape" For the Purposes of MTP Act, Wife Conceiving Out of Forced Sex Can Seek Abortion: Supreme Court",*Live Law News Network,* 29 September 2022*, available at* https://www.livelaw.in/top-stories/rape-includes-marital-rape-for-the-purposes-of-mtp-act-wives-conceiving-out-of-forced-sex-can-seek-abortion-supreme-court-210551(last visited on 25 August 2023)

Myanmar, Sri Lanka, Haiti, Laos, Mali, Senegal, and Tajikistan, are developing states, according to a UN Women report.[45]

In 1922, the Soviet Union was the first to criminalize marital rape and eliminate marital exception from its laws against sexual violence. Marital rape has been illegal in Poland (since 1932), Australia (since 1981), Canada (since 1983), the United Kingdom (since 1991) and South Africa (since 1993). In***R v. R***[46], it was decided thatthe notion that a wife unconditionally consents to her husband having sex with her, regardless of her health or how legitimate her objections are, is no longer acceptable. There was a strong outcry regarding this choice. Many claimed that this was taking things too far and would keep men constantly living in fear of false accusations.Any violence against women, including marital rape, is a violation of her fundamental human rights, according to the UN Declaration on the Elimination of Violence Against Women (DEVAW), which was adopted in 1993. The Assembly also demanded that each of the participating nations enact national laws to protect women. Up until 1970, in the United States, a spouse could not be accused of marital rape unless the couple was living apart. In ***Oregon v. Rideout***[47] this was contested, however, unsuccessfully. By 1993, marital rape was illegal in all 50 US states as a result of numerous such reforms.[48] The marital rape exception was likewise abolished in Nepal in 2002 after the country's Supreme Court ruled that it violated both the right to privacy and equal protection under the law.[49]

10. Clashing Perspectives of the Men's Front

Men's Welfare Trust technically became a party because of its involvement in the case before the Delhi High Court was eventually permitted. They discussed the bigger picture of respectful communication and being receptive to opposing viewpoints. There are two

45 Outlook Web Desk, "Supreme Court's Judgment on Marital Rape: What Has Been the Discussion So Far", *Outlook*, 29 Sept 2022, *available at*https://www.outlookindia.com/national/supreme-court-s-judgment-on-marital-rape-what-has-been-the-discussion-so-far-news-226703(last visited on 25 August 2023)

46 [1991] 4 All ER 481

47 1978

48 Aeshita Singh, "Marital Rape in India: Will the Kerala HC Judgment Usher Any Change?",*Academike*. 13 August 2021, *available at*https://www.lawctopus.com/academike/marital-rape-in-india/(last visited on 25 August 2023)

49 Mitul Sharma, "The Biggest Shortcoming Of Indian Penal Code Section 375: The Marital Rape Exception And Marital Rape Laws Of Some Other Countries" *Legal Services India,available at*: https://www.legalserviceindia.com/legal/article-9306-the-biggest-shortcoming-of-indian-penal-code-section-375-the-marital-rape-exception-and-marital-rape-laws-of-some-other-countries.html#:~:text=It%20is%20the%20first%20nation,its%20laws%20against%20sexual%20assault.&text=The%20marital%20rape%20exemption%20was,equal%20protection%20under%20the%20law. (last visited on 21 August 2023)

components to the position: the first is the question of the appropriate venue, and the second is the issue's resolution itself. As far as the forum is concerned, the stance that has been adopted is that when an exception to a certain offence exists, the exemption is contested, and if that exception is upheld, the offence's scope is widened.The position we had taken was that a court cannot grant the petitioners' request because it would expand the definition of the crime and include more people who would be subject to punishment under that specific provision. This is because if the petitioners' request were granted, the exception to Section 375 would be eliminated, making those who had previously been exempt from prosecution subject to prosecution now.It was never previously said that the issue of domestic sex abuse should not be acknowledged. However, every other jurisdiction has refrained from using the term "rape" about something that occurs within a family for the simple reason that, even if the accused ought to be punished, others shouldn't suffer the consequences, especially since this occurs within the family. As a result, the use of the word "rape" must be replaced with the term "sexual violence"; this was a question of labelling. It was suggested that therefore for all practical reasons the first option available to the wife under Section 376B of IPC is to show and convince the court that although she lives under the same roof as her husband, there is no actual relationship akin to that of a married couple. And she is effectively the victim and he is the abuser. Therefore, even if there isn't a legal divorce or separation between the husband and wife, a judge could nonetheless find someone guilty under Section 376B. In addition, Sections 377 and 498A allow for the taking of refuge without any exceptions. Furthermore, even if the current remedies are insufficient, this does not establish a constitutional violation that would justify overturning the exception.It was further stated that the same nations that had recognised domestic and sexual violence in marriage also had recognised various norms. The same nations that don't refer to it as rape also acknowledge the accused person's right to claim that he was considered to have given consent because of the alleged conduct.[50]

11. Exploring the Real-World Dynamics

The villages of India are thought to contain the essence of the country. In these areas, where archaic traditions still prevail over the law of the country and there is widespread illiteracy. However, regardless of degree, a large portion of the metropolitan population also identifies with this mind-set. Hindu women are technically coparceners, but family members do all in their power to prevent them from obtaining their share. Even if they do, it comes at the expense of collapsing of relationships. Marriage is regarded as a sacrament by Christians, Sikhs, Buddhists, Jains, and Hindus; while a contract under Muslim law, in practical terms, the discretion of Muslim women in marriage usually takes a backseat. The idea of making marital rape a crime under the IPC is being explored in such a culture.

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50 Voice for Men India. *Marital Rape Verdict | Advocate J Sai Deepak | Other Side,* 2022, *available at*https://www.youtube.com/watch?v=BYwJ-MDdudo

Logically, even if it does occur, it would be of little value because the voice of the harmed party will be silenced before it can ring the bell for justice. According to NFHS, 99.12% of rape cases go unreported. Therefore, this percentage will be closer to 100% if the cases of marital rape are included in the total.[51]

12. Conclusion

Marital rape has traditionally been considered a taboo subject in India because no one wants to call into doubt the close bond between a husband and wife to the detriment of the sanctity of the pious institution of marriage. But times have changed, and now there are voices from every corner and crevice calling for the criminalization of this violent act. One thing that must be kept in mind is that rape never ceases to be rape, even when it occurs inside the context of marriage. The unfortunate reality is that India still abides by out-dated colonial legislation and doesn't consider marital rape to be a crime. Instead of seeing marital rape as a manly prerogative, such a form of violence ought to be made illegal.Given that contemporary jurisprudence is increasingly inclined to the preservation of women's rights, it is high time that lawmakers give this matter some serious thought and make this act illegal.

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51 Hindi Debating Society Zakir Husain Delhi College. *Institution of Marriage in India and Marital Rape by Dr. VikasDivyakrti Sir,* 2022,*available at* https://www.youtube.com/watch?v=tI5lwhU-v58

Panchayati Raj Institutions: A Tool of Good Governance

Dr.Sarita Kumari

Abstract

Panchayati Raj Institutions is the most important and potent tools, provided by the Indian constitution to empower the democratic values on the grassroots level. Panchayati Raj Institutions are the pillars of democracy. India's development agenda is rural development. The architecture of Indian panchayati Raj system, which has its roots in the long history and culture of our country, has been primarily designed to address this agenda. It also strengthens the foundation of democracy at grassroots level by ensuring social and political empowerment of the people of about 2.6 lakh panchayats with 31.5 lakh elected representatives, out of which about 46% are women.

Keywords: PRIs, E-gramswaraj, good governance women empowerment, watermanagement, human development, sustainable development, etc.

1. Introduction

The panchayati Raj system has been assigned a constitutional status through 73rd ammendment to the constitution of India. Part ix, article 243 was added to the constitution as a sequel to this amendment providing three tier system of panchayats, evolution of powers and responsibilities to panchayats, etc. It also provides wide representation to scheduled tribes, scheduled castes, and OBCs, which are the weaker section of the society. Article 243G of the constitution stipulates that panchayat should plan for and implement schemes for local economic development and social justice.

Panchayats are primarily the responsibilities of state government because local government is a state subject. Panchayats are set up and operate through the respective State panchayati Raj Acts The state legislature are to consider the 29 subjects illustratively set out in the 11th schedule of the constitution for devolution to the panchayats. The eleventh schedule covers a wide range of rural development agenda including agriculture, landimprovement, landreforms, minorirrigation, water management, fisheries, socialforestry, minor forest produce, small scale and cottage industries, rural housing, ruralroad, rural electrification, poverty alleviation programmes, education, market and fairs, health and sanitation, family welfare and public distribution system and maintenance of community assets. The ministry of panchayati Raj was created on 27th may 2004 with the aim to make PRIs an effective efficient and transparent vehicle for local governance, social change, and public service delivery mechanism meeting the aspirations of local population.[1] The role of ministry of

* Assistant Professor, Department of Political Science, Ranchi University, Ranchi

1 Dasarathi Bhuyan and Purna Chandra Pradhan, 2010, New panchayati Raj: A study of socio-political and administrative dynamics, Abhijeet publication, New Delhi.

panchayati Raj involves strengthening the administrative infrastructure, basic services,etc. by leveraging technology and capacity building of the functionaries of rural local bodies.[2]

The centre time to time has strengthened the PRIs to ensure that the rural India is empowered and walk on the path of overall development. The vision of the government is to attain decentralised and participatory local self government through PRIs and its mission is empowerment, enablement and accountability of PRIs to ensure inclusive development with social justice and efficient delivery of services. Gram panchayat Institutions are the primary entities which take care of all the basic needs of the public, maintaining water sources, villagewells, tanks and pumps, street lighting and drainage system, all come in the purview of gram panchayat. PRIs being run by the elected representatives of the village only can always identify the problems at the grassroots levels more efficiently, and thus reduces the burden from the state administration. PRIs gave three sources of funding: grants received from the local bodies, funds from the centrally sponsored schemes and find received by the state governments on the advice of state finance commissions. Although, PRIs are governed independently the rule of their governance are formed by the state government. There are two categories of work that PRIs are supposed to do. One is mandatory category and other is optional. Optional set of works depends upon the available resources with a PRI. Establishment of reproduction, centre for animals, promoting agriculture, plantation alongside the roads, welfare of new born and mothered. are the optional works for panchayati Raj. Under mandatory category comes following set of works: primary health, construction of public wells, construction of public toilets, social health, primary and adult education, vaccination, irrigation, supply of potable water, rural electrification hygiene, maintenance of public pathways, etc. In the 73rd constitutional ammendment, the scope of work for PRIs was further enhanced to include services at the time of natural calamity, preparing annual development plan for panchayat area, implementation and review of poverty alleviation programmes, annual budget and removing encroachment from public land. Not only administrative works but also in managing the law and order situation, panchayats are playing commendable role. Many village panchayats take action against the culprit and try to create an atmosphere of justice. Gram panchayats also take up tasks related to sustainable energy sources, public distribution system, etc. They are empowered by state legislatives.[3]

The PRIs are conceptualised in a way that the bottom up approach could be thought of for development at local level. The idea is to get the plans ready on need basis by the same people who have to use the facilities. So village panchayats make plans of development with people's participation. Thus the panchayati Raj Institutions in their structure and

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2 Ishita, G. Tripathi, 2023, e-gramswaraj, kurukshetra, publication division, Delhi, vol-71

3 Giriraj Singh, 2023, empowering panchayati Raj Institutions, kurukshetra,public division, New Delhi.

conception are meant to be a backbone of successful and good governance system. Acknowledging the crucial role PRIs can play in the implementation of successful and good governance. Some plans like Gram panchayat development plan, Rashtriya Gram Swaraj Abhiyan, SWAMITVA yojna, e-panchayat, Deen-Dayal Upadhyaya Panchayat sashakti karanayojna, swacch Bharat Abhiyan are some schemes that aims in strengthening the panchayati Raj system in India and empowering local communities to participate in the development process to achieve the constitutional goal of successful governance at grassroots level. E-governance in PRIs is expected to help in enhancing and re defining various socio-economic environmental technological aspects of community development.[4] In this context, e-gramswaraj has been a potent example of minimum government and maximum governance propelled by the ICT revolution. It serves the multiple objectives of effective decentralisation, enhancing accountability of the money used for public service, optimum utilisation of the scarce resources and raising public awareness about various aspects of local governance process and practices.

2. Good Governance Through E-Gramswaraj

With the objective of strengthening digitalisation in panchayats, improving grassroots governance, empowering rural citizens and ensuring transparency and accountability, the ministry of Panchayati Raj has launched e-gramswaraj, a work based comprehensive application for PRIs in 2020. This application is mandated to facilitate effective monitoring and evaluation of works taken up in gram panchayats. It enables uploading of gram panchayat development plans and financial and physical progress report by gram panchayats.[5]

The gram panchayats constitutionally mandated to examine and review the available resources with the community and accordingly prepare GPDP (Gram Panchayat Development Plans) for ensuring economic development and social justice. GPDP should be comprehensive and should be based on a participatory approach involving the community particularly the Gram Sabha. The challenge before the Panchayats is to ensure rightful documentation of the plan and after due consultation with the experts in the field. The success of Gram panchayat development plan rests on the accurate identification of the activities, participatory approach and effective implementation. For this to be successful, all line departments need to be in sync. Self governance is the foundation of democracy, which underscores its significance in India, which is the largest democracy in the world. Gram Swaraj or self government is definitely an integral part of Aatmanirbharta or self-reliance and e-gramswaraj has a crucial role to play in that. The e-self government not only improves public service delivery quality, but also it acts as a reform tool for governance

4 R. Singh and Suratsingh, 2011, local democracy and good governance, (five decades of panchayati Raj), Deep and Deep publication, Delhi

5 S.R. Singh, 2012, Panchayats and good governance, New Delhi

transformation. The participatory nature brings with it higher responsibilities and enhanced responsiveness.[6]

3. Women empowerment through Panchayati Raj

Women participation in PRIs impacted them positively as 79 percent of women representatives realised enhancement in their self esteem, 81 percent perceived enhancement of confidence and 74 percent realised their capacity in decision making ability, 67 percent women opined that after becoming elected representatives of panchayats their respect has been enhanced within family and 82 percent women opined enhanced their respect in community. As many as 72 percent have reported that they have actively involved in providing civic amenities and a quite significant number made efforts in enhancing enrolment of children in schools and reducing domestic violence in the villages. The constitution has enabled women to be instrumental in deepening decentralised governance through PRIs. They are not only for preparing plans for economic development but also with social justice caring all marginalized groups in rural areas. Studies revealed that women have contributed positively in the delivery of goods and services to the masses. Women play their role in an effective way. Panchayats should function as institutions of self government meaning thereby that they at least enjoy triple Fs (clearly defined functions, adequate funds and sufficient functionaries) at their level.[7]

The twin objectives of panchayati Raj system as envisaged by the Indian constitution are to ensure local economic development and social justice. They are expected to play an effective role in the planning and implementation of functions related to 29 subjects enlisted in the eleventh schedule of the constitution. Many sustainable development goals targets fall within the purview of these subjects. With a view to realise the SDGs, it is crucial that the village/ gram panchayats develop their own action plan to improve living conditions. There is a need to be more inclusive in addressing the problems of people from different sections.[8]

To ensure sustainability in water resources especially for local water resources such as groundwater and local ponds, panchayats should not act only as service provider but also as a concerned observer and monitor. People's participation creates awareness and a sense of ownership which drives the water project towards success and significant social impacts.[9]

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6 Bhuwan Bhaskar, 2023, Good governance, kurukshetra, publication division, Delhi.

7 Mahi pal, 2023, women empowerment, kurukshetra, publication division, Delhi.

8 Manjula wadhwa, 2023, 2030 Agenda for sustainable development, kurukshetra, publication division, Delhi vol-71

9 Jugdeep saxena, 2023, water management through panchayat, kurukshetra, publication division, Delhi.

In the changing paradigm of rural development strategy, the PRI is expected to not only provide services to improve the well being of people, they are also expected to get engaged in making people aware of climate change and disaster preparedness. The PRI system has brought governance structure to grassroots level at rural areas and created space for participation of people in planning, monitoring and evaluation of different schemes and service delivery programmes, which have direct impact on human development.[10]

4. Conclusion

Indeed, PRIs are the pillars of democracy. The present focus of the government is to enable the PRIs to attain sustainable development goals at panchayats level to further enable the country to attain the SDGs at national level. The vision of the government is to attain decentralised and participatory local self government through PRIs and its mission is empowerment, enablement, and accountability to PRIs to ensure inclusive development with social justice and efficient delivery of services. PRIs is the most important and potent tools provided by the Indian constitution to empower the democratic values on the grassroots level. PRIs not only empowering the women and are not only preparing plans for economic development but also with social justice and caring all marginalized groups in rural areas. E-gramswaraj has been a potent example of minimum government and maximum governance. Our PRIs also work in sustainable development, water management, human development, women empowerment, and providing good governance at grassroots level.

10 Giriraj Singh, 2023, empowering panchayati Raj Institutions, kurukshetra, public division, New Delhi

Role of Customary Practices in Women Empowerment & Social Cohesion in the State of Punjab

Dr. Kanika Gaur[*] & Ms. Shruti Dahiya[**]

Abstract

The legal customary marriage practices of Punjab have played a pivotal role in maintaining the social entropy in this agrarian society. The Karewa, the Anand Karaj and the chadar andazi are the popular forms of customary marriages amongst the various tribes of Punjab. The customary marriages are protected under the Hindu Marriage Act as well but the customary marriages alike the customs as opposed to public policy are not tenable. These customs in Punjab are not general as there is no particular custom which is generally applicable to whole of Punjab rather there different customary ceremonies applicable according to local or tribal predominance. Punjab being an agrarian society had customs rooted in the unity of interest and possession which gave rise to customs like chadar andazi marriage ceremony. This was generally applied in cases of second marriage of widows where they were married to the younger brother of the deceased husband to restrain the further division of agrarian property or to restrict entry of an outsider in the societal familial structure. The customary practices like these also impacted the rules of inheritance and succession which aimed towards maintaining the social cohesion by intra-tribal practices and caused women empowerment as well. The customary practices like "khandamaad or khaanjawai" prevalent in the State for securing property rights within family also aimed at social harmony. In some places in India where the major property rights to women that were recognised as their assets were gifts given to them during marriage, like Streedhan then the customary practices like Northern Province of British India or in certain tribes of Punjab like agricultural Jat tribes had different customs as far as property rights of women were concerned which were very progressive in nature. This paper will elucidate the customary marriage practices and rules of succession regarding especially women and will provide the progressive view of those earlier approaches along with their role in social cohesion and harmony. This paper will also present the current social and legal perspective of these customary marriages in the light of various judgments especially regarding the State of Punjab. Lastly this paper will present conclusion and will provide suggestions for the way forward.

Keywords: Customary Marriage, Chadar Andazi, Punjab, Hindu Marriage Laws, Social harmony

* Assistant professor, Chitkara University, Rajpura, Punjab
** Research Scholar, Panjab University, Chandigarh

1. Introduction

Customs are the oldest source of Law and are foundational basis of any Legal system that exists today. They can be characterized as cultural practices that, simply by virtue of their widespread use and ongoing existence, have come to be recognized as definitive due to certain obligations. Even though there was no outside authority in prehistoric societies, individuals nevertheless arranged themselves into cohesive groups with an inherent system for justice and freedom. Human beings came up with rules and regulations as a result of both deliberate conscious decision-making processes and spontaneous responses to their environment. People gradually began to identify customs, practices, and rituals that were common in a particular area or group and realized how they contributed to the formation of a systematized approach to regulate social conduct and behavior.[1] These groups had social harmony because the customs regulated the behavior of the people and gradually these were codified as laws, In fact the issue of customary laws also came into fore when the codification of Criminal laws was under way in British India. When the Select Committee's final report on the amended Criminal Procedure Code was turned in it was argued that the British subjects living in India have different customary practices as asked Council Member Barrow Ellis, *"Having been to Europe; having become acquainted with the European feelings, ideas, and customs; and having qualified themselves to take their places with the European members of the Civil Service",* and argued that why elite Indians shouldn't have the same powers that European servants do at that point of time.[2] Ellis proposed that Indian visitors to England could comprehend the British accused's *mens rea*, but Fitzjames Stephen maintained that Englishmen were entitled to certain personal law privileges as Indian residents, just as Hindus and Muslims were given privileges under their own customs and personal laws.[3] In Punjab, amongst the farming tribes, Anand marriage and karewa by chaddar adazi are the two most common types of marriage still today and aim at social harmony being intra-community; and women empowerment as well as some of these aim at customary property rights for women. According to Henry Maine's description after following a comparative study of various societies, that women have always been seen as the liability and responsibility of fathers and husbands and were kept out of property rights just like slave, children and disabled people and were denied the right to inherit throughout the various civilisations that have existed in Rome, Greece, Common Law, and Civil Law Countries. But subsequently, as the utilitarian perspective took hold and equality became the accepted standard worldwide, women were also

1 Anirudh Vats, '*Customs as a Source of Law'*, I-Pleaders, dated July 8, 2019

2 See Commander-in-Chief Barrow Ellis's speech in Supplement to the Gazette of India of Criminal Procedure Code, 1872 dated May 4, 1872

3 Elizabeth Kolsky, *'Codification and the Rule of Colonial Difference: Criminal Procedure in British India'*, Law and History Review , Fall, 2005, Vol. 23, No. 3 (Fall, 2005), pp. 631-683

acknowledged as eligible to inherit. The customary practices regarding succession were however favourable to women in Punjab when the world elsewhere was coming to terms to property rights for women for example The Pathans of Tarn Taran and the Mohammedan Kambohs of Amritsar Tehsil maintained that in the absence of male heirs' daughters had the right to inherit landed property. They also acknowledged widow's right to inherit property in preference to collaterals.[4]

2. Customs and their inter-relationship with Law

James C. Carter has aptly described the significance of customs in the early times when he said that- "*Who does not know that the ultimate support upon which all laws must rest is public opinion. And what is this but saying that law, in order to be obeyed and enforced must accord with the public standard of justice.*"[5] The customs in any civilisation had been lifeline for their amicable existence in one sphere as it used to regulate civil and criminal matters. The customs are nothing but rules that were formulated by common men after practising them for a good period of time and therefore considered to be the best governing method as they owe their origin to the experiences, beliefs and reason of mankind. Therefore, customs traditions or conventions are unwritten laws governing social and economic relationships in myriad ways. These are the rules of conduct which people observe and follow without being imposed from above. According to John Austin *"a custom is a rule of conduct which the government observe spontaneously and not in pursuance of a law set by a political superior. The custom is transmitted into positive law. when it is adopted as such by the courts of justice and when the judicial decisions fashion upon it are enforced by the power of the state"*.[6] But before it is adopted by the courts and clothed with legal sanction it is a rule of positive morality. Customary laws can be defined as compilation of customary beliefs, principles or values, rules and codes of conduct, and established practices and being enforced by the community itself it carry a sanction backed by general consciousness or will. They are not mechanically formed or superficially derived but their source lies in natural resource with use of some practices and beliefs that later acquires the force of law. They are locally recognised, orally held, adaptable and evolving.[7] In India too before the advent of the British, religious scriptures, customs and usages had the force of law and these used to vary with region, religion,

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4 Harish C. Sharma, "*custom, law and the women in the colonial punjab*" Vol. 62, 2001, pp. 685-692

5 Thomas W. Shelton, "*The Law of Custom*" VIRGINIA LAW REVIEW , Vol. 11, No. 1, 1924, p. 37.

6 M.Freeman, LLOYD'S INTRODUCTION TO JURISPRUDENCE, 8 th edn., 2007.

7 Cuskelly Katrina, "*CUSTOMS AND CONSTITUTIONS: STATE RECOGNITION OF CUSTOMARY LAW AROUND THE WORLD*" 2011, Constitutional recognition of customary law around the world (iucn.org) (visited on February 22, 2023).

social background, level of economic development and even the political order. When the East India Company won the dewani rights of Bengal they discovered that the indigenous systems and the customs were ingrained in the society, obligatory and had force of law but the colonial rulers had no knowledge of either law or its language of governance.[8]Thus, it got established that their rule over Indians could not be possible without adequate knowledge of native traditions, usages, customs and other religious texts acceptable to the people. Therefore, as early as 1781, customary laws and personal laws were taken into consideration and pandits and maulvis were appointed as interpreters.[9] Hindu law based on the texts such as the Smritis, Srutis, Dharamshastras and Muslim law on Shariat was given importance. Gradually, as they became more familiar with Indian conditions, they gave custom its due importance. Moreover, in certain regions such as the Punjab, Oudh, Kumaon Hills, Central Provinces, religious books were not established in any concrete manner and people were more under the influence of customary law and personal law than the shastric law.[10] In the pre-British Punjab questions regarding succession, proprietary rights, shares in property among males and females, marriage, re-marriage, divorce, dower and guardianship were decided on the basis of local customs and traditions. After the annexation, the British administrators upheld the sanctity and legality of these customs and practices albeit with certain qualifications i.e., custom must be uniform, should not be unreasonable, immoral, unethical, and contrary to public policy and law. Hart maintained that until a procedural rule is established to define what constitutes law, norms cannot, by definition, become "laws." He believes that most customs are too informal to be considered laws. With a few exceptions such as the ones mentioned above, local norms were not often documented in classical Dharmaśāstras. Nonetheless, the sections mentioned above do offer clear procedural guidelines for figuring out whether customary norms are legitimate. Dharma: Local norms (deśadharmas, kulācāra, etc.) are also valid; the customary practice of well-trained Āryas within the boundaries of Āryāvarta is considered a valid supplement to textual sources (and in fact provided the basis of Smṛti texts in the first place). Insofar as they do not contradict the Veda or Śāstra, local norms such as deśadharmas and kulācāra are also legitimate; in fact, some texts, like the Baudhāyanas, were inclined to accept them even in cases where they did. In the modern world, norms are typically only given legal force when they are put in writing. On the surface, it appears that things are the opposite in India. In court proceedings, it seems that unwritten rules have typically been the only ones that are accepted. Dharmaśāstra is a type of jurisprudence that is meant to establish legal

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8 Sripati Roy*, "CUSTOMS AND CUSTOMARY LAW IN BRITISH INDIA*", 1911, https://www.indianculture.gov.in/rarebooks/customs-and-customary-law-british-india (visited on February 25, 2023).

9 Janaki Nair, WOMEN AND LAW IN COLONIAL INDIA: A SOCIAL HISTORY, 1996.

10 Supra note 4

principles and educate legal minds, according to Davis.[11] This description is ideal for the later products of the tradition, such as the mediaeval commentaries and topically organised compendia. Though they undoubtedly served the same purposes (Gagarin's "propaganda"), the versified codes transmitted under the names Manu, Yājűavalkya, Nārada, Bṛhaspati, and others appear to be rules. They are part procedural law, part substantive law, and part constitution. They are frequently quite detailed, defining crimes and torts, outlining court procedures, and suggesting penalties and other remedies. Their origins are found in the earlier codes that define the accepted practices of Vedic rituals. The dispute over whether they contain laws is not so much on how they are framed as on the absence of direct evidence that they were applied in legal practice.[12]

3. Customary marriage in Punjab

The customs in Punjab are a result of agnatic theory or as Sir Henry Maine points out it is 'patriarchal" in nature where the basic idea is that all the descendents by virtue of their descent are eligible for the share in property. The customary marriage in Punjab impacts the Rules of succession as well as ancestral property that comes in the hands of the unmarried or widowed female will revert back to the agnates on the death or marriage of the female.[13] The Britishers showed diplomatic reluctance in interfering with the customs and traditional practices of the agriculturist tribes of Punjab. They had realised the potential of peasants and saw Punjab as a model agriculture province hence invoked their own tribal customary laws governing private matters such as inheritance, alienation of land, etc. to establish a link between State and rural intermediaries. It was this primacy of customary laws which reflected the paternalist system of imperial rule in Punjab.[14] The practice of considering customs if any, before the state enacted personal laws concerning issues like marriage, succession, divorce, adoption etc. led to the recognition of "Customs as the First and Primary Rule of Decision in the Punjab". It was then incorporated in Section 5 of "The Punjab Laws Act, 1872 "to establish that matters stated above shall be decided by any custom applicable to parties concerned, which is not contrary to justice, equality, and a good conscience and has not been by this or any other enactment, altered or abolished or declared void by a competent authority and personal laws of Hindus and Mohammedans

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11 Davis and Donald R., Jr. 2005. *Intermediate Realms of Law: Corporate Groups and Rulers in Medieval India.* Journal of the Economic and Social History of the Orient (2010) 13-15

12 Timothy Lubin, Writing and the Recognition of Customary Law in Pre modern India and Java, Journal of the American Oriental Society , Vol. 135, No. 2 (April–June 2015), pp. 225-259

13 Prenter, 'Customs in Punjab', Journal of Comparative Legislation and International Law, 1924, Third Series, Vol. 6, No. 4 (1924), pp. 223-237

14 Dr. Paras Diwan, CUSTOMARY LAW (OF PUNJAB AND HARYANA), 5th edn., 2006.

shall be applicable only when customary rules don't prevail.[15] A few general guidelines for customary marriage are acknowledged and recognised, and they can be summed up as follows: 1) Strict regulations are not required. 2) No religious etiquette is followed.[16] 3) Strict observance of special ceremonies is not present.4) the parties consent is necessary. 5) The approval of the parties' parents or guardians is required if the parties are minors. 6) Although cohabitation is not the same as marriage, living together as husband and wife is material evidence of marriage.[17] In Punjab, amongst the farming tribes, Anand marriage and karewa by chaddar adazi are the two most common types of marriage. The first is carried out in accordance with Sikh marriage rites and is recognised by law (The Anand Marriage Act, 1909, Anand Marriage Amendment Act 2012) amongst Sikhs. The second form viz. karewa is a special type of widow remarriage. This marriage is performed with the brother or some other near male relative of the deceased husband. The marriage does not necessitate any religious ceremony but takes place by throwing a *chaddar* (sheet of cloth) on the woman the presence of the community, and confess all the rights of a valid marriage and this customary marriage exists among the *jats*.[18] Held among the Sidhu Jats of Fazilka Tehsil, it was decided that if the husband passed away before the muklawa—the ritual of bringing the bride home following her initial meeting with her parents—his brother would take it, meaning the marriage would be considered karewa.[19] Among jats no ceremonies are considered essential for the performance of widow's remarriage, particularly when the second husband is Mere cohabitation assumes the relationship of the brother of the first.[20] When a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary is proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage.[21] Customs rarely if ever prohibit interclass marriages where a jat of Amritsar district married a jhewari, by chaddar anduzi, lived as husband and wife for some years and had a child of the union, it was held valid. From a marriage of a jat boy with a girl of a class like nai, jhewar, or Kalal, the children will be legitimate whether or not a formal chaddat andazi had taken place.[22] Karewa marriage is not permitted among Brahmins and Rajputs of Punjab. It confers no rights to children born to it.[23] A woman cannot marry a second husband in the life time of her

15 Pyare Lal Sharma, THE PUNJAB CUSTOMARY LAW, 1967.

16 AIR 1961 Punj. 301 (FB)

17 1936 Lah. 261:1929 Lah. 725 P.C.

18 Jain and Jain, The Punjab Customary Law Book, 2015, Jain Law Agency, Chandigarh

19 1937 Lah. 612

20 Harnam Singh v. Gurdial Singh. AIR 1961 Punj. 301 (F.B.)

21 10 Lahore. 725 (P.C.)

22 73 PR 1897

23 113 PR 1885

first husband, until the former marriage is validly set aside. Such illegality cannot be cured by acquiescence or long continued cohabitation. Among Sikh jats, a woman expelled and repudiated by her husband free to remarry according to custom another man without even a ceremony of *Chaddar Andazi* and the off-spring of such a union is legitimate.[24] Widow's Karewa marriage with a brother of her husband does not cause forfeiture of life-estate in the husband's property nor the forfeiture of right to future succession qua the husband's property.[25] The jats of Ludhiana observe a custom where under a woman can marry by chaddar anduzi if she is abandoned or turned out by her husband and would be entitled to maintenance from the second husband.[26] Divorce was prevalent among the Muslims but the Hindu customary law did not envisage divorce, because according to Hindu Shastras marriage is indissoluble tie and sacrament. Of course the Hindu Marriage Act has totally abrogated this custom. Even before the enactment of Hindu Code in exceptional cases like one among the Hindu Jats of Malerkotla divorce was customary.[27] Affirmed by Supreme Court holding that the Hindu Jats of Jullundur district observe a custom whereunder the husband may divorce his wife and dissolve the marriage. The divorced wife may then remarry during the life time of the first husband.[28] Similarly it exists amongst Sainis of Gurdaspur Tehsil who many expel a wife and repudiate her in the presence of the village panchayat and the divorce becomes effective.[29] A Grewal Sikh of Ludhiana may according to a custom divorce his wife but only on the grounds of unchastity and apostacy. In this case it was held that where the husband has right to abandon or repudiate his wife he cannot dissolve marriage merely by repudiating at his will for no reason or even for disobedience or cruelty especially when there is no allegation of immorality or apostacy against her.[30] Divorce as such was nominally impossible among the Jats and other Hindus but the custom of man turning out his wife, who could thereafter remarry was well recognised. The institution of divorce by such repudiation widely prevailed in the districts of Ferozepur, Jullundur, Ludhiana, Ambala, etc. There is an exception of Tarkhans who do not observe Hindu law and such agricultural custom applies to them in some regions even today.[31] The position has now materially changed with the enforcement of the Hindu Marriage Act which enables either of the spouse to get a divorce on the grounds mentioned in Section 13 thereof. There is also custom of Khanadamad where the man who marries the daughter

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24 177 P.R 1913

25 Gurdialo vs. M Dhan Kaur. 61 Pb. Law Reporter 163

26 Prit Singh v. Nasib Kaur. 58 PLR 424

27 AIR 1959 Punjab. 553

28 Gurdit Singh vs Mst. Angrez Kaur. AIR 1968 SC 142

29 ILR (1969) 2 Punjab 330

30 Jagjit Singh v. Smt. Mohinder Kaur 1968 Cur. L. 80770 PLR 838

31 Mal Singh v. Ram Kaur 1972 Cur. L.J. 221

of a son-less proprietor instead of taking the girl away home lives with her in her father's house. Ordinarily property gifted to khanadamaad will come back to the reversioners of the donors when the line of the done becomes extinct.[32]

4. Proprietary Rights of Women in Customary Law Era

Sir Meredith Plowden on the basis of prevalence of joint family system in the Punjab had made a remark about the agriculturist tribes of the Punjab (most of whom claimed Hindu origin) i.e., they were fast bound by the agnatic theory of succession.[33] The concept of joint family system resembles to the patriarchal setup as explained by Sir Henry Maine that, "the idea being that all the descendants of a proprietor form one united family and that each descendant, no matter how remote from that proprietor, has a right to succeed to the family property in virtue of his descent".[34] In joint family too, the rule of succession was that collaterals, no matter how remotely descended from a common ancestor, excluded all females and all strangers. The customs regarding succession to property in land were governed by the ties of kinship as well as by the local common interests. The agnates only had the right to succeed the property. Since by marriage sisters or daughters were to be provided for in another clan, there was no need to give them a part of the village patrimony. To do so would have meant the coming in of an outsider or an intruder in the community. In fact, a woman was considered as the "terminus of the family with whom the branches or the twig of genealogy was closed."[35] There were, however, a few exceptions to these general rules. The Pathans of Tarn Taran and the Mohammedan Kambohs of Amritsar Tehsil maintained that in the absence of male heirs' daughters had the right to inherit landed property. They also acknowledged widow's right to inherit property in preference to collaterals.[36]The Awans and Khokhars of Sialkot conceded that a daughter in the absence of sons and a collateral could inherit a definite share of the ancestral property. This conception of a definite share in the ancestral property to a daughter was certainly inconsistent with the generally asserted life tenure of unmarried daughters.[37]The Arains of Batala Tehsjl held that in the absence of male issue, a man could leave his property to his daughters or their off springs by a written deed or by making a formal declaration of the same before the headman and other coparceners but such daughters had no right to will away the property.

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32 1937 Lah. 705

33 N. Hancock Prenter, "*CUSTOM IN THE PUNJAB, JOURNAL OF COMPARATIVE LEGISLATION AND INTERNATIONAL LAW* " Vol. 6, No. 4, 1924, https://www.jstor.org/stable/752774

34 Id. 223

35 C.L. Tupper, PUNJAB CUSTOMARY LAW, 1881.

36 Harish C. Sharma, "*CUSTOM, LAW AND THE WOMEN IN THE COLONIAL PUNJAB*" Vol. 62, 2001, pp. 685-692

37 Id. 688

Long after the British invaded the nation, Hindu customs and laws remained in effect. Throughout the eighteenth and nineteenth centuries, British colonial rulers recognised distinct Hindu family laws for different religious groups and other cultural groups, even as they introduced uniform laws governing other aspects of social life, like crime and commerce. Thus, until the turn of the 20th century, the Mitakhshara and Dayabhaga laws governed the inheritance laws. The Hindu Women's Right to Property Act (1937), which placed a strong emphasis on women's estates, was the colonial rulers' first attempt to create a uniform law of succession for Hindu women. Long after the British invaded the nation, Hindu customs and laws remained in effect. Throughout the eighteenth and nineteenth centuries, British colonial rulers recognised distinct Hindu family laws for different religious groups and other cultural groups, even as they introduced uniform laws governing other aspects of social life, like crime and commerce. Thus, until the turn of the 20th century, the Mitakhshara and Dayabhaga laws governed the inheritance laws. The Hindu Women's Right to Property Act (1937), which placed a strong emphasis on women's estates, was the colonial rulers' first attempt to create a uniform law of succession for Hindu women. This Act was the first of its kind to put an end to the controversial debate over the characteristics of stridhan, and it established Hindu women's rights over landed properties inherited from male owners, especially from husbands, even though to a limited extent. The 1937 Act recognised three types of widows: intestate man's widow; widow of a pre-deceased son; and widow of a pre-deceased grandson who is the son of a predeceased father. The widows were given a share in the undivided interest of a Mitakhshara coparcener.[38] Much was made of the Hindu Women's Right to Property Act as an instrument for improving the treatment of Hindu women, especially for young widows. Pressure for this type of social reformation came at the instigation of European as well as Indian social reformers stretching back to Raja Ram Mohan Roy[39]. The old Shastric laws went through in tact despite this reformist agenda. The 1937 Act's greatest shortcoming was that it could never ensure any rights to women heirs in cases where the deceased had disposed of his property through a will, despite the fact that it granted Hindu women some limited rights over their intestate husband's property. The Act made no mention of women's shares of agricultural land either. Even after India gained independence, Hindu women maintained a limited interest in landed property. In 1948, during the legislative debates of the Constitutive Assembly of India, Dr. B.R. Ambedkar brought attention to the disadvantages that Hindu women faced due to the succession laws. The Hindu Code

38 Diwan, supra n. 13, at 352.

39 Raja Ram Mohun Roy (Aug. 14, 1774-Sept. 27, 1833) was best known for his efforts to abolish the practice of sati, the corrupted Hindu funeral practice in which the widow was compelled to sacrificed herself on her husband's funeral pyre. It was he who first introduced the word "Hinduism" (or "Hindooism") into the English language in 1816. For his diverse contributions to society, Raja Ram Mohan Roy is regarded as one of the most important figures in the Bengal Renaissance and is hailed as "the father of modern India."

Bill was therefore the first step toward abolishing the idea of limited estate for women and converting it into a full estate.[40]

5. Customary Law Marriage and Judicial activism

The Apex Court in *Surjeet Kaur*[41] Judgment which was a property dispute in which paternity was disputed held that in view of the facts of the case in which the Karewa marriage was not celebrated according to the valid customary ceremonies of that marriage as in this form of marriage in Punjab the widow can get married to the brother of the deceased husband by a *chadar* (bedsheet) being put on her head. In this case, however none of this was followed and the marriage was done with not the brother but with the stranger with no ceremony followed but merely *Gur* (jaggery) being distributed to celebrate the marriage. The Honourable court held that Section 17 of the Hindu Marriage Act states that the necessary rites outlined in the Act for a customary marriage had not been performed. The mere fact that sugar or gur was distributed would not make a marriage legally recognised.[42] The Court differentiated in the same judgment that long cohabitation has to be with proper ceremonies as well and stated that the reliance placed on *Charan singh*[43] judgment is no proper as in *Jats* of Punjab no rituals are necessary for a widow to remarry, though this is particularly true when the second husband is the first's brother. Through simple cohabitation, the widow becomes his wife and he becomes her husband. This must be because it's widely believed among Jats that the widow is acting appropriately and according to expectations when she marries her husband's brother.[44] The Apex Court recently held that the right to cohabitation, family recognition, procreation and childrearing, the capacity to exclude others out of the marriage, and the desire for the marriage to gain social acceptance are among the incidents of a marriage.[45] The judgment also reiterated the fact that the customary marriages are protected under Indian laws stating that matrimonial laws were a product of the 19th and 20th century codification project, which recognised these social practices explicitly while also allowing unwritten customs to continue to exist (except for legally regulated aspects such as marriageable age, etc.). Since the SMA is the only option for a secular, nonreligious "civil marriage," it is still subject to personal law in terms of succession and other matters.[46]

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40 Dr. Babasaheb Ambedkar : Writings and Speeches Vol. 14 (Part-1) First Edition by Education Department, Govt. of Maharashtra : 6 December, 1995 Re-printed by Dr. Ambedkar Foundation : January, 2014

41 Surjeet Kaur vs Garja Singh 1994 AIR 135

42 *Ibid* para 11

43 Charan Singh Harnam Singh And Anr. vs Gurdial Singh Harnam Singh And Anr AIR1961P&H301

44 *Ibid* para 8

45 Supriyo alias Supriya Chakraborty v. Union of India 2023 SCC Online SC 1348

46 *Ibid.* para 12

6. Conclusion and Suggestions

Beyond its legal implications, customary marriage plays a vital role in preserving cultural identity and fostering social cohesion within diverse communities. Through the exchange of customary rites and rituals, families come together to celebrate love, unity, and continuity. These ceremonies serve as a testament to the resilience of cultural traditions in the face of modernisation, reaffirming the importance of heritage in an ever-changing world. Some of them are women favouring as in eastern India they follow the custom of asking the husband to move over to the wife's place after marriage and the wife has the right to drive the man out any time during their married cohabitation if she decides to do so in consultation with the community. Some of them follow the custom of asking the husband to move over to the wife's place after marriage and the wife has the right to drive the man out any time during their married cohabitation if she decides to do so in consultation with the community. This customary practice is very opposite to the present marital position in India where girls have to go after marriage and dwell in family of groom. In some Indian Tribal communities, property is inherited by daughters, not by sons. Among the Khasis in Meghalaya, a woman is treated as the head of the family and she plays that role for all legal purposes and some communities consider the cattle folk in the house as members of the family as well. Among the Kinnaurs of Himachal Pradesh, the custom is for a woman, if she wants, to take up to five husbands which is unthinkable for the patriarchal Indian society. All these are examples of social cohesion and harmony with a progressive view towards women empowerment. The customs in Punjab like Karewa marriage or *chadar andazi* marriage was created to maintain social cohesion in agricultural society where the second marriage of widow was done with the younger brother of the husband also the customs such as *Khanadamaad* where the daughter is married to a person who stays with family and takes care of family property were intended to restrict entry of outsiders in social well-knit society. They were certain customs of progressive nature that allowed women to inherit from their fathers but only in case of absence of son or other male heir. It was a conditional right but atleast recognized right to property of women. Though not implemented in its entirety but sometimes chief courts on basis of equity and conscience did gave judgments recognising possession of women over ancestral property as her right. It led to conflicting situation and therefore customs were proposed to being codified. The British administration didn't gave much thought towards it because their ultimate goal was to maintain order in province and generation of revenue hence the major succession legislations have been after the Independence. Hence, the role of customary practices especially related to marriage and succession in social harmony or women empowerment cannot be denied in the state of Punjab.

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Prisoner's Rights an Analytical Study with Prison Reforms: Miles to go with Human Rights Aspect

Vikas Sharma* & Prof. (Dr.) KB Asthana*

Abstract

The rights of prisoners have long been a subject of debate and concern within the realm of criminal justice systems worldwide. The present analytical study aims to examine the complex interplay between prisoner's rights and prison reforms, with a particular focus on the human rights aspect. By analyzing the existing legal frameworks, institutional practices, and international standards, this study seeks to shed light on the challenges faced by incarcerated individuals and the necessary reforms to ensure the protection of their fundamental human rights.The study begins by providing an overview of the historical context of prisoner's rights, tracing the evolution of international human rights instruments and their application to the treatment of prisoners. It explores the inherent tension between punishment and rehabilitation, highlighting the need to strike a balance that upholds human dignity while maintaining societal safety and security. Furthermore, the study examines the prevailing conditions in prisons, addressing issues such as overcrowding, inadequate healthcare, violence, and discrimination. It emphasizes the impact of these conditions on prisoners' physical and mental well-being, as well as their potential for social reintegration upon release. Drawing on empirical research and case studies, the study presents evidence that underscores the urgency for comprehensive prison reforms. The analysis also explores the role of various stakeholders in promoting prisoner's rights and driving prison reforms. It examines the responsibilities of governments, correctional authorities, legal professionals, civil society organizations, and international bodies in ensuring compliance with human rights standards. The study highlights the importance of transparency, accountability, and effective oversight mechanisms to monitor and enforce these rights.Furthermore, the study assesses the progress made in prison reforms thus far and identifies the remaining challenges on the path towards achieving comprehensive human rights-based approaches in prisons. It explores innovative initiatives and best practices from around the world that have successfully contributed to positive change and rehabilitation outcomes for prisoners.Ultimately, this study argues for the urgent need to prioritize the human rights of prisoners and to implement comprehensive prison reforms. By doing so, societies can aim to transform prisons into rehabilitative institutions that facilitate the reintegration of individuals back into the community, thus reducing recidivism rates and promoting a just and humane criminal justice system.

Keywords: Prisoners' Rights, Prison reforms, Human Rights, Criminal Justice, Rehabilitation, Incarceration, Human Dignity, Accountability, Recidivism.

1. Introduction

Prisoner's rights and the need for comprehensive prison reforms have become increasingly significant topics within the realm of criminal justice systems worldwide. The treatment and rights of incarcerated individuals are fundamental aspects of a just and humane society, as they reflect the commitment to uphold human dignity and ensure the effective rehabilitation and reintegration of offenders.This analytical study aims to delve into the intricate relationship between prisoner's rights and prison reforms, with a specific focus on the human rights aspect. It seeks to provide law researchers with a comprehensive understanding of the challenges faced by prisoners, the existing legal frameworks, and the necessary reforms needed to safeguard their fundamental human rights.Historically, prisoners have been subjected to punitive measures rather than being recognized as individuals with inherent rights. However, the evolution of international human rights instruments has gradually brought attention to the importance of respecting the rights of prisoners. Instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Standard Minimum Rules for the Treatment of Prisoners (also known as the Nelson Mandela Rules) have laid down essential principles and guidelines for the treatment of prisoners, emphasizing the need to ensure their dignity, safety, and well-being.While these international standards exist, their implementation and enforcement within national jurisdictions remain inconsistent. Many prisons face significant challenges, including overcrowding, inadequate healthcare, violence, and discrimination, which undermine the rights and well-being of prisoners. Moreover, the overarching objective of rehabilitation and successful reintegration is often overshadowed by punitive measures and a focus on societal safety and security.

This study seeks to shed light on these pressing issues by analyzing the prevailing conditions in prisons and assessing the efficacy of existing legal frameworks. It will explore the impact of these conditions on prisoners' physical and mental well-being, as well as their potential for successful reintegration into society upon release.

Additionally, this study will examine the role of various stakeholders in promoting prisoner's rights and driving prison reforms. Governments, correctional authorities, legal professionals, civil society organizations, and international bodies all play crucial roles in ensuring compliance with human rights standards and advocating for necessary reforms. The study will emphasize the importance of transparency, accountability, and effective oversight mechanisms in monitoring and enforcing these rights.By critically analyzing existing research, empirical evidence, and case studies, this study aims to identify the gaps and challenges that persist in achieving comprehensive prisoner's rights and prison reforms. It will explore innovative initiatives and best practices from around the world that have successfully contributed to positive change and rehabilitation outcomes for prisoners.

Ultimately, this study argues that there is still much ground to cover in the journey towards recognizing and protecting the human rights of prisoners. By highlighting the pressing need for comprehensive prison reforms and a shift towards a human rights-based approach, this research aims to contribute to the ongoing discourse surrounding prisoner's rights and support the efforts towards a just and humane criminal justice system.In conclusion, this analytical study serves as a valuable resource for law researchers interested in delving into the complexities of prisoner's rights and prison reforms. By examining the human rights aspect and addressing the remaining challenges, this research aims to ignite further discussions, policy changes, and practical solutions that prioritize the well-being, rehabilitation, and successful reintegration of prisoners into society.

The Demonstration likewise makes posts for detainees, for example, convict detainees who will capacity and convey obligations inside Prisons premises and will considered to be community workers. Section 9 of the Demonstration carefully forbids prison officials to convey business exercises inside prison premises. The Section IV of the demonstration manages confirmation, evacuation and release of detainees. The fundamentals of this section cover that convicts going into prisons will be altogether checked and every one of their possessions will be kept in care of guard and the female convicts will be checked uniquely by female officials. The criminal convicts will be inspected by clinical official and stamps and wounds on his body will be recorded. Detainee will possibly be expelled from Prisons premises if in the assessment of clinical official, he endures with intense malady.

Sections 42 to 54 arrangements with offenses identifying with Prisons. Section 42 spreads out that any individual who being into or expels from Prisons precluded articles, abets offenses disallowed under act or speaks with indicted detainees will be rebuffed with Prisons of a half. Prisons offense are specified under area 46, which will incorporate willful defiance of Prisons rules, utilization of criminal power or compromising language, foul conduct, refusal to work, making harm Prisons property or records, arrangement or plotting for escape and so on, offenses carried out under the Section will be culpable under areas 46 and 47 of the Demonstration. Section 52 spreads out that in the event that a detainee is in a propensity for perpetrating offensive wrongdoing on numerous occasions, he will be sent to Area Officer or some other Justice of top notch by director. The demonstration under area 54 lays discipline for offenses submitted by Prisons subordinates.[1]

The Prisoner have been in our general public since Old India, when the relieving components were housed at an area assigned by the rulers to shield the overall individuals from wrongdoing. Prisons facilities were viewed as a position of Hostages, where detainees were held for retaliation and discipline. Initially, it was accepted that partition and Prisons measures would adjust the liable people, yet this conviction is dynamically being

1 K. Jaishankar, Tumpa Mukherjee, Kindle Edition, Indian Prisons, Pg. 15 onwards.

supplanted by the complex idea of social safeguard. From second to time, the organization and specialists distinguish certain worries confronting Prisons facilities.

Prison Reforms: On July 15, 2015; Mr. President Obama recorded a lot of reasons that the US should change the criminal equity framework. What's more, a few reasons that the public authority will look more into the American people group and attempt to offer more chance and more rights to every one individual in the country. President Obama has previously investigated the circumstance. The quantities of steps are "marking the Reasonable Condemning Act."(Hudson, David).[2]

The president additionally clarified the future change standards. "As the president noted, 'we're exactly toward the start of this cycle, and we need to ensure that we stay with it.' He then, at that point, spread out the three vital regions in which we need to zero in on change: the local area, the court, and the cell block."(Hudson, David) On this Obama just recorded what the central government will zero in on.

A doubt, the state of modem penitentiaries is superior to that in the past yet at the same time a lot of still needs to be done toward jail changes for empathetic treatment of detainees. The treatment of detainees ought to be as per the protected commands to get them the fundamental rights. Underscoring the requirement for change in the mentality of prison specialists towards the jail detainees, the High Court in Mohammad Giassudin v. Province of Andhra Pradesh, noticed: "Reformist crime analyst across the world will concur that the Gandhian determination of wrongdoers as patients and his origination of penitentiaries as medical clinics—mental or moral—is the way in to the pathology of misconduct and the restorative job of discipline.

2. Theories of Imprisonment[3]

Detainees were generally kept in prisons under earlier social structures. They received punishments outside of the prisons. However, over time, as human development increased, prisons came to be the main means of punishment.There are primarily four important theories of discipline: reformative theory, preventive theory, preventive hypothesis, and retributive hypothesis. Yes, a child who falls and accidentally kicks the floor is often believed to be dishing out revenge and would not serve any remedial purpose. The second is the demotivational hypothesis.

By rebuking the guilty parties, this concept obstructs the wrongdoer often and diverts the general public by obstructing him and keeping them from presenting a demonstration that is unlawful. Formative hypothesis satisfies the demand for the offender's recovery,

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2 NAACP's 106th public show.

3 Goldsmith, A., Halsey, M. & Groves, A. (2015) *Tackling Correctional Corruption: Best Practice in Detection and Prevention, London: Palgrave.*

but preventive theory prevents a wrongdoer from repeating the transgression. Modern criminologists don't believe in punishment without a purpose. They consider a criminal to be a patient who should be treated humanely.[4]

Legal executive position in the Organisation for Prisons and Justice Preeminent Court, the Indian judicial system, plays a vital and active role in the organisation and restoration of prisons. One may say that Indian legal executives did so until the 1980s. Summit Court came up with a new prison law in 1974. In a major victory for the court in D.B.M. Patnaik's case[5]stated that the simple confinement doesn't deny the convicts of all the crucial rights revered in our Constitution. Preeminent Court again in Hiralal's case[6] worried for the recovery of prisoners and reorganization of penitentiaries. In Sunil Batra's case, which is regarded as a victory for prison equity and detainee rights in India, the court ruled that "the way that a person is legally imprisoned doesn't prevent the utilisation of Habeas Corpus to secure his other intrinsic rights."

In Sunil Batra'scase which is taken as an achievement in the field of Prisons equity and rights of the detainees in India, Court held that "the way that an individual is Uttarakhand Legal and Lawful Review legally in Prisons doesn't forestall the utilization of Habeas Corpus to secure his other intrinsic rights". [7]In Prem Shankar Shukla's case, Court observed that no individual will be cuffed, shackled routinely for persuade of the custodian's escort.[8] Preeminent Court again in *R.D. Upadhyay's case*[9]has held that option to reasonabletreatment and right of legal cure are pre-requisites of organization of Prisons equity. In HussainAraKhatun's case Regarding prison changes, the court used a proactive and effective approach. Court set aside other concerns regarding improvements to the conditions of Indian prison institutions.[10]As a result, by approaching prisons as a basis for rehabilitation rather than punishment, this creative work by an Indian legal executive demonstrates a change in attitude towards the rights of prisoners and the rejuvenation of prisons. In

4 Kumar, Soumya: Prisoners rights in India and reforms needed in Prisons. (National Human Rights Commission, New Delhi, 2006) (NHRC Library, NewDelhi).

5 MadhavaMenon, N. R. Ed.: Criminal justice series. 21 vols.(National University of Juridical Science, Kolkata, 2005) (NHRC Library, New Delhi).

6 1977.

7 *Sunil Batra* v. *Delhi Administration*, 1980 AIR 1579, 1980 SCR (2) 557.

8 *Prem Shankar Shukla***v.** *Delhi Administration,* 1980 AIR 1535, 1980 SCR (3) 855.

9 Madhyrima, Rights behind Bars, Concept, Visualization & Layout: Chenthil Kumar Paramasivam, *Edited by Swati Mehta pg. 42 onwards.*

10 *HussainaraKhatoon&Ors* v. *Home Secretary, State of Bihar,*1979 AIR 1369, 1979 SCR (3) 532.

India, there are eight different types of prison foundations. The Focal Correctional Facilities, Area Prison, and Sub Prison are the most well-known and common prison organisations. The Ladies Correctional Facilities, Borstal Schools, Open Correctional Facilities, and Exceptional Correctional Facilities are among the several types of prison foundations.

Table-I

Types	**Number**	**Total capacity**
Central Prisonss	134	159158
District Prisonss	379	137972
Sub Prisonss	741	46368
Women Prisonss	18	4784
Open Prisonss	63	5370
Borstal Schools	20	1830
Special Prisonss	43	10915
Other Prisonss	3	420
Total	**1387**	**366781**

The above table has referenced the kinds of Correctional facilities and their complete limit as the finish of 31st December 2022.Inmates held up in India prisons are ordered as convicts, under-trails at present on trial in a court of law.

2. Sketch of Worldwide Commitments and Rules on Prisons

International covenants and instruments are become lights demonstrating the way of equity and humankind to the countries. The desire to execute and uphold human rights should originate from inside a country. The instrumental undertakings have not been futile. It requires some investment to change global sincere goals into national standards Meanwhile; these offer the national legal executive a chance to decipher national law in the light of worldwide commitments of the nation. The position has been honorably summarized by *the Incomparable Court of India in Varghese* v. *Bank of Cochin*".[11] The individual can't come to court however may gripe to the human rights board of trustees, which, thusly, will set in different strategies. To put it plainly, the essential human rights cherished in the Universal Agreements above alluded to, may, at the best illuminate legal foundations and rouse administrative activity inside part States, yet separated from such profound respect, medicinal activity at the occurrence of a wronged individual is past the region of legal authority. "The Incomparable Court of India has alluded regularly to the Worldwide

11 Equivalent citations: 1980 AIR 470, 1980 SCR (2) 913,

Pledges while managing Human Rights infringement. For Instance, in the Prem*Shankar Shuklav. Delhi Administration, the Preeminent Court,*[12]while managing binds and different mortifications perpetrated on people in care, watched, "All things considered, even while talking about the applicable statutory arrangements and sacred necessities, court and insight should always remember the center chief found in Article 5 of the Widespread Affirmation of Human Rights, 1948:" *Sunil Batra*v. *Delhi Administration*[13]the Preeminent Court made numerous references to international human rights treaties. Therefore, courts must properly consider the International Instruments of Human Rights while handling cases of infringement.The Indian Constitution's craftsmanship makes it mandatory for the State to promote respect for international law and contractual commitment. One of the criminal equity strategies to compensate and provide recompense for victims and society is to rebuff lawbreakers. In this way, certain disciplines are subject to the laws governing criminal justice in each society. One of these punishments that is established in this way is imprisonment, and those who have been charged with a crime are detained in prison as a result.

Even though the guilty are sentenced to prison and have their liberties restricted, they still have important rights and opportunities that must be protected whether they are in prison or not and have the right to be rejected. The rule of law protects these chances and rights. This problem suggests that the proper way to respond is constrained by the constructive norms that must be followed as punishment and discipline are applied. It is thought appropriate to reject this issue of criminal law and criminal equity using the most effective strategy. Law establishes the boundaries of this privilege and authority for heads of prisons and their staff. The law set forth a number of regulations in order to accomplish this and ensure the detainees' human rights as well as to guide interactions with them and prison administrators.According to these regulations, prisons are run within a legitimate framework, and in this environment, the detainees' rights are solidly protected. These guidelines are provided in a few international legal documents. This essay examines these regulations from a human rights perspective, taking into account how they relate to the ecological, educational, administrative, executive, medical, academic, and humanistic aspects of prisons.

3. Trends in India's Prisons, Committee, and Judiciary Trends

Human rights concerns and obligations are currently a prominent part of government policy.[14]The pride and value that are inherent in every human being and are the focus

12 V Krishnaiyer, Bench: Krishnaiyer, V.R., Prem Shankar Shuklavs Delhi Administration on 29 April, 1980.

13 Bench: Krishnaiyer, V.R, Petitioner: Sunil Batra, respondent: Delhi Administration.

14 The prisons and prisoners' law in India are one of those laws that are constantly unnoticed and forgotten.

of human rights and basic opportunity are the source of all human rights. In a nutshell, everything that enhances a person's free and dignified presence should be viewed as a human right. It took some time for the concept to develop and solidify. The notion of Human Rights was initially at odds with the Common Rights advanced by political philosophers in earlier eras. The final one is comprehensive. It is almost probable that the legal inside-the-edge work of the standards relevant to and to the constitutions itself has significantly reduced the possibilities for progress. We shall apply the status of human rights in prison institutions impartially. All things considered, Prisons Foundation should care for the inmate with the goal of re-socializing them by maintaining and enhancing every seductive relationship the inmate has with his or her loved ones. For instance, the therapy will boost their self-esteem and increase their awareness of others' expectations. Each detainee's individual needs for religious care, training, professional direction and preparation, business guidance, physical improvement, and mental character reinforcement should be taken into consideration as well as his social and criminal past, the duration of his sentence, and his prospects for release. These can serve as true centres of reformation and will strengthen the reformative perspective in the organisation and operation of prisons.Human rights had laws that were supernaturally far away until recently, but that is changing thanks to increased awareness of the concerns, demonstrations, and zeal of advocates, experts, and courts.

The National Human Rights Commission suggested the Prisons Change Bill in 1996. In 1998, the draught Bill underwent detailed revisions, some of which resulted in new legislation. One such state was Rajasthan, which included a section on prisoners' rights and obligations in its Rajasthan Penitentiaries Act, 2001.[15]

4. Penitentiaries and Prisons Laws in India

Significant rules which have a direction on the guideline and the executives of Prisonss in the nation are: (i) The Distinguishing proof of Prisoner Act, 1920. (ii) Constitution of India, 1950. (iii) The Exchange of Prisoner Act, 1950.[16](iv)The Portrayal of Individuals Act, 1955. (v) The Prisoner (Participation in Courts) Act, 1955. (vi) The Probation of Wrongdoers Act, 1958. (vii) The Code of Criminal Strategy, 1973. (viii) The Emotional well-being Act, 1987. (ix) The Adolescent Equity (Care and Insurance) Act, 2000. (x) The Human Rights Protection Act, 1993.

5. Prisoner's Rights and Administration of Prison in India

A prison, penitentiary, or rehabilitation facility is a place where people 32. The main objective of prisons is to protect society from injustice and retaliation. According to

15 This Act may be called the Raj Co-operative Societies Act, 2001.

16 Bar Act, The transfer of prisoners Act,1950, *Act No. 29 of 1950, 12th April,1950*.

contemporary thinking, the goal of renewing and recovering prisoners cannot be achieved by using corrective procedures for treatment of Prisoners alone.[17]

The United Nations has also provided a few more guidelines and standards, whether they be minor guidelines or critical requirements for the treatment of prisoners. The State is mandated by law to protect the human rights of its citizens as well as the safety of the general public everywhere. They are provided with some essential rights considered as Human Privileges of Prisoner: National and Global Instruments in order to protect the residents from any potential abuse of this power.

In India, privileges of Prisoner were for some time smothered under the pilgrim rule and has as of late developed in broad daylight talk. Thus, the prisoners' rights as:

- Option to be held up fittingly dependent on Legitimate Classification.
- Exceptional Right of youthful Prisoner to be isolated from grown-up prisoners.
- Directly against being confined for more than the time of sentence forced by the court.

6. Panchayat System's Function in Prison Administration and Prisoners' Employment in a Variety of Fields

Even if the concept of the corrective foundation undoubtedly makes one-on-one work with prisoners challenging and establishes constructive barriers to the individual interaction that is the fundamental tool of social work. Despite these restrictions, given the availability of talented and skilled social workers, there are potential for unique work with prisoners.

"In actuality, the point at which the inmate has just arrived at the prison is the greatest time for the social worker to contact him. The detainee's initial day or night in the prison and his interactions with other prisoners, when he is confused, afraid, and usually even mocking of everyone, seem to be the ideal times for the social worker to connect with him. The social worker will give him the opportunity to discuss the harsh realities of prison life, his future prospects, as well as the limited but nonetheless promising educational and employment alternatives available there.

The social worker must determine how much support the prisoner requires and whether he is now eligible for social casework assistance. The social worker must be aware that the prisoner frequently masks his true feelings and that he requires some time before he can take advantage of casework administration. Until the inmate is actively seeking problems, the social worker must certainly refrain from overwhelming him with suggestions and offers of assistance. He will occasionally need advice and assistance with specific issues, such as connections with his family, how to proceed with obligations he has broken,

17 P.C. HariGovind, Assistant Professor, Bhavan's N. A. Palkhivala Academy for Advanced Legal Studies, Ramanattukara, Kozhikode, Kerala.

changes to the prison, the assignment to a specific preparation unit, or a shift to another living arrangement.

The social specialist's main responsibility at a prison is to assist the prisoner in changing his own mindset towards misbehaviour, punishment, and repression. He will make an effort to help him understand how he thinks about his own behaviour, alter his social attitude, and develop fresh ideas for his future. Right now, a social worker could be helpful in encouraging use of the prison library, professional preparation and studies, as well as adjusting to the prison's rules. In the event that he requires assistance in doing so, he will assist him in maintaining communication with his loved ones. The social worker will finally play a big part in preparing the prisoner for release and reintegration into society.He influences him to adopt a responsible attitude towards prison regulations, towards seeking employment, and furthermore makes an effort to inform him that a key factor in granting his release is a different perspective on society and its laws. Often, the social worker has a difficult time convincing the prisoner that he is ultimately responsible for his own change and improvement.

7. Administration of Prisons in India

Our country's prison system has been in place for more than 100 years. On the off chance that one looks back, one cannot help but be astounded by the enormous transformation that was done during this time.[18]Even though the development is still in its early stages and is only being used in a small number of the country's prisons, it still provides assurance regarding the method of handling guilty persons.[19]

Many of the brutal treatment methods are currently in the past, making room for a few new ones including outdoor labour, offices for higher education, leisure and correctional plans, group work, and salary installment. There are currently efforts being made to treat the captives with a less restrictive regime and more freedom. At many public forums, the management of prisons and the reorganisation of inmates has been the subject of intense debate and critical study.[20]The Hon'ble Supreme Court of India has been taking a strong stance against the inhumane and degrading circumstances in prison facilities in recent years, which has caught the attention of the media and social movements. The situation of detainees has become a fundamental concern for open police since there is growing support for the preservation of human rights in all facets of life.

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18 The jail administration in India is regulated by the Indian Prison Act of 1894 and the Jail Manuals of various States.

19 AmarendraMohanty, Narayan Hazary, Indian Prison System, Indian Prison System, Pg 21onwards.

20 AmarendraMohanty, Narayan Hazary, Indian Prison System, Indian Prison System, Pg 21onwards.

Any discipline can only gaze either backwards or forwards. Two of the four generally accepted kinds of discipline look to the past, and two to the future. Only the negative types were used prior to actual current events, and even now, the positive types are not used as liberally and artistically as they may be. The first of the four categories of punishment that we might refer to as "in reverse negative" is retaliation. Its primary goal is to prevent the offender from enjoying the fruits of his offence, but it also goes above and beyond by attempting to include him in actual tragedy.

8. Conclusion

Prisons law has evolved over the years in every country to protect the unalienable rights of prisoners and to ensure that prisons are run properly. By doing so, it will be possible to update all prison manuals as well as reform the criminal legislation, build a new penitentiaries demonstration, and change the organization's present legal framework. Above all, the Indian Legal Executive must keep up its supportive and active role in the judicial system for prisoners.

Contracting has shown to be a successful strategy for managing and running prisons and other detention centres. The Legislature only transfers a fraction of its official or governing duties when it grants. It does not renounce its stance or its unambiguous responsibilities. Regardless of whether they are run by government officials or a private organisation, prison facilities would continue to be subject to the oversight and directive of the Legislature and, in the majority of cases, to the legislation itself.

In India, the administration would not lose control over the penitentiaries and prisons if it offered an agreement for them to be managed and supervised by private contractual workers and offices because the principles, guidelines, and Acts would continue to be upheld by the administration, its supervisory forces, and the relevant authorities. According to the present inquiry, India may decide to privatise the prison facilities on an experimental basis after carefully weighing all the drawbacks associated with private penitentiaries and considering the experiences of countries like the USA and the U.K.

In order to maintain the public's trust in the majority rules system and the overall perception of law enforcement in general, it is imperative to address all problems and errors that arise over the course of this framework's operation. In order to address this, the present study examined the hierarchical structure, the operation of the current Criminal Equity Framework and Police, as well as the causes of the human rights violations. The present investigation also sought suggestions from law enforcement officials, police, and prison authorities for enhancing the Criminal Equity Framework and police as part of a field review.

The administration convened a meeting in 2005 to develop a new police demonstration that may serve as a template for state representation. Mr. Soli Sorabjee, a prominent advocate of the Preeminent Court, led this meeting. In late 2006, the Association government received a Model Police Act from the Police Demonstration drafting council. In addition to these efforts, the Comparable Court provided new information in the ongoing open intrigue case on police changes.

The court provided a framework for the Indian government to work within as they implemented the modifications to the police. Two other government groups that were formed between 2001 and 2004 also produced recommendations for the overall Criminal Equity Framework. These included the Mali Math Panel on Criminal Equity Framework Changes (2001-03) and the Audit Board of Trustees on 270 NPC and Other Commissions and Councils Proposals (2004-2005). The distinguished court issued the directives necessary to implement the assignment of police modifications in the well-known Parkash Singh v. Association of India case[21] from 2006 at that time. The court determined that it would award "fitting bearings" considering the "gravity of the issue" and "all out vulnerability with regards to when police changes would be presented." The Prison reforms has started many years ago, India and other countries but still many reforms into the prison system required. Such as we have seen the live murder of TilluTajpuria and operation of gansgster Ateek Ahmed from the prison itself. Secondly the living condition of the inmates should also be looked after by this reforms.

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21 AIR 1987 P H 263.

Constitutional Dimension of Justice and Judicial Interpretation

Dr. Manoj Kumar* & Dr. Vinay Kumar Kashyap**

Abstract

The Constitution is the modern scripture of independent India. It is an inspirational and living document, an ideal of the Indian society which lay down aspirations of people that apply to not just India but to many emerging nations of the world. The Constitution contains provisions which allows flexibility in amending the constitution and is accommodative of various streams of thought to expand the frontiers of freedom and liberty, justice and fraternity, fairness and equality. Justice is of paramount importance and most discussed objective of the State and society and also serves as foundation for orderly human living. Justice demands the regulation of selfish actions of people for securing a fair distribution, equal treatment of equals, and proportionate and just rewards for all. It stands for harmony between individual interests and the interests of society. Justice is of central importance to political theory. In defending or opposing laws, policies, decisions and actions of government, appeals are made in the name of justice. Persons involved in every agitation for securing their interests always raise the slogan: "We want Justice". All civil rights movements are essentially movements for justice. Justice stands for rule of law, absence of arbitrariness and a system of equal rights, freedoms and opportunities for all in society. In fact, justice stands recognized as the first virtue or ideal or objective to be secured. In its preamble, the Constitution of India gives first priority to the securing of "justice - social, economic and political" for all its people. In contemporary times justice stands conceptualized basically as social justice.

In the above backdrop this paper aims to analyse the philosophical and social interpretation of justice in India by the higher courts and evolution in the scope of justice that have taken place in the society post adoption of the constitution and what justice means in today's date.

Keywords- *Justice, Constitution, Social, Economic, Political, Empowerment, Rights.*

1. Introduction

The Constitution is the modern scripture of independent India. To use a Latin expression, it is *suprema lex* in India and is not merely a collection of articles and clauses. Indian constitution is an inspirational and living document, an ideal of the Indian society and even better society India strives for. The constitutional texts lay down aspirations that apply to

* Assistant Professor of Law, Rajiv Gandhi University (A Central University), Rono Hills, Doimukh, Arunachal Pradesh- 791112, Email- kumarmanojbhu@gmail.com.

** Assistant Professor of Law, Rajiv Gandhi University (A Central University), Rono Hills, Doimukh, Arunachal Pradesh- 791112.

not just India but to many emerging nations of the world. Dr. Ambedkar and his colleagues in the Constituent Assembly were remarkably large-hearted and generous in their approach. They allowed for flexibility in amending the Constitution and were accommodative of various streams of thought. Above all, they trusted the wisdom of future generations to expand the frontiers of freedom and liberty, justice and fraternity, fairness and equality. They trusted future generations to not just amend the provisions of the Constitution but to constructively re-imagine and re-interpret it for changing times.

In constitutional jurisprudence, "State" does not mean just the "government". The priority to be responsive is there for all public and private institutions. This is an age when public services and public goods are increasingly being delivered by the private sector. Education, health, housing, urban transport and telecom and internet access are examples. The expansion of justice creates a greater role for non-state players as well. Any future safeguarding and strengthening of the Constitution – and upholding of justice in its various forms – will require the participation of both public and private stakeholders. Justice has as many stakeholders as India has citizens and its domain is so wide that it impacts multifarious aspects of human life.

Justice is of paramount importance and most discussed objective of the State and society and also serves as foundation for orderly human living. Justice demands the regulation of selfish actions of people for securing a fair distribution, equal treatment of equals, and proportionate and just rewards for all. It stands for harmony between individual interests and the interests of society. Justice is of central importance to political theory. In defending or opposing laws, policies, decisions and actions of government, appeals are made in the name of justice. Persons involved in every agitation for securing their interests always raise the slogan: "We want Justice". All civil rights movements are essentially movements for justice.

Justice stands for rule of law, absence of arbitrariness and a system of equal rights, freedoms and opportunities for all in society. In fact, justice stands recognized as the first virtue or ideal or objective to be secured. In its preamble, the Constitution of India gives first priority to the securing of "justice - social, economic and political" for all its people. In contemporary times justice stands conceptualized basically as social justice.

In the above backdrop this paper aims to analyse the philosophical and social interpretation of justice in India by the higher courts and evolution in the scope of justice that have taken place in the society post adoption of the constitution and what justice means in today's date.

2. Meaning and Concept of Justice

A just society is impossible to survive in absence of law. Justice must be present for a society to be legitimate. It is a crucial pillar supporting proper development of a nation.

Justice also refers to "proper implementation of the law" as opposed to arbitrariness. What we mean when we say "appropriate implementation of the law" is "right application of the law." It is by proper interpretation and putting laws into practice can justice be achieved in a community.

Justice is not a new concept but has been evolving with the evolution of civilization and society. It is deeply ingrained in the roots of our Indian civilization. Justice is an elastic concept which varies from people to people from time to time, according to the prevailing conditions, customs, traditions, religious beliefs, and above all philosophy of life which determines the moral sense of the community.[1] To put it in other words, it would mean that "justice is justness" and the standards for what is considered to be just are as dynamic as human society is and is not a fixed criterion. Though several explanations and meaning has been provided by different scholars to the term justice but the most basic and clearest is given by Lord Denning who has stated that "justice is what the right minded members of the community believe to be fair".[2]

Justice may mean different things for different set of people *viz*., "to an ordinary person, justice may mean due punishment for a crime. To a philosopher, justice may mean morality. To a lawyer, justice may mean the application of the rule of law."[3] In common parlance justice is the "idea of getting what one deserves", "fairness", "moral righteousness" and "equality". The expression "getting what one deserves" also means "getting punishments for 'immoral' actions." Similarly, "fairness" means "treating equals equally" which includes "treating people unequally to recognise and correct past injustices."

Justice is a complex concept and touches almost every aspect of human life. The term "Justice" finds its origin in the Latin word "Jungere" which means "to bind or tie together." The word 'Jus' also means 'Tie' or 'Bond'. Thus, it implies a system in which men are tied or joined in a close relationship. Justice seeks to harmonise different values and to organise upon it all human relations. As such, justice means bonding or joining or organising people together into a right or fair order of relationships. To put this in context, "justice" means to tie individuals in a society together and to harmonize a balance between them which results in an enhancement of human relations.

Justice could also be related to French word 'jostise' which means "uprightness", "equity", "vindication of right", "administration of law." It is a term which has multiple dimensions and therefore it is subject matter of intellectual debates and discourse. A clear and concise definition is yet to be settled on. The only common theme found in the vast amount of

1 S.M.N. Raina, *Law Judges and Justice*, 40 (Dialogue Publications, New Delhi, 2nd edn., 1986).

2 Lord Denning, M.R., *The Road to Justice*, 4 (Stevens & Sons Ltd., London, 1955).

3 Komal Parnami, "Concept of Justice: Difficulties in Defining", 2 *International Journal of Law Management & Humanities* (2019).

discussions and deliberations is that justice forms a broad segment of human morality and is very closely interlinked with it.[4]

Justice as a concept is related to the underlying presumption that it is synonymous to the principle of equal rights and opportunities and to get fair treatment. In this context equality, fairness and liberty are pillars of justice.[5] The principle of equality implies that "equals should be treated equally and unequals unequally". The term "equality" signifies "the absence of special privileges to any section of the society, and provision of adequate opportunities for all individuals without any discrimination." The preamble secures to all citizens of India "equality of status and opportunity." This provision embraces three dimensions of equality- civil, political and economic.[6]

Justice is the quality that ensures that each person receives his rightful compensation and "individuals should be treated the same, unless they differ in ways that are relevant to the situation in which they are involved". Also, justice and fairness are terms that are closely interlinked with each other. "Fairness" implies "what appears to be fair to a disinterested, impartial and reasonable observer."[7] According to Herbert Spencer "liberty is an integral aspect of justice" and "the essence of justice is that every man is free to do which he wills provided he infringes not the equal freedom of any other man". Also, Immanuel Kant has considered justice as "to act in such a way that the maximum of your actions may become a universal principle that everyone follows". Justice can be understood as "the standard of rightfulness" which means that "minimum threshold should be applicable of what will amount to right or wrong." The perception of justice may change over time in every society which may result into differences in social and physical systems.

It is interesting to note that "the idea of justice is so ancient that everything has been said about it and at the same time, it is so modern that it constitutes an ever-changing context of contemporary society." In this context deliberation could be made on traditional meaning of justice on the one hand and technical and complex meaning on the other hand which it has acquired through evolutionary process. Traditionally, justice was taken "as a moral virtue of character as well as an important and desirable attribute that a political society requires." Plato said that "justice is giving to each person his due". Therefore, justice traditionally means "ensuring that fair results are produced and each person duly receives what he is entitled to." On the other hand, Aristotle viewed "justice as fairness among individuals and developed the ideas of distributive justice, fairness in distribution of goods

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4 Yashwant Sanjenbam, "My Idea of Justice", available at: https://maslsa.nic.in/docs/Publications/01_Yashwant_Sanjenbam.pdf (last visited on April 25, 2024).

5 *Supra* note 1.

6 Laxmikanath, M., Indian Polity, 29 (McGraw Hill & Chronicle Publications, Noida 2008).

7 *Supra* note 1.

and opportunities to individuals and in case of a fault in it, corrective justice comes into play."[8] Karl Marx said that "the idea of justice and its content varies with the economic interest of the ruling class."[9] John Rawls' developed a "theory of *justice" which was based on social contract theory and viewed "justice as fairness" and held that "justice as fairness* describes a society of free citizens holding equal basic rights and cooperating within an egalitarian economic system."[10] Rawls argued that "equal distribution of resources should be the desirable state of nature instead of following utilitarian philosophies."[11] His *Theory of Justice* holds that "every individual has an equal right to basic liberties, and that they should have the right to opportunities and an equal chance as other individuals of similar ability."[12]

This concept is no longer widely held in the contemporary discourse on justice. The unwavering belief that there is a single, perfect set of ideals that form the cornerstone of social justice has come under heavy scrutiny. Probably the greatest way to illustrate this point is through Prof. Amartya Sen's tale of "Three Children and a Flute" in which "Anne, Bob and Carla contesting for the ownership and possession of a flute. Anne being the only one knowing how to play a flute claims it for herself. Bob on the other hand counters with claims of poverty and him being unable to buy a flute. Carla claims to have actually made the flute by her own skill and claims she is entitled to own it."[13]

From the standpoint of an impartial third party, each of the three makes valid arguments, each supported by a distinct theory of justice. The utilitarians believe that Anne should be in possession of what is rightfully hers, whereas the egalitarians believe Bob should be in possession and the liberals believe Carla should. Another, more creative and complex approach is for Bob to receive the money that Anne earns from playing the flute; Carla should remain the owner. But a critical viewpoint asks: Is it fair that Bob is getting money in exchange for making no contribution, Anne is losing the money she had earned by her skill, and Carla is denied her possession? What then is just in this context? Therefore, justice is still an open subject without a clear solution, as Prof. Sen himself says that "there may not indeed exist any identifiable perfectly just social arrangement on which impartial

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8 See, "The Concept of Justice", available at: https://legalvidhiya.com/the-concept-of-justice/ (last visited on April 10, 2024).

9 Donald Van De Veer, "Marx's View of Justice" 33 *Philosophy and Phenomenological Research* 379 (1973).

10 See, "Stanford Encyclopedia of Philosophy- John Rawls", available at: https://plato.stanford.edu/entries/rawls/ (last visited on March 311, 2024).

11 *Ibid*.

12 *Ibid*.

13 *Ibid*.

agreement would emerge and the choosing of any one alternative can appear to be just but is instead arbitrary."[14]

When we examine the contemporary conception of justice within the framework of a legal system, we find that natural justice is ingrained in the laws and that compliance with them is necessary for justice to be served. Legal justice is justice administered in conformity with such legal regulations. The law establishes what a person is entitled to as well as the conditions under which he may assert that entitlement. An individual who has such a claim or entitlement is referred to as a right-holder. The person who bears the responsibility of acknowledging and upholding the rights of others is known as the duty bearer. When rights are granted by the law, justice is served when those rights are upheld by the law. When a person's right is violated he would suffer injustice. This implies that in order for justice to be served, the right-holder would need a remedy, which the legal system offers. Therefore, the availability of a remedy is essential to the enjoyment of a legal right, since the right cannot be meaningfully exercised in the absence of a remedy.

The contemporary perspective holds that justice is about putting the right into practice. It is therefore possible to argue that the idea that justice was once a moral or religious requirement, but that it became secularized with the passage of time and in the modern era it is equated with access to justice. Two factors can be used to explain the Indian conception of justice. There are two perspectives on justice: the traditional Indian (or Hindu) perspective and the notion of justice as it is outlined in the constitution. The spiritualist philosophy of Indian thought has also adopted the idea of justice.

3. The Preamble to the Constitution and Idea of Justice

"Justice" is arguably the most poignant term in the Constitution. The word "justice" is just one word however, it is an emancipating and multifaceted term. Furthermore, "justice" is both the means and the goal of our constitutional and nation-building process. In the narrow sense of legal system, justice is served when right and wrong are adjudicated upon in a courtroom. And more so when justice is accessible, affordable and quickly available to all citizens, irrespective of background. But justice must also be seen in a wider context – in terms of society's evolution and its changing beliefs, lifestyles and technologies.

In the preamble to the Constitution, "Justice - social, economic, and political" is a promise made to all Indian citizens. An indispensable tool for understanding and interpreting the Constitution is the preamble. The preamble serves as the Constitution's original text. The preamble does not view justice as a one-dimensional concept. It is thought to have effects in the social, political, and economic domains. Equal adult participation in the political process as well as the just creation and application of laws are prerequisites for political justice. Fair wages, equal possibilities for employment, and the complete eradication of poverty

14 *Ibid*.

are all implied by economic justice. Therefore, increasing employment, entrepreneurship, and the economy are some instances of economic justice.

Social justice is still a cornerstone of our nation's development, especially in light of the diverse history of our people as well as the inequalities and hierarchies that have occasionally characterized the past. Simply speaking, it means eradicating social disparities and balancing competing demands and claims from various communities and groups and providing equal opportunity is central to social justice. This conceptualization of justice is still applicable in the 21st century, notwithstanding the obstacles that have arisen since 1949. Undoubtedly, the notion of justice—political, economic, and social—has a strong foundation, but it also requires fresh perspectives. It needs to be applied anew to new circumstances that may not have existed or been anticipated when the founders of our Constitution were at work.

"Political justice" in the electoral arena does not stop with free and fair elections and with universal franchise. Or with the right of every citizen who meets age and other criteria to offer oneself as a candidate. Improving transparency in campaign finance is also an example of promoting political justice. Disruptions in parliamentary proceedings are an unfortunate occurrence which can be seen as encroachment on the citizen's understanding of justice.

The concept of social justice has also broadened to include contemporary civic standards in India, including clean air, less polluted cities and towns, rivers, and water bodies, hygienic and sanitary living circumstances, and environment friendly growth and development. From the perspective of social justice, these are all ramifications of environmental and climate justice. One could argue that there is a social equity gap if a youngster develops asthma as a result of air pollution.

Perhaps the most tantalising influence on justice is that of technology. This is especially so because this is an era of rapid and enormous technological change – of big data and automation, and of the fourth industrial revolution. Technology is an enhancer of justice as well as a challenge. A need is being felt to think of technology justice as a subset of economic justice. This is very true in the context of access to technology for the poorer and less-privileged fellow citizens.

Technology has made huge contributions to the quality of life. Innovations in agricultural technology that began with the green revolution, have made India self-sufficient in food and have rolled back hunger. New vaccines and life-saving drugs have eradicated diseases and improved life expectancy. The telecom surge has reduced distances and allowed businesses to become more efficient. And the internet has made knowledge democratic and accessible. Information is no longer a privilege, it is a commodity. Innovation has also worked for the benefit of disadvantaged sections of society. A case in point is India's

experience with technology-enabled, Aadhar-linked direct benefit transfers. These have plugged corruption, leakages and exclusion from India's welfare programmes. Although innovation and technology have brought gains, however, questions of access and privacy have also arisen simultaneously. For example, there is the dilemma of weighing data privacy against the use of data for the greater common good. Within these competing imperatives lie competing notions of justice. And such issues will probably stay with us through the 21st century.

The adoption of the Constitution was a milestone in India's democratic journey. In the last seven decades, as democracy has deepened, so is the aspiration for justice. The expansion of the idea of justice is a consequence of an informed and demanding citizenry attempting to forge novation of social contract with a responsive state. The preamble to the Constitution begins with the words – "We, the people of India, having solemnly resolved to constitute India into a sovereign socialist secular democratic republic and to secure to all its citizens: JUSTICE, social, economic and political………". Thus, the very opening lines in the Preamble to the great Constitution lay down one of the most significant purposes of the Constitution i.e. JUSTICE.

The preamble to the Constitution enshrines the country's contemporary goal of fairness. The framers of the Constitution made sure to include justice in the preamble itself because they understood how important it was to establish justice. The concept of justice expressed in the preamble of the Indian constitution is also reflected in Articles 14, 15, 16, and 17 which are enshrined in Part III of the constitution which grants every citizen fundamental rights. The Constitution contains provisions pertaining to "Equal Justice and Free Legal Aid" under article 39A which grant every individual the right to get *pro bono* legal assistance from court officers. No one can be refused free legal representation. In order to guarantee that no citizen is denied the opportunity to obtain justice because of their financial situation or other impairments, the State must guarantee that the legal system operates on the principles of fairness, equal opportunity, and free legal assistance. In the celebrated case of *Kesvananda Bharati* v. *State of Kerala,*[15] the Supreme Court held that "fundamental rights and directives principles aim at the same goal of bringing about a social revolution and establishment of a welfare state and they can be interpreted and applied together and that they are supplementary and complementary to each other."

When social and economic disparities exist, political and equitable justice is constantly denied. An oppressed and impoverished individual can practically not engage in the political process or seek legal protection from the courts. Natural justice is justice that is commonsensical in nature. The Preamble to the Constitution understands justice as having social, economic, and political dimensions. This all-encompassing notion of justice is

15 (1973) 4 SCC 225.

reiterated in Article 38(1), which requires the state to strive to secure and protect "a social order in which justice, social, economic and political, shall inform all the institutions of the national life."

The idea of distributive justice is one of the key ideas of justice that the constitution upholds. Fair resource allocation to those who need it is known as distributive justice. The distributive justice principle lays down how a class of people should be allocated rights, goods, and well-being. This has been described in Article 38 and 39 of Indian Constitution. Also, the idea of corrective justice has emerged which rectifies the injustice inflicted by one person on another which ensures that the accused offenders repairs the harm caused by apologising, returning stolen goods and/or community service. Natural justice, economic justice, political justice, social justice, and legal justice are a few examples of the many diverse types of justice.

3. Judicial Interpretation of Justice

Indian judiciary serves as the guardian of fundamental rights and the protector of civil rights. It is crucial to the execution of the three different types of justice guaranteed by the Indian Constitution. The judiciary has been crucial in establishing justice in the nation and making the idea of justice stated in the preamble a reality. The judicial attitude has been progressive, and it has demonstrated via its judgements that justice is an essential aspect of a developed and law-abiding community.

The idea of social justice has been given a fundamental and dynamic shape by the Indian Supreme Court. The court rulings have been guided by social fairness. By permitting affirmative action by the government and holding that compensatory justice and distributive justice are both forms of distributive justice that guarantee a more just and equitable distribution of communal resources among all citizen groups, the judiciary has given practical form to social justice. Through the imposition of the old contractual responsibilities, the concept of social justice has brought about a fundamental change in industrial society. It is no longer a confined, skewed, or enigmatic idea. Its goal is to support the elimination of socioeconomic disadvantages and inequalities. It is based on the fundamental concept of socioeconomic equality.

The rule of law and equality serve as the cornerstones of the Constitution. A similar theory was articulated by the Supreme Court in *Vishakha* v. *State of Rajasthan*,[16] which stated that no adequate philosophy of justice could be developed without finding a place for equality and freedom in the system of societal structure. The Supreme Court ruled that sexual harassment in the workplace is illegal. The only way to free women from harassment and exploitation is to empower them to develop and flourish in a comfortable environment.

16 1997 (6) SCC 241.

The concepts of 'social justice' and 'economic empowerment' trace their roots in very firm ideals and principles which form the bedrock of the Indian Constitutional ideology. The Supreme Court in *S.R. Bommai* v. *Union of India*,[17] included social justice amongst the unalterable "basic features of the Constitution", while, economic empowerment has been viewed by the Supreme Court as an 'integral constitutional scheme' and as a 'basic human right' in *R. Chandevarappa* v. *State of Karnataka.*[18]

A more notable example of how the judiciary has put social justice into practice is in the progressive reading of the Constitutional provisions that permits affirmative action by the government. In *Indra Sawhney* v. *Union of India*,[19] the Supreme Court declared "twenty seven percent reservations legal for socially and economically backward classes of the society under central services." The Court also attempted to strike a fair balance between distributive justice and benefit distribution at the same time. In *M.R. Balaji* v. *State of Mysore*,[20] it held that "for the object of compensatory justice, limit of reservation should not be more than 50%."

The idea of social justice has been given a dynamic structure by the Supreme Court. In *Calcutta Electrical Construction Company Ltd.* v. *S.C. Bose*,[21] the Court held that "the right to social and economic justice is a fundamental right." Mr. Justice K. Ramaswamy amplified the concept in *Consumer Education Research Centre* v. *Union of India*,[22] and observed that "the Preamble and Article 38 of the Constitution of India, the supreme law, envisions social justice as its arch to ensure life to be meaningful and liveable with human dignity. Social justice, equality and dignity of person are cornerstones of social democracy. The concept 'social justice' which the Constitution of India engrafted, consists of diverse principles essential for the orderly growth and development of personality of every citizen. Social justice is a dynamic device to mitigate the sufferings of the poor, weak, *Dalits*, Tribals and deprived sections of the society and to elevate them to the level of equality to live a life with dignity of person. In other words, the aim of social justice is to attain substantial degree of social, economic and political equality, which is the legitimate expectations."

The Supreme Court in *D.S. Nakara* v. *Union of India*,[23] observed that "the principal aim of socialism is to eliminate inequality of income and status and standard of life

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17 AIR 1994 SC 1918.

18 1995 (6) SCC 309.

19 AIR 1993 SC 497.

20 AIR 1963 SC 649.

21 1992 (1) SCC 441.

22 AIR 1995 SC 922.

23 AIR 1983 SC 130.

and to provide a decent standard of life to the working people. The expression 'social and economic justice' involves the concept of 'distributive justice', which connote the removal of economic inequalities and rectifying the injustice resulting from dealings or transactions between the unequals in society. Social justice, therefore, comprehends more than lessening of inequalities by differential fixation, giving debt relief or regulation of contractual relations."

In *Minerva Mills Ltd*. v. *Union of India*,[24] the Constitution Bench had examined the definition of "socialism" in order to solidify a socialistic state that ensured socioeconomic fairness for its citizens through the interaction of the Directive Principles and the Fundamental Rights. The Court further added that "Rights in Part III are not an end in themselves but are 'the means to an end', and the end is specified in Part IV. Together, the two realize the idea of justice, which the Indian State seeks to secure to all its citizens."

In *Minerva- Mill's case*,[25] the Supreme Court observed that "Parts III and IV together constitute the core of commitment to social revolution and they, together, are the conscience of the Constitution is to be traced to a deep understanding of the scheme of the Indian Constitution. Parts III and IV are like two wheels of a chariot, one no less important than the other. Snap one and the other will lose its efficacy. They are like a twin formula for achieving the social revolution which is the ideal which the visionary founders of the Constitution set before themselves. In other words, the Indian Constitution is founded on the bed-rock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution." Therefore, the Supreme Court firmly maintained that the two wheels of the chariot—fundamental rights and directive principles—should be read in a way that promotes equality in society after *State of Madras* v. *Champakam Dorairajan*,[26] wherein the Court had held that "the Chapter of Fundamental Rights is sacrosanct and not liable to be abridged by any legislative or executive act or order, except to the extent provided in the appropriate article in Part III. The directive principles of state policy have to conform to and run as subsidiary to the Chapter of Fundamental Rights."

Article 46 states that "the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the scheduled castes and the scheduled tribes, and shall protect them from social injustice and all forms of exploitation." As a measure of promoting social and economic justice the courts in

24 AIR 1980 SC 1789.

25 AIR 1980 SC 1789.

26 AIR 1951 SC 226.

Rangachari's case,[27] and *Thomas case*,[28] declared that "reservation in promotions is a part of equality in Article 16(1)" which was also affirmed in *Indra Sawhney's case,*[29] that "Article 16(4) is facet of Article 16(1) itself." It has also been held that "the protection of the minorities in Articles 29 and 30 is a facet of right to social justice and prohibition on grounds of religion outlawed by guaranteeing freedom of religion, right to practice of their choice and right to manage subject to social welfare of their institutions."

The Apex Court in *Ashok Kumar Gupta* v. *State of U.P.,*[30] held that "it is now settled legal position that social justice is a fundamental right and equally economic empowerment is a fundamental right to the disadvantaged." In *Ajaib Singh* v. *Sirhind Coop.*,[31] the Court observed that "in dealing with industrial dispute the Courts should keep in mind the doctrine of social justice which is founded on basic ideal of socio-economic equality as enshrined in the Preamble of our Constitution." The Supreme Court in *Municipal Corporation of Delhi* v. *Female Workers (Muster Roll)*,[32] held that "the provision entitling maternity leave under the Maternity Benefit Act, 1961, even to women engaged on casual basis or on muster roll basis on daily wages and not only to those in regular employment are in consonance with the doctrine of social justice and any contention against it is contrary."

In *S.R. Bommai* v. *Union of India*,[33] it has been opined that "social justice and judicial review are the basic feature of the Constitution of India. The seeds of social justice are seeded within the Preamble. Articles 14, 15 and 16 speak of equality before law and equal protection of laws. Besides the Preamble, the Directive Principles of State Policy contained in Chapter IV of the Constitution expostulate the philosophy of social justice." In *Workmen of Meenakshi Mills Ltd.* v. *Meenakshi Mills Ltd*.,[34] the Apex Court held that "the Preamble to the Constitution declares the solemn resolve of the people of India to secure to all the citizens justice-social, economic and political. This resolve finds elaboration in Directive Principles of State Policy contained in Part IV."

The content, ambit and interplay of justice and social justice was elucidated in *Consumer Education & Research Centre* v. *Union of India,*[35] wherein the Apex Court observed that "the constitutional concern of social justice, as an elastic continuous process, is to transform

27 *The General Manager, Southern ...* v. *Rangachari*, 1962 SCR (2) 586.

28 *State of Kerala* v. *N. M. Thomas*, 1976 SCR (1) 906.

29 *Indra Sawhney* v. *Union of India*, 1992 Supp 2 SCR 454.

30 AIR 1997 SC 283.

31 AIR 1999 SC 1351.

32 AIR 2000 SC 1274.

33 AIR 1994 SC 1918.

34 (1992) 3 SCR 33.

35 (1995) 3 SCC 42.

and accord justice to all sections of the society by providing facilities and opportunities to remove handicaps and disabilities with which the poor etc. are languishing. It aims to secure dignity of their person. It is the duty of the state to accord justice to all members of the society in all facets of human activity. The concept of social justice embeds equality to flavour and enlivens practical content of life. Social justice and equality are complementary to each other so that both should maintain their vitality. Rule of law, therefore, is a potent instrument of social justice to bring about equality in result."

In *M. Nagraj* v. *Union of India*,[36] it was held that "Article 38 in Part- IV is the only Article which refers to justice- social, economic and political. However, the concept of justice is not limited only to directive principles. There can be no justice without equality. Article 14 guarantees the fundamental right to equality before the law on all persons. Great social injustice resulted from treating sections of the Hindu community as 'untouchable' and, therefore, Article 17 abolished untouchability and Article 25 permitted the State to make any law providing for throwing open all public Hindu religious temples to untouchables. Therefore, provisions of Part-III also provide for political and social justice."[37]

The Supreme Court in *Muir Mills Co. Ltd.* v. *Suti Mills Mazdoor Union*,[38] realized the difficulty of defining the phrase 'Social justice' and refused to lay down any rigid-definition when is said that "social justice is a very vague and indeterminate expression and no clear cut definition can be laid down which will cover all situations", but it added that "concept of social justice does not emanate from the fanciful notions of any adjudicator nor the phrase means that reason and fairness must always yield to the convenience of a party-convenience of the employee at the cost of the employer… in an adjudication proceedings".[39] The Supreme Court, however, regarded the concept of social justice "as living concept of revolutionary import, it gives sustenance to the rule of law and meaning and significance to the ideal of a welfare state".[40]

The delicate task of administering social justice by balancing individual's rights and the needs of society in imposing social control, falls on the shoulders of judiciary in general, and the Supreme Court in particular. Referring to the aspect of social justice Subba Rao, C. J.,[41] as he then was, had observed that "the rule of law under the Constitution has a glorious content. It embodies the modern concept of law evolved over the centuries….It enjoins to bring about a social order in which justice, social, economic and political shall inform all

36 AIR 2007 SC 71.

37 *M. Nagraj* v. *Union of India*, 2006 (8) SCC 212.

38 Per Bhagwati, J. AIR 1955 SC 170.

39 Per S. K. Das Justice in *Panjab National Bank* v. *Sri Ram Kanwar*, AIR 1957 SC 276.

40 Per Gajendragadkar, J. in *State of Mysore* v. *Workers of Gold Mines*, AIR 1958 SC 923.

41 *I. C. Golaknath* v. *State of Punjab*, AIR 1967 SC 1643.

the institutions of national life. It directs it to work for an egalitarian society where there is plenty, where there is equal opportunity for all, to education, to work, to livelihood, and where there is social justice …".

In *Balbir Kaur* v. *Steel Authority of India*,[42] the court held that "the concept of social justice is a yardstick to the justice administration system or the legal justice and it would be an obligation for the courts to apply the law depending upon the situation in a manner whichever is beneficial for the society". In another case it was held that "Social justice is a device to ensure life to be meaningful and liveable with human dignity. State has to provide facilities to reach minimum standard of health, economic security and civilized living to the workman. Social justice is a means to ensure life to be meaningful and liveable".[43]

In *Samantha* v. *State of Andhra Pradesh*,[44] the Court observed while defining socialism that "Establishment of the egalitarian social order through the rule of law is the basic structure of the constitution." In order to achieve a significant level of social, economic, and political equality, the Court placed a strong focus on social justice. The concept of distributive justice was advanced by the court in order to ensure the equitable allocation of the nation's material resources and to benefit the common welfare.

Chief Justice K.G. Balakrishnan opined that "Why you define socialism in the narrower sense as the communists do? … why don't you go by the broader definition which mandates the state to ensure social welfare measures for all the citizens as a facet of democracy?" By reading the word socialist in the preamble with fundamental rights contained in article 14 and 16 of the constitution, the Supreme Court has deduced the fundamental right to equal pay for equal work and compassionate appointment.

The doctrine of implied Fundamental Rights connotes that in order to treat a right as a Fundamental Right it is not necessary that the same should be mentioned expressly in the Constitution.[45] As observed by the Court in *Unni Krishnan* v. *State of Andhra Pradesh*,[46] "Political, social and economic changes entail the recognition of new rights and the law in its eternal youth grows to meet the demands of society."

Thus, through the marvel of judicial creativity and to a large extent, due to the expanding dimension of Right to life i.e. Article 21 of the Constitution, the Supreme Court has accorded the status of fully enforceable rights on many directive principles. The transition

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42 AIR 2000 SC 226.

43 *Consumer Education & Research Centre* v. *Union of India*, AIR 1995 SC 922.

44 1997 (8) SCC 191.

45 M.P. Jain, *Indian Constitutional Law* 880 (LexisNexis, Haryana, 8th edn., 2018).

46 1993 (1) SCC 645.

has been visualized chiefly in the times following *Maneka Gandhi* v. *Union of India*,[47] case. Right to food, Right to education, Right to free legal aid, Right to livelihood, Right to socio-economic justice including Right to social justice and economic empowerment are some of the many rights that are an outcome of judicial creativity.

Though the Supreme Court had always held the concept and significance of social justice in high regard since the times of the dawn of Indian republic, it was, however, in *C.E.S.C. Limited* v. *Subhash Chandra Bose*,[48] that the Apex Court laid down that right to social justice is a fundamental right. There is a huge difference in plainly recognizing the significance of a certain concept and raising the status of the very same concept to the high pedestal of a Fundamental Right. The Court observed that "the aim of fundamental rights is to create an egalitarian society to free all citizens from coercion or restrictions by society and to make liberty available for all. Right to human dignity, development of personality, social protection, right to rest and leisure as fundamental human rights to common man mean nothing more than the status without means… Socio-economic and cultural rights are their means and relevant to them to realise the basic aspirations of meaningful right to life…"[49]

The Court then referred to various social and economic rights viz. right to food, clothing, housing, education, livelihood, leisure, fair wages, decent working conditions, social security, physical and mental health, the same being recognized by Universal Declaration of Human Rights and International Conventions on Economic, Social and Cultural Rights as integral facet of the crucial right to life. The Court outlined how the Indian Constitution provides for the very same rights by engrafting the concept of socio-economic justice and observed that "…Our Constitution in the Preamble and Part IV reinforce them (i.e. socio-economic and cultural rights including right to food, clothing, housing etc) compendiously as socio-economic justice, a bed-rock to an egalitarian social order. The right to social and economic justice is thus fundamental right."[50]

Coming to the concept of economic empowerment, it can easily be gauged by looking through the huge span of the judgments of the Supreme Court that the relevance of the concept was never dormant in the Indian Constitutional jurisprudence but the big transition occurred in 1995, when economic empowerment was recognized in *Murlidhar Dayandeo Kesekar* v. *Vishwanath Pandu Barde*,[51] case as a basic human right and a fundamental right of the various depressed sections in India. The portraiture given by the Supreme Court in this case regarding the significance of economic empowerment in Indian context

47 AIR1993 SC 2178.

48 AIR1992 SC 573.

49 *Ibid*.

50 *Ibid*.

51 1995 Supp. (2) SCC 549.

is worth mentioning: "Providing adequate means of livelihood for all the citizens and distribution of the material resources of the community for common welfare, enable the poor, the *Dalits* and tribes to fulfil the basic needs to bring about a fundamental change in the structure of the Indian society which was divided by erecting impregnable walls of separation between the people on grounds of cast, sub-caste, creed, religion, race, language and sex. Equality of opportunity and status thereby would become the bedrocks for social integration. Economic empowerment thereby is the foundation to make equality of status, dignity of person and equal opportunity a truism."[52]

The Court observed "economic empowerment as a key factor in bringing about a considerable improvement in the lives of the depressed sections. Steps taken for economic empowerment viz. providing adequate means of livelihood and distribution of material resources of society shall be highly conducive in the direction of improving the overall structure of the Indian community which had been scathed by the divisive malpractices of the yester years." The Court finally observed that "Economic empowerment to the poor, *Dalits* and Tribes, is an integral constitutional scheme of socio-economic democracy and a way of life of political democracy. Economic empowerment is, therefore, a basic human right and a fundamental right as part of right to live, equality and of status and dignity to the poor, weaker sections, *Dalits* and Tribes."[53] Quite similar were the observations of the Court in *R. Chandevarappa* v. *State of Karnataka*.[54]

Social justice and economic empowerment are concepts which are complementary and mutually conducive to each other. Both the concepts go hand in hand. In *State of Bihar* v. *Kameshwar Singh*,[55] the Court held that "the ideal we have set before us in Art. 38 is to evolve a State which must constantly strive to promote the welfare of the people by securing and making as effectively as it may be, social, economic and political justice that shall inform all the institutions of the national life." The idea of social justice is made up of many different ideas that are necessary for each citizen's personality to develop in an ordered manner. It is an effective tool for lessening the suffering of the underprivileged, weak, *Dalit*, tribal, and destitute groups of people.[56] Again in the case of *Air India Statutory Crop.* v. *United Labour Union*,[57] the court observed that "the Preamble and Art 38 of the Constitution envision social justice as the arch to ensure life to be meaningful and liveable with human dignity."

52 *Ibid*.

53 *Ibid*.

54 1995 6 SCC 309.

55 AIR 1952 SC 252

56 *Consumer Education & Research Centre* v. *Union of India,* AIR 1995 SC 922.

57 AIR 1997 SC 654.

The Supreme Court has broadened the definition of justice to include economic justice, so transforming it into a tool for eliminating socioeconomic inequality. In *J. K. Cotton Spinning & Weaving Mills* v. *The State of Uttar Pradesh*,[58] it pointed out that "in industrial matters, doctrinaire and abstract notions of social justice are to be avoided and realistic and pragmatic notions applied so as to find a solution between the employer and the employees which is just and fair."

The Supreme Court has expanded the envelope of social justice by adjudicating on diverse social matters concerning education, livelihood, gender and environment. In *Mohini Jain* v. *State of Karnataka*,[59] as well as *Unnikrishnan* v. *State of A.P.*,[60] the Supreme Court observed that "a man without education was no better than an animal", and held that "the right to education was an essential ingredient for a dignified and meaningful life." In *Rural Litigation Entitlement Kendra* v. *State of U.P.*,[61] as well as *M.C. Mehta* v. *Union of India,*[62] the Court held that, right to life includes right to live in a clean and healthy environment. In *Bandhua Mukti Morcha* v. *Union of India*,[63] the Court, while decrying the practice of bonded labour, held that Right to life, under Article 21, means right to live with dignity. In *Vishakha* v. *State of Rajasthan*,[64] it held that sexual harassment of a woman at workplace, is a denial of both her right to life and personal liberty under Article-21, as well as amounted to discrimination on the basis of sex, and violated the right to equality guaranteed under Articles 14 and 15. In *Paschim Banga Khet Mazdoor Samity* v. *State of West Bengal*,[65] the Court deemed the failure on the part of the Government hospital to provide timely medical treatment to a person in need of such treatment a violation of his right under Article-21. Thus, the Supreme Court of India has delivered many judgments[66] to strengthen the concept of social justice and always stepped in to protect the interest of the Indian citizens through the objective enshrined in Constitution.

58 AIR 1961 SC 1170.

59 1992 (3) SCC 666.

60 1993 (1) SCC 645.

61 1985 (2) SCC 431.

62 AIR 1987 SC 1086.

63 1984 (3) SCC 161.

64 1997 (6) SCC 241.

65 1996 SCC (4) 37.

66 *M.H. Hoscot* v. *State of Maharastra*, AIR 1978 SC 1548, *P. U.D.R.* v. *Union of India*, AIR 1982 SC 1473, *Bandhua Mukti Morcha* v. *Union of India*, AIR 1982 SC 849, *State of Kerala* v. *N.M. Thomas*, AIR 1976 SC 490, *Indira Sawhney* v. *Union of India*, AIR 1993 SC 497, *Neerja Chaudhary* v. *State of M.P.,* 1983(3) SCC 243.

In *Shayara Bano* v. *Union of India*,[67] a constitutional bench of the Supreme Court while extending its arm in the domain of personal laws in order to ensure women empowerment as a measure of social justice struck down the practice of triple *talaq* as illegal and violative of fundamental rights guaranteed under Article 14 of the constitution. Subsequently, the government enacted the Muslim Women (Protection of Rights on Marriage) Act, 2019, prohibiting triple *talaq* as void and illegal. It provides imprisonment for up to 3 years and a fine to the husband who practiced instant *triple* talaq.

In *Vineeta Sharma* v. *Rakesh Sharma*,[68] the Apex Court while dealing with an important legal issue "whether the Hindu Succession (Amendment) Act, 2005, which gave equal right to daughters in ancestral property, has a retrospective effect?" held that "daughters must be given equal rights as sons, daughter remains a loving daughter throughout life. The daughter shall remain a coparcener throughout life, irrespective of whether her father is alive or not". Therefore, a daughter will have a share after Hindu Succession (Amendment) Act, 2005, irrespective of whether her father was alive or not at the time of the amendment.

In *Aureliano Fernandes* v. *State of Goa*,[69] the Supreme Court observed that "even after a decade of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ("POSH Act") being formulated, its implementation and enforcement is still inadequate" and in order to "fulfil the promise that the POSH Act holds out to working women all over the country" issued a slew of directions for the proper implementation of the POSH Act all over the country.

In *NALSA* v. *Union of India*,[70] the Supreme Court dealt with the issue of justice for sexual minorities where the Court said that "the right to self-determination for transgender persons is an instance where it has led the complex social process of inclusion. While crafting the range of remedies for transgender persons, it held that they were a socially and educationally backward class of citizens who ought to be eligible for affirmative action in education and employment besides welfare and other policies." The Supreme Court recognized transgender people as a third gender and affirmed their fundamental rights under the Indian Constitution and held that "the State was bound to take affirmative action for their advancement so that the injustice done to them for centuries could be remedied." It was held that "gender identity is an integral part of a person's identity and cannot be determined solely by biological factors." This, in turn, led to the enactment of the Transgender Persons (Protection of Rights) Act, 2019. Further, in *Navtej Singh Johar* v.

67 AIR 2017 SC 4609.

68 (2020) 9 SCC 1.

69 2023 SCC Online SC 621.

70 (2014) SCC 438.

Union of India,[71] the Court decriminalized all consensual sex among adults and led to the inclusion of the LGBTQ community in mainstream society.

In *Gujarat Mazdoor Sabha* v. *State of Gujarat*,[72] the Supreme Court quashed the notification issued by the Gujarat Labour and Employment Department granting exemptions to all factories in Gujarat from provisions of the Factories Act, 1948 relating to daily working hours, weekly working hours, intervals for rest and spread overs of adult workers as well as from payment of overtime wages at double rates and held that "the 'right to life' guaranteed to every person under Article 21, which includes a worker, would be devoid of an equal opportunity at social and economic freedom, in the absence of just and humane conditions of work. A workers' right to life cannot be deemed contingent on the mercy of their employer or the State. The notifications, in denying humane working conditions and overtime wages provided by law, are an affront to the workers' right to life and right against forced labour that are secured by Articles 21 and 23 of the Constitution." The Court observed that the pandemic cannot be a reason to do away with statutory provisions that provide dignity and rights for workers by the Gujarat Government and held that "the pandemic is not a 'public emergency' within the meaning of Section 5 of the Factories Act threatening the security of the country."

These cases decided by the Apex Court depict the role of the Court in advancing justice-social, economic and poitical is a testament to the fact that it is an institution that is responsive to aspirations of a rapidly changing social milieu. In the decades to come, the Supreme Court as a composite institution would serve in a more effective manner and steer the chariot of justice towards a constitutional destiny.

4. Conclusion

Social, economic, political, and legal justice are the four main facets of justice. These types are entirely dependent on one another and connected to one another. Justice can only be truly appreciated if it satisfies all its facets. In the absence of social and economic justice the conception of political and legal justice is misnomer. Political and equal justice are invariably denied when social and economic inequality persists. In pragmatic sense it is nearly impossible for someone who is oppressed and impoverished to seek legal protection or to be involved in the political process. Similarly, no one can truly have his social and economic liberties and rights safeguarded without political rights and equal protection under the law. Furthermore, for a meaningful life in society, justice must embrace rights, liberty and equality.

Social justice can be achieved only by ensuring economic and political justice. Provisions related to equality is enshrined in Article 14 and 15 of the Constitution which enforces all

71 2019 (1) SCC (CRI) 1.

72 (1998) 2 GLR 1135.

the three types of justice- social, economic and political. Also in 2019, 103rd constitutional amendment was made to ensure economic justice for economically weaker section people. The jurisprudence behind this amendment was implementation of economic justice. The role of judiciary becomes all the more important in Constitution as judiciary is the protector of civil rights and it acts as a custodian of fundamental rights. It is crucial pillar of state for upholding the three forms of justice guaranteed by the Indian Constitution. The judiciary has been crucial in ensuring that justice is administered throughout the nation and that the preambular description of justice is realized. In this sense, the court has taken a progressive stance, demonstrating by its rulings that justice is a necessary component of a civilized and law-abiding community.

The judiciary upholds and defends the rule of law. With society changing at its fastest rate ever in the 76th year of independence, the objective of a welfare state must take centre stage. Part IV of the Constitution dealing with Directive Principles of State Policy lays down goals and purposes that is to be pursued by the state. Only if the state works to carry out its constitutional and welfare state obligations with a strong moral sense can they be realized. By establishing and defending a social order where social, economic, and political justice inform all national institutions, efforts should be made to advance the wellbeing of the populace.

Despite the enormous advancements in practically every field, particularly the economics, science, technology and infrastructure development, the gap between the rich and the poor is continuously widening. In India, the courts have played crucial role in ensuring social justice to people. Legislature and the judiciary both play significant roles in distributive justice, but courts are more effective in providing compensatory or corrective justice; both ideas are understood to be mutually relative rather than mutually exclusive. Delivering social justice is the aim and objective.

India is one among the nations that upholds the "principle of social justice." Yet, enunciating the "principle of social justice" is one thing, but making it effective is quite another. In order to attain social justice, we, the Indian people, need to address the myriad of problems that people face in this country, because of caste, gender, religion, culture, tradition and other. In Indian society still gross social inequity at all levels is in existence. We have to redress this inequality and change our focus from criticism to developing a theory of justice committed to intervening in and transforming the real social circumstances. In conclusion it will be important to stress that India has no shortage of laws for securing justice, it has only the shortage of commitment for implementation of the laws. It should also be remembered that it is not only the responsibility of political elite to work for achieving justice to all the section of the society, in fact it is duty of every Indian to assist his country man so that justice can be secured for all.

The Indian legal system is fundamentally based on the ideas of economic empowerment and social justice. While social justice is one of the main objectives of the Indian Constitution, economic empowerment offers a viable means of realizing many of the lofty goals set forth in the document. The ideas of economic empowerment and social justice are no longer constrained by the fundamental restrictions of the Directive Principles of State Policy, which the Constitution specifically declares unenforceable. The above ideas have gradually been given the high status of fundamental rights by the Supreme Court of India, which has also noted that they are both important components of the deeply valued right to life. The aforementioned shift is a significant advancement in contemporary Indian constitutional jurisprudence, as non-enforceable directive concepts are now endowed with the weight and fangs of basic rights. The best result of this shift, however, is that it is progressive in the direction of giving the citizens' already listed fundamental rights additional significance and value.

In contemporary India, there exists a pressing necessity for coordination between the judicial and executive branches of government. Every time a problem in our society gets out of control, the legislature creates legislation to address it; however, because the laws are not put into practice, the public, especially the masses, never sees a break in the darkness. Therefore, we must amend our current procedural law and take the required actions to ensure that laws are properly implemented, including promptly filling up the judicial vacancies in all courts, in order to build a functional judicial system. Social justice cannot be achieved by the court or by the law alone. The evolution of the justice delivery system, or the judicial system, is a crucial component of the social justice agenda, which heavily relies on the relationship and cooperation of the three branches of government. The government's efforts to ensure social fairness through equalization or protected discrimination policies have created some conflict in society, despite its well-intentioned dedication. Ensuring the appropriate and equitable execution of policies is crucial in order to transform social justice into a potent tool for advancing social progress. India's continued existence as a nation depends on how we, the people, uphold the Constitutional provisions. All citizens should study the Constitution more closely and become familiar with its wider features because besides being supreme law it is also the law for the protection of interest of majority of the people who belong to poor socio-economic background.

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Empowering Green Energy: Unleashing the Potential of Intellectual Property Rights (IPR)

Abhinav Prakash* & Dr. Niladri Mondal**

Abstract

The ongoing conflict between Russia and Ukraine, coupled with the strong opposition from European and Western nations, has triggered a major energy crisis. Further, when Russia and Saudi Arabia led OPEC+ countries refused to reduce oil production, it made the situation worse. Thus, likely to cause fuel prices to rise a lot for countries that import oil, impacting developing nations in Africa, Southeast Asia, and other regions the most. It could jeopardize the whole global economy. However, during this crisis, the International Solar Alliance (ISA) emerges as something that could change things. The ISA is a group of countries that get a lot of sunshine. These countries are working together to use more solar power. They have made a special platform to help them share ideas and collaborate. This alliance encourages using more solar energy through a dedicated platform. It allows governments, organizations, companies, industries, and other partners to join forces. The primary objective of this strategy is to meet the energy requirements of member nations in a manner that is both secure and accessible, while also being cost-effective, fair, and environmentally sustainable. This article focuses on the role and potential of Intellectual Property Rights (IPR) in facilitating this transition. Therefore, the relationship between IPR, technological transfer, and the adoption of green energy is examined, highlighting the importance of IPR.

Keywords: Green Energy, Technology Transfer, Solar Energy, International Solar Alliance

1. Introduction

"We are like tenant farmers chopping down the fence around our house for fuel when we should be using Natures inexhaustible sources of energy – sun, wind and tide. ... I'd put my money on the sun and solar energy. What a source of power! I hope we don't have to wait until oil and coal run out before we tackle that." ***Thomas Alva Edison***

Today, the world is facing one of the most severe energy crises of modern times. Russian Ukraine war and thereby the anti Russian stand of European and western countries have worsened the situation. The heads of the OPEC and OPEC+ countries, which comprises of nations that produce crude oil, are Russia and Saudi Arabia, respectively. The United States of America has requested these countries to refrain from reducing their crude oil output. Reduction in crude oil production would further worsen the energy crises by making the

* Assistant Professor, Chotanagpur Law College, Ranchi, Ranchi University, Ranchi

** Assistant Professor, Chotanagpur Law College, Ranchi, Ranchi University, Ranchi

fuel more expensive for the crude oil importing countries. Third world countries like countries of African continents, South East Asian countries, etc. would be severely affected by the surge in fuel prices, which may further worsen the global economy.

The IEA (International Energy Agency) executive director Fatih Birol in IEA's annual World Energy Outlook has acknowledged that "The energy world is shifting dramatically before our eyes. Government responses around the world promise to make this a historic and definitive turning point toward a cleaner, more affordable and more secure energy system". [1] He further added that these situations along with the emerging challenges out of the climate change issues may have a gross impact on green energy transition throughout the world. At this juncture, The International Solar Alliance (ISA) being a coalition of countries falling at the Torrid Zone (completely or partly between the Tropic of Cancer and the Tropic of Capricorn); which remains maximum number of sunny-days throughout the year may play a vital role. The goals of ISA are to create a special group that helps countries with lots of sunlight to work together. This group lets different people like governments, groups that work with two or more countries, companies, and industries all work towards the same goal: using solar energy better to meet how much energy member countries of ISA need. The way they do it makes sure this goal happens safely, easily, without costing too much, fairly, and in a way that helps the earth.

However, the basic issue with the technology transfer of solar energy technologies is that majority of the patent holder on these solar energy technologies are multinational corporations "MNCs" of the developed countries. Therefore, it requires a sufficient source of funds, knowledge base, infrastructure, and existing market to lure and motivate these multinational corporations for considering such technology transfer to third world countries. Since "IPR is one of many factors influencing firms' decisions to transfer technology to, or to invest in, a particular country. Therefore, it becomes apparent that the effects of IPRs and their strengthening are often dependent on their interrelationship with other factors, such as the size of the domestic market, the structure of factor supply, productive infrastructure, and the degree of stability of the macroeconomic environment[2]."

This paper discusses the complex relationship between intellectual property rights (IPR) and the promotion and development of green energy sector. Its primary objective is to explore the way in which IPR can act as a catalyst for the technology transfer, its adoption, and adaptation of renewable energy technologies across the globe and thereby laying the path towards realization of reliable, affordable and clean energy for all.

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1 https://www.reuters.com/business/energy/energy-crisis-sparked-by-ukraine-war-speed-up-green-transition-iea-2022-10-27/

2 Euro Faire, Patents and clean energy: bridging the gap between evidence and policy, Final report, http://www.eurosfaire.prd.fr/7pc/doc/1308064085_patents_clean_energy_study_en.pdf (accessed on 22nd Feb. 2022)

1.1 Global Demand for Global Green Energy Transition

In the present global arena, there is a major energy crisis exacerbated by political tensions. The conflict between Russia and Ukraine has provoked much anti-Russian feeling among European and western countries, while OPEC and OPEC+ alliances led by Russia and Saudi Arabia have disagreed with the USA's call to maintain crude oil production levels. This denial threatens a rise in fuel prices thereby intensifying the energy crisis further. Developing countries in Africa, Southeast Asia and beyond are especially susceptible to higher fuel charges which might strain their fragile economies. Within such context International Solar Alliance (ISA) emerges as an important gathering of solar resource rich nations situated within the Torrid Zone. ISA's main aim is to promote cooperation among member states in order to improve safe, accessible, and sustainable use of solar power.

However, a significant hindrance to the transfer of solar energy technologies still exists. Most patents in this domain are held by multinational companies (MNCs) which reside in developed countries. For multinational corporations to involve third world nations in technology transfer, a balance of funding, expertise and infrastructure as well as viable markets is required. Ultimately, the intersection of geopolitical conflicts, economic inequalities, and environmental mandates highlights the importance of teamwork to overcome the energy crisis and accelerate the transition to sustainable energy alternatives. The key thing here is to investigate new approaches under which intellectual property mechanisms can promote global renewable energy sustainability by providing fair access to green technologies.

1.2 Need and Significance of Green Energy Transition

Renewable energy is renowned for its ability to exploit nature while basing itself on patent rights towards sustainable development. Besides, it is important also to note that socio economic ecological factors have necessitated the change from fossil fuel-based traditional systems of energy hence giving way for worldwide adoption of clean power alternatives.

Carbon emissions from combustion of fossil fuels resulting into Climate change and its adverse effect requires transformation to sustain the environment and sustainable development. Such green gas emissions and other discharges to the environment are contributing to uncertain weather patterns, degradation of polar ice caps, increase in sea level and disruption of ecosystems and biodiversity across the globe.

Carbon reduction in the atmosphere is necessary especially in the energy sector which leads to climate change. Renewable sources of energy are attractive due to their reliance on infinite natural resources like sun rays, air currents, water masses and hot stones for electricity production which do not emit or minimally produce greenhouse gases. They can significantly reduce worldwide carbon footprint harmonizing with set deal targets such as Paris Agreement and mitigate most catastrophic impacts caused by global warming.

Carbon dioxide reduction is obligatory, particularly in the energy industry which causes global warming. Renewable sources of energy are popular because they do not produce carbon gases or minimize their emission into the dark air as well as utilize infinite natural resources like solar radiation, wind power, hot rocks and water bodies to generate electricity. They can also contribute towards reducing worldwide carbon footprints as well commensurate with specific deal targets such as those provided by Paris Agreement and help to prevent most disastrous consequences of climate change. The ecological transition to green energies is important for both environment-friendly reasons as well as economic purposes. Nevertheless, fossil fuel extraction, processing and combustion have associated adverse effects such as pollution, public health problems and environmental degradation. In addition, renewable energy minimizes these costs thus presenting new economic opportunities. Such investments generate many jobs from manufacturing and installation work through maintenance to research and development positions. Thus investment in the renewable energy infrastructure stimulates economic growth through innovation while ensuring that the country's energy security by reducing dependence on imported fossil fuels and unstable world oil markets.

Clean energy transformation is a natural affair or related to people interacted with. Generally, a steady supply of electricity can lead to better lives but some areas are still facing challenges in this regard.

2. Theoretical Framework

2.1 Conceptual Overview of IPR and Its Role in Technology Transfer

Intellectual property rights (IPR) also facilitate the stakeholders in such technology transfer by providing them a legal framework that can enhance exchange of intellectual capital.

For example, under patent law, an inventor can claim exclusive rights over his inventions for certain duration. This enables him to control use, reproduce and commercialize his/her inventions. An inventor may also be assigned these proprietary rights to third parties via license agreements; which would be subject to financial considerations. Thus, it ensures and balances the financial interest of the inventor and societal interest of people at large. Therefore, Intellectual Property Rights plays a vital role in promoting innovation ecosystem for protecting creators and stimulating progress. Some of these may include patent rights, trade secrets and trademarks are the intellectual property rights to protect patents, copyrights, and copyright information.

In other technology transfer situations, IPR provides sharing avenues for innovations by licensing agreements or joint ventures among others. The inventors have an exclusive right through patents while brand names are protected through trademarks because ownership

over innovative works is retained under copyright while safeguarding company's confidential business information is done through trade secret. For this reason it becomes necessary to establish clear legal frameworks and agreements that secure intellectual assets and encourage cooperation such that a jointly owned knowledge may be most beneficially utilized for humanity.

2.2 Theoretical Perspectives on The Relationship Between IPR And Green Energy Transition

Legal protection as well as incentive is part of intellectual property rights (IPRs) that serve towards supporting the ecosystem of innovation. There are several forms of IPRs including copyrights, trademarks, patent, and trade secret which all preserve intellectual material as well as promote knowledge and technology transfers. Hence in technology transfer from research institutions to industries or any other organizations intellectual property has such significance for reasons not mentioned above.

Technology can be transferred in various ways, such as for commercialization, development or further research purposes. Licensing, joint ventures, spin-offs and acquisitions are the major types of technology transfer that occur globally. This requires the patenting which is the grounding of a product ownership. Intellectual Property Rights (IPR) through providing a legal protection for the unauthorized exploitation of any technological innovation may act as a supportive mechanism for creating innovation ecosystems and may also provide incentives for inventors and innovators. Fair agreements and clear legal frameworks are crucial for safeguarding intellectual property and promoting stakeholder participation. This might also make it possible for people to reach their full potential and make breakthroughs and discoveries by spreading information across society.[3]

3. Historical Evolution of IPR regimes in the context of Renewable Energy Technologies

The ultimate objective of the Intellectual Property Rights (IPR) regimes has been to promote the innovation, creation and dissemination of knowledge for the benefit of people at large. In the contemporary context, however, the global energy crisis and the adverse effects of climate change pose threats to both the earth's natural reserve and global economic advancement. Ensuring the global green transition necessitates using intellectual property rights (IPR) methods, platforms, and legal frameworks to leverage technology, innovations, and information exchange within the clean energy industry.

Clean energy technologies, such as solar photo-voltaic, wind turbines, biomass energies, etc., have seen tremendous advancements. By offering exclusive rights and financial

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3 James Barton, Intellectual Property and Access to Clean Energy Technologies in Developing Countries: An Analysis of Solar Photovoltaic, Biofuel and Wind Technologies, ICTSD Programme on Trade and Environment, Issue Paper no. 2 (2007).

rewards under patent laws, intellectual property rights (IPR) can encourage innovators to engage more in R&D and facilitate knowledge transfer globally.[4] The increase in filing of patents demonstrates the value of intellectual property rights in the renewable energy sector. The incentive for innovation in renewable technologies and the competitive environment created by this led to the development of advanced technologies.[5].

Governments worldwide are implementing policies to promote renewable energy adoption, including feed-in tariffs, tax credits, and research grants, to combat global warming and energy insecurity. Policy makers recognize that technology transfer and sharing of information is important in promoting the use of renewable energy leading to such government programs as facilitating technology transfer agreements that promote joint R&D initiatives as well as capacity building endeavors in developing nations.

However, there have been issues when it comes to the evolution of Intellectual Property Rights (IPR) regimes within this sector. Patent thickets and litigation disputes have raised uncertainties about intellectual property rights, potentially limiting innovation, competition, and access to essential renewable energy technologies. There are also debates about the balance between patent rights and the public interest, particularly in terms of access to clean energy technologies, affordability, and equitable distribution of benefits.

International collaboration and standardization efforts, including IRENA, WIPO, and ISO, are crucial in promoting harmonization of patent laws, facilitating technology transfer, and developing standards for renewable energy technologies globally. This evolution in renewable energy technologies will shape innovation patterns and competition rules, promoting global cooperation and fair access to green technologies, influencing international cooperation and policy interventions. IPR frameworks impact green energy technology diffusion through patents, licensing agreements, and market competition, stimulating research and development investments, and ensuring essential technologies are available.[6] Balancing the interests of patent holders and technology users is crucial in promoting the efficient diffusion of technology and fostering innovation. [7]

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4 K. Kariyawasam & M. Tsai, Intellectual Property, Climate Change and Technology Transfer in South Asia, in Matthew Rimmer (ed.), Intellectual Property and Clean Energy - The Paris Agreement and Climate Justice (Springer 2018) 207–234.

5 Wolfgang Keller, Absorptive Capacity: On the Creation and Acquisition of Technology in Development, 49 J. Dev. Econ. 199, 199–227 (1996)

6 H. de Coninck & A. Sagar, Technology in the 2015 Paris Climate Agreement and Beyond, ICTSD Programme on Innovation, Technology and Intellectual Property, Issue Paper No. 42 (International Centre for Trade and Sustainable Development, Geneva, Switzerland), www.ictsd.org (2015).

7 Wolfgang Keller, International Technology Diffusion, 42 J. Econ. Lit. 752, 752–782 (2004).

4. Challenges and Opportunities

4.1 Analysis of Opportunities for Leveraging IPR to Incentivize Innovation and Collaboration in the Renewable Energy Sector

Using intellectual property rights like patents, trademarks, copyrights and trade secrets strategically can promote innovation and partnership in renewable energy. These rights give creators and inventors exclusive control over their inventions or creations for a set period. Managing intellectual property rights smartly allows stakeholders like renewable energy companies, researchers and policymakers to encourage innovation and partnership. When companies have exclusive rights and potential to profit from their inventions, a strong intellectual property environment motivates investment in researching and developing renewable technologies. Intellectual property also enables collaboration. Companies can license their technologies to others, permitting an exchange of knowledge and expertise. This can accelerate technology progress and sharing, and let smaller companies or researchers access technologies and thereby further contributing to the technology diffusion and reducing duplication of efforts. IPR incentivizes technology adoption too. It protects inventors and creators, rewarding them. This encourages renewable energy tech dissemination and adoption. More investments get attracted. Market opportunities arise for clean energy solutions. IPR strategic management creates an environment. It encourages innovation, collaboration and tech adoption in renewable energy. Clean energy solutions develop and deploy faster. This contributes to a sustainable, low carbon future.

4.1.1 Encouraging Research and Development (R&D) Investment

Patents matter a lot for investing in new renewable energy technology. They give inventors rights to their ideas. This lets them earn back money spent on research. Companies, researchers, and inventors can get patents for novel inventions. Then they can make money through licenses, royalties, or being the only seller.

A strong patent system motivates companies to fund R&D. This drives progress and innovation for renewable energy. Inventors know their ideas are safe, so they share knowledge. Sharing info helps people work together and speeds up adopting renewable solutions. By recognizing and rewarding inventors, strong patent protection contributes to the growth and development of the renewable energy industry. It encourages companies and individuals to pursue research and development, knowing that they will have the opportunity to monetize their inventions and establish a competitive advantage. This, in turn, attracts more investments, expands the market for renewable energy technologies, and accelerates the transition towards sustainable energy sources. Patents serve as a driving force for innovation and investment in the renewable energy sector, fostering technological advancements that are crucial for achieving a sustainable future.

4.1.2 Facilitating Technology Transfer and Collaboration

Licensing agreements allow patent holders to give other parties access to patented technologies. This extends market reach, speeds up sharing breakthroughs, and enables partnerships. Patent pools let multiple patent holders combine intellectual assets. This reduces costs and enables industry wide access to key technologies. These facilitate technology transfer and collaboration in the renewable energy sector.

4.1.3 Promoting Open Innovation and Knowledge Sharing

Patents allow inventors exclusive rights. They also help spread knowledge and enable working together. For example, licensing agreements and technology transfer. Open innovation models are another way. These include open-source licensing, patent pledges, and research groups working together. They create platforms for sharing intellectual assets. They allow exchanging technical knowledge. In addition, they facilitate the development of joint solutions to common problems. There is even the possibility of having stakeholders benefiting from amalgamation of their knowledge and ideas through open innovation processes. This would result in faster technological advancement. For instance, global energy challenges can be effectively met.

4.1.4 Supporting Green Technology Transfer and Capacity Building

Intellectual Property Rights (IPR) may significantly facilitate technology transfer, adoption and adaption of such technology through capacity building efforts in least developed and developing countries by providing them licenses for technologies in affordable price and fair terms. These initiatives will led the path towards the growth of expertise and fostering of the advancement of eco-friendly energy options in developing nations. Collaborative efforts like partnerships and agreements for technology transfer offer avenues to overcome barriers, to accessing technology. They also engender inclusive innovation within the renewable energy industry. This creates an opportunity for strategic management of IPR. It serves as a way to reward creativity and encourage working together for better renewable energy sector. Stakeholders may utilize IPR effectively in order to spur technological development, thus, speeding up the diffusion of renewable energy technologies. This ensures effective response to global energy challenges. Indeed, they are all striving towards attaining a future where there is sustainable and resilient energy system for all.

4.2 Examination of Policy Interventions and Best Practices Aimed at Addressing Ip-related Challenges

When looking at policies and best practices within the renewable-energy industry it becomes evident that different approaches are applied in encouraging research and development for innovation, enabling cooperation between researchers,

businesses, governments. It is also to be ensured that the advantages of innovation are distributed fairly among those engaged by sharing fresh information about emerging technologies and making them available to all groups.

4.2.1 Patent Pools and Technology Licensing

PATENT pools are partnerships where several patent holder's team up to give joint licenses to their patents through a single contract. These pools have some advantages such as reduced transaction costs and less complicated licensing discussions. They also make it easier for technology to spread by giving access to a wide range of patents. For patent pool policies to work effectively there must be clear guidelines on how the pool will operate which includes allocation of roles." To ensure justice in using technology, licensing terms should be open and draw users transparent licensing terms are vital in promoting fairness and stimulating participation in technology. Clear rules can be developed that make the policy effective though it is important to also introduce formats that allow innovation and knowledge sharing. IP rights issues concerning renewable energy sector policies can thus be solved through these guidelines while improving innovation, encouraging collaboration, and making renewable energy technologies more accessible.

4.2.2 Standardization and Interoperability

In order for the products and systems made by different companies to work together smoothly, SSOs play a crucial role in setting industry standards for renewable energy technologies. A clear set of licensing rules for patents that are essential for the standard is needed to foster innovation and fair competition. Fair, reasonable, and non-discriminatory (FRAND) licensing practices help to strike the right balance between the interests of patent-holders and those who want to make use of the technology. Some of the best guidance for creating these regulations includes being transparent about how licensing works, making decisions based on consensus and having ways of appealing any disputes.

4.2.3 Technology Transfer and Capacity Building

Governments, organizations and agencies will promote this sort of technical development and know-how sharing through a host of different pacts and approaches, including international agreements where companies pool tech rights, partnerships between national governments and industry and shared knowledge and training programs. Hopefully they aim to create surroundings that nurture creativity strengthens safeguards, for property and introduce eco technology in nations that might otherwise resort to polluting alternatives. Best practices to ensure the same may include promoting technology transfer initiatives with due consideration to national development priorities, promoting inclusive innovation, and ensuring the equitable distribution of benefits.

4.2.4 Open Innovation and Knowledge Sharing

In order to boost the rate of knowledge exchange, teamwork and to enhance technology improvements in the renewable energy industry, open innovation methods like open-source licensing, joint research program and patent commitments are applied. These strategies are in turn managed by different groups like governments, research centers, and businesses that collectively promote an encouraging environment to work for a more stable growth through open innovation. Governments act through the creation of stimulating open innovation by making innovative legislation and policies established. This may comprise of various measures including elaborating patent and licensing provisions to ensure a greater level of clarity and transparency between the diverse industries players thereby encouraging information sharing.

To spread the technology across the industry, the government can provide financial incentives or subsidize like tax breaks and granting a grant. To promote open innovation it is essential that collaboration networks and communities be formed. Such networks should be created by holding events and workshops and by carrying out knowledge exchange through platforms, albeit by governments, universities and businesses. Technology sharing should be watch over through seeing to it that it is done as needed. Transparent rules and channel setup should be a top priority when technologies are going to be shared among the relevant parties. Resultant, the accountability and trustworthy character is set in the open innovation system.

When this guidelines and recommendations of the mentioned subjects are adopted by governments, research organizations and businesses, they create a background for the advancement of renewable energy through open innovation only. This can breed cooperation, knowledge sharing and more robust techniques which more often than not will result in the quicker utilization and innovation of the technological advances.

4.2.5 Policy Coherence and International Cooperation

Tackling the IPR issues in the renewable energy sector demands fit remedies. It is fundamental that we hold policy coherence across our countries and make efforts to strengthen international cooperation at the same time. Governments, by default, are the law-makers for patents within their borders and sometimes globally. They are therefore, nature players when it comes to establishing uniformity in patent laws enforcement, and regulatory frameworks. This way technology should easily transfer to other fields, investments can be attracted and countries will be bridged. The collaboration can improve the way of business between regions. Alongside global bodies like the World Intellectual Property Organization (WIPO) and the United Nations Framework Convention on Climate Change (UNFCCC), which really matter, since they ensure the consistency of the workflow, exchange of expertise and widespread discussions among all the parties involved.

Addressing IPR issues in the renewable energy space needs a comprehensive approach that respects both the needs of inventors and rights holders and the needs of their society, as well as users. It is critical that policymakers ensure that an appropriate balance is struck by the system so that cooperation and innovation are fostered and new technologies are more quickly adopted to serve the dual ends of sustainable development and the urgent and global energy demands facing society, all while recognising the importance of ensuring fair access to clean energy solutions, which is critical for balanced and environmentally responsible energy systems.

4.3 Challenges and Opportunities for Technology Diffusion

Studies demonstrate that technology adoption and green energy use are different across regions, bringing both challenges and opportunities. As Wang and Hu (2017) documented, factors such as market rivalry, unstable policies, and legal hazards affect the way that technologies spread in the solar photovoltaic business, especially in emerging markets. Conversely, research by Rai and Sagar (2019) and Chen et al. (2020) shows that global efforts to fight against climate change and support sustainable growth might benefit from international alliances, knowledge-sharing networks, and from licensing arrangements and bilateral deals that facilitate the interplay of knowledge and technology[8].

The significance of intellectual property (IP) rights in technology sharing and the spread of green energy across regions shed light on the complex dynamics of innovation, cooperation, and policy in the renewable energy sector. Understanding what drives the diffusion of new technologies from one region to another, and their subsequent adoption in different regional contexts, is critical for policymakers, industry stakeholders, and scholars eager to identify and pursue tailored initiatives to enhance innovation, foster the transfer of technology, and meet global energy challenges.[9]

4.4 Case Studies

Demonstrating Effective Programs or Collaborations In IPR To Promote The Creation of Environmentally Friendly Energy Sources.

4.4.1 Case Study 1: International Solar Alliance (ISA)

The International Solar Alliance (ISA) serves as an exemplary initiative that effectively utilizes Intellectual Property Rights (IPR) for the advancement of sustainable energy development. Established in 2015 by India and France, the ISA seeks to foster cooperation among solar abundant nations to bolster solar energy adoption and combat energy

8 A. Sagar & H. de Coninck, Collaborative Research and Development (R&D) for Climate Technology Transfer and Uptake in Developing Countries: Towards a Needs-Driven Approach, 131 Clim. Change 401, 401–415 (2015), https://doi.org/10.1007/s10584-014-1123-2

9 *Id.*

poverty[10]. One of the main undertakings of the ISA is the Solar Technology Application and Resource Centre (STARC), which concentrates on facilitating technology transfer, capacity enhancement, and knowledge dissemination in the solar energy domain[11].

Through STARC, the ISA streamlines the dissemination of groundbreaking solar technologies by providing technical support, training programs, and financial resources for solar projects. Moreover, the ISA actively encourages the establishment of industry standards and best practices in solar energy technologies, promoting harmonization and compatibility across various systems. Notably, the ISA promotes the utilization of opensource licensing and collaborative research initiatives, fostering knowledge sharing and fostering innovative advancements in the solar energy sector[12].

4.4.2 Case Study 2: Renewable Energy and Energy Efficiency Partnership (REEEP)

REEEP (Renewable Energy and Energy Efficiency Partnership) which was founded in 2002 is one of the major partnerships which links one another include different form of government, global institutions and private sector. It is committed to having both renewable energy and energy efficiency programs in developing countries. Beyond simple patenting, REEEP uses its IPR to promote the development of sustainable energy. Their endeavors include financing mechanisms that support the execution of clean energy projects; legislative measures that favor renewable power generation and its integration; training and capability advancement connected to the promotion of technology sharing and innovation.

REEEP's Clean Energy Information Gateway (CEEG) provides the clean energy segment with data on advanced technologies and most efficient practices. It enables similarly situated people to become aware of how to make positive change in their communities, ensuring that this knowledge spreads widely, inspiring a constructive collaboration and knowledge sharing. It has a strong impact on the promoting and formation of widespread renewable energy application over the regions.[13]

4.4.3 Case Study 3: Open Invention Network (OIN)

The Open Invention Network (OIN) is a unique program that uses Intellectual Property Rights (IPR) to encourage the creation of new ideas and cooperation in the renewable energy industry. Founded in 2005, OIN connects a group of organizations that work together to protect and promote the Linux System, an open-source software platform commonly used

10 iSolar Alliance, https://www.isolaralliance.org/ (last visited Feb. 18, 2024)

11 Id at 16

12 Id

13 Renewable Energy and Energy Efficiency Partnership (REEEP), https://reeep.org/ (last visited Feb. 18, 2024).

in renewable energy areas such as smart grids, energy management systems, and dispersed energy sources.[14].

Companies that join the Open Invention Network (OIN) agree not to sue each other over patents related to Linux-based technology. This deal helps Linux-based technologies improve because it promotes cooperation and creativity. OIN makes it easier to use patents in court, which helps with the growth of open innovation. This is especially important for renewable energy solutions that use Linux software because it helps them get adopted and put into practice. Examples from the real world show how well IPR-based projects and partnerships work to promote the development of sustainable energy.

These initiatives work through enabling teamwork, promoting technology sharing and facilitating the transfer of knowledge to deploy sustainable technology solutions de facto around the globe. All of which are critical to combating climate change and fostering global sustainable growth.[15]

5. CONCLUSION

IPR and the development and wide spread adoption of environmental friendly energy technologies, resulting from several studies, have provided key, important knowledge, and implications which are critical to fostering a sustainable global energy shift:

5.1 Key Findings:

Intellectual Property Rights (IPR) plays a key role in green energy, shaping innovation, knowledge sharing, technology spread and deployment. Diverging IPR approaches (for example, patents, licensing) influence innovation incentives, competition and technology spread. Divergence in IPR frameworks and policy is an important driver of regional differences in the development of green energy. Globally accelerated expansion of clean energy, depends upon the resolution of complex problems in cross-disciplinary teams, that harness the diverse skills and expertise required, and that facilitate collaboration, and the exchange of knowledge and skills. Vital to the empowerment and care of people, and the protection of planetary health, such measures should be implemented in renewable energy policies, training offered and the sharing of skills and knowledge from the international to the local communities encouraged.

5.2 Implications:

In order to accelerate the global march toward renewable energy, policy makers need to enact policies that balance the needs of innovators, consumers, and society overall, policies that encourage new ways of thinking, of collaborating, of disseminating clean energy technologies. Industry insiders, for their part, should focus on honing their intellectual

14 Open Invention Network, https://openinventionnetwork.com/ (last visited Feb. 18, 2024).

15 Id.

property management skills, on forging deep alliances, on championing open innovation methodologies to ensure that renewable energy technologies continue to mature and that their potential is realized through "holistic innovation."

The shift to green energy will only succeed if we have researchers at the cutting edge, doing cross-disciplinary research that is both collaborative and global. That research has three aims: identify areas where we don't know enough and then fill in those knowledge gaps with hard evidence; provide policy makers with insights that are driven by data, not by prejudice; and develop comprehensive sets of solutions that make the green energy industry more sustainable, fair and resilient.

However, there are many things that international organizations can do to help make this transition less painful and lots of positive things that they can do as well. For example, they can help to promote ways to ensure that researchers, practitioners and others share what they are learning; work to create programs that will build the skills and capabilities let us all thrive in the green energy sector and its spin-offs; and work to ensure that clean energy technologies are transferred particularly to developing countries in a way that ensures these technologies can be successfully adopted and implemented.

Through international cooperation and the sharing of responsibilities, these organizations can tackle climate change and promote sustainable development globally.

For the adoption of energy and the promotion of sustainability it is essential to take a comprehensive approach. This involves implementing government regulations fostering collaboration, among sectors conducting research across disciplines and establishing partnerships on an international level. It also reflects the significance of the Intellectual Property Rights on promoting innovation, inventions, technological transfer and its optimum utilization for overcoming the challenges posed by Global Energy crises and Climate Change simultaneously.

5.3 Concluding remarks on the significance of IPR in advancing the global transition to sustainable energy

Intellectual property rights (IPR) have to play a vital role in realizing the global green transition for providing reliable, affordable and clean energy for all. This would ensure the energy security and environmental protection simultaneously. IPR mechanisms and platform would be utilized for supporting innovation by incentivizing and safeguarding ideas in energy technologies. This would encourage the researchers and companies to invest in the technology transfer and dissemination of knowledge and technology related to renewable energy. This would empower nations and businesses to embrace practices in consonance with the environments and economic development for all. IPR may provide a platform for collaborations and partnerships fostering teamwork among research institutions, businesses and investors in the green energy sectors. By ensuring

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the incentives to the real inventor, IPR may further promote investment in research and development sectors. This would acts as a driving force for the innovation and investments in clean energy technologies and thereby IPR may act as a catalyst, for the advancement and implementation of eco-energy solutions and sustainable future.

Governmental protection to intellectual property rights (IPR) through the policy intervention is essential for driving innovation and sustainable energy progress. However, challenges such as expensive licensing process, unfair licensing terms poses a complex problem when it is supplemented by the legal ambiguities related to IPR in the existing legal system in developing and least developed countries. Ultimately, balance between nurturing innovation, protection and access to the people should be ensured through multilateral, bilateral and other mechanisms across the globe.

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Child Labour and International Trade: Challenges in adopting Humanistic Approach under World Trade Regime

***Dr. Sanchita Tewari & **Dr.M.R.Sreenivasa Murthy**

Abstract

The rise of child labour in international trade is becoming increasingly prominent, partly due to the World Trade Organization's (WTO) refusal to incorporate labour standards into its framework. Developing countries, in particular, resist linking trade with labour regulations, creating a loophole that allows export industries to exploit child labour domestically. The pressure to remain competitive in global markets, drive economic growth, and the conflicting interests between developed and developing nations are major factors contributing to the failure of incorporating labour standards into the WTO system. To address this issue, effective regulation of child labour in international trade requires a multifaceted approach, including stronger international collaboration, enforcing existing labour standards, promoting ethical trade practices, and providing support for developing nations to balance growth with labour rights protections. The present article explores the issue of child labour in India's export industry and examines why the WTO continues to restrict discussions on the trade-labour linkage. The authors delves into the WTO's stance on excluding labour standards from its framework, highlighting the resistance from developing countries. Additionally, the article analyses the alternative approaches adopted by the United States and the European Union, which have incorporated labour standards into international trade through bilateral agreements and other mechanisms, circumventing the WTO's restrictions.

Keywords: *Child labour, Labour standard, International trade, WTO*

1. INTRODUCTION

Globalization could offer children an escape from lives of toil and drudgery, but instead, it draws more children into servitude[1]

The latest global estimates indicate that 160 million children (63 million girls and 97 million boys) were in child labour globally at the beginning of 2020, accounting for almost one in ten of all children worldwide.[2] 79 million children, i.e., nearly half of all those in child labour, were in hazardous work that directly endangers their health, safety and moral

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* Teaching Assistant, National University of Study and Research in Law, Ranchi.

** Associate Professor, National University of Study and Research in Law, Ranchi.

1 David M. Smolin, *Conflict and Ideology in the International Campaign Against Child Labour*, 16 Hofstra Lab. & Emp. L.J. 383, (1999).

2 International Labour Office and United Nations Children's Fund, *Child Labour: Global estimates 2020, trends and the road forward,* ILO and UNICEF, New York, (2021).

development.[3] 60 per cent of global trade in the real economy depends on the supply chains of 50 enterprises, which employ only 6 per cent of workers directly and rely on a hidden workforce of 116 million people.[4] These obscure employment relations increase the chances of companies being involved in human rights abuses such as child labour. Children are employed because they are cheap and pliable to the demands of the employer and are not aware of their rights.[5] It is also observed through various secondary sources that most of the child labour is not necessarily found in the production of globally traded goods but in the supply chains both in the domestic and international markets.

Richard Freeman, Professor of Economics at Harvard University, believes that these programmes are based on the free market principle In his paper, 'What Role for Labour Standards in the Global Economy?' having to meet consumer preferences, he points out that most people care about the social conditions of production of the goods they purchase, and, given a choice, would rather buy goods produced under fair and non-exploitative working conditions. This desire of consumers in advanced industrialised countries can be fruit-fully harnessed to improve the lives of workers in low-income countries. According to Freeman "*The consumer who cares about labour standards consumes not only physical goods but also the work conditions associated with them. He is the principal willing to pay higher prices for the goods produced under better working conditions, which provides a financial margin for improving conditions or increasing wages in less developed countries. Since consumers want this outcome, producing under humane conditions in those countries would improve the economy overall.*"

The Covid scenario is witnessing the increasing child labour footprints in the international trade. The denial of WTO to incorporate Labour standards in its ambit, negation of the developing countries to the idea of trade-labour linkage, provides the gap for the export industries to engage the child labour at the domestic level. The urge for survival in global competition, economic growth, and conflicting interests between developed and developing nations are the core reasons for failure of incorporating the labour standards under the WTO regime.

How to regulate the child labour in the international trade? WTO rules require members to comply with a set of basic free trading principles, in particular national treatment and most-favoured nation status. When a member wishes to take a trade affecting measure that departs from WTO rules, they can justify the action on the basis of general exceptions.

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3 *Id.*

4 M. Boersma, *Changing Approaches to Child Labour in Global Supply Chains: Exploring the Influence of Multi-Stakeholder Partnerships and the United Nations Guiding Principles on Business and Human Rights*, Law Journal Library (2017), p. 1249.

5 UNICEF, *Child Labour in India*, available at: <http://unicef.in/Whatwedo/21/Child-Labour>, (last visited on Sep. 18, 2021)

Whereas there is no specific provision in the WTO rules on human rights, according to case law and precedents, the general exception can sometimes allow trade-restricting measures based on human rights concerns. Yet, the open nature of WTO-rules means that members must devise trade-restrictive measures carefully, and that the dispute settlement process can involve complex legal interpretation if litigation arises.[6] The uncertainty surrounding the compatibility between WTO rules and human and labour rights is attracting growing attention, generating calls for WTO reform. In the context of the coronavirus pandemic, the debate has refocused on the need to revise the WTO standards to make it compatible with the human rights.

This debate of inclusion of human rights under the umbrella of WTO standards increasing with the advent of pandemic. The one of the important dimensions of the aforementioned debate is the child labour and international trade. The increasing child labour foot prints in the international trade during pandemic raised alarm about the need for addressing the same.

In the preliminary report of the resolution adopted in United Nations Sub-commission resolution on promotion and protection of human rights, 2000/7, it is explained that the modern concept of globalization is not a purely economic phenomenon that is divorced from the human values and policy decisions.[7] The report criticized the functioning of WTO which increased the global inequality and discrimination[8] and also characterized the WTO structure and its assumptions about global trade are heavily in favour of transnational corporations and developed nations. The main objective behind adopting the above resolution is to take concrete action on WTO, which is mainly focusing on international trade and commercial interests of the transnational corporations and developed countries by reasserting the primacy of human rights obligation. The main issues dealt under this resolution are ineffective implication of human rights protection in the economic globalization and WTO regime, WTO's stringent protection of Transnational corporation's interests. The main theme of the resolution requests that the governments while drafting legislations pertaining to international trade must give primary consideration to human rights objectives. WTO must take human rights perspective as prime concern while reviewing the agreements governed under its regime. The International Conventions

6 Jana Titievskaia, lonel Zamfir *et.al., WTO rules: Compatibility with Human Rights and Labour Rights*, European Parliament, (March 2021), *available at* : <https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/689359/EPRS_BRI(2021)689359_EN.pdf>, (last visited on Nov 18, 2021).

7 J. Oloka-Onyango & Deepika Udagama, *The Realization of Economic, Social and Cultural Rights: Globalization and its impact on the full enjoyment of human rights*, ESCOR, Sub-Commission on the Promotion and Protection of Human Rights, 52d Sess., Provisional Agenda item 4, U.N. Doc. E/CN.4/Sub.2/2000/13 (2000).p.1-5.

8 *Id.* at13-19.

relating to Human rights must take further measures to analyse the human rights impacts of the international trade.

There are different arguments put forward in this aspect, first, let WTO incorporate labour standards clause in the WTO text; second, let ILO handle the same independently; third, let there be a third way through GSP, Bilateral and Regional approaches. In this article, the author attempted to portray the issue of child labour in the export industry in India, why till date WTO is restricting the dialogue on trade-labour issue; what third way is adopted by the USA and EU in incorporating labour standards in the international trade.

2. WTO & CHILD LABOUR

After the second world war, the global trading rules developed and WTO grew out of GATT 1947. The creation of the WTO in 1995 can be seen as the fulfilment of the vision of the participants at the Bretton Woods Conference in 1994, almost a half century later.[9] The main aim of the evolution of GATT into WTO is aimed at reducing protectionism, reduction in tariffs leading to increase in the world trade. However, it is known that GATT continues to exist even today in the form of agreement establishing trade principles and disciplines for its members. WTO with its main objectives of open markets, non-discrimination and global competition in the world are working for the national development and welfare of all countries. It is a general understanding that trade policies and regulatory regime entered into as an agreement can have adverse effects on trade therefore the good governance in the world economy is rather important. Hence it becomes all the more important to create a firm and a strong legal foundation in order to manage the multilateral trade agreements or in other words multilateral trading system. As witnessed that that a stronger institution may allow the system of rules and disciplines to be enforced more rigorously than in the past and should at the very least ensure that the trade policies of the members become transparent.[10]

Explaining about maintaining the standards we need to discuss in the very first hand what are standards in the realm of WTO and how they are different from regulations? Regulations are generally technical specifications for a particular product or production process which are mandatory. A standard is generally voluntary in nature usually being defined by an industry or by a non-governmental standardization body and under the control of the firms and the industries. It is seen that standards be it for product or for human health and safety are welfare enhancing but it is also a true fact that these standards may have trade impeding effects hence they are dealt under GATT. At this juncture it becomes important to

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9 Dipak Das, *Child Labour In India: Rights Welfare And Protection* 40 (Deep & Deep Publishers Pvt. Ltd., 2011).

10 *Id.*

analyze whether the standard that is talked about has more weightage in terms of welfare enhancement or in terms of trade impact. The phenomenon of child labour must be seen as the ultimate symbol of a failure to achieve a corresponding global protection for the vulnerable.[11] There is quite literally nothing in WTO law concerning child labour, apart from the abstract debate as to whether or not Article XX of the GATT should *allow* member countries to maintain import bans on the products of child labour.[12]

Referring to the topic 'Trade and Labour Standards' as a subject of intense debate, WTO claimed that 'for several years the issue of trade and core labour standards has been the subject of intense debate among and within some World Trade Organization member governments'.

This was particularly ironic, since the then newly minted WTO did in fact have enforcement "competence," albeit only as far as trade principles were concerned; whereas the ILO was well known not to enjoy such competence.[13] While the ILO clearly has responsibility for generating international labour standards, it lacks the type of enforcement arm that sets the WTO apart from other international law systems. According to scholars, child labour and WTO has a deep structure connection. The same can be explained in the following words: *"Article XX approach, with its narrow WTO focus, reductionist at best. At worst, it is a distraction that leads one to ignore the actual facts of global child abuse; the reality of child trafficking for the purposes of work in sweatshops and in the sex industry. That is why, in my view, the fact of a global economy leads inevitably to the need for a global solution to such economic outrages; at the same time, I maintain that the WTO itself, as an institution, is not the place to look for that solution."*[14]

Despite the fact that import restrictions on goods produced under abusive labour conditions may do little to ameliorate these conditions on any scale, we may nevertheless be about to see a showdown at the WTO between just such a set of import restrictions and free trade principles. This impending dispute, is symbolic of the hostility so often expressed by developing countries towards the prospect of "trade and" restrictions by wealthy countries against products from the developing world that, in their production process, have offended

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11 Sara Ann Dillon, "A Deep Structure Connection: Child Labor And The World Trade Organization" 9 *ILSA Journal of International & Comparative Law,* 443, (2003), *available at*: <https://nsuworks.nova.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1432&context=ilsajournal/ >, (last visited on March 8, 2020).

12 *Id.*

13 *Supra* Sara Ann Dillon (2003).

14 *Id.*

against non-economic principles (such as core labour standards) derived from some other sector of international law.[15]

As has been pointed out, most child labour is tied to a given national economy, and does not bear any direct relationship to MNEs, nor is most child labour related to export trade, although clearly some is.[16] Relying on GATT Article XX to justify import bans in such cases is certain to generate more hostility, and have little effect on the underlying problem.[17] Thus the practical problem is here there is no relationship of the labour exploitation to exports, GATT Article XX is essentially irrelevant in any case.

As far as the issue of labour standards are concerned, it was introduced at the request of the USA and France in the final stage of the Uruguay Round. The main aim and objective with which these countries initiated this particular agenda was to initiate discussions on the introduction of a social clause specifying the minimum standards in this area. There has been difference of opinions amongst the developing and the developed countries with respect to the issue of standards. The developing countries have been talking loud and in favour of introducing labour and environmental standards whereas from view point of a developing nation the labour standards as envisaged under WTO[18] lend to presume that labour standards are defined to absolute and universal rather than matters to be decided individually and independently by sovereign nations. It need to be recognized that the choice standards may depend on a country's stage of development and per capita income and therefore the weight attached to standards may differ across welfare functions of different countries. Hence standards are perceived at least by the developing nations to have created rents for the developed countries and standard setting activity being termed as collusive. There remains a requirement for interested parties to co-operate and to the extent that there are costs of developing or adhering to a standard, there may be incentive to free ride.[19] Given that there are costs involved in meeting the standards its existence may reduce the contestability of market because potential entrants find it less attractive to

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15 Indian Minister for Commerce and Industry Murasoli Maran was reported to state that "developing countries have long opposed the linkage of trade with labor and environmental standards on the grounds that they might be used as an excuse to distort competition, undermine comparative advantage and provide a 'Trojan horse' of protectionism." Maran Opposes New Non-Trade Issues at WTO Meeting*",* *The Hindu*, June 20, 2001.

16 *Supra* Sara Ann Dillon, 2020.

17 *Id.*

18 *See* <https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm>, (last visited on November 8, 2021).

19 *Supra* Dipak Das (2011).

compete or enter.[20] The barriers to entry are greater and thereby the profit enhancing impact of the imposition of the standards is more. [21]

The WTO-covered agreements do not explicitly mention child labour, yet there is increasing international concern for the phenomenon of child labour, evidenced through international human rights law and international labour law treaties and a push by some developed countries' WTO Members for inclusion of a "social clause" governing child labour under the covered agreements.[22]

Talking about the social clause, sometimes it is forced upon the developing countries to follow and comply with the social standards. If the developing countries do not comply with these standards the repercussions would be severe like imposition of import restrictions from the other countries and trade barriers which becomes a more costlier issue. The other viewpoint is that forcing the developing countries to comply with these standards may be harmful to their economic interests and could interfere with their efforts to pursue less interventionist and more export oriented economic policies.

In the fifth conference of labour minister of developing countries in the year 1995 it was observed by the experts that social clause was unacceptable to them because of the fact that it was imperative to commit to promote and safeguard dignity through the promotion of measures aiming at improving the working conditions of all people and provide better levels of protection. The argument on this line was that each country should develop its own standards according to its needs and perceptions of cost theory applicable and that to some extent would help in serving the best interests in the world efficiency. It was also remarked that if all the countries were to impose the same standards it would mean that some countries impose higher standards than the corresponding social costs or that others will impose standards than the social cost. Either way outputs will then set in inappropriately low or high and welfare will not be maximized.

Labour costs and labour standards need to be differentiated in the first hand because the debate is all about labour standards and not labour costs. The focus is therefore on protection of workers' rights and labour standards. Labour costs are endogenous and largely reflect a country's comparative advantage. On the other hand labour standards have emerged as a challenge in the arena of political economy of the world trading system. Insisting that further trade liberalisation be mode conditional convergence in labour costs make little

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20 *Id.*

21 *Id.*

22 Williams, J., "Addressing child labour: reflections on the WTO's role", 14 *Journal of International Trade Law and Policy* 4-22 (2015) available at: <https://doi.org/10.1108/JITLP-05-2015-001>, (last visited on November 15, 2021).

sense, and would constitute blatant protectionism.[23] The gains from trade result precisely from differences in costs, which are a reflection of differences in factor endowments and technological capacities of countries.[24]

Fortunately, or unfortunately WTO must face the challenge of labour standards and also environmental issues. WTO is destined to remember that social and labour issues are relevant to its overall goal to improve people's standard of living in a sustainable manner.[25] Obviously it requires some acceptance of harmonization through an agreement to adopt specific minimum labour standards. To diversify the goods and services market opening it may require some movement of quid pro quo and care must be taken to minimize the possibility of capture by industrial or anti trade lobbies. Also care and initiatives should be taken to compensate those countries which face trade barriers. However, a vigilant watch should be there that the domestic import competing industries do not mis utilize this opportunity. The basic aim and objective are related to labour rights therefore the collection of all the revenues through whatever trade action should be utilized for making good the situation of the exporting country.[26]

2.1 Singapore Ministerial Conference Declaration (1996)

All the member countries addressed the question of whether the WTO should consider the link between core labour standards and trade in the Singapore Ministerial Conference. Few member countries strongly recommended that the WTO shall take up the issue of earnest, many suggested that the task be left to the ILO, and some called for cooperation between the two bodies. Most member countries indicated their support for core labour standards, denouncing infringements on workers' rights and the use of child and slave labour.

Some member countries, such as Switzerland, Finland, Italy, Germany, France and Portugal, affirmed the primacy of the ILO on core labour standards, but suggested that the WTO cooperate with the ILO on this issue. According to Sweden, the WTO should support continued work in the ILO but could review progress at the WTO's biennial Ministerial meetings. According to Netherlands, avoiding a dialogue on labour standards does not promote a better understanding of views or dispel fears about hidden agendas.

But majority of the developing countries along with UK and Australia stated that the WTO is not the appropriate forum to discuss the issue. Some of the developing countries expressed concern that labour standards would be used as a pretext for protectionist measures, and majority of the developed countries affirmed that they should not be used in that manner.

23 *Supra* Dipak Das, 2011.

24 *Id.*

25 Gabrielle Marceau, *Trade and Labour,* The Oxford Handbook of International Trade Law, Oxford University Press (2009).

26 *Id.*

The countries such as Venezuela, Guatemala, the Czech Republic, and others said the WTO should not allow instruments to enforce compliance with labour standards. Malaysia rejected any attempt to discuss a social clause in the WTO. Macau and Uganda stated that the introduction of labour standards would have a negative impact on the economic development of developing countries. Myanmar stated that linking the labour standards and trade would be detriment to the effective functioning of the WTO. Interesting point highlighted by the countries such as Spain, France, Luxembourg, Sweden and Belgium is about not inviting the Director-General of the ILO to speak about such important issue.[27]

However, a compromise between proponents and opponents resulted into the inclusion of following paragraph in the final Ministerial Declaration of WTO: Singapore Ministerial Conference Declaration (1996). "*We renew our commitment to the observance of internationally recognized core labor standards. The International Labor Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labor standards for protectionist purposes, and agree that comparative advantage of the countries, particularly low wage developing countries, must in no way put into question. In this regard, we note that WTO and ILO secretariats will continue their existing collaboration."*

There is a clear consensus: all WTO member governments are committed to a narrower set of internationally recognized "core" standards, freedom of association, no forced labour, no child labour, and no discrimination at work (including gender discrimination).[28] World Bank study estimated that less than 5% of child workers in the developing world are involved in export related activities.[29] Existing collaboration between the WTO and the ILO includes participation by the WTO in meetings of ILO bodies, the exchange of documentation and informal cooperation between the ILO and WTO Secretariats.[30]

2.2 Seattle Ministerial Conference in 1999

The third WTO Ministerial Conference was held in 1999 in Seattle, United States. In this Conference, United States and European Union proposed to create a forum within the WTO for centralized discussion of labour standards (bans on child labour and the like).

27 Summary Report, 9-13 December 1996, 1st Ministerial Conference of the WTO, available at: <https://enb.iisd.org/events/1st-ministerial-conference-world-trade-organization-wto/summary-report-9-13-december-1996>, (last visited on November 15, 2021).

28 WTO, Labour standards: consensus, coherence and controversy available at: <https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm">,(last visited on December 15, 2021).

29 WTO, Trade and Labour standards available at: <https://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/18lab_e.htm>, (last visited on December 8, 2021).

30 *Id.*

Mr.Juan Somavia, Director-General, International Labour Office submitted to the Third WTO Ministerial Conference in Seattle, the paper titled, 'Decent work for all in a global economy: An ILO Perspective', wherein he addressed the issue of impact of intensified competition on labour markets. In his address, he mentioned that promoting human rights at work, core labour standards shall be the central point while promoting intensified competition, globalized trade etc.,

Mr.Juan Somavia, highlighted the importance of deriving integrated solutions to address the problems cropping up side by side of the economic growth and development. He said, '*Development is not just about trade, or just about investment, or just about production. It is about all of these things, but also about building social and economic institutions for governance and participation. It is about employment and social integration, about creating economic incentives which promote social goals. It is about investing in capabilities, skills, knowledge, health. It is about looking for synergies between social and economic progress. In the field of work of the ILO, that means, for instance, showing that safer jobs ae more productive jobs; that child labour undermines longer term economic capability; that effective policies for gender equality lead to more dynamic economies; that a more secure population is also willing to adjust to economic needs. In such an integrated response, the goal of decent work provides a way to build social standards into development and into effective participation in the international economy'*.[31]

Developing countries in this Conference strongly opposed the United States and European Union's proposal to create a forum within the WTO for centralized discussion of labour standards (bans on child labour and the like).[32] The debate between the proponents and opponents about the role WTO to play in implementing the labour standards was intense and there were strong disagreements among the members. The then US President Bill Clinton mentioned to the local newspapers that he believed that trade sanctions might one day be used in retaliation for labour-standard violations. This statement of Bill Clinton triggered the divide more. After the failure of having a consensus on any role for the WTO on the question of labour standards at the Seattle Ministerial Conference, the whole world turned to the ILO as the forum for addressing the question.[33]

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31 Decent work for all in a global economy: An ILO perspective, Submission by Mr.Juan Somavia, Director-General, International Labour Office to the Third WTO Ministerial Conference in Seattle, available at: <https://www.ilo.org/public/english/bureau/dgo/speeches/somavia/1999/seattle.htm>, (last visited on November 15, 2021).

32 Chapter 17, The Seattle Ministerial Conference, available at: <https://www.ilo.org/public/english/bureau/dgo/speeches/somavia/1999/seattle.htmhttps://www.meti.go.jp/english/report/downloadfiles/gCT0017e.pdf>, (last visited on November 15, 2021).

33 A difficult issue for many WTO member governments, WTO, available at: <https://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief16_e.htm>, (last visited on November 15, 2021).

2.3 Doha Ministerial Conference 2001

The preparatory negotiations to Doha Ministerial Conference 2001 had only a little reference to labour standards. The change of administration in United States (Clinton to Bush), made it less interested in this topic and EU suggested that there was no question of the issue being raised again. Still due to the persuasion of developed countries' trade unions led by International Confederation of Free Trade Unions (ICFTU), the issue was raised with United States at the forefront, with the support of Canada, Norway, Sweden and Germany. Developing countries continued their opposition to the inclusion of labour standards into the WTO. The Asian countries including India, the G-77 and China reaffirmed that in their view the ILO was the competent body to deal with labour standards. Zimbabwe, India, Malaysia, Thailand, South Korea, Brazil, Pakistan and Indonesia were at the front of the opposition to bring labour standards issues into the WTO.

It can be said that the supporters of the trade-labour linkage were less vocal in Doha compared to the opponents. The supporters were tactical enough to ensure that the final declaration did not rule out a possible role for the WTO on labour standards issue. The Ministerial Declaration at Doha finally on the labour standards states: '*We reaffirm our declaration made at Singapore Ministerial Conference regarding internationally recognized core labour standards. We take note of the work underway in the International Labour Organization (ILO) on the social dimension of globalization'.* It can be said that the Doha Declaration fell short of completely ruling out any possible role for the WTO on labour standards. The Doha Declaration reaffirmed the Singapore Ministerial Declaration's position by continuing the legacy on the subject i.e., legacy of lack of consensus to fix WTO's role in establishing labour standards in international trade.

According to proponents, the Doha declaration left an opening for future WTO work on the labour issue and according to opponents, it brought the matter to an end. By looking at the preparatory documents at Doha, it can be said that a proposal for a clear and positive statement on the WTO position as regards labour standards was apparently not acceptable to all the parties. Rather there was a draft line in the revised draft declaration of 27 October 2001 which recognizes the ILO as a more suitable place to discuss labour standards. The deleted line is as follows: '*The ILO provides the appropriate forum for a substantive dialogue on various aspects of the labour standards issue'.* These words were not there in the final declaration otherwise it would have drastically changed the nature of the trade-labour debate in so far as institutional roles are concerned.[34]

34 Trade-Labour Debate: The State of Affairs, CUTS Center for International Trade, Economics & Environment, 2004, ISBN 81-8257-025-5, p. 17 available at: <https://cuts-citee.org/pdf/RREPORT04-03.pdf>, (last visited on November 17, 2021).

2.4 12th Ministerial Conference 2021

Though the 12th Ministerial Conference 2021 was postponed indefinitely due to corona, but analysts said that in a series of meetings held in Brussels and later in London as preparatory for 12th Ministerial Conference 2021, the United States and European Union is said to be working out a detailed strategy to bring back the debate of trade-labour nexus on to the platform. On 22nd October 2021, United States Trade Review (USTR) published the details of the Group of Seven (G7) trade ministers meeting details which included the United States, Japan, Germany, France, the United Kingdom, Italy and Canada, in which it was mentioned that the G7 trade ministers, called '*for eliminating forced labour, child labour and labour standards in global supply chains…*'. They discussed priorities for a successful 12th Ministerial Conference of the WTO, and expressed their commitment to reforming the WTO and building a more viable and durable multilateral trading system with rules-based trading system with no place for forced labour, child labour and with a commitment on labour standards[35].

3. Possibility of Implementation of Core Labour Standards through WTO Trade Sanctions – Arguments for and Against

Among resentment and rejection, the proponents of the trade sanction approach such as United States and European Union argue that there is considerable presence of child labour in the export industry and trade sanctions will play an important role in eradicating and ensuring labour standards. According to 2020 List of Goods produced by Child labour or Forced Labour in the global supply chain market, published by the Department of Labour, United States[36], a study of 154 countries reveals that 73 million children are engaged in hazardous labour and 152 million children are working as child labour in the supply chains in which many are part of complex global supply chains.

As there are opponents to the proposal of using trade sanctions to impose core labour standards to eradicate and prevent labour standards issue in the international trade, in the same way, there are proponents who argue that trade sanctions will lessen the number of child labour engagement in the international trade. According to the proponents, it is not the only way, but it one of the way to eradicate and prevent child labour. Though some critics suggest that trade ban is a big stick to be used to create such a little impact on the child labour in export sector, as the reach and effect of the use of tool is on very small area of the entire problem. According to proponents, trade sanctions will be effective way, if it's one of the uniform standards of WTO. If a country that utilizes child labour is unable to

35 Danger of WTO's Doha MC4 in 2001 repeating itself in MC12 in 2021, published in SUNS#9445 dated 26 October 2021, Third World Network, available at: <https://www.twn.my/title2/wto.info/2021/ti211023.htm>, (last visited on November 15, 2021).

36 *See* <https://www.dol.gov/sites/dolgov/files/ILAB/child_labor_reports/tda2019/2020_TVPRA_List_Online_Final.pdf>, (last visited on December 17, 2021).

find new trading partners a broader trade ban can have significant effect. Though initially, it will lead to displacement, reengagement of the children in domestic sector, but slowly the need for economic development will make the countries to look for alternatives to comply with the trade sanctions. The politics surrounding child labour and trade will eventually end when the alternatives are found and the adults will be engaged where children are seen as low cost labour.

According to the opponents who want WTO not to be included in the debate of the enforcement of core labour standards in the international trade argue that if the essence of the essence of the trade-labour link is seen as being able to invoke trade sanctions against non-compliant countries, there would be a huge asymmetry in the way in which sanctions operate. The big economies such as United States, European Union, Japan etc., can only credibly apply the trade sanctions and will be in a position to threaten enormous damage to small trading partners who are non-compliant with agreed international labour rights, while the small economies would not be able to do likewise. The developed economies threat of sanctions carry more weight than ones made by developing countries and will lead to major exports to generate the foreign earning.

The following was stated in the Carnegie Endowment Working Paper Number 17 of 2001 entitled "Breaking the Labour-Trade Dead-Lock' about the one sided nature of such trade sanctions: '*in the hands of industrial giants, the sanctions stick becomes a huge club poised to wallop emerging economies and do significant damage. But when the stick is in the other hand developing countries' hand, it shrinks to the size of a splinter that can annoy but do little harm to a large, developed, diversified economy'*.[37]

Further, it is also argued that the trade-labour issue can act as a distraction from market access concerns. It is being argued that developing countries products (especially agricultural products) still face several barriers to developed countries' markets that is, developing countries are popular targets for trade conditionality and threat of trade sanctions because of their relative economic vulnerability.

Now coming to the argument of trade sanctions as imperfect tool, it is noticed that trade sanctions often miss their targets. In the vast majority of developing countries, for example, India, most workers are employed in agriculture, services and informal sectors of their domestic economies. In the case of child labour, it has been found that the vast majority of children work in sectors far removed from the global economy and thus sanctions directed at imports would serve no useful purpose, hence the benefit will reach to small section

37 Phil Potter; Staci Warden, Inter-American Dialogue (Organization), Trade Policy Group; Carnegie Endowment for International Peace, Economic Reform Project, 'Breaking the Labour-trade Dead Lock', e-book published by Washington, DC: Carnegie Endowment for International Peace: Inter-American Dialogue, 2001, available at: <https://carnegieendowment.org/files/17Warden-IAD.pdf>, (last visited on December 4, 2021).

of child labour, probably less than five to ten percent, employed in the export industries in manufacturing and mining. In India, it is seen that majority of the child labour are engaged in non-trade work such as agriculture, fishing, hunting, forestry, shoe shining, newspaper selling, restaurants and domestic work which are actually the root of the child labour problem. The trade sanctions will no way benefit those who are engaged in non-trade work, hence may not give significant results in addressing the core issue.

It is also argued that the trade sanctions approach leave its intended beneficiaries worse off and compromise the WTO fundamental objectives. This can be explained with a classic example of the case study of child labour in Bangladesh. In 1993, US threatened Bangladesh with the trade sanctions following a campaign against child labour. Terrified Bangladesh garment factory owners in Dhaka dismissed tens of thousands of children under the age of 16. This served to hurt the very children, it supposedly set out to help, and left them worse off. Many of the children meta fate worse than in the garment factories and ended up in more dangerous and less lucrative jobs such as working in poor and dangerous conditions in factories not producing for export, as street vendors and in prostitution. The same scenario is repeated with reference to child labour employment and threat of trade sanctions in soccer ball manufacturing units in Pakistan and carpet industry in Nepal. Hence, according to the critics, the adoption of trade sanctions approach without providing alternative sources of income of the children and their families will aggravate the children's poverty. Considering the linkage of trade and labour, this effort will slow down the trade liberalization efforts and will hurt the developing countries' workers and will also compromise the fundamental objective of the WTO, which is further trade liberalization.

Further, the analysts says that the trade sanctions approach can only inflict pain and elicit compliance from industries and governments engaged in international trade which are taking *suo moto* initiatives to maintain core labour standards and maintain global labour standards. Hence, finally the critics argue that trade sanctions approach has not worked before and there is no evidence that it will work in future, because it cannot induce the domestic policy reforms. It is seen that United States economic sanctions failed to bring core labour standards in Sudan, Iraq, North Korea, Burma, Liberia, Central African Republic, Chile, Nicaragua, Paraguay and Romania. The use of sanctions by the United States under its Generalized System of Preferences (GSP) is a classic example of its potential abuse.[38]

Further, critics argue that the reason for raising the debate of linking ILO with WTO to implement core labour standards in the international trade is because of the lack of 'teeth' to enforce the labour standards by ILO. WTO which has effective dispute settlement mechanism is seen as a vessel to achieve the ILO's objective. This reason is not sufficient

38 Ludo Cuyvers, Weifeng Zhou, Linking International Trade and Labour Standards: The Effectiveness of Sanctions under the European Union's GSP, Journal of World Trade, Volume 45, Issue 1 (2011), Pp. 63-85.

to convince the developing countries to accept the inclusion of labour issues into the trade agenda.

According to critics, the trade-labour relationship and enforcement of core labour standards through WTO framework is a dialogue of developed countries to gain command in the international trade regime under the shadows of 'moral imperialism'. According to critics, the developing countries are taking initiatives to ratify ILO standards and declarations by ratifying the same by bringing new laws and amendments in the existing laws at their domestic legal regimes to ensure the compliance. For example, in India various laws, regulations, policies, schemes and programmes were introduced to eradicate and prohibit child labour. In fact the programmes like sarva siksha abhiyan, beti bachao beti padao, mid-day meal scheme etc., are revealing the statistics that parents and government want the children to be in school rather than at work if it were affordable.

4. Labour Standards Implementation by differently Interpreting the WTO Agreement

There is demand from every corner of the world to open debate about sustainable development in the WTO forum. The current wording of the WTO rules leaves room for interpretation with regard to whether measures to protect human and labour rights can be allowed or not. But according to critics, these may not be sufficient, '*solutions…. That focus on interpretative techniques and an expansive understanding of WTO applicable law appear to have limited prospects'.* This clearly brings out that a review or reform of WTO rules is needed. European Commission in its 2021 communication on the trade policy review is proposing that the WTO reforms should focus on enhancing the WTO's contribution to sustainable development and is expecting WTO to play a greater role in promoting a decent work objective through enhanced analysis and exchanges of experience, including better cooperation with the ILO on the impact of trade on social development and on the general economic benefit of worker's rights.

Some are demanding for new WTO agreement with social clause or human rights clause; some are looking for amendment to the GATT with social clause or labour rights; or alternatively a treaty, 'mandating the positive protection of human rights to be passed as a part of the WTO package' or as a non-binding alternative, a declaration on human rights similar to the Doha 2001 (though merely will have a guiding force) or by permitting the trade sanctions to be used to impose core labour standards.

According to some, who argue that WTO covers the human rights issues says, '*WTO, if the trade-restrictive measures are taken without violating the general principles such as Most Favoured Nation Treatment and National Treatment, and if such trade restrictions are justified under one of ten 'general exceptions' (GATT Article XX), i.e., Members should demonstrate appropriate regulatory intent, and the measure should not be an 'arbitrary or*

unjustifiable discrimination between countries where the same conditions prevail'. Article XX(e) contains the only explicit reference to conditions of labour under GATT 'relating to the products of prison labour'. Article XX(a), which sets out measures necessary to protect public morals. For instance, under Article XX(a), European Communities justified a general ban on the marketing of seal products following moral outrage caused by the inhumane killing of seals. The WTO Appellate Body endorsed the EU ban in its final ruling, but emphasized that the measure had to be fully non-discriminatory[39]. Article XX(b) includes a justification for measures necessary to protect human, animal or plant life or health and the same could be used to take measures seeking to enforce human and labour rights in supply chains are necessary to protect the health of workers. But there is no clarity whether WTO includes the labour issues in its ambit or not. Many developing countries, such as Mexico, contended that labour standards constitute a 'barrier to free trade'.

In answer to the question, what in reality the relationship between trade and labour standards under WTO umbrella is till date no one has argued in the WTO that labour standards constitute a barrier to free trade and WTO never ruled on child labour because the issue never appeared for a ruling.[40] For example the trade policy of the European Union is aiming to ensure that economic development goes hand in hand with respect for human rights and high labour standards, in line with WTO rules. The potential trade measures that the EU is envisaging to fight the labour standards related phenomena include import bans, increased customs duties for certain products or the blacklisting of companies involved, as long as they are devised in a WTO-compatible manner. For example, adoption of binding legislation on tracking forced labour in supply chains, legislation on human rights due diligence in international supply chains, adoption of trade-related obligations at global level, as envisaged by an international treaty on business and human rights (currently being negotiated in the framework of the UN Human Rights Council, or by possible WTO reform measure) etc., EU bilateral trade agreements containing the human rights clause are providing for commitments relating to labour rights that are binding to varying degrees, yet to be tested for WTO compliance in practice, but theoretically is anticipated to be a subject matter fit to be brought to the WTO DSU as dispute.

The EU unilateral trade measures regarding rare and precious minerals from conflict areas, Kimberely Process (a scheme to track and ban diamonds from conflict areas) etc., are yet to be tested for WTO standards. For Kimberely Process, the EU asked for WTO waiver, although there was no reason to believe that the scheme would not qualify under the GATT general exceptions. Similarly US conflict minerals legislation and OECD due diligence guidance, targeting imports of minerals likely to finance armed conflict in certain areas

39 WT/DS400 – European Communities – Measures Prohibiting the Importation and Marketing of Seal Products

40 *Id.*

have been construed in such a way as to fall under the Article XXI exception for security measures rather than under Article XX exceptions hence are assumed to be able to survive. But the question is whether such trade restrictive measures survive under Article XX exception?

Comparing US conflict minerals legislation with EU regulation on conflict minerals which became applicable from 1st January 2021, which obliges importers of certain minerals to comply with due diligence obligations as defined by the OECD guidance, the US legislations is geographically limited to central Asia and the later has a global scope, hence this makes it more difficult to justify under the same GATT Article XXI security considerations, by reference to specific UN security resolutions on central Africa.[41]

5. Forum Shifting: Adopting A Third Way - GSP, Bilateral and Regional Approaches to Deal with the Trade-Labour Issue

Amidst the heated opposition from the developing countries with regard to the integration of labour standards in the WTO, the powerful economies linked the both through unilateral action and bilateral and regional agreements. Those are seen as forum shifting or third way adopted by the powerful economies to implement something which they could not achieve at the multilateral level.

Part IV of the GATT, dealing with 'Trade and Development' provides for the grant of trade preferences to developing countries by developed countries on a non-reciprocal basis through mechanism outside the GATT. This is mainly done through the Generalised System of Preferences (GSP) initiated under the auspices of the United Nations Conference on Trade and Development (UNCTAD) in 1968. This type of trade policy is enabled by GATT through the special and differential treatment provision (Enabling Clause) which allows developed countries to treat developing countries more favourably than other WTO members to strengthen industries in developing countries. The GSP has three essential features. First, it entitles developed countries to grant trade preferences to developing countries on a non-reciprocal basis. Second, where such preferences are given, a derogation from the Most Favoured Nation (MFN) Principle is allowed. Third, as opposed to the special relationship between former colonies and their colonial masters, the GSP is general in that it can be given to any developing country regardless of whether there has been a colonial relationship or not. The EU and the US consequently made the granting of GSP benefits subject to certain specified labour standards, thus specifically linking trade preferences to labour standards.

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41 WTO rules: Compatibility with human and labour rights, European Parliament, available at: <https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/689359/EPRS_BRI(2021)689359_EN.pdf>, (last visited on December 15, 2021).

A. EUROPEAN UNION - GSP

According EU, GSP is the EU Trade policy's main tool to support developing countries and their efforts to pursue sustainable development. The GSP removes import duties from products coming into the EU from developing countries and helps developing countries to alleviate poverty and create jobs, while at the same time abiding by international values and principles. The negative conditionality enables the removal by the EU of preferences to GSP beneficiaries in cases of serious and systematic violations of human or labour rights. the positive conditionality offers additional benefits to eligible countries in order to help them assume the special burdens and responsibilities resulting from the ratification of core international conventions on human and labour rights.

In 1994, the EU established a direct link between trade and labour standards in the context of its relationship with developing countries through its GSP system. The EU GSP legislation recognizes as minimum international labour standards: (i) Prohibition of forced and prison labour; (ii) the substance of ILO conventions 87 and 98 dealing with freedom of association and the right to bargain collectively; and (iii) the substance of ILO convention 138 dealing with the minimum age of employment. Developing countries, which fail to observe the substance of these standards, may lose their preferential access to the EU market.

With effect from January 1998, the EU Council Regulation, establishing the GSP, provided for special incentives in the form of additional preferences, which are given upon the request to countries which adopted and applied the substance of ILO standards concerning freedom of association and collective bargaining. The EU GSP Regulation for 2002-04 included in it the new incentives and provided for the GSP to be withdrawn in cases of 'serious and systematic' violations of any of the core labour standards. In terms of this Regulation, the EU can withdraw GSP benefits where there is substantive ILO criticism of the situation in the countries concerned, including the non-implementation of the recommendations of the ILO Committee on Freedom of Association.

The EU's GSP has been the subject of dispute settlement in the WTO and its current structure reflects the findings of the WTO bodies. Responding to a complaint brought by India against the EU, the WTO Appellate Body report on the EC – Conditions for the granting of tariff preferences to developing countries[42], stated that the EU's drug arrangement failed to provide non-discriminatory treatment 'to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the same 'development, financial and trade needs'.

42 EC-Conditions for the Granting of Tariff Preferences to Developing Countries, (WT/DS246/AB/R).

THREE TYPES OF ONE-WAY PREFERENTIAL TRADE SCHEMES

1. **Standard GSP**
   The general arrangement grants duty reductions for around 66% of all EU tariff lines to low-income or lower-middle income countries (according to the World Bank classification), which do not benefit from other preferential trade access to the EU market (currently 15 beneficiaries[1]).
2. **GSP+**
   The special incentive arrangement for Sustainable Development and Good Governance ('GSP+') grants full duty suspension for essentially the same 66% of tariff lines as the Standard GSP to eligible countries that are vulnerable in terms of their economic diversification and export volumes. In return, beneficiary countries (currently 8 of them) must ratify and effectively implement 27 international conventions, which cover human and labour rights, environmental protection and good governance.
3. **EBA (Everything But Arms)**
   The special arrangement Everything But Arms ('EBA') grants full duty-free, quota-free access for all products except arms and ammunition to countries classified by the United Nations as Least Developed Countries (LDCs). Unlike for the beneficiaries of the Standard GSP and GSP+, LDCs benefitting from the EBA (currently 48 of them) do not lose EBA status by entering into a trade agreement with the EU

Source[43]

Out of the three arrangements, GSP+ has the strongest obligations for beneficiary countries. When entering GSP+, countries agree to implement effectively 27 international conventions related to human rights, labour rights, environmental protection and good governance. The EU supports them in their efforts and engages through regular dialogue and monitoring missions to follow their progress. The following are the some examples related to progress on eradicating child labour as per EU's 2018-19 Country Highlights GSP+[44]:

- Sri Lanka was able to reduce child labour to 1% (from 16%), partly through pioneering 'Child Labour Free Zones' and committed to a goal of 0% by 2022.
- Bolivia raised the minimum working age to the internationally accepted standard of 14 years. Bolivia established a certification scheme in the agricultural sector for fighting child labour.
- Paraguay adopted a national strategy to eradicate child labour by 2024, including through providing a minimum income to vulnerable families.

43 Trade: 2019 Biennial Report on the Generalized Scheme of Preference on 10/02/2020, European Commission, available at: <https://trade.ec.europa.eu/doclib/docs/2020/february/tradoc_158618.pdf>, (last visited on December 5, 2021).

44 *Id.,*

- Mongolia agreed to conduct a child labour survey following a recent GSP+monitoring mission. The EU provided budget support for Mongolia to strengthen labour standards; it includes a child labour survey and a progress indicator related to ILO Conventions.
- Cabo Verde declared tackling child labour, especially the hazardous labour as priorities for engagement.
- Pakistan launched a national child labour survey and started implementation of the National Action plan on Human Rights.
- Philippines declared tackling child labour as priorities for engagement.
- Bangladesh made urgent progress on the full elimination of forced and child labour.
- Myanmar decided to ratify ILO Convention 138 on the minimum working age and align legislation with the fundamental principles and labour rights, in particular eliminating forced and child labour, and ensuring freedom of association both in legislation and in practice.

On human rights and labour rights, the 2018 GSP mid-term evaluation found that GSP+ is effective in creating leverage both through its monitoring mechanism and the prospect of accession. Countries that are unwilling to address and engage on issues of concern are being more closely scrutinized by EU. Through enhanced engagement, the EU intensified the dialogue with three EBA beneficiaries i.e., Bangladesh, Cambodia and Myanmar, to press for concrete actions on and sustainable solutions to serious shortcomings in respecting fundamental human and labour rights.

According to the Proposal for a Regulation of the European Parliament and of the Council on applying a generalised scheme of tariff preferences and repealing Regulation (EU) No 978/2012 of the European Parliament and of the Council, 2021/0297 (COD)[45] Under the EU's zero tolerance approach for child labour the reasons for temporary withdrawal should include exports of goods made by internationally prohibited child labour, as well as forced labour including slavery and prison labour. Chapter V, Temporary withdrawal provisions common to all arrangements, '*the preferential arrangements referred to in Article 1(2) may be withdrawn temporarily, in respect of all or of certain products originating in a beneficiary country, for any of the following reasons: (b) export of goods made by internationally prohibited child labour and forced labour and prison labour;'*

45 Proposal for a Regulation of the European Parliament and of the Council on applying a generalised scheme of tariff preferences and repealing Regulation (EU) No 978/2012 of the European Parliament and of the Council, 2021/0297 (COD), European Commission, Brussels 22.9.2021, COM (2021) 579 final, available at: <https://trade.ec.europa.eu/doclib/docs/2021/september/tradoc_159803.pdf>, (last visited on December 15, 2021).

European Commission President Ursula von der Leyen promised that under her leadership the Commission would further strengthen the use of trade tools in support of non-trade policy objectives. In her *Agenda for Europe 2019-2024,* she stressed, '*Trade is not an end in itself. It is a means to deliver prosperity at home and to export our values across the world'* including '*the highest standards of climate, environmental and labour protection, with a zero-tolerance policy on child labour'*.[46] According to the Commission Staff Working Document, Impact Assessment Report published by European Commission on 22.09.2021[47], the attainment of GSP objectives, notably on sustainable development could be advanced by adding the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OP-CRC-AC) and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OP-CRC-SC), Convention on the Protection of the Rights of Persons with Disabilities (CRPD).

B. UNITED STATES OF AMERICA – GSP

The U.S. Generalised System of Preferences (GSP) program provides nonreciprocal, duty-free tariff treatment to certain products imported to the United States from designated beneficiary developing countries (BDCs). Congress first authorized the U.S. program in Title V of the Trade Act of 1974 along with EU and other developed countries. Congress extended the U.S. GSP program in Division M, Title V of the Consolidated Appropriations Act, 2018 (P.L. 115-141). This legislation extended the GSP program until December 31, 2020, as well as retroactively renewing it for the time period between December 31, 2017 and April 22, 2018. Currently, 119 developing countries and territories are GSP beneficiary developing countries (BDCs). The program provides duty-free entry into the United States for over 3,500 products (based on 8-digit U.S. Harmonized Tariff Schedule tariff lines) from BDCs, and duty-free status to an additional 1,500 products from 44 GSP beneficiaries additionally designated as least developed beneficiary developing countries (LDBDCs). In 2019, products valued at about $21.0 billion (imports for consumption) entered the United States duty-free under the program, out of $235.1 billion worth of total imports from GSP-

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46 Ursula von der Leyen, A Union that strives for more – My agenda for Europe, Political Guidelines for the next European Commission 2019-2024, available at: <https://ec.europa.eu/info/sites/default/files/political-guidelines-next-commission_en_0.pdf>, (last visited on December 15, 2021).

47 Commission Staff Working Document, Impact Assessment Report, Proposal for a Regulation of the European Parliament and of the Council on applying a generalised scheme of tariff preferences and repealing Regulation (EU) No 978/2012 of the European Parliament and of the Council, 2021/0297 (COD), European Commission, Brussels 22.9.2021, COM (2021) 266 final, available at <https://trade.ec.europa.eu/doclib/docs/2021/september/tradoc_159809.pdf>, (last visited on December 19, 2021).

eligible countries. Total U.S. imports from all countries amounted to about $2.5 trillion in 2019.

When designating BDCs and LDBDCs, one of the following mandatory criteria which beneficiary countries should comply is '*have taken or taking steps to grant internationally recognized worker rights (including collective bargaining, freedom from compulsory labour, minimum age for employment of children, and acceptable working conditions with respect to minimum wages, hours of work, and occupational safety and health); and implementing their commitment to eliminate the worst forms of child labour'.*[48] Additionally GSP reporting requirement include an annual report to Congress on the status of internationally recognized worker rights within each BDC, including findings of the Secretary of Labour with respect to the beneficiary country's implementation of its international commitments to eliminate the worst forms of child labour.

According to the 20th Annual report, the 2020 Findings on the Worst Forms of Child Labour, in accordance with the Trade and Development Act of 2000 (TDA) prepared by the U.S. Department of Labour, the TDA set forth the requirement that a country implement its commitments to eliminate the worst forms of child labour for the President of the United States to consider in designating the country a beneficiary developing country under the Generalised System of Preferences (GSP) program. This report covered 119 independent countries and 15 non-independent countries and territories designated as GSP beneficiaries. According to the overview of 2020 assessments, Argentina, Colombia, Costa Rica, Ecuador, Mexico and Peru made meaningful efforts in eradicating and preventing child labour in all relevant areas, covering legal frameworks, enforcement, coordination, policies, and social programs, which in some cases included taking suggested actions recommended in 2019. Despite of significant advancement, it is important that still the child labour challenges remain in these countries. According to the report, the significant advancement serves as a laudable indicator of a country's efforts against child labour during the reporting period; it is not a sign that work is over. Further, the report says 14 other countries such as Brazil, Chile, Cook Islands, Cote d'Ivoire, Democratic Republic of the Congo, Georgia, Madagascar, Malawi, Nepal, Philippines, Rwanda, Sri Lanka, Thailand and Uzbekistan received an assessment of significant advancement if they would have met the baseline level of protection. Total 73 countries received a moderate advancement assessment in 2020 and made meaningful efforts to eliminate the worst forms of child labour in some relevant areas covering laws and regulations, enforcement, coordination, policies and social programs and meanwhile, 19 countries received an assessment of minimal advancement for making efforts in only a few relevant areas.

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48 19 U.S.C. §2462(b).

According to the report, other countries also made efforts to address their child labour situation during the year, yet because they simultaneously continued or established a detrimental law, policy, or practice that delayed advancement in eliminating the worst forms of child labour, the highest assessment level these countries could receive was a minimal advancement. 19 countries such as Afghanistan, Armenia, Azerbaijan, Cambodia, Gabon, Iraq, Kyrgyz Republic, Mali, Mauritania, Moldova, Mongolia, Somalia, Tanzania, The Gambia, Timor-Leste, Tonga, Uganda, Ukraine and Yemen implemented or maintained a law, policy, or practice related to access to education, minimum age for work, labour inspection, impunity, criminal treatment of victims, or the recruitment and use of child soldiers that undermined advancement. 8 countries such as Anguilla, British Virgin Islands, Dominica, Grenada, Montserrat, Niue, Saint Helena, Ascension, and Tristanda Cunha and Tokelau received an assessment of No Advancement because they made no effort to prevent the worst forms of child labour. These countries lack legal frameworks that meet international standards, leaving children without an adequate preventive mechanism. Burma, Eritrea and South Sudan were found complicit in the use of forced child labour during the reporting period, whether for commercial exploitation, public works projects, or forced recruitment in armed conflict. In this report, India is placed at Moderate Advancement.[49]

United States Trade Representative (USTR) leveraged the influence of GSP worker rights eligibility review to encourage Bolivia to raise the floor. Two years later, Bolivia raised the minimum age of work to 14 in line with international standards. USTR's review of Uzbekistan's GSP eligibility also pushed the Uzbek government to eliminate the systematic use of forced labour, including of children, in its annual cotton harvest. Under the U.S.-Mexico-Canada Agreement (USMCA), with the strongest labour standards in any trade agreement, Ambassador Katherine Tai has committed to lead the fight against forced labour globally, which includes forced child labour, and will work with Mexico and Canada on their shared obligation to ensure Agreement's prohibition of the importation of goods produced by forced labour, including forced child labour.[50]

The following is one of the classic example of U.S. efforts to deal with the child labour in the international trade. On January 18, 2008, a public notice was published in the Federal Register on pages 3495-3496 requesting public comments by February 15, 2008, on whether each beneficiary country exporting certain hand-loomed carpets is taking steps

49 Sweat & Toil, 2020 findings on the worst forms of child labour, Spotlight on a vulnerable world The Pandemic's Global Impact, U.S. Department of Labour, https://www.dol.gov/sites/dolgov/files/ILAB/child_labor_reports/tda2020/2020_TDA_Magazine_optimized.pdf

50 Charita Castro and Jennifer Oetken, The Power of Trade in Protecting Children from the Worst Forms of Child Labour, 12th June 2021, available at: <https://ustr.gov/about-us/policy-offices/press-office/blog-and-op-eds/2021/june/power-trade-protecting-children-worst-forms-child-labor>, (last visited on December 18, 2021).

to eliminate the worst forms of child labour, including the use of bonded child labour, in the production of certain carpets imported under the U.S. GSP programme. The GSP Subcommittee of the Trade Policy Staff Committee has decided to extend the deadline to March 14, 2008, for receipt of public comments for this review. The following are the list of active and recently closed GSP country practices reviews related to child labour:

Country	Basis for Petition	Petitioner	Docket Number on Regulations.Gov	Status
Bolivia	Worker Rights & Child Labour	USTR	USTR-2017-0009	Closed on October 25, 2019 with no loss of GSP benefits
Kazakhstan	Worker Rights & Child Labour	AFL-CIO	USTR-2018-0008	Ongoing
Uzbekistan	Worker Rights & Child Labour	ILRF	USTR-2013-0007	Closed on October 30, 2020 with no loss of GSP benefits

Source[51]

C. FTA/RTA

The North American Free Trade Agreement (NAFTA) between the US, Canada and Mexico became effective in 1994. Prior to that the sponsors of NAFTA had to contend with strong opposition from the labour movement in Canada and USA. Labour in these two countries feared that law wages and inadequate enforcement of labour legislation in Mexico would induce businesses to move to that country which would result in downward pressure on wages and plant closures in Canada and the USA. In order to appease the USA labour movement, the USA government insisted on the inclusion of labour standards through what came to be known as the Labour Accord. The supplementary agreement known as the North American Agreement on Labour Co-operation (NAALC) was signed in 1993. The core obligation by each of the NAALC parties is to 'effective enforce its domestic labour law'. NAALC has provisions for sanctions against defaulting parties. This established the trade-labour linkage in the international trade.

Later, through bilateral trade agreements, the developed economies started insisting on the inclusion of labour standards requirements in international trade. The US Trade and Development Act, 2000 which embraces the Africa Growth and Opportunity Act (AGOA) and the US-Caribbean Trade Partnership Act (CBTPA) shows the trend. The AGOA conditions eligibility for US trade preferences on respect for core labour standards and the implementation of ILO Convention No.182 concerning the banning of the worst forms of

51 Ongoing Country Reviews, Office of the United States Trade Representative, Updated as of December 2020, available at: <https://ustr.gov/issue-areas/preference-programs/generalized-system-preferences-gsp/current-reviews/ongoing-country>, (last visited on December 18, 2021).

child labour. The CBTPA requires Caribbean countries applying for trade preferences to comply with core labour standards and it requires countries to establish minimum wage and maximum-hour standards for workers and ban the use of child labour.[52]

Further, labour provisions in trade agreements have been one tool used by G7 countries to set framework conditions for decent work. In 45 current G7 trade agreements, representing over 90 countries, labour provisions have increasingly become more important dialogue in the past two and half decades. By mid-2019, there were 85 RTAs (one third of the total RTAs in force (293) as notified by WTO) that included labour standards. Apart from NAFTA, the most recent RTAs which included the labour standards are: the EU-Canada Comprehensive Economic and Trade Agreement (CETA, 2017); the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP, 2018) between eleven countries including Canada and Japan; and the EU-Japan Economic Partnership Programme (2019).

Compared to USA and Canada, EU has a large number of RTAs with labour provisions. As of 2019, Canada had included labour provisions in 12 of its 14 agreements in force, while the USA, which also has 14 agreements in force, has included labour provisions in 13 of them. The EU has included labour provisions in 43% of its RTAs, up from 40% in 2016. Since 2013, only 2 out of 13 EU RTAs in force have not included labour provisions. Japan has included labour provisions in 6 of its 18 agreements in force, owing to the recent ratifications of EU-Japan and CPTPP in 2018. There is also an increasing trend of South-South RTAs with labour provisions between developing and emerging country partners, the share of which represents about one-quarter of the total RTAs with labour provisions. By mid-2019, there were 55 countries without labour provisions in any of their RTAs, with the vast majority of countries located in Southern Asia and Middle East.[53]

Recently, US came out with a legislation titled Bipartisan Congressional Trade Priorities and Accountability Act of 2015 which lays out labour obligations in RTAs and EU came out with 'Trade for All' (2015) strategy which reinforces the EU's integration of sustainable development in RTAs, based on high labour and environmental standards coupled with development cooperation. Canada has promoted the inclusion of core labour standards and linkages to trade since the 2001 Summit of the Americas in Quebec. Japan's 'Development Strategy for Gender Equality and Women's Empowerment' included focus on inclusive

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52 Trade-Labour Debate: The State of Affairs, CUTS Center for International Trade, Economics & Environment, 2004, ISBN 81-8257-025-5, p. 17 available at: <https://cuts-citee.org/pdf/RREPORT04-03.pdf>, (last visited on December 15, 2021).

53 Labour Provisions in G7 Trade Agreements: A Comparative Perspective (1919-2019) International Labour Organization, available at: <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_719226.pdf>, (last visited on December 19, 2021).

development that fosters women's participation in the labour market and 'traditionally male-centered areas'. The following table will show the location of labour provisions in trade agreements, examples of G7 and other agreements[54]:

6. CONCLUSION

It is a hard fact to digest that despite all international and national legislative and regulatory framework and initiatives, how and why the problem of child labour is still persisting in Export Industry? No one denies that labour standards need to be improved, respected and enforced, but only difference is about the way of implementation. According to the protagonists, the imposition of trade sanctions is the key to better global labour standards and according to the antagonists, a greater role is to the assigned to the ILO and other non-coercive approaches rather than WTO.[55] According to Andrew, there following interesting questions emerge from the decision at Doha to put aside the international labour standards debate within the WTO.

- Does declining to take up the issue matter in the effort to improve global adherence to core labour standards?
- Does passing on the issue help or harm the overall mandate and responsibility of the WTO to expand global trade?

  Further, the following four broad questions have been raised inside and outside the WTO. These are as follows:[56]

- The analytical question: if a country has lower standards for labour rights, do its exports gain an unfair advantage? Would this force all countries to lower their standards (the "race to the bottom")?
- The response question: if there is a "race to the bottom", should countries only trade with those that have similar labour standards?
- The question of rules: Should WTO rules explicitly allow governments to take trade action as a means of putting pressure on other countries to comply?
- The institutional question: is the WTO the proper place to discuss and set rules on labour or to enforce them, including those of the ILO?

54 *Id.,*

55 *Supra* Trade-Labour Debate: The State of Affairs (2004) at 17.

56 WTO, Labour standards: consensus, coherence and controversy available at: <https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm> (last visited on December 8, 2021)

When it comes to trade and labour standards there are four general viewpoints: (1) Trade is the answer, (2) Leave it to the International Labour Organization (ILO), (2) Labour Rules and (4) The Third Way (Again).[57] The following emerges from these viewpoints:

- The **'Trade is the Answer'** viewpoint stresses that more trade increases economic growth, which leads to improved labour standards. Any effort to focus the WTO on labour standards is dismissed as a misguided distraction, or perhaps a more insidious protectionist ploy.
- The **'Leave it to the ILO'** viewpoint believes that labour standards is a serious concern, but the WTO isn't really equipped to work on the subject. Rather, it should be left to the ILO. Indeed, the ILO should be strengthened to do so.
- The **'Labour Rules'** view point is premised on the existence of correlation between labour standards and trade. Thus, since international labour standards are so important to trade flows, WTO rules should permit to trade measures for a failure to comply with international labour standards.
- The **'Third way (Again)'**, view point is that there is nothing inherently inconsistent between expanding trade and improving implementation of core labour standards. The objectives are mutually reinforcing, rather than mutually exclusive, and there is a political benefit for both institutions to be seen working together.

The Inter-play between these viewpoints is the crux of the entire issue. Before dealing with these, it is required to refer to WTO's Singapore Ministerial Declaration of 1996 where it was stated that the International Labour Organization (ILO) alone had the "competence" to enforce global labour standards.[58] The failure of implementation of labour standards in the international scenario from 1996 to 2021 shows that ILO alone is not competent to enforce the labour standards. WTO-ILO combination is required. The use or potential use of trade sanctions against countries which fail, refuse or are unable to comply with core

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57 Andrew J. Samet, Doha and Global Labour Standards: The Agenda Item that Wasn't, The International Lawyer, Fall 2003, Vol.37, No.3, Symposium: The United States, the Doha Round and the WTO – Where Do We Go From Here?, Fall (2003), Pp.753-759, American Bar Association, available at: <https://www.jstor.org/stable/40707737>, (last visited on December 15, 2021).

58 Certain member delegations had argued in favor of inclusion of a commitment to a "core labour standards" provision in the declaration, but this was ultimately defeated, mainly by the resistance of developing countries. *See* James L. Kenworthy, "U.S. Trade Policy and the World Trade Organization: The Unraveling of the Seattle Conference and the Future of the WTO*",* 5 *Geo. Pub Pol'y Rev*. 103 (2000). Kenworthy wrote that *"during the Singapore conference, the United States.. had pushed for a significant statement by the ministers that could lead to future negotiations in the area of core labor standards and trade and environment. .... However, Washington was forced to give way on its demands for further work on labour standards in the WTO as the price of bringing Pakistan, India and some other hard-line developing countries on board."*

labour standards is seen as one of the effective solution to the problem, though this debate escalates the developed vis-à-vis developing countries divide. According to critics, the use of trade sanctions to enforce core labour standards is neither advisable nor politically feasible, because they are imperfect enforcement tool.

This dilemma of adopting which way to follow, is not only delaying the solution to the problem, but also becoming the reason for increase of the intensity of the problem. It is the high time for the trade experts to adopt the way to address the issue rather than engaging themselves in blame game or burden shifting exercises. Change will not come, unless intended steps are not taken to bring the change. If we believe that current generation are the seekers of change, then don't make them wait. Confusions and doubts should not overshadow the change.

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Assessing the Impact of Air Pollution in Urban Areas: A Comparative Study Of Varanasi And Ranchi

***Dr. Shilpi Gupta & **Dr. Swati**

Abstract

The research investigates aspects of addressing air pollution knowledge, causes, and effects within two culturally diverse urban regions, Varanasi, and Ranchi. It is based on in-depth survey-based research with primary data collection from 500 respondents in each city, on issues such as societal perception of air pollution level, pollution sources, health impact of pollution, existing laws and their effectiveness. It emerged that both cities consider vehicular and industrial pollution as the development pollutants, nevertheless, there are shockingly low levels of awareness on pollution control measures. More evidence of air quality degradation concerns the resources in two cities. This study aims to emphasise the importance of the public's perception of air pollution so that legal measures may seek to influence such perceptions and/or promote pollution control by changes in people's behaviour. The contribution of this study is to explain differences in the perception of air pollution depending on urban factors and suggest measures of more efficient environmental policies within the sustainable management of cities."

Keywords: *Child labour, Labour standard, International trade, WTO*

1. Introduction

Air pollution is one of the major environmental issues causing critical attention in the 21st century among other forms of pollution. It has health effects, effects on components of the environment, and even for economics. Cities with industrialization, high vehicular traffic, and crowded population inhabit a lot of pollutants. This study is set in two major Cities of India, the historic and devotional city of Varanasi, and the expanding industrial, and agricultural City of Ranchi. These cities have cultural and spatial differences but still grapples with air pollution and its health and structural danger.

The aim of this study is to determine how air pollution is perceived by the general population in these cities, to find out the most prevalent air contaminants, and to assess the risks associated with the contamination on health, the economy and the use of such terms as sustainable development. Furthermore, it is a goal of this research to analyze the reliability of the existing legal measures concerning air pollution as well as the existing efforts toward

* The Corresponding Author and the Project Director of the ICCSR Sponsored Project entitled "Effectiveness of Air Pollution Laws in safeguarding human health, economy and sustainable society: A study of urban areas of Varanasi and Ranchi.

** Assistant Professor, Xavier Law School, St. Xavier's University, Kolkata, India.

increasing the people's awareness regarding air pollution from the perspective of human and environmental health.

The description of the theoretical assumptions in this research is based on theories of urban environmental governance and sustainability. It includes the researches of pollution abatement and public interest in environmental issues, mostly in relation to urban air quality, development, and environmental law.

Air pollution in urban areas has reached critical levels globally, particularly in rapidly growing cities like Varanasi and Ranchi[1]. India, in particular, faces significant challenges in balancing urbanization with air quality management[2].

Urban areas, particularly in developing countries, face significant challenges in managing air quality and promoting sustainable development[3]. Thus, this study is important for the decision-makers and designers since it compares and contrasts the common ideas about air pollution and the actual dimensions in two regions of India with varying socioeconomic and cultural conditions. While highlighting the weaknesses and the potential factors of societal awareness and legal provisions, the study makes suggestions that can help enhance the posture towards air quality management, thus being useful in theory and practice in urban environmental governance.

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2. Literature Review

With an eye towards its sources, impacts, and mitigating techniques, the problem of air pollution has been well investigated in metropolitan settings all throughout the world. With important effects on public health, economic development, and environmental sustainability, air pollution is mostly generated by industrial emissions, vehicle exhaust, and unsustainable farming practices. Previous research shows that fast urbanisation and inadequate regulations make cities in underdeveloped nations, like India especially vulnerable[4] .

1 Molina, M. J., & Molina, L. T., Megacities and Atmospheric Pollution, 54 J. Air & Waste Mgmt. Ass'n 644 (2004), https://doi.org/10.1080/10473289.2004.10470936.

2 Belka, M., Kim, J. Y., & Lagarde, C., Development Committee Closing Press Conference, World Bank/IMF Annual Meetings (Oct. 12, 2013), http://hdl.handle.net/10986/24345.

3 Fisher, J. E., Andersen, Z. J., Loft, S., & Pedersen, M., Opportunities and Challenges within Urban Health and Sustainable Development, 25 Current Op. Envtl. Sustainability 77 (2017), https://doi.org/10.1016/j.cosust.2017.08.008.

4 Belka, M., Kim, J. Y., & Lagarde, C., Development Committee Closing Press Conference, World Bank/IMF Annual Meetings (Oct. 12, 2013), http://hdl.handle.net/10986/24345.

Development, e.g., die pollution, either from 1971 or from the civil industry, road vehicles, and relatively inefficient vehicles, out of which bio soot vessels head towards their sustainability ecology sources underdrive Nile content, alerts India's spiraling pressure. Past writings about such pollution depicted less developed countries undergoing rapid urban growth like India as a risk area.[5]

With specific reference to cities like Varanasi and Ranchi, vehicular and factory emissions have been found as primary reasons for reducing the ambient air quality[6]. Urban pollution is most severe in Varanasi, whose narrow roads with high vehicle density are features of apathy, whereas, every advantage of Ranchi is hampered by its mining and manufacturing industries. Other studies also highlight the cultural and geographical considerations on how people engage with the policies and issues of air pollution[7].

Studies have extensively documented the link between air pollution and adverse health outcomes, particularly respiratory and cardiovascular diseases[8]. In India, air pollution is a significant contributor to these health conditions, with limited public awareness hindering efforts to reduce its impact[9]. The adverse effects of air pollution on human health are well-documented, with geospatial analytics revealing the significant relationship between pollution levels and respiratory diseases.

Furthermore, environmental awareness and its components as they relate to management of air pollution, has received attention from several authors. It is broadly accepted that society awareness is one main aspect among other features that aids in the behavioral and policy change. Some researchers argue that awareness and educational campaigns can be instrumental in enhancing public participation in initiatives to curb environmental pollution. Nevertheless, it is even more of a problem that awareness and action do not reciprocate people understand what environmental pollution is but cannot act as their hands are tied by lack of tools and information.

Theoretical frameworks for sustainable development are also a useful means of assessing the effectiveness of different control measures for air pollution. The urban planning and development policies require the aspects of air quality management to be embedded

5 Id.

6 Sharma, S., Jain, S., & Khirwadkar, P., The Effects of Air Pollution on Human Health, 33 Indian J. Env't Prot. 358 (2013).

7 Kumar, P., Kumar, A., & Brewster, C., Investigating Electric Vehicles Adoption in Urban Public Transport: A Socio-Technical Transition Analysis Across Cities of the Global North and South, SSRN (2023), https://dx.doi.org/10.2139/ssrn.4493763.

8 Brunekreef, B., & Holgate, S. T., Air Pollution and Health, 360 Lancet 1233 (2002), https://doi.org/10.1016/S0140-6736(02)11274-8.

9 Sharma, S., Jain, S., & Khirwadkar, P., The Effects of Air Pollution on Human Health, 33 Indian J. Env't Prot. 358 (2013).

in the processes and structures to enhance sustainability over the long run[10]. Urban air pollution in Indian cities is largely driven by vehicular emissions, industrial activities, and biomass burning[11]. Moreover, the increase in the adoption of electric vehicles targeting minimization of emissions from vehicular traffic in the cities is consistent with global trends in decarbonisation and renewable energy[12].

This literature review draws attention to the major proponents of the present study as well as the previous studies ensuring present and future research within the nexus of air pollution, public understanding, and urban sustainability. It does not only end there, but it also prepares the ground for the analysis of data collected in Varanasi and Ranchi, which forms part of the larger picture of environmental governance in Indian cities.

3. Methodology

In this work both quantitative and qualitative data are incorporated to create a mixed methods approach utilizing surveys as well as interviews to describe air pollution awareness and its effects focusing on Varanasi and Ranchi cities. Each structured questionnaire was taught to the selected 500 respondents from each focus city in expectation of capturing diversified gender, age, education, and occupation status. The purposive sampling method was employed in order to reach respondents drawn from different sectors of the society concerning air pollution, to get different views of the problem.

The questionnaire employed both closed and open questions in order to gauge the respondents' understanding of causes of air pollution, its health and environmental consequences, and their knowledge of current regulations and control mechanisms. The data were prepared into basic quantitative statistics such as frequency distributions, percentages, and cross-tabulations, and thereafter analyzed using statistical packages in order to determine patterns and relationships between variables.

The responses provided useful insights to supplement the open-ended questions as they were particularly aimed at understanding the attitudes and views of the people towards air pollution and environmental governance. In the case of this study, geographical and cultural features of Varanasi and Ranchi were also added to examine the effect of such elements on people's knowledge and actions.

10 Fisher, J. E., Andersen, Z. J., Loft, S., & Pedersen, M., Opportunities and Challenges within Urban Health and Sustainable Development, 25 Current Op. Envtl. Sustainability 77 (2017), https://doi.org/10.1016/j.cosust.2017.08.008.

11 Kumar, P., Kumar, A., & Brewster, C., Investigating Electric Vehicles Adoption in Urban Public Transport: A Socio-Technical Transition Analysis Across Cities of the Global North and South, SSRN (2023), https://dx.doi.org/10.2139/ssrn.4493763.

12 Kumar, P., Kumar, A., & Brewster, C., Investigating Electric Vehicles Adoption in Urban Public Transport: A Socio-Technical Transition Analysis Across Cities of the Global North and South, SSRN (2023), https://dx.doi.org/10.2139/ssrn.4493763.

The data synthesis also emphasized on the use of descriptive statistics in order to make the results understandable. Such a comparison was necessary in order to show the interregnal awareness and perceptions of public towards air pollution between two cities. Self-reported data that is common in such studies has a drawback as it tends to introduce some biases and the narrow coverage of the study, which does not reflect the whole nation is also a limitation.

Such a strategy allows carrying out a comprehensive assessment of the problem of air pollution awareness and its socio-economic and environmental effects in Indian megacities.

4. Results and Findings

This research yields important information on the perceptions and awareness of air pollution in the cities of Varanasi and Ranchi. However, the most interesting findings concern the collected data from the 500 respondents in each city. While the overall responses were similar, several problems differed in terms of public consciousness concerning the awareness of air pollution and its determinants, its health, economic, and environment effects. Previous studies have established that prolonged exposure to air pollution can have severe respiratory and cardiovascular consequences.

a. Societal Awareness of Air Pollution

The research demonstrated moderate knowledge levels regarding air pollution in the study sites, as 44% of respondents in Ranchi and 46% in Varanasi reported that they were aware of the issue, but of this only partially. Almost a third of the participants in both cities, 16% in Ranchi and 13% in Varanasi, of the population surveyed had no awareness of what air pollution is, and this attests to the fact that enrichment and outreach programs on the environment are still lacking. The outcomes of this study as discussed above bear testimony that most of the people know or have information on air pollution but sensitization needs to be more strategic, more especially to the vulnerable populations who are most affected by environmental degradation.

b. Causes of Air Pollution

According to a survey, urban transport vehicles were the foremost identified source of air directly emitted pollution by 49% of the respondents in Ranchi and 53% of the respondents in Varanasi, thus reiterating the increasing role of transportation in the overall air pollution. Some other major pollution sources were the industrial pollution that 35% of the respondents in Ranchi while that 33% of the respondents in Varanasi, cited. These results are consistent with previous studies that have noticed that urbanization and industrialization are the main reasons behind the pollution in the Indian cities. However, “other’ in places such as aggravating this kind of pollution included activities like burning waste and construction dust as stated by 16% of respondents in Ranchi and 14% in Varanasi.

c. Impact on Health

Data indicates high level of concern amongst the people with regard to air pollution and health. In this case, 42 % of respondents in Ranchi concurred that air pollution greatly limits the life span of all organisms, while 44.4% of respondents in Varanasi observed this. Increasing incidence of respiratory illnesses, that have been mentioned in the filed survey, is also evident, with 52 % of respondents in Ranchi and 50.4% in Varanasi reporting of these respiratory problems drastically increasing in the last few years. This corroborates with medical studies that have related air pollution to respiratory diseases especially asthma and chronic obstructive pulmonary disease. The study results, which indicate a rise in respiratory diseases due to air pollution, align with research showing that particulate matter can cause significant health issues, including asthma and COPD[13]. The acute respiratory effects of air pollution observed in this study have been corroborated by earlier research showing similar patterns[14]

d. Economic and Agricultural Impact

Respondents from both cities acknowledged the economic and agricultural effects of air pollution. In this case, 52 % of the respondents from Varanasi held that polluted air had adverse effects on crop production, while 48.82 % held such views in Ranchi. Aligned with this finding are other studies which report that farming output is reduced by air pollution due to destruction of plants and soils. Further, negative economic impacts of air pollution were felt in agricultural and tourist sectors in 33% of the respondents in Ranchi and 32% in Varanasi.

e. Awareness of Legal Safeguards

Moderate awareness was observed concerning some of the pollution control authorities in India, like the Central and State Pollution Control Boards, as 44% of the respondents from Ranchi and 43% from Varanasi were found to be aware of such institutions. However, respondents in Ranchi didn't know or even heard of specific environmental laws, with only 20.4% reporting knowledge of the Air Act. The reason for such low knowledge level among the respondents can be attributed to the limited access of the organisations and the legal regimes in the society that will nurture, view and be able to protect the environment.

f. Sustainable Development and Mitigation Efforts

There was positive response for the sustainable tools and practices, as 47% of the Ranchi respondents and 45.2% of Varanasi reported awareness regarding sustainable development.

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13 Fisher, J. E., Andersen, Z. J., Loft, S., & Pedersen, M., Opportunities and Challenges within Urban Health and Sustainable Development, 25 Current Op. Envtl. Sustainability 77 (2017), https://doi.org/10.1016/j.cosust.2017.08.008.

14 Dockery, D. W., & Pope, C. A., Acute Respiratory Effects of Particulate Air Pollution, 15 Ann. Rev. Pub. Health 107 (1994), https://doi.org/10.1146/annurev.pu.15.050194.000543.

Coherently, 52% of the responders in these two cities believe that electric buses could help in solving the challenge of air pollution. These align with the changing attitude of people towards sustainable technologies which conforms to the strategies that seek to reduce carbon emissions and combat climate change[15].The survey results indicated a widespread concern about the health impacts of air pollution, which is consistent with global research linking particulate matter to premature mortality. Similar to findings in other developing nations, respiratory issues are increasingly prevalent in cities like Varanasi and Ranchi[16]

5. Discussion

This exhaustive study provides significant revelations regarding the knowledge and opinion of the residents about air pollution in urban Varanasi and Ranchi In India. Although both cities exhibit an understanding of air pollution, there are still significant segments of the population that are unaware of even the basic elements surrounding air pollution. This shortfall in levels of awareness underlines the necessity for better information through campaigning and outreach programmes especially in the less educated or lower socioeconomic groups.

The public's view in both cities that vehicles echolocation is the leading source of air pollution holds true to earlier observations made of urban sources of pollution in India. The increase in the number of cars and poor structures and systems for regulating and managing the public transport system significantly aggravates the problem. In this respect, it is optimistic that supportive attitude towards electric vehicles exists within the cities. Nevertheless, there is more to the adoption of cleaner transportation systems than the willingness of the people. While there has been some progress in addressing air pollution, historical events such as the London smog demonstrate the need for robust policy measures

The study also shows how increasing alarm is formed on the health effects associated with air pollution especially respiratory airs. The high percentage of respondents linking pollution with shorter lifespan and more respiratory illnesses is in line with the conclusions of overseas medical studies. However, regardless of the attention given to air pollution, there exists a gap in the information regarding the laws that have been established with an aim of dealing with the pollution. Their low knowledge on some specific Laws and rules such as The Air (Prevention and Control of Pollution) Act, 1981 and The Air (Prevention and Control of Pollution) Rules, 1982 indicates horizontal weakness on the part of the

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15 Kumar, P., Kumar, A., & Brewster, C., Investigating Electric Vehicles Adoption in Urban Public Transport: A Socio-Technical Transition Analysis Across Cities of the Global North and South, SSRN (2023), https://dx.doi.org/10.2139/ssrn.4493763.

16 Fisher, J. E., Andersen, Z. J., Loft, S., & Pedersen, M., Opportunities and Challenges within Urban Health and Sustainable Development, 25 Current Op. Envtl. Sustainability 77 (2017), https://doi.org/10.1016/j.cosust.2017.08.008.

government as well as the NGOs to effectively catalyze and disseminate such laws to the people.

This aspect of the study briefly compares Varanasi and Ranchi and elaborates how although both cities are grappling with similar kinds of challenges, pollution sources and its perception among the public differs. In the case of Varanasi, an excessive amount of vehicular pollution was observed whereas in Ranchi, an excess of industrial pollution was studied which all require focused, area-based solutions.

Despite these constructed barriers, the paper emphasizes the necessity of a comprehensive approach that is able to embrace and combine awareness campaigns, policy change and technological progress to reduce air pollution. It emphasizes the necessity of sustainable development which would help reconcile public perception with global environmental action and advocates for better utilization of existing legal instruments.

6. Conclusion

This paper attempts to bridge these gaps by exploring the level of public awareness, the perception and effects of air pollution among the respondents in the urban areas of Varanasi and Ranchi. The findings indicate that although there is some level of understanding on the issue, most people demonstrate knowledge gaps, more critically, on the legal aspects and the health and economic impacts of air pollution. Road transport and industrial pollution were cited as the main causes highlighting the urbanization and industrialization of the countries. Effective policy interventions aimed at reducing particulate matter in urban environments are crucial for protecting public health.

The study also gives attention to the fact that air pollution has detrimental effects on human health – respiratory diseases to be specific, and health impacts extend to agriculture and productivity as well. There is also support from the public for the adoption of such solutions in the future, which provides an avenue for policy intervention. On the contrary, the low level of awareness with regard to pollution control laws indicates that more work needs to be done concerning public education and the enforcement of pollution laws. The global scale of air pollution's impact on mortality highlights the urgency for collaborative policy responses.

To sum up, management efforts to control air pollution in these urban regions must take a more comprehensive view that incorporates awareness creation, better laws, and green technology. There is a need to consider the need for follow-up studies to evaluate the changes in the outcomes, as well as to study the solutions in relation to the pollution in the particular regions.

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Human Rights in the 21st Century: Issues and Challenges

***Dr. Abhishek Kr Tiwari**

Abstract

The global community has confronted with substantial and interconnected human right issues in the twenty-first century, that pose multifaceted threats to humans. The three prominent issues in the twenty-first century: war and security, environmental management, and poverty are been elaborated by this paper. The aggressive development in technology of warfare has resulted in the emergence of novel weaponry due to which the morels of warfare has come to an end. Furthermore, the new group of international entities that are not fully delineated and operating on a global scale creates security challenges for the governments. The climate change, exhibit a set of unique qualities that are unprecedented for the human species, with its potentially disastrous consequences, the collaborative activities of many individuals at worldwide and across time play vital role in it, and also entails hazards that are spread out geographically and chronologically. In Recent decades the tackling of both global and national poverty has become difficult. As an example, the ratio of impoverished individuals has been seen declined notable in the global population, while the countries with adequate domestic resources capacity has dramatically rise in impoverished individuals. The central political and moral challenge of this century is to overcome these worldwide and interconnected challenges. By using a human rights perspective the research paper wants to provide key solutions to these challenges. The paper examines the ways how these issues create danger to the human rights and endeavours our knowledge of human rights with concern to these difficulties. The study not only encircles fundamental but also practical enquiries. The main factors of this discussion are political and philosopher's theories with its interdisciplinary method. The present research paper will elaborated the work of those individuals who has given markable policies in the field of human rights.

Keywords: *Human Rights, Poverty, Environmental Management, Sustainable Development*

1. Introduction

The political and moral challenges for the 21st century have three basic elements: poverty, environmental degradation and armed conflated. Whatever the case may be the above mentioned challenges are be required solved through integrated methods with the help of human right basis. The historical and political climate have fostered a great level respect for the human right. Due to the increasing numbers of population and nationalism in them has raised numerous novel and complex facts in the society. Although the above situation

* Associate Professor, Faculty of Law, University of Lucknow, Lucknow.

is rising day by day but there is a urgent need of effective implementation of human right in fights. According to reports, the number of deaths caused by conflicts has increased threefold since 2008, and there were more countries experiencing violent conflicts in 2016 than at any time in the almost 30 years before. As per the report of the 'World Bank,' 1.25 billion people call nations that are unstable or have been hit by conflicts home. Since most fights are no longer fought by clearly defined sides or within confined geographical zones, the nature of armed warfare has changed dramatically.[1] On top of that, there are now unmatched ways of fighting thanks to technological breakthroughs in the last several years. As time goes on, the scale of environmental problems grows. Over the first 10 years of the new millennium, worldwide emissions of greenhouse gases increased by around 2.2% year, despite repeated warnings about the associated dangers. The 2°C warming target, beyond which climatic impacts including extreme weather, illness, and migration are expected to occur, is very unlikely to be met due to these increases. Because people haven't dealt with this kind of situation before, finding political answers is not as fast as it should be. Particularly it is the reason acceptable for the dangers that are unlikely to happen but might have a big effect. Many different people's activities, spread out throughout the globe and over decades, have come together to create these dangers. There are still major obstacles that poverty poses. Nearly 795 million people are undernourished, and over 1 billion people throughout the world live on less than $1.25 a day. The character of poverty as an issue has changed as well in the last few decades. More specifically, although the percentage of the world's poor has decreased, the percentage of the poor living in countries with large domestic capacity has increased significantly.

2. Reinvigorating Human Rights for the Twenty-First Century

The development of international human rights legislation is considered one of the remarkable achievements in the field of international relations since 1945. Nevertheless, the on-going triumph of human rights is not unavoidable, and the growing demands for more rights or efforts to tackle all societal issues from a human rights standpoint may nevertheless, paradoxically, weaken their credibility. This inclination is demonstrated by the merging of human rights with individual criminal accountability; rationalisation of the use of force guided by appeals to safeguard human rights and advance democracy; marginalisation of the government's role; the proliferation of novel rights; and lack of recognition of the intrinsic adaptability of human rights standards. The present chapter advocates for a reversion to the concept of 'human rights' as international human rights legislation, while upholding the separation between law and morality or law and politics. Identifying that these notions are formulated and implemented in distinct ways does not weaken any of them; instead, it emphasises that societal advancement can only be attained

1 Mahoney, Kathleen E., and Paul Mahoney, eds. Human Rights in the 21st Century: A Global Challenge. Martinus Nijhoff Publishers, 2023.

by appealing to legal, political, and moral principles, rather than by advocating human rights as a universal solution capable of rectifying all injustices.[2]

2.1 State of Play and the Road Ahead: Humanizing Security

In the contemporary era of globalisation, both human rights and security are significantly influenced by a wide range of factors. Conflicts of various magnitudes, both visible and hidden, span both physical and virtual realms, driven by the widespread use of remarkable technology advancements such as armed drones, deadly autonomous robots, and systems of cyberconflict. What strategies may be used to harmonise these developing security challenges with a shared dedication to protect human rights? The present study provides an overview of the political situation within this intricate environment and elucidates, the study highlighted the legal development of human right and issues arising from armed conflict, cyber warfare, the process of 'securitizing' human rights, and the pursuit of sustainable security. Concluding, it emphasises the need of 'humanising security' as the most effective approach to harmonise these ideas in the future.[3]

3. Insecurity and Human Rights

The primary concern of the chapter in the twenty-first century is to effectively manage the delicate equilibrium between the rights to state protection and the obligations of state restraint within a context of uncertainty. Contrary to conservative stereotypes, it contends that human rights are not just liberal "politically acceptable" tools of governmental control. Rather, they have grown more closely linked to the expansion of state coercion, a procedure that poses a threat to the security of human rights. While courts have had to delicately navigate these imperatives, politicians and philosophers are less acutely aware of the risk which can be used by human right to justify exaggerated demands for state coercive protection. In its conclusion, the chapter suggests that we might emulate the approach of courts, which have grappled with the intricate equilibrium between obligations of safeguarding and limitation, and begin to adopt a notion of 'acceptable uncertainty.' Exclusively by accepting the potential hazards associated with liberty can we engage in a fruitful discussion on the correlation between insecurity and human rights?[4]

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2 'Human Rights Challenges' (United Nations for Human Rights) < https://www.unitedforhumanrights.in/voices-for-human-rights/human-rights-challenges.html> accessed 29 August, 2024.

3 Hurst Hannum, 'Reinvigorating Human Rights for the Twenty-First Century' (Oxford Academic) < https://academic.oup.com/book/36650/chapter-abstract/321652171?redirectedFrom=fulltext> accessed 28 August 2024.

4 Liora Lazarus, 'Insecurity and Human Rights' (Oxford Academic) < https://academic.oup.com/book/36650/chapter-abstract/321654828?redirectedFrom=fulltext> accessed 28 August 2024.

3.1 'Sustainable Security': A Proposal

Goal 16 of the Sustainable Development Agenda (SDG) mandates the global community to advance 'just, peaceful and inclusive communities' that affects on emphasis of security. The crucial objective is to establish the robust national institutions. Instead of seeing this as explicit approval for the establishment of oppressive institutions, this chapter contends that SDG 16 encourages a fundamental reconsideration of prevailing discussions on security. This would see interpersonal insecurity as a fundamental issue that has to be tackled alongside geopolitical insecurity, and acknowledge that successful institutions are characterised by their resilience, ample resources, responsiveness, and effective governance. Lacking a transition towards sustainability in our endeavour to ensure security, the revolutionary capacity of Sustainable Development Goal 16 will be challenging to achieve. In fact, the goal may be used to justify oppressive, repressive, and often fundamentally undemocratic actions and institutions that are purportedly necessary to prevent violence and counter terrorism and crime.[5]

4. New challenges faced for the safeguard of human right.

Upholding basic rights in the modern world presents a multitude of obstacles. As the designated body responsible for researching, reflecting, and recommending on the human rights programme, it is within your expertise to assist us in considering the strategies for achieving universal human rights protection in the future. Prior to the start of a new session, I would like to provide some ideas to you on the emerging issues in the advancement and safeguarding of human rights. This responsibility falls upon you as the Sub-Commission for the promotion and protection of Human Rights.

41.1 Relief for the Victims of Gross Violations of Human Rights: The Challenge of Protection

The special procedures of the "Commission on Human Rights" consist of a diverse group of special rapporteurs, representatives, and other experts who are responsible for studying these occurrences and providing yearly reports to the Commission. Each year, this Sub-Commission addresses a topic pertaining to infringements of human rights. Has the analysis of the results from the special processes been conducted in order to provide suggestions to the "Commission on Human Rights" for further measures to safeguard the rights of individuals whose rights are being contravened? Should one? [6]

5 Fiona de Londras, ''Sustainable Security': A Proposal' (Oxford Academic) <https://academic.oup.com/book/36650/chapter-abstract/321654828?redirectedFrom=fulltext> accessed 28 August 2024.

6 Bertrand Ramcharan, 'New challenges in the promotion and protection of human rights' (United Nations) <https://www.ohchr.org/en/statements/2009/10/new-challenges-promotion-and-protection-human-rights> accessed 29 August 2024.

4.2 The Challenge of Prevention

The optimal method of safeguarding is the proactive avoidance of severe infringements of human rights. A decade, the Office of the High Commissioner sent a report to the Commission outlining the difficulties associated with prevention.

4.3 The Challenge of Poverty

The human rights are applicable to all individuals, regardless of their socioeconomic status or the colour of their skin, as being the offspring of God. "Today, ubiquitous poverty causes millions of people to experience hardship, indignity, and wastage. Factors contributing to this phenomenon are many, both local and global. In many cases, the quality of governance is a fundamental factor. A further fundamental factor is the performance of the global economic system. Disparities in ethnicity, beliefs, and values systems might be contributing elements in certain circumstances. The human rights approach to poverty reduction is founded on the fundamental notion that by adopting democratic governance structured by the rule of law and adhering to the principles outlined in the Universal Declaration, a society can enhance the prospects of individuals and escape the cycle of poverty."[7]

4.4 Education as a route from poverty: The challenges of Promoting and Protecting the Rights of Children

I find it logical that only education would help you escape poverty more easily. I grew up in a developed nation, where I was born also. For others, whether they reside in rural or urban environments, education is the only means out of the destitute circumstances they are born into in developing nations. When the child rights movement started and the Convention on the Rights of the Child was signed, all of us hoped that contemporary youngsters would be better off. There will be good effects for society as a whole as a result of this measure's implementation, as it will keep disadvantaged children in school.[8]

4.5 The Challenges of Justice and Empowerment for Women

The moral conscience of a human being finds the immoral treatment of women in certain parts of the world quite disturbing. Our prospects of successfully tackling the challenges of conflicts, underdevelopment, and injustice are small, according to strategic experts, unless we empower and provide justice for women. In his book "Getting Ready for the 21st Century," Paul Kennedy made a strong argument along these lines. In Runaway World, Anthony Giddens also accomplished this. How will you, distinguished Sub-Commission

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7 Dapo Akande, 'Human Rights and 21st Century Challenges: Poverty, Conflict, and the Environment' (Oxford Academic) < https://academic.oup.com/book/36650/chapter-abstract/321654828?redirectedFrom=fulltext> accessed 28 August 2024.

8 Kathleen E. Mahoney, 'Human Rights in the 21st Century' (Brill) < https://brill.com/edcollbook/title/9256?language=en> accessed 29 August 2024.

members, work to ensure that women's rights are central to the UN's future human rights policies? It is expected that you can answer this question competently.

4.6 The Challenges of Democracy and the Rule of Law

Governments should be established by popular vote, as stated in the Universal Declaration of Human Rights. Societies where people can participate in government in a fair and active way are more likely to achieve justice, equality, and development, regardless of how democracy is defined. In a law-abiding society, people may go to court to settle disputes over their economic, social, cultural, civil, and political rights, among others. Judgements handed down by South Africa's Constitutional Court have had far-reaching effects on questions of economic, social, and ultural rights' justification and the concept of their progressive implementation.[9]

4.7 The Challenge of the National Protection System in Each Country

"The Secretary-General is putting the national protection system idea front and centre, and for good reason: After a thorough international code of human rights is drafted, the next step is to ensure its implementation inside national borders. International protection is important because it supplements domestic duties that each country must carry out. Human rights education in schools and other educational institutions, national monitoring of the situation of vulnerable segments of the population, availability of specialised human rights institutions to promote and safeguard human rights, and incorporation of international human rights standards into national legislation are all characteristics of a comprehensive national protection system." The Secretary-General's reform strategy includes the national protection system and two other basic ideas. The special procedures system, which comprises special rapporteurs, representatives, and working groups, is being strengthened, and efforts are being made to ensure that the basic human rights accords are effectively implemented.

In terms of improving the enforcement of the human rights treaties, the Secretary-General's rationale is clear once again. International human rights norms may be more easily enforced within a country with the help of domestic national protection mechanisms. The framework of human rights accords on a global scale provides the essential groundwork for this. People may wonder how your research is helping to make human rights accords more effective. This matter is really important. Efforts to facilitate the execution of treaties are what this term alludes to.[10]

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9 Symonides, Janusz, ed. Human rights: New dimensions and challenges. Routledge, 2019.

10 Simon Caney, 'Human Rights, Population, and Climate Change' (Oxford Academic) < https://academic.oup.com/book/36650/chapter-abstract/321654828?redirectedFrom=fulltext> accessed 28 August 2024.

4.8 The Challenges of New Threats: Terrorism and Biotechnology

Terrorists gravely violate human rights, and the war on terror is being used as a justification for ever more serious violations of human rights anywhere. Does looking into this area immediately meet a need? As the UN Security Council has asked, how can we reasonably reconcile safeguarding human rights with combating terrorism? Along with those from the United Nations and other international organisations, the Office of the High Commissioner for Human Rights recently completed gathering a list of fundamental legal principles from treaty bodies in the African, European, and Inter-Americas systems. Based on decades of study in many different worldwide locales, this resource offers perceptive analysis. This synopsis of essential human rights legal concepts emphasises the need of maintaining the rule of law and the non-derogability principle of the fundamental rights stated in Article 4 of the International Covenant on Civil and Political Rights.

4.9 The Challenges of People on the Move, Globally

Individuals' global movement, whether as refugees, displaced people, or economic migrants, is a defining feature of modern civilisation. "Within the UNHCR, my colleagues have been vigorously advocating for innovative ideas to strengthen the current international system for asylum seekers' protection. Initiatives to increase protection in conformity with international humanitarian law are now being discussed within the framework of UNHCR and the International Committee of the Red Cross. There are few clear answers to the complex and difficult problems surrounding the protection of internally displaced people from a conceptual, legal, and practical standpoint. The Special Representative of the Secretary-General on Internally Displaced Persons has spearheaded the development of a crucial set of principles." As part of their joint efforts with other humanitarian organisations, the Special Representative has been working tirelessly to provide help to the most vulnerable populations. It is nevertheless reasonable to say that, in the current international setting, the protection of internally displaced people is inadequate.

People migrating, whether legally or illegally, and their families are another concern. We hope that the Convention on the human rights of migratory workers and their families, which went into force this year, will help improve the lives of this group. Beyond this accord, however, what other issues need a human rights lens to be applied?[11]

4.10 The Challenges of Inequality

Globally, disparities exist along several dimensions, including ethnicity, race, gender, and socioeconomic status. The original name of this Sub-Commission was the Sub-Committee on Minority Protection and Anti-Discrimination. In the run-up to the Durban Conference, what particular duties will you take on, and how do you plan to keep the spotlight on

11 Koh, Harold Hongju. "A United States Human Rights Policy for the 21st Century." . Louis ULJ 46 (2002): 293.

global inequality? Find out what your relationship is like with the ADA and the SELAC, and if it's suitable. Have you not yet looked at any demographics that are facing prejudice? A philanthropist recently visited me and stressed the fact that more than twelve million people are enduring or recovering from leprosy and are subjected to very unfair societal treatment.[12]

5. Cascading Effects: The Importance of Human Rights for One and All

Similar to the problem of corruption, the occurrence of spill over effects across borders becomes evident when there is a pervasive disregard for basic human rights in a foreign country. This connection between respect for human rights and circumstances of international stability and peaceful relations among states is explicitly stated in the Charter and the UDHR. The UDHR mentions the "resort to rebellion" as a solution when rights are not safeguarded by the rule of law. An examination of the individual rights protected by the "International Bill of Human Rights" (which encompasses the UDHR, the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR)) reveals that, apart from representing a fundamental concept of "good governance" between leaders and the general population of a country, there are several evident (and well-documented) consequences that arise from the adherence to basic human rights. Ensuring respect for rights is crucial for maintaining the integrity of government and achieving wider societal benefits within a national system, and more so within the international system, given the significant levels of interconnectedness resulting from globalisation.

Specifically, the right to freedom of opinion and expression, as protected by Article 19 of the ICCPR, is of utmost significance in safeguarding against corruption and abuses of power in both the government and private sector. It also helps to maintain the rule of law and ensures that public leaders are held accountable to standards of governance quality, among other objectives. In light of the present extent of international commercial and business operations, particularly within the multinational enterprise (MNE) sector, it is imperative for both the general public and regulatory bodies to remain well-informed about the characteristics of business activities conducted in foreign countries.

It relates to the standards set by the OECD Guidelines for MNEs and includes knowing of any links with abuses of human rights or dishonest government institutions, establish local and worldwide governance priorities, supporting ethical business practices, and holding powerful people responsible who compromise public welfare at the national and international political levels depends on accurate and comprehensive information from a strong civil society and critical media all around the world.

12 Burns Weston, 'Human rights in the early 21st century' (Britannica) "https://www.britannica.com/topic/human-rights/Human-rights-in-the-early-21st-century" accessed 30 August 2024.

The basic adoption of gender equality is been needed at globally for the concept of human right and their development in which political advancement controlled population, development economically and socially with marinating the real form of democracy. Not only this the World Bank has also accepted that empowerment of women is the basis need for economic growth. But at the national level and worldwide if the personal security of women is needed to maintained peace and security at large. The specific security issues arise due to change in sex ration of china in respect to sex-selection abortion and procedure. The fundamental human rights can only be protected by effective management of serious global challenges. Insufficient, social safety and fundamental social services and inappropriate employment, excessive economic disparities leads to underperforming economy and harmful for society.[13] Insufficient provision of social security, easily available high-quality education, and healthcare hinders the ability to move ahead in society, access opportunities, and foster entrepreneurial innovation.[14]

13 Akande, Dapo, et al., eds. Human rights and 21st century challenges: Poverty, conflict, and the environment. Oxford University Press, 2020.

14 Augusto Lopez-Claros, 'Human Rights for the Twenty-first Century' (Cambridge Core) < "https://www.cambridge.org/core/books/global-governance-and-the-emergence-of-global-institutions-for-the-21st-century/human-rights-for-the-twentyfirst-century/195E4D85A4BF590BFE407FC881139E0D" accessed 30 August 2024.

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CHOTANAGPUR LAW COLLEGE
A NAAC Accredited Institution
Nyay Vihar Campus, Namkum, Tata Road, NH-33, Ranchi, Jharkhand
Phone : 0651- 2261050
Email : info@cnlawcollege.org • Website : www.cnlawcollege.org