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THE OTHER CHILDREN: STRENGTHENING THE HUMAN RIGHTS OF CHILDREN WITH ALBINISM IN NIGERIA

Oluwakemi Omojola*

1. Introduction

The spate of killings, mutilations and other types of violence directed towards children with albinism (CWA) in Africa has made obvious the need for states and stakeholders to redouble their efforts in protecting CWA. Aside from violence against their persons, discrimination in social and economic spheres especially in health, educational and employment sectors add to the health burden of being born without Melanin.[1] On account of these attacks and discrimination, the UN Human Rights Council by Resolution 23/13, expressed concern about attacks against persons with albinism and the widespread discrimination, stigma and social exclusion.[2] The effect of these human rights violations are grave; depriving them of their rights. As articulated by a collaborative project between UNICEF and the Albino Foundation (TAF).

Children with albinism in Nigeria are among the most vulnerable of all children. Their situation is further compounded by the fact that they are the most susceptible to skin cancer due to the exposure of their delicate skin type to the harsh equatorial sunlight. Many of these children are not in school, not because of any mental disability, but because of visual impairment, discrimination from other children, and social exclusion as a result of their skin color. Ignorance about albinism among families and communities sometimes dictates the rationale for parents not to enroll

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[1] What is Melanin?<http://www.news-medical.net/health/What-is-Melanin.aspx> accessed 8 June 2022.

[2] Persons with Albinism <https://undocs.org/A/HRC/24/57> accessed 8 June 2022.

their children with albinism in school, due to the erroneous belief that educating a child with albinism is a waste of resources.[3]

A resolution against violence and discrimination against PWA was adopted by the United Nations Human Rights Council (UNHRC) in 2013.[4] Additionally, a resolution acknowledging June 13 as International Albinism Awareness Day was enacted. The African Commission on Human and Peoples' Rights (ACHPR) also passed a resolution urging African governments to take decisive action to end violence and other forms of discrimination against people with albinism in Africa, where the issue is severe.[5] The African regional action plan on albinism identifies four key areas of intervention that will advance and enhance the lives of PWA in general. These include equality and non-discrimination, responsibility, prevention, and protection.[6]

Although there is no reliable statistics on the number of CWA in Nigeria, it is estimated that CWA make up over 40% of the country's 2 million PWA.[7] In 2013, The Nigerian Government launched the Albino Foundation Empowerment Project and inaugurated the National Committee on Albinism with a mandate to draw up a National Policy on Albinism.[8] The purpose of the policy and its implementation recommendations is to help PWA overcome discrimination and challenges in all facets of life. However, the National Policy on Albinism has not yet been completely put into practice. In order to "facilitate and improve the lives of persons with albinism through access to social services such as education, healthcare,

[3] The Knowledge, Attitude and Practices Study on Children with Albinism in Nigeria. <https://albinofoundation.org/wp-content/uploads/2017/03/UNICEF-Report-on-Children-with-albinism-in-Nigeria.pdf> accessed 10 June 2022.

[4]OHCHR<http://www.ohchr.org/Documents/Issues/Discrimination/A.HRC.19.41_English.pdf> accessed 7 June 2022.

[5] <http://www.achpr.org/sessions/54th/resolutions/263/ >accessed 8 June 2022.

[6] Regional Action Plan on Albinism <https://www.hrfn.org/wpcontent/uploads/2017/10/RegionalAction_Plan_on_albinism_EN.pdf> accessed 8 June 2022

[7] Ibid.

[8]Under the Same Sun. Albino v Persons Albinism.<http://www.underthesamesun.com/sites/default/files/why-we-prefer-the-term-person-with-albinism_0.pdf>accessed 9 August 2022.

and employment," a committee was established in April 2019 to evaluate the policy.[9]

CWA in Nigeria are seen as different from other children because of their appearance amongst predominantly dark-skinned children. The discrimination and stigma start from this perceived otherness which are fuelled by myths and superstitions surrounding the condition. Skin cancer, which causes 98% of all deaths, is another risk factor for CWA. Compared to the general population, the risk of developing skin cancer is 1,000 times higher in Africa.[10] Under international human rights law, states have particular obligations to uphold, defend, and implement the CWA's human rights, particularly those outlined in the Convention on the Rights of Persons with Disabilities and the Convention on the Rights of a Child.[11]

An outline of CWA's human rights status in Nigeria is undertaken in this study. It investigates the difficulties they encounter and goes on to look at the particular rights that are infringed upon, such as the rights to equality and non-discrimination, health, and education. This study is divided into six sections in addition to the introduction. Section two deals with conceptual clarification while section three is the theoretical and legal framework. Albinism Myths, Misconceptions and beliefs is the subject of section four while section five examines the rights that are violated. Section six concludes with recommendations that will advance the cause of CWA in Nigeria.

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[9] Olaleye Aluko, '*FG Reviews National Policy on Albinism*' *Punch Newspaper* (Abuja, 11 April 2019) <https://punchng.com/fg-reviews-national-policy-on-albino/> accessed 18 August , 2022.

[10] Mabula JB, Chalya PL, Mchembe MD, Jaka H, Giiti G, Rambau P, Masalu N, Kamugisha E, Robert S, Gilyoma JM. Skin cancers among Albinos at a University teaching hospital in Northwestern Tanzania: a retrospective review of 64 cases. BMC Dermatol. 2012 Jun 8;12:5. doi: 10.1186/1471-5945-12-5. PMID: 22681652; PMCID: PMC3483204 accessed 17 July, 2022.

[11] Albinism Worldwide Report 2021.<https://www.ohchr.org/sites/default/files/Documents/Issues/Albinism/Albinism_Worldwide_Report2021_EN.pdf>accessed 12 August 2022.

1. Conceptual Clarification

1.1. Albinism

The word "Albino" comes from the Latin "albus," which means "white." Around 1660, missionary and historian Balthazar Tellez first used the term "Albino." When he observed tribe members with this condition on the West African coast, he coined the term to characterise them. The earliest documented cases of albinism were in Germany and Rome.[12] Albinism, also known as Congenital Hypopigmentary Disorder is a genetic condition that affects people from all races. The condition is characterised by lack of the genes producing melanin-the pigment that protects the skin from ultraviolet light from the sun. Persons with albinism may lack pigmentation in the skin, eyes and hair. The gene that carries albinism is a recessive gene. The recessive gene for albinism becomes expressed only when two parents carrying the recessive genes pass them to the child.[13]

Three primary forms of albinism exist: (i) Oculotaneous albinism: patients with this form of the condition have incomplete vision and decreased skin and eye pigmentation as a result of tyrosinase deficiency, (ii) Oculocutaneous albinism: this form of the disease is caused by a lack of melanin pigmentation in the skin, hair, and eyes where tyrosinase is present, but other variables result in less melanin being produced.[14] They lack pigment and are extremely light-sensitive. This is the most prevalent kind of albinism, (iii) Ocular albinism: this kind of albinism is caused by a decrease in the amount of melanin pigment in just the eyes. Compared to other family members, those who have this illness have somewhat lighter skin and hair. This kind of albinism causes vision issues and a lack of

[12] A *Short History* of *Albinism (2010*) <*http*://*tauqeeruhassan*.*articlealley*.com> accessed 12 June 2022.
[13] ibid
[14] Everything You Need To Know About Albinism< https://www.medicalnewstoday.com/articles/245861> accessed 16 August 2022.

pigmentation in the eyes.[15] Due to hereditary recessive mutations in a single gene, children in African cultures who are born with oculocutaneous albinism lack pigment in their skin, hair, and eyes. This makes them extremely vulnerable to the sun's harmful effects on the skin, which can worsen eye diseases and lead to serious health problems including skin cancer.[16]

1.2. Who is a Child?

Article 2 of the African Charter on the Rights and Welfare of the Child, 1990, states that a person under the age of eighteen is considered a child. According to the 1989 Convention on the Rights of the Child, a child is any person under the age of eighteen, unless their legal majority is reached earlier. Section 277 of the Child's Rights Act states that a child is anyone under the age of eighteen. Some qualities often associated with childhood are 'physical and emotional immaturity and vulnerability in comparison to adults, causing lack of autonomy and social dependence. Being a child has been described as the chronological age marking the boundary between childhood and adulthood, which is often set at 18 years.[17]

In some countries, births are recorded and birth date is an important aspect of people's personal and legal identity. However, this is not the case in all societies, and in many locations, social experience such as labour migration, marriage, and physical markers including height, facial hair, or the start of menstruation, may be more important than age in signifying adult status.[18] It is clear that whatever age or social experience is used children are vulnerable and depend on adults to take decisions for them.

[15] Ruusa Ntinda, *The Rights of People With Albinism: A Conceptual and Rights Based Comparative Analysis* (University of Namibia 2011) < http://hdl.handle.net/11070.1/834> accessed 16 August 2022.
[16] Patricia Lund., *'Distribution of Oculocutaneous Albinism in Zimbabwe*. <https://jmg.bmj.com/content/jmedgenet/33/8/641.full.pdf> accessed 14 November, 2022.
[17] Therese Blanchet*., 'Lost Innocence, Stolen Childhood.'* (1996). Dhaka, Bangladesh: The University Press Ltd Preface
[18] ibid

2. Theory of Otherness

The theoretical background of this paper is hinged on the theory of Otherness also known as Othering. It is based on the notion that a person with albinism is different from other persons in the community. Although first coined as a systematic theoretical concept by Spivak in 1985, the notion of Otherness draws on several philosophical and theoretical traditions. Significantly, the concept draws on an understanding of self which is a generalization of Hegel's master-slave dialectic as developed in Phänomenologie des Geistes.[19] According to Crang, Otherness is "a process through which identities are set up in an unequal relationship." Otherness is the simultaneous construction of the self or in-group and the other or out-group in mutual and unequal opposition through identification of some desirable characteristic that the self or in-group has and the other or out-group lacks. Otherness as a process therefore sets up a superior self or in-group that is cognitively constructed to an inferior other or out-group. A perceived difference exists between the self or in-group and the other or the out-group.[20]

The concept of Otherness leads to the 'self' distancing themselves and dehumanizing the 'other'. A platform is set for a superior self or in-group that is different from inferior other or out-group. It involves a discursive process by which a dominant in-group ('us' the self) constructs one or many dominated out-groups ('them' the other). Otherness consists of applying a principle that allows individuals to be classified into two hierarchical groups: (them and us).[21] Imafidon, in relation to albinism,

[19]Sune Jensen, *'Othering, Identity Formation and Agency. (2011) Qualitative Studies*, *2*(2),63-78.< http://ojs.statsbiblioteket.dk/index.php/qual/article/view/5510 accessed 16 August 2022

[20]Farai Maunganidze, Kudakwashe Machiha and Martha Mapuranga , Employment Barriers and Opportunities Faced By People With Albinism. A Case of Youths With Albinism In Harare, Zimbabwe (Sandro Serpa ed 2022) Cogent Social Sciences, 8:1, DOI: 10.1080/23311886.2022.2092309 accessed 16 August 2022.

[21]Jean-Francois. STASZAK, Other/Otherness. International Encyclopedia of Human Geography, (2008,) Elsevier

aptly describes it as melanin-privileged African versus Africans with albinism:

Being born a black African or an African with melanin (without any forms of disability) confers on a person the intrinsic worth that makes her to be at once accepted by the community, part of the privilege that a person with melanin enjoys the socially given idea that one is superior to others without melanin. In this way, the socially normalized color of the skin, which the person had no control over during birth, becomes a criterion for exacting superiority over others who were born without melanin, and these, of course, are persons with albinism. A melanin-privileged would therefore feel superior to and assume to have authority over the life, wellbeing, and existence of persons with albinism in an African place. The truism of this is pretty obvious in African communities.[22]

Otherness insists that any concept of self or identity requires the establishment of a distinct and external other against which it is defined. This implies that rather than thinking of identity as a concept that unites people who have something in common, it is something essentially linked to the identification of difference.[23]

The perception of CWA as being very different from other children has contributed in no small measure to the discrimination, stigma and social exclusion experienced by CWA especially regarding their health, education and status in Nigeria.

[22] Elvis Imafidon ,'*Intrinsic Versus Earned Worth In African Conception Of Personhood*. (Elvis Imafidon ed. Cham: Springer 2020.)Handbook Of African Philosophy Of Difference (Pp. 239–254).
[23] Ibid (n.17).

3. Legal Framework for the Rights of Children with Albinism in Nigeria

3.1 Constitution of the Federal Republic of Nigeria (1999)

Section 42(2) Constitution of the Federal Republic of Nigeria 1999[24] provides that "no citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth"[25] The Constitution guarantees and protects human rights in all aspects of human life. Under Chapter IV, human rights which are inalienable and justiciable are provided. Some of these rights are right to life,[26] right to dignity,[27]right to personal liberty,[28] right to fair hearing,[29]

3.2 Child Rights Act (2003)

The Child Rights Act (CRA) 2003. The Child Rights Act is the domestication and enactment into law of the two international treaties in Nigeria.[30] The CRA thereby became one of the principal laws in relation to matters concerning children in Nigeria.[31] CRA provides for the right to best standard of health attainable. Government in this regard has designed several plans, policies and programme to enhance the health condition of a Nigerian child.[32] Despite the enactment of the CRA by the National Assembly, the CRA has not been domesticated in some states in Nigeria.[33] Other rights are the rights to survival and development, to a name, to freedom of association and peaceful assembly, to freedom of thought,

[24] Constitution of the Federal Republic of Nigeria, 1999.
[25] Constitution of the Federal Republic of Nigeria (CFRN) 1999.
[26] CFRN S 33.
[27] CFRN S 34.
[28] CFRN S 35.
[29] CFRN S 36.
[30] The Child's Right Act.
[31] Olayinka Akinwumi*, 'Legal Impediments on the Practical Implementation of the Child Right Act 2003'* (2009) 37 IJLI 387.
[32] CRA S 13 .
[33] Beatrice Okpalaobi and Celestine Ekwueme, 'United Nations Convention On The Rights Of A Child: Implementation of Legal and Administrative Measures In Nigeria <https://www.ajol.info/index.php/naujilj/article/view/136272>accessed 8 August 2022.

conscience and religion, to private and family life, to freedom of movement, to freedom from discrimination, to dignity of the child, to leisure, recreation and cultural activities, to parental care, protection and maintenance, to free, compulsory and universal primary education, as well as encouragement of the child to attend and complete secondary education.[34]

3.3 Discrimination Against Persons with Disabilities (Prohibition) Act 2018

The Discrimination against Persons with Disabilities (Prohibition) Act[35] outlaws discrimination on the basis of one's physical, mental or sensory impairment. It imposes sanctions including fines and prison sentences on those who contravene it. It also stipulates a 5-year transitional period for modifying public buildings, structures and automobiles to make them accessible and usable for people with disabilities.[36] The law will also establish a National Commission for persons with Disabilities responsible for ensuring that people with disabilities have access to housing, education, and healthcare.[37] The Commission will be empowered to receive complaints of rights violations and support victims to seek legal redress amongst other things. A body corporate who discriminates on this ground is subject to a fine of N 1,000,000 (one million naira) while an individual is liable to pay a N100,000 (hundred thousand naira) fine, face a six months imprisonment term or both. It prohibits all forms of discrimination against persons with disability. If an individual is found violating this law, he/she will pay a fine of N100,000 (hundred thousand naira) or a term of six months imprisonment. The law imposes a fine of one million naira on corporate bodies.[38]

[34] SS 3-20 CRA.
[35] The Discrimination against Persons with Disabilities (Prohibition) Act 2018.
[36] S 6 DAPD Ac
[37] S 31 DAPD Act.
[38] S 1 DAPD Act.

Under section 17 a person with disability has a right to education free from discrimination. It also entitles a person with disability to free education up to secondary level and mandates the National Commission for Persons with Disabilities to provide educational assistive devices. The provision in section 17 is further complemented by section 18 which mandates all public schools from primary to tertiary to be inclusive of and accessible to persons with disabilities. The Act makes discrimination against PWDs a crime.

3.4 The Universal Declaration of Human Rights, (UDHR) 1948

The concept of human rights was devised as an umbrella concept for the protection of people from discriminatory and oppressive state policies.[39] The Universal Declaration of Human Rights, (UDHR) 1948[40] states that 'all human beings are born free and equal in dignity and rights.[41] Vulnerable groups such as women, indigenous people and children have been assigned special protection by the United Nations (UN) legal framework, with the obligation on governments to domesticate these provisions in their local laws.[42] The Preamble of the UDHR affirms 'recognition of the inherent dignity, equal and inalienable rights of all members of the human family' including children.

3.5 The African Charter on the Rights and Welfare of the Child (ACRWC) 1990

The African Charter on the Rights and Welfare of the Child (ACRWC) 1990 was adopted by the 26th Ordinary Session of the Assembly of Heads

[39] Mary Ann Glendon, *The Rule of Law in the Universal Declaration of Human Rights,* 2 Nw. J. Int'l Hum. Rts. 1 (2004). <http://scholarlycommons.law.northwestern.edu/ njihr/ vol2/iss1/>.

[40] *Universal Declaration of Human Rights* (adopted 10 December *1948*. UNGA Res 217 A(III) accessed 16 August 2022.

[41] Ibid.

[42] Ines Kajiru and John Mubangizi, *'Human Rights Violations of Persons With Albinism In Tanzania: The Case Of Children In Temporary Holding Shelter'* (2019) 19 African Human Rights Law Journal 246-266 <http://dx.doi.org/10.17159/1996-2096/2019/ v19n1a12> accessed 16 August 2022.

of State and Government of the Organisation of African Unity on 11th July 1990 in Addis Ababa Ethiopia. It is a document for the explicit protection of children and their rights. Article 4(1) of the African Children Charter stipulates that the best interest of the child are the primary considerations.[43] The African Charter originated because the member states of the AU believed that the UNCRC missed important socio-cultural and economic realities particular to Africa.[44] It provides for some rights: the right to survival and development, name and nationality, freedom of expression, thought, conscience and religion, to education, leisure, recreation and cultural activities, protection from abuse and torture, against harmful practices, and child labour.[45]

3.6 United Nations Convention on the Rights of a Child (UNCRC) 1989

Nigeria is a state party to the UN Convention on the Rights of the Child. It was ratified in 1991. The Convention was adopted on 20 November 1989 by General Assembly Resolution 44/25. It puts forth all the fundamental rights of the child, whether civil, political, economic, social or cultural. Article 2 of the UNCRC, specifically prohibits discrimination on the basis of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.[46]

Article 4 of CRC makes it mandatory for governments to take every available measure to protect and respect children's rights. States that ratified the Convention thus agreed to take every step in reviewing their laws relating to children. CRC also includes processes for assessing states' legal, social and economic services as well as their educational and health

[43] Amanda Lloyd, *A Theoretical Analysis of the rights of Children in Africa : An Introduction to the African Charter on Rights and Welfare of the Child* <https://www.corteidh.or.cr/tablas/R21588.pdf> accessed 9 September 2022

[44] African Charter on the Rights and Welfare of the Child, ACRWC (adopted 1990 entered into force Nov. 29, 1999) OAU Doc. CAB/LEG/24.9/49 (1990)

[45] ACRWC art 5 -23.

[46] ACRWC art 2 CRC.

systems.[47] State Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. It provides for state parties to strive to ensure that no child is deprived of his or her right of access to health care services.[48] The right of the child to education is entrenched in the CRC with a view to achieving these rights progressively and on the basis of equal opportunity.[49]

3.7 Convention on the Rights of Persons with Disabilities (CRPD)

Convention on the Rights of Persons with Disabilities (CRPD) 2006.[50] The purpose of the CRPD is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity. It provides for adequate standard of living and social protection for persons with disabilities. Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in conjunction with various barriers may hinder their full and effective participation in society on an equal basis with others.[51] It provides for equality before the law without discrimination,[52] right to education,[53] and right to health[54] amongst others.

4. Albinism Myths and Traditional Harmful Beliefs

4.1. Misconceptions and Harmful Beliefs

Myths, misconceptions and harmful traditional beliefs play a major role in the abuse, discrimination and challenges faced by CWA. For instance, the

[47] Ibid (no.24).
[48] CRC art 24.
[49] CRC art 28.
[50] Convention on the Rights of Persons with Disabilities (CRPD) (adopted 24 January 2007) A/RES/61/106.
[51] CRPD art 28
[52] CRPD art 5.
[53] CRPD art 24.
[54] CRPD art 25.

idea that the consumption of salt by people with albinism is the cause of the burns on their skin is a myth. The fact is that without melanin, ultraviolet (UV) rays in sunlight can easily damage their skin and increase their risk of developing skin cancer.[55] It is also a myth that CWA do not see in the afternoon. The hot sun rays make them squint because of lack of pigment in the eyes which makes CWA very sensitive to light-this is called photosensitivity.

In some parts of Africa, especially in Tanzania, Malawi, and Burundi, killing of people with albinism for their body parts is rife because of the false belief that they bring good luck, wealth, and even political success. Some believe that body parts of CWA can be used to harness powers to win elections, a sport competition, to enhance the physical strength of a human or even to cure HIV or AIDS.[56] Some other myths range from punishment from the gods, conception during menstruation, to seeing frightening sights during pregnancy. [57] Some also believe that albinism is a contagious condition. [58] These are not true at all. These false narratives and age-long beliefs have done a lot of harm to CWA and PWA in general.

4.2. Traditional Beliefs

A Nigerian town in Ondo State called Ibule-Soro forbids the birth of CWA in the town. Ibule-Soro is a town in Ifedore Local Government Area of the State. However, PWA are forbidden to enter Ibule-Soro as it is believed that they would die. According to Adenekan

[55] Nosakhare Emma-Iyamu *'Demystifying the Myths of Albinism' Blueprint Newspaper* (July 6 2019) <https://www.blueprint.ng/demystifying-the-myths-on-albinism/> accessed 4 July 2022.
[56] ibid.
[57] ibid.
[58] Tolulope Adenekan*, 'Information Needs of Albinos in the Yoruba Ethnic Group, Nigeria.* International Journal of Technology and Inclusive Education.' <8. 1385-1393. 10.20533/ijtie.2047.0533.2019.0169> accessed 16 July 2022.

people generally, except albinos, are warmly received in the agrarian community where the best palm wine is sold because it is believed that the river goddess in the town forbids albinos from entering the town. Apart from the fact that a CWA cannot enter the town, no indigene of the town has ever given birth to an Albino. Jooro, the river goddess, kills any Albino delivered by any indigene of the town wherever they may reside.[59]

Adenekan stated further that the people of Ibule-soro town witness an influx of visitors from neighboring Akure on a daily basis because of their good palm wine and bush meat however, only PWA are excluded from all of the intense commercial and social activities.[60] Such cultural practices infringe on the rights of CWA born in this community. They are literally dead on arrival and excluded from being part of the community. Their rights to life and freedom of movement is infringed pon.

5. Violation of the Rights of Children with Albinism in Nigeria

5.1. Right to Equality and Non-discrimination

Non-discrimination and equality are core principles of international human rights law. All major human rights instruments protect against discrimination, which is defined as any "distinction, exclusion, restriction or preference based on race, colour, disability, sex, or other status that impairs the enjoyment of all rights by all persons on equal footing. The principle applies to everyone and to all human rights.[61] Section 10 of the CRA provides for right to freedom from discrimination and protection from deprivation by reason of the circumstances of the birth of a child. Name calling, taunting and shunning are some forms of

[59] ibid.
[60] ibid.
[61] Convention on the Elimination of All Forms of Racial Discrimination CERD (adopted 21 December 1965 entered into force January1969) art 1.

discrimination experienced by CWA, making them easy target for bullying, physical molestation and false accusation.[62]

Donald Tampi, recounting his childhood experience stated that while in secondary school he was discriminated against by his peers who made fun of him and pretended to be blind when they walked past him. According to him, 'I always had to move closer to the board, people laughed at me and talked bad about me, and they never said anything good about me.''[63] Ms Lucy Iziegbe, a PWA herself said a lot of CWA were being bullied in schools, while those who could not handle the bullying opted out of school. As noted by her 'a place where they ought to acquire knowledge has now become a red zone for them and so a lot of them are uneducated.''[64]

In a study by Aborisade which explored childhood experiences of PWA, participants stated that they were called derogatory names such as 'low current', 'monkey child', 'spirit being' and 'oosha (god)'. A total of thirty-two participants in the same study reported being frequently prevented from attending social gatherings or outings that their siblings and other family members were part of. For example, Elias, the only male child among three sisters, shared his experience of being barred from attending his sister's wedding due to his parents' concerns that the groom's family might call off the wedding out of fear that Elias's sister could give birth to a child with a congenital condition. Additionally, participants expressed that they continue to experience emotional and psychological issues, including paranoia, anger, guilt, depression, feelings of

[62] The Albino Foundation Knowledge Attitudes and Practices <https://albinofoundation.org/wp-content/uploads/2017/03/UNICEF-Report-on-Children-with-albinism-in-Nigeria.pdf > accessed 23, August 2022.

[63] Oluwatobilola Jaiyeola, *Living in Nigeria Tough, We suffer discrimination Punch Newspaper* (10 July 2022) <https://punchng.com/living-in-nigeria-tough-we-suffer-discrimination-albinos/> accessed 25 July, 2022

[64]Stop Discrimination Against Albinos *Premium Times* (28 September 2021). https://www.premiumtime.sng.com/regional/south-south-regional/487068-stop discrimination-against-albinos-beauty-queen.html> accessed 5 July 2022.

powerlessness, withdrawal, low self-esteem, and a sense of worthlessness, stemming from their childhood experiences.[65]

5.2. Right to Education

As noted by Adelakun and Ajayi,[66] CWA have rights to education just like any other child. The rights of individuals with albinism are often constrained by the challenges that both educators and parents face in comprehending the condition. The insufficient information regarding albinism, prevalent in both educational and domestic settings, leads to young individuals with albinism encountering difficulties related to their physical appearance. [67] Individuals with albinism face significant obstacles due to their skin condition, as they often experience ridicule, even from educators.[68] Children with albinism (CWA) in Nigeria are required to enrol in regular schools without any accommodations for their specific needs or additional resources to facilitate their education. Nwosu et al. identified several challenges that educators encounter when working with CWA, including insufficient teaching resources, limited time to address the unique requirements of these children, and the struggle to foster acceptance among their peers who do not have albinism.[69] Franklin et al. assert that addressing the requirements of CWA within conventional educational environments may often necessitate only slight modifications to classroom arrangements, such as providing access to visual aids. However, they emphasize that a more profound transformation in the attitudes of teaching staff and fellow students may be essential.[70] Article

[65] ibid
[66] ibid
[67] ibid
[68] Ibid (no.18)
[69] Kinsgsley Nwosu and Obinna Ezennaka, *'Teaching Children with Albinism in Nigerian Regular Classrooms: An Examination of the Contextual Factors* <http://kadint.net/our-journal.html >accessed 23 August 2022.
[70] Anita Franklin, Patricia Lund, Caroline Bradbury-Jones and Julie Taylor, *'Children With Albinism In African Regions: Their Rights To 'Being' and 'Doing'.* (2018) BMC Int Health Hum Rights 10.1186/s12914-018-0144-8. PMID: 29329540; PMCID: PMC5767025. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5767025/>

29 of UNCRC provides that education should optimally develop each child's personality, talents and abilities.[71]

The effective development of CWA is jeopardized by policies that lack inclusivity. The unavailability of large print reading materials, the absence of magnifying devices for reading, and the insufficient allocation of additional time during examinations for students with vision impairments are examples of non-inclusive educational policies that impede the academic performance of pupils with albinism.[72] Access to appropriate educational support, including teachers with the knowledge of how to assist children with albinism have been recognized as important in enhancing the self-esteem of CWA, promoting their personal development and creating a sense of belonging.[73] Aborisade found that prejudicial treatments lead to the denial of continuous education or preferred vocation of CWA.[74]

5.3. Right to Health

Failure to prevent foreseeable deaths, including from skin cancer will not only constitute a violation of the right to health, but also the right to life.[75] Regarding health of CWA discrimination not only occurs directly but also indirectly. Indirect Discrimination occurs where a law, policy, procedure or practice appears to be neutral but has the effect of disproportionately disadvantaging a particular group. It occurs indirectly where persons are required to wait in the sun for long hours to receive a service, waiting in the sun increases the vulnerability of CWA to skin cancer and therefore

[71] Ibid (no.68)

[72] Oluwakemi Adelagun, '*Albinos Seek Inclusion In Government Policies, Programmes'* Premium Times (11 June 2021) <https://www.premiumtimesng.com/news/top-news/467216-albinos-seek-inclusion-in-government-policies-programmes.html> accessed 14 August 2022.

[73] Ibid (no.84).

[74] Richard Aborisade, *'Why Always me?: Childhood Experiences of Family Violence and Prejudicial Treatment against People Living with Albinism in Nigeria'.* (2021). *J Fam* 36, 1081https://doi.org/10.1007/s10896-021-00264-7 accessed 14 August 2022

[75]Amnesty International 'Promoting and Protecting the Rights of Persons with Albinism <https://www.amnesty.org/en/wp-content/uploads/2021/07/AFR0338792021 ENGLISH.pdf>accessed 14 August 2022.

may be a barrier to that child accessing the relevant service.[76] The right to health is particularly important to people with albinism given the health complications they often experience.[77] The right to health is recognised in a number of international instruments to which Nigeria is signatory.[78] People with albinism have special health needs, owing to the vision impairments and vulnerability to skin cancer associated with the condition. In this regard, to ensure access to the right to health for people with albinism, states have an obligation to ensure access to suitable skin cancer prevention such as sunscreen and sun protective clothing, access to information on skin cancer prevention, access to affordable skin cancer treatments, and access to glasses and other visual aids and adaptive devices, such as magnifying glasses.[79]

In 2007, the Federal Government started the free cancer treatment programme which around 5,500 patients benefited from before it was discontinued for lack of funding. Inspite of the provisions of section 32 of the Lagos State Special Peoples' Law (LSSPL) 2011 which provides for free healthcare for people living with disabilities, they are unable to access surgical removal of cancerous lesions under the law. According to the CMD of Lagos State University Teaching Hospital (LASUTH), 'free health is archaic. Somebody has to pay, and I am not aware of any dedicated fund to look after them, the solution to this problem is the provision of a pool of funds to look after people with albinism.'[80]

[76] Ibid.

[77] OHCHR,Albinism Reports<https://www.ohchr.org/sites/default/files/Documents/Issues/Albinism/Albinism_Worldwide_Report2021_EN.pdf> accessed 14 August 2022

[78] UDHR Art 25 , ICESCR Art 12, ICESCR Art 5, CRC art 24, CRPD art 25

[79] Ibid (no.76)

[80] Gbenga Ogundare , *'How Person with Albinism Are Suffering in Lagos Despite Special People Law' The Cable* (15 August 2020) <https://www.thecable.ng/how-persons-with-albinism-are-suffering-in-lagos-hospitals-despite-special-peoples-law> accessed 12 September, 2022

6. Albinism as a Disability

The UN Convention on the Rights of Persons with Disabilities (UNCRPD) defines persons with disabilities as those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.[81] Persons with albinism often have low vision, nystagmus and photophobia. In addition, their lack of pigmentation makes them vulnerable to the sun and more susceptible to skin cancer.[82] CWA are unable to enjoy rights on an equal basis with others when they are treated differently due to their condition, or when they are unable to attend community events held outdoors in the sun because of lack of appropriate shelter and high cost of sunscreen. The visual impairment and high susceptibility to skin cancer, therefore constitute impairments requiring barriers to be removed.[83]

It is noteworthy that the Protocol on the Rights of Persons with Disabilities in Africa specifically mentions albinism in its preamble indicating that it recognises albinism as a disability.[84] However, this protocol is yet to come into force. Article 7 of the UNCRPD provides that States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with others and prevent further disabilities, including among children and older persons.

7. Albinism and Human Rights

Human rights-based approach is very crucial in addressing the challenges of CWA**.** A Human rights-based approach to Albinism is about the removal of physical and social barriers; it is about changing attitudes for policy makers, employers, teachers, health care professionals and even

[81] CRPD art 1
[82] Ibid (no.74)
[83] Ibid.
[84] Protocol to the African Charter on Human and *Peoples' Rights on the Rights of Persons with Disabilities in Africa* (adopted 29 January 2018).

family members. It is about ensuring universal design, accessible technology, and coordinated public programmes and service.[85] The approach requires government to provide the resources necessary to implement these goals and to enforce penalties for those who refuse to cooperate.'[86] This approach builds on the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms. However one of the barriers to full enjoyment of the rights of CWA is the dichotomy between Chapters II and IV of the Constitution of the Federal Republic of Nigeria 1999. Chapter IV provides for civil and political rights from section 33-46 which are enforceable rights including right to Freedom from Discrimination.[87] The rights outlined in the International Covenant on Civil and Political Rights (ICCPR) of 1966 are presented here. Chapter II delineates the Fundamental Objectives and Directive Principles of State Policy, which, due to section 6 (6) (c), are not subject to judicial enforcement. The implication of the foregoing is that Health and Education of CWA are not justiciable under the CFRN, 1999. However, going by the judicial activism in the case of *SERAP v. Federal Republic of Nigeria and Universal Basic Education Commission.*[88] The ECOWAS Court dismissed the Federal Government's argument that the right to education is merely a policy directive rather than a legal entitlement for citizens. The Court determined that this right is justiciable and can be enforced under the African Charter.[89]

[85] OHCHR,*'About Albinism and Human Rights'*< https://www.ohchr.org/en/special-procedures/ie-albinism/about-albinism-and-human-rights> accessed 23 June 2022

[86]Bill Albert and Rachel Hurst,' Disability and A Human Rights Approach To Development <https://hpod.law.harvard.edu/pdf/human-rights-approach.pdf> accessed 23 June 2022.

[87] CFRN S 42.

[88]SERAP v. Federal Republic of Nigeria and Universal Basic Education Commission ECW/CCJ/APP/08/08.

[89] Femi Falana, 'Chapter 2 of 1999 Constitution *Why Nigerian Judiciary Must be Proactive' Tribune* (22 March 2022) https://tribuneonlineng.com/chapter-2-of-1999-constitution-why-nigerian-judiciary-must-be-proactive-falana/ accessed 23 September 2022

8. Conclusion and Suggestions

It is imperative for government to make available funds in concert with non-governmental organisations to reinstate the free cancer screening treatment for CWA. In addition sun screen lotions should be provided at subsidized rates for CWA. This initiative will aid in safeguarding their skin against the harmful effects of the sun. It is essential for the Nigerian government to provide support to non-governmental organizations, both financially and in other forms, similar to the practices observed in countries like Kenya, Liberia, and South Africa. The Kenya Albinism Society, for instance, receives an annual funding of one million dollars from the government. In Liberia, the Albinism Society is allocated three hundred thousand dollars each year, while South Africa contributes eight hundred thousand dollars. Additionally, seven other African nations also extend their support to the Albinism societies within their borders.[90]

Schools should be better equipped and teachers trained to effectively teach CWA. In the words of one parent "Teachers should understand how to help a child with albinism."[91] Simple interventions include allowing CWA to wear hats and protective clothes, as well as avoiding sun exposure during the middle of the day. The use of low vision devices, should be monitored and their use evaluated frequently.[92] Teachers should be provided and trained on the needs of CWA such as textbooks and examination materials with larger fonts, and assistive devices to read the board.

Provision of sunscreen lotions and creams should be highly subsidized or made freely available to CWA in all states of the Federation. CWA should have access to preventive treatment as well as free and timely surgical

[90] Persons with Albinism Need Budget Line – Foundation *Sun Newspaper (13 June 2019)* <sunnewsonline.com/persons-with-albinism-need-budget-line-foundation/> accessed 12 September 2022

[91] Patricia Lund and Paul Lynch,' Promoting The Educational Inclusion of Children with Albinism In Sub-Saharan Africa Educational Experience of This Group of Visually Impaired Children.< https://www.cedol.org/wp-content/uploads/2013/09/Promoting-the-educational-inclusion-Lund-and-Lynch.pdf>acessed 16 September 2022

[92] ibid.

interventions of various health issues at government hospitals. These will ensure adequate protection of CWA giving them equal opportunities as any other Nigerian Child. Debunking myths and superstitious beliefs entail engaging communities both virtually and in-person. Awareness and advocacy programs will help reduce misconceptions, myths and discrimination surrounding albinism. This can be done in the rural and urban areas and through radio and television jingles, advertisement, brochures and leaflets. Social media is a useful tool to engage the society about Albinism. It is essential for the society to be informed about the causes of albinism to dismantle long-standing myths, superstitions, and discriminatory practices. Comprehensive advocacy efforts should be undertaken at both national and international levels to promote the Lagos State Special People's Laws (LSSPL) of 2011 and the Discrimination against Persons with Disabilities (Prohibition) Act, 2018, which provides protection for individuals with albinism.

Children with albinism in Nigeria are protected by plethora of instruments and laws both nationally and internationally. However, what obtains in reality is that they suffer from various forms of abuses, discrimination and barriers fuelled by superstitions, myths, ignorance and impunity. This paper has highlighted particular rights of children with disabilities (CWA) that are being violated in Nigeria. Among the various rights enshrined in the Constitution, the right to education, the right to health, and the right to freedom from discrimination are impacted. It is the duty of the government to enforce laws and policies designed to eliminate obstacles, thereby enriching the lives of CWA.

THE CONNECTION BETWEEN RIGHT TO CLOTHING AND HUMAN RIGHTS

Garima Oberoi[*]
Ankush Garg[**]

1. Introduction: Various Senses of the Right to Clothing

Since these rights and freedoms are universal, interrelated, and indivisible, it would be detrimental for states to analyse or enforce them in isolation from one another, as this would compromise the protection of other human rights and the actual exercise of individual freedoms. The concept of human rights as a unitary structure can be understood by considering both the content of their legal protection and the state of that legal protection.

Therefore, it is reasonable to investigate the human right to proper attire, not just as a right to survival but also as a right to personal dignity and civility. Right to sustenance includes the right to adequate clothing and footwear. This is due to the clear connection that exists between the right to proper clothes and footwear and other fundamental human rights, such as the right to life and the right to health.

We contend that the right to adequate clothes and footwear is not "secondary," "negligible," or "ignorable" because without it, the human being cannot realise the benefits of exercising the right to life, the ability to freely develop one's own personality, or cultural rights.

The basic human right to wear clothing can have a direct influence on a person's ability to convey a particular feeling of public status, rank, or dignity, as well as on a person's sense of belonging to a particular trade,

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professional body, or social category. This is because clothing can be used to convey a particular feeling of public status, rank, or dignity.[1]

Therefore, the right to express oneself through one's dress is intrinsically tied to the right to exhibit a particular colour scheme and style of garments that suggests affiliation with a particular group. One way to put it is that certain people are denied the privilege of wearing a certain outfit because they don't belong to a certain social group, profession, or political party.

If examined from a different angle, the clothes might be interpreted as having the powerful meaning of compulsory suiting, which alludes to the act of compelling certain categories of individuals to don uniforms by either government organisations or privately owned companies.

Some writers believe that clothes indicate "necessitate a type of graphic dialogue," "the display on the person's body of certain correspondence that can benefit his or her position in the group," "a language developed by an array of traditional signals," and even "an indication from afar, via visible indications of the social standing, age, sexual orientation, occupations, relationships, positions of power, races, etc" (Nanu, 2001, pp. twelve to fourteen). Each piece of apparel "is coated in cultural significance addressing especially the exercise of authority", with hints about the wearer's position (wearing the uniform), country, administrative authority, and group or association. A human face is either fully highlighted or completely obscured by the clothing, reducing the image to a basic depiction of a gallery of similarly obscured faces (wheels in the bureaucratic system). On the other hand, it can highlight the face, underlining its distinctiveness.

[1] Fant, Jennie Holton, *John Lambert: 'Look to the Right and Dress! The Travelers' Charleston: Accounts of Charleston and Lowcountry, South Carolina* (first published 2005, Penguin 2006) 268.

2. Compulsory Dress Rules Interfere with Individuals' Human Rights

Under the principles of international law that pertain to human rights, everyone has the right to freedom of expression, as well as the ability to publicly demonstrate their faith or beliefs in accordance with their own personal convictions. The manner in which a person dresses can be a significant indication of their religious identity, as well as their cultural background or personal views. All people should, as a matter of principle, be free to decide for themselves what they will and will not wear, as this is directly related to their exercise of their constitutionally protected rights to assembly and expression. It is the responsibility of governments to respect, safeguard, and ensure the individual rights of all people to freely express their identities, views, or personal convictions. They have a responsibility to cultivate an atmosphere in which no one is pressured into making a decision against their will. It is not permissible to use one's interpretation of a religion, culture, or tradition as a justification for imposing clothing codes on people who prefer to dress differently. Individuals should be protected from having their family members, community or religious groups, or leaders force them to dress in a particular manner through the implementation of safeguards by the states.[2] One's right to freedom of expression and one's right to manifest one's faith or belief can only be limited in ways that meet a rigorous three-part test under international human rights law. the restrictions must be established by law; they must serve a specified legitimate aim authorised by international law; and they must be clearly necessary and reasonable for that purpose. In order for a restriction to pass this test, it must meet all three of these requirements. To put it another way, they have to be within the law. Limits on dress that some or even most people find uncomfortable or offensive must be carefully interpreted, and cannot be used to ensure respect for the rights of others or preserve specific public interests. Furthermore, any constraints

[2] Kesselman, Amy, '*The 'Freedom Suit': Feminism and Dress Reform in the United States',* 2022(1)1. JSTOR <http://www.jstor.org/stable/190097> accessed 30 October 2022.

that are imposed must not be discriminatory, must not place the right itself in jeopardy, and must not violate any other human rights.[3]

3. Dress Codes Reflect and Exacerbate Discrimination

Ideas and assumptions about gender identity and duties are often transferred through legislation, policy, and practise through norms related with dress standards. Reason being, stereotypical gender roles are intrinsically linked to how people should dress. This holds true for both sexes. Women are disproportionately affected by governmental & non-state actors' efforts to control women's clothes as a metaphorical representation of a society's ideas. This is because women's dress is the symbolic embodiment of a community's ideals. This is true regardless of whether or not the individuals on whom these regulations are enforced hold the same values. Dress regulations can be an outward manifestation of sexism and heterosexism and a manifestation of the desire to objectify and subjugate women by controlling their sexuality and hence their agency. Additionally, dress codes can be a sign of the desire to control women's sexuality. Women who are victims of physical assault or social stigma because they do not adhere to prescribed standards of dress may be taught that they are to responsible for their circumstances[4]. The use of victims as scapegoats in this manner is a convenient pretext that is utilised to strengthen the seeming legitimacy of limitations on clothes. When it comes to restricting the human rights of individuals, states must not rely on prejudices about the religions, customs, or cultures of their citizens. For instance, it is not reasonable to presume that women who come from a particular ethnicity, religious tradition, or cultural background are devoted to the views or standards that are typically associated with that

[3] Nicholas Gibson, *'Faith in the Courts: Religious Dress and Human Rights'* The Cambridge Law Journal, 2007, (657) 97. JSTOR< http://www.jstor.org/stable/4500947> Accessed 30 Oct. 2022.

[4] Pager, Devah, and Hana Shepherd, *'The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets.'* (*Annual Review of Sociology*, 30 December 2008) <http://www.jstor.org/stable/29737787 >Accessed 13 October 2022.

background. In addition, women shouldn't be coerced into conforming to the conventions of a specific religion or culture if they don't want to.

4. Comparative study

In November 2007, the President of Chechnya, which is now part of the Russian Federation, Ramzan Kadyrov, asked on women to dress modestly in accordance with the customs of the region and to wear a headscarf. Female students in secondary and postsecondary institutions, as well as females over the age of ten, have been mandated to cover their hair or risk expulsion. In Grozny, official buildings have signs posted outside stating that only women covering their hair with a headscarf are permitted to enter, and security officers are said to enforce this policy.

Russian human rights advocates in September 2010 said they had witnessed groups of young men in uniforms or black clothes stopping women for wearing unsuitable dress and lecturing them about virtues inherent in Chechen history.[5]

The 21 regional ordinances on clothing standards in Indonesia "obviously discriminate against women" in their intent or impact, according to the National Commission on Violence Against Women (Komnas Perempuan). Since 2010, a bylaw has placed restrictions on the clothing that Muslim women in the West Aceh region are allowed to wear.

According to the findings of the Commission, supposed violations of dress standards are incorrectly invoked as a reason for crime, which perpetuates "the impunity of the offenders because women victims are perceived to be the most guilty party." Dress regulations are discriminatory not only against racial and religious minorities but also against women.[6]

[5] Shachar Akhtar, *'Freedom of the Dress: Religion and Women's Rights in Secular States' Harvard International Review* (2010) 53 59.
[6] Eléonore Lépinard, *'Migrating Concepts: Immigrant Integration and the Regulation of Religious Dress in France and Canada'* (2015) 611 32.

Infractions can result in a variety of punishments, including disciplinary measures for public workers, social consequences, such as public shame, and even criminal prosecution. Officials of the government have the authority to refuse to offer services to people who are deemed to be non-conformist. In Aceh, the Sharia police, also known as Wilayatul Hisbah, and, in some cases, members of the public undertake raids to ensure that women conform with the law. Those who do not comply face a penalty of three months in prison or a fine of two million rupiah, whichever is greater (220 USD).

Women and men who go out in public in the Islamic Republic of Iran are required by law to conform to a mandated dress code. This code is enforced by the government.

Women are expected to dress conservatively at all times of the year, which means wearing loose garments that conceal their hair, neck, arms, and legs. Despite the fact that many women still choose to dress in the traditional style, those who do so run the risk of being harassed by the police or other security forces such as the volunteer basij militia. This is especially true during the summer crackdowns that have become more commonplace since President Ahmadinejad was elected in 2005.

Article 638 of the Islamic Penal Code deems it illegal and punishable to violate the dress code, with punishments ranging from 10 days to two months in prison and/or 74 lashes for the most egregious offenders. According to a notice that is attached to the article, any woman who goes out in public without wearing an Islamic covering will be subject to a term of ten days to two months in jail or a monetary punishment[7].

The Saudi Arabian dress code is enforced on all citizens, although it places particularly onerous requirements on the country's female citizens. Women in Saudi Arabia are expected to dress modestly, meaning they should avoid

[7] Amy Place, 'Reading Dress and Identity in the Roman Mosaics of Carthage and Tabarka' in Susanna Harris (ed), *Textiles in Ancient Mediterranean Iconography*, Oxbow Books, 2022,.

revealing or form-fitting clothing. It is widely held that women who expose too much skin are more likely to commit adultery. Men in Saudi Arabia are likewise supposed to dress modestly. Since Saudi Arabia lacks a criminal statute, its modesty standards are based on judicial interpretations of Qur'anic and Sunni references (practices of the Prophet Mohammed).

It is the duty of a woman's male guardian, also known as her mahram, to ensure that she dresses in accordance with the standards that have been established. Also known as the Committee for the Propagation of Virtue and the Prevention of Vice, this religious police organisation enforces morality and public order. (al-Mutawa'een), is in charge of ensuring that strict norms of Islamic behaviour, such as clothing codes, are adhered to by the populace. As a result of perceived violations, such as not covering one's face or displaying one's legs, arms, ankles, or hair, they will either verbally chastise the woman or her guardian, beat them on the spot, or arrest and hold them. They also sometimes arrest and jail women for no apparent reason at all.

In 2009, the case of journalist Lubna Hussein brought into the forefront the practise of flogging women in Sudan for “indecent or immoral apparel” under Article 152 of the 1991 Criminal Act. This practise was brought into the spotlight due to the fact that it was written into the law. Her petition to the Constitutional Court questioning the legitimacy of the statute is still being considered there more than a year after it was initially filed.

The public order regime includes the Public Order Police (POP) and public order courts. For crimes like “indecent or immoral” apparel or behaviour, these courts impose punishments that are cruel, inhuman, and degrading. Both men and women are held to the same standards in public spaces. The POP have wide latitude to decide if an individual has acted in “an indecent manner, or a manner opposed to public morals” or “wears an indecent, or immoral dress, which causes discomfort to public sensibilities,” as neither of these terms are defined under the rules

governing public order. As a type of physical punishment, the public order courts have the ability to administer up to forty lashes to a person as a maximum sentence.

Because the POP has a disproportionately negative effect on women from low-income backgrounds, such as tea sellers and street vendors, as well as women from Eritrean and Ethiopian diasporas, the public order regime has had a profound influence on women of all faiths and traditions.

5. The Right to Clothing and its Connection to the Right of the Peoples to Development

Unlike the human right to shelter, for instance, we do not consider the right to adequate clothing and footwear to be "a subordinate, second class right." The right to development is inextricably related to this one. The right to development is inextricably tied to the right to development, which explains why (also regarded here from the perspective of a collective right of the peoples). The nations that are members of the United Nations (and other international organisations) adopt certain types of policies to support impoverished countries or developing countries, policies and measures of humanitarian aid, and collaboration in certain critical economic fields, in the goal of closing the widening gap between the countries in the industrial sector. This is in accordance with the international legal commitments that have been taken on.[8]

The concept of international cooperation among states is a cornerstone of international law because it sets norms of lawful behaviour for states to follow in their international dealings. The overarching goal of these principles is to create a genuine international community that works together toward common goals like maintaining international security and stability. Other goals include: sustaining peace and friendship among the peoples (Diaconu, 2002, pp. 316-317) (originating from the fundamental

[8] Tina Boloti, *'Offering of Cloth and/or Clothing to the Sanctuaries: A Case of Ritual Continuity from the 2nd to the 1st Millennium BCE in the Aegean?*' in Cecilie Brons And Marie-Louise (eds) Nosch, Textiles and Cult in the Ancient Mediterranean (2017).

liberties acknowledged in the preamble of the UDHR, which concern the right of human beings and peoples to live free from wants, fears, destitution, and dread, as well as free from oppression, violence, and injustice).

We are of the opinion that international cooperation between peoples and states, at the international level, is necessary for the establishment of sets of actions, policies, and unitary measures, at the international level, in order to offer a concrete benefit to the right of peoples to develop. We believe that the right to wear decent clothes and shoes should not be seen as a separate and absolute right. A fair quality of life is a human right, and this is a right that is closely related to that right but is not included in its substance. This is instead seen as a distinct right that must be recognised as such in international, national, and regional law.

The right to adequate clothing and footwear is intertwined with the rights to health, safety, and personal security; autonomy over one's own body; freedom of expression; freedom of identity; and the right to fully and freely develop one's own self with the expectation of closing the widening gap that currently exists between the countries in terms of the industrial sector.

Whether we regard it as a "subsistence right" or as a right from the category of "rights of comfort and civilization," we believe that there are strong legal links between the right to suitable clothes and footwear and the people's right to development. However, it may also be viewed as an individual right (human beings have an inherent right to progress in all areas of their lives, including in terms of their own identities, careers, communities, and cultures.). In either case, we believe that there are tight legal links between Everyone has the right to weather-appropriate apparel and footwear.

The right to development falls under the umbrella of solidarity rights, which are linked to the freedom, sovereignty, and independence of the people to decide for themselves (in the sense that the people are not

hostages to a system but rather "freely select their political status and freely ensure their economic, social, and cultural growth"). Articles 1 and 1 of the International Covenant on Economic, Social, and Cultural Rights of 1966 and Articles 1 and 1 of the International Covenant on Civil and Political Rights of 1966 are foundational to any discussion of the right to development.

However, this does not indicate that every people should conduct themselves in a manner that is wholly different from the behaviours of the other groups in order to reach the level of development that is being desired. From this vantage point, the right of peoples to development is understood as a right of solidarity, and the concept of cooperation among states is brought into play to provide the necessary legal and political balance and to sustain the system of international relations' coherence. Considered from the perspective of international solidarity between rich, industrialised governments and developing countries, this right reveals the germ of a unified legal system governing international interactions. These are the kinds of relationships that are predicated on collaboration, the pursuit of mutual benefits, a high level of trust among the participating states, and a number of other objectives and guiding principles that are shared by all of them. Their end goal is to establish a legal framework applicable to the entire international community.[9]

The states that are signatories to the International Covenant of Economic, Social, and Cultural Rights of 1966 have an express legal commitment to ensure that their citizens enjoy these rights, as stated in paragraph 1 of article 2 of the Covenant. "to act both by own effort, and with international aid and collaboration, notably from the economic and technical standpoint, using the available resources to the maximum" in order to exercise the rights that are granted by the Covenant. This obligation is stated in the International Covenant on Economic, Social, and Cultural Rights of 1966.

[9] Nicholas Gibson, *'Faith in the Courts: Religious Dress and Human Rights'* (2007) The Cambridge Law Journal, <http://www.jstor.org/stable/4500947> accessed 30 October 2022.

The International Covenant of Economic, Social, and Cultural Rights of 1966 has a provision requiring compliance with this responsibility. The right to clothes is part of the broader right to adequate subsistence, which the states parties are obligated to protect in full. This can be done in a variety of ways, including through international collaboration and support among the states for the sake of international security and stability. This right is considered to be a human right. In this particular setting, international cooperation and assistance may be able to foresee the development of states that are at risk of affecting or are unable to fulfil the conditions necessary to guarantee that human rights are respected. In particular, this may pertain to the human right to clothing.[10]

By utilising the mechanisms of international cooperation, also known as the solidarity component of the right to development, the governments are in a position to concretely give a real benefit of the individual right to clothes, in addition to other rights linked with the more general human right to a suitable quality of living, for the person and for his or her family. This is possible because the individual right to clothes is associated with the more general human right to a suitable quality of living. This can be accomplished through the use of international cooperation mechanisms. This is possible within the context of the rights of the peoples to development.

6. Recommendations

The following are measures that Amnesty International urgently urges all UN member states, and in particular those states represented on the UN Commission on the Status of Women, to implement:

- Throw out the laws that tell people how they must appear and how they must dress, or else.

[10] Shailesh Ayelet, *'Freedom of the Dress: Religion and Women's Rights in Secular States'* Harvard International Review, 2010 <http://www.jstor.org/stable/42763375> accessed 12 October 2022.

- It is crucial that measures be adopted to protect women from being compelled to wear certain clothing by their own family members, community members, religious organisation leaders, or other members of these groups.
- In line with Article 5A of the Convention on the Elimination of All Forms of Discrimination Against Women, implement activities to change the social and cultural norms of behaviour of men and women in order to eliminate prejudices and practises based on the belief that one sex is inferior or superior to the other or on conventional gender roles. The goal of these actions is to remove prejudices and practises based on the notion that one sex is inferior or superior to the other.
- Formulate and put into action strategies, policies, and programmes designed to end any and all types of discrimination against women.

7. Conclusions

To wrap up, we'd like to bring your attention to the fact that this human right is understudied and under defined in the doctrine, despite being, in essence, a fundamental human right along with the right to life, sustenance, drinking water and water for personal needs, housing, health, freedom, and dignity. The right to clothes and all other human rights are interconnected and do not allow for discrimination, thus this scenario is harmful to the human being. Therefore, it is necessary to explicitly define and consolidate the legal acceptance of the right to clothing at the national, regional, and worldwide levels, with an eye toward its various legal ties, most notably with the rights described in our article. The fact that we all wear clothes and get our hair cut “may possibly... have contributed to the sometimes marginalised status that dress is accorded within academia and museology,” as one researcher put it. However, this should never stop legal scholars from investigating what the appropriate relationship between the law and a particular conduct, even if that activity is quite prevalent.

I have sought to theorise freedom of dress and apply it to specific areas of the law throughout this article. By doing so, I have significantly deviated from the conventional presentation of this topic in today's legal literature as a problem of antidiscrimination law 340, as well as a general worry about whether or not the law can ever do anything about it. Because our identity, as well as the way we identify ourselves in connection to the rest of society, is at stake, I am going to return to an approach that is based on rights in order to solve the problem. Identity is not a fixed and unchanging characteristic, nor is it so ephemeral as to be devoid of any relevance to the continued existence of humans. Identity serves as the foundation for mobilisation to transform social conventions and the law and a phenomenon that is shaped by societal conventions and the legislation in their initial setting.

In the consumer society in which we live, if we do not have the flexibility to choose how we present ourselves to the world, we do not have the freedom to continuously edit, disrupt, and reform our identities; we do not have freedom over our ability to choose for ourselves.

RIGHT TO ADEQUATE HOUSING VIS-A-VIS PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT

Shruti Goyal[*]

1. Introduction

Right to adequate housing is a cherished human right and has been recognised by international human rights law as a part of adequate standard of living.[1] Adequate standard of living includes adequate housing. The right to household includes that a person will not be forcefully evicted from his house. Not only the "*Universal Declaration of Human Rights*" recognizes this right, but it is also recognised by the "*1979 Convention on Elimination of All Forms of Discrimination Against Women"*[2] and the "*1989 Convention on the Rights of the Child"*.[3] The right to adequate housing is provided to women and children by virtue of these Conventions as India is a signatory to all three Conventions.

Human rights have a strong link with the right of adequate housing as there is interdependence and interrelation between all human rights. Many other human rights like right to work, the right to enjoy good health, the right to privacy without interference of others, right to education, right to vote, right to social security etc. have the right to adequate housing at their base. If a person is rendered homeless then the enjoyment of other human rights becomes debatable.

2. Domestic Violence vis-a vis Adequate Housing

Though women have a right to adequate housing but due to domestic violence, women and children often become homeless especially when

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[1] The Universal declaration of Human Rights, Article 25(1) .

[2] The Convention on Elimination of All Forms of Discrimination Against Women, Article 14(2) and 15(2).

[3] The Convention on the Rights of the Child, Article 16(1) and 27(3).

there is no specific law to protect them. One of the major causes for women and children becoming homeless is domestic violence.[4] One of the important facets of the right to adequate housing includes that a person will not be forcefully evicted from his house. In such a scenario, it becomes the obligation of the state to ensure protection to women and children so that they are not rendered homeless and driven out of their own homes where they resided.

In India, the woman often becomes a victim of violence at the hands of her family members but does not report it because she fears that she will be forcefully evicted from her house and she will not have any place for residing. Until 2005, married women had no right to claim any right of residence in her matrimonial home and she had to go back to her parents place in case she filed a criminal case against her husband or in-laws or went to a civil court for grant of divorce. The "*Protection of Women From Domestic Violence Act, 2005"* (hereinafter DV Act) for the first time recognised the 'right to residence' and a 'right to shared household' of a women even when she did not have any proprietary rights in the property.

The Supreme Court of India in recent years has expanded this right of residence by saying that it is not restricted to actual residence and option of alternative accommodation can also be availed. The right to stay in a shared household was expanded by the Supreme Court in 2022 where the daughter-in-law was given a right to a shared household in a house owned by the father-in-law.[5] Till now the conception was that the right to residence under the DV Act can be claimed only by the wife when she has been subjected to domestic violence. However, the apex Court in the case of *Pragya Tyagi v. Kamlesh Devi*[6] has expanded the scope and held that "the right to reside in a shared household is also available to other relatives like sister, mother or even a girl child who is being cared for as a foster

[4] The Right to Adequate Housing, United Nations Habitat, Office of the United Nations High Commissioner for Human Rights, p. 18. Available at https://www.ohchr.org/sites/default/files/Documents/Publications/FS21_rev_1_Housing_en.pdf".
[5] Satish Chander Ahuja v. Sneha Ahuja, (2021) 1 SCC 414.
[6] (2022) 8 SCC 90.

child. Further, it was also held by the Court that it is not necessary that she has been a victim of domestic violence. The author in this article will explore how the dimensions of right to shared household and right to residence which are provided under the Domestic Violence Act has been expanded in its scope so as to ensure that women and children can avail the right to adequate housing which is an integral part of human rights".

3. Right to Adequate Housing Under Domestic Violence Act

The DV Act was enacted in 2005 to ensure that the women is saved from violence which happens within the precincts of a home. Although the home should be a safe haven for the women, the reality is that she is at a higher risk of facing violence and cruelty at home rather than being assaulted by a stranger on the streets.[7] The existing law only provided for penalizing the husband or his relatives for cruelty under criminal law or in cases of violence the wife could plead cruelty as a ground for divorce in civil law. The DV Act was passed so that there can be a civil law to protect the women. Moreover, the violence may be committed against a woman who is staying in that home due to marriage, consanguinity or adoption. She may be in the relationship of a wife, sister, mother, aunt or any other relationship. The Act aims at protecting all types of women who are staying in a domestic relationship from domestic violence as the existing law could not grant them protection in entirety.

Under the Act, a victim of domestic violence can claim relief under Chapter IV of the Act which is the heart and soul of the Act. One of the relief that can be claimed is residence orders[8] and right to a shared household.[9]

[7] M. Schelong Katherine, *'Domestic Violence and the State: Responses to and Rationales for Spousal Battering Marital Rape and Stalking'* (1994) Marquette Law Review, 78.
[8] The Protection of Women from Domestic Violence Act, 2005 § 19.
[9] The Protection of Women from Domestic Violence Act, 2005 § 17.

4. Residence Orders

The right to adequate housing is provided under section 17 and section 19 of the Act. Section 19 provides that "If the Magistrate is satisfied that domestic violence has taken place, he may pass a residence order restraining the respondent from dispossessing or disturbing the possession of the aggrieved person from the shared household."[10] He may pass an order through which he can direct the respondent to remove himself from the shared household or restraining him from entering any portion in the shared household where the victim is reading. The relatives can also be restrained from entering that portion. The magistrate has the authority to prevent the responder from giving up or alienating his rights in the shared household unless the court grants permission. He may direct the respondent that an alternative accommodation be arranged. The substitute living space need to be on par with what she gets in the shared household. Another option is that he can be asked to pay rent for the same.[11] The Magistrate may having regard to the financial condition of the parties also impose an obligation on the respondent to discharge rent and other payments.[12]

This right basically provides to the woman a right to secure housing. The sections[13] provide "a woman with the right to reside in her matrimonial home or shared household whether she has any title or rights in such house or not". The right to secure housing is secured by passing of residence orders by the Magistrate.[14]

A sine qua non for the court to pass residence orders under section 19 is that the victim should have approached the Court by filing an application for domestic violence. In *Samir Vidyasagar Bhardwaj v. Nandita Samir*

[10] The Protection of Women from Domestic Violence Act, 2005 § 19.
[11] The Protection of Women from Domestic Violence Act, 2005 § 19(1)(f).
[12] The Protection of Women from Domestic Violence Act, 2005 § 19(6).
[13] The Protection of Women from Domestic Violence Act, 2005 § 17 and 19.
[14] *Statement of Objects and Reasons* of The Protection of Women from Domestic Violence Act, 2005.

Bhardwaj,[15] the Court held that "the Magistrate has the jurisdiction to order removal of spouse from shared household on being satisfied that the domestic violence has taken place."

In order to ensure that the victim or her child is safe, the Magistrate can impose additional conditions and pass any other direction.[16] The Magistrate may instruct or require the police station officer in charge to provide the aggrieved party with protection in order to guarantee that the residence orders are followed. [17] He may also order the respondent to return her stridhan or property belonging to her.[18]

Regardless of any provision under any law, every woman in a domestic relationship has the right to live in a shared household under the DV Act. This right of residing in the shared household is irrespective whether she has any beneficial interest in the property or any right or title.[19] The aggrieved person shall not be removed from the shared household unless a legally mandated procedure is followed.[20]

5. Shared Household

The question is what is "shared household"? The Act defines shared household as "shared household means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member,

[15] (2017) 14 SCC 583.
[16] The Protection of Women from Domestic Violence Act, 2005 § 19(2).
[17] The Protection of Women from Domestic Violence Act, 2005 § 19 (5) and 19 (7).
[18] The Protection of Women from Domestic Violence Act, 2005 § 19(8). "
[19] The Protection of Women from Domestic Violence Act, 2005 § 17(1).
[20] The Protection of Women from Domestic Violence Act, 2005 § 17(2).

irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household."[21]

In *Satish Chander Ahuja v. Sneha Ahuja*,[22] the Court held that "the expression 'at any stage has lived' refers to living of the aggrieved person in a household at the time of filing of application for domestic violence or passing of order under section 19 or her living in the recent past prior to exclusion from possession or on her remaining temporary absence."

In *Neelam Gupta v. Mahipal Sharan Gupta*,[23] the Supreme Court held that where there is a share of the husband in the property owned entirely by the deceased first wife, the remedies of the second wife are restricted against such share of the husband alone.

Another question is whether the words "joint family" are restricted to parties belonging to Hindu religion. The question was posed before the Court in *Pragya Tyagi v. Kamlesh Devi*.[24] The Court held that the expression "joint family" cannot be restricted to Hindu joint family. The Domestic Violence Act being a secular law is applicable to every woman in India. The word "joint family" is not restricted to Hindu religion onl;y but encompasses "family members living together as a joint family" irrespective of any religion or community or social background.

6. "Lives" or "at some stage has lived"

Another question is whether the wife can claim to reside in a "shared household" even when she has not lived there. In order to get the relief of right to residence, the applicant has to prove two things. Firstly, that there is a "domestic relationship" and secondly, there is a "shared household".

In our Indian society, in certain circumstances a woman may not move into her matrimonial home immediately after marriage. For example, a

[21] The Protection of Women from Domestic Violence Act, 2005 § 2(s).
[22] (2021) 2 SCC 324.
[23] (2020) 11 SCC 232.
[24] (2022) 8 SCC 90."

couple may leave for honeymoon soon after marriage without residing in a matrimonial home and during this honeymoon period their relations get strained and she may be sent to her paternal home. It is possible that during this period the marriage has got consummated and is perfectly valid. Another example is where after marriage the girl is sent back to her home because of certain traditional beliefs for a particular month even before consummation of marriage. Another situation is where the husband immediately after ,marriage proceeds overseas and the husband resides in the shared household after he proceeds overseas and she is subjected to domestic violence. The point is that in such cases the woman may not live or have either lived at some point of time in a shared household with the husband. Will such a woman be entitled to the relief of residence?

The above discussed question was brought before the Madras High Court in *Vandhana v. T. Srikanth,*[25] where a peculiar situation arose. In this case the applicant and the defendant got married in February 2007. However, they did not live together at any point of time. A formal social marriage was planned in the month of July 2007. However, in June 2007 the respondents allege that the complainant along with others forcibly trespassed into his house due to which they have lodged a criminal complaint. The applicant seeked the relief to reside in the shared household.

The Madras High Court held that "keeping in mind the objectives of the Act, a healthy and correct interpretation would be that words 'live' or 'at any point of time lived' would include within its purview 'the right to live'. That means, it is not necessary for the woman to establish the physical act of living in a shared household either at the time of institution of proceedings or as a thing in the past. If the relationship has a legal sanction, she gets a right to live in a shared household." The Court relied on the Supreme Court case in *B.P. Achala Anand v. S. Appi Reddy,*[26] wherein the Supreme Court held that "A Hindu wife is entitled to be

[25] 2007 SCC Online Mad 553.
[26] (2005) 3 SCC 313.

maintained by her husband, She is entitled to remain under his roof and protection. Right to residence is a part and parcel of a wife's right to maintenance."

Thus, the Court held that a woman having a relationship which has legal sanction and has a "right to live in a shared household" is entitled to get relief of right of residence even if she has not lived in a "shared household" at any point of time. This right springs from a valid and subsisting marriage and the relationship of marriage automatically confers the right to residence to a wife.

In *Pragya Tyagi v. Kamlesh Devi*,[27] the Court held that "the right to reside in a shared household cannot be restricted to actual residence. Even in absence of actual residence in the shared household, a woman can claim the right to reside in a shared household. The Court gave an illustration that in Indian society as per the societal norms, the wife generally stays with her husband in his household but in certain cases due to professional, occupational or other genuine reasons they may decide to reside at different locations. In such cases, she has a right to reside in the shared household not only in the house of the husband, if it is located at another place which is a shared household but also the shared household in which the family of her husband resides."

Another point is that at times the wife might have stayed with the relatives of the husband for some time. Will those households where she has at any point of time stayed come within the arena of shared household. Can she claim the right to reside in those households? This matter was brought before the Supreme Court in *Satish Chander Ahuja v. Sneha Ahuja.*[28] the Court in this case held that "the expression 'shared household' does not contemplate that wherever an aggrieved person has lived with the relatives of the husband at some point of time, all such houses shall become a shared household".

[27] (2022) 8 SCC 90.
[28] (2021) 2 SCC 324.

7. Can Only the Victim of Domestic Violence Claim Right to Shared Household?

Another pertinent question is whether it is essential that the woman must be a victim of domestic violence to claim the right to reside in 'shared household'? Under section 17 of the DV Act, every woman who is in a domestic relationship has a right to reside in the shared household and under section 19 the Magistrate is empowered to pass a residence order while disposing of an application of domestic violence. Thus, two types of reliefs are contemplated under the Act. One is, right to reside in a shared household under section 17 and second right to seek residence orders under section 19 of the Act.

Under section 17(1) every woman gets a right to reside in the shared household who is in a domestic relationship. Section 17(2) and section 19 gives the mechanism to enforce the right given in section 17(1). Under section 17(2) the woman who is aggrieved cannot be evicted or excluded from the shared household and under section 19 the magistrate can pass residence orders while disposing of an application of domestic violence.

The Magistrate under section 19 is empowered to pass a variety of residence orders. Shared household comes into picture only when residence orders are claimed in terms of section 19(1)(a) to (e). Under section 19(1)(f) the woman can also claim the relief of alternative accommodation. In such cases the concept of "shared household" would not be evoked. In *N. Muruganandam v. M. Megala*,[29] the Madras High Court held that "the expression shared household occurring in section 19(1)(f) of the Act is just for the purpose to enable women to seek alternative accommodation which is at par with the shared household which she enjoyed at a point of time".

Another difference is every woman who is in a domestic relationship has the right to reside in a shared household and it is not necessary that she has to be the victim of domestic violence whereas residence orders under

[29] (2011) 1 CTC 841 (Mad).

section 19 are passed when the women is the victim of domestic violence.[30]

The Court in *Pragya Tyagi v. Kamlesh Devi*,[31] held that "the right to reside in a shared household is available even to a girl child who is cared for as a foster child and she cannot be evicted or excluded from the shared household. Section 17(2) would come into play to protect the right of the girl to reside in a shared household."

8. When There are Conflicting Right Claims in a Shared Household

The question is where the property does not belong to the husband but the parents of the husband, that is to mother-in-law or father-in-law. Whether that property falls within the definition of "shared household"? Can the wife claim a right to residence in such property?

In 2007, the apex Court in *S.R. Batra v. Taruna Batra*,[32] held that "the definition of 'shared household' will not include households where the victim lived only for some time in a domestic relationship. In this case the property exclusively belonged to the mother-in-law. The wife stayed there for some time with her husband after marriage. The Court in this case held that the wife cannot claim a right to reside in the shared household in that property as the property belonged to mother-in-law. The Court held if the wife wants to claim a right of shared household, then the property in which she is claiming a right must either belong to the husband or should have been a joint family property of which the husband is a member or he should have taken that property on rent."

Similar questions arose before the Supreme Court again in *Satish Chander Ahuja v. Sneha Ahuja*.[33] The facts were that there were divorce proceedings between the husband and wife. The wife claimed a right to

[30] Pragya Tyagi v. Kamlesh Devi, (2022) 8 SCC 90.
[31] (2022) 8 SCC 90.
[32] (2007) 3 SCC 169.
[33] (2021) 1 SCC 414.

shared household in a property where the father-in-law lived. In this case appellant was the respondent's father-in-law. He has filed a suit against his daughter-in-law praying for a mandatory injunction for removing her from his property. He pleaded that the daughter-in-law has no right to residence against the father-in-law. The house was bought by the father-in-law (appellant) in 1983. His son got married in 1995. After marriage the son and his wife (respondent) started living on the first floor of the house. After a dispute broke out between the son and his wife, the wife moved to the guest room on the ground floor of the house. She later on filed divorce petition under the Hindu Marriage Act which is still pending. She has also filed an application of domestic violence against the husband, the father-in-law and mother-in -law on the account that she has been subjected to severe emotional and mental abuse by them. The father-in-law is a senior citizen and suffers from a number of ailments. He has filed a suit for evicting his daughter-in-law from his property.

The question before the Supreme Court was "whether the wife is entitled to stay in the house belonging to the father-in-law. That is, whether the definition of "shared household" can only be that household which is a joint family or which the husband of the aggrieved person has a share?" The Court held that the law does not require that an aggrieved person may either own the premises or has taken the property on rent jointly or singly. The property may be a premises that belongs to husband's relative with whom the woman lives in a domestic relationship. The word used in the section are "at any stage has lived". In a shared household, there must be permanency of living. If the living is casual. Living must have permanency. A property cannot become a shared household only because people live there occasionally. The court held that "keeping in view the objective of the Act woman has the right to residence in a shared household irrespective of her having any legal right in the same or not.

The Court held that the law has not been interpreted correctly in *S.R. Batra's case"*.[34]

In *Rajnesh v. Neha,*[35] the Supreme Court again said that "the right to residence is not an indefeasible right and while granting relief under the provisions of Domestic Violence Act or in any civil proceeding, the Court has to balance the rights between the woman who is an applicant under the Domestic Violence Act and the parents-in-law".

The apex court observed that right to residence in a shared household is not infeasible when the daughter-in-law is pitted against the father-in-law. However, the Court must balance the rights of both parties in granting relief, keeping in mind that senior citizens also have a right to live happily into old age and not be bothered or haunted by the marital dispute between their son and daughter-in-law.

9. Alternative Accommodation

When the Magistrate is approached by the victim of domestic violence to pass residence orders, the Magistrate may if the circumstances so require in place of giving her a portion f shared household, ask the respondent to make arrangements for alternative accommodation of the same level as enjoyed by her in shared household or pay rent for it.[36]

In *Jaidev Rajnikant Shroff v. Poonam Jaidev Shroff,*[37] the question before the Supreme Court was when the respondent is providing "alternative accommodation" should be it be "identical" to the shared household she was enjoying earlier. The Court in this case held that the accommodation has to be similar. "Similar" does not mean "identical". "Similar" has to be construed in a realistic manner. It will be difficult to find out a house identical to the shared household house having the same area, the same facilities and the same luxuries. In this case, the wife initially agreed that

[34] S.R. Batra v. Taruna Batra, (2007) 3 SCC 169.
[35] (2021) 2 SCC 414.
[36] The Protection of Women from Domestic Violence Act, 2005 § 19(1)(f).
[37] (2022) 1 SCC 683.

she will find an accommodation for herself and the husband agreed to pay the rent. Then the Court passed order and appointed an architect to identify similar properties. The architect did the work elaborately and gave a list of 17 identified properties which were upscale properties similar to the shared household. The rent of these properties varied from 12 lakhs per month to 30 lakhs per month. However, the wife rejected all of them on grounds like the view was not "sea view" as was in the shared household or in case of "sea view" properties that they were a bit small than the shared household property or that the "sea view was fully done with". The Court held that "the word 'similar' has to be construed as providing the same degree of luxury and comfort as is available in the shared household. It does not mean 'identical'".

In *S.R. Batra v. Taruna Batra*,[38] the Supreme Court held that "the wife's claim for alternative accommodation can only be against her husband and not against her in-laws or other relatives of the husband. However, later on in 2021 in *Satish Chander Ahuja v. Sneha Ahuja*,[39] the apex Court held that the view taken in *S.R. Batra's case* that the relief of alternative accommodation can be enforced only against the husband is wrong. "

10. Is the Relief to Reside in "Shared Household" Available Only to Aggrieved Woman?

The question is whether the Court can pass a residence order only if the woman has been a victim of domestic violence. That is, is it mandatory that she has been abused in order to file an application demanding the right to residence in a shared household.

This question has been brought before the Court in the case of *Pragya Tyagi v. Kamlesh Devi*.[40] The Court held that "the right to reside in a shared household is given to every woman who is in a domestic relationship by virtue of section 17(1) of the DV Act. A woman may be in

[38] (2007) 3 SCC 169.
[39] (2021) 1 SCC 414.
[40] (2022) 8 SCC 90.

a domestic relationship due to adoption, marriage, consanguinity, joint family or relationship in the nature of marriage.[41] The enforcement of this right is given in section 17(2) and section 19 of the Act. The right is given in section 17(1) irrespective of whether she is an aggrieved person or not. It is an independent right".

Thus, a woman in a domestic relationship who has not been subjected to domestic violence can also claim to reside in the shared household as her right. Therefore, relations like "daughter, mother, sister, wife, daughter-in-law or mother-in-law and such other women" who are in a domestic relationship have a right to reside in a shared household. They cannot be thrown out or evicted from the household even in absence of domestic violence.

11. Conclusion

To conclude, it can be said that the right to an adequate household is one of the most cherished right of a human being. Without shelter a person's existence becomes meaningless. The Supreme Court by granting this protection to women has expanded the horizons of the Domestic Violence Act to new heights.

[41] The Protection of Women from Domestic Violence Act, 2005 § 2(f).

JUDICIAL PERSPECTIVE ON THE SOCIO-CULTURAL PARADOX OF WOMEN ENTERING SABARIMALA

Nanda Prasad[*]
Abhinandan Kumar Singh[**]

1. Introduction

Justice delivered by the weight of the law requires careful consideration of both words and silence. There is more to the task than meets the ear when it comes to the construction of the sounds of the texts of constitutions. In other words, justice is a quality that enhances the worth of human life. The Indian Constitution makes this virtue of government the primary purpose of the state, demonstrating its importance. Freedom of opinion, religion, faith, and worship, as well as equality of position and opportunity, are all firmly established in the Constitution of India's expansive preamble. To achieve these preamble purposes, the Indian Constitution guarantees citizens a wide range of protections designed to help them flourish as unique people and lead fulfilling lives.

Legal implications see the Constitution as a leveller, removing the veils from centuries of sexism. The prologue, with its well-constructed prose, contains insights about the cosmos that are worth more than they seem on the page. The Constitution includes both gender-neutral and positive clauses of an enabling type, which permit the State to adopt further legislative and executive acts on behalf of certain groups or categories. The intent of these provisions is to guarantee not just a change in politics, but also the centrality of the person in a fair social order. While the actual change in women's lives brought forth by constitutional protections is still little, it is growing.

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The spirit of the Indian Constitution is often found to be on the weaker side when it comes to dynamic socio-cultural paradoxes as they originate in political constructions and different narratives across different parts of the country. The intersection of these seemingly unrelated fields such as law, religion, politics and governance in this era only serves to exacerbate the predicament. When authoritarian or populist administrations with sophisticated ideologies try to make themselves seem democratic by introducing a lot of new laws and regulations, the sheer volume of information overwhelms the brain and prevents it from making good decisions.[1]

The constitution of India protects one's right to practice and profess one's religions, beliefs and faiths.[2] The vision of the Constitution's founders is best shown when the many articles of the Constitution are interpreted in light of the preamble's comprehensive language. It promotes a more caring, compassionate, and fair social order by emphasising the importance of religious freedom. The freedom to religion is guaranteed by the mandate of equality of position and opportunity included in Articles 14, 15, 17, as well as Articles 25 and 26[3]. The suggested Indian social system guarantees fairness to every citizen irrespective of their race, colour, religion, caste, creed, nationality, or gender. The previous seven decades' worth of constitutional interpretations provide witness to an earnest effort to protect each person's value in a just society.[4] The Constitution's silences have been interpreted to were interpreted to benefit the ruling class, marginalising various vulnerable groups. The Hon'ble Supreme Court has, in a number of cases, vividly depicted a tale of corrective actions to ratchet up the volume on the rule of law, justice, and constitutionalism.[5]

[1] Parmod Kumar, Supreme Court Judgment on Sabarimala disappointing, will have problematic repercussions, INDIAN EXPRESS, Sep. 28, 2018.
[2] A.25, Constitution of India, 1950.
[3] The Constitution of India, 1950
[4] Francis Coralie Mulin v. The Administrator, U.T. Administration AIR. 1981 SC 746.
[5] Id.

Within this context, this paper explores the Indian judiciary's strategy of redefining religious freedom as a means of resolving the country's socio-cultural paradox through transformative constitutionalism. In this context, this paper is an attempt to understand the meaning, scope and up to what extent we have the freedom of practicing, professing and propagating religion.

The judgement delivered by the Hon'ble Supreme Court of India in Indian Young Lawyers Assn. & Ors. v. The State of Kerala & Ors. (Famously known as Sabarimala Judgement) is at the core of the ongoing debate.[6] The SCI looked for answers to the age-old problem of inconsistencies that have plagued India throughout its history. When viewed side by side, the worship of goddesses and the deprivation of right of women coming from a certain bracket of age from entering the Sabarimala Temple in Kerala reveal two very different attitudes toward women. Rule 3(b) which was framed while exercising the powers given under S.4 of the Kerala Hindu Public Worship Places (Authorization of Entry) Act, 1965 prohibits admittance on the grounds that such individuals violate local custom and usage. As the petitioners see it, these Rules run counter to the rights guaranteed by A.14, A.15, A.25 of Part III of Indian Constitution and 51-A (e) of Part V as contained in the Indian Constitution.

The legality of a regulatory framework that denied female devotees equal rights was examined by the SCI. The regulatory mechanism was examined against constitutional dictums, and it appeared at first glance to exclude female devotees from the mainstream. Even though Justice Indu Malhotra wrote a dissenting opinion, it is clear that the courts are determined to end discrimination based on narrow and inaccurate cultural stereotypes.

2. Sabarimala Case[7]

Initially, the case was heard by a 3 judges' bench, in which the Kerala High Court's[8] ruling on the same topic was also examined. Due to the

[6] (2019) 11 SCC 1.
[7] State of Kerala & Ors. v. Indian Young Lawyers Association (2017) 10 SCC 689

importance of the issues at hand and the advice of amicus curiae, the drafted the following five legal questions for the Hon'ble Supreme Court to consider.

1. the legitimacy of the ban on female devotees based on biological grounds under Articles 14, 15, and 17, and its confirmation under the expression "morality" in Articles 25 and 26;
2. Article 25's definition of a "essential religious practise" and Article 26's guarantee of a religion's "right to manage its own affairs in matters of religion";
3. In relation to the Ayyappa Temple's legal status as well as the implications that this temple is having for its funding from the Constitutional Fund of India, as well as the principles outlined in Articles 14, A.15(3), A. 39(1), and A. 51-A(e) of the Indian Constitution,
4. Whether or not on the anvil of the parent Act titled Kerala Hindu Places of Public Worship (Authorization of Entry Act, 1965) rests the legitimacy of Rule 3 (b) of the parent Rules.
5. The legality/validity of Kerala Hindu Places of Worship (Authorization of Entry) Rules 1965's Rule 3(b), which was acting as a barrier to female devotees aging from 10 and 50 that is to say 'menstruating' women from entering the temple's garbhagriha;

3. Judgment

A panel of five judges issued their decision in four separate opinions. In the first section, we will be discussing the joint opinion of then Hon'ble Chief Justice of India Deepak Mishra and Hon'ble Mr. Justice Ajay Manikrao Khanwalikar. Then Hon'ble Mr. Justice Rohinton Fali Nariman penned the academically sound second section. Justice D. Y. Chandrachud wrote a moving script for the third act. In Section IV, J. Indu Malhotra offered her disagreeing viewpoint.

[8] S. Mahendran v. The Secretary, Travancore Devaswom Board , Thiruvananthapuram and Ors, AIR 1993 Ker 42.

3.1. Two Impartial Judges, Justices Deepak Mishra and A.M. Khanwalikar

Some quotes from the opinion are as follows:

The Indian constitution enables each and every religious group of the country to freely establish and administer their religious institution. However, public morality, health, and safety may and should come before individual rights acting as checks and balances on the same.

The Sabarimala temple should remain open to anybody and everybody who is willing to perform worship there. Section 15 of the Travancore Devaswom Board, 1950 governs, controls, and supervises the institution. A State includes "other authorities," as per A. 12 of the Indian Constitution which also includes the Board. Therefore, the Board as well as other Devaswoms, which includes the Sabarimala temple, must comply with the protections of basic rights, such as those protected under Article 25(1).

Article 25(1)'s use of the term "all individuals" to describe those who are granted this right makes no reference to gender. The protections of Article 25 cannot be denied to female devotees due to the unique physiological needs associated with gender (1).

3.2. Supreme Court Justice Rohinton Fali Nariman

a. Article 25's wording of "All individuals" suggests that it refers to human beings.
b. A religious group's freedom to freely exercise its faith is essential so long as it does not infringe on the equal right of other believers to follow the same faith.
c. The Constitution's Preamble provides important context for understanding Articles 25 and 26. It is in the interest of thinking, belief, and worship that the right to profess, practise, and promote the faith be understood.
d. Superstitions are not required components of religion since they are founded on irrelevant premises. Evidence-based judgement is

required in such cases, and the standard for what constitutes an important religious activity has been clearly articulated. However, when several factions within a religious community have contradictory views that are not supported by evidence, the courts may adopt a pragmatic stance and go on.

e. If the government infringes on a person's religious freedom, that person may seek redress under Articles 14, 15(1), 19, and 21. Article 15(2) and Article 17 would apply in cases of interference by non-state entities.
f. A. 26, in contrast to A. 25(1), guarantees the freedom to freely practise their faith to religious groups. The many Hindu subgroups do not form a coherent religious group.

3.3. Justice D. Y. Chandrachud

a. It is not a branch of any particular religion.
b. Claiming that prohibiting women from entering temples is a violation of their right to worship is unconstitutional, regardless of whether such a prohibition is found in religious texts.
c. Constitutionalism and constitutional morality are incompatible with exclusionary rituals or practises.
d. To exclude female worshippers is not a necessary part of any religion. d. This kind of behaviour is unacceptable because it demeans women and violates their right to equal treatment in areas such as social standing, religious freedom, and access to religious spaces.
e. Anathema to constitutional values is the exclusion of female devotees on the basis of their menstrual state. The Constitution does not allow for this.

3.4. Chief Justice Indu Malhotra

A lone dissenter, Justice Indu Malhotra, noted various facts suggesting that the policy of exclusion dates back centuries and has persisted virtually unchanged since the beginning of recorded history. Her dissenting opinion

argued that it was a constitutionally protected pre-Constitutional practise.[9] It was noted that there are approximately a thousand temples dedicated to Lord Ayyappa, indicating that the ban on female worshippers is not universal. Only in cases where the god has been depicted in the form of a "Naishtik Brahmachari" does this apply. Since the god has taken on a different form in each of these temples, the rituals and ceremonies associated with worshipping him are distinct from those practised at Sabarimala. It is a question of "religion," "religious faith and practise," and "the fundamental" to restrict this temple's core beliefs and rituals. This custom emanates from the same guiding concept that was used during the pran prathishtha of the Temple in question. Ayyappa's identity and manifestation as a "Naishtik Brahmachari" were at stake, hence the opposing judgement established a legitimate connection between the purpose sought and the means to that end. It was determined that this method is in keeping with the god's "Naishtik Buddhi." The court concluded that this practise could not be considered an insult to the religious beliefs of female followers since there must be some rationale for it. The sacrifices made by worshipers were strictly for the sake of maintaining the heavenly and holy appearance of the god. In addition, the Board is duly empowered by S.31 of the Travancore Cochin Hindu Religious Institutions Act , 1950 enabling it to manage the Temple at par with the Temple's customary practices and traditions. Dissenting judge quotes may be organised as follows:

The legitimacy of religious observances cannot be determined by using Article 14 or rationality standards.

a. Pursuant to Article 25, the right to freely practice and propagate one's religion is unequivocally protected. However, equality in religious matters should be interpreted within the context of adherents of the same faith, ensuring that the essential beliefs and practices of any religion or sect are duly respected.

[9] A.13(3), Indian Constituion.

b. The petitioners' assertion of equal protection under Article 14 is in conflict with the rights of temple worshippers as safeguarded by Articles 25 and 26 of the Constitution. Except in instances where a religious practice is malevolent, oppressive, or constitutes a societal ill, such as sati, it is Ultra vires of this court to determine which religious practices, customs and traditions are to be declared invalid on the ground of violation of fundamental rights.
c. Article 25(2)(b) of the Indian Constitution requires that Hindu places of worship be accessible to the public. However it must be kept into account that the Kerala Hindu Places of Worship (Authorization of Entry) Act, 1965, was enacted while still A. 25 was present and the same was not outside the scope of the said article. The proviso to S. 3 was inserted to ensures their autonomy in managing their own affairs without external interference.
d. Articles of the Constitution Space and respect for followers of various sects to exercise their religion according to their own religious demands is essential to morality in a diverse society and secular democracy. The use of reason or reasoning in religious concerns is unnecessary and inappropriate in the court system.
e. The Constitution's authors appreciated the country's tradition and history. f. Articles 25 and 26 ban State interference except in situations requiring social welfare and reform, laying the groundwork for a secular society with a wide variety of religions and beliefs.
f. Adherents of the Ayyappan Dharma who worship Lord Ayappa constitute an acknowledged and recognized religious sect of Lord Ayyappa. Male devotees are referred to as "Ayyappans," while female adherents are known as "Malikapurnams." In the context of Hindu religious practices, a first-time visitor to Temple is designated as a "Kanni Ayyapppan." The practitioners are collectively called by the name of those who consider lord Ayyappa as their god or "Ayyappaswamis." Prior to undertaking the challenging ascent of the 'Pathinettu Padikal' to access the

Sabarimala Temple, a pilgrim is required to adhere to a stringent code of conduct known as "Vruthum."

g. It has been noted that the temple possessed a significant amount of land before to independence, lending credibility to the notion that it serves the public good. The temple is run by Devasom board which had been receiving money from state treasury since 1922 after a proclamation was issued by the ruler of erstwhile state of Travancore. After independence of the country, it does not receive anything from the Govt. of India or consolidated fund of India. Thus, The Board does not qualify as a "State" or "other authority" under Article 12 of the Indian Constitution.
h. The concept of untouchability, as delineated in Article 17, is fundamentally anchored in caste-based discrimination and is thus inapplicable in the present context. Historically and literally, untouchability has never been interpreted to encompass female devotees as a collective group. The precedents cited by the petitioners, which pertain to the inclusion of Dalits in temple entry movements, are irrelevant to the issue of age restrictions for female devotees. Notably, these age limitations are deeply rooted in the historical beliefs and practices specific to the Sabarimala Temple.

4. The Court's Rationale

By a vote of 4 to 1, the SCI's Constitutional Bench ruled that gender-based restrictions on devotees were contrary to the spirit of Articles 14, 15, and 17, as well as outside the scope of the moral principles referred to in Articles 25 and 26. Minority opinion accepted the pleas of respondents and considered their practise of banning the entry of female devotees as part of their distinct practise in view of the manifestation of deity as 'Naishtik Brahmachari.' All other questions relating to 'essential religious practises' and 'denominational character' were resolved in favour of petitioners.

Article 13(3)(a) refers to "customs or usage having in the territory of India the force of law." The dissenting opinion thus hinges on the interpretation of the term "law" within this context. The minority opinion, asserting that

the prohibition on female devotees aged 10 to 50 is unconstitutional, was upheld as law. The majority's interpretation relied on the principle of statutory construction that mandates the "statute should be read as a whole," with its meaning determined by the surrounding text.

The Court while delivering its judgement cited A. 13 and discussed the same in detail and found out that since the practice in question was in violation of A. 14, 15, 25, 26, therefore A.13 should be applied to invalidate the said practice and thus should be interpreted to support the majority judgement's reasoning.

The majority of the court found that the Parent Act, the Kerala Hindu Places of Worship (Authorisation of Entry) Act, 1965, and Kerala Hindu Places of Worship (Authorization of Entry) Rules, 1965, are all consistent with the Constitution. However Rule 3(b) of the Kerala Hindu Places of Worship (Authorization of Entry) Rules, 1965 exceeds not only Sections 3, 4 and 4 (1) of the Parent Act, but also Articles 13(1) (2) (3), 14, 15(2), 25, 26, 51, and 51-A(e) of the Constitution.

The discriminatory practice of excluding or limiting female devotees of menstruating age clearly violates fundamental human rights and is thus illegal under both domestic and international human rights law.[10] The State bears the responsibility to address any social or cultural traditions or patterns that are biased and discriminatory, denying women's equality with men. Article 5 of CEDAW, when read with Article 13(1)(2)(3) of the Constitution, mandates that signatories take appropriate, proper and significantly important measures to change the existing social and cultural normal of conduct of men and women in a way, eliminating pre-conceived notions, customs, and other practices founded on considerations of subordination, superiority, or stereotypes. Additionally, Article 51(c)obliges states to make laws in consonance with international law and treaty obligations.

[10] Articles 1, 2, 18, 28 of UDHR, Article 13 (1) of ICESCR, Article 18 of ICCPR, Articles 1, 2(a), 2(b), 2(c), 2(d), 2(e), 2(f), 2(g), 3, 4, 5 of CEDAW.

The majority ruling clarified the ambiguity by interpreting the non-obstante clause through the principles of purposive construction, harmonious construction, and the mischievous rule of construction. It affirmed that all Hindu temples must remain accessible to all Hindus, prohibiting the prevention of any Hindu person irrespective of his/her gender from entering a place of public worship, praying, or performing any religious service. The Supreme Court meticulously examined the text of Section 3 and concluded that these rights are guaranteed to all sections and classes of Hindus, irrespective of the presence of any law, custom, usage, instrument, decree, order, or court ruling to the contrary. Moreover, Section 3 recognizes the autonomy of religious denominations in managing their own religious affairs, as further validated by Article 26(2) of the Constitution. However, the Sabarimala temple was found not to be entitled to any exemptions from these provisions.

The Court ruled those words "public-order," "public morality," and "public health" in the non obstante clause of Article 25 are all qualified by the word "public." Women of the religious faith entering the country within the age range provided must not pose a threat to public safety. For the sake of elucidating the range of "public morality," it is also important to recall that this Constitution was not imposed from without. In essence, the citizens of this country adopted and presented it to themselves. Public morality, etc., must be properly understood as synonymous with constitutional morality.

The Court ruled that excluding women of a certain age range as an essential practise is not the same as a Hindu religious doctrine or practise. It was pointed out that without this discriminatory practise, Hinduism would not be Hinduism. Women are welcome to enter a Hindu temple as devotees and pay their respects to the temple's deities. Given the lack of any textual or biblical basis, the Court rejected any argument for the exclusion of women.

Because it included an exemption to Section 4, the majority judgement further emphasised the provision's one-of-a-kind character (1). They saw

that the exception was more significant than the rule itself. It makes it very clear that the state may not treat any Hindu any differently because of their religious beliefs or their membership in a certain social group. Combining Articles 14, 15(2), 17, 21, 25, and 26 led to the conclusion that the regulation prohibiting the admittance of female devotees of the designated age category was unlawful.

In addition, Justice Chandrachud resorted to several extracts from the Constituent Assembly Debates to buttress his own limited conception of untouchability in connection to caste-based discrimination.[11] He reaffirmed the point that Article 17 is a socially revolutionary provision and that the phrase "untouchability" was intentionally left ambiguous by the Constitution's drafters. In order to ensure that the practise was completely outlawed, this was done.[12] According to Shiva Rao, a member of the Constituent Assembly, Article 17 protects against all types of untouchability, whether they occur inside a group or across communities. Moreover, it was proposed to institutionalise the practise of "untouchability" or the imposition of any kind of incapacity.[13] To back up his claim, he cited the Protection of Civil Rights Act of 1955, which makes it illegal to prevent anyone from entering a place of public worship for the purposes of worship or prayer (Sections 3, 4, and 7), a provision that unambiguously covers untouchability on the basis of history, philosophy, or religion. It's a start in the correct direction towards reevaluating the social compact and enshrining international human rights in the constitution.

5. Conclusion

In light of the foregoing, it is clear that the Constitution represents a convergence of societal, moral, legal, and philosophical values with the aim of bringing about a social revolution by combating marginalisation and restoring human dignity. These norms must be interpreted in a way

[11] Supra Note 9.
[12] Id.
[13] Id.

that serves the greater good without compromising the interests of those with a vested interest in the outcome. According to social contract theory, the state's overarching goal is to protect the rights of all its citizens while also ensuring their safety. In this era of human rights and inclusive development, the pursuit of fraternity may justify making room for individual recognition. When functioning properly, the Court transformed the democratic system into a culture of constitutional openness, equality, and freedom for all. Evidence of the Court's striking leaning toward fortifying constitutionalism on the soil of the script of the Indian Constitution can be found in:

- using the 'rule of purposive construction' to interpret the texts' gaps and the infused melodies, thereby transferring the germs of transformative constitutionalism from volkspele to toyitoyi law;
- condemning as contrary to constitutional rule of law and constitutional morality the practise of socially excluding female devotees on the basis of menstrual status.
- redefining the relationship among and between culture, law, and society, spatial and temporal construction distinguishing constitutional morality from individual and social morality.

The Constitutional Bench's lengthy and nuanced decision in the Sabarimala matter reflects the importance it placed on human rights law, constitutional law, and inclusive governance. The five judges gave careful consideration to the numerous precedents cited by both sides and carefully evaluated their applicability. To ensure the smooth operation of the legal system, it reflected the balance between conservatism and progressivism in legal development. All of the judges relied on Bodenheimer's dictum, "Backward Pull Forward Push," to bolster their decisions.[14] The Supreme Court of India reaffirmed its previous stance in Manoj Narula v. Union of India[15] by stating that "constitutional morality" necessitates giving due deference to the Constitution's established principles and giving Rule of

[14] Edgar Bodenheimer, *Power, Law and Society*, 5-6 (New York, 1973) .
[15] (2014) 9 SCC 1.

Law a priority. Constitutional morality can fortify patriotism for the Bill of Rights and the rest of the Constitution. Constitutional morality, in fact, is like a laser beam when it comes to constructing institutions and resolving contradictions. Liberal construction covering a diverse and inclusive society should be at the heart of constitutionalism, rather than a strict adherence to black-and-white lettering of the notion of constitutional morality.

In both instances, the prohibitions were deemed illegal by the courts, who also rejected the denial of female devotees' ability to pursue religion as a means to achieve enlightenment. There may be state-level, national, and international socio-political ramifications of cross-border transformation of international human rights legislation concepts in the future. The ruling on Sabarimala to submit a review petition to a Seven Judge Bench under a populist dictatorship has caused rationalists to raise an eyebrow, as can be heard by the sound of a bugle. It defended its decision to send the Sabarimala petition to a bigger bench by grouping it with other ongoing cases on matters as disparate as female genital mutilation among Dawoodi Bohras, the admittance of interfaith Parsi women into the fire temple, and the entry of Muslim women into mosques. Even the legendary Senior Advocate Fali Nariman thought this exercise was irrelevant to the actual matters they were working on. According to Prof. Baxi, this shift is a violation of constitutional discipline and an override of constitutional morality. To him, constitutional morality trumped established religion and political philosophy. It is important to remember that a Constitution is meant to safeguard the people of a country more so than the institutions that are supposed to uphold the social compact. In light of this, it is vital that constitutional provisions be contextualised to incorporate human rights and promote gender equality, not only in the religious sector but in all spheres of life.

POLITICALLY MOTIVATED INTEGRATION OF HUMAN RIGHTS IN TRADE POLICY

Ahan Gadkari[*]

"Everything is political"[1]

Charles Stross

1. Introduction

Global geo-economic power is based on international trade. Therefore, it is no wonder that as the United States-China hegemonic rivalry heats up, legal issues relating to the international trade architecture become increasingly significant.[2] One of the most pressing emerging issues within international trade is the increased linking of alleged Chinese human rights abuses to United States trade policy. While academics pay close attention to global trade, a significant development that has been largely ignored is the incorporation of human rights into US trade policy with China. This article intends to shed light on some of the emerging commercial and legal difficulties that have arisen as a result of the recent trend in the United States to couple human rights concerns inside China with national security-based trade policy.[3]

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[1] Charles Stross, *Saturn's Children* (Penguin 2008).

[2] Anthea Roberts, Henrique Choer Moraes & Victor Ferguson, *'Toward a Geoeconomic Order in International Trade and Investment'*, 22J. Int'l Econ. L. 655 (2019).

[3] While not the focus of this Article, developments arising from the Russian Federation's invasion of Ukraine corroborate the increasing willingness of Western nations to utilize sanctions as a result of human rights claims underscoring the importance of the topic. *See 'FACT SHEET: Joined by Allies and Partners, the United States Imposes Devastating Costs on Russia* (24 Feb. 2022), https://www.whitehouse.gov/briefing-room/presidential-actions/2022/02/21/executive-order-on-blocking-property-of-certain-persons-and-prohibiting-certain-transactions-with-respect-to- continued-russian-efforts-to-undermine-the-sovereignty-and-territorial-integrity-of-ukraine/ (accessed 2 May 2022)' ('As a result of Putin's war of choice, Russia will face immediate and intense pressure on its economy, and massive costs from its isolation from the global financial system, global trade, and cutting-edge technology. This includes cutting off Russia's largest bank from the U.S.

The article is structured in five sections. Section II gives some historical background for the present state of United States-Chinese ties and United States trade policy. In Section III, we examine United States' allegations of human rights abuses in China, the implementation of trade policies in response to these allegations, and China's responses, which include an enlargement of her own concept of national security and the use of more aggressive legal tools to counteract sanctions. The implications of human rights-based trade policy are examined in Section IV. This part discusses the potential impact on enterprises, the establishment of alliances and supply networks, and the possibility of backlash encouraging a China-centric trade system in the longer run. Section V sums up the article and concludes.

2. Understanding US-China Trade Relations

2.1. Contextual Background

The United States' relationship with China has undergone a monumental sea change in recent years.[4] Gone are the rosy predictions of US policy-makers who believed that economic engagement, most-favored-nation

financial system – a significant blow to its ability to function and process global trade'.); *Press Release 'Canada Cuts Russia and Belarus from Most-Favoured-Nation Tariff Treatment,* https://www.canada.ca/en/department-finance/news/2022/03/canada-cuts-russia-and-belarus-from-most-favoured-nation-tariff-treatment.html (accessed 2 May 2022)' ('Russia's invasion of Ukraine, supported by Belarus, is a violation of international law and threat to the rules-based international order'); *FACT SHEET: EU Sanctions Against Russia Following the Invasion of Ukraine* (26 Feb. 2022), https://ec.europa.eu/commission/presscorner/detail/en/fs_22_1402 (accessed 2 May 2022) ('Ban on exports, sales, supply or transfer of all aircraft, aircraft parts and equipment to Russia … . Sharpening existing export controls on dual use goods to target sensitive sectors in Russia's military industrial complex, and limiting Russia's access to crucial advanced technol- ogy'.); Francesco Guarascio, 'EU bans 70% of Belarus Exports to Bloc With New Sanctions Over Ukraine Invasion*'* (2 Mar. 2022) https://www.reuters.com/world/europe/eu-approves-new-sanctions-against-belarus-over-ukraine-invasion-source-2022-03-02/ (accessed 2 May 2022) (EU trade sanctions on Belarus for supporting Russia and allowing Belarus to serve as a conduit for Russian forces).'

[4] Joel Slawotsky, *'U.S. Extraterritorial Jurisdiction in an Age of International Economic Strategic Competition'*, 52 Geo. J. Int'l L. 427, 428 (2021).

status, and World Trade Organization (WTO) membership would inevitably lead China to assimilate into the US-led international trade, economic, and liberal-political orders.[5] This dramatic shift can be seen in a comparison of 'US National Security Strategy (NSS) and Chinese National Defense Strategy.'[6]

The United States shifted course because China followed its own route to development rather than accepting the pre-existing US-led system or adjusting its own political and economic governance to conform to Western ideals of democracy and human rights. 'On a more fundamental level, however, the shift reflected apprehension about China's rise to prominence as a dominant global trading power, with the world's second largest economy by nominal GDP (the world's largest by Purchasing Power Parity) and dominant or near-dominant leads in a number of emerging technologies that will shape the digital future, including artificial intelligence (AI) and central bank digital currencies.'

Moreover, the Asian Infrastructure Investment Bank, a novel and far-reaching Chinese strategy, was singled out by former US Treasury Secretary Summers as the time the US "lost control of the global financial system".[7] It was clear that China had lofty goals, as shown by her National Development Bank, Belt and Road Initiative, and Yuan inter-

[5] Joel Slawotsky, *'Principled Realism: Thoughts on the New U.S. National Security Strategy*' (11 Jan. 2018), https://lcbackerblog.blogspot.com/2018/01/joel-slawotsky-principled-realism.html (accessed 2 May 2022)

[6] '*Compare the 2002 National Security Strategy',* https://georgewbush-whitehouse. archives.gov/nsc/nss/ 2002/ (accessed 2 May 2022) '('In time, China will find that social and political freedom is the only source of [national] greatness'.) and the *2006 National Security Strategy,* https://georgewbush-white house.archives.gov/nsc/nss/2006/ (accessed 2 May 2022) ('China's leaders … cannot let their population increasingly experience the freedoms to buy, sell, and produce, while denying them the rights to assemble, speak, and worship.) with the *2017 National Security Strategy',* https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017 0905.pdf (accessed 2 May 2022) ('China seeks to displace the United States in the Indo-Pacific region, expand the reaches of its state- driven economic model, and reorder the region in its favor').'

[7] Lawrence Summers, *'Time US Leadership Woke Up to New Economic Era'* (5 Apr. 2015), https://www.ft. com/content/a0a01306-d887-11e4-ba53-00144feab7de (accessed 2 May 2022).

nationalization initiatives, which had pushed her ahead of the United States in the race to become a key player in shaping global governance.

Current economic nationalist trends, deep fissures within Western societies, the potential development of new networks arising from new governance institutions, and transformative digital technologies have all conspired to create conditions leading towards a possible modification of global governance, even as the US-led order continues to hold:

> We also must consider the possibility that a knowledge economy enclosed within one large authoritarian country might enjoy better prospects than a system of globally dis- tributed production and worldwide consumption held together by the institutions of liberal internationalism. We may be heading toward a second-best world of increasingly national markets supported by technological accomplishments that make managing an illiberal state easier. If international cooperation fails because of the deep conflicts that the knowledge economy spawns, advanced capitalism in one country might prevail. This is to say that the twenty-first century might be China's.[8]

Despite the widespread belief that the US-led liberal financial and trade regimes would persist for decades to come, researchers who are free of arrogance cannot help but be concerned about China's eventual rise to hegemony. The dramatic change in US-Chinese ties is unsurprising given the stakes.

[8] Paul B. Stephan, *'The World Crisis and International Law – The Knowledge Economy and the Battle for the Future'* 15–16 (CUP forthcoming 2022). 'For an excellent analysis of the current global power shifts in the context of crisis in Western political-economic governance; political science; and history', *see ibid.*, at 254–58 (discussing China's potential to wield competitive advantage from 'scaling knowledge- based innovation, even if it can't fully scale internationally'). The transition might in fact already be underway but imperceptible. *See* Zbigniew Brzezinski, *Between Two Ages: America's Role in the Technetronic Era* 9 (1970).

'A decade ago, in the latter days of former President Obama's second term, the first inklings of the paradigm shift that would forever alter the nature of human interactions began to emerge. When the Obama administration realised that China's rise posed a threat to US dominance in Asia, it initiated a strategic re-orientation known as the Pivot to Asia.'[9] This "Pivot" included 'a strong US security commitment to allies in close proximity to China and the push to retain Washington as the rules-maker, all in an effort to meet China's potential challenge to US dominance in Asia. As part of his argument in favour of the Trans-Pacific Partnership (TPP) President Obama made it clear that he wanted the United States, not China, to determine trade policy':

> "Right now, China wants to write the rules for commerce in Asia. If it succeeds, our competitors would be free to ignore basic environmental and labor standards, giving them an unfair advantage over American workers. […] We can't let that happen. We should write the rules."[10]

For what reason is a focus being put on trade regulations?[11] Since "whoever makes the rules, owns the gold,"[12] 'the deterioration in US-China relations was epitomised by an apparent Chinese snub of Obama upon his arrival in Beijing for a G20 summit.'[13] As will be discussed in

[9] Julien Chaisse, *'State Capitalism on the Ascent: Stress, Shock, and Adaptation of the International Law on Foreign Investment'*, 27 Minnesota J. Int'l L. 339, 353 (2018).

[10] 'Writing the Rules for 21st Century Trade' (18 Feb. 2015), https://obamawhitehouse.archives.gov/ blog/2015/02/18/president-obama-writing-rules-21st-century-trade (accessed 2 May 2022). *See also* Anton Malkin, 'The Made in China Challenge to US Structural Power: Industrial Policy, Intellectual Property and Multinational Corporation's, Rev. Int'l Pol. Econ. 1, 20 (2020).

[11] Slawotsky, supra n. 4 at 447–53

[12] Joel Slawotsky, 'He Who Makes the Rules Owns the Gold: The Potential Ramifications of the New International Law Architects, in China's International Investment Strategy. Bilateral, Regional and Global Law and Policy', 413–429 (J. Chaisse ed., Oxford University Press 2019).

[13] Mark Landler & Jane Perlez, *'Obama Plays Down Confrontation with China over His Plane's Stairs',* (5 Sep. 2016), http://www.nytimes.com/2016/09/05/world/asia/china-obama-group-of-20-summit- airport-arrival.html (accessed 2 May 2022).

greater depth in the following section, trade is intrinsically linked to economic security and a fulcrum of hegemonic power, with China planning strategies aimed at toppling the United States as dominant power.[14]

2.2. 2017–2020 Under Trump: When the Trade War Really Began

Donald Trump's argument that the United States was a "sucker" with regard to global trade electrified his followers during the 2016 US Presidential election campaign.[15] Trump ran on a platform of "Make America Great Again," which resonated with large swaths of the American public who blamed trade with China specifically (and international trade generally) for the loss of jobs, the decimation of US industrial capacity, unfair treatment at the WTO,[16] and the fear that American exceptionalism was at risk.

Rejecting the TPP, criticising the WTO, renegotiating the North American Free Trade Agreement, and starting a trade war with China in 2018 are all part of Trump's trademark legacy as president and his America First strategy.[17] The Trump administration has started imposing tariffs on China on the grounds that the security's economic governance gives Chinese companies an unfair trade advantage, hurting the US economy.[18] They claim this is the case because China's state-centric capitalism is national

[14] *Ibid.*

[15] 'Donald Trump Accuses China of Trade 'Rape'' https://www.youtube.com/watch?v=Cy9iY6CvAHU *(accessed 2 May 2022).*

[16] China also believe the WTO needs reform. *See* Ru Ding, *Time to Reform the Non-Actionable Subsidy Rules in the WTO: The COVID-19 Subsidies and Beyond Rethinking, Repackaging, and Rescuing World Trade in Law in the Post Pandemic Era* 57–76 (Hart Publishing 2021)

[17] *See* Executive Ord. 13786 of 31 Mar. '2017 *Omnibus Report on Significant Trade Deficits',* https://www. govinfo.gov/content/pkg/FR-2017-04-05/pdf/2017-06968.pdf (accessed 2 May 2022)

[18] *See* 'USTR Finalizes Tariffs on $200 Billion of Chinese Imports in Response to China's Unfair Trade Practices' (18 Sep. 2018), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/Sept./ustr-finalizes-tariffs-200 (accessed 2 May 2022).

from the US market-capitalism model,[19] and that this gives Chinese companies an unfair competitive advantage.[20]

To be fair, the trade war expressed more than just frustration about trade imbalances; it also reflected widespread US views that the current global trading system had been a direct cause in China's ascent and the United States' collapse. There has been a growing consensus across the political spectrum in the United States that China poses a serious generational national security threat to US global supremacy, a view that gained support under the Trump administration. In fact, the trade war is reflective of the broader fight over political-economic governance, despite claims from both Chinese state-media and US elites that US tariffs and trade policy are transitory and will alter post-Trump. As we will see in the next section, challenging China on trade remains a focus post-Trump.[21] As a result, trade tensions are unlikely to retreat any development soon.

2.3. President Joe Biden and his Administration

Despite hopes to the contrary, Joe Biden's victory in 2020 did not restore trade ties. United States officials maintain that " For too long, China's lack of adherence to global trading norms has undercut the prosperity of Americans and others around the world."[22] The Biden administration also launched a thorough review of United States trade policy with respect to China, the basics of which were made public in October 2021. The 'new' US trade policies include a continuation of the trade war and insistence on

[19] Slawotsky, *supra* n. 4, at 451–53.

[20] Ming Du, *'China's State Capitalism and World Trade Law',* 63 Int'l & Comp. L.Q. 409 (2014); *See also* Thomas J. Prusa & Edwin Vermulst, *'United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China: Passing the Buck on Pass-Through',* 12 World Trade Rev. 197, 228 (2013).

[21] Ru Ding, *'Interface 2.0 in Rules on State-Owned Enterprises: A Comparative Institutional Approach',* 23 J. Int'l Econ. Law 637, 638 (2020).

[22] '*Remarks As Prepared for Delivery of Ambassador Katherine Tai Outlining the Biden-Harris Administration's New Approach to the U.S.-China Trade Relationship*' (4 Oct. 2021),https://ustr.gov/about-us/policy-offices/press-office/press releases/2021/Oct./remarks-prepared-delivery-ambassador-katherine-tai- outlining-biden-harris-administrations-new (accessed 2 May 2022).

failed Chinese compliance with regard to the "Phase One Agreement"[23] (with potential modifications);[24] an intention to confront China over state-centric economic governance;[25] coordination with allies;[26] and, in a potentially significant development, a new emphasis on human rights.[27]

The concept of human rights is used to frame the war between the effectiveness of democracies and autocracies in the twenty-first century.[28] The United States is attempting to establish a coalition of allies in response to allegations of human rights violations in Xinjiang,[29] and the inclusion of human rights in US trade policy[30] offers China with an intriguing challenge in this regard.

> *"In the G7, G20, and at the WTO, we are discussing market distortions and other unfair trade practices, such as the use of forced labor in the fisheries sector, and in global supply chains, including in Xinjiang. In the coming months and years, we will build off of this work."*[31]

It has been argued that the United States' trade strategy has remained largely unchanged, if not become more strident, under both the nationalistic Republican Trump Administration and the "woke"

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[23] *Ibid.*
[24] *Ibid.*
[25] *Ibid.*
[26] *Ibid.*
[27] Wendy Wu, 'US Will Use '*All Available Tools' to Tackle China on Trade, Make Human Rights Issues a Priority'* (2 Mar. 2021), http://www.scmp.com/news/china/diplomacy/article/3123783/us-will-use-all-available-tools-tackle-china-trade-make-human (accessed 2 May 2022).
[28] *'Remarks by President Biden in Press Conference'* (25 Mar. 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/03/25/remarks-by-president-biden-in-press-conference/ (accessed 2 May 2022).
[29] 'New U.S. Government Actions on Forced Labor in Xinjiang' (24 Jun. 2021), https://www.whitehouse. gov/briefing-room/statements-releases/2021/06/24/fact-sheet-new-u-s-government-actions-on- forced-labor-in-xinjiang/ (accessed 2 May 2022)
[30] 'Carbis Bay G7 Summit Communique' (13 Jun. 2021), www.whitehouse.gov/briefing-room/statements releases/2021/06/13/carbis-bay-g7-summit-communique/ (accessed 2 May 2022), paras 29 and 49.
[31] *Supra* n. 22.

Democratic Biden Administration.[32] This is because the United States now frames its competition with China as a struggle between Western democracies and authoritarian China.[33] This is because, from the nationalistic Republican Trump administration to the "woke" Democratic Biden Administration, the United States has adhered to the Trade War, the Enhanced Investment Review,[34] and as discussed in the next Part, is now aggressively invoking human rights in trade policy.

3. Politically Motivated Use of Human Rights

This section explains how US claims of human rights violations in China affect the ongoing trade dispute. The increasing idea of national security and Chinese reactions are discussed as well as other tangential topics.

3.1. Violations of Human Rights by China as claimed by the United States

The protection of human rights has become a central plank in American foreign trade. For example, Beijing's imposition of national security legislation in the Hong Kong Special Administrative Region (HKSAR) led to a Trump Executive Order stating that the US will treat Hong Kong as

[32] Chris Miller, *'Biden Opens Sneaky New Front in Trade War Against China'* (22 Jun. 2021), https:// foreignpolicy.com/2021/06/22/biden-semiconductors-south-korea-china-trade-war/ (accessed 2 May 2022); Gordon Lubold & Alex Leary, 'Biden Expands Blacklist of Chinese Companies Banned From U.S. Investment*'*(3 Jun. 2021), https://www.wsj.com/articles/ biden-expands-blacklist-of-chinese-companies-banned-from-u-s-investment-11622741711 (accessed 2 May 2022)

[33] *Supra* n. 28.

[34] 'U.S. Treasury Says China Private Equity's Magnachip Purchase Poses Security Risk*s',* https:// www.reuters.com/business/us-treasury-says-china-private-equitys-magnachip-purchase-poses- security-risks-2021-08-31/ (accessed 2 May 2022) (31 Aug. 2021). *See also* Dini Sejko, 'The Transnational Law of Sovereign Wealth Funds: Governing State Capitalism at the Time of Protectionism', Edward Elgar Publishing (forthcoming 2022) Ch. 6. Furthermore, there is increased anxiety over Chinese investments into the EU based upon national security. *See* Diana Reisman, 'The EU and FDI: What to Expect from the New Screening Regulations*'* (2020), Research Paper No. 104 in the IRSEM Research Paper Collection, https://www.irsem.fr/institut/ actualites/research-paper-no-104-2020.html (accessed 2 May 2022).

China (as opposed to an independent jurisdiction).[35] US Customs and Border Protection then mandated that imports from Hong Kong indicate "China" as the country of origin.[36] US strategy includes recruiting allies with respect to claims of human rights violations in China.[37]

However, the United States' invocation of human rights abuses centres on allegations of international law violations in Xinjiang, China, a region that produces almost 20% of the world's cotton and produces almost half of the world's production of polysilicon, a global component of solar energy panels.[38] The United States has led claims that China has engaged in human rights violations against the Uyghur Muslim minority in Xinjiang, primarily occurring in forced housing centres, including genocide.[39] China has denied the claims, arguing that the housing centres are for de-radicalization and retraining after radicalised Uyghurs committed many acts of terrorism. China also accuses the United States of human rights violations and claims that the US is being hypocritical in its accusations.[40] The most controversial assertions in this area of trade policy are that

[35] *'The President's Executive Order on Hong Kong Normalization'*. (14 Jul. 2020) https://trumpwhitehouse. archives.gov/presidential-actions/presidents-executive-order-hong-kong-normalization/ (accessed 2 May 2022).

[36] *'Removal of Hong Kong as a Separate Destination Under the Export Administration Regulations',*https://www.federalregister.gov/documents/2020/12/23/2020-28101 /removal-of-hong-kong-as-a-separate-destination-under-the-export-administration-regulations (accessed 2 May 2022).

[37] *Supra* n. 30, para. 49

[38] Dan Murtaugh, *'Why It's So Hard for the Solar Industry to Quit Xinjiang',* Bloomberg Green (10 Feb. 2021), www.bloomberg.com/news/articles/2021-02-10/why-it-s-so-hard-for-thesolar-industry-to-quit-xinjiang (accessed 2 May 2022).

[39] Joel Slawotsky, *'Is China Guilty of Committing Genocide in Xinjiang?'* 20 Chinese J. Int'l L. 625 (2021).

[40] '*The Report on Human Rights Violations in the United States in 2020'* http://www.chinahumanrights. org/html/2021/HRRUS_0324/16288.html (accessed 2 May 2022).

China's housing projects in Xinjiang facilitate the use of forced labour (at no or cheap cost).[41]

> "[A]t least one hundred thousand workers have been subjected to forced labor in factories in industrial areas where the camps are located or have been transferred out of Xinjiang to factories in other parts of China."[42]

As a result, the United States claims China's Xinjiang-related violations of international law allow for unfair trade practises.

3.2. United States Actions in Response to Claims of Violations of Human Rights in China

The United States has begun an initiative to punish those responsible for the forced trade in Xinjiang and has taken violations to ban imports from the region.[43] The Tariff Act of 1930 (Tariff Act) provides the legal authority for sanctions on products linked to forced labor.[44] US Customs and Border Protection (CBP) has blocked imports from Xinjiang on the basis of the Tariff Act, which allows CBP to prohibit the importation of products made with forced labor.[45] In addition, in July 2021, the United States urged American companies, especially supply chains, to sever ties

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[41] *Supra* n. 29

[42] 'USTR Joins Other Federal Agencies in Issuing Updated Xinjiang Supply Chain Business Advisory' (13 Jul. 2021), https://ustr.gov/about-us/policy-offices/press-office/pressreleases/2021/july/ustr-joins-other-federal-agencies-issuing-updated-xinjiang-supply-chainbusiness-advisory (accessed 5 May 2022).

[43] 'U.S. Cracks Down on Imported Goods Made by Uyghurs and Other Victims of Forced Labor' (6 Sep. 2021), https://www.nbcnews.com/business/economy/u-s-cracks-down-imported-goods-made-uyghurs- other-victims-n1278157 (accessed 2 May 2022).

[44] 'Tariff Act of 1930', https://www.govinfo.gov/app/details/USCODE-2011-title19/USCODE-2011-title19-chap4-subtitleII-partI-sec1307 (accessed 2 May 2022).

[45] 'CBP Issues Region-Wide Withhold Release Order on Products Made by Slave Labor in Xinjiang' (13 Jan. 2021), https://www.cbp.gov/newsroom/national-media-release/cbp-issuesregion-wide-withhold-release-order- products-made-slave' (accessed 2 May 2022). 'The Department of Homeland Security Issues Withhold Release Order on Silica- Based Products Made by Forced Labor in Xinjiang' *(24 Jun. 2021), https*://www.cbp.gov/ newsroom/national-*media-release/department-homeland-security-issues-withhold release-order-silica (accessed 2 May 2022).*

with companies linked to the charges of international law violations in Xinjiang.

> "The People's Republic of China (PRC) government continues to carry out genocide and crimes against humanity … Given the severity and extent of these abuses, including widespread, state-sponsored forced labor and intrusive surveillance taking place amid ongoing genocide and crimes against humanity in Xinjiang, businesses and individuals that do not exit supply chains, ventures, and/or investments connected to Xinjiang could run a high risk of violating US law."[46]

The fact that the Advisory was released as a unified statement by the US Departments of State, Treasury, Commerce, Homeland Security, Labor, and the US Trade Representative's Office demonstrates the importance of the statement. 'Furthermore, the Office of the US Trade Representative has emphasised the importance of human rights and trade and anticipates a collaborative approach with American allies to confront China.'[47] 'The G7 allies' joint statement regarding Xinjiang is an example of this partnership',[48] 'as it denounces state-sponsored forced labour and opposes the use of such labour in supply chains.'[49] 'The statement also explicitly criticises China with respect to human rights in Xinjiang.'[50]

The US's advocacy for its allies to censure China over Xinjiang has met with some results. EU governments have sanctioned Chinese officials over Xinjiang, and various EU parliaments have called for increased human rights protection in Xinjiang.[51] 'This has not had a major impact on trade,

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[46] *'Xinjiang Supply Chain Business Advisory'* (13 Jul. 2021), https://www.state.gov/wp-content/ uploads/2021/07/Xinjiang-Business-Advisory-13July2021-1.pdf (accessed 2 May 2022).
[47] *Supra* n. 22.
[48] *Supra* n. 30, para. 49.
[49] *Ibid.*, para. 29.
[50] *Ibid.*, para. 49.
[51] EUROPEAN COUNCIL, 'EU Imposes Further Sanctions Over Serious Violations of Human Rights Around the World' (22 Mar. 2021), https://www.consilium.europa.eu/

but it is the first time since the Tiananmen Square protests of 1989 that the EU, the UK, and Canada have sanctioned Chinese entities.'[52] Human rights claims have contributed to the delay of the EU-China Comprehensive Agreement on Investment,[53] which was triggered by the EU's sanctions against Chinese officials over Xinjiang. As can be shown below, national security is becoming an ever more important part of trade (and investment) policy,[54] and the definition of "security" is quickly expanding.[55]

3.3. Developing New Frameworks for National Security

How did human rights evolve into an important facet of international trade negotiations related to national security? 'In recent years, the idea of national security has expanded far beyond the original understanding of physically defending the national bastion.'[56] For instance, 'national security-based measures against allies do not easily comport with the historical notion of self-defence as a means to defend territorial integrity from military attacks.'[57] Likewise, equating impaired economic sectors damaged from prior invocations of national security as 'new' security threats is problematic.[58] To the contrary, Chinese sanctions against United

en/press/pressreleases/2021/03/22/eu-imposes-further-sanctions-over-serious-violations-of-human-rights-aroundthe-world/ (accessed 2 May 2022).

[52] Katia Fach Gomez, 'EU-CHINA *Negotiations on Investor State Dispute Settlement Within the CAI Framework: Are We on the Right Track'?,* 55 Revista General de Derecho Europeo (2021).

[53] *Ibid.*

[54] 'Uyghur Forced Labor Prevention Act', https://www.congress.gov/117/plaws/publ78/PLAW- 117publ78.pdf (accessed 2 May 2022).

[55] Executive Ord. 13936, *'The President's Executive Order on Hong Kong Normalization'* (14 Jul. 2020), https://home.treasury.gov/system/files/126/13936.pdf (accessed 2 May 2022); *Supra* n. 46.

[56] J. Benton Heath*, 'Trade and Security Among The Ruins',* 30 Duke J. Comp. &Int'l L. 223, 232 (2020).

[57] Chad P. Bown, *'Trump's Steel and Aluminum Tariffs are Cascading Out of Control',* http://www.piie.com/blogs/trade-and-investment-policy-watch/trumps-steel-and-aluminum-tariffs-are-cascading-out-control (accessed 2 May 2022).

[58] *Ibid.*

States military contractors providing weapons to Taiwan are more in line with the traditional concept of security.[59]

3.3.1. United States National Security Concepts and Their Growth

Transformational great power rivalry and rapidly developing new technologies are the primary forces behind the broadening scope of national security concerns.[60] US government documents and speeches have made it abundantly clear that data, social media, dual-use technologies, and state-centric governance pose significant threats to national security.[61] Digital currencies and China's growing involvement in international financial markets are also seen as threats:

> "China's tightened integration with global financial markets poses distinct economic risks to US investors and national security risks to the United States."[62]

So, we have crossed the chasm from thinking of national security just in terms of the physical protection of territory to include economic, scientific, and ideological dimensions as well. An example of how human rights have been integrated into national security is the Biden Executive Order on securities investments from June 2021. Executive Order titled "Addressing the Threat from Securities Investments that Finance Certain Companies of the People's Republic of China,"[63] trumped Trump's Executive Orders targeting "Communist Chinese Military Companies" announced in 2020. 'Expanding the criteria from purely military entities to a broader potential

[59] 'Foreign Ministry Spokesperson Zhao Lijian's Regular Press Conference' (14 Jul. 2014–2020), https:// www.mfa.gov.cn/ce/ceus//eng/fyrth/t1797731.htm (accessed 2 May 2022).
[60] Joel Slawotsky, *'The Fusion of Ideology, Technology and Economic Power: Implications of the Emerging New United States National Security Conceptualization'*, 20 Chinese J. Int'l L. 3 (2021).
[61] *Ibid.*, at 30–34.
[62] *Ibid.* at 166; '*Report to Congress of the U.S.-China Economic and Security Review Commission'* 11 (Nov. 2021), https://www.uscc.gov/sites/default/files/2021-11/2021_Annual_Report_to_Congress.pdf (accessed 2 May 2022). at 11.
[63] *Ibid.*

class of businesses,[64] the Biden order shows the new emphasis on human rights by mentioning concerns over the use of Chinese surveillance technology "to facilitate repression or serious human rights abuse," thereby expanding the scope from military entities to a broader class of businesses.' The US is going after activities in Xinjiang as well as the surveillance technology that is used to help and abet them by expanding the firms subject to investment restriction to include surveillance technology, or owned by organisations operating in such sectors. The link between respect for human rights and protecting the country is confirmed by Treasury Department regulations:

> "Pursuant to E.O. 13959, as amended, OFAC expects to use its discretion to target, in particular, persons whose operations include or support, or have included or supported, (1) surveillance of persons by Chinese technology companies that occurs outside of the PRC; or (2) the development, marketing, sale, or export of Chinese surveillance technology that is, was, or can be used for surveillance of religious or ethnic minorities or to otherwise facilitate repression or serious human rights abuse."[65]

The implications for trade policy are similar, even though the Biden order is related to investment.

As was noted above, when the United States talks about a war between "democracies and autocracies," it is really talking about a clash between Western liberalism and China's authoritarian view of human rights. As a part of this ideological conflict, it is advocated that human rights be linked to trade policy in order to protect US national security.

[64] *Ibid.*
[65] Financial Sanctions, https://home.treasury.gov/policy-issues/financial-sanctions/faqs/900 (accessed 2 May 2022).

3.3.2. The Growth of China's Security Concepts

The Data Security Law (DSL) exemplifies China's fast evolving concept of national security,[66] which now includes not just economic but also social and public stability.[67] 'Export controls are authorised to protect China's national security and economic interests under the China Export Control Law (ECL).'[68] 'When "national security" is clearly differentiated from "national interests," export restriction measures that further foreign policy or industrial policy objectives unrelated to conventional defence and security issues have an explicit foundation.'[69] 'Taking a broad view of China's national security in terms of its entire national interests and security, the ECL allows for action against any country or territory that poses a danger to China.'[70]

> "This Law is established to safeguard national security and interests, perform non- proliferation and other international obligations, and enhance and regulate export control … Export control work should uphold a comprehensive national security perspective."[71]

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[66] *See* Yan Luo & Zhijing Yu, *'China Issued the Draft Data Security Law Inside Privacy'* (3 Jul. 2020), http://www.insideprivacy.com/data-security/china-issued- the-draft-data-security-law/ (accessed 2 May 2022).

[67] *China Set to Pass Law Protecting Vital Tech From U.S. (16* Oct. 2020), finance.yahoo.com/news/china- set-pass-own-law-210000590.html (accessed 2 May 2022).

[68] Ori Kawate, *'China Readies New Law to Ban Companies on National Security Grounds*' (9 Oct. 2020), asia. nikkei.com/Politics/International-relations/US-China-tensions/China-readies-new-law-to-ban-companies-on-national-security-grounds (accessed 2 May 2022).

[69] Nathan Bush, Sammy Fang, John Zhang & Ray Xu, *'China's New Export Control Law'* (19 Oct. 2020), (http://www.dlapiper.com/en/us/insights/ publications/2020/10/ chinas-new-export-control-law/ (accessed 2 May 2022)).

[70] 'PRC Export Control Law (unofficial translation)', Arts 1 and 3 http://www.cov.com/-/media/files/corporate/publications/file_repository/prc_export_control_law_2020_10_cn_en_covington.pdf (accessed 2 May 2022).

[71] *Ibid*., Art. 1 and 3.

Therefore, like the United States, China is broadening her definition of national security beyond the narrow confines of physical defence to encompass an increasing variety of interests.[72] However, this can be dangerous, as unrestrained notions of national security may be too far-reaching.[73] This careless expansion of security risks overuse as well as cover for advancing protectionist aims,[74] which can lead to retaliatory measures.

3.4. China's Trade Retaliation Against United States National Security Measures

To China, the United States' trade policies and implementation of sanctions are motivated by 'competitive rivalry, double standards',[75] and a desire to preserve American hegemony over the world.[76] China's responses to US trade policy and sanctions have become more "muscular," with measures like the Anti-Foreign Sanctions Law (AFSL), the new 2021 Blocking Statute (Blocking Statute,) a refocus on extraterritoriality, and the potential ability to use its formidable state-centric model to retaliate against entities adversely affecting Chinese national interests.

3.4.1. Blocking Statute and Anti-Foreign Sanctions Law

The purpose of the new Blocking Statute[77] is 'to establish the legal procedure to retaliate against the enactment of (or aiding) anti-Chinese measures, as evidenced by the intent and commentary from Chinese state

[72] Keith Zhai & Yoko Kubota, *'China to Restrict Tesla Use by Military and State Employees'* (19 Mar. 2021) http://www.wsj.com/articles/china-to-restrict-tesla-usage-by-military-and-state-personnel- 11616155643 (accessed 2 May 2022).
[73] Slawotsky, *supra* n. 60, at 61
[74] 'China to Sanction Boeing, Raytheon Over Arms Sales to Taiwan' (26 Oct. 2020), http://finance.yahoo. com/news/china-sanction-boeing-lockheed-martin-073445071.html (accessed 2 May 2022).
[75] *Supra* n. 60, at 38–43.
[76] Kristen Hopewell, '*Strategic Narratives in Global Trade Politics: American Hegemony, Free Trade, and the Hidden Hand of the State'*, 14 Chinese J. Int'l Pol. 51 (2021).
[77] *Supra* n. 60.

media',[78] 'which makes manifestly clear the purpose of the new law is to counter 'discriminatory measures' and therefore disincentive third-parties from involvement in such measures.'[79] China's 'AFSL' is meant to discourage the imposition of international sanctions. [80] According to AFSL:

> "If any foreign country violates international law and the basic principles of international relations, contains or suppresses China based on various pretexts or its own laws, takes discriminatory restrictive measures against Chinese citizens or organisations, or interferes with China's internal affairs, China is entitled to take corresponding countermeasures."[81]

Since both the AFSL and the Blocking Statute are relatively new regulations, their precise outlines are unclear at this time. However, greater clarity about the AFSL is expected to be forthcoming from the Chinese government.

3.4.2. Increasing Adoption of Extraterritoriality

With its newfound openness to the exercise of extraterritorial jurisdiction, China has likewise adopted a broader definition of extraterritoriality.[82] For instance, the Chinese Anti-Monopoly Legislation states that "this law shall apply to the monopolistic conducts outside the territory of the People's Republic of China that has the effect of eliminating or restricting

[78] Beibei Zhang, *'Critical Evaluation of China's New Blocking Statute Against Unfair Extraterritoriality*', 51 Hong Kong L. J. 775, 776 (2021).
[79] *Ibid.*, at 780–785.
[80] Chen Qingqing & Liu Xin, *'China's Newly Passed Anti-Foreign Sanctions Law to Bring Deterrent Effect Against Western hegemony'* (10 Jun. 2021), https://www.globaltimes.cn/page/202106/1225911.shtml (accessed 2 May 2022).
[81] 'Anti-Foreign Sanctions Law of the People's Republic of China', http://www.npc.gov.cn/npc/c30834/ 202106/d4a714d5813c4ad2ac54a5f0f78a5270.shtml (accessed 2 May 2022).
[82] *Supra* n. 4, at 433–436.

competition on the domestic market of China."[83] As an interesting aside, Chinese courts acknowledge the difficulties associated with the term "immediacy" when discussing domestic harm, and therefore define "adverse impacts" to encompass possible future harm to China's economy.[84]

'The Hong Kong National Security Law (HKNSL) exemplifies China's embrace of extraterritoriality as an example of the more aggressive trend in defending Chinese national security, as it contains no geographic limitation, thus encompassing conduct committed by anyone, anywhere, that harms Hong Kong's national security'.[85] 'When someone who is not a permanent resident of Hong Kong commits an offence against the HKSAR, the HKNSL provides in Article 38 that "[t]his Law shall apply to offences under this Law committed against the Hong Kong Special Administrative Region from outside the Region by a person who is not a permanent resident of the Region.'[86]

China's DSL, which, as was mentioned above, has a very wide conception of "security interests," is another example of China's embrace of

[83] Michael Faure & Xinzhu Zhang, *'Towards an Extraterritorial Application of the Chinese AntiMonopoly Law That Avoids Trade Conflicts'*, 45 Geo. Wash. Int'l Rev. 501, 528 (2013).

[84] '*Huawei Jishu Youxian Gongsi Su Jiaohu Shuzi Tongxin Youxian Gongsi Deng Lanyong Shichang Zhipeng Diwei Jiufen Shangsu An* (华为技术有限公司诉交互数字通信有限公司等滥用市场支配地位纠纷上诉案) [Huawei Tech. Co. *v.* Interdigital Commc'ns, Inc., A Dispute over Abusing Dominant Market Positions (*Huawei v. IDC*)], 2013 Yue Gao Fa Min San Zhong Zi No. 306 [Higher People's Ct. of Guangdong Province Civil No. 306 2013] (Higher People's Ct. of Guangdong Province 21 Oct. 2013) (China).'

[85] Naomi Xu Elegant, *'China Exercises Extraterritorial Jurisdiction: If You're Reading* This, Beijing Says Its New Hong Kong Security Law Applies to You' (7 Jul. 2020), (http://fortune.com/2020/07/07/hong-kong-law-scope-extraterritorial-jurisdiction/ (accessed 2 May 2022).

[86] 'Hong Kong national security law' full text (2 Jul. 2020), http://www.scmp.com/ news/hong- kong/politics/article/3091595/hong-kong-national-security-law-read-full-text (accessed 2 May 2022).

extraterritoriality.[87] The DSL not only applies inside China, but also to companies and persons outside of the country if their "data activities" have the potential to compromise China's national security, public interests, or the rights of Chinese residents.[88] The revised ECL also recognises the law's applicability outside China's borders.[89] China's Blocking Statute, AFSL, and more aggressive endorsement of extraterritoriality could strengthen China's 'legal' retaliation against entities supporting or involved in executing trade sanctions against Chinese interests, to the extent that nations impose such measures or sanctions against China due to human rights issues.

3.4.3. State Capitalism and Countermeasures in "Business"

China's state-centric model can be used to exact "business retaliation" against foreign trade policies that target violations of human rights claims.[90] This is because, under China's political-economic governance, strategic businesses, and especially state-owned or controlled entities, "make significant investments across borders which allow them to control local assets."[91] In addition, under China's type of administration, economic interests support political goals.[92] This means that state-linked enterprises and investments in China serve as a strategic foothold from which Chinese government programmes may be promoted.

It is not out of the question that China's powerful economic giants may retaliate for trade policies damaging to 'China's national interests within the framework of business choices, given the importance of the State in China's corporate ecosystem'.[93] In its role as a majority or only

[87] *Supra* n. 66
[88] *Ibid.* Art. 2.
[89] *Supra* n. 70, at Art. 44.
[90] *Supra* n. 9, at 345–54.
[91] *Ibid.* at 341.
[92] Joel Slawotsky, *'The Impact of Geo-economic Rivalry on U.S. Economic Governance: Will the United States Incorporate Aspects of China's State-Centric Corporate Governance?'*, 18 Va. L. & Bus. Rev. 559 (2022).
[93] *Ibid.*

stakeholder in important Chinese companies, the Chinese government appoints board members who may strive to further Communist Party of China goals. Thus, in addition to legal reprisal, foreign governments and businesses face "business retaliation."

4. Exploring the Future

In this section, this article explores how incorporating human rights into trade policy could affect international commerce. The section begins by discussing the stress that exists for companies because of their inherent contradictions. The next domino to fall is on supply chain realignment and commercial trade formation. Last but not least, economic and trade realism may help create the circumstances that push China to the centre of the global trade system in the long run.

4.1. Constraints on Businesses

Human rights will become a more central focus in US trade policy, creating tension that will require US corporations to strike a delicate balance. The predicament in which Boeing finds itself is representative of the stresses encountered by companies doing business in China. Boeing, a major US aerospace and military contractor, has urged the US to insulate trade from geo-political issues (including human rights claims).[94] In the absence of rules, US corporate directors are obligated to increase shareholder-value while remaining in compliance with US laws.

Even if there were to be no Western penalties, fines, debarment from government contracts, or corporate culpability, there would still be a risk to the company's image among Western customers. Even in the birthplace of shareholder-value corporate governance, director obligations to enhance shareholder-value may be less stringent than in the past.[95] The 'sustainability' or ESG movement is becoming increasingly embedded in

[94] *Ibid.*

[95] Michael Schuman, *'America's China Strategy Is Working'* (20 Sep. 2021), https://www.theatlantic.com/international/archive/2021/09/us-china-human-rights/620112/ (accessed 2 May 2022).

Western liberal-democracies, and this lends weight to corporate due diligence to ensure consumers are satisfied that products purchased are not connected to human rights violations. The trend toward increased corporate accountability was highlighted by the *Marchand ruling* from the Delaware Supreme Court.[96]

Indeed, corporate responsibility and potential liability for ensuring supply-chains are not abusing human rights either directly or by aiding and abetting the primary wrongdoer, presents an additional risk factor for businesses.[97] A clear global trend has developed recognising potential corporate liability for human rights abuses outside of their home-jurisdictions,[98] including a growing consensus on the need to impose corporate liability in domestic courts for fomenting human rights abuses.[99] Countries in the West are working to ensure that supply chains are properly monitored by businesses and that corporations do not participate in human rights violations in other countries.[100] But due diligence obligations may be convoluted, multi-faceted, onerous, and exceedingly risky.[101]

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[96] Marchand v. Barnhill, 212 A.3d 805 (Del. 2019). *See also* David Gelles & David Yaffe-Bellany, 'Shareholder Value Is No Longer Everything', *Top C.E.O.s Say* (19 Aug. 2019), https://www.nytimes.com/2019/08/19/business/business-roundtable-ceos corporations.html (accessed 2 May 2022); Leo E. Strine Jr., 'Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy: A Reply to Professor Rock', 76 Bus. L. 397, 399–400, 410, 431–433 (2021).

[97] Rachel Chambers, *'Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the UK Supreme Court'*, 42 U. Pa. J. Int'l L. 519, 522 (2021).

[98] 'District Court of The Hague 26 May 2021, ECLI:NL:RBDHA:2021:5337', https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339 (accessed 2 May 2022); Nevsun Resources Ltd. *v.* Araya, 2020 SCC 5 (Can.).

[99] Dalia Palombo, 'The Duty of Care of the Parent Company: A Comparison Between French Law, UK Precedents and the Swiss Proposals', 4 Bus & Hum. Rts. J. 1 (2019).

[100] *Modern Slavery Act of 2015*, § 54(1), http://www.legislation.gov.uk/ukpga/ 2015/30/contents/enacted (accessed 2 May 2022).

[101] Oscar Beghin & Edwin Vermulst, *'New EU Rules on Supply Chain Due Diligence: A Net Cast Too Wide?'* (15 Apr. 2021), http://regulatingforglobalization.com/ 2021/04/15/new-eu-rules-on-supply-chain-due-diligence-a-net-cast-too-wide/ (accessed 2 May 2022).

Also, there is two-way street traffic when it comes to consumer outrage over human rights. Businesses in the West who abide by human rights guidelines or suggestions risk backlash from Chinese customers, who have significant buying power and have been fiercely critical of organisations viewed as 'anti-China. For instance, the Swedish retailer H&M stated their "great concern" over reports of forced labour in Xinjiang and decided they would no longer get cotton from the region. Consumers in China were very critical of the business, and as a result, all traces of it were removed off the internet.[102]

Foreign companies should learn from the recent experiences of Tesla and Intel in making business choices in Xinjiang. Tesla (who has strong commercial interests in China) nevertheless opened a showroom in Xinjiang,[103] despite widespread backlash. Intel, a chipmaker based in the US, has publicly expressed regret at being forced to comply with sanctions imposed by the US government. In a message posted in Chinese on Weibo, the company apologised to its Chinese customers, partners, and the general public. The firm said that the letter it issued to its suppliers was not intended as a political statement but rather to show that it was in line with United States sanctions on the Xinjiang region.[104]

[102] Eva Xiao, *'H&M Is Erased From Chinese E-Commerce Over Xinjiang Stance'* (25 Mar. 2021), https://www. wsj.com/articles/h-m-is-erased-from-chinese-e-commerce-over-xinjiang-stance-11616695377 (accessed 2 May 2022); Adela Suliman, 'Nike, H&M, Burberry Face Backlash and Boycotts in China Over Stance on Uyghur Treatment*'* (25 Mar. 2021), https://www.nbcnews.com/news/world/ nike-h-m-face-backlash-china-over-xinjiang-cotton-concerns-n1262019 (accessed 2 May 2022) (consumer backlash calls for boycotts); 'US Voices Concern About China's Treatment of NBA*'* (22 Oct. 2021), https://www.reuters.com/lifestyle/sports/us-voices-concern-about-chinas-treatment-nba-2021-10-22/ (accessed 2 May 2022).

[103] 'Tesla showroom in China's Xinjiang Region Blasted by Rights groups' (4 Jan. 2022), https://www.reuters.com/world/china/tesla-criticised-opening-showroom-chinas-xinjiang-region-2022-01-04/ (accessed 2 May 2022).

[104] John Liu, *'Intel Apologizes Over Its Statement on Forced Labor in Xinjiang'* (23 Dec. 2021). https://www.nytimes.com/ 2021/12/23/business/intel-apology-china-xinjiang.html (accessed 2 May 2022).

The complicated challenges that firms face are shown by Tesla's choice to set shop in Xinjiang and Intel's subsequent apologies. Companies are hesitant to risk business opportunities in China out of fear of lost sales and consumer retaliation.[105] Moreover, consumers are also voters in Western democracies; while concerns over human rights are "PC" at the moment, it is questionable whether such concern is durable when their personal financials suffer.[106] This makes the long-term sustainability of injecting human rights into trade policies uncertain.

4.2. Partnerships and Supply Chain Realignment

The supply lines of big global firms including "Apple, BMW, Gap, Huawei, Nike, Samsung, Sony, and Volkswagen"107 are allegedly affected by allegations of forced labour in Xinjiang, which might have far-reaching consequences for the economy as a whole. Furthermore, national security concerns are causing the United States and its Western allies to worry about becoming too dependent on China for the supply of important commodities. Human rights claims look likely to play a part in the US government's efforts to redirect supply networks away from China.[107] This is why US officials want to adopt methods to oppose and diversify supply-chains advocating for a decrease on dependency on Chinese-based supply chains.[108] Human rights concerns look likely to play a role in efforts to redirect supply chains away from China.[109]

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[105] Vanessa Friedman & Elizabeth Paton, 'What Is Going on with China, Cotton, and All of These Clothing Brands?*'* (29 Mar. 2021), www.nytimes.com/2021/03/29/style/china-cotton-uyghur-hm-nike.html (accessed 2 May 2022); Megumi Fujikawa, 'Japan's Muji Appeals to China by Advertising Use of Xinjiang Cotton*'* (11 May 2021), www.wsj.com/articles/japans-muji-appeals-to-china-by-advertising- use-of-xinjiang-cotton11620692294#:~:text=Muji%20says%20it%20uses%20cotton,owned%20by% 20Ryohin%20Keikaku%20Co (accessed 2 May 2022).

[106] *Supra* n. 8, at 354

[107] 'Uyghurs for sale', Australian Strategic Policy Institute https://www.aspi.org.au/ report/uyghurs-sale?cf_chl_jschl_tk=pmd_UjBadZVArgnDKFYpOS07nKK0JHhclJLd RNt CPixeKXI-1635075340- 0-gqNtZGzNAiWjcnBszQil (accessed 2 May 2022) (2020).

[108] 'Disruptions Task Force to Address Short-Term Supply Chain Discontinuances' (8 Jun. 2021), https://www. whitehouse.gov/briefing-room/statements-releases/2021/06/08/

Western authorities are becoming increasingly aggressive in response to claims of business involvement in forced labor.[110] The United Kingdom is one such country. Has declared that corporations shall not participate in labour violations in Xinjiang,[111] with the goal of encouraging or compelling them to relocate their operations elsewhere. A growing potential is the investment of supply chains away from China due to labour sanctions.[112] This might lead to greater economic decoupling from China and the establishment of two trade blocs, one centred on the United States and the other on China.

4.3. Confronting Pushback and a Trade Order that Favours China

United States-Chinese hegemonic competition includes a fierce trade war. By enshrining trade inside the framework of human rights,[113] the US is attempting to form a coalition of like-minded sovereigns that might greatly affect global trade in the future.[114] The US sees China as a hegemonic

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fact-sheet-biden-harris-administra tion-announces-supply-chain-disruptions-task-force-to-address-short-term-supply-chain-discontinu ities/ (accessed 2 May 2022).

[109] 'The Signing of the Uyghur Forced Labor Prevention Act' (23 Dec. 2021), https://www.state.gov/the- signing-of-the-uyghur-forced-labor-prevention-act/ (accessed 2 May 2022).

[110] Angelina Rascouet & Geraldine Ami, *'Zara and Uniqlo Owners Face Investigation Over Profiting From Alleged Uyghur Forced Labor in China'* (2 Jul. 2021), https://fortune.com/2021/07/02/zara-uniqlo-skeckhers-investigation-uyghur-forced-labor-china/ (accessed 2 May 2022).

[111] 'UK Government Announces Business Measures Over Xinjiang Human Rights Abuses' (12 Jun. 2021), https://www.gov.uk/government/news/uk-government-announces-business-measures-over-xinjiang- human-rights-abuses (accessed 2 May 2022).

[112] 'Building Resilient Supply Chains' (Jun. 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/100-day-supply-chain-review-report.pdf (accessed 2 May 2022).

[113] Heightened Chinese integration with Western nations is viewed as a national security risk. For example, Chinese integration with global financial markets is viewed as a US national security threat. *See US-China '*Congress Report to Congress of the U.S.-China Economic and Security Review Commission' (Nov. 2021), https://www.uscc.gov/ sites/default/files/2021-11/2021_Annual_Report_to_Congress. pdf (accessed 2 May 2022) at 11.

[114] Alexander Smith, *'U.S. Struggles to Unite Democratic European Allies Against China'* (3 Aug. 2021), https://www.nbcnews.com/news/world/u-s-struggles-unite-democratic-european-allies-against- china-n1275773 (accessed 2 May 2022).

adversary and desires a US-centric international trade and financial system.

However, US success to restrain China is not certain. Strong criticism exists even inside the US corporate world, as seen by Tesla's choice to do business in Xinjiang and Intel's apologies. It is easy to find such instances of economic realism. A number of economic and political realist currents are pushing the West toward more economic cooperation with China.[115] There is robust commerce between China and the European Union (EU),[116] with China being the EU's biggest commercial partner.[117] 'Additionally, China has shown a readiness to "step-in" and assume a leadership role after the United States' withdrawal from the TPP and critiques of the WTO. China is leading by example in the creation of the biggest economic bloc in the world, the Regional Comprehensive Economic Partnership. The fact that China has applied to join the Trans-Pacific Partnership Comprehensive and Progressive Agreement is also a sign.'

In addition, new technology and international competition might push developed countries to adopt principles of state-centric economic governance.[118] A more China-centric global order may be a by-product of digitalization, nationalism, surveillance, and authoritarianism.[119] It is abundantly obvious from looking back in time that the adoption of political-economic models is cyclical. Since the conclusion of World War II, the Western-liberal system has established the backbone of international

[115] *Supra* n. 52, at 52; *also* Stephen Wright, *'US Allies Diverge over Labeling China's Treatment of Uyghurs as Genocide'* (5 May 2021), https://www.wsj. com/articles/u-s-allies-diverge-over-labeling-chinas-treatment-of-uyghurs-as-genocide-11620207782 (accessed 2 May 2022).

[116] Finbarr Bermingham, 'Xinjiang's Exports to the EU Boom, Despite Political Concerns Over Forced Labour' (25 Jul. 2021), https://www.scmp.com/news/china/diplomacy/article/3142389/xinjiangs-exports-eu-boom-despite-political-concerns-over (accessed 2 May 2022).

[117] 'China Overtakes US as EU's Biggest Trading Partner' (17 Feb. 2021), https://www.bbc.com/news/ business-56093378 (accessed 2 May 2022).

[118] Slawotsky, *supra* n. 92.

[119] Stephan, *supra* n. 8.

commerce and exerted tremendous influence. In addition, the US dollar is still widely accepted across the world as a means of payment, giving the United States a disproportionate amount of power in international commerce and government and giving US law enforcement authorities extraterritorial authority.

Yet, no global reserve currency lasts forever and a currency's standing is cyclical especially in the context of a generally declining economic and trade position. Because of China's position as the world's biggest trading nation, the country's currency is expected to continue appreciating. The United States faces the greatest danger from the potential disinterest of its friends due to human rights issues in China. There is a risk that a more dominant China in international trade may reduce the incentive for other countries and corporations to follow US trade policies that are based on human rights.

Aligning with China may be tempting for countries worried about their home economy because of the huge Chinese market. To put it another way, if enough of the United States' friends do not band together with the United States to fight China, the United States will be unable to establish an alliance of Western countries to do so. There may be longer-term economic, political, and trading realities that favour a Chinese-centric trading order.[120]

5. Conclusion

In this piece, we looked at how incorporating human rights into US trade policy is creating new, complex problems. The economy, international politics, and global governance are all interconnected with the theme of human rights. While bilateral trade between the United States and China remains strong, foreign companies doing business in China will face increased complexity. To succeed in China, foreign companies will have to weigh the benefits of complying with domestic Chinese policies and tapping into China's massive market against the risks of regulatory

[120] Summers, *supra* n. 7.

reprimand, criminal enforcement, or civil liability in their home countries. As allied states begin developing partnerships based on mutual economic and political self-interest, the injection of human rights into the framework of the hegemonic conflict may be a precursor of increased regionalism or a split into coalitions. Economic nationalism, regional-ism, protectionism, retaliation, and a reshaping of the current trade architecture might result from the development of US and Chinese partnered trade and investment coalitions.

TRANSPREJUDICE: EMBRACING THE THIRD GENDER IN THE INDIAN SOCIETY

Geetika Walia*

1. Introduction

Freedom and quality in dignity and rights are the traits with which all human beings are born. One of the main aspects of human rights is that they are universal, inseparable and indispensable. When we speak of dignity of an individual, we also include sexual orientation and gender identity in that. Therefore, it is pertinent to note that there should not be any kind of discrimination on the basis of sexual orientation or sexual identity of a person. Many steps have been taken to recognize the rights of such people and efforts have been taken to give them ample amount of respect and give them a life of dignity. But it is important to mention that discrimination on the basis of sexual identities is still a global problem and concern.

Presence of the transgender (TG) community in our society can be found in mythology, be it Greek or Indian mythology. However, this gender identity was considered to be mythical till the recent years, which has seen the uprising of the transgender community. The world itself had tried to cast them out until they voiced themselves. However, the world, which is governed by laws, now faced a new obstacle- how can laws which are made for the male and female, apply to the third gender (transgender)?

Many nations in the world have contributed in helping the transgender communities raise from the abyss to which they were cast out. Many other nations still consider them outcasts and even punish them for their gender identity. India, in the midst of this, has developed laws for the TG

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community after the landmark judgment given by the Hon'ble Supreme Court of India in the NALSA case.[1]

Whether the current laws in India serve the TG community adequately is of prime concern in the current Indian scenario. The TG children, who have never been in the context of any law so far, are still facing problems with regard to family laws including adoption as well as being stranded and left to fend for themselves without any particular childcare homes for them.

The Constitution of India guarantees fundamental rights to all its citizens. A citizen is a citizen regardless of gender identity. It is thus imperative to look into the needs of the TG community and revisit the laws governing them and protect them because, it is when the fight for justice starts that the people need help. Since the fight for their acceptance in the society has already begun, it is essential to join their cause to establish their rights under law- not only to protect them but also to serve justice to them, which they have longed for.

2. The Indian Constitution and the Rights of Transgenders

The Indian Constitution has given the rights of freedom, equality and life the halo of Fundamental Rights under Part III. The fundamental rights are applicable to all citizens regardless of their gender or status. The Preamble enshrines the concepts of Justice, Liberty, Equality and Fraternity and forms the basic structure of the Constitution of India.

Article 14 prescribes the concept of equality before law. Articles 15 and 16 are extensions of Article 14 and enables a citizen to be free from all sorts of discrimination and also engraves the concept of affirmative action in order to protect the interests of socially and educationally backward classes of citizens. Article 19 focuses on the freedom of expression, freedom to assemble peaceably, to form associations, to move freely throughout the territory of India, to reside and settle in any part of the

[1] National Legal Services Authority v. Union of India, (2014) 5 SCC 438.

territory of India and to practice any profession or to carry on any occupation, trade or business. Article 21 deals with the right to life and personal liberty- "No person shall be deprived of his life or personal liberty except according to procedure established by law".[2]

Article 21 has been interpreted by the Hon'ble Supreme Court to incorporate an umbrella of rights like the right to privacy[3], the right to livelihood[4] etc. The Supreme Court has played a major role in interpretation of the constitutional provisions to ensure justice to all. Yet the TG community has always faced severe issues in the society, especially with regard to their basic human rights and the fundamental rights incorporated in the Indian Constitution. These people were subject to discrimination as well as ostracism in the Indian society that is in complete negation of their constitutional rights as embedded in Articles 14 and 15. They are kept away by their own family and also subject to sexual atrocities with nobody to stand up for their cause. The nihilism of their existence is a pathetic condition and a great fall in enforcing the laws laid down in the Constitution itself.

While listing out the provisions of our Constitution and comparing them with transgender rights and law in India, it is impossible to rule out the wide discrimination attributed to their gender identity. The Constitution embodies the concepts of equality to all citizens and it is the need of the hour that the TG community is accepted by the Indian society owing to the magnanimous supreme law that rules over the land.

In recent times, the judiciary has taken the upper hand in criticizing as well as opposing the inhumane conditions to which the TG communities are subjected to. This was the major cause of bringing about a law for the TG community.

[2] Constitution of India. Art. 14, 15, 16, 19 and 21.
[3] Justice K.S Puttuswamy v. Union of India (2017) 10 SCC 1.
[4] Olga Tellis v. Delhi Municipal Corporation (1985) SCC 3 545.

It is relevant to be aware of the stand of the judiciary with respect to the TG community and their rights. Since the Apex Court is the guardian of the Constitution, it is noteworthy to point out the major decisions of the Supreme Court of India with respect to the subject of Transgender and their rights.

3. Human Rights Perspective and International Law

The Universal Declaration of Human Rights (UDHR) of 1948 was penned down as a result of the atrocities that shook the world during World War II. Law via treaties, customary and general principles of international law as well as other sources of law usually guarantees these rights. All parties to the international treaties have a duty and obligation towards the international community to respect, fulfil and protect human rights. Human rights are basic rights available to all human beings regardless of nationality, ethnicity, sex, language, religion, or any other status.

"*All human beings are born free and equal in dignity and rights*"

Article 1 of the UDHR

Gender identity and sexual orientation has been a topic of rather wide debate in a many countries. However, as per the UDHR, every human being is born free and equal, regardless of their status or gender. The first body of the United Nations to implement resolutions on the protection of human rights, gender's identity and sexual orientation in June 2011 was the United Nations Human Rights Council. The Council expressed its serious apprehension towards the acts of violence and discrimination committed against individuals based on their gender identity through its Resolution 17/19.[5] The states under this Resolution have the obligation and commitment to not just protect but also respect the basic human rights of the LGBT community and this includes the following:

[5] Fact sheet- International Human Rights Law and Sexual Orientation & Gender Identity, UN FREE & EQUAL, available at: https://www.unfe.org/wp-content/uploads/2017/05/International-Human-Rights-Law.pdf (Visited on August 23, 2022).

1. Proscribe any discrimination done on the basis of sexual orientation and gender identity.
2. Prohibition of discrimination by passing necessary laws.
3. Protecting them against ant act of violence, cruelty, degrading or inhumane treatment
4. Declaring all those laws as invalid that criminalize sexual demeanour between adults of same sex.
5. Creating awareness amongst the people by providing education through various training programmes and workshops to stop the stigmatization of this community and accepting them with open arms like normal people.
6. Protecting the freedom of expression, association and peaceful assembly for all LGBT people
7. Creating an environment or a society where the LGBT community is respected and they are considered to be equal to the other citizens.

Today's world and society has made tremendous advancement with respect to the rights of the transgender. The LGBTQ rights have gained popularity in many corners of the world because of support groups for the same cause. The validation of rights of the queer community cannot be penned down without the mention of the Yogyakarta principle[6] which listed out principles in order to protect the rights of individuals regardless of their gender identity or sexual orientation. The different NGO's fought for the protection and upholding the rights of LGBT community and one of the main principles that acted as their guiding force was the Yogyakarta Principles. International Commission of Jurists (ICJ)[7] and International

[6] This is the result of a meeting held in the year 2006 in Yogyakarta, Indonesia and are called as the "Principles on the application of international human rights law in relation to sexual orientation and gender identity" available at: https://www.refworld.org/pdfid/48244e602.pdf (Visited on September 22, 2022).

[7] Established in 1952 with a mission to "help and protect the human rights with the help of rule of law" available at https://www.icj.org/about/vision-mission-and-statutes/ (Visited on September 25, 2022).

Service for Human Rights (ISHR)[8] constituted a group of experts in the field of human rights who were given the tremendous task of developing "a set of international legal principles on the application of international law to human rights violations based on sexual orientation and gender identity" which were called as the Yogyakarta Principles.[9]

Many resolutions have been passed by the United Nations emphasizing on the recognition of the rights of transgender and further protecting those rights. On of the main articles in this regard is Article 26 of the ICCPR (International Covenant on Civil and Political Rights) which "prohibits discrimination and gives equal protection to all persons before the law has been interpreted to include transgender persons under the category of "sex". Further Article 9 of the ICCPR has interpreted that the "right to liberty is available to everyone which includes all persons of LGBTQ identity". Similarly Article 12 of the ICESCR (International Covenant on Economic, Social and Cultural Right) has been interpreted to recognize "the right to health of transgender persons as a vulnerable group that requires positive State protections".

The Committee on the Anti-Torture Convention requires special measures to protect transgender persons from torture under Article 2, as well as provide effective redressal mechanisms for transgender victims of torture under Article 14 of the Convention. In 2017, the OHCHR (Office of the United Nations High Commissioner for Human Rights) released a statement insisting that LGBTQI+ persons are protected under the UN

[8] A non- profit organization formed in 1984 in Switzerland and Geneva and formed to help and provide assistance to human rights activists available at: https://ishr.ch/about-us/ (Visited on September 22, 2022).

[9] Anthony S Winer, *Levels Of Generality and The Protection of Rights Before The United Nations General Assembly* https://www.corteidh.or.cr/tablas/r33554.pdf (Visited on September 2, 2022).

Charter, Universal Declaration on Human Rights and did not require the creation of new specific obligations.[10]

4. Social Ostracism and Invalidation of Basic Rights

The existence of transgender can be traced back to old scriptures and Vedas. Historically speaking, in India TG's were worshipped in temples and yet they are social outcasts. This paradox has been formed due to the mentality of the society to attribute the concept of gender as binary in nature that is either male or female. Every individual from the TG community is subjected to social ostracism and ill- treatment.

The TG community faces struggle in every aspect of their lives. At early childhood, when they begin to understand the complexity of their gender identity, most of them are abused and abandoned by their family. If they are not abandoned, a multitude of them run away from their homes due to the rejection faced by them on behalf of their family. These children are often lead to prostitution and other illegal activities in the dark corners of the society. Since their gender identity does not avail them basic human necessities including housing, education and employment due to social ostracism, they also fall prey to criminalities. Since the entry to transgender in prostitution starts from a quite young age, the room is left open for child abuse.

The TG community often suffers major health risks due to the unhealthy environment they are thrown into by society. Since umpteen members of the TG community are subjected to sexual harassment day-in and day-out, healthcare is of relevant concern especially for determining STD's. Moreover, Sex Reassignment Surgeries (SRS) are done by TG individuals to assert their identity. These surgeries come with a lot of complications afterwards and thus healthcare becomes an essential need for TG individuals. Valetudinarianism is not a concept that the TG community can

[10] AJ Agrawal, Need for Recognition of Trans Rights in International Human Rights Law, CLPR https://clpr.org.in/blog/need-for-recognition-of-trans-rights-in-international human- rights-law/ (Visited on September 21, 2022).

harbour in their minds as their social out casting extends to lack of health-care facilities.

Transgenders have no identification cards including voter and Aadhar-even though this was dealt with by the Supreme Court[11] itself, about three-fourths of the population of the TG community in India are yet to receive an identification. The total population of transgenders in India comprises approximately 4.88 lakh as per the census of 2011.[12] The lack of an identity in a country paves way to trouble in access to all or any rights guaranteed by the country. Since the TG community is left unidentified, the status of 'citizen' is not granted which thus leads to questioning their basic needs and rights guaranteed under the Constitution of India. Moreover, since their family ties are usually nullity, the intricacies faced by them in proving their nationality is equal to that of an immigrant with no identification.

Inheritance rights of the TG community are a lacuna in law. Succession laws are silent to the rights of the TG community. Adding the social intricacies to this context, the transgenders are left with no property due to their gender identity. Personal laws including marriage, maintenance and adoption have no provision relating to the TG community. Penal laws are inclusive only for the cisgender. The laws for sexual assault and rape does not include the transgender. The cisgender has been concentrated upon to such an extent that the Indian society has left the TG community as a myth. Even though the TG community tries to come out of their mythical existence, they have little laws to assist them.

The exclusion of the TG community from Indian laws lays out major problems for the enforcement of their rights. The Constitution of India guarantees right to equality under Article 14, which is a fundamental right of every citizen in India. However, the TG community in India is not only

[11] National Legal Services Authority v. Union of India, (2014) 5 SCC 438.
[12] Transgender in India, CENSUS 2011 https://www.census2011.co.in/transgender.php (Visited on September 20, 2022).

denied equality but also the basic rights of a human being. The solid discrimination faced by them in the Indian society is against the concepts enshrined in our Constitution. Moreover, Article 21, which provides for the right to life and personal liberty, has been interpreted to include an umbrella of rights, which are applicable to every citizen. These rights have been given the halo of Fundamental Rights in our Constitution and thus its denial can be questioned in the Apex Court via Article 32.

5. Analysis of the Naz Foundation Case

The Naz Foundation was set up in 1994 by Anjali Gopalan and a few others. The main focus of their work was HIV/AIDS prevention and care. They began to work with the transgender community also. In 2000, a young man came to see them and recounted his horrid tale wherein he was forced to receive electro- shock therapy at a government hospital to be 'cured' of his homosexuality. While the Foundation tried to register a complaint with the National Human Rights Commission, they were turned down as it was pointed out that Section 377 made homosexual acts a criminal offence. This led the NGO to file the petition in the Delhi High Court. The case was heard in 2009 by the bench of Chief Justice Ajit Prakash Shah and Justice Muralidhar. The Ministry of Home Affairs filed an affidavit in the Court supporting the retention of Section 377. The Home Ministry argued that homosexuality was against public morality and hence should remain criminal. The National AIDS Control Authority (NACO) stated that AIDS was difficult to prevent and treat since the criminalization of homosexual conduct was pushing everything underground.

The Naz Foundation case posed a dramatic change and aired the discussion regarding queer communities. The Delhi High Court held: "We declare that Section 377 IPC, insofar it criminalizes consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution. The provisions of Section 377 IPC will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. By 'adult' we mean everyone who is 18 years of age and

above. A person below 18 would be presumed not to be able to consent to a sexual act. This clarification will hold till, of course, Parliament chooses to amend the law to effectuate the recommendation of the Law Commission of India in its 172nd Report which we believe removes a great deal of confusion. Secondly, we clarify that our judgment will not result in the reopening of criminal cases involving Section 377 IPC that have already attained finality."[13]

The judgment of the Delhi High court also mentioned two incidents sexual violence:

> "Lucknow incident- 2002, in the report titled 'Epidemic of Abuse: Police Harassment of HIV/AIDS Outreach Workers in India' published by Human Rights Watch, the police during investigation of a complaint under Section 377 IPC picked up some information about a local NGO (Bharosa Trust) working in the area of HIV/AIDS prevention and sexual health amongst MSM's raided its office, seized safe sex advocacy and information material and arrested four health care workers. Even in absence of any prima facie proof linking them to the reported crime under Section 377 IPC, a prosecution was launched against the said health care workers on charges that included Section 292 IPC treating the educational literature as obscene material. The health workers remained in custody for 47 days only because Section 377 IPC is a non- bailable offence.
>
> Then there is a reference to 'Bangalore incident, 2004' bringing out instances of custodial torture of LGBT persons. The victim of the torture was a hijra (eunuch) from Bangalore, who was at a public place dressed in female clothing. The person was subjected to gang rape, forced to have oral and anal sex by a group of hooligans. He was later taken to police station where he was stripped naked, handcuffed to the window, grossly abused and tortured merely

[13] Naz Foundation v. Govt. (NCT of Delhi), 2009 111 DRJ 1.

> because of his sexual identity. Reference was made to a judgment of the High Court of Madras reported as Jayalakshmi v. The State of Tamil Nadu[14], in which an eunuch had committed suicide due to the harassment and torture at the hands of the police officers after he had been picked up on the allegation of involvement in a case of theft. There was evidence indicating that during police custody he was subjected to torture by a wooden stick being inserted into his anus and some police personnel forcing him to have oral sex. The person in question immolated himself inside the police station on 12.6.2006 and later succumbed to burn injuries on 29.6.2006. The compensation of Rs.5,00,000/- was awarded to the family of the victim."[15]

After the judgment of the Delhi High Court, a part- time astrologer, Suresh Kaushal sought the permission of the Supreme Court to challenge the verdict and was granted permission. A multitude of religious groups, including minority groups supported the cause their hatred towards the TG community was obvious. Thus, in the case of Suresh *Kumar Kaushal & Anr V. Naz Foundation & Ors*[16], the Supreme Court held that "Section 377 IPC does not suffer from the vice of unconstitutionality and the declaration made by the Division Bench of the High court is legally unsustainable."[17]

The reversal of the Delhi High Court judgment impacted the TG community- they who felt like they were free and accepted with regard to their identity and their new taste of freedom granted by the Delhi High Court was snatched away from them by the Apex Court in the *Suresh Kumar Kaushal* case.[18] Thus, decriminalization of Section 377 by Delhi High Court brought hope to the TG community but they were reinstated as criminals by the Supreme Court. Section 377 of IPC criminalized carnal intercourse, which interferes with the concept of right to life as well as

[14] (2007) 4 MLJ 849
[15] Naz Foundation v. Govt. (NCT of Delhi), 2009 111 DRJ 1, Para. 21, 22
[16] (2014) 1 SCC 1.
[17] Id.
[18] (2014) 1 SCC 1.

privacy within communities like the TG's. Criminalization of the same is equal to criminalizing the gender identity and sexual orientation of transgenders as well as homosexuals. Since the TG communities do not have valid marriage laws, criminalization of carnal intercourse causes further hardships in their lives. Abuse and harassment at the hands of people as well as the police rendered the TG community helpless.

6. Rights of the Transgender Child

Childhood is the root of an adult life. The stronger and deeper the root, the better the fruits of life. One cannot say the same for the transgender child. The family and the society often looks down upon a TG child. The amount of TG children being abandoned by their family is bountiful. If they are not abandoned, a multitude of them are subjected to cruelty, including sexual assault. Hence, either one way or the other, many of them leave the household as if to escape from the horrors that lie within the walls of their so called home or are desolated.

The desolated TG children are driven to prostitution, beggary, criminalities and some are subject to trafficking. Since they have no home or identification, it is easy for criminals to drag them into deep waters. Sexual abuse on TG children is common yet left unnoticed because of their gender identity. Since these children are kept locked away in the society, the law is unable to reach out and even if the law does reach out, there are a lot of complexities involved. Sexual abuse on children is penalized under the POCSO Act, 2012[19] and according to Section 2(1)(d)[20] of the Act "child means any person below the age of eighteen years." Since the word used is 'person' TG children are inclusive in the definition and thus the offences committed against them should be taken up by the authorities.

TG children resort to beggary and criminalities including theft as they are left to fend for themselves. Moreover, since education is usually denied to

[19] The Protection of Children from Sexual Offences Act, 2012 (Act 32 of 2012).
[20] Protection of Children from Sexual Offences Act, 2012 (Act 32 of 2012) Section 2(1)(d).

them either because of their gender identity or because they don't feel like they belong amongst the cisgender children, they employ themselves in streets begging. The social exclusion of these children makes them develop a kind of bitterness, which in turn changes to rage. This is one of the root causes of criminality flourishing in the TG community especially in the case of children. It is a well- known fact that kidnapping, abduction, trafficking and forced labour is a criminal offence under the IPC[21]. TG children are often prey to hardcore criminals as they have no family or home many of them are trafficked easily and even used as slaves and subjected to forced labour since they have nobody to voice their suffering. It is thus imperative that the TG child be guardian and protector as far the doctrine of *parens patriae*[22] goes.

Taking this situation into account, it is impossible to rule out the fact whether there are care- homes for TG children and whether they are registered as transgender. The first TG children home is in the process of establishment at Bengaluru. An IAS Officer, Pallavi Akurathi, who moved to establish separate children's homes for TG's had stated:

> "My field level staff informed me that in many instances, when transgender children who are in need of care and protection are produced before the Child Welfare Committee (CWC), they are not able to place these children in the existing children's homes for boys and girls. CWCs avoid placing these children in the existing children's homes. I spoke to several people from the transgender community who spoke about the violence and abuse they faced as transgenders and decided that it is best that a separate home is established exclusively for such a vulnerable section of children."[23]

[21] IPC, 1860 Sections 359-374

[22] *Parens Patriae* in Latin means "parent of the nation". In law, it refers to the power of the State to intervene against an abusive or negligent parent, legal guardian or informal caretaker, and to act as the parent of any child or individual who is in need of protection.

[23] Tanu Kulkarni, India's first transgender children's homes will be in Bengaluru, THE HINDU https://www.thehindu.com/news/national/karnataka/indias-first-transgender

Education comes into play from childhood to youth. *"The State shall provide free and compulsory education to all children of the age of six to fourteen years in such a manner as the State may, by law, determine"*[24] a fundamental right engraved in the Indian Constitution which is but a mere dream for many TG children. It is apt to point out that although certain States in India have provided reservation for TG in employment, little steps have been taken in educating them. Employment follows education. An illiterate can never progress in the society and reservation will not serve its purpose in employment unless the same is brought about in education. The Department of Social Justice under the Government of Kerala brought about an innovative scheme named 'Sabhalam' to provide financial assistance to TG students pursuing Degree/ Diploma level professional courses.[25] The first school to be opened for the TG community was in Kochi, Kerala. It was supposed to accommodate 10 students (aged between 25 and 50) and included hostel facilities[26]. However, the shock that followed is that no members of the TG community turned up for registration in the school and the school was later converted into a hostel for TG employees of Kochi Metro and other institutions. One of the inmates made a statement on the topic:

> "The members of the community want jobs and not education. Though we are getting opportunity for education, we are neglected while applying for jobs. Hence, job is more important for us"[27]

childrens-homes-will-be-in-bengaluru/article33243137.ece (Visited on September 10, 2023).

[24] The Constitution of India, Art. 21A

[25]Saphalam scheme for Transgender students pursuing Professional courses, Social Justice Department, Government Of Kerala http://swd.kerala.gov.in/scheme-info.php?scheme_id=MTcxc1Y4dXFSI3Z5 (Visited on September 20, 2023). See also G.O(Rt) No. 258/2020/SJD dated 20-062020 available at http://swd.kerala.gov.in/ DOCUMENTS/Order_new/GOs/31400.pdf (Visited on September 20, 2023).

[26] Ashraf Padanna, India opens first school for transgender pupils, BBC NEWS https://www.bbc.com/news/world-asia-india-38470192 (Visited on September 20, 2023).

[27] Manasa Joseph, Kochi: Transgender school turns flop, converted into hostel, DECCAN CHRONICLE https://www.deccanchronicle.com/nation/current-affairs/231217/kochi-

This statement reinforces the complexities faced by them at the early childhood stage i.e. neglect and abuse. The social stigma faced by the children of the TG community causes them to resort to any kind of employment to earn their daily bread and education is not even an issue in their mind, when they come of age.

Another area of concern is adoption of TG children. As per Indian law, adoption laws are provided under the Hindu Adoption and Maintenance Act, 1956 (HAMA); Juvenile Justice (Care and Protection) Act, 2015 (JJ Act) and the Central Adoption Resource Authority (CARA).

It is a requisite for every citizen in India to be identified in order to obtain all the underlying benefits from the government of the country. The TG community are not only left unrecognized but also pushed far away from the society. After the Transgender (Protection of Rights) Act, 2019 came into existence; a national portal was created for transgender individuals to claim benefits including identification cards, shelter homes, medical facility services, scholarships and skill training. However, as per the information provided in the said portal, only 5785 certificates[28] so far- an extremely low count when compared to the census report of 2011 which estimates the population of transgenders at approximately 4 lakh.[29]

The process of obtaining an identification certificate as provided in the Act of 2019 is complex. It requires providing documents to the District Magistrate for issuance of the certificate. Moreover, if after receiving the ID card the transgender undergoes SRS, a revision application has to be filed before the District Magistrate to make necessary changes in the identification certificate. Only after obtaining the said certificate can a TG individual alter the gender identity in the government records.

transgender-school-turns-flop-converted-into-hostel.html (Visited on September 20, 2023).

[28] National Portal for Transgender Persons, https://transgender.dosje.gov.in (Visited on September 20, 2023).

[29] *supra* note 5.

In the IPC Section 8 defines Gender as the pronoun "he" and its derivatives are used of any person, whether male or female. Further Section 10 defines "Man" and "Woman" which states that the word "man" denotes a male human being of any age; the word "woman" denotes a female human being of any age.[30]

As provided above, the IPC does not recognize the "Transgender" and thus punishment for the criminal offences committed against them is a major lacuna in the law. Provisions of the TG Act of 2019 do not take offences committed against the TG community (including sexual abuse) in a serious manner, which is a direct violation of the fundamental rights of transgender. The law regarding rape in IPC has to be amended in order to include the trans-female. Gender identity should not be a cause for discrimination in granting justice to a victim.

It is imperative to include the TG community for reservation, as they are, by all means, a socially and educationally backward class. Affirmative action is a step towards attainment of equality for the TG community. Although the TG Act of 2019 intends to prevent discrimination, it has not inculcated the concept of reservation to mend the gap of inequality faced by the TG community in the Indian society.

7. Conclusion

Some of the important and affinitive steps were taken by the he Karnataka government to protect the transgender community. One of the most significant step in this regards is the C.S. Dwarakanath Backward Classes Commission Report of 2010. The recommendation made by the Commission was the inclusion of the transgender community in the more backward communities. This would enable them to get various government benefits. Through this report it was concluded that the transgender could not get any decent jobs because of the lack of identity. Therefore, the government took this decision of including them in the other backward class. A transgender was appointed to an administrative

[30] IPC, 1860, Sections 8 and 10.

job in the Group D category by the Karnataka High Court. The Karnataka Government 2012-2013 has instituted an initiative entitled Lingathwara Alpasankhyathara Yojana (gender minorities programme), proposing to implement training, loans, and subsidies through Non-Governance Organization working in the area.

As per the Act of 2019, National Council was to be formed for the TG individuals. However, after the formation of the said Council, no news whatsoever has been provided with regard to their functioning. Whether the said Council is operational and rendering help to recognize the TG community is a question, which ought to be subject to inspection.

Marriage and other personal laws including succession, maintenance etc. needs to be revised so that it is inclusive of the third gender. As of now, the members of the TG community have to go to Courts in order to get their marriage certificate, as the application forms are pro-cisgender. Property rights are necessary for any individual. Since the TG community is turned away from their own homes and the society pushes them further away from shelter, it is a dire need for a transgender to get property rights protected. Succession laws need to be reconsidered so as to include the third gender along-with the binary gender of male and female heirs.

The TG Act 2019 may have been a good start to prevent discrimination but whether the written law is implemented and enforced by the authorities is to be taken into notice. The Act places more authority in higher government and judicial officers while negating the root level enforcement- especially in rural areas. More weight put on the shoulders of the government will not cause a sudden change in the matter of TG rights. Only base level recognition of the third gender and spreading awareness about the same will bring about a change in the lives of the TG community.

Child rights are significant. It is only when the child is protected that the society will progress. So far, the TG child is a nihility in adoption laws. Statutes do not safeguard their rights. The Act of 2019 contains provisions

to prevent abandonment, however, the number of child care institutions set up for TG children can be inspected in order to understand the current scenario and whether the provisions of the Act are being implemented for the benefit of the TG children. The Child Rights Commission has every right to take up this matter as any person below the age of 18 years is considered as a child under Indian law. If the rights of TG children are not protected, they will be subject to inhumane conditions and live by begging as well as resorting to criminalities.

DEMYSTIFYING THE IDEA OF INTANGIBLE CULTURAL HERITAGE THROUGH THE LENS OF HUMAN RIGHTS

Danish Chandra*

1. Introduction

Intangible Cultural Heritage (hereinafter referred to as "ICH") is a critical component in sustaining and preserving a diverse culture, particularly in the age of globalisation.[1] The knowledge and assimilation of intangible cultural heritage of various community helps in understanding each other's way of life and enhances mutual respect for each other. Its relevance stems from the premise that this is not only a form of cultural expression, but it also contributes to long-term development by disseminating a wealth of information and skill to descendants.[2] ICH is traditional and contemporary life at the identical period, that implies it comprises age-old customs passed down through generations that are in accordance with current practises of urban and rural communities representing many cultures.[3] It provides for the principle of inclusivity as people share expression of their heritage which are similar to the practices of different cultural entities. These have indeed been transmitted down to the next generation, have evolved in reaction to their surroundings, and assist to our feeling of identification and perpetuity by acting as a bridge between the past, the

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[1] Aruushi Gupta and Prathama RK, *'Analysis of Heritage Management in India and its Impact on Stakeholders',* http://ijpsl.in/wp-content/uploads/2021/06/Analysis-of Heritage-Management-in-India-and-Its-Impact-on-Stakeholders_Aruushi-Gupta Prathama-RK.pdf., accessed on November 03, 2021.

[2] Janaina Mello, *'Intangible Cultural Heritage, India and Yoga',* https://www.researchgate.net.publication/326688953_Intangible_Cultural_Heritage_India _and_Yoga, accessed on November 03, 2021.

[3] Arun Kapur, *'Importance of tangible and intangible heritage of the core area of Chowk Lucknow'* https://iopscience.iop.org/article/10.1088/1755-1315/402/1/012006/pdf., accessed on November 03, 2021.

current, and the future.[4] It contributes to social structure, encouraging a sense of belongingness.[5] It is not simply regarded as an ethnic pleasure to make the comparison solely on the grounds of exclusivity.[6]

The finest meaning of ICH is enclosed in the '2003 UNESCO Convention on Intangible Cultural Heritage' which explains it in a way comprehensive enough to embrace various know-hows and jargons across the world such as the practises, expositions, phrase, insights, expertise and the processes, relics and works of art connected therewith – that societies, organisations as well as, in certain situations, individual people recognised as an integral component of cultural heritage.[7] Heritage is usually accepted to encompass monuments or collecting valuable items, howbeit that also incorporates folk tales, creative art forms, traditional and ethnic carnivals, and local handicrafts that are passed down through our families.[8] This ICH, by its very nature, is fragile and necessities safe and thoughtful adherence in the facade of rising globalisation of human rights culture.[9]

Accordingly, the paper is divided into four sections. The first section will discuss the national and international laws acknowledging the importance and concept of ICH. Next it would be argued that how ICH is intertwined with human rights. Further, certain intangible cultural heritage in the form of age-old customs will be analyzed through the lens of human rights and constitutionalism. Lastly, a robust mechanism will be suggested which is a

[4] 'What is Intangible Cultural Heritage?' https://ich.unesco.org/en/what-is-intangible-heritage-00003, accessed on November 03, 2021.
[5] Patricia Ann Hardwick, *'Intangible Cultural Heritage in Asia Traditions in Transition',* https://asianethnology.org/downloads/ae/pdf/AsianEthnology-2252.pdf., accessed on November 03, 2021.
[6] Livinus Kindo, *'Museum and Intangible Heritage',* OHRJ, Vol. XLVII, No. 1 http://magazines.odisha.gov.in/Journal/jounalvol1/pdf/ojrj-1.pdf., accessed on November 03, 2021.
[7] Bhaswati Mukherjee*, 'India's Intangible Cultural Heritage: A Civilisational Legacy* To The World', https://www.cgihamburg.gov.in/pdf/2015_07_INDIA_S_INTANGIBLE_CULTURAL_HERITAGE_A_CIVILISATIONAL_LEGACY_TO_THE_WORLD.pdf., accessed on November 03, 2021.
[8] *Supra* Note 1.
[9] 'What is Cultural Heritage', http://www.cultureindevelopment.nl/cultural_ heritage/ what_is_cultural_heritage, accessed on November 03, 2021.

fitting paradigm to tackle a lot of the cynicism that surrounds while practicing seemingly liberal and humanitarian ICH.

2. Intangible Cultural Heritage: A Blend of Domestic and International Laws

For its importance as a cornerstone of mankind's civilization, provisions relating to ICH have been incorporated in public international law, necessitating legitimate preservation not merely at the domestic, but likewise at the international arena.

2.1. Domestic Law

India is known for its rich heritage and culture; the culture, languages, dialects make it Incredible India. The Indian Constitution's founding fathers decided to make it mandatory for both the government as well as each citizen of India to conserve and safeguard their cultural history, as Article 29[10] of the Constitution, which is a fundamental right, grants every segment of citizen who reside in Indian territory the right to preserve their own language, script, and culture. By virtue of Article 51A (f)[11] of the Constitution, citizens are also obligated to cherish and conserve the legacy.

In 2019, a bill was proposed in Lok Sabha titled '*The Promotion and Protection of Intangible Cultural Heritage Bill, 2019*.' In the bill, ICH has been referred to as local based traditions, customs, and representations and articulation such as understanding, proficiency and cultural heritage of community or individuals.[12] The board shall undertake to perform these functions- conducting a survey every year for preparing a list representing intangible cultural heritage of India. To save documentary records of local

[10] Protection of interests of minorities '(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.'

[11] Article 51A (f) 'to value and preserve the rich heritage of our composite culture.'

[12] Shri Kunwar Pushpendra Singh Chandel, MP, *'The Promotion and Protection of intangible Cultural Heritage Bill, 2019',* http://164.100.47.4/billstexts/lsbilltexts/asintroduced/304LS%20As%20Int....pdf., accessed on November 03, 2021.

traditions and to conserve them using the finest ways available. Additionally, it is the obligation of the board to identify, safeguard and uphold the enriched, diverse and enormous incorporeal cultural heritage of the country, constituting a Management Committee comprising of a chairperson and at least five other members, on behalf of various cultural traditions to create consciousness in the direction of and assimilation of intangible cultural heritage of the country. Furthermore, the proposed legislation has incorporated the clause which deals with establishment of a board known as *Alha Board* which would undertake the work of protecting and conserving the intangible cultural heritage. It is proposed that the board will consist of twenty-five to be appointed by sovereign at the centre and out of these, two members shall be representatives of the cultural organizations.[13]

2.2. International Law

The United Nations Educational, Scientific, and Cultural Organization (hereafter referred to as UNESCO) is renownedly known for its functioning in the arena of cultural and historical preservation.[14] Ever since its inception, the organisation has propelled global cooperation and teamwork in the domain of cultural heritage, primarily predicated on the assumption that nations must preserve and safeguard cultural heritage due to its importance to humanity and as a source of international collaboration, nurturing cooperative relationship and deterring global disputes.[15] Nations who are part of UNESCO have endorsed three Cultural Heritage Conventions: '*The Convention concerning the Protection of the World Cultural and Natural Heritage* (1972);[16] *the Convention on the*

[13] *Supra* Note 11.
[14] 'Protecting Our Heritage and Fostering Creativity, UNESCO' https://en.unesco.org/themes/protecting-our-heritage-and-fostering-creativity (Sept. 12, 2021).
[15] 'UNESCO in Brief – Mission and Mandate, UNESCO', https://en.unesco.org/about-us/introducing-unesco (Sept. 12, 2021).
[16] '*The Convention Concerning the Protection of the World Cultural and Natural Heritage'*, 16th session, Paris, Nov. 16, 1972.

Protection of the Underwater Cultural Heritage (2001)[17] *and the Convention on the Safeguarding of the Intangible Cultural Heritage* (2003).[18] These accords define the several forms of cultural heritage and are intended to protect cultural heritage at regional and global scale. The overwhelming backing for the *World Cultural and Natural Heritage Convention* and the *Intangible Heritage Convention*, specifically, demonstrates that nations across the globe recognise the significance of cultural heritage preservation and development.[19] These UNESCO Heritage Conventions demonstrate a transition from the shielding of traditional knowledge for the wider populace, with an increasing focus on national sovereignty and entitlements (Convention on World Cultural and Natural Heritage and Convention on Underwater Cultural Heritage) to the preservation of cultural identity of specific societies, encompassing people in the procedure of recognition and proclamation (Convention on Intangible Cultural Heritage).'

It has long been recognised that formless or ethereal parts of cultural legacy, nominally intangible cultural assets, make up a significant portion of national history. As per Article 2(1) of the '*Convention on Intangible Cultural Heritage*,' ICH is defined as: the behaviours, appearances, sentiments, beliefs, and abilities that communities, organisations, and, in certain instances, individuals acknowledge as an essential component of their cultural heritage, or even the devices, items, relics, and cultural places linked with them.[20] Surprisingly, this definition emphasises the desire of factions and individuals instead of merely the strength and desire of nations, acknowledging that people are the ones who create and maintain cultural legacy. Regardless of this, it is pertinent to emphasise that nations have complete control over the capacity to define and legally recognise cultural assets.

[17] '*The Convention on the Protection of the Underwater Cultural Heritage',* 31st session, Paris, Nov. 2, 2001.
[18] '*The Convention on the Safeguarding of the Intangible Cultural Heritage',* 32nd session, Paris, Oct. 17, 2003.
[19] Yvonne Donders, *'Cultural Heritage and Human Rights,* in The Oxford Handbook of International Cultural Heritage Law*',* 170 (F. Francioni and A. Vrdoljak, ed., OUP 2019).
[20] *Supra* 18 at art. 2, ¶ 1.

A strong correlation connecting ICH as well as the cultural identity is recognised in the '*Convention on Intangible Cultural Heritage*.' Article 2(1) of the convention asserts that the individuals of the social organization perpetually construct intangible cultural legacy in reaction to their surroundings, their relationship with environment, and their heritage, and this gives them with a feeling of recognition and permanence.[21]

Languages are frequently considered as an element of intangible cultural heritage, specifically local or ethnic dialects. Dialects play an indispensable part in the manifestation as well as transfer of cultural legacy, according to the *Convention*. Article 2 (2) (a) affirms that dialect is a pathway for ICH that is critical to persons' and groups' identities.[22] The majority of intangible cultural heritage genres rely on language for habitual practise. Language is not just a conveyance in the realm of folk tales and emotions; it is the fundamental core of them. As a result, actions in the realm of dialects are required to promote and conserve ethnic identity.

Furthermore, the 1989 *UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore*[23] revealed a strong correlation with both cultural heritage and cultural identity. It provides a detailed outline about the *folklores* that is intrinsically related to ICH and accentuates its connection to cultural identity.

3. Paradigm Approach: Human Rights Approach to Intangible Cultural Heritage

Intangible Cultural heritage is sometimes a great attribute for ethnic groups to help bolster their ethnic heritage, yet it equally entails pejorative connotations. Intangible cultural heritage can indeed portray mankind's sinister half.[24] Human rights serve a pivotal role here as well, this moment

[21] *Ibid.*
[22] *Supra* 18 at art. 2, ¶ 2 (a).
[23] '*The UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore',* 25th session, Paris, Nov. 15, 1989.
[24] Farida Shaheed, '*Report of the Independent Expert in the Field of Cultural Rights',* ¶ 8, A/HRC/14/36 (March 22, 2010).

as a guard against traditional or customary practises associated with cultural heritage that adversely affect persons or society. 'The *Universal Declaration on Cultural Diversity'* and the '*Convention on the Protection and Promotion of the Diversity of Cultural Expressions'* both states unequivocally that cultural values or heterogeneity must not be suffused to undermine human rights or to restrict freedom of expression.[25]

On the similar lines, the '*Convention on Intangible Cultural Heritage'* outlines intangible cultural heritage to encompass "social activities and rituals." As a natural outcome of these institutional standards, specific part of the population, such as women, may be mistreated, prejudiced, or abused. As a result, article 2(1) states that only intangible cultural practices that are consistent with contemporary worldwide civil rights accords will be considered.[26] As a corollary, the '*UN Convention on the Elimination of All Forms of Discrimination Against Women (1979)'*[27] assigns a cementitious responsibility on nations to customise the sociocultural trends of behaviour of males and females for eradicating bigoted customs and such practises that are premised on the notion of the humiliation or dominance or prejudicial role of either sexes.[28]

Modifications in cultural practises are clearly more fruitful when they emerge from inside the traditional setting rather than being dictated from outside. This doesn't really, absolve nations of their responsibility to devise strategies to foster such transformations. As per Article 34 of the *'United Nations Declaration on the Rights of Indigenous Peoples'*[29] indigenous peoples have the right to propagate, cherish and guard their traditions, beliefs, rituals, protocols, practises, and legal frameworks or norms, in

[25] '*UNESCO Declaration on Cultural Diversity',* (Nov. 2, 2001) art 4; '*Convention on the Promotion and Protection of the Diversity of Cultural Expressions'* (adopted 20 October 2005, entered into force 18 March 2007) 2440 UNTS 311, art 2(1).
[26] *Supra* 20.
[27] '*The Convention on the Elimination of All Forms of Discrimination against Women',* Res. 34/180, New York, Sept. 3, 1981.
[28] *Id* at art 5 ¶ (a).
[29] '*The United Nations Declaration on the Rights of Indigenous Peoples',* Res. A/RES/61/295, Sept. 13, 2007.

consonance with pre-defined Human Rights ideals.[30] In addition to this, according to Article 4 of the '*United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities',*[31] individuals shall be entitled to cultivate and exhibit their history, rituals, and practices, save when specific activities are in defiance of domestic law and opposed to international norms.[32]

The *Committee on Economic, Social and Cultural Rights*[33] also recommended that nations must take steps to address systemic prejudicial behaviours and to eradicate all types of bigotry directed at groups premised on their distinct ethnic identity. Moreover, the Committee observed that noteworthy aspect of the right to join in cultural activity is that everybody has the freedom to partake in their very own traditions while upholding human rights. It specifically cites the liberty of conscience, opinion, faith and the right to use one's preferred dialect.[34]

Because intangible cultural traditions are so different, it is extremely difficult to offer broad comments about whether they are tolerable from the standpoint of social justice. The extent of their potential confrontation with these inalienable rights is ruled by the facts of the situation. Traditional norms that are demonstrably in violation of human integrity cannot be defended on the basis of intangible cultural (heritage) rights.

4. How Much (Law)gical are Intangible Cultural Heritage?

When it comes to ethnic plurality and legacy (especially intangible), human rights are frequently invoked. Unfortunately, certain measures to

[30] *Id* at art 34.
[31] '*The United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities',* GA Res. 47/135, Dec. 18, 1992.
[32] *Id* at art 4.
[33] 'UN Committee on Economic, Social and Cultural Rights (CESCR)', *General comment no. 21, 'Right of everyone to take part in cultural life' (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights),* E/C.12/GC/21, 21 December 2009.
[34] *Id* at ¶ 52.

safeguard intangible cultural assets, ironically, pose a menace to certain fundamental rights.[35] Many people assert that following an age-old legacy is a basic right, although many argue that it is distinctly in violation of human rights norms as well as accords. Some manifestations of historical legacy are incompatible with a person's liberty to select his or her own road.[36] The saddest part is that certain traditional practices and beliefs widely espoused by certain spiritual or cultural communities infringe upon basic innate rights and fundamental liberties of those who are less privileged elements of civilization, notably females and kids, undocumented migrants, as well as the underprivileged. Fertility cults, circumcision, forced marriages, and gender-based regulations to veil the upper torso in specific manner are all instances of cases in point. Many have been discarded or are on the verge of being discarded, while others are yet thriving but also flourishing.[37]

4.1. Sati System: Murderous Ritual versus Devotional Custom

In the old days, Hindu communities' widows have encountered appalling situations in every way. After the demise of her spouse, it was customary for a widow to shave her head and dress in white attire. She was forbidden from remarrying or wearing any gold jewellery. An even harsher and barbaric ritual was for a Hindu widow to sacrifice herself in her husband's funeral pyre as an act of *Sati*.[38]

The tradition of widows being immolated on their husbands' funeral pyre, known as Sati, has always been at the heart of discussion over the depiction of the East in Western literature. Aside from the fact the

[35] Monica Palmero Fernandez, 'Towards a Human Rights Approach to Cultural Heritage Protection', https://www.heritageinwar.com/single-post/2019/07/02/towards-a-human-rights-approach-to-cultural-heritage-protection, accessed on November 03, 2021.
[36] DEAN B. SUAGEE, 'Human Rights and the Cultural Heritage of Indian Tribes in the United States', 8 INT. J. CULT. PROP. 48, 50 (1999).
[37] William Logan, *'Cultural Diversity, cultural heritage and human rights: towards heritage management as human rights based cultural practice',* INT. J. HERIT.STUD 1, 11 (2012).
[38] Anand A. Yang, *'Whose Sati?: Widow burning in early 19th century',* 1 J. WOMEN'S HIST. 8, 10 (1989).

significant number of occasions of *Sati* can indeed be mapped in records by Britishers, many of whom were available at these incidences to thwart or discourage would-be satis. [39] Albeit the Anti-sati law was passed in 1829[40], the immolation of Roop Kanwar, a Rajput widow, in the state of Rajasthan in 1987 sparked a resurrection of attention in the tradition of sati in late-twentieth-century India.[41] While these occurrences merely serve to corroborate the West's and even Indian feminists' perceptions of sati as a common homicidal practice that is still tolerated in Indian culture, elements of the East and/or conformist Hindu values, on the other hand, defend the idea that sati is an audacious cult of "wifehood dedication," wherein widow "voluntarily" seek to make herself sati without any spiritual or societal compulsion being applied.[42]

The *Jauhar* is an apparently identical ancient tradition. Despite their traditional significance in the midst of *Rajputs*, there continue to be substantial disparities amid them. Whilst *Sati* was an instance of self-immolation carried out by an individual, *Jauhar* seems more like a communal or mass suicide. Furthermore, whereas *Sati* can be conducted by any upper-caste woman, Jauhar was committed by the royal family as a means of escaping the brutality of invaders.[43]

Unfortunately, traditional and religious notions are used to justify as well as laud wife's freedom to suicide. What is defended in the guise of traditional believes is a heinous deed. Especially in circumstances where *Sati* is regarded as a comportment of own desire, it is vital to comprehend why certain females prefer to endure this torment. It is not just because they want to be reunited with their spouses after death; it is also to avoid

[39] Andrea Major, *'A Question of Rites? Perspectives on the Colonial Encounter',* 4 HIST. COMPASS 780, 789 (2006).
[40] The Bengal Sati Regulation Act, 1829, No. 17, Regulation of Bengal, 1829 (India).
[41] T.K. Rajalakshmi, *'Sati and the Verdict,' FRONTLINE* (March 12, 2004), https://frontline.thehindu.com/other/article30221385.ece., accessed on November 03, 2021.
[42] Paul B. Courtright, *'The iconographies of Sati, in Sati: The Blessing and the Curse 30',* (John Stratton Hawley, New York: Oxford University Press 1994)
[43] M. Shamsudiin, *'A Brief Historical Background of Sati Tradition in India',* 3 DIN VE FELSEFE ARAŞTIRMALARI 44, 46 (2020).

the cruelty they could face as a widow if they're still living.[44] Sati's ideologies have an overtly patriarchal and masculine tone to them.[45] The female divinity analogy and the iconography of the perfect wife employed to recount these acts have ramifications that go past the conduct. Choice and compulsion are two more concepts that must be comprehended within the paradigm of broader frameworks of societal and theological oppressions to which these females have been enslaved to their whole lives.[46]

4.2. Female Genital Mutilation: An Inhumane Practice Ensuring the "Pride" of Community

Those treatments that include half or whole ablation of the outer female genitalia, or other harm to the women's external genitalia for non-medical considerations are classified as female genital mutilation. Conventional circumcisers, who typically serve other important responsibilities in societies, such as monitoring childbirths, are the people who execute the majority of the circumcisions.[47] For decades, the *Dawoodi Bohra society* has practised this secret female circumcision ceremony, with an absolutely zero societal discourse of its horrifying ramifications.[48] Female genital mutilation is decided to carry out due to myriad of purposes that differ by place as well as period, and involve a combination of sociocultural variables within households and cultural groups. One of most prevalent explanations given are: a) This constitutes a theological observance, b) this

[44] Nandini Bhattacharyya-Panda*, 'Women in the Śāstric tradition: Colonialism, law, and violence,* in The Blackwell Companion to Religion and Violence 390' (Andrew R. Murphy ed., Oxford: Wiley-Blackwell, 2011).
[45] Dorothy Stein, 'Burning widows, burning brides: The perils of daughterhood in India', 61 PAC. AFF. 465, 470 (1988).
[46] Ania Loomba, 'Dead women tell no tales: Issues of female subjectivity, subaltern agency and tradition in colonial and post-colonial writings on widow immolation in India 36 HIST. WORKSHOP J. 209, 220 (1993).
[47]Female Genital Mutilation', WHO https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation accessed on November 03, 2021.
[48] Lawyers Collective Women's Rights Initiative (LCWRI), 'Female Genital Mutilation: Guide to Eliminating the FGM Practice in India', 7 (2012).

constitutes a custom, and c) it is meant to keep a female child's libido (sexuality) in check.[49]

Female genital mutilation is regarded as an infringement of girls' and women's human rights across the globe This demonstrates profound gender bias and extreme prejudice against women, contradicting Article 1 of the '*United Nations Convention on the Elimination of All Forms of Discrimination Against Women*'[50] and Article 2 of the *'Universal Declaration of Human Rights'*[51], both of which expressly state that women possess the prerogative to be completely independent of all kinds of discrimination. As this inhumane practice disproportionately impacts girls as young as eighteen, the problem at hand significantly contradicts the norms dealing with the safety of children's rights stated in the '*Convention on the Rights of the Child'*[52]. The practise also infringes on a woman's right to wellbeing, safety, and inviolability, as well as her legal claim to be freed from torment and harsh, abhorrent, or inhumane treatment, and her right to life when the operation leads to demise, thereby non fulfilment of the commitment towards the international instruments like '*International Covenant on Civil and Political Rights'*[53] and '*General Assembly Resolutions and Secretary General Reports on Traditional or Customary Practices Affecting the Health of Women and Girls*.'[54]

When all is said and done, no justification can legitimize removing a girl's genitals, regardless how "minimal" the surgery is. Nobody has the authority to limit or regulate a female's sexual inclinations, or to instruct her she must stay pure. These are male chauvinist beliefs that don't belong in modern situation. Even when one believes that genital mutilation is the

[49] *Supra* 47.
[50] *Supra* 27 at art 1.
[51] The Universal Declaration of Human Rights, GA Res A/RES/217(III), Paris, Dec. 10, 1948, art 2.
[52] The Convention on the Rights of the Child, GA Res 44/25, Sept. 2, 1990, art 19.
[53] The International Covenant on Civil and Political Rights, GA Res 2200A (XXI), March 23, 1976, art ¶ 91.
[54] 'General Assembly Resolutions and Secretary General Reports on Traditional or Customary Practices Affecting the Health of Women and Girls', A/RES/53/354, Sept. 10, 1998, ¶ 17-18.

route to achieving "spiritual" or "religious" purity, one must be cognizant of the certitude that sanctity is found not in one's genitals, but in one's attitudes as well as actions.

4.3. Triple Talaq: A Blatant Infraction of Human Rights

Human rights are commonly associated with more liberty and advancement. It is worthy of mention, regrettably, that granting liberty doesn't quite automatically imply liberation. The ubiquitous concept on which human rights are premised is a fundamental cause for their exclusive aspect. The gloomy facet of cardinal rights is most visibly manifested in the issues of females, who are trapped at the crossroads of civic pride and contemporary ideology.[55] The scenario of a severely oppressed Muslim woman who need assistance through the liberal rights rhetoric is one such humanistic issue. The *Shayara Bano v. Union of India*[56] is at the forefront of the ongoing argument about triple talaq.

Triple talaq, also known as *talaq-ul-biddat* or *talaq-ul-bain,* is a kind of talaq that is only practised by the Hanafi School. Such talaq is not approved or recognised by the Shias and Mallikis. This sort of talaq allows the man to announce three divorce declarations during any moment sans taking into account the stance of the wife, and the terrible aspect is that this form of talaq is irrevocable.[57] While analysing the contours of universally recognised inalienable privileges and the golden thread of Indian Constitution the five-judge bench of the Hon'ble Supreme Court in *Shayara Bano v. Union of India* comprising of Justice Nariman, Justice UU Lalit, Justice Kurian Joseph, former Chief Justice of India JS Kehar and Justice Abdul Nazeer with a majority of 3:2 declared *talaq-ul-biddat* as unconstitutional since it contravenes Article(s) of the Indian Constitution i.e 14, 15, 21 and 25.

In the aforementioned case, it was found that the rights of the wife in a marriage bond among Muslims had manifested considerable sexual

[55] Avantika Tiwari, *'Triple Talaq-Counter Perspective with Specific Reference to Shayara Bano',* 1 ILI Law Review 86 (2017).
[56] Shayara Bano v. Union of India (2017) 9 SCC 1.
[57] Mulla, *Principles of Mahomaden Law*, 450 (Lexis Nexis, 22nd ed. 2017).

inequality, as the practise of *talaq-ul-biddat* provided a husband an unconditional right to dissolve the married tie in which the wife seemed to have no voice in the issue, inasmuch as it may be announced in the absence of the female spouse, and even sans the woman's consent, insofar as it might. Evidently, in violation of equality and anti-discrimination clause of the Indian Constitution. As a result, Muslim women have suffered a tremendous deal of injustice. Into the bargain, the court cited the *Charu Khurana v. UOI*[58] and *Valsamma Paul v. Cochin University*[59], in which it was unequivocally stated that 'gender justice is the nurtured accomplishment of inherent human rights, and that prejudice purely on the basis of sexual identity is not permissible.'

In addition to constitutional legislation, various international agreements and treaties were cited, such as the 'United Nations Convention on the Elimination of All Forms of Discrimination Against Women' and 'the Universal Declaration of Human Rights.' These references sought to establish a connection between human rights principles and traditional customs.[60]

Despite this progressive ruling, the so-called stakeholders in society have been vocal in their opposition to the ruling. When challenged with social conventions, women's rights typically take a back seat whenever a step towards women emancipation is taken.

4.4. Sabarimala Issue: A Discourse on Civilized Form of Untouchability

Legal scheme supports the essence of constitutionalism and oftentimes replenish substantive deficiencies inadvertently remain unresolved by the legislative or are creatures created out of upheavals in contemporary advanced, secular and democratic nation. Unfortunately, in a nation as deeply devoted to sacred dogmas as India, the certitude that judiciary adjudicate on spiritual aspects has historically been a matter of friction.

[58] Charu Khurana v. UOI (2015) 1 SCC 192.
[59] Valsamma Paul v. Cochin University (1996) 3 SCC 545.
[60] *Supra* 56 at ¶ 192.

These legal difficulties in India include a complicated dynamic interaction amongst Article(s) of the Indian Constitution 14, 25, and 26. Whenever aforementioned Articles are brought together, we are overwhelmed by the extensive discourse which springs up as we contemplate the constitutional integrity principles. With regard to *Indian Young Lawyers' Association v. State of Kerala,*[61] a five-judge bench of the Hon'ble Supreme Court, comprised of former Chief Justice of India Deepak Mishra, Justice Nariman, Justice D Y Chandrachud, and Justice Malhotra, confronted a paradoxical customary practise wherein a restriction was imposed on the admittance of women of menstruation age (between 10 and 30 years of age) into the *Sabarimala Shree Dharma Sastha* Temple which is dedicated to *Lord Ayyappa*.

The Sabarimala decision 'lubricated the gears of social integration and gave feminist doctrine new life.' The temple's practise of banning women was ruled unlawful by a 4:1 vote. Dipak Misra, the former Chief Justice of India, stated that spirituality is a living part of inextricably linked to a person's self-respect, and paternalistic practises premised on the marginalisation of one sex in lieu of someone else cannot be legally permitted to intrude on the underlying liberty to practise and espouse one's spirituality.[62] Furthermore, Justice Chandrachud acknowledged that biological attributes of females, such as menstruation, have really no influence on the constitutional rights given to them. A woman's menstrual condition cannot be a solid legal ground for depriving someone of self-respect, as well as the shame associated with it has no validity in a constitutional order. In addition, Justice Chandrachud stated that the marginalisation was a manifestation of untouchability and female ostracization that violated fundamental and innate human rights.[63]

To cut a long tale short, a conservative construction of the Holy book shouldn't be employed to justify biased perspective that focuses on an

[61] Indian Young Lawyers' Association v. State of Kerala (2019) 11 SCC 1.
[62] *Id* at ¶ 106, 110 and 144.5.
[63] *Supra* 61 ¶ 341, 342 and 357.

individual's biological condition. Females should not be subjected to societal discrimination based primarily on conceptions of immaculateness and squalor. The goal of this case was to gain judiciary to take action and limit fanatical acts under the pretence of religious belief. Human rights do not entail barring females' entrance to venues of religious prayer purely because of their biological condition and yet these cardinal privileges came to the fore as an escutcheon to protect against the bigoted customary practices.

5. Intangible Cultural Heritage: Critical Assessment

'Unlike tangible heritage, ICH is, by its own nature, of a markedly dynamic nature. This nature actually represents the two sides of a coin. On the one hand, it allows ICH persistently to recreate itself in order constantly to reflect the cultural identity of its creators and holders. In fact, such a heritage has the intrinsic capacity to modify and shape its own characteristics in parallel to the cultural evolution of the communities concerned, and is therefore capable of representing their living heritage at any moment.'[64] 'On the other hand, this inherent flexibility – or, in other words, the 'ephemeral' character of ICH – makes it particularly vulnerable to being absorbed by the stereotyped cultural models prevailing at any given time. In an age when globalization is virtually uncontrolled, such characterization puts the very identity of peoples in peril of being curtailed and absorbed by the dominant society following dogmatic customs. In consideration of the fact that cultural identity is inextricably linked to the safeguarding of ICH and to its transmission to future generations, modern society, with its typical models and customs, may need a robust mechanism which can ensure preservation of original humanitarian customs which are not overshadowed by hackneyed stereotypical principles.'[65]

[64] Federico Lenzerini, "Intangible Cultural Heritage: The Living Culture of Peoples", *European Journal of International Law*, 22 (1), 101, 115 (2011).
[65] *Id.*

6. Suggestions: Strengthening the Role of Communities in Safeguarding and Balancing the Intangible Cultural Heritage and Human Rights

Intangible Cultural Heritage is reliant on those whose understanding of rituals, crafts, and practises is transmitted down through the ages or from one cultural group to another.[66] Additional aspect strengthening and reinforcing the relationship between ICH and social justice appears to be significant role of communities in the identification, advancement, and management of ethnic heritage. Paying particular attention to the *Intangible Cultural Heritage Convention*, 'Nations must recognize as well as describe intangible cultural heritage components with the assistance of individuals, factions, and appropriate non-governmental entities. Besides this Article 15 of the Convention vehemently asserts that each nation must strive to secure the greatest feasible engagement of organizations, and, wherever necessary, persons who produce, preserve, and disseminate such heritage in the context of its protection actions of intangible cultural heritage, and to engage them constructively in its administration.'[67]

Because these cultural norms are passed down to future generations, it is important to pass on only those rites and behaviours that are ethically correct and do not degrade either gender. As a result, educating community members about concepts that assert a balance between customs and human rights can go a long way toward preventing disputes between two intrinsic ideals that are intertwined as a double helix. For accomplishing this end a reference can be made to Article 27 of the *Convention on World Cultural and Natural Heritage* which specifically stipulates, 'nations should undertake teaching initiatives to promote folk's admiration for cultural heritage.[68] The *Convention on Intangible Cultural Heritage* is considerably comprehensive, and it incorporates unique provisions for local groups. Article 14 specifies that nations shall undertake educative, instructional as well as awareness-

[66] *Supra* 19.
[67] *Supra* 18 at art 15.
[68] *Supra* 16 at art 27.

raising programmes with(in) groups to ensure that intangible cultural heritage is recognised, respected, and enhanced in societal structure.'[69]

7. Concluding Remarks

Since ages only tangible heritage was considered as valuable so to as to be preserved and protected but with changing dynamics of human lives, understanding of ICH is acquiring momentum. ICH has an element of human rights attached with it which often gets flouted leading to societal and political consequences. At the international front, UNESCO is the bellwether for recognizing, developing and ensuring the sustainability of intangible cultural heritage to keep them alive for the generations to come to appreciate them and enhance their value by promoting them. In India, at present there is no legislation to protect these rights but the judicial organ of the government has time and again discarded the practices which were against the human rights and recognised the heritage and rights which deserved the attention of the system and its citizen and our nation as a whole.

No doubt ICH can play a positive role in acknowledging cultural identity. However, it has certain negative connotations attached with it. ICH may reflect the darker side of the humanity. In this sense, human rights play a pivotal role, this time as a shield against cultural or traditional practices related to cultural heritage that are harmful for individuals or communities.

[69] *Supra* 18 at art 14.

UNDERSTANDING THE ESSENCE OF JUSTICE IN MODERN INDIA THROUGH THE LENS OF LEILA SETH

Kirti Minhas [*]
Shubhra**

1. Introduction

"Talking of Justice"[1] is authored by Justice Leila Seth, by virtue of which she has raised her concern regarding people's rights in modern India. She is glorified as first women judge of Delhi High Court as well as first women to hold the position of Chief Justice of State High Court. This book has been written in the year 2014 in the backdrop of horrendous rape of *Nirbhaya*[2] (the fearless one), which has shaken the core of humanity and humanism.

"Justice not only been done, rather than seen to be done", is the main objective that has been highlighted by the author. Talking of Justice is the reflection of author's journey as a Judge and human being. Author has confined her writing within the purview of six themes, which are:

- Gender Crime & Gender Justice
- Widow & Child Rights
- Judiciary: Gender Sensitivity & Gender Sensibility
- Criminalisation of Sexual Orientation
- Rights of voiceless prisoners and PIL
- Reforms in Judicial Administration to stop denial of Justice

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[1] Leila Seth, *Talking of Justice: People's Rights in Modern India* (Aleph book company 2014) 214.
[2] Mukesh v. State (NCT of Delhi) (2017) 6 SCC 1.

2. Analysing the Themes in Prevailing Circumstance

2.1. Gender Crime & Gender Justice

The first and foremost theme that has been addressed by author is gender crime. Gender justice has also been discussed concurrently. Being one of the notable members of Justice Verma Committee, (committee of Justice J.S Verma, Justice Leila Seth, Ex-Solicitor General Gopal Subramaniam, constituted in the aftermath of the 2012 gang rape in Delhi). She has categorised the perpetrator to be male only, however victim's gender is left to be inclusive one including male, female, transgender. Justice Seth has advocated for the inclusion of marital rape within the legal definition of rape and exclusion of the same from the ambit of exception[3]. The age-old misinterpretation of gender crimes has also been sighted, according to which sexual crime against women means crime against the property, owned and possessed by men. However, now the right to dignity and integrity of women's body has been vested in women and crime against the same is a crime against women herself. In modern times rape is defined in the pretext of absence of consent. The stance of the European Commission of Human Rights has been enumerated, according to which "rapist continue to be rapist, irrespective of the degree of the relationship shared with victim". It has been expressly stated by her that injustice to the female fraternity is not only confined within the ambit of commission of criminal acts, rather than it is extended to the denial of equal rights to Muslim women. For example- there is no right to maintenance of Muslim women under section 125 of criminal procedure code, 1973 (*Mohammed Ahmed Khan v. Shah Bano Begum and others*[4]) as well as recognisance of Triple Talaq in Muslim law. She has also mentioned the absence of UCC (Uniform Civil Code) as one of the biggest hurdles in attaining the goal of gender justice, that's why Article 44[5] continues to be a dead letter. Author has extensively shared her experience as a member of 15th Law

[3] Indian penal code 1860, s 375.
[4] AIR (1985) SC 945.
[5] Constitution of India 1950, Art. 44.

Commission of India and made the submission that once Uniform Civil Code will come into existence, monogamy will be mandatory and there will not be any disparity between men and women in terms of law relating to marriage, divorce, property rights, etc.

Thus, after taking into consideration of aforesaid points (as stated by author regarding gender crime and gender justice), a humble submission can be made that, Justice Leila Seth in the capacity of author has addressed the above-mentioned issue significantly and systematically. However, her stance can be criticised on the ground of specifying the gender of culprit, in the commission of sex crimes. In this regard a progressive legal step of United States and Canadian legislature recognising the "penetration, no matter even the slightest of vagina or anus of victim with any part of body or object, of another person, without consent of victim, amounts to rape[6]". This shows the gender neutrality in terms of victim and culprit, regarding the commission of sex crimes. This is the need of hour, to recognise the male rapes by females, transgenders. Male rape is one of the most important reasons behind the 'psychic – impotency' of males. Such 'psychic – impotency[7]', plays a decisive role in breaking the matrimonial homes.

Author has prominently raised the issue of denial of equal rights to muslim women and also their subjugation due to regressive form of divorce i.e., "Triple Talaq", that needs to be abolished. This book has been written in 2014, from that time, course of justice has been changed by criminalising the Triple Talaq on 1st of August, 2019 by virtue of passing "The Muslim Women (Protection of Rights on Marriage) Bill, 2019". This bill has been passed in furtherance of the judgement given by Hon'ble Supreme Court

[6] The United States Department of Justice Archives, <https://www.justice.gov/archives/opa/blog/updated-definition-rape> accessed on 29 Nov. 2021.

[7] Haveripeth Prakash, *'Prostitution and Its Impact on Society-A Criminological Perspective'* (2013) 2(3) IRJSS <http://www.isca.in/IJSS/Archive/v2/i3/6.ISCA-IRJSS-2013-027.pdf. >accessed on 27 Nov. 2021.

of India, in the case of *Shayara Bano v. Union of India*[8]. This expresses the far-reaching vision of author.

2.2. Widow & Child Rights

Second theme, that has been addressed is widow and child rights. Author has highlighted the Hindu custom of sati, by sighting the *Roop Kanwar case*[9]. In this case, Roop Kanwar, a teenager burnt alive in the funeral pyre of her deceased husband and her place of demise is considered as a place of pilgrimage. In furtherance of the above-mentioned case, she has also stated that, initially widows are forced either to commit sati or to remain slave on the name of preserving chastity. Significant change in terms of widow remarriage started by virtue of Hindu Widows Remarriage Act, 1856. However, the aforesaid Act, has denied the propriety rights of widow upon her deceased husband's property after being remarried. This bone of contention ceases to exist by virtue of section14(1) of Hindu Succession Act, 1956.

Justice Seth has also addressed the children's rights as an issue of prominence, in the light of Geneva Declaration, Article 26 of UDHR, 1948, United Nations Declaration of the Rights of the Child, 1959, Convention on the rights of the child, 1989. Convention on the rights of the child, 1989 carries a binding legal obligation on individual states ratifying it, which stands out this Convention. Author explained the active participation of India in ratifying the Convention in 1992 and also in inserting the Article 21A in Indian Constitution, recognising the children's fundamental right to education. In furtherance of insertion of Article 21A[10], right of children to free and compulsory education Act, 2009 passed and subsequently enforced in 2010.

[8] AIR (2017) 9 SCC 1 SC.
[9] Madan Singh S/O Sumer Singh and Others v. State of Rajasthan, LQ/RajHC (1987) 707.
[10] Constitution of India 1950, Art. 21A

In the course of discussing children's rights, she has addressed the issue of girl child by highlighting the female foeticide as one of the biggest barriers in the way of protecting rights of female children. Author has enumerated Pre-Conception and Pre Natal-Diagnostic Techniques (Prohibition of sex selection) Act, 1994 as a boon in preventing sex selective abortion to a great extent. However, the critical issue of low sex ratio remains in subsistence. She has considered education as one of the most important tools in eliminating the hurdles laying in the way of attaining well balanced environment for birth and worth of daughters. Issue of increasing rate of school drop outs among girls has been raised by her, recognising child-marriage as major cause. She also highlighted the 73rd and 74th Constitutional Amendment Acts of 1993 for ensuring political upliftment of women in the society at large.

Justice Leila Seth in the capacity of author has addressed the above-mentioned issue inclusively. She has interlinked the issues of lack of education, female foeticide, child marriage, increasing rate of school drop outs among girl child and low sex ratio. Author has depicted through her writings that how a vicious cycle is formed being a causative factor behind each other. However, she has failed to mention the issue of untouchability faced by widows and role of Article 17 in criminalising such misdeeds. Low sex ratio highlighted by her as a matter of prime concern. However, study of "Fifth National Family Health Survey (NFHS)[11], 2019-2021, has turned the table, depicting India having more women than men (increase in overall sex ratio, on every 1000 men there is 1020 women)". But, at the same time sex ratio at birth continues to be lower. So, there is a partial sign of relief and hope, regarding striking a perfect balance between male and female population.

2.3. Judiciary: Gender Sensitivity & Gender Sensibility

[11] Ruchika Chitravanshi & Ishaan Gera, *'India now has more women than men but sex ratio at birth still low',* (Business Standard, 26 Nov 2021) <https://www.business-standard.com/article/current affairs/india-now-has-more-women-than-men-but-sex-ratio-at-birth-still-low-121112501539_1.html> accessed on 26 Nov 2021.

Third theme, that has been addressed by Justice Seth is 'Judiciary: Gender Sensitivity & Gender Sensibility'. She has addressed the above-mentioned issue by sighting the *Bhanwari Devi rape case*.[12] In the aforesaid rape case, court has denied the occurrence of rape on following grounds:

- Accused belong to socially respectable class
- Accused are middle aged people
- Victim belongs to lower caste community

Author has ridiculed the reasoning given by the District and Session Court, Jaipur behind the acquittal of accused in this rape case. She has quoted the statements of Justice J.S Verma given in the case of *Vishakha v. State of Rajasthan*[13] (this case filed in the pretext of Bhanwari Devi rape case, in order to ensure the enforcement of fundamental rights of working women) that- "in order to fill the void present in domestic law, due importance is to be given to international convention CEDAW which is in consonance with the law of land". In this case Justice J.S Verma has explicitly laid down Vishakha guidelines to be applied till the enactment of The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

Justice Leila Seth in the capacity of author is truly justified in highlighting 'lack of gender sensitization of Indian Judiciary' as one of the most significant barriers in rendering gender justice. In this regard a very recent judgement of Bombay High Court, can be sighted, wherein Hon'ble Justice Pushpa Ganediwala held that "groping the breasts of female child without direct skin-to-skin contact would constitute an offence of molestation under I.P.C, 1860 but it will not amount to sexual assault under the POCSO Act" [14].

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[12] Geeta Pandey, *'Bhanwari Devi: The rape that led to India's sexual harassment law',* (*BBC NEWS*, 17 March 2017) <https://www.bbc.com/news/world-asia-india-39265653>.accessed on 20 December 2021.

[13] (1997) 6 SCC 241

[14] Sneha Rao, *'Restricting touch or physical contact only to skin to skin contact absurd: Supreme court reverses Bombay H.C POCSO judgement',* (*Live Law*,18 Nov.

2.4. Criminalisation of Sexual Orientation

Fourth theme, that has been addressed is 'Criminalisation of Sexual Orientation'. She has criticised the erroneous judgement of Hon'ble Supreme Court of India, criminalising the same sex intercourse in 2014. According to her, aforesaid judgement has infringed the fundamental rights of homosexuals guaranteed under Article 14, Article 15, Article 21 of Indian Constitution and negated the right of exercising choice of sexual orientation by LGBT community.

In the capacity of author and parent she has justified herself, in enumerating the irony of fate of LGBT people. This issue has been raised in the pretext of judgement given by Hon'ble S.C in the *Naz foundation case*[15]. However, this defeat has turned its own fate in 2018 by virtue of the decision rendered by Hon'ble Supreme Court of India in the case of *Navtej Singh Johar & others v. U.O. I*[16]. Then Chief Justice of India Dipak Misra leading five judge constitution bench has unanimously held that criminalisation of private consensual sexual conduct between adults of the same sex under section 377 of I.P.C, 1860 is clearly unconstitutional. This also shows visionary approach of author.

2.5. Rights of Voiceless Prisoners and PIL

'Rights of voiceless prisoners and PIL' is the fifth theme that has been addressed by author. Justice Seth has enumerated the shift in legal approach from deterrence to rehabilitation and reform by mentioning the stance of Hon'ble S.C, recognising the prisoners as persons and also the humanitarian stance of India being the signatory of 'International Covenant on Prisoner's Rights'. She has recognised the issue of overcrowding of Indian jails, infringing prisoner's right to life with dignity[17] by sharing her experience being the head of "Justice Leila Seth

2021)<https://www.livelaw.in/top-stories/pocso-skin-to-skin-judgment-supreme-court-bombay-high-court-attorney-general-185784>accessed on 18 Nov 2021.

[15] Naz foundation v. Govt. of NCT of Delhi, 160 DLT 277.

[16] AIR (2018) SC 4321.

[17] Indian Constitution 1950, Art. 21.

Commission of Inquiry, while examining Rajan Pillai's custodial death". Overcrowding, lack of ventilation, a smaller number of toilets and urinals, unhygienic condition, rampant spread of tuberculosis among jail inmates are major reasons behind inhumane living condition of prisoners. Author stated about 'a model prison manual', framed in 2005, but it has not been yet adopted by all states. Some of the alternatives to prison system which are now part of Indian legal system have been mentioned by her:

- House arrest
- Victim offender mediation scheme
- Fines for minor offences
- Victimology- paying compensation to victims
- Open jails
- Community service
- Various forms of parole

Author has mentioned PIL as one of the most important tools in restoring the faith of voiceless prisoners in Indian Judicial system. In this regard she has sighted the case of *Hussainara Khatoon and others v. Home Secretary, State of Bihar*[18], *People's Union for Democratic Rights v. U.O. I*[19] has been referred, wherein the scope and nature of PIL has been laid down by Justice Bhagwati.

Justice Seth has addressed the 'Rights of voiceless prisoners and PIL' as intrinsically linked issues. By her writing she has shown the humanitarian aspect of judge and author, who is eagerly trying for prisoner's reforms and not for deterrence, recognising PIL as significant means to achieve the same.

[18] (1979) AIR 1369.
[19] (1982) AIR 1473.

2.6. Reforms in Judicial Administration to stop denial of Justice

'Reforms in Judicial Administration to stop denial of Justice' is the last theme for discussion. Author has enlisted some of the factors, causing delay in rendering justice leading to denial of justice:

- Huge backlog of cases
- Lack of proper court infrastructure
- Multifarious appeals from interlocutory orders
- No limitation on time for oral arguments
- Prolong delay in the recruitment of judges
- Lack of transparency in collegium system while appointing judges
- Nominal number of judges per million people

She has mentioned the 100th report of Law Commission of India, wherein "defects in law and in administrative apparatus", have been considered as one of the significant factors behind delay in rendering justice. some reforms are suggested by her:

- Ensuring decentralization in administration of justice.
- Judicious use of competent judges to handle the admissibility of cases.
- Enforcement of 77th Report of Law Commission of India, recommending the separation of investigative portion of police from that of the maintenance of law and order.
- Promptness in the appointment of judges.
- Sanctioned strength of judges should be increased.

Author has systematically pointed out the lacunae in judicial administration along with suggestive steps. However, she fails to appreciate Article 312(1) of Indian Constitution, which deals with All India Judicial Service, ensuring the enhancement in terms of judicial competence. She has rightly pointed out the inadequacy of judges in India.

This becomes quite evident by having only "21.03 judges[20] per million people".

3. Concluding Observations

All the issues have been addressed by her prominently along with the suggestions for the redressal of same. Issues discussed by author have proved its future implications in terms of LGBT rights, Triple Talaq, Marital Rape, etc. This book successfully addresses its audiences (in legal field and beyond it). It derives its relevance from the much-needed reforms that are essentially required in judicial administration and in terms of criminalisation of marital rape. Strength of the book lies in its narrative, which compels its audience to complete it in one go. Its narration is simple to understand and to grasp its essence, which is embedded in the concept of 'just being the soul of justice'.

[20] PTI, 'Judge-Population Ratio Stood At 21.03 Judges Per Million People In 2020: Law Minister', (Business world, 30 Nov 2021)< http://www.businessworld.in/article/Judge-Population-Ratio-Stood-At-21-03-Judges-Per-Million-People-In-2020-Law-Minister/06-08-2021-399663/.> accessed on 30 Nov 2021.

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