CASIHR Journal on Human Rights Practice

JULY-DECEMBER 2020

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CASIHR Journal on Human Rights Practice

Volume IV **July-December 2020** **Issue II**

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BAIL UNDER INDIAN ANTI-TERROR LAWS: THE LIBERTY JURISPRUDENCE

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Bhavi Kapur**

1. Introduction

> "*Beat me, hate me, You can never break me, Will me, thrill me, You can never kill me, Sue me, Sue me ... All I want to say is that, They don't really care about us*"
>
> Michael Jackson[1]

During what can be referred to as seventy-four long years into independence, the Indian criminal law, a remnant of the British colonisation of India, often plodded as the Indian society was seen to transmute with the advent of crimes such as economic offences etc., which were never brought to the fore in the country's less reminisced colonial days. Accordingly, the bail jurisprudence of the country was overhauled and amended from time to time. With the exalt in the anathema of terrorism and the corollary involvement of bail jurisprudence, ensued by the vivisection of the monolithic Indian soil into what is now known as the states of India, Pakistan and Bangladesh, paved the way for various anti-terror legislations over the years in order to curb the problem, with each legislation surfacing a new framework while furthering the banal genesis which can be best explained in the words of Cassandra Claire[2] as she says, *"*The law is hard, but it is the law*"*. While the fate of any criminal offender when it comes to matters of bail is governed by the axiomatic norm of "bail being a right and jail an exception*"*[3], those who classify as offenders due to their complicity in any form of terrorist or other unlawful activity are subjected to much harsher norms. Thus, as the fate of these offenders is governed by the despotic anti-terror legislation i.e. Unlawful Activities Prevention Act, 1967[4], their right to bail falls in a penumbra which was metaphorically delineated 25 years ago, in June

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1 Michael Jackson, 'They don't care about us'*, Genius, available at* https://genius.com/Michael-jackson-they-dont-care-about-us-lyrics (last accessed 10 September 2020).

2 Cassandra Claire, *City of Glass*, Walter Books, North Mankato, 2009.

3 *State of Rajasthan* v. *Balchand*, AIR 1977 SC 2447.

4 The *Unlawful Activities Prevention Act*, 1967 is the current counter-terror law in India. It was amended in 2002 to convert it into an anti-terror law. Thereafter it has been amended in 2008, 2012 and now recently in 2019.

1995 when Michael Jackson released his most controversial song, "They don't care about us", a song which protested against injustice and the social and political problems.

1.1. Prevailing Dichotomies in the Criminal Justice System

Bail as a concomitant of liberty has been primordial to the justice system ever since the curial temples were engendered as a consequence of the Assize of Clarendon in the year 1166[5]. As the constitutional precepts and criminal law are labyrinthine and inextricably woven with each other, the principle of liberty and a dignified life is the quintessence of the concept of bail and the same was augured by Lord Denning[6] as his conscientious self observed:

> *Whenever one of the King's judges takes his seat, there is one application which by long tradition has priority over all others. Counsel has but to say, "My Lord, I have an application which concerns the liberty of the subject" and forthwith the judge will put all other matters aside and hear it. It may be an application for a writ of habeas corpus, or an application for bail, but whatever form it takes, it is heard first.*

Even though bail as a concept holds much prominence under the Indian criminal system, its practice is beleaguered by the ambivalence pertaining with regards to the notion of individual liberty and the interests of the society. This two thronged model was first articulated by Herbert Packer when he whelped[7] the 'crime control model' and the 'due process model'. As delineated by Packer, the 'crime control model' aims at the 'repression of criminal conduct' and "primary attention be paid to the efficiency with which the criminal process operates to screen suspects, determine guilt, and secure appropriate dispositions of persons convicted of crime."[8]This efficiency is in furtherance of protecting the social interests and placing them over the norms of individual liberty. While the 'due process model' on the other hand encourages the courts to act as the pantheons of liberty and protect the principle of liberty as barest bones by placing them over the interests of the society. With little variegation in order to overcome the lacunas in the models propounded by Packer, Chandra and Satish[9] suggest the adoption of the 'liberty

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5 Ernest F. Henderson (ed.), *Select Historical Documents of Middle Ages*, University Press of Pacific, 1896.

6 Tom Denning & Baron Denning, *Freedom under the Law,* Stevens & Sons. Ltd., 1949.

7 Herbert L. Packer, "Two Models of the Criminal Process", *University of Pennsylvania Law Review,* Vol. 113, No. 1, November 1964.

8 *Id*., at p. 9.

9 Aparna Chandra and Mrinal Satish, "Criminal Law and the Constitution", *The Oxford Handbook of the Indian Constitution*, 2016, at pp. 794-795.

perspective' and the 'public order perspective.' While the former being in tandem with Packer's 'due process model' is a paradigm for the promotion of liberty over state interests, the latter is in congruity with the 'crime control model' and avers the expansion of state powers while the norm of individual liberty is constricted. With terrorism being abhorred and vituperated as the greatest sin afflicted upon mankind and the greatest offence that can be committed against a state, ensued not by religion but by fundamentalism[10], the bail matters of offenders governed by the anti-terror law often find their fate submitted to what Packer calls the 'crime control model' and what Chandra and Satish term as the 'public order perspective'. The same posits doubts regarding the principle of "bail a right and jail an exception"[11]as a reality or a phantom. Accordingly, the observations of Justice Krishna Iyer[12] become cogent in the light of the existing doubts as he expresses,

> *Hopefully, one wishes that socio-legal research projects in India were started to examine our current bail system. Are researchers and jurists speechless on such issues because pundits regard these small men's causes not worthwhile? Is the art of academic monitoring of legislative performance irrelevant for India?*

2. The Human Rights of Personal Liberty and Presumption of Innocence

To prevent what Lord Denning[13] described as "they have lasted so long as to turn justice sour", the Indian Supreme Court has time and again reiterated the general principle of "bail a rule and jail an exception", taking into consideration the ability of trials to extend or prolong over aeons and the exorbitant amount of occupancy level of prisons by the under-trial prisoners in India. Justice V.R. Krishna Iyer explaining the rationale behind the general principle of bail, in *Gudikanti Narasimhulu* v. *Public Prosecutor*[14]astutely recorded,

> *The issue of bail is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process... After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of procedure established by law. The last four words of Article 21 are the life of that human right.*

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10 Abhijit Naskar, *Illusion of Religion: A Treatise on Religious Fundamentalism*, Createspace Independent Publishing, 2017.

11 *State of Rajasthan* v. *Balchand* AIR 197 7 SC 2447.

12 *Moti Ram* v. *State of M.P* AIR 1978 SC 1594.

13 *Allen* v. *Alfred Mc Alpine* (1968) (I) AIIER 543.

14 *Gudikanti Narasimhulu* v. *Public Prosecutor* (1978) 1 SCC 240.

The general principle which as highlighted by the Apex Court being in line[15] with the 8th Amendment to the American Constitution and Article 9(3) of the International Covenant of Civil and Political Rights, is premised on the belief that the accused shall not undergo punishment before his guilt is established as the Indian criminal system similar to the American criminal system[16] is fuelled by the principle of presumption of innocence[17] of the accused and the same was expounded by the Supreme Court in *Gurbaksh Singh Sibbia* v. *State of Punjab*[18], where the Court further observed that since presumed to be innocent, the accused shall be entitled to his freedom which will further place the accused in more comfortable shoes to defend himself. Even though bail as a concept in its entirety is obscured by the predilection of the judges in determining the right, with judicial decisions oscillating in favour and against the principle, in matters of terrorism the courts have witnessed the reversal of the principle of presumption of innocence, further whittling down the rule of bail. The same is egregious from the recent judicial temperament in such matters or from the juxtaposition of judicial attitude or the laxity extended for bail in offences covered under Prevention of Money Laundering Act, 2002 (PMLA) or other laws.[19]

2.1. Bail under TADA, 1987: The Two-Tier Test

The first anti-terror law of India, Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) legislated and rather adopted in a scurried fashion by the President with the abstinence of both the Houses of the Parliament, was an attempt[20] to legislate a law which would fill the void created by a lack of anti-terror law in the post-independence India and for combating terrorism as it was seen to be besieging our nation. The law even though belonging to the post-independence India had visible traces of the canonical despotic laws during the colonial regime such as the Rowlatt Act, 1919[21], which ultimately became the cause of its epitaph.

The bail provision under the legislation was provided under Section 20(8), with little variegation from the current provision under Section 43D(5) of UAPA, it

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15 *Dataram Singh* v. *State of U.P* (2018) 3 SCC 22.
16 *Coffin* v. *United States* 156 US. 4 32 at 435 (1895).
17 *Emperor* v. *HL Hutchinson* AIR 1931 All 356.
18 *Gurbaksh Singh Sibbia* v. *State of Punjab* (1980) 2 SCC 565.
19 *Nikesh Tarachand Shah* v. *UOI* (2018) 11 SCC 1; *Ankush Kumar* v. *State of Punjab* (2018) SCC Online P&H 1259.
20 Shruti Bedi, *Indian Counter Terrorism Law*, Lexis Nexis, India, 2015.
21 Durba Ghosh, *The Reforms of 1919: Montagu-Chelmsford, the Rowlatt Act, Jails Commission and the Royal Amnesty*, Cambridge University Press, 2017.

also provided for the two tiered test where the public prosecutor was to be afforded with an opportunity to contradict the application for bail, and bail was to be granted where the court had reasonable grounds to believe about the lack of complicity of the accused or the likelihood of his committing an offense while being released on bail. Accordingly, TADA did not empower the designated court to grant bail, on the contrary it served as a restriction upon the right to bail of such accused[22].

The provision was discussed at length by the Supreme Court while deliberating upon the subject of its constitutionality in *Kartar Singh v. State of Punjab*[23], wherein the Court presented a close comparison between the twin-test provided under Sec. 437of the CrPC and Section 20(8), reaching the conclusion that the twin test under Section 20(8) "was in consonance" with the conditions for bail prescribed under Section 437of the CrPC. The Court further averred the prosaic and archaic contention of the interest of the victim being balanced against the liberty interest of the accused. The same resulted in little abyss being devoted to determining what constituted as 'reasonable grounds' for the purpose of granting bail.

With the *Kartar Singh* judgment the Supreme Court not only determined the less fortunate fate of those accused for offences contained under TADA but also displayed its stolid attitude towards the constitutional precept of liberty. Accordingly, when in *Hitendra Vishnu Thakur* v. *State of Maharashtra*[24] the Supreme Court recognized the need for independent application of mind in performing the onerous duty and scrutinizing the material to see "whether the provisions of TADA are even prima facie attracted", the same was believed to be once in a blue moon miracle ensued by the ephemeral dispelling of subliminal acts of judicial discretion.

2.2. Bail under POTA: A Stringent Outlook

With the freshet of reports regarding the omnibus application of the TADA Act resulting in about more than 76,000 persons being accused in a decade with the conviction rate as low as 4%[25], the very pen with which the legislation was drafted, dug its grave as it lapsed in 1995.

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22 *Hitendra Vishnu Thakur* v. *State of Maharashtra* (1994) 4 SCC 602.
23 *Kartar Singh* v. *State of Punjab* (1994) 3 SCC 569.
24 *Supra* note 22.
25 "Black Law and White Lies- A Report on TADA, 1985-1995", *Economic & Political Weekly*, Vol.30, No. 18-19, 6 May 1995.

With TADA being a concept of the past, Prevention of Terrorism Act, 2002 (POTA)[26] came into the picture as the conscience of the global community was shaken after the attack on twin towers in New York and especially of India which was also jolted by the Parliament attack of December, 2002. Accordingly, POTA [27] which was introduced not only to curb terrorism but with the idea of remedying the ills of TADA, rather furthered an even more stringent pre-trial bail policy. Section 49(6) and (7) of the Act provided for the same twin-test provided for under TADA with the exception that it removed the requirement for judicial satisfaction pertaining to the accused's complicity or his ability to commit an offence while out on bail. The same was replaced with the wordings, "satisfied that there are grounds for believing that he is not guilty of committing such offence." To worsen a provision which had nothing right about it[28] just like a black man's left arm[29] , the accused could apply for bail under the provisions of CrPC only after the expiry of one year from the date of detention.

Accordingly, with less respect for the law, the constitutionality of the same was challenged before the Supreme Court in *PUCL* v. *UOI*[30]. The petition was nothing but a futile attempt to witness the parody wherein the Court harped the same incantations regarding 'compelling state interests'. The Court again forwarded a comparison of provisions, only this time Section 49(6) and (7) were compared with 20(8) of TADA and since the latter was upheld to be constitutional, the former enjoyed the same status as the Supreme Court was of the opinion that POTA deals with offenses "more complex than ordinary offenses". Even though POTA met its end in 2004 after reporting of gross human right violations in the application of the Act, especially in the State of Gujarat, the twin test still continues to exist, now only in a different body which is the UAPA, while our democratic precepts face what can be referred to as an existential crisis.

2.3. Bail under UAPA: A Burden Lightened?

Compared to the previous anti-terrorism laws in India, the conditions of bail under Section 43D (5) of the Unlawful Activities Prevention Act, 1967 (UAPA) impose

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26 Jayant Krishnan, "India's Patriot Act: POTA and the Impact on Civil Liberties in the World's Largest Democracy", *Law & Inequality: A Journal of Theory & Practice*, Vol. 22, No. 4, December 2004.

27 Christopher Gagne, "POTA: Lessons learned from India's Anti-Terror Act", *Boston College Third World Law Journal,* Vol. 25, No. 9, January 2005.

28 Ujjwal Kumar Singh, "Democratic Dilemmas: Can Democracy Do without Extraordinary Laws", *Economic & Political Weekly,* 1 February 2003, at p.1.

29 Aarish Chhabra, *The Big Small Town: How Life looks from Chandigarh* , Unistar Books Pvt. Ltd., India, 2017.

30 *PUCL* v. *Union of India* (2004) 9 SCC 580.

a lighter burden on the courts. While previous anti-terror statutes required the recording of an opinion by the court that there are reasonable grounds for believing that the accused is "not guilty" of the alleged offence, UAPA requires that there are reasonable grounds for believing that the accusation against such person is *"prima facie"* true.

For the grant of bail under S. 43D(5), UAPA the conditions required to be fulfilled are that the offence committed must be punishable under Chapter IV and VI, UAPA; case diary and charge-sheet must have been placed on record for the perusal of the court; and most significantly the accused is to be denied bail *if there are reasonable grounds to believe that the accusations are prima facie true*. The expression "prima facie true" would mean that the materials/evidence collected by the investigating agency[31] in reference to the accusation against the concerned accused in the FIR, must prevail until contradicted and overcome or disproved by other evidence. On the face of it, it must show the complicity of the accused in the commission of the stated offence. Thus, the degree of satisfaction is lighter when the court has to opine that the accusation is "prima facie true", as compared to the opinion of accused being "not guilty" of such offence.[32]

While the 2008 amendment has facilitated a little laxity to the existing anti-terror law of India, the vacillating judicial decisions due to different judicial temperament of benches and the lack of acceptability of the general rule of bail regarding "bail being a right and jail an exception" furthers the continuum of a state where the words of Justice Krishna Iyer will always be relevant as he pronounces, "The question of Bail or Jail? ... belongs to the blurred areas of criminal law."[33]

3. Is Justice Blind and Lame?

In the light of recent events the epigram pronounced by a zealot of constitutional precepts, Nani A. Palkhivala becomes more relevant than ever as he sharply observed that, "Justice has to be blind, but I see no reason why it should also be

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31 Namit Saxena, 'Regular bail under UAPA qua terror acts: Outshylocking Shylock' (2020) *Bar and Bench*, *at* https://www.barandbench.com/columns/regular-bail-under-the-uapa-1967-qua-terror-acts-outshylocking-shylock (last accessed 13 September 2020).

32 Vrinda Bhandari, "Bail and Terror Offences: An Analysis" , Salman Khurshid, Sidharth Luthra, Lokendra Malik and Shruti Bedi (eds)., *Taking Bail Seriously: The State of Bail Jurisprudence in India,* Lexis Nexis, New Delhi, 2020, at p. 370.

33 *Narasimhulu* v. *Public Prosecutor* (1978) 1 SCC 240.

lame. It just hobbles along barely able to walk."[34] The refusal of bail to the student activist Safoora Zargar[35] who was accused of making ' inflammatory speeches' at Chand Bagh, Delhi and being involved in conspiracy to block roads while taking part in anti-CAA protests, by the Delhi Court is an exercise of judicial discretion which is unpalatable for a nation which holds liberty as being integral to human dignity[36]. She had been booked under various provisions of IPC along with sections 13, 16, 17 and 18 of UAPA in relation to an alleged conspiracy behind the riots. After judicial scrutiny, bail was denied to her initially due to the embargo under S. 43D(5), UAPA. The Delhi High Court later granted her bail on June 23, 2020 on humanitarian grounds on account of her pregnancy. Surprisingly, both the courts failed to discuss the essence of S. 43D(5), UAPA. The Sessions court seemed to have applied it incorrectly to justify the denial of bail and the Delhi High Court made no mention of the applicability[37] of the provision while granting bail. This attitude reminds us of the human side of those who are consecrated on the curial benches and their susceptibility to make errors, as has been explained by the English poet Alexander Pope as he pronounced the adage "to err is to human...".

While the Delhi Sessions court order denying bail is devoid of any explanation pertaining to how the acts of Zargar come under the ambit of 'terrorist activities' under Chapters IV and VI. The order is a travesty in the sense that with limited application of mind it merely states that the acts amount to 'unlawful activity' under S. 2(o), UAPA, further upending the well chiselled distinction between 'unlawful activity' and 'terrorist activity' as provided under UAPA[38]. The order is dishevelled in the sense that it is devoid of minimum legal abyss as it fails to recognise that until and unless the court was *prima facie* of the opinion that Safoora Zargar is involved

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34 Jignesh R. Shah, *The Wit & Wisdom of Nani A. Palkhivala,* Rupa Publications India, New Delhi, 2015, at p. 17.

35 Deepriya Snehi, 'Safoora Zargar bail order doesn't satisfy criteria for prima facie case under section 43D(5) of UAPA' (2020) *Live Law, at https://www.livelaw.in/columns/safoora-zargar-bail-order-doesnt-satisfy-criteria-for-prima-facie-case-under-section-43d5-of-uapa-158041* (last accessed 14 September 2020).

36 *Maneka Gandhi* v. *UOI* (1973) 3 SCR 530.

37 Uday Bedi, 'The Safoora Zargar bail order: An exercise of complete judicial oversight?' (2020) *Bar and Bench, at https://www.barandbench.com/columns/safoora-zargars-bail-order* (last accessed 16 September 2020).

38 Shruti Bedi, 'Bail Jurisprudence remains a Blurred Legal Arena' (2019) *The Tribune*, *available at https://www.tribuneindia.com/news/comment/bail-jurisprudence-remains-blurred-legal-arena/842801.html* (last accessed 17 September 2020).

in a terrorist activity, any reference to S. 43D(5), UAPA is completely illegal. While referring to Zargar's speech as 'inflammatory speech', the court did not discuss the content of the speech nor did it venture to explain the nature and contours of any conspiracy. It simply stated that the conspiracy would "lead to disorderliness and disturbance of law and order at an unprecedented scale". The court by relying on vague and ambiguous terminology to invoke S. 43D(5), UAPA has abdicated its responsibility of exercising judicial discretion with caution, paying little heed to the caveat issued by the Supreme Court in *Chaman Lal* v. *State of U.P.*[39]

The Supreme Court in *NIA* v. *Zahoor Ahmed Shah Watali*[40] held that at this stage of granting bail elaborate "dissection or examination of the evidence is not required"[41] and the Court is to "arrive at a finding on the basis of *broad probabilities"* instead of "weighing the evidence meticulously."[42] However, the sessions court failed to record any finding which justified the invocation of S. 43D(5), UAPA. Grant or denial of bail in terrorism-related offences under UAPA is a power which lays down a test of a lesser degree than TADA & POTA. The Supreme Court has, however in the *Watalicase*, released the court even from this responsibility by asking the court to 'merely' record a finding on the basis of *broad probabilities regarding involvement in commission of stated offence or otherwise.*[43]

The Delhi High Court while granting bail on humanitarian grounds to Zargar, has conducted itself like any court exercising powers under Cr.P.C. without any reference to the validity of invocation of S. 43D(5), UAPA. Thus, the judgment establishes what Charles Dickens was alluding to, when he penned, "This is court of chancery, which so exhausts finances, patience, hope."[44]Therefore, it is imperative that the judiciary presents its astute and conscientious self while adjudicating such matters, else the judgments delivered will be less venerated and will display what the former US Representative of State Lamar S. Smith desired to express when he said, "Judicial abuse occurs when judges substitute their own

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39 *Chaman Lal* v. *State of U.P* (2004) 7 SCC 525.
40 *National Investigation Agency* v. *Zahoor Ahmad Shah Watali* (2019) 5 SCC 1.
41 *Ibid*.
42 *Id.* at p. 38, 46. Also see Bhandari, *Supra* note 32, at p. 365, 379.
43 Bhandari, *Ibid*.
44 Charles Dickens, *Bleak House,* Penguin Books, 2006, at p. 120.

political views for the law."[45]

4. Oscillating Judicial Attitudes

S.B. Pettingill rightly remarked, "an excess of law is despotism, from which free men revolt."[46] Recognising this principle the Supreme Court in *Nikesh Tarachand Shah* v. *Union of India*[47] declared Section 45, PMLA as unconstitutional. The bail provision under Section 45 of PMLA similar to its counterpart i.e. Section 43D (5), UAPA, presented the accused with a twin test for the grant of bail. Accordingly, while the accused being prosecuted under either of the two legislations was bereft of the right to anticipatory bail, the same being proscribed, the provision for ordinary bail was also very stringent. As per the twofold test, before granting bail the public prosecutor was to be provided with an opportunity to challenge the application of bail as the same was essential and furthermore the court was obligated to deny bail if it was of the opinion that there are reasonable grounds to believe that the accused was guilty of the offense or was to likely commit any offense while released on bail. The Supreme Court exercising its power of judicial review, astutely recognized the anomalies engendered by the provision within the umbrella of bail jurisprudence and the insidious curb on the right to liberty imposed by the provision which would further bulwark the constitutional precepts furthered by the bastion of these fundamental rights i.e. the magna carta of India.[48] However, the provision under UAPA for grant of bail remains unaffected as the same is armoured by the defence of public interest and accordingly, the Supreme Court juxtaposed the provisions under Section 20(8) of TADA with Sec 45 of PMLA, explaining how the same was upheld in the *Kartar Singh* judgment[49] as the provision furthers a compelling state interest following the 'crime control model'.

Accordingly, the judgment has further ensued quandary as on one hand while dealing with Sec 45 the Supreme Court has delivered a judgment which is nothing but a rendition of the role of the guardian of the rights of the people, a role that the

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45 Eric A. Posner, "Does Political Bias in Judiciary Matter? Implications of Judicial Bias Studies for Legal and Constitutional Reforms", *Chicago Unbound*, No. 377, 1 January 2007.

46 Henry Hazlitt, *The Free Man's Library*: *A Descriptive and Critical Bibliography,* Kessinger Publishing, LLC, 2010, at p.43.

47 *Supra* note 19.

48 Shruti Bedi, "Bail under Prevention of Money Laundering Act, 2002: A Critical Analysis of Nikesh Tarachand Shah Judgment", in Salman Khurshid et al. *Supra* note 32.

49 *Kartar Singh* v. *State of Punjab* (1994) 3 SCC 569.

Court was all along fated to deliver[50]. While on the other hand the lack of laxity in bail matters pertaining to terror offenses has witnessed the courts furthering the parochial and canonical notions upheld by the English Lords ruling over the Indian colonial courts, displaying a retrogressive march[51] astray from the idea of liberty as dreamt by those who struggled for this state of democracy and as provided by this very court when it pronounced its landmark judgment in *Maneka Gandhi* v. *Union of India*[52].

This juxtaposition of bail under UAPA with bail under other penal legislations becomes much more jagged in light of the bail granted by the Court to student cum environmental activist Disha Ravi in what has popularly came to be known as the *Toolkit case*'[53]. The order passed by the very court which denied bail to Safoora Zargar in a case with facts bearing almost no or little variegation from the facts manifested in Disha Ravi case, besides the factum of the former being charged with sedition under UAPA and latter with sedition simply as provided under section 124 A of the Indian Penal Code[54], while witnessed the court shrift from the antediluvian notions usually upheld by the Court against the concept of bail, as it ensured that the precepts of liberty were to be the leitmotif upheld in such cases, such volte face in the attitude of the court seems to have accentuated the belief that irrespective of similar facts or circumstances what is otherwise allowed as a right under other penal legislations cannot be extended as a right in a case stamped with charges under UAPA, as for these cases violence will not be a gravamen for the offence under section 2(o) and the rule has been pronounced with a sense of caution that, "when you choose to play with embers, you cannot blame the wind to have carried the spark a bit too far and spread the fire."

4.1. Liberty is not a Gift

As the historians in their sense of hedonism comfort themselves with the belief that the Indian Constitution was penned with the blood, toil, tears and sweat of those who struggled to ensure such a consequence of its existence, this bastion of fundamental rights is seen to dominate all subjects of law, with the fundamental

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50 Ravi Nair, "The Unlawful Activities (Prevention) Amendment Act, 2008: Repea ting Past Mistakes", *Economic & Political Weekly,* Vol. 44, No. 4, 24 January 2009.

51 Anand Teltumbe, "On the Urban Maoists", *Economic& Political Weekly,* Vol. 53, No. 26-27, 30 June 2018.

52 *Supra* note 36.

53 *State* v. *Disha A. Ravi,* Bail Application No. 420/2021.

54 Gautam Bhatia, 'Safoora Zargar and Disha Ravi: A Tale of Two Bail Orders' (2021) *Live Law, at https://www.livelaw.in/columns/safoora -zargar-disha-ravi-bail-uapa-sedition-caa-nrc-farmers-protest-twitter-tool-kit-delhi-riot-170423* (last accessed 15 April 2021).

rights being consecrated as the quintessence of our democracy. Accordingly, like every other fundamental precept the fundamental right to liberty was promoted and propagated in every possible sense in the post- independence India. Its sublimity has been best expressed by Nani A. Palkhivala in his inimitable style as he pronounced,

> *The Constitution represents 'Charters of power granted by liberty', and not 'Charters of liberty granted by power'. Liberty is not the gift of the state to the people; it is the people enjoying liberty as the citizens of a free republic who have granted power to the legislature and the executive.*[55]

Thus, the idea of ivory-towerish applicability of criminal law was not only unacceptable but impossible for attaining and preserving the democratic ideals on which this country is premised. Accordingly, the criminal law principles are seen to be applicable in tandem with the constitutional precepts.

This explains why post-independence, the Indian justice system guaranteed the axiomatic right to life and liberty to its people. "Bail, and no Jail" was the tradition followed by the Indian judiciary, which protected personal liberty while deciding matters of bail. The vesting of the discretion in the courts is considered to be in trust, which must be exercised with judicial caution and circumspection.[56] However, the position under anti-terror laws is different as the judicial incantation of the 'exceptional' times of terrorism has resulted in the except--ional anti-terror laws normalising extended periods of pre-trial detention and stringent bail provisions, such that bail has become the exception and jail, the norm.

4.2. A Ray of Hope

Recently, while pronouncing an unprecedented judgment, granting bail to an under trial prisoner charged with offences under UAPA, the Supreme Court seems to have adopted the principle pronounced by Felix Frankfurter who served as the Associate Justice of the Supreme Court of United States, when he observed that, "Judicial judgment must take deep account... of the day before yesterday in order that yesterday may not paralyze today."[57]Accordingly, as the Supreme Court blew life into the adage, 'Bail is a right and jail an exception' which otherwise had a wishy-washy standing in cases wherein the accused were charged with offences as

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55 Shah, *Supra* note 34.
56 Bedi, *Supra* note 38.
57 Daniel Rice, "Felix Frankfurter and Reinhold Niebuhr: 1940-1964", *Cambridge University Press,* Vol. 1, No. 2.

provided under UAPA, such retrogradation seemed to have shred, which in the eyes of the court seemed to be yesterday's notions against the concept of bail in order to protect the interest of the state, as the same were cankerous to the lofty ideals of liberty.

The Supreme Court bench comprising of Justices N.V. Ramana, Surya Kant and Anuradha Bhose in *Union of India* v. *K.A. Najeeb*[58], while dismissing the Centre's appeal against the 2019 order passed by the Kerala High Court, parted its way from the bare condition that the accused has to demonstrate that the prosecution has failed to establish that a 'prima facie' case exists against the accused in order to be able to exercise the right of bail. In the instant case, the accused who was charged in light of the facts that a few members of the Popular Front of India (PFI) had chopped off the palm of a college professor, in furtherance of what they regarded as vigilante justice as the professor was believed to have set a 'blasphemous' question paper, had already served four years as an under trial prisoner and after circumspection, the factum of 276 witnesses yet to be examined was acknowledged and accordingly the accused was released on bail in contradiction to the practice in vogue where bail under UAPA is recognized as an unattainable dream and not a reality.

The Supreme Court relied on the pronouncement in *Shaheen Welfare Association v. Union of India*[59] wherein for serious offences under TADA, the Court had observed that violation of a fundamental right could serve as a premise for grant of bail even if the case is under stringent criminal legislations such as anti terror laws, delay in trial would still be a ground for granting bail[60]. Accordingly, as the fundamental right of the speedy trial of the accused was being infringed[61], the same entitled him the right to bail. The Court also observed that in *Angela Harish Sontakke* v. *State of Maharashtra*[62], the Apex Court had granted bail to the accused irrespective of the application of Section 43D(5) and the same was further adopted in *Sagar Tatyaram Gorkhe* v *State of Maharashtra*[63], wherein the accused was an under trial prisoner in a case with charges under UAPA and had already spent four years in jail, and since 147 witnesses were yet to be examined, he was released on bail.

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58 *Union of India* v. *K.A. Najeeb,* Special Leave Petition (Cr.) No. 11616 of 2019.

59 *Shaheen Welfare Association* v. *Union of India,* 1996 SCC (2) 616.

60 *Paramjeet Singh* v. *State (NCT of Delhi),* AIR 2000 SC 3473 B*; Baba alias Shankar Raghuman Rohida* v. *State of Maharashtra* (2005) 7 SCC 387.

61 *Hussain* v. *Union of India,* Criminal Appeal No. 511 of 2017.

62 *Angela Harish Sontakke* v. *State of Maharashtra* (2016) CCR 374 (SC).

63 *Sagar Tatyaram Gorkhe* v. *State of Maharashtra* SLP(CRL) No. 7949 of 2015.

While the judgment of the Supreme Court can be deemed as a ray of hope in the penumbra in which the question of bail under UAPA whether a right or not falls. Only time shall tell as to whether this judgment will be the silver bullet which provides magical answers to the complicated question of bail under UAPA, with the trial court and High Courts observing the principle laid down in this judgment to grant bail or whether the same would simply be another addition to the omnibus list of precedents which with the passage of time have only engendered the labyrinth pertaining to right of bail under UAPA, while the same remains unanswered.

5. Bail Jurisprudence: An Assessment

21st Law Commission of India's, 268th Report's concluding lines commence with the realisation, "that existing system of bail in India is 'inadequate' and 'inefficient' 'to accomplish' its purpose." [64] These lines shall be considered as the beginning of what can be called as the much-needed journey for revamping the Indian bail jurisprudence which currently is in a state of ramshackle.

In order to bolster the practice of the general principle of 'bail being a rule and jail an exception' the existing baleful and ignoble bail provisions under UAPA must be revised after thoughtful consideration to the extent of laxity that can be afforded for stimulating what can be called as a balance between the 'individual interests of liberty' and the 'compelling state interest'. The twin test under Section 43D(5) which is nothing more than an albatross stuck in the neck of the accused needs to be mellowed down such that a window for promoting and propagating the constitutional precept of liberty in cases where the victim interest is not at stake can be created.

Furthermore, the court should strictly look down at the practice of relay detention[65] which enables the investigating authorities to detain the accused beyond the prescribed period without any substantial evidence against him on the mere premise of more time required for the purpose of investigation. A certain degree of judicial activism can prevent the law from its dotage. If the Court carries the spirit of the Constitution and is not governed by its aversion for the offense of terrorism, then it can provide succour to accused by following the dictates of the

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64 'Two Hundred and Sixty Eighth Report on 'Amendments to the CrPC, 1973 – Provisions Relating to Bail'', *The Law Commission of India, available at http://lawcommissionofindia.nic.in/reports/Report268.pdf* (last accessed 15 September 2020).

65 Abhishek Manu Singhvi, "India's Bail Jurisprudence: Need for Urgent and Comprehensive Revamp", Salman Khurshid et al., *Supra* note 32.

conscience of the Indian Constitution. Lastly, lucidity on the subject can be provided by conducting juridical research which can be mulled upon by expert judicial minds, the outcome of which can be incorporated to reform the law in a manner that it arouses respect among the people. As the famous American lawyer Louis D. Brandeis says, "if we desire respect for the law, we must first make the law respectable."

6. Conclusion

If the bail provision as provided under UAPA was to be put to test for its depravation of liberty as provided under Article 21, the conclusion can be best worded by the observation of Justice V.R. Krishna Iyer when he remarked, "law is vicariously guilty of dilatory depravation of citizen's liberty, a consummation vigilantly to be vetoed".[66] However, if a more staunch opinion was to be taken into consideration then Ashworth's contention would suffice as he pronounced, "a right is not a right if it can simply be defeated by public interest."[67]The true answer however lies in the art of harmonious construction with a balanced recognition of the constitutional right of liberty and safeguards for countervailing the anathema of terrorism.

The Indian courts not unbeknownst to this principle of harmonious construction have adopted it time and again when their wits were tested and thus, the question why not now? Why not in matters of bail? The answer to these questions partly lies in the stringent anti-terror legislations which have curtailed the powers of judiciary, not lending itself to a liberal understanding of the subject. The remnant of which can be answered by the basic human nature of fear, especially in a state which has witnessed the 26/11[68] or Uri[69]attacks, or a nation which is invidiously placed between neighbours sharing no bonhomie with them. Thus, the aversions of the judicial benches which are elicited by the presiding fear not only in their own hearts but in every Indian heart, though not desired can't be avowed as irrational. However, what needs to be reminisced is that it was lucidity and conscientious application of judicial minds in the form of judicial activism which led India out of

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66 *Babu Singh* v. *State of U.P.* (1978) AIR 527.

67 Andrew Ashworth, "Four Threats to the Presumption of Innocence", *Int'l Journal of Evidence and Proof*, Vol. 10, No. 4, 2006.

68 Debanish Achom, '26/11 Mumbai Attacks: How India fought back – A Timeline' (2018) *NDTV*, *at https://www.ndtv.com/mumbai -news/26-11-mumbai-attacks-how-india-fought-back-a-timeline-1953099* (last accessed 15 September 2020).

69 Mukhtar Ahmad, Rich Philips & Joshua Berlinger, ' Soldiers killed in army base attack in Indian-administered Kashmir' (2016) *CNN*, *at https://edition.cnn.com/2016/09/18/asia/india-kashmir-attack/index.html* (last accessed 15 September 2020).

the dark times like the 1975 emergency.[70] While fear as a governing principle needs to be ruled out, the need for laxity in the existing provisions is to be understood.

The Supreme Court in *Veena Sethi* v. *State of Bihar*[71] in its desire to protect the rights of the people especially the downtrodden stated that, "the rule of law does not merely exist for those who have the means to fight for their rights and very often for the perpetuation of status quo…but it exists also for the poor and the downtrodden… and it is solemn duty of the court to protect and uphold the basic human rights of the weaker section of the society."[72] It is essential to comprehend that the life and liberty of any person cannot be taken for granted. Accordingly, it is the duty of the state to safeguard the rights of its citizens.[73] The citizens cannot be deprived of their rights except in consonance with law. The Indian bail jurisprudence can be refurbished by doing away with the penumbra that surrounds it while India marches into the twenty first century with a stronger spirit of democracy where Justice Krishna Iyer's question "Bail or Jail?" no longer remains unanswered.

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70 'The Darkest Phase in Indira's tenure as PM' (2019) *The Economic Times, at https://economictimes.indiatimes.com/news/politics-and-nation/democracy-interrupted-some-lesser-known-facts-about-emergency-1975-77/emergency/slideshow/69940337.cms* (last accessed 17 September 2020).

71 *Veena Sethi* v. *State of Bihar* (1982) 2 SCC 583.

72 *Id*, at p. 586.

73 Sudha Ramalingam, 'Bail courts should not violate basic human rights of accused' (2017) *DT Next*, *at https://www.dtnext.in/News/Opinion/2017/03/28113733/1030027/Bail -courts-should-not-violate-basic-human-rights-.vpf* (last accessed 17 September 2020).

UNDERSTANDING GENDER IDENTITY AND SEXUAL ORIENTATION: A RELOOK INTO THE HUMAN RIGHT OF LGBT'S IN INDIA

Parvathi S. Shaji*

1. Introduction

> *"Neither the existence of national laws, nor the prevalence of custom can ever justify the abuse, attacks, torture and indeed killings that gay, lesbian, bisexual, and transgender persons are subjected to because of who they are or are perceived to be. Because of the stigma attached to issues surrounding sexual orientation and gender identity, violence against LGBT persons is frequently unreported, undocumented and goes ultimately unpunished. Rarely does it provoke public debate and outrage. This shameful silence is the ultimate rejection of the fundamental principle of universality of rights."*
>
> *Loise Arbour, Former UN High Commissioner for Human Rights 1*

As rightly addressed by Loise Arbour, in this liberal economic and world culture, the stressing element of addressing and legitimizing the concerns of persons with different sexual orientation or gender identity and protection of their human rights in par with considering them equal to other citizens. This position is frequently a source of concern for several judicial and legal professions around the world, as they are tasked with the primary responsibility of protecting and ensuring the human rights of people of different sexual orientations and gender identities. As cultural standards and perceptions of propriety have revolved around religious morality ideologies. The framing of laws in relation to almost majority of spheres especially with reference to sex and gender circumscribed on the religious, moral ideologies.[2] Therefore without any benefit of doubt, the framing of any legal framework concerning sexual orientation and gender identity are strongly rooted deep within societal perceptions that reflect these beliefs. And while considering the scientific discourses, during the nineteenth and twentieth centuries saw the rise of science as a forum to suppress homosexuality and in par with that biological, medical, criminological and sociological approaches several theories emerged to justify the containing of

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1 Ms. Louise Arbour, The United Nation High Commissioner for Human Rights, made the statement while making a presentation at the International Conference on LGBT's Human Rights, Montreal, 26 July 2006.

2 Michael Goodich, The Unmentionable Vice: Homosexuality in the Later Medieval Period, 111 (1979).

homosexuality.[3] Further, in addition to moral and scientific contentions, the question of homosexuality has also been exploited for political oppressions also. Moreover, the sense of nationhood and culture relativism are being interchangeably used to oppose the movement towards decriminalizing homosexuality, stating in lieu with the aspect that it is forbidden to nation's identity, culture and values. Thus, there stand a long way addressing the question of movement towards recognition by enriching the mission towards equalizing the status and position of the homosexual in all respects.[4]

2. Clarifying the Various Concepts

It recalls for a conceptual clarification of some of the terms and phrases prior addressing the issues and concerns in relation to the same.

2.1. Defining Sexual Orientation

The terms such as "gay"," lesbian", "transgendered", "transsexual" in describing one's sexual orientation.[5] The "Yogyakarta Principles on the Application of International Human Rights Law to Sexual Orientation and Gender Identity (Yogyakarta Principles)" define sexual orientation in a meaningful way.[6] "According to the preamble of the Yogyakarta Principles:

> *"refers to each person's capacity for profound emotional, affectional and sexual attraction to, and intimation and sexual relations with, individuals of a different gender or the same gender or more than one gender"*

Accordingly, the status of one's sexual orientation determines the category the person belongs to taking into concern the person's experience or sexual attraction.[7] Further, the sexual orientation of a person is divided in a series of descriptions possessing

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3 See Johansson, Warren and Percy, William A, Homosexuals in Nazi Germany, 118 (7th ed. Henry Friedlander, 1990); Lively Scott, Homosexuality and the Nazi Party 52 (George A. Rekers ,1996).

4 Pieter R. Adriaens and Andreas De Block, The Evolution of a Social Construction,49 Perspect. Biol. Med. 570,585 (2006).

5 Pickett, Brent, Homosexuality- The Stanford Encyclopedia of Philosophy 791(2008).

6 "The Yogyakarta Principles are a collection of guidelines for how international human rights legislation should be applied to issues of sexual orientation and gender identity. The Principles establish binding international legal standards that all countries must adhere to. A renowned group of international human rights experts convened in Yogyakarta, Indonesia in 2006 to define a set of international principles relating to sexual orientation and gender identity in response to well-documented patterns of abuse. The Yogyakarta Principles are a universal guide to human rights that affirms binding international legal principles that all states must adhere to. They envision a world in which all persons born free and equal in dignity and rights are able to exercise their unique birthright."

7 Miller, Alice, Sexual Rights Words and their Meanings: The gateway to effective human rights Work on Sexual and Gender Diversity, paper submitted for the Yogyakarta Meeting, November 2006.

medical interest in par with their sexuality, the classification is in terms of I) homosexual, describing same-gender attraction[8], ii) heterosexual, describing opposite-gender attraction[9]iii) bisexual, describing both opposite and same sex attraction.[10]Therefore, it can be enunciated that the identity creation process is a indeed a complex process as it involves the scientific , religious and moral factors.

2.2. Defining Gender Identity

Gender expression must be acknowledged and identified in order to represent adequate human rights protection consistently. People who do not fall within the stereotyped masculine or feminine models have been subjected to human rights violations because of their concept of what properly characterises a gender as that of a male or female tight categorization norm. "Women's economic independence, personal deportment, form of dress, mannerisms, speech patterns, social behaviour and interactions, and the lack of an opposite sex partner are all factors that may challenge gender norms." According to the preamble of the Yo gyakarta Principles, gender identity means:

> *"refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms."*

Considering the conventional method of defining a gender, it is being directly linked to different societal processes such as class, sexuality, age and ethnicity. But the formulation of a straitjacket formula constructs undeniably distresses the lives of LGBT and intersex persons. In reality, in the procedure of gender policy framing and analyses often the LGBT's and intersex people are often deliberately left out. This is regrettable because it represents a heteronormative mindset by making lesbian, gay, and bisexual people and their relationships invisible, misunderstood, and marginalized. It also restricts the scope of gender analysis and settles for a limited

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8 "Homosexual men and women, commonly known as gay men and lesbian women, are people who have a sexual preference for people of the same gender. By the second part of the nineteenth century, the term gay had become widely accepted. It was used as a therapeutic term to describe guys who expressed sexual attractions toward other men. In today's jargon, the term homosexuality refers to both male and female same-sex sexual behaviour. In the late 19th and early 20th centuries, the homosexual identity evolved into a variety of gay, lesbian, queer, and other identities."

9 "Heterosexual women and men, also termed as straight persons, have a sexual orientation towards persons of the opposite sex."

10 "Bisexual women and men have a sexual preference for people of the same sex as well as people of the opposite sex."

perspective on issues of gender and equality.

2.2.1. Defining LGBT

LGBT, now the connotation took a new form as it is LGBTQIA+, is an abbreviation for "lesbian[11], gay[12], bisexual[13] , transgender[14], genderqueer[15], Intersexed[16], Agender[17], Asexual[18] and Ally[19] community" people. It combines the sexual orientation-based identities of lesbian, gay, and bisexual people with the non-sexual orientation-based identity of transgender people.

3. Relooking the Transformation and Recognition of LGBT's Human Rights

The century old Christian tradition had placed on record death penalty for non-procreative sex which was imbibed by the European World of the Enlightenment in its criminal laws. But the French Revolution paved a different direction by breaking the European custom by abolishing moral crimes including sodomy under a new Penal Code in 1791. But subsequently post the fall of Napoleon most countries repealed their codes except France, Belgium, Spain and Netherlands did not re-criminalize sodomy. The mid-twentieth century witnessed the modern decriminalization movement. Post-

[11] "Lesbian is a word used to describe female-identified persons who are attracted to other female-identified people romantically, erotically, or emotionally. Individual female-identified persons from many ethnic backgrounds, including African-Americans, accept the term "lesbian" as an identifying marker, despite this."

[12] "Gay is a word used in various cultural contexts to describe guys who are romantically, erotically, and/or emotionally attracted to other males. Because not all males who participate in "homosexual activity" identify as gay, the term "gay" should be used cautiously. A collective term for the LGBTQIA+ community or an individual identification name for someone who does not identify as straight."

[13] "Bisexuality refers to a person's emotional, physical, and/or sexual attraction to both males and females. This attraction does not have to be distributed evenly amongst genders, and one gender may have a preference over the others."

[14] "Those whose gender identities or gender roles differ from those traditionally associated with the sex they were assigned at birth are referred to as transgender."

[15] "The word "genderqueer" refers to a person whose gender identification does not fit within a binary gender definition."

[16] "Individuals born with a variety of sex traits, such as chromosomes, gonads, sex hormones, or genitals, are classified as intersex."

[17] "A transgender person perceives themselves as neither a man nor a woman, and has no gender identity or expression."

[18] "Asexuality is characterised by a lack of sexual attraction to others, as well as a lack of interest or desire for sexual engagement. It might be a matter of sexual orientation or a lack of it. It can also be classified more broadly to encompass a wide range of asexual sub-identities."

[19] "Ally is someone who confronts heterosexism, homophobia, biphobia, transphobia, heterosexual and gender straight privilege in themselves and others, cares about lesbian, gay, bisexual, trans, and intersex people's well-being, and believes that heterosexism, homophobia, biphobia, and transphobia are social justice issues."

World War II, the British Wolfenden Report of 1957 and the American Model Penal Code recommended that the crime of sodomy be abolished. The American State of Illinois became the first to adopt this recommendation in 1961. Considering the common law countries, in Europe countries like Czechoslovakia and Hungary were the initial set to abolish their sodomy laws. Also, on the other side, there also existed jurisdictions wherein never had an explicit legal prohibition of sodomy in certain groups of countries like Latin America, Japan, Mexico and Brazil also enacted a version of the Napoleonic Code. Further, United Kingdom has also repealed Victorian Law against homosexuality which was ignited by the law and morality debates which led to the drafting of Wolfenden Report, which triggered for legislative changes in the 1960s and human right interventions resulting from its engagement with the European Human Rights system.[20]

The initial movement towards recognition of LGBT's and allied persons witnessed during the year 1961 with the institution of the Mattachine Society of Washington in USA, whose prime motto was to work publicly "to equalize the status and position of the homosexual" [21]. Subsequently, a trail of similar organisations emerged rapidly with the mission of repealing the anti-sodomy laws as a part of a broader human rights struggle, During the early 1969, some activists were describing their efforts as a "gay liberation".

3.1. Judicial and Legislative Interpretation with Regard to the Recognition of Rights: Relooking the International Scenario

The European Court of Human Rights determined "buggery and gross indecency in Northern Ireland to be violations of the right to privacy" under Article 8 of the European Convention on Human Rights in 1981. In the landmark decision of *Dudgeon v The United Kingdom* [22], "in which the decision arose from a challenge to the law by a gay man who resisted the existence of the offences declared in Northern Ireland which held him liable to criminal prosecution and infringed on his right to privacy". The court determined that the "keeping in force of the impugned legislation represents an ongoing interference with the applicant's right to respect for his private life, including his sexual life.".[23]

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[20] Katz J, The Invention of Heterosexuality 52 (1995). Also see, Douglas Sanders, 377 and the Unnatural Afterlife of British Colonialism in Asia , 4 AsJCL 1, 6 (2009).

[21] Eskeridge, Michael Jose Torra, Gay Rights after the Iron Curtain 22.2 Fletcher Forum World Aff. 821, 855(1998).

[22] European Court of Human Rights, Judgement of 22 October 1981, Application No. 7525/76, para 41.

[23] Jose Torra, supra 73 ,76.

A similar stand was taken by the European Court in the case of *Norris v Ireland*[24] and *Modinos v Cyprus*[25], which defined a fine rubric against homosexuality based on religion and claimed that there was a legitimate aim in the "protection of morals" for maintaining the laws. The court has enunciated its judgement by citing the practice in other member states of the European Human Rights System that had long discriminated consensual sex between same sex adults. Significantly in the year 1999, the European Court expressly pressed down "sexual orientation" as a prohibited category of discrimination and as a consequence in the case of *Salguerio da Silva Maouta v Portugal*[26], the ECHR has struck down a Portugese Court decision that deprived a father of his custody rights because he was gay.

Further, a group of six countries have enacted legislation allowing same sex marriage which includes the Netherlands, Belgium, Spain, Canada, Norway and South Africa.[27] Out of which South Africa and Canada adopted the same by their respective Supreme Court's order as in the decision of *Fourie Bonthuys v Minister of Home Affairs*[28], and *Reference Same Sex Marriage*[29]. Moreover, a set of 18 countries and federal states recognized these rights under varied legal frameworks. Further, in most states of the United States of America, permits for gay and lesbian adoption by single persons or couples[30] The Progress of the movements vindicating the gay and lesbian rights gradually pitched into other parts around the globe. The formation of Colombia's *Moviemiento Por La Liberaicion* Homosexual concluded a successful campaign to decriminalize sodomy in 1981 followed by campaigns by local organizations in New Zealand, Israel and Australia. The movements were not only cornering on repealing of anti-sodomy laws, it included other human right concerns such as non-discrimination and recognition of rights. During the start of 1994, the several countries in the America enacted prohibitions on sexual orientation discrimination by a constitutional amendment in Ecuador[31],by a legislation in Mexico[32], by a Supreme Court ruling in

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24 European Court of Human Rights. Case No. 6/1987/129/180

25 European Court of Human Rights. Application No. 15070/89, 25 March 1993

26 Judgement of 21 December 1999, Application No. 33290/96

27 With respect to Netherlands -Civil Code, Article 30, Book 1, reform of 2001; Belgium – Civil Code, Article 143, Book I, Title V, Chapter I, reform of 13 February 2003; Spain - Civil Code, Article 44, reformed by Law 13/2005, 30 June 2005, Canada – Civil Marriage Act of 20 July 2005, South Africa- Civil Union Act [No. 17 of 2006], 30 Nov 2006.

28 European Court of Human Rights. Case CCT 25/03

29 [2004] 3 SCR 698

30 Gary J. Gates, M.V. Lee Badgett, Jennifer Ehrie Macomber and Kate Chambers, Adoption and Foster Care by Gay and Lesbian Parents in the United States, 3 (2nd ed. March 2007).

31 Ecuador Constitution art 23, para 3

32 Federal Law to Prevent and eliminate Discrimination, Equal Employment Opportunity Commission (2003)

Canada[33],by a series of Constitutional Court rulings in Colombia[34] and by an executive order in Venezuela[35]. In June 2008 under this background, there occurred in place the adoption of the Organization of American States, by consensus of its first Resolution on "Human Rights, Sexual Orientation and Gender Identity" can be held to be considered as important.[36]

4. Analysis of LGBT's Rights in International Legal Framework of Human Rights

The concern of LGBT and the questions relating to gender identity and sexual orientation concern is being placed for discussion under the ambit of "The Universal Declaration of Human Rights, adopted by UN General Assembly Resolution 217A(III) of 10 December 1948". UDHR which says about "the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world". Because of "the inalienable nature of Human Rights, all human beings are treated as persons before the law, regardless of their sexual orientation or gender identity, and are entitled to freedoms derived from the inherent dignity of the human person, including equality before the law, non-discrimination, and equal protection under the law".

4.1. Structure of Equality before the law and Non-discrimination In reference to Sexual Orientation and Gender Identity:

In fact, because these categories are not officially included in any of the major international treaties, there is no clear claim of laying down protection clauses for sexual orientation and gender identity in international human rights law. However, the international agreements were not intended to be complete in their enumeration of status, and the phrase "or other status" is a clear indicator that the architects intended to include the protection of nameless categories, such as sexual orientation and gender identity.[37] As in "Article 26 of the International Convention on Civil and Political Rights (hereinafter referred as ICCPR) on equality before law and right to be free from discrimination possess the same structure and the other status category is free standing and can very accommodate to the evolving categories

33 Egan v Canada. [1995]2 SCR 513
34 Constitutional Court of Colombia. Judgements No. T-097/94, T-101/98, C-481/98, C-507/99, T-268/00, C-373/04
35 Regulation of the Statutory law of the Work, Official Journal No. 5.292 (1999).
36 Human Rights, Sexual Orientation and Gender Identity, AG/RES 2435-XXXVIII-O/08 (2008).
37 Melinda Kane, Social Movement Policy Success: Decriminalizing State Sodomy Laws, 1969-1998, 8 MOBILIZATION: AN INTERNATIONAL QUARTERLY 313, 315(2003).

also." The Organization of American States' General Assembly has passed its first resolution on human rights, sexual orientation, and gender identity.[38] Furthermore, sexual orientation and gender identity have been specifically included on the list of forbidden grounds of discrimination in new international instruments..[39]

4.1.1. Protection of Gender Identity, Sexual Orientation and UN Human Rights Treaty Bodies and UN Special Procedure:

The UN Human Rights Treaty Bodies have determined sexual orientation as a category for protection against discrimination and equality before the law. Also, the Human rights Committee has affirmed that the reference to "equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" as dealt under Art 26 of the ICCPR which enumerates on discrimination on grounds of sexual orientation.[40]

Further, the Committee on Economic, Social and Cultural Rights enunciates that by virtue of Art 2.2[41] and Art 3[42] of ICESCR which says "that discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of health status, sexual orientation which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health".[43]

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38 Resolution AG/RES, 2435 (XXXVIII-O/08) of 3 June 2008.

39 "The Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, approved by the Inter-American Commission on Human Rights in 2008, the Libero-American Convention on Young People's Rights (entered into force in 2008); Charter of Fundamental Rights of the European Rights of the European Union (Article 21.1); and the Council Framework Decision on the European Arrest and the Surrender Procedures between Member States, adopted by the Council of the European Union on 13 June 2002."

40 Human Rights Committee: Opinion held in the case of Nicholas Toonen v Australia, Communication No. 4881/1992, paras 8.2-8.7. Also refer the case of Edward Young v Australia, Communication No,941/2000, para 10.4 and in the case of X v Colombia, Communication No. 1361/2005, para 7.2.

41 Article 2.2 of ICESCR – "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

42 Article 3 of ICESCR-"The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."

43 Committee on Economic, Social and Cultural Rights, General Comment No. 14; "The right to the highest attainable standard of health (Article 12) para 18, See also, Committee on Economic, Social and Cultural Rights, General Comment No.15."

Moreover, the Committee Against Torture has considered "that the sexual orientation is one of the prohibited grounds included in the principle of non-discrimination".[44] In its General Comments on adolescent health, HIV/AIDS, and the rights of children, the Committee on the Rights of the Child mentioned sexual orientation as one of the forbidden grounds of discrimination.[45]

In 1994, in the case of *Toonen v Australia*[46], "the UN Human Rights Committee held that laws criminalizing homosexuality constituted an unlawful interference with the right to privacy, protected and guaranteed by Art 17 of ICCPR". The Committee also opined that Art 2(1) of the ICCPR and interpreted "sex" in Article 2(1) to include sexual orientation. And the committee came to the conclusion that:

"the state party sought the Committee's guidance as to whether sexual orientation may be considered an 'other status' for the purposes of Art.26. The same issue could arise under Art. 2, para1, of the Covenant. The Committee confines itself to nothing, however, that in its view the reference to sex in Art. 2, para 1, and 26 is to be taken as including sexual orientation"

Subsequently, it has addressed that the use of the "other status" provision under Art.2(1) and 26 of the ICCPR would have been more satisfying, instead of an interpretation that includes sexual orientation in the definition of sex.[47] Following the Toonen formulation, successive UN jurisprudential interpretations of sexual orientation have moved away from it, asserting protection for the category of sexual orientation in international human rights law under the sex rather than other status.

The UN Special Procedures on Human Rights issued a statement on "the issue of nondiscrimination and equality before the law in relation to discrimination based on sexual orientation and gender identity". Also, the "UN Working Group on Arbitrary Detention, in expressing its views on homosexuals who are detained on given prison sentences solely because of their sexual orientation"" held that "detention is arbitrary because it violates articles 2(1) and 26 of the ICCOR which guarantees equality

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44 Committee Against Torture, General Comment No. 2: Implementation of Art 2 by State parties, para 21 and 22.

45 Committee on the Rights of the Child, General Comment No. 4: Adolescent Health, para 6 and General Comment No.3 HIV/AIDS and the rights of the child, para. 8

46 UN Doc. CCPR/C/50/D488/1992of 4 April 1994.

47 Sarah Joseph, Gay Rights under the ICCPR- Commentary on Tooner v Australia, 13 U Tas L Rev 14, 17(1994); Anna Funder, The Tooner Case 5 Pub L Rev 22, 26 (1994); Wayne Morgan, Identifying Evil for What it is: Tasmania, Sexual Perversity and the United Nations, 19 Melb. U. L. Rev. 33, 36 (1994).

before the law and the right to equal legal protection against all forms of discrimination, including based on sex"[48]

4.1.2. European Union's Initiatives

A Within the European Union, a variety of legal policies have been implemented to prevent discrimination based on sexual orientation.[49] Undeniably, these instruments invokes the legislative banning of discrimination especially with regard to employment based sexual orientation.

i. "Article 13 of the 1997 Treaty of Amsterdam empowered Member States of the European Community to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".
ii. "Employment Directive of 2000, all member states were required to pass legislation against discrimination in the workplace on a variety of grounds, including sexual orientation."
iii. "Directive 2004/58/EC of the European Parliament listed sexual orientation among the prohibited grounds for discrimination."
iv. Staff Regulations of Officials for the European Communities provides that "officials shall be entitled to equal treatment under these Staff Regulations without reference, direct or indirect to sex or sexual orientation, without prejudice to the relevant provisions requiring a specific marital status"[50]
v. The European Arrest Warrant preamble recognizes that "this framework decision respects fundamental rights and observes the principles recognized by Article 6 of the Treaty on European Union".[51]

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48 Report of the Writing Group on Arbitrary Detention, UN Doc.E/CN.4/2004/3, of 15 December 2003, para 73

49 Article 13 of the 1997 Treaty of Amsterdam empowered "Member States of the European Community to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation"

50 "Council Regulation (EC, ECSE, Eurotom) No. 781/98 of 7 April 1998 (The Staff Regulations Article 1a (1))."

51 Art 6 the Treaty on European Union –"1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.
The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.
2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

vi. In the "Charter of Fundamental Rights of the European Union, Art. 21(1) on non-discrimination declares that discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief political or any other opinion, membership of a national minority, property, birth, disa bility, age or sexual orientation shall be prohibited"

4.1.2.1. Non-discrimination and European Court of Human Rights

Unlike the period of *Dudgeon's case* adopting *a* narrow scope for gay rights in 1999, the European Court expressed a broader role for the right to privacy and non-discrimination as observed in the twin cases of Lustig Prean and Beckett v United Kingdom[52] and Smith and Grady v United Kingdom[53], the court observed that the "the question of the Court is whether the above-noted negative attitudes those of a different race, origin or colour and to the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority constitute sufficient justification for the interferences at issue". Further, relying on Article 8 of the European Convention on Human Rights[54], the Court invalidates laws that excluded gays and lesbians from the military and opened up an interpretation of privacy that envisaged the public manifestations of the gay experience. The European Court in *S.L. v Austria* [55], taking into consideration the scientific evidence in favour of equal age of consent for both heterosexuals and homosexuals. In the case of *Goodwin v United Kingdom* [56], the court dealt with the questions of gender identity as in with regard to the applicant has raised allegation of violation of Art 8, Art 12[57], Art

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52 European Court of Human Rights, Judgement of 27 September 1999, Application No. 31417/96 and 32377/96

53 European Court of Human Rights, Judgement of 27 September 1999, Application No. 33985/96 and 33986/96

54 Art 8 of the European Convention on Human Rights deals with right to respect for private and family life

1. "Everyone has the right to respect for his private and family life, his home and his correspondence."
2. "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others"

55 European Court of Human Rights, Application no. 45330/99 9 January 2003

56 European Court of Human Rights, Application No 17488/90, Case No 16/1994/463/544, ECHR 1996

57 Art 12 of ECHR – "Right to marry Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

13[58] and Art 14[59] of European Convention on Human Rights in respect of the legal status of transsexuals in the United Kingdom and specially the treatment in the areas of employment, social security, pensions and marriage.

4.1.3. Phase of Protection of Gender Identity, Sexual Orientation and Inter American System of Human Rights

With the similar interface like other international human rights instruments, there doesn't exists an explicit reference to sexual orientation or gender identity in the human rights instruments of the Inter- American System[60] also with the exception of "the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas". The initial phase of its protection "on human rights and sexual orientation in the Inter-American system", the decision in the case of *Marta Lucia Alvarez Giraldo v Colombia,* [61]the court held that "in principle, the claim of the petitioner refers to facts that could involve, inter alia, a violation of Article 11(2) of the American Convention in so far as they could constitute an arbitrary or abusive interference with their private life"

Further, the Inter- American Commission has enunciated on the fact that the "criminalization of homosexuality and deprivation of liberty simply because of sexual preference is a practice contrary to the provisions of various articles of the American Convention and must therefore be corrected"[62]. Also, the Special Rapporteurship on Migrant Workers and their Families of the Inter-American Commission on Human Rights has taken consideration of its decision based on the principle of equality and non-discrimination.[63]

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58 Art 13 of ECHR – "Right to an effective remedy Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

59 Art 14of ECHR – "Prohibition of discrimination the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

60 See "Art II of the American Declaration on the Rights and Duties of Man: Arts 1(1) and 24 of the American Convention on Human Rights; Article 9 of the Inter- American Democratic Charter"; Principle 2 of the Declaration of Principles on Freedom of Expressions

61 Case Number 11.656, Report No. 71/99 (Admissibility) of 4 May 1999, para 21.

62 Inter- American Commission on Human Rights, Press Release No. 24/1994.

63 Second Progress Report of the Special Rapporteurship on Migrant Workers and their Families in the Hemisphere, OEA/Set.L/V/II.111. Doc.20 rev., 16 April 2001.

5. India's Legal Framework of the Protection of LGBT's Human Rights

5.1. Residues of Homosexuality in the History

Homosexuality may be found in ancient India's religious literature, as well as in contemporary fiction, which attests to the existence of same-sex love in various forms. The notion of homosexuality is also mentioned in ancient literatures such as the Manu Smriti, Arthashastra, Kamasutra, Upanishads, and Puranas. There have been reports of same-sex activities among sannyasins who are unable to marry. As a result, historical and mythical books from all around the world, including India, include references to homosexuality. Even today, there are evident cultural remains of homosexuality practised in a small village in Gujarat called Angaar, where a ritualistic transgender marriage is performed among the Kutchi population during the Holi festival. It is quite unusual as both the Ishaak and Ishakali are men which is being practiced for the past 150 years. As a result, history is replete with evidence demonstrating the presence of homosexuality in the past.[64]

With the current shift in rights-focus happening all around the world, the path from decriminalisation to civil protection to civil recognition isn't fully linear. Considering the situation in India during the pre-codification era, the multi-religion culture is providing various penalizing protocol to homosexual offences. With the first consistent criminal laws adopted in India in 1860, codification of laws began during the British period.[65] The Indian Penal Code contains a unified definition of homosexual behaviour in the form of unnatural offences, as well as its nature and penalty. Although sexuality minorities have always existed in India, their challenges have never been fully expressed, sometimes in culturally sanctioned forms (such as the hijra) and other times in invisibility and silence. After the nineteenth century, LGBT minority addressed issues relating to violations of their human rights, and numerous civil society organisations in India took up their cause. Lesbian, gay, and bisexual issues were first addressed in a public forum in India in the late 1980s with the publication of Bombay Dost, the first homosexual magazine in India, and the founding of Sakhi, a lesbian collective in Delhi. In fact, most Indian human rights organisations, such as the Individual's Union of Civil Liberties (PUCL), have yet to address the subject of mistreatment of homosexuals, lesbians, bisexuals, and

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64 Dipika Jain et al, Bureaucratization of Transgender Rights: Perspectives from the ground, 14 SLR 16, 19 (2018).

65 Alok Gupta, This Alien Legacy: The Origins of 'Sodomy' Laws, British Colonialism (Sept 3, 2020,10.30 AM) https://www.hrw.org/report/2008/12/17/alien -legacy/origins-sodomy-laws-british-colonialism.

transgender people due to their sexuality. This ignores the fact that sexuality is closely linked to repressive societal ideologies and systems like patriarchy, capitalism, caste, and religious fundamentalism. As a result, the struggle for sexuality rights is closely tied to the broader human rights movement for economic, political, and social liberation.

5.2. Judicial Interpretation and the struggle for development of LGBT's rights in India

In modern India, the first literature on homosexuality was authored by Shakuntala Devi in the year 1977. Sec 377 of Indian Penal Code deals with the criminalization of homosexuality in India. It all triggered off with the movement to repeal Sec 377 by AIDS Bhedbhav Virodhi Andolan in 1991. Following that, in 2001, it regained impetus when the Naz Foundation filed a Public Interest Litigation in the Delhi High Court. The landmark decision of Naz Foundation v Government of NCT Delhi, which was filed by Non-governmental organisation based in Delhi, Naz Foundation. "The petitioners' main argument was that Sec 377 infringed on the basic rights provided by Articles 14, 15, 19, and 21 of the Indian Constitution. The lawsuit was brought in the public interest, arguing that its efforts to stem the spread of HIV/AIDS were hampered by acts of discrimination against the gay community as a result of Sec 377. Discrimination has also resulted in major concerns such as abuse, harassment, and assault by public officials, putting the LGBT community at risk by restricting their fundamental rights. Another main submission was that the right to non-discrimination on the ground of sex in Article 15 should not be read restrictively but should include sexual orientation. And the hon'ble Delhi High Court stated that Sec 377 violates Art. 14,15 and 21. With marking the criterion of Art. 14 i.e., the classification should be on an intelligible differentia which has a rational relation to the objective sought." It concluded that "Section 377 does not distinguish between public and private acts, or between consensual and non-consensual acts, therefore does not consider relevant factors such as age, consent, and nature of the act or absence of harm. Thus, such criminalization in the absence of evidence of harm seemed arbitrary and unreasonable". Discrimination on the ground of sexual orientation is impermissible even on the horizontal application of the right enshrined under Article 15.[66]

[66] Melissa Cyril, Sec 377: LGBT Rights and HR Policy in the Indian Workplace, India Briefing (Sept. 23,2020, 09:10PM).https://www.india-briefing.com/news/section-377-india-lgbt-rights-hr-policy-indian-workplace-17804.html.

The judgment was restricted to adults. Section 377 applied to minors. Section 377 had permitted the harassment of LGBT people. With de-criminalization of homosexuality, the discrimination would not go away immediately. But this would violate the law. "It will take time for the judgment to bed-in".[67]

Subsequently, the decriminalization of homosexuality led to many appeals before the Delhi High Court. And in the earmarked case of *Suresh Kumar Koushal v Naz Foundation*[68], the major contention put forth by the appellant was Sec 377 should be transformed to the status of gender neutral and should be inclusive of acts such as carnal intercourse which are committed voluntarily irrespective of gender. It does not infringe right to privacy under Art. 21. The arguments raised by the appellants reflects the fact that the previous judgement affects the social structure of India and the whole institution of marriage. On the flipside, the respondent argued that Sec 377 pulls down the dignity and is targeted at their sexual orientation. Adding to it, then contented that 'It outlaws sexual activity between men which is by its very nature penile and non-vaginal, it impacts homosexual men at a deep level and restricts their right to dignity, personhood, and identity, equality and right to health by criminalizing all forms of sexual intercourse that homosexual can indulge in'. On December 2013, the two-judge bench of the hon'ble Supreme Court overruled the Delhi High Court decision and held that it is legally unsustainable. Also, declared that "Section 377 does not criminalize a particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offense. Such a prohibition regulates sexual conduct regardless of gender identity and orientation."

And for the first time in the judicial history of India, which bought a ray of hope in the life of 'hijras'. In the land mark judgement of *National Legal Service Authority v Union of India*[69], created 'third gender' status for hijras or transgenders. The transgender persons' right to decide their self-identified gender is also upheld. The court has identified apart from hijras, other wide range of transgenders includes *Enunch*[70]

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67 Robert Wintemute, Same- Sex Love and Indian Penal Code Sec 377: An Important Human Rights Issue for India, 4 NUJS L Rev.31 35 (2011). 1 -36. Also see, R. Wintemute, Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes, 60 Mod. L. Rev 334, 337 (1997); R. Wintemute, Sex Discrimination in MacDonald and Pearce: Why the Law Lords Chose the Wrong Comparators, 14 King's Law J 267, 269(2003).

68 Civil Appeal No. 10972 OF 2013

69 (2014) 5 SCC 438, decided on 15 April, 2014 by a bench comprising of Justice K.S. Radhakrishnan and Justice A.K. Sikri.

70 "Eunuch refers to an emasculated male and Intersexed refers to a person whose genitals are ambiguously male-like at birth, but this is discovered later, the child previously assigned to the male sex is reclassified as intersexed – as a Hijra."

Kothi[71], *Jogtas /Jogappas*[72], *Shiv - Shakthis*[73]. On a further declaration, the hon'ble apex court has laid down the measures or steps that need to be absorbed by the both respective authorities of Centre and State Government, which is as follows:

i. With respect to granting legal recognition of their gender identity such as male, female or as third gender.
ii. Adopt measures to treat them under the category of other backward classes and cannot be subjected to discrimination in availing equal opportunities in education and employment opportunities in educational institutions and government jobs.
iii. Initiating operative mechanism as in an exclusive HIV Sero - surveillance Centres due to the reason that Hijras/Transgenders face several sexual health issues.
iv. Effort should be initiated in addressing the emotional and phycological traumas faced by the community such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc,
v. Adopting measures to provide medical care to TGs in the hospitals and also provide them separate public toilets and other facilities.
vi. Adopting measures for structuring various social welfare schemes for their better livelihood.
vii. Adopting measures to create public awareness so that they fell that are also part and parcel of the social life and be treated as untouchables. And thereby they can regain their respect and place in the society.

On 2 February 2016, criminalization of homosexual activity was reviewed by the Supreme Court. In August 2017, "the Supreme Court unanimously determined that under Article 21 of the Indian Constitution, the right to privacy is an inherent and fundamental right, giving LGBT supporters hope that Section 377 will be removed soon. The Court also decided that a person's sexual orientation is a personal affair."

6. Conclusion

When it comes to the identification of the rights of the transgender people's gender

[71] "Kothis are a diverse species. Biological males who exhibit varied degrees of 'femininity' – which may be situational – are referred to as 'Kothis.' A small percentage of Kothis engage in bisexual activity and marry women."

[72] "Jogtas, also known as Jogappas, are devotees and servants of goddess Renukha Devi (Yellamma), whose temples may be found in Maharashtra and Karnataka. 'Jogta' refers to the Goddess's male servant, while 'Jogti' refers to the Goddess's female servant (also known as 'Devadasi')."

[73] "Shiv-Shakthis are males who have feminine gender presentation and are possessed by or particularly connected to a goddess. Senior gurus induct Shiv-Shakth is into the Shiv-Shakti society, teaching them the norms, conventions, and rituals that must be followed."

identity and sexual orientation, a right-based approach should be adopted, where each of them, exemting their sexual orientation or identity, they have the right to full equality, legal protection against discrimination, social rights such as marriage and adoption, and the opportunity to participate in decision-making. They also have the "right to enjoy social and cultural rights. such as visibility and freedom of expression, access to education, healthcare, and sexual health services, inclusion in statistics and research, establishment and registration of organisations, and the ability to organise meetings and activities." These can be considered as the fundamental rights that can be addressed and enabled for assuring the realization of the principles of equality and non-discrimination. As the resolution passed by the UN stands outright in the creation of a positive impact all over the world but India's approach is quite disappointing in addressing the concern. The time demands for an emergent wiping off the conservative attitude and adoption of a strong established steps for the welfare of the sexual minority. So, in this 21st century of a liberal and globalized entities, there demands for a stronger protection for leading a life of respect and attaining recognition in its fullest by the transgenders as being homosexual is not disease which demands treatment but a state of being born with such instincts beyond the human control.

INTERNET SHUTDOWNS AND VIRTUAL CURFEWS: SEARCHING FOR RIGHTS IN DIGITAL DARKNESS

Shilpa Jain *
Adithya Anil Variath **

1. Introduction

In the first half of the 20th century, the world witnessed the horrors of countless wars, armed conflicts and nuclear bombing. The most fascinating development post the World War II era was the race to space between the United States and the U SSR. In October 1957, the Soviet Union's successfully launched the Sputnik satellite. It was a wake-up call that profoundly shocked the US Defence Department.[1] As a response to this unprecedented technological development, the US Defence Department in 1958 issued Directive 5105 which facilitated "the setting up of the Advanced Research Projects Agency (ARPA)."[2] APRA was developed to facilitate 'resource sharing' network, and from this initiative came the APRANET, which sought to break up information into 'packets' to communicate in a decentralised pattern. This was called the "'Internet-ting project' and the system of networks which emerged from the research was known as the 'Internet.'" The aim behind breaking information was to create a system that would still function if a Soviet Nuclear Strike struck American Communication Systems.[3] Today, the Internet is over four decades old, thus the 'Internet' owes its origin to the geopolitical scenarios post World War II.

With the US government removing restrictions on the internet's commercial use in the 1990s, the internet became a *de facto* global information infrastructure. This was trickling down the reaction of the Clinton Administration's 'Global Information Infrastructure Initiative' (GII). The GII initiative was based on the idea that,

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1 John Naughton, "The evolution of the Internet: from military experiment to General Purpose Technology", *Journal of Cyber Policy*, Vol. 1, No. 5, 2016, p. 28.

2 CRS Report: Prepared for Members and Committees of Congress, 'Defense Advanced Research Projects Agency: Overview and Issues for Congress, Congressional Research Service', R45088, at 17 (2017); See also U.S. Congress, House Committee on Science and Technology, Science Policy Study Background Report No. 8: Science supported by the Department of Defense, Committee Print, Prepared by Congressional Research Service, H702-14 (1987).

3 National Research Council et al., *Funding a Revolution: Government Support for Computing Research*, The National Academies Press, Washington, D.C., 1999, p.169.

> *"[n]ew computer and telecommunications technologies can foster democracy, open new markets, create high-paying jobs, promote peace and international understanding, promote freedom of expression and freedom of information, and foster sustainable development."*[4]

So, the principles of participatory democracy, promotion of freedom and market-centric terms were always imperatives of the internet for the international liberal order. Digital technology over time has erased the asymmetry between those in power and those who are governed. This digital technology which was developed to fasten the mobilisation of people democratically in societies has also become an instrument of subjugation and control of societies.

While institutional incapacity to provide digital infrastructure and access to the internet was a social evil in the last decade, this decade of Industry 4.0 is struggling with a more nuanced crisis of institutional authoritarianism and authoritative digital exclusion. The fourth industrial revolution has introduced radical changes in how we perceive technology. The authors have in an earlier piece argued that "The gap between the first and second industrial revolution was around 100 years, second and third was 70 years, third and fourth is 25 years. As this trend indicates, we cannot rule out the fifth industrial revolution within 10-15 years, or even earlier."[5] According to a study, "globally, there are more than 4.54 billion active internet users as of January 2020, encompassing around 59 per cent of the global population."[6] Today's technology is defined by ubiquitous surveillance, algorithmic decision making and unfair concentration of data wealth in the hands of those who have the institutional capacity to deploy them. And there is little doubt in predicting that the next revolution would further crystallise the role of digital technologies in democracies.

Internet is no longer a mere communicative tool. Internet is slowly turning into an extension of human personality, it is shaping social opinions, predicting behaviour patterns and even influencing political ideologies.[7] This makes internet-based technologies an indispensable tool for the political machinery in

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4 The Global Information Infrastructure, "A White Paper Prepared for the White House Forum on the Role of Science and Technology in Promoting National Security and Global Stability", *National Academy of Sciences*, 1995, pp. 29-39.

5 Adithya Variath, "Smart thinking and smarter politics", *The Pioneer,* 13 September 2020, at p.6.

6 J. Clement, 'Worldwide digital population as of January 2020', *Statista,* available at https://www.statista.com/statistics/617136/digital-population-worldwide/ (last accessed 13 September 2020).

7 Janna Anderson and Lee Raine, 'Concerns about democracy in the digital age', *Pew Research Centre*, available at https://www.pewresearch.org/internet/2020/02/21/concerns-about-democracy-in-the-digital-age/ (last accessed 13 September 2020).

the current times. This developmental shift has also given rise to the fourth-generation rights, of which 'governmentality' is the crudest test to interweave the relationship between man and technology. The new industrial revolution has also influenced how man contracts with the State. The texture of democracy is seeing alterations, while democratic authoritarianism is becoming the new norm, the internet is becoming the new weapon to fight the failures of political ideologies.

Democracy as a tool of governance is vulnerable, it can be easily hijacked as a legitimising tool by undemocratic actors to fulfil their undemocratic objectives. The perforation of the internet has also revolutionised how individuals respond and react to authoritarian orders. The rise of power of web-based platforms provides a medium to express dissent. Dissent is the basic crux of any functioning democracy, and the internet is also used as a medium to express dissent and revolt against illegitimate governmental policies. The world has also seen marshalling of revolutions with ulterior motives masquerading as democratic protests. Unprincipled protests and villainous revolutions have no place in a democratic order, and the government in power is authorised to take reactive and proactive measures to abort activities disrupting public order, peace and security. However, the dilemma arises when under the guise of public order and peace, authoritarian governments often tend to immobilise democratic defiance using despotic measures. While governments in the past could cut water supply and electricity to downplay and divert protests, today, governments are controlling telecommunications and internet connectivity.

Masked as a "law and order" countermeasure, internet shutdowns are becoming the new global normal. In 2019, around 29 nations like Iran, Turkey, Iraq have arrogated internet disruptions as a policy to prevent the spread of information which those governments deemed dangerous.[8] For the past few years, India, the largest functioning democracy leads the world in internet shutdowns.[9] As the internet is becoming a fundamental aspect of our economic, social and cultural life, the repercussions that are *de facto* denial of the internet is also multidimensional.

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8 Daniel Wolfe, 'Internet shutdowns are an increasingly popular means of government suppression', *Quartz,* available at https://qz.com/1774364/internet-shutdowns-are-an-increasingly-popular-means-of-suppression/ (last accessed 13 September 2020).

9 In 2018, India accounted around 67 per cent of the total recorded internet shutdowns worldwide. See Megha Bahree, 'India Leads the World in the Number of Internet Shutdowns: Report', *Forbes,* available at https://www.forbes.com/sites/meghabahree/2018/11/12/india-leads-the-world-in-the-number-of-internet-shutdowns-report/#6bc542e53cdb (last accessed 13 September 2020).

2. Understanding the Access to the Internet from the Perspective of Human Rights

Denial of the internet is a form of denial of human rights. To understand this proposition, we need to delve deeper into what constitutes a 'right'. According to Jack Donnelly, "The neologism 'Right' has two central moral and political senses: rectitude and entitlement. What makes the 'right' reactive is that violations of rights are a particular kind of injustice with a distinctive force and remedial logic. In its social interaction, rights crystallise in three forms - assertive exercise, active respect and objective enjoyment."[10] However, to qualify as a human right, "rights" have to be realised as social practices and social values and become the norm of political legitimacy.[11] The utility of any resources to the State plays a role in how the resource will be prioritised by the State. Considering the utility of the internet as a means to facilitate core universal freedoms of speech and expression, no healthy democracy can subjugate the utility of the internet. Right to the Internet today qualifies both the elements of rectitude and entitlement. The Preamble of the UDHR asserts the idea of human rights as the "standard of achievement for all peoples and all nations."[12] In 2016, a report from the Human Rights Council asseverated "access to the internet to be a basic human right."[13]

2.1. Cyberspace governance in the International Order

The United Nations in 2016, declared that "it considers the internet to be a human right."[14] Article 19 of the UDHR was amended to incorporate "The promotion, protection and enjoyment of human rights on the Internet", via a resolution adopted by the General Assembly. [15] The UN resolution is the joint diplomatic effort of "Brazil, Nigeria, Sweden, Tunisia, Turkey and the USA" reaffirmed a universal call that "the same rights that people have offline must also be protected online".[16]

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10 Jack Donnelly, *Universal Human Rights in Theory and Practice*, Oxford University Press, Oxford, 2013, pp. 8-12.

11 *Ibid.*

12 See Universal Declaration of Human Rights, 1948, Preamble, G.A. Res. 217 A (Dec. 10, 1948).

13 Kyung Min Kim, Internet rights in focus: 38th session of the Human Rights Council, *AccessNow*, available at https://www.accessnow.org/internet-rights-in-focus-38th-session-of-the-united-nations-human-rights-council/ (last accessed 13 September 2020).

14 Catherine Howell & Darrell M. West, 'The internet as a human right', *Brookings,* available at https://www.brookings.edu/blog/techtank/2016/11/07/the-internet-as-a-human-right/ (last accessed 13 September 2020).

15 See UN General Assembly, Oral Revisions of 30 June, Human Rights Council Thirty-second Session Agenda item 3 "32. The promotion, protection and enjoyment of human rights on the Internet."

16 A/HRC/res/26/13, June 2014.

Although it was adopted unanimously, "there were several countries opposed to the amendments, including Russia, China, Saudi Arabia, Indonesia, India and South Africa."[17] Article 19 is "soft" law, as it entails a recommendatory power to nation-states and lacks any enforcement mechanisms like a "hard" law.

By nature, a UN resolution is unenforceable. However, in contemporary international law, these resolutions indicate a political commitment. The UN resolution entails an international consensus by the liberal global order to refrain from "measures to intentionally prevent or disrupt access to or dissemination of information online".[18] The Post-World War II era apart from the rapid rise of technologies saw the rise of democracies. A State upholding the means of freedom of speech and expression like digital technologies is a democratic attempt towards rebuilding relationships with its citizens. Before the adoption of the resolution, an embryonic "UN report on the Promotion and Protection of the Right to Freedom of Opinion and Expression was circulated to prevent France and the UK from blocking copyright infringers from accessing the internet."[19] The implied idea behind the report was also to oppose the "blocking of internet access in retaliation to political unrest". The timing of the release of the UN report was also momentous, as it coincided with a shutdown of Syria's internet connection. The UN also considers restricting the access of the internet, "regardless of the justifications to be disproportionate and thus a violation of Article 19, Paragraph 3, of the International Covenant on Civil and Political Rights."[20] The recent UN General Assembly debates also call upon all States to ensure that "communication access is maintained at all times without exceptions."[21]

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17 'UNHRC: Significant resolution reaffirming human rights online adopted', *Article19,* available at https://www.article19.org/resources/unhrc-significant-resolution-reaffirming-human-rights-online-adopted/ (last accessed 13 September 2020).

18 David Kaye, 'Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN expert urges DRC to restore internet services', *OHCHR,* available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24057&LangID=E (last accessed 13 September 2020).

19 'Annual Reports: Freedom of Opinion and Expression', *United Nations Human Rights Office of The High Commissioner* , available at https://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Annual.aspx (last accessed 13 September 2020).

20 Policy Brief, 'Internet Shutdowns', *Internet Society*, available at https://www.internetsociety.org/policybriefs/internet-shutdowns (last accessed 13 September 2020).

21 Deborah Brown, 'UN General Assembly adopts record number of resolutions on internet governance and policy: Mixed outcomes for human rights online', *Association for Progressive Communications*, available at https://www.apc.org/en/news/un-general-assembly-adopts-record-number-resolutions-internet-governance-and-policy-mixed (last accessed 13 September 2020).

The resolution to amend Article 19 of the UDHR also signifies a political commitment adopted by the world community as a response to many countries embracing internet shutdown or digital disruptions as a national policy response. This also indicates the crystallising of two enterprising geopolitical philosophies. First, the idea of freedom of speech and expression getting a universal consensus. Second, the acknowledgement of the internet as a paramount invention. This becomes further clear as the resolution[22] also recognises that a global and open Internet is imperative for the full implementation of the Agenda 2030 Sustainable Development Goals.[23] Considering the internet as a human right also comes with a responsibility to ensure it is available to all. Technologies that are a privilege i.e. available to only those who can afford it, defeats the whole purpose of blanketing it under the contours of human rights. Any indispensable resource in a human being's life cannot come at a price in any functioning society. This indispensability of the internet in the life of humans makes it the newest and one of the most powerful additions to the long list of human rights.

2.2. Networking other rights through access to the Internet

Post the 1990s, global connectivity has become the rule. Internet as a resource is now a sine qua non to facilitate a wide range of activities including health, education, business and psychology. All these factors independently or interdependently constitute an extension of human rights. Today, the realisation of rights is more important than theoretical scripting of rights. While freedom of expression is most correlated right while dealing with digital technologies, the internet also is a perfect exemplar of duality. The duality of the internet concerning human rights indicates a 'twin dilemma'. The authors argue "access to the internet in itself is a substantial human right, and access to the internet is also a facilitator to realise various other human rights."

In a democratic society, civil and political rights form the buttress of a liberal polity. Internet disruptions act as a tool used to intentionally prevent or disrupt access to information and freedom to express information. In the age of digital media, shutdowns coincide with the freedom of the press. Freedom of peaceful assembly ensures accountability and dissent in domestic order. When social media platforms are viewed as a threat to the organizational potential of the state,

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22 G.A. Res. 70 (1), (Sep. 25, 2015).

23 Meetings Coverage, 'Full Implementation of 2030 Agenda for Sustainable Development Requires Reaching Those Furthest Behind, Secretary-General Tells High-Level Political Forum', *United Nations*, available at https://www.un.org/press/en/2016/ecosoc6787.doc.htm (last accessed 13 September 2020).

governments rely on justifications like "unchecked rumours and the capacity of online debate to incite violent protest"[24] to shut the flow of information through the internet. Internet shutdowns can also disrupt this way of life and way of thought, by coinciding with the cultural rights of communities.

Disruptions also undermine economic and social rights. While Internet shutdowns damage the domestic financial ecosystem and local economy through immobilising e-commerce, mobile banking and start-ups etc., it also creates a colossal effect on the confidence of foreign investors. Article 12 of the ICESCR establishes "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." In the age of digital therapies and e-consulting, interfering with access to the internet undoubtedly hurt health-related services. Right to Education imposes a duty on the State to avoid hindrance with its essentials, the internet is largely becoming a source and tool for academic research. Digital disruptions thereby jeopardise academic efficiency and social inclusiveness. Though rarely reported, large-scale shutdowns can undermine humanitarian efforts.[25]

3. Effects of Digital Disruptions on the Right to Dissent in an Information Society

The character of a 'right' can never be absolute. Absolutism leads to chaos and 'reasonableness' is a public policy response to minimise the chaos. Freedom too like other liberties is a conditional right and reasonable restrictions have to impose to obviate public disorder and protect peace and security. The internet shutdown conundrum is an attempt to answer whether this policy response falls under the contours of 'reasonability'. These large-scale digital disruptions are frequently called network shutdowns, Internet shutdowns, or blackouts. An Internet shutdown can be defined as:

> *"intentional disruption of Internet - based communications, rendering them inaccessible or effectively unavailable, for a specific population, location, or mode of access, often to exert control over the flow of information."*[26]

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24 Policy Brief, 'Internet Shutdowns', *Internet Society*, available at https://www.internetsociety.org /policybriefs/internet - shutdowns (last accessed 13 September 2020).

25 See Jan Rydzak, *Disconnected: A Human Rights Based Approach to Network Disruptions*, Global Network Initiative Report, Washington, D.C., 2019, p.10. "A network disruption is the intentional, significant disruption of electronic communication within a given area and/or affecting a predetermined group of citizens. Extreme manifestations of network disruptions involve the comprehensive or complete disconnection of digital communication within the defined area."

26 *supra* note 19

The phenomenon by its very character resembles an extension of authoritarianism, although, it is not limited to authoritarian and non-democratic regimes. The Global Network Initiative Report highlights:

> *"Democracies are not distant to this threat. However, in democracies, the majority of shutdown events have revolved around issues of national or regional security, wherein shutdown disorients the protesters and disrupts coordination among the protest or movement leaders. Under the garb of 'reasonability,' governments disconnect communication networks during or in anticipation of mass protest, whether violent or non-violent. For instance, 37 of the 61 shutdowns between January and September of 2017 were suspected to be caused by either protests or political instability."*[27]

Social media offers a platform that democratises the expression of public opinion. Freedom of speech and expression, privacy and dissent are just some of the contemporary values liberal democracies are striving to protect even on the internet. Despite the libertarian origins, two events over the past few events indicate how collective dissent can mobilise into a political movement and revolution. The first was the historic revolt in the Arab world in 2011. The protests began with the creation of a Facebook page that mourned the killing of a young Egyptian by the state police. The information spread like a fire and thousands of people were organised at Tahrir Square in downtown Cairo. This popular civil disobedience marked the beginning of a fight against autocratic dictators in the Middle East. Zine al-Abidine Ben Ali of Tunisia, Muammar Gaddafi of Libya, Ali Abdullah Saleh of Yemen, and Hosni Mubarak of Egypt were thrown out of power. This popular democratic movement is now the 'Arab Spring' and the transformative role of social media and the internet in these protests is undeniable.[28] While in terms of foreign policy analysis, the proximate cause of the protests itself was an inflammable combination of ruthless policing, youth unemployment, absence of political freedom and lack of social mobility, platforms like Facebook and Twitter amplified and provided direction and momentum to this collective frustration.

The second historic event was the 2011 Indian anti-corruption movement. Social media played an indispensable role in mobilising people across the country.[29]

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27 *supra* note 23, at 8.

28 Heather Brown, et. al., 'The Role of Social Media in the Arab Uprisings', *Pew Research Centre*, available at https://www.journalism.org/2012/11/28/role-social-media-arab-uprisings/ (last accessed 13 September 2020); Gadi Wolfsfeld, et. al., "Social Media and The Arab Spring: Politics Comes First", *The International Journal of Press/Politics,* Vol. 18, 2013, pp. 15-37.

29 Esha Sen Madhavan, 'Internet and Social Media's Social Movements Leading to New Forms of Governance and Policymaking: Cases from India', (2016) 1 *Glocalism: Journal of Culture, Politics and Innovation*, available at http://www.glocalismjournal.net/issues/networks-and-new-media/articles/internet-and-social-medias-social-movements-leading-to-new-forms-of-governance-and-policymaking-cases-from-india.kl (last accessed 13 September 2020).

Movements on Facebook like "Candle Light Support Rallies", "India against corruption badges", "25,00,000 Missed Calls" and online broadcasting of the fast unto death movement by Anna Hazare, resulted in citizens turning out in large numbers against the UPA-II dispensation. Today, the Internet and social media play an effective role in election campaigns, government schemes' advertisings and even in ensuring grassroots level policy implementation.

3.1. Evolution of Internet shutdowns as a law enforcement measure

Digital disruptions as a law-and-order response received global traction during the Egyptian revolution of 2011 when authorities as a counter-response to the mass movements "shut down the Internet for nearly a week to disrupt communications of protestors."[30] After 2011, politically motivated use of Internet shutdowns has seen an upward trend. 2018 alone accounted for 196 internet shutdowns, growing from 106 in 2017 and 75 in 2016.[31] In 2018, government rationales included "combating fake news, hate speech, and related violence, securing public safety and national security, precautionary measures, and preventing cheating during exams, among others."[32]

Internet shutdowns have unprecedented technical, economic, and human rights impacts. While reasonable disruptions like Internet curfews, i.e., "full or partial blackouts at prescribed times throughout an examination period to prevent cheating in professional and school exams are a new trend in several countries, targeted disruptions in anticipation of unrest, military operations, mass events, and elections do not necessarily fall into the reasonableness criteria."[33] During elections, the suspension of services reduced the visibility of the opposition. Governments typically justify elections-related disruptions as retaliation to national security threats or concern for the fairness of the electoral process. Considering how powerful a tool internet has tuned into, digital disruptions enables to wither away powerful movements. This whole case has made internet disruptions a new law enforcement measure. But to identify whether these measures are undertaken for law enforcement or for enhancing self-serving arbitrary interests need a case-by-case analysis.

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30 Noam Cohen, "Egyptians Were Unplugged, and Uncowed", *New York Times*, 13 September 2020, at p.8.

31 Access Now Report on 'Targeted, Cut Off, and Left in The Dark: The #Keepiton Report on Internet Shutdowns in 2019', at 15 (2019).

32 *Ibid.*

33 *Ibid.*

3.2. Targeted Disruptions

Internet disruptions have a direct impact on human rights and the same has been acknowledged by the Special Rapporteur's June 2017 Report to the Human Rights Council which states that,

> "the users affected from an Internet shutdown are cut off from emergency services and health information, mobile banking and e-commerce, transportation, school classes, voting and election monitoring, reporting on major crises and events, and human rights investigations."[34]

Internet-related anthropological studies have also highlighted the problem of intersectionality. Whereas digital exclusion is a contemporary concern, gender too can dictate access to the internet. A 2017 World Wide Web Foundation study found that men globally are 33 per cent more likely to have access to the internet.[35] The role of the internet in 'welfarism' and governance is also important as the internet ensures power accountability and transparency. But far these tools are inclusive will test the efficiency of tools. Internet shutdowns are sometimes executed in regions with marginalized ethnolinguistic or ethnic-religious group forms a considerable part of the population.[36]

4. Economics of Cyberspace

The vitality of digital technology for economic development is geo-economically imperative. A 2012 World Bank analysis found "…fixed broadband generating a 1.35% increase in per capita GDP for developing countries and a 1.19% increase for developed countries."[37] In the era of the fourth industrial revolution, the internet is the modern fuel. According to reports, "it is estimated that for a highly Internet connected country, the per day impact of a temporary shutdown of the Internet and all of its services would be on average $23.6 million per 10 million population."[38] In

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34 'Report on the role of digital access providers, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (HRC 35th session, 30 March 2017) A/HRC/35/22', *UNHCR,* available at *https://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/SR2017ReporttoHRC.aspx* (last accessed 13 September 2020).

35 Nanjira Sambuli, 'Women, the web and the future of work', *Web Foundation,* available at *https://webfoundation.org/2017/03/women-the-web-and-the-future-of-work/* (last accessed 13 September 2020).

36 *Supra* note 23, at 12.

37 Michael Minges, "Background Paper Digital Dividends: Exploring the Relationship Between Broadband and Economic Growth", *World Development Report 2016: World Bank* , Vol.1, 2016, p.5.

38 'New Report Reveals the Economic Costs of Internet Shutdowns, GNI Report – The Economic Impact of Disruptions to Internet Connectivity', *GNI*, available at https://globalnetworkinitiative.org/%E2%80%8Bnew-report-reveals-the-economic-costs-of-internet-shutdowns/ (last accessed 13 September 2020)

countries with lower levels of Internet access, "the average estimated GDP impacts account to $6.6 million for medium and $0.6 million per 10 million population low Internet connectivity economies."[39] In contemporary international order economic impacts draws institutional attention. Followed by the UN Special Rapporteur on freedom of expression voicing his concerns at "the disproportionate impact of Internet shutdowns on people's right to expression,"[40] the Human Rights communities have come forward "to access the impact of internet shutdown on the third generation right of 'collective development'".[41]

A Human Rights Council resolution, adopted by consensus in 2016, stated that it "condemns unequivocally measures to intentionally prevent or disrupt access to or dissemination of information online in violation of international human rights law".[42] In 2011, the Egyptian government to curb protests imposed the infamous internet shutdown. The counter-response policy's damage was swift and dramatic. Apart from the socio-cultural effects, it badly disabled economic prosperity. The business was disabled as they could not engage in e-commerce or provide services. After the Arab Spring, the Organization for Economic Development and Cooperation recognised that "the decree to cut internet connectivity cost Egypt $90 million."[43]

According Centre for technology innovation at Brookings Institution's study, "between July 1, 2015, and June 30, 2016, internet shutdowns cost at least US$2.4 billion in GDP globally."[44] The report states, "Economic losses include $968 million in India."[45] These data do not account for tax losses, business to be formulated in future, start-up plans, investor commitments, foreign investor confidence and

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39 'The economic impact of disruptions to Internet connectivity: A report for Facebook', *Deloitte*, available at https://www2.deloitte.com/global/en/pages/technology-media-and-telecommunications/articles/the-economic-impact-of-disruptions-to-internet-connectivity-report-for-facebook.html (last accessed 13 September 2020).

40 'The Special Rapporteur's 2017 report to the United Nations Human Rights Council is now online', *United Nations Human Rights Office of the High Commissioner*, available at https://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/SR2017ReporttoHRC.aspx (last accessed 13 September 2020).

41 *Ibid.*

42 Avani Singh, *Legal Standards on Freedom of Expression: Toolkit for the Judiciary in Africa*, UNESCO Publishing, 2018, p. 151.

43 Taylor Reynolds & Arthur Mickoleit, 'The Economic Impact of Shutting Down Internet and Mobile Phone Services in Egypt', *Organization for Economic Development and Cooperation*, available at https://www.oecd.org/countries/egypt/theeconomicimpactofshuttingdowninternetandmobilephoneservicesinegypt.htm (last accessed 13 September 2020).

44 Darrell M. West, 'Internet shutdowns cost countries $2.4 billion last year', *Brookings,* available at https://www.brookings.edu/wp-content/uploads/2016/10/intenet-shutdowns-v-3.pdf (last accessed 13 September 2020).

45 *Id.*

consumer confidence. The impacts of a temporary shutdown are directly proportional to the emerging maturity of the online ecosystem. The union territory of Jammu and Kashmir was under a digital lockdown for more than a year. The case of internet shutdown in the region is curious considering the economical hit the region had due to the internet gag affecting the IT sector to tourism. A report by The Indian Council for Research on International Economic Relations divulged that "16,315 hours of intentional internet downtime between 2012 and 2017 has cost the Indian economy $3.04 billion."[46]

5. Need for a New Social Contract in the Cyberspace: From Hobbes to Kautilya

Kautilya was the first 'Contractualist' in India, however, his idea of a social contract was different from the Hobbesian perspective. Kautilya's *Arthashatra* is a perfect politico-economic treatise on the role of the State. Kautilya's political philosophy was based on minimum interference of the State, as opposed to Emperor Ashoka's model of governance which focussed on total control of the King over the actions taken by the State. Ashokan model of administration can be loosely correlated with the Hobbesian state. The present-day *laissez-faire* can be remotely associated with the 'Kautilyan' model of governance. Advocating rights in the sphere of cyberspace requires the State to acknowledge the liberty of individuals and thereby maintaining appropriate distance from the actions of people. Today cyberspace governance demands a shift from the Hobbesian model of administration to Kautilya's limited interference model of governance.

Legitimate concerns of the Government to ensure public order and security should be grounded in law and must reflect the 'proportionality-nexus' and 'legitimate aim' of the State to safeguard the public order and security. The international human rights regime requires assessments to be guided by principles of proportionality and necessity. The interference of the state shall be limited to the actions being taken adhering to the principles of 'due process of law' and 'natural justice'. The universality of access to the internet is also implicit in its cross-border penetration. In a globally interconnected world of an open internet, content that may be problematic might be sourced from different jurisdictions. From a statistical perspective, there is no effective study which proves that shutdowns have at the grassroots level addressed the crisis. However, there have been studies suggesting information blackouts have

[46] Rajat Kathuria, et. al., *The Anatomy of An Internet Blackout: Measuring the Economic Impact of Internet Shutdowns in India,* Indian Council for Research on International Economic Relations, New Delhi, 2018, p. 10.

impacts on the civil, political, economic, social, and cultural rights of citizens. Considering the cost-benefit analysis, the cost of internet shutdowns far exceeds the purposeful benefit of disruptions. Even shutdowns for a short period may have long-term implications. Psychologically, disruptions also lead to "loss of trust and confidence on the Internet as a reliable platform."[47] The post-traumatic stress disorder aftermath of internet shutdowns remain under-studied and under-recorded. Public policymakers must assimilate that access to the internet should be the norm, and any limitation to this freedom of expression is the exception.

6. The Legal and Judicial Outlook on Internet Shutdowns in India

According to Article 19 of the Constitution of India, "Many of the fundamental rights guaranteed by our Constitution the freedom of speech and expression, the freedom of association, the freedom of trade is exercised in significant part on the Internet."[48] There are two statutes i.e. Code of Criminal Procedure 1973,[49] and Indian Telegraph Act 1885 read with Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017, which confer powers upon Government agencies to order blanket network disruptions within its jurisdiction.[50]

The Kerala High Court Judgment was a seminal judicial intervention to ensure judicial acknowledgement of the right to access the internet. In its judgment in the case of *Faheema Shirin RK v. State of Kerala and others,*[51] the Court held that "the right to have access to the Internet is part of the fundamental right to education as well as the right to privacy under Article 21 of the Constitution". The Kerala High Court based its judgment based on the ratio laid down by the Supreme Court in the case of *S. Rangarajan and others v. P. Jagjivan Ram* [52] in 1989. The court observed,

> *"When the Human Rights Council of the United Nations has found that the right of access to the Internet is a fundamental freedom and a tool to ensure the right to education, a rule or instruction which impairs the said right of the students cannot be permitted to stand in the eye of law."*[53]

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47 *Ibid.*

48 The Constitution of India, 1950, art. 19, cl. 1

49 Section 144 of the Indian Penal Code, 1860.

50 *Living in Digital Darkness: A Handbook on Internet Shutdowns in India*, SFLC, New Delhi, 2018, p. 70 (2018).

51 *Faheema Shirin RK v. State of Kerala and others*, W.P(C). No. 19716/2019-L

52 *S. Rangarajan and others v. P. Jagjivan Ram* , Civil Appeal Nos. 1668 & 1969 and 13667-68 of 1988

53 'Access to Internet is a basic right, says Kerala High Court'*, The Hindu*, available at https://www.thehindu.com/sci-tech/technology/internet/access-to-internet-is-a-basic-right-says-kerala-high-court/article29462339.ece (last accessed 13 September 2020).

On 10 January, the Supreme Court in the case of *Anuradha Bhasin v. Union of India*[54] ordered a review on the clampdown on communications and some other constitutional guarantees in the region of Jammu and Kashmir. The Supreme Court reiterated that "at all times, restrictions upon fundamental rights had to be consistent with the proportionality standard. In particular, as part of the proportionality standard, the State had to select the least intrusive measure to achieve its legitimate goals." The Supreme Court in its 'findings' upheld the right to the internet as a fundamental mechanism to realise other fundamental rights enshrined under Part III of the Constitution, however, there were no directions given to the government concerning the internet in this case.

7. Conclusion

The world is more connected than ever before because of digital technologies and this makes the internet an extension of society. Internet freedom encompasses both democratisation of rights and protection of democratic rights. The whole debate of cyberspace becoming the new resource has ushered two distinctive ways of thought between "cyber utopians", who believe the internet is a powerful tool to topple dictators, and "cyber dystopians", who believe that autocracies are using the tools of the internet to strengthen their own dictatorial rule. The goal of the international order is to strengthen the process of liberation that includes active political participation by the citizenry, protection of human rights and maintaining a rule of law that is fair to all citizens. Internet's potential as a tool for political change has not been fully realised. However, the internet's potential to facilitate self-serving interests has been captivated by governments across the globe.

Internet shutdown justified as means to protect order 'for' the people are now turning into a blatant authoritative response 'against' the people. It is also quintessential to understand that economic development and human rights cannot be disentangled. The future of a functioning order depends on how society conceptualises a viable alternative to prevent the horrors of unrestricted freedoms than making internet shutdowns as a national policy. Any policy or action undermining 'due process' or 'proportionality' principles will fail the test of time. There is a need for nations to analyse internet shutdowns through the prism of the human rights-based approach, rather than through the lens of security. As economic, cultural and social rights form the three important pillars of human rights, shutting down access to the internet is the modern equivalent of shutting down human rights.

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54 *Anuradha Bhasin v. Union of India,* WP (C). No. 1031/2019.

THE ROLE OF FOOD SECURITY GOVERNANCE IN ACHIEVING DISTRIBUTIVE JUSTICE

Rohtash*
Jaimala**

1. Introduction

Supreme Court of India in the landmark judgment recognized that 'Right to Food' is fundamental right under Article 21 of the Constitution of India.[1] Accordingly the Parliament of India enacted The National Food Security Act, 2013 that protected the underprivileged section of the society and transforming the Govt. schemes into legislations. With the enactment the Act of 2013 'Right to Food' became as a Statutory right the Act stated that, "An Act to provide for food and nutritional security in human life cycle approach, by ensuring access to adequate quantity of quality food at affordable prices to people to live a life with dignity and for matters connected therewith or incidental thereto."[2] Further apex court held that right to food basic human right also. "Availability at all times of adequate world food supplies of basic foodstuffs to sustain a steady expansion of food consumption and to offset fluctuations in production and prices".[3] "Ensuring that all people at all times have both physical and economic access to the basic food that they need".[4] Universal Declaration on Human Rights also recognizes the Right to Food as Human Right.[5] International Convention on Economic, Social and Cultural Rights (1966) explicitly stresses on the right to food and freedom from Hunger.[6] These are the definitions which help to understand the concept of food security and how to response such problem while delivering justice. Justice is multidimensional concept such as

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1 *Peoples Union For Civil Liberties* v. *Union of India And Ors*. Writ Petition (civil) 196 of 2001.

2 Preamble of The National Food Security Act, 2013.

3 World Food Summit, 1996

4 Food and Agriculture Organization, 1983

5 Article 25(1)- "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." Universal declaration of Human Rights (1948)

6 Article 11(1)- "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent." International Convention on Economic, Social and Cultural Rights (1966)

economical, social, political, environmental and distributive. Distributive justice concerns with the fairness in the allocation and distribution of resources among different sections of the society on the basis of the different principles while not compromising the efficiency. Distributive justice, thus, as far as food security is concerned, mainstreaming of the underprivileged section of the society.

2. The Dimensions of Food Security

Food security is multidimensional concept such as (4A) Availability, Accessibility, Affordability and Acceptability. *Availability*- The first and foremost dimension of the food security is the Availability. There are various dimensions involved to make availability of food including the production, storage and supply. For a comfortable level of availability of food require agriculture sector must be efficient to produce at desirable or targeted level. All the developing countries are highly dependable on agriculture sector. Most of the developing countries having backward agriculture sector facing problems of disguised unemployment, low level of technology, subsistence level of food production that causes slow process of commercialization, low level of public investment & infrastructure and high growth rate of population. Climate change is the serious problem for the agriculture production as it affects the cropping patterns. Moreover international trade is also important factor in ensuring food security as it make sure availability of food from food surplus regions to food deficit regions. The global food supply chain can be possible smoothly if there is free market economic system with minimum interventions necessarily only for market regulation by the state. Doha Round under World Trade Organization may play an important role if all the member nations are ratified it. Therefore, the production is the main determinant of the food security. *Accessibility*- The second important dimension of the food security is the accessibility that food supply chain is fair whether it can be through public distribution system by the state or by market forces. Sometime market is more efficient than court to deliver justice. *Affordability*- The third dimension is affordability meaning thereby that targeted groups under the food security programme must have purchasing power to make demand for food. Purchasing power further determined that whether economy is in inflationary or recessionary pressure and International exchange rate are favorable or not. *Acceptability*- The last dimension of the food security is the acceptability that is related to cultural aspects of the food security that the available food must be accepted by the majority of the population e.g. population residing in the coastal area prefers seafood over the other food items while the while the population residing in the non costal area prefers non-seafood such acceptability is the cultural dimension of food security. Sometime it can be related to religion also.

3. Gender and Food Security

3.1. Women feed the world while facing food insecurity.

Women have less ownership and access to productive resources. There is unequal distribution of land and other resources between men and women. This inequality leads to food insecurity more among the women than men. Gender is the most important factor which determines the food security in the society. Even among the children gender is the barrier to ensure the food security. Families distribute resources among the children on the basis of the gander. Girl child are having less nutritional diet than boys.

Patriarchal mind set and poverty are the reasons for such discrimination. Lack of economic independency and decision making among women is another considerable factor to ensure food security. Women and girl child need different nutritional needs. [7] Women are equally or in some backward countries more than half of the work force contributing in the agriculture sector still they are considered as assistance labour. This is the gender discrimination that denied the role of the majority women labour engaged in the agriculture sector. Such discrimination leads to injustice that further leads to the food insecurity among the women. Women and girls are not having succession rights of land in most of the developing countries. Therefore they are not able to access agarble land. Another problem is that in the low backward countries women and girls are not adequate and sufficient education and learning opportunities that make them unskilled to use technology and innovation in the agriculture sector.

Financial sector also discriminates on the gender basis credit facilities are less access to women than men because women have less collateral to credit facilities. Another constraint is the women are sharing more household responsibilities than men that make them pay less time in the fields.[8] Despite of high growth rate of economic growth, benefits of growth are unevenly distributed among the women and girls. Such uneven distribution makes women and girls the most disadvantage group in the society. Therefore is strong positive correlation between the gender insecurity and food & nutritional insecurity. Moreover the LGBTQ community is another under privileged section of the society that is the most venerable group as far as food security is concerned after women, girls and juveniles. This community after recognizing as third gender by the Supreme Court of India is able to claim all rights

7 Intergovernmental Panel on Climate Change, Special Report on Climate Change, 2019.
8 US AID, United States Agency, 2015

legitimately including food.[9]

4. Protracted Crisis and Food Security Governance

Protracted crisis is a situation characterized in which the recurrent of natural calamities, disasters, conflicts, threatens to sustainability of food production, livelihood crisis and institutional incapacity to response such crisis. In other words protracted crisis is characterized when significant portion of the population is venerable to death, disease over a prolonged period because of natural disasters.[10]

Food security governance is the only way to address food security crisis in the protracted crisis areas. Food security governance is characterized that 'right to food' is recognized and delivered by the state as a liability. Food security governance is the interconnected network or is a process in which different stake holders such as State, Farmers, market and public private partnership. The role of the State is very crucial that it must recognized 'Right to Food' as a legal right and set up institutional mechanism to deliver such right. Public policy and legislation are the key components on the part of the State to ensure food security.

Distribution system must be regulated and fair wheatear it managed by the State or by the market. When the market is regulated by capable institutional set up then it is more efficient than Courts. Building infrastructure and mainstreaming of the disadvantage groups in the society from farm sector to modern sectors is the subject matter of the public policy and its implementation with given of resources. In late 1960s India achieved food security through Green Revolution it was matter of Food security Governance. Food security with the objective of sustainable agriculture is only possible when food policy shift from conventional approach to new approach which must address sustainable food system.[11]

5. Food Security Governance in India

5.1. Pre-harvest and Post-harvest Management

Food security in India managed by the General Govt. (both Union and States Govt.) broadly on two levels that is *Pre-harvest* and *Post-harvest Management. Pre-harvest management* to ensure the availability of food and assistance to the farmers through various subsidizing schemes such subsidies on seed, pesticides, bore well, Minimum

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9 *National Legal Service Authority* v. *Union of India & Others*. Writ petition (civil) No. 604 of 2013.

10 Improving Food Security and Nutrition in Protracted Crisis, Food and Agriculture Crisis, United Nations.

11 Food Security Policies: Making the Ecosystem Connections, Gland, Switzerland, IUCN (2013).

Support Price (MSP) and irrigation subsidies (both on underground and ground water in the form electricity and canal subsidies). *Post-harvest management* includes the procurement price, storage, economic cost and distribution at subsidized price. Public Distribution System with two major schemes namely Antyodaya Anna Yojana and Annapurna Anna Yojana is addressing food security in the post-production management.

5.2. Food Security, Inclusive Growth and Distributive Justice

Food security is the matter of great core of concern in India since independence. First five year plan was primarily focused on the agriculture & allied sector addressed the challenges that time

India faces to feed the population. Green Revolution in India not only helped to achieve food security but economic growth in short run and economic development in the long run. Its impacts on the small sectors were tremendous in terms of employment generation, poverty alleviation and export promotion. Moreover the Five years planning by the Planning Commission was the successful story behind the green revolution.

Public Distributed System which latter on restructured as Target Public Distributed System is one of the most successful programmes in the world that has been achieved food security. Subsiding of food distribution in India is the strategically successful story. Segregation of the underprivileged section of the society into targeted groups such as Schedule Caste, Schedule Tribes, Other Backward Class, Women & Girl Children, Disabled Person etc.. Ninth, Tenth, Eleventh & Twelfth Five Years were focused on the inclusive and more sustainable growth specially focused on the mainstreaming of the backward section of the society.[12]

Mid-day meal programme in India is an important and successful programme to achieve both food security and school enrollment in primary and upper primary schooling. Direct Benefits Transfer Scheme is another milestone in transferring subsidies in the form of cash directly in the bank accounts of the beneficiaries.

6. Food Security Challenge During COVID-19

The Corona Virus Disease outbreak is raised serious questions on the food security governance in India. Countrywide lockdown left marginalized section in very miserable conditions. The food security is in question in terms of the accessibility

[12] Five Years Plans' Documents, Planning Commission of India.

and affordability during the COVID lockdown. The government seems failed to response such outbreak while the Civil Society (NGOs, Religious Institutions) played an important role to deliverer food. The absence public health emergency response system is the matter cores of concerns in India to response such outbreaks in India. COVID raise the food insecurity in the developing and backward countries.[13]

7. Conclusion

Food security is one of the important determined of the distributive justice. No doubt India achieved a milestone success in the path of social justice yet it has a long way to go ahead to achieve distributive justice by securing food security. The Poverty, under nourishment, malnutrition in women and children especially girl child is the biggest challenge to achieve good security and gender justice. India needs to address the food insecurity in the SCs, STs and other marginalized section of the society. The National Food Security Act, 2013 is an important legislation in this respect. The story of distributing justice is attractive in India but it is a long way ahead to go. The food security governance is also needs to strengthen by institutional set up and the food policy should be redesigned in the light of the Sustainable Development Goals.

[13] Food Security And COVID-19, World Bank Brief, May 28, 2020.

DEATH PENALTY IN RAPE CASES: VIOLATION OF HUMAN RIGHTS VIS- A-VIS CONSTITUTIONAL RIGHT TO LIFE

Sandhya Rohal*
Tanu Arora**

1. Introduction

The concept of death penalty as an punishment started from last of 18th century B.C. It was in the Code of King Hammurabi of Babylon who initiated this for more than 20 crimes. In Britain it was initiated somewhere in tenth century A.D. By influence of Britain America also initiated the punishment of capital punishment in fact in more than 220 crimes as listed by their government. If researcher study about the historical background of death penalty in Indian aspects then it can be seen from way back of 4th century. ***Kalidas*** has beautifully observed the need of death penalty.[1]

India is such country where crime and criminals are such huge in number. Law is a tool to control the society . crime and criminals are running parallelly with never ending process. There is controversy on the question of abolition of death penalty. One side it is the procedure established by law and is awarded for the most heinous and grievous offense.[2]

Authors categorised controversy in to two parts:

- ⬆ control crime by imposing punishment
- ⬇ Article 21, No Person shall be deprived of his life except process established by Law.

Though IPC provides a death sentence as a punishment for various offenses such as criminal conspiracy, murder, waging war against the government, abetment of mutiny, dacoit with murder, and anti-terrorism. Since independence, there have been fifty-two capital punishments that have taken place in India and twenty-two capital

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1 Quoted in Shukla Das , Crime and punishment in Ancient India , Abhinav Publications, New Delhi , 1977.p56

2 Available at, *https://knowlaw.in/index.php/2021/05/24/death-penalty-judicial-dilemma-sentencing/* .

Punishments that have taken place since 1995.[3]

2. Evolution of Death Penalty

In fact need of capital punishments have been discussed in Ramanyana and Mahabharata . The Ashoka great also not denied capital punishment in case of state offences. The basis of the dandniti in India were deterrence and mental rehabilitation. The concept of social defence clearly and non-correctional theory is the very much apparent factorin Indian penal system . it is also find in the kautilya's work .

According to Kautilya:

punishment was the universal means of ensuring public security.

According to some jurists of law Brahmans were exempted from death penalty and they were awarded banishment otherwise, while still we can see some examples in the history were death penalty was awarded to a Brahman and therefore they cannot be called to be totally exempted[4]

The Muslim jurisprudence also state about the concept of capital punishment , the main purpose death penalty is to deterrent society to do such acts which are against their personal laws or laws meant or declared by Prophet Mohammad [5].

3. Crime and its relation with penalty in Muslim Law:

3.1 The universal Declarations of Human right 1948 mentioned that-

"everyone has the right to life" and "no one shall be subject to torture or to cruel , inhuman or degrading treatment or punishment"

3.1 In American Declaration of the Rights and duties of Man also state about the above said declaration in their constitution.

3.2 In drafting of UDHR 1948, drafters have seen all nations constitution in which it found that the right to life is basic right and hence, it has been added in UDHR. However, it is also true that all nations have borrowed ideas of framing of constitution from each other nations. Broadly from: Britain , America , French declaration etc. But after framing of UDHR 1948 the concept of Right to life has been taken broader concept than it was before in

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3 *Ibid*.

4 Dr.Sen P.N. *Hindu Jurisprudence*.

5 chapter -2 historical background – origin and evolution of the concept " shodhganga"(Also available at shodhganga.inflibnet.ac.in

other nations because it has included various aspects in this.

3.3 In European convention of Human Rights : it came into existence in 1950's it also broadly deals with the provision of Right To Life, here also it has been stated clearly that the right to life is subject to conditional on execution of death penalty if it is specified by the particular law of the land.

These examples of international laws in context of death penalty. However, by virtue of article 6[6] of international covenant on civil and political rights it has been cleared that the death penalty cannot be used as matter of course rather it required some exceptional cases which contains the seriousness in intention and crime also.

In fact General Assembly recognised that:

"In case of death penalty there is need for high standard of Fair Trial"

Trial should be Just, Fair and Reasonable. Due process of law and rule of law are basic two elements to execute death penalty as one of the punishment.

4. Death Penalty and its Legal Position in India:

The death sentence has been given in Indian legislation not as matter of course rather it is based on theory of rare and rarest cases.

4.1 Indian legislature on capital punishment

there are various legislatures in India which manifest capital punishment . there are almost 18 legislations which have been enacted by central government and that contains around 59 sections in theses enactments. The central enactments which deals with the capital punishment are as follows [7]:

4.1.1 Capital punishment in Indian penal code:

a) Section 121 : Treason , for waging war against the Government of India
b) Section 132: Abetment of mutiny actually committed
c) Section 194 : Perjury resulting in the conviction and death of an innocent person
d) Section 195 A: Threatening or inducing any person to give false evidence resulting in the conviction and death of an innocent person

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6 *Ibid.*

7 Prof.N.V.Paranjape, *Criminology ,Penology, Victimology* 17 (Central Law Publication,17th edn.,2017

e) Section 302 : Murder

f) Section 305 : Abetment of a suicide by a Minor ,insane person or intoxicated person

g) Section 307 (2) : Attempted Murder by a Serving life Convict

h) Section 364 A: Kidnapping for ransom

i) Section 376 A: Rape and injury which causes death or leaves the woman in a persistent vegetative state

j) Section 376 E Certain repeat offenders in the context of rape

5. Death Penalty in Rape Cases

In spite of legal restriction imposed on illegal sex indulgence , the incidence of this vice is on a constant increase. The obvious reasons for the upward trend in sex-offence is that sexually which is bio –physiological phenomenon is as essential to human organs as food and water.[8]

5.1 The Doctrine of Rarest of rare:

In India there is perplexing aspects in implementation of death penalty. In entire world there are more then 110 countries which have completely discarded death penalty in any form of crime , irrespective of gravity in nature of offences. But in Indian laws it is not banned or abolished rather it has become more active from last few decades. Here , in India capital punishment is not award as matter of course rather award on the basis of theory of *Rarest Of Rare Cases* , as we have already mention the list in aforesaid paragraphs, that which sections of Indian penal code and other enactments applies or deals with death penalty. However , the most common death row convicts either are in cases of Rape including murder in cases of terrorism.

Before theory of rarest of rare case there was a judgement :

Jagmohan Singh vs The State Of U. P on 3 October, 1972

In this case Supreme Court Left the discretion upon the judge to fix the maximum penalty and stated that the imposition of the death sentence is the exercise of discretion[9] . In this case Marshall, J. observed as follows[10] :

> *"There is but one conclusion that can be drawn from all of this -i.e., the death penalty is an excessive and unnecessary, punishment which violates*

[8] *Ibid.*

[9] Available at, *https://knowlaw.in/index.php/2021/05/24/death-penalty-judicial-dilemma-sentencing/*

[10] Available at, *https://indiankanoon.org/doc/1837051/* .

> *the Eighth Amendment. The statistical evidence is not convincing beyond all doubt, but, it is persuasive. It is not improper at this point to take judicial notice of the fact that for more than 200 years men have laboured to demonstrate that capital punishment serves no purpose that life imprisonment could not serve equally as well. And they have done so with great success. Little if any evidence had been adduced to prove the contrary. The point has now been reached at which deference to the legislatures is tantamount to abdication of our judicial roles as factfinders, judges, and ultimate arbiters of the constitution. We know that at some point the presumption of constitutionality accorded legislative acts gives way to a realistic assessment of those acts. This point comes when there is sufficient evidence available so that Judges can determine not whether the legislature acted wisely, but whether it had any rational basis whatsoever for acting. We have this evidence before us now. There is no rational basis for concluding that capital punishment is not excessive. It therefore violates the Eighth Amendmen*t."

The Doctrine of rarest of rare case has been originate in way back 1980's in case of Bachan Singh v State of Punjab [11] in this case Hon'ble Supreme court of India determined the constitutional validity of death sentence but such punishment would be given on the this doctrine i.e 'Rarest of rare case'. In this case the Hon'ble court elaborated two questions in which stated where life imprisonment would be insufficient:

I. Was there something unusual about the crime interpreting a life imprisonment sentence insufficient.

5.2 Doctrine in Rape cases:

In the case of Nirmal singh & others v state of Hrayana [12] , here in this case accused Dharampal and Nirmal were convicted for murder of 5 persons on the evidence of two eye witness, in first case against accused committed rape on Poonam , due to which he imprisoned for ten years but he wanted to go for appeal , and then during appeal he given treats to all family members of poonam whose deposition was responsible for Dharampal's conviction. But he killed all five members of poonam from khulhari in which hon'ble court awarded him death sentence as such merciless and brutally killing falls in rarest of rare case theory.

Sushil Murmu v State of Jharkhand ,[13] reiterated the 'rarest and rare case' doctrine and held , "when collective conscience of the community is shocked and it will

11 AIR 1980 SC 276
12 AIR 1999 SC 1221
13 AIR 2004 SC 394

except the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty , death sentence must be awarded."

In Priyadarshini Mottoo Rape case [14], held that where the court feels some difficulty in ,making choice between the award of death sentence or life imprisonment , the appropriate course would be to award lesser sentence while choosing between the two punishments , both aggravating and mitigating circumstances should be weighed . In the instant case , the appellant committed rape and murder of a hapless junior colleges LLB student for having rebuffed his amorous overtures after causing her long harassment . He inflicted her 19 injuries after raping her. His acquittal by the trail court was reversed by the Delhi High Court and he was sentenced to death.

In CASE – Mukesh &Anr vs State of NCT Of Delhi &Ors(2017)

This case is the one which typically crossed all limits of inhuman treatment, here accused treated female named "Nirbhya" as an object. One night of Delhi on 16th December, 2012 , a 23 year old girl was brutally raped in moving bus. She was returning with her friend after watching movie and they boarded an off duty bus at bus stand in which six other men included driver were there. But after some time the friend of Nirbhiya found that the bus is moving in off route direction. The friend of her found suspicion and asked to driver to stopped the bus but they could not . Thereafter , they beaten her friend then all of them assaulted the female and gang raped her for an hour there after they drove the bus in entire Delhi . One of accused who is Juvenile attackers inserted an iron rod into her genital area . due to which she got major injuries . and after that they through her out side of bus.

Due to these injuries she could not survived. But after 7 years of this brutality she not justice as the decision executed on date 20th March 2020 on which all four accused hanged till death.

6. Alteration in Indian Criminal laws:

There are certain Amendment relating to rape in Indian penal code

6.1 The criminal Law Amendments Act of 1983:

6.1.1 Amendment relating to Indian Penal Code:

[14] AIR 2012 SC 3565

This amendment came into effect after Mathrua Rape case, in year 1972, this case broadly dealt with the custodial rap[e case which happened within the police station of Desaiganj in Maharashtra. It was alleged by the victim that she has been ravished by two police officer of the same station. But the conviction was not given to accused persons rather they acquitted in final appeal of supreme court of India.

But this judgement given huge outcry in public at public at large and insisted the government to bring amendment in IPC by The criminal law amendment act 1983.the broad area relating to provisions of rape amended such as , section 228-A i.e. Disclosure of identity of victim of rape , section 375-Rape , IPC , section 376 i.e. Punishment of rape, Section 376 A - intercourse by a man with his wife during Separation , Section 376 B-Intercourse by public servant when woman is in police custody , section 376 C- Intercourse by superintendent of jail , remand home etc, Section 376 D Gang Rape , section 498 A Husband or relative of husband of woman Subjecting her to Cruelty.

6.2 Code of Criminal Procedure, 1973

Section 327 (2) and 327(3) relating to rape trial , that to be conducted in camera proceedings and no person to be allowed to publish or print any matter relating to proceeding.

6.3 Indian Evidence Act, 1872

Section -113 A, Presumption as to abetment of suicide by married women.

Section -114 A , Presumption as to absence of consent.

6.4 **Criminal law Amendment Act of 2013**

This Amendment came into existence after the Rape case of Nirbhaya 2012, this case given a big blow on the protection of women at Global level. This incident given united call of all people to ask from entire system, to bring change in Criminal law, and to bring harsh punishment in such kind of heinous crime. However, In March 2020 , Four Remaining accused were hanged till death.

6.5 Amendment in IPC 1860 are as follows:

Section 166 A- Public servant disobeying direction under law

Section 166 B- Punishment For Non treatment of Victim

Section 354- Assault or criminal Force to woman with intent to outrage her modesty Section 354 A to Section 354 D

7. Death Penalty as Violation of Human Rights

Article 21 as constitutional right to life:

"No one can take life of other without following Due Process of Law".

There are different issues which one raised with Death Penalty. Indian penal code (IPC) provides for Death Penalty as one of the form of punishment. On the other hand as per International convention, Article 6 :

"Every human being has an inherent Right to life"

This convention has been ratified by India. So, according to this ratification, it in very clear that India is in favour of abolition of Death Penalty. By these , two issues, there are two groups who are standing in favour & against the abolition of Death Penalty.[15]

In favour of abolition of death penalty:

"Death Penalty is inhuman and violation of Constitutional Rights to life of a human being".

On the other hand those who are against to abolition of Death Penalty has contention that[16]:

"*it Death Penalty is abolished, then there may not been effective justice system in the society and the graph for crime against innocent section will raise too high"*

The most practicable and representative public opinion of India was concluded by our first Prime Minister Pt. Jawahar Lal Nehru [17]:

"At one time I was strongly opposed to death penalty and in theory my opposition still continues. And yet with all my repug nance for executions. feel that some method or eliminating utterly undesirable human being will have to be adopted and used with discretion."

Similarly, Mrs. Indira Gandhi stated as[18] :

"I am personally in favour of abolition of capital punishment. But certain

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15 Sarda Mukund, Capital Punishment: A Violation of human rights: A Study(January 5, 2016), Available at SSRU: *https://ssru.com/abstract =2711104* .

16 *Ibid.*

17 Venugopal Rao, Facets of crime in India (1962); pg.136.15 The Times Of India, March 3,1983.

18 The Times Of India, March 3,1983.

crimes were heinous in nature and deserved punishments."

8. Human rights and Indian constitution

Indian constitution is not directly and expressly dealing with human rights but there may implied expression which is as follows[19]:

I. Human Rights are implied as civil liberties in form of fundamental rights i.e. Article 14 to 32 under Indian Constitution.

II. Human rights are also implied as Democratic rights in form of DSPS under Indian Constitution.

There is also accepted fact about the human rights is that they have always been regarded as the backbone of every democratic country or set-up.

9. Conclusion and suggestion

Question concluded that:

Whether death penalty is treated as tool to infringe the fundamental right or Human rights to live or not?

Researchers summed up that if death penalty is executed as per due process of law then it can be prove as best tool to control heinous crime against society. If we make punishment free India then there is every chance that crime rate against society will break records. It is somewhere impossible to control society without deterrent theory. Researcher here wrap up this discussion with the question - Whether any other punishment can possess all the advantages of Death Penalty is a matter of doubt ?

Answer of this question is deterrent theory of punishment. This theory emphasis more on protection of the society from offenders by eliminating offenders from society. Deterrent punishment such as death penalty should be an example to society and person who have tendency to commit similar crime. This theory results in eye for eye , So it reduce crime rate in society by elimination of criminals. Application of this theory has following justification:

[19] Rakesh Bhatnagar , Capital punishment violates human rights and the constitution , for more details see, http:// the quint.com , published on 06 , September 2015.

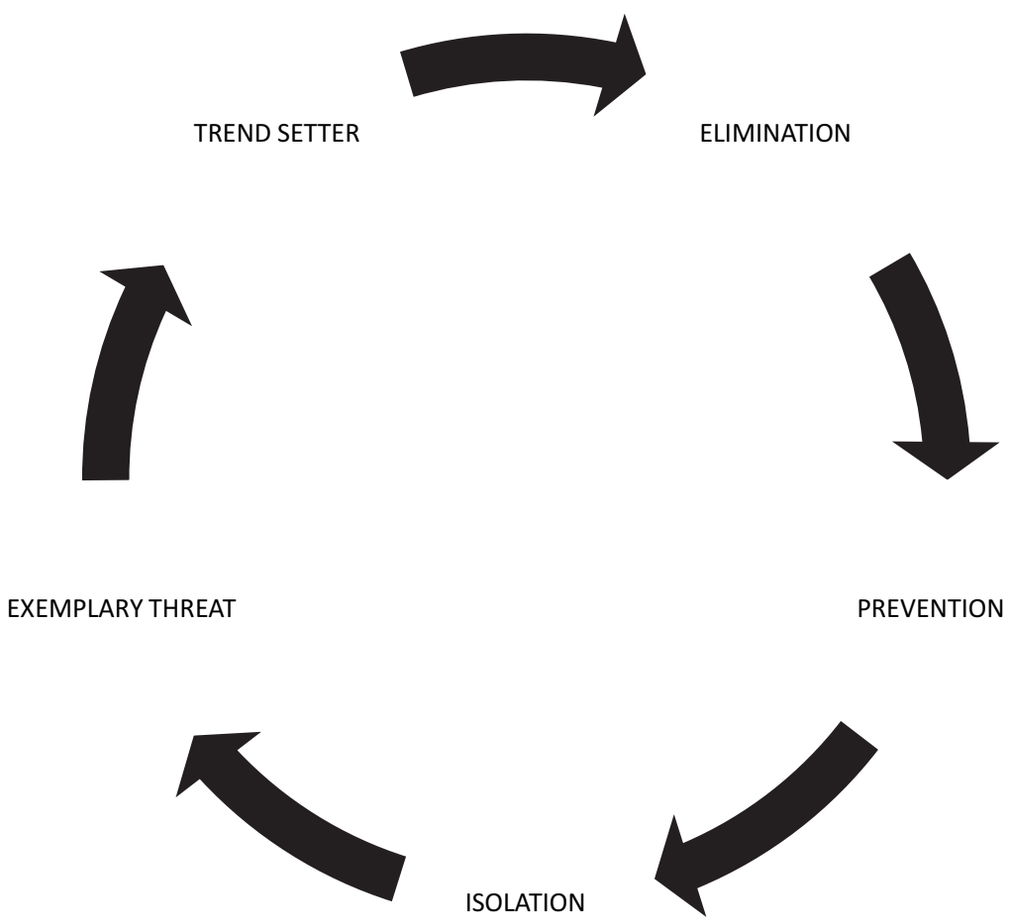

IMAGE 1

So, the world scenario for the death penalty for its retention and abolition is described in the given below image:

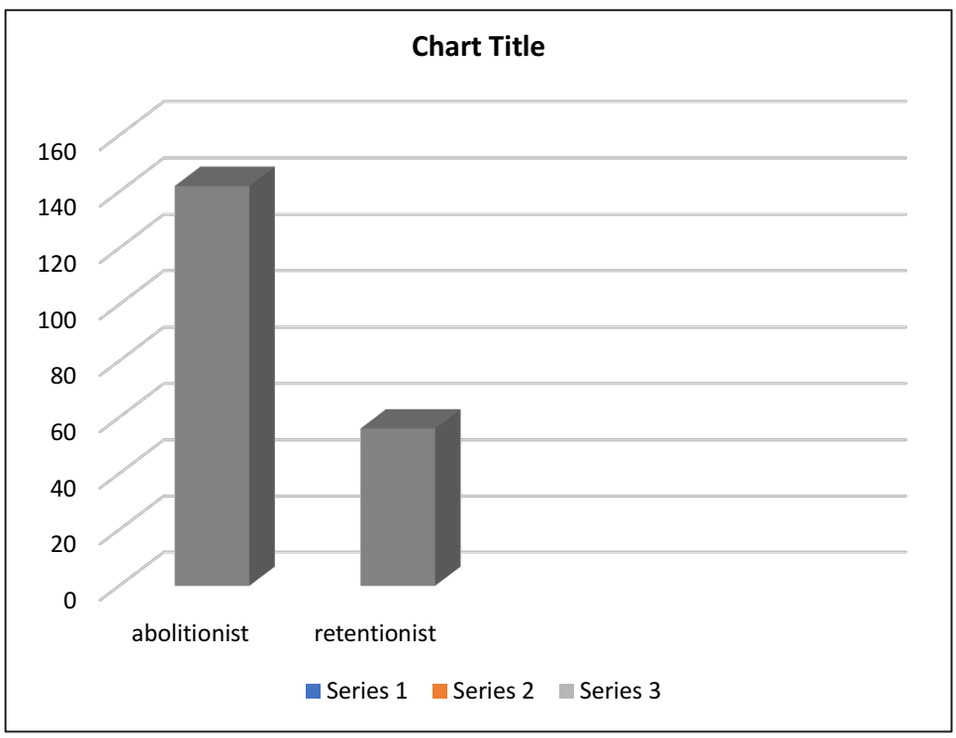

Image 2 [20]

Most countries, including almost all experience first world war nations, have proposed abolished capital punishment either in law or in practice. The notable exceptions are the :

I. United states,

II. Japan

III. South Korea

IV. Taiwan

Additionally, capital punishment is also carried out in china , India and most Islamic

[20] Data is collected from secondary source, ,*https://en.wikipedia.org/wiki/Capital_punishment*, accessed on 09 September 2020.

states. The United States is the only western country to still use the death penalty[21]

As we all know crimes against women have increased to such an extent which has become matter of concern for the lawmakers and it is now very high time which is essentially requires to know the actual root cause of this problem. It is also notable whenever there is a crime against women, children, old aged people or mentally challenged people and such crimes are barbaric in nature then the law should be as strict as it can be. No mercy should be awarded against those criminals.

Whenever any heinous crime such as Rape and Gang Rape committed then the punishment for those crimes should be very strict and by virtue of that punishment there must be a message to the entire society that is if anyone would dare to do such kind of heinous and barbaric in nature. Further, there should be more swiftness for punishment for these kinds of crimes and there should be no mercy petition allowed. If these kinds of hard steps would take then only a positive message would go to the society and there should be zero tolerance against such crimes. There can be no doubt about that punishment of capital very justified in its nature whether it being moral or legal. If India being such a huge democratic country removed this punishment from its execution then it will be very easy for criminal to move freely after killing someone or after doing any kind of heinous crime specially Rape and gang rape. In final analysis, it can be seen that the punishment of death sentence, is not against social justice and protection of society from hard core criminals

The death penalty cannot be asked on the ground of its constitutionality. Yes of course it should not be imposed arbitrarily, unreasonably, discriminatorily, freakishly or wantonly, but if it is administered rationally, objectively and judicio usly, it will develop people confidence on Indian legal and judicial system.

[21] Available at, *https://en.wikipedia.org/wiki/Capital_punishment*, accessed on 12- September 2020.

HUMAN RIGHTS VIOLATION OF HEALTHCARE PROFESSIONALS IN TIMES OF COVID-19: AN EXPLORATORY STUDY

***Supreet Gill* ***

> *The bourgeoisie has stripped of its halo every occupation hitherto honoured and looked up to with reverent awe. It has converted the physician, the lawyer, the priest, the poet, the man of science, into its paid wage labourers.*
>
> ***Karl Marx and Fredrick Engels,***
> ***The Communist Manifesto*[1]**

1. Introduction

Originally, Divinity (theology), medicine and law were regarded as learned profession; special knowledge is *sine qua non* for professional attainment[2]. Therefore, medicine is regarded as one of the noble professions and doctors are held in highest regards among their patients. One often comes across the signboard in hospitals and clinics, which says that, *"We Serve, He Cures"* which points to the fact that medical profession is a service to humanity and not a business. While their training and education, medical students are molded in such a fashion that they treat their patient as the priority, with highest regard and this emotion is reciprocated by the patients who treat them equivalent to god. The medical profession has always been regarded as noble and has commanded huge respect in society.

However, in the year 2020, mankind became witness to a situation so unprecedented and devastating that we were left dumbfounded and at a complete loss of experience to give appropriate response to the deadly COVID-19 pandemic. The recent outbreak of the novel corona virus has brought the entire world to a standstill. People from all walks of life and profession were forced to give up their normal way of life and be trapped within the four walls of their homes to ensure safety of their own and their loved ones. However, there were select few who were not afforded the luxury of being within the warmth of their homes and those select few are fighting on behalf of rest of us. The tireless work of health care professionals involved in the fight against this pandemic is indeed commendable and they deserve the much needed credit that was due to them. They are rightly being called "the real heroes". From our doctors to medical students, nurses to lab technicians, every health care professional has been put in the line of fire and often have to work without even the most basic amenities,

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1 K. Marx, *The Communist Manifesto,* London, 1996.

2 A. Prasad and C.P. Singh, *Legal Education and the Ethics of Legal profession in India,* 151 University Law House, Jaipur, 2005.

while the common man gets to sit at home and crib about simple issues of life.

At a time when the world is standing up against the fight for this deadly pandemic, it is unfortunate that some people have become so inconsiderate owing to their ignorance that they are harming and violating rights of healthcare professionals. It is highly disturbing to see that since COVID-19 pandemic started, there has been an average of one incident per day against health care professionals. The newspapers are full of stories of violations and misdemeanours against doctors and other staff who are merely doing their duty and serving citizens across the globe. The doctor to patient ratio in India is already very poor and to further worsen the situation, a lot of healthcare professionals have succumbed to the pandemic. As of August, 2020, the Indian Medical Association had flagged nearly 200 deaths of doctors due to complication related to corona virus.[3] In these testing times, when health care professionals are stepping forward to take care of people, its time we realise that they too are human and they, like any human being, sometimes need to be taken care of. It will take more that mere clapping for them for us to repay the debt that we owe them. We need to be considerate, we need to be co-operative, we need to be kind, we need to remember that doctors are first a human being and then a doctor.

The purpose of this research is to highlight recent events where health care professionals were subjected to various kinds of human rights violations from direct attacks like stabbing, stone pelting, spitting on them to working in a sleep deprived state for long hours in inhumane conditions and no relief. This research is an exploratory study shedding light on these human rights violations and possible solutions that may contribute to ease the pressure on health care professionals.

2. Human Rights: The Concept

The concept of "Human Rights" needs no definition or explanation. There is not a single legal document which comes into existence without incorporating the concept of human rights, either directly or indirectly. One may quote endless legal instruments, national or international and infinite number of judicial decisions in order to define or explain the concept of human rights. However, the researcher prefers to explain the concept of human rights in her own words. Human rights are those basic and inalienable rights, which if taken away from any human being, he/she will cease to have a humane existence. In other words, human rights are those basic rights which are guaranteed to us first by nature, then by law, in order to lead an

[3] B. S. Perappadan, "Coronavirus: Indian Medical Association flags death of 196 doctors", *The Hindu*, 8 August 2020, at p.8.

existence which is befitting of a human being. These rights are inherent to all human beings irrespective of any boundaries of gender, race, caste, creed, profession, religion, ethnicity or nationality. The Universal Declaration of Human Rights, 1948 along with its supporting instruments are the cornerstone of the human rights movement and owing to these instruments member states ensure through their legislations that human rights of their citizens are protected under all circumstances.

In Indian context, the Constitution of India, is regarded as the golden rule book of human rights which are enumerated in its Part III and the justice delivery system is deemed to be its guardian. In circumstances when human rights of its citizens are threatened, reliance is placed on the Constitution in order to seek justice and the judicial system of the country on several accounts has taken suo moto notice of the situation and always inevitably upheld the sanctity of human rights.

However, it is highly unfortunate to see that the goddess of justice, who wears a blindfold in order to be unbiased has turned a deaf ear too to the plight of health care professionals in the country. Recent attacks and several incidents of suicide of health care professionals has made it amply clear that something needs to be said and light needs to be shed on the inhumane conditions these people work in, which is swiftly leading to their physical and mental degradation. The recent death of a famous Bollywood celebrity caused such a hue and cry in the media and newspapers are still rife with the latest updates about inquiry into circumstances surrounding his demise. There is no doubt that his death was highly unfortunate, painful and he had several bright years ahead of him. Be that as it may, what is even more painful to see is that the people of our country can obsesses over the death of a famous film star but have forgotten that several health care workers are also pushed to take their own lives owing to mental stress they are put under due to nature of their job. Their job anyway was very taxing, but COVID-19 seemed to have contributed even further to their deteriorating mental health.

Having a safe physical and mental work environment is a basic human right of every person. However, the nation seems to have conveniently edited out health care professionals from that list, who are facing physical and mental abuse due to the pandemic. The next section of the paper will highlight such human rights violations faced by health care professionals.

3. Human Rights Violations During Covid-19: A Nightmare For Health Care Professionals

As mentioned in the previous section, a safe workplace environment is one of the

basic human rights. At a time when health care providers are working day and night, sometimes compromising their own health, the general public is engaging in shameful activities ranging from non-cooperation with the medical staff to something as serious as assault which is a criminal offence. One such incident was reported in Latur, Maharashtra where, Dr. Dinesh Verma was attacked by the son of a COVID patient who was under his supervision in Alpha Super Speciality Hospital. It was reported[4] that the attacker's mother was seventy-year-old lady who was admitted to the hospital. At the time her condition was stable, however, owing to her advanced age and medical history of diabetes and high blood pressure she succumbed to the disease. It is reported that when Dr. Verma informed the relatives of the deceased about her demise, the son of the deceased started arguing with the doctor which later turned violent when he picked a sharp medical instrument and stabbed the doctor several times. Dr. Verma shouted for help and the hospitals staff had to intervene in order to save his life, despite which he sustained several serious injuries to the hand and chest. The President of local Indian Medical Association chapter has condemned the incident and brought it to the knowledge of authorities as well as posted images of injuries on social media[5], so that the plight of doctors may be brought in front of the entire nation.

In another such incident reported[6] in Belgavi, Karnataka, a mob which included relatives of a deceased patient vandalized the hospital as well as set an ambulance on fire at the Belagavi Institute of Medical Sciences (BIMS). The police, later reached the spot and seeing the gravity of the situation deployed personnel for protection of hospital staff. Mr.VinayDastikop, the Director of Belagavi Institute of Medical Sciences admitted to the fact that doctors, nurses and other medical staff were quite shook up after the incident and were reluctant to return to their place of work for they feared that their life was danger. For obvious reasons, any human being will feel threatened in a situation like this. However, the staff returned to duty after reassurance by the presence of police personnel for their protection. Meanwhile, a similar incident[7] was reported in Karnataka's state run K.C. General hospital wherein

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4 MD Bureau, 'Brutal Violence: Maha Doctor Stabbed By Son After COVID Patient Dies'(2020) *Medical Dialogue, at https://medicaldialogues.in/state-news/maharashtra/brutal-violence-maha-doctor-stabbed-by-son-after-covid-patient-dies-68121*.

5 Posted on Twitter handle of Indian Medical Association: Indian Medical *Association@IMAIndiaOrg*.

6 Garima, 'Doctors On Mass Protest After Relatives of Deceased COVID Patient Vandalise Hospital, Set Ambulance On Fire' (2020) *Medical Dialogue, at https://medicaldialogues.in/state-news/karnataka/doctors-on-mass-protest-after-relatives-of-deceased-covid-patient-vandalise-hospital-set-ambulance-on-fire-67952*.

7 *Ibid.*

relatives of a patient who tested positive for corona virus posthumously, attacked the medical staff for delay being caused in handing over the body of the deceased. The delay was owing to autopsy formalities and paper work that needed to be done in order to release the body of the patient. These two incidents have led to widespread outrage in the state and the Karnataka Association of Resident Doctors (KARD) is observing a black badge protest.

In another incident[8] which was reported to have taken place in Uttar Pradesh's Moradabad district, where a team of medical professionals who had gone to inspect possible COVID-19 cases in an area were brutally attacked. While the doctors and other medical staff were conducting physical examination on a suspected patient, several peoples of the locality came out of their homes and started pelting stone on the team which led to injury of health and property. This shameful act has also been recoded on video and had been posted on several media platforms. The SSP of the area Mr. Amit Pathak stated that this act was not only violation of Section 144 of Indian Penal Code but also of the Epidemic Diseases Act, Disaster Management Act and that strict action would be taken against such miscreants.

In Punjab's Sangrur district, another incident[9] was reported where the team from the Health Department was attacked by local residents of Dirba slum area, who had gone to collect samples for testing. The slum area was earlier declared as a semi/ micro containment zone since five residents has tested positive for coronavirus in the locality. It was reported that sampling of almost fifty percent of the residents was almost complete and when the team returned on the following day they were met with highly non co-operative attitude which later turned violent. When questioned about their behavior, the residents said that they were irked due to presence of the team in the area as now they were labeled as contaminated zone and that tag brought a lot of social stigma along with it. They also informed that since most of them were daily wagers, they feared loss of employment as they would not be allowed to move out of the contaminated zone. It is evident that people have become desperate and due to ignorance and misinformation being spread by various quarters, the medical health care workers have to suffer. In another incident[10] reported from Punjab's Mansa district, the farm union of village Bachhoana gheraoed Health Department's mobile team when they went to pick up a patient who had tested COVID positive.

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8 *"Coronavirus outbreak: Medical team attacked, stones pelted at ambulance at UP's Moradabad", The Economic Times*, 15 April 2020.

9 R. Jagga, "Locals hurl stones at Health Dept team in Sangrur, oppose testing drive", *The Indian Express*, 27 August 2020.

10 *Ibid.*

Due to fear of loss to man and property, the team had return without the patient. This ignorant and rough attitude of the general public is adding further to the spread of the pandemic.

The right to a decent burial or cremation upon death is also one of the basic human right of a person. It has been laid down by various human rights instruments and judicial precedents[11] that a person has the right that his body be treated with dignity upon his death. Though it is not clear whether the term 'person' as mentioned in Article 21 of the Indian Constitution includes a dead person. However, time and again, the courts have included a dead body in a limited sense and said that even a dead body has the right to be treated with dignity. However, in times of COVID-19 pandemic when doctors are struggling day and night to fight the pandemic, they are not even being afforded with this basic dignity upon succumbing to the disease. If they wanted they could have sat at home in their luxurious and safe environment, however, they chose to come to work in order to honour the Hippocratic oath and while dispensing their duties, if they contract the virus, they are not even given the basic respect and dignity of being buried upon death. Despite being thankful and expressing gratitude to these heroes the general public is opposing them and abandoning their bodies and protesting when their bodies are buried.

Once again, it is important to highlight here that most of the Indian population is crippled due to illiteracy and the other half is shackled by ignorance. In a very painful incident reported from Chennai[12] where a fifty-five year old neuro-surgeon died of COVID-19 and his body was denied a decent burial. The local authorities had to change his final resting place twice as people of the locality where he was supposed to be originally buried started a violent protest. This was owing to the misconception that burial of his body in their locality may cause the virus to spread there. It is said that around sixty to seventy people armed with sticks and stones started attacking the team who was performing last rights of the departed soul. It took almost the entire night for the team of doctors and health care professionals to bury their colleague.

In another shameful incident[13] reported from Punjab, from Sangrur district, residents of the village Fatehgarh Chhana, have passed a resolution against testing of asymptomatic patients in their village. They allege in their resolution that the health department teams lack proper equipment for testing and that, "isolation centers

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11 *Ramji Singh and Mujeeb Bhai v. State of U.P.,* (PIL) No. 38985 (2004).

12 "*Violence mars COVID-19 doctor-victim's burial, surgeon, ward boys turn undertakers", Times of India,* 20 April 2020.

13 Parvesh Sharma, "In Sangrur, villagers pass resolution against testing, Allege false reports, poor facilities at isolation centers", *The Tribune,* 25 August 2020.

lacked mandatory facilities and to top it all, "as per social media reports, organ trade was flourishing under the garb of COVID deaths."[14]Similar incidents have been reported in villages of ChathaNanhera, Deh Kalan. If the above alleged issues brought to light by the villagers is true, then it raises very serious concerns about functioning of health department. Nonetheless, concern also needs to be raised about the legality of the said ordinance passed by villagers who are not co-operating with health care professionals at a time when it is of grave importance.

These are just some of the instance of violation of human rights of health care professionals that deal with direct threat or assault. There are several other instances where basic necessities, which any person would take for granted are not available to health care professionals. To begin with, the medical institutes which are responsible for treating COVID patients is seriously understaffed and owing to that, those who are on duty are so terribly over worked that it is causing threat to their physical as well as mental health. Resident doctors across the country have been raising concern about being overworked and underpaid during the pandemic. However, it was one tweet from a resident doctor of K.E.M. hospital who highlighted the plight of resident doctors during COVID. While exposing the real situation he said that at the time of inspection, hospitals show that they are properly staffed however, this is far from being true. He stated that for almost thirty-five COVID patients, without any relatives allowed, as few as only three resident doctors are the only staff who take care of all the needs of the patients. Everything from feeding the patient to taking them to the washroom and even putting their dead bodies in the bag, is all done by resident doctors. It is alleged that they are even denied sick leave and when they ask for one they are threatened that they will not be allowed to complete their degree. The doctors had taken their complaint to higher authorities, however, to no avail. When they became helpless, and were left with no choice, they uploaded the infamous video showing ground realities and exposing that they were being threatened for voicing concerns over shortcomings of the system.

When doctors and health care professionals are put under such tremendous stress they are bound to snap at some point. There has been a rise in reports of doctors dying by suicide in the recent months owing to the pandemic. It is claimed that suicide rate among doctors was already very high but work stress related to pandemic has only added what the psychologists are now calling a "public health crises".[15] There have been reports of nearly ten doctors dying by suicide since the start of the

[14] *Ibid.*

[15] J. P. Joseph, "Suicides Among Doctors Were Too Common in India. Then the Pandemic Came", *The Wire,* 19 August 2020.

pandemic. If one thinks hard, that amounts to ten less doctors on duty to fight the battle against COVID. There has been a case of suicide in Solapur[16], where a 24 year old intern who was working in the COVID cell of the hospital committed suicide due to work related stress. This is an alarming trend among healthcare professionals and steps must be taken to ensure that they are not only physically, but also mentally healthy.

Difficulties related to occupational hazards of being a health care professional in times of COVID are immense for both male and female workers. However, females are facing problems of a different kind owing to their physiological make up. It is well known fact that all health care professionals have to wear PPE (personal protective equipment) kits in order to protect them from spread of any infection. However, once they wear the PPE suits they cannot take it off till the end of their work shift as there are not many to spare. In such circumstances it becomes exceedingly difficult for them to use the toilet and it was revealed by one of the female doctors that they often have to wear adult diapers for passing urine[17] and it becomes even more difficult when they are menstruating as they have to wear a tampon or a sanitary napkin along with a diaper. Wearing sanitary napkins without changing for long working hours puts them at an increased risk of several infections which, if left untreated may lead to serious health issues.

All the above instances shed light upon the grim circumstances in which health care professionals are working. One can only hope that the COVID situation improves one day and that vaccine is discovered soon. Tomorrow when everything returns to normal, we may only vaguely remember this very forgettable year but for health care professionals who are working and even dying in stressful conditions, may be scarred for as long as they live. Hence, it is not only their right, but our duty to at least co-operate with them to give them some respite from their present situation.

4. Suggestions to Improve the Situation for Healthcare Professionals

The magnitude of COVID-19 pandemic was only realised once the government began to lift the lockdown in a phased manner. Prior to that, people were contained from moving freely which proved quite effective to curtail the spread of virus. The real enormity was only realised when people resumed their day to day activities and

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16 'Maharashtra MBBS Intern Allegedly Commits Suicide, Work Stress Blamed' (2020) *Medical Dialogues, at https://medicaldialogues.in/state-news/maharashtra/maharashtra-mbbs-intern-allegedly-commits-suicide-work-stress-blamed-68328*.

17 Disha Roy Coudhary, "Have to wear sanitary pad with diaper for hours: Female doctors on challenges of wearing PPE", *The Indian Express*, 27 August 2020.

the virus started spreading uncontrollably. However, violent behavior against doctors started during the early months of the pandemic and it was during April that the Indian Medical Association stood up against this violence and issued a "white alert" stating that doctors across the country would light a candle at 9 P.M. on April 22 and declare April 23 a "Black Day" by wearing black badges to work. Violence against doctors and medical professionals is not a recent phenomenon which was triggered during COVID-19. In fact, doctors and health care professionals have been demanding a central legislation since a long time but without any success. Very recently, before the pandemic became a global threat, the health ministry had even drafted a proposed bill providing protection to health care professionals. Unfortunately, The Health Services Personnel and Clinical Establishments (Prohibition of Violence and Damage to Property) Bill, 2019, which proposed to punish any person responsible for assault on a doctor or other healthcare providers on-duty by imposing a jail term of up to 10 years was dismissed by the Home Ministry during an inter-ministerial consultation over the draft law[18] stating that if such a law was enacted for doctors, other professions like the police force or lawyers may also start demanding the same. However, come 2020 the pandemic grew to a large extent and doctors and healthcare professionals came at the forefront which coaxed the government to revisit demands made by doctors. Finally, on the same day when doctors were contemplating white alert, Union Minister Prakash Javadekar issued a media statement hours after Union Home Minister Amit Shah and Health Minister Harsh Vardhan interacted with doctors and senior representatives of the Indian Medical Association (IMA), through a video conference, in New Delhi.[19]

The Cabinet approved promulgation of an Ordinance to amend the Epidemic Diseases Act, 1897 namely the Epidemic Diseases (Amendment) Ordinance, 2020 wherein any acts of violence will be treated as cognizable and non-bailable offences. There is also a provision for providing compensation for injury to healthcare service personnel or for causing damage or loss to the property and person guilty of an offence under the provision can be sentenced to seven years of imprisonment along with a fine of up to Rs 5 lakh.[20] Additionally, the ordinance proposes a capping of

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[18] Garima, 'Rising Violence Against Medicos In Times Of Coronavirus: IMA Issues White Alert, Find Nurses Support' (2020) *Medical Dialogues*, *at https://medicaldialogues.in/news/health/medical-organization/rising-violence-against-medicos-in-times-of-coronavirus-ima-issues-white-alert-find-nurses-support-65052*.

[19] *"Covid-19: Violence against healthcare workers now punishable by up to 7 years in prison", The Indian Express,* 22 April 2020.

[20] The punishment ranges from three months to five years, and fine from Rs 50,000 to 2 lakh. In terms of severe cases where grievous injuries have taken place, the punishment starts from six months to seven years and the fine starts from Rs 1 lakh to 5 lakhs.

time period of thirty days and one year in which the investigation will be completed and final decision will be pronounced respectively. It is pertinent here to mention that the entire medical fraternity ranging from doctors, nurses, paramedic staff to even ASHA workers are brought within its ambit. Even the Hon'ble Prime Minister Narendra Modi tweeted about the same in order to reassure the medical fraternity that their safety is of utmost importance and that they are highly valued citizens of the country. In a recent development, the Indian Medical Association has written a letter to the Hon'ble Prime Minister requesting that doctors and health care professionals who have lost their lives to COVID-19 in line of duty, must be treated at par with martyrs of armed forces and their dependents be given government jobs depending on their educational qualifications.[21] In the letter, IMA has suggested that nearly 87,000 healthcare workers have been infected and 573 of them had lost their lives due to COVID-19 and that the least that Centre could do is give an "inclusive national solatium" for the ultimate sacrifice made by their families. It would be interesting to see whether the Hon'ble Prime Minister obliges IMA with their request. In a time when India is predicted to top the world statistics in the coming weeks, it becomes even more important to protect and stand by our health care professionals so that they may be able to do their duty free from fear or threat of violence.

5. Conclusion

In a time when India is predicted to top the world statistics in the coming weeks, medical manpower has become exceedingly precious. Therefore, the time to show solidarity with them is now. The time to protect their rights is now. The time to guarantee them basic human rights is now. If we fail them today, history will not look kindly on us as citizens who lived in 2020 and it will be a burden of shame so heavy to bear that our future generations will not only condemn us but also never forgive us.

[21] *"Treat doctors losing lives in COVID fight at par with martyrs of armed forces: IMA to PM"* , *The Indian Express*, 31 August 2020.

BLOWING THE WHISTLE ON WHISTLEBLOWER PROTECTION: A TALE OF REFORM VERSUS POWER

Subhoda Banerjee*
Niteesh Kumar Upadyay**

1. Introduction

> "Neither laws or judges can bring any results, unless someone denounces the wrongdoers."
>
> Lykourgos[1]

The above stated quote has been found to be very appropriate in today's world. The march of globalisation, liberalisation and privatisation (LPG) has significantly and effectively contributed in promoting the socio-economic and cultural growth of our country[2]. But whether LPG has really made the world a better place to live in, is a big issue of concern. We all are aware of the fact that every rose has its thorn, similarly, the advent of LPG even though has open up trade barrier and has led to technological advancement yet it has also augmented cancer like evil called corruption[3]. Although the 'multi-headed monster' named corruption has been found to be deeply rooted in our society since time immemorial, yet with the passage of time it has spread its roots to every nook and corner of the globe[4]. In India in 2014 a landmark act The Whistle Blowers Protection Act was passed with a motive to protect whistle blowers from victimisation[5]. The act was much needed with the number of increasing attacks and victimisation of the whistle blowers and was also one of the important recommendations by Law commission of India in year 2001 to curb corruption[6].

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1 Costas Bakouris, 'Whistleblowing in Greece: An alternative to Silence' (2013) Transparency, *at http://blog.transparency.org/2013/05/08/whistleblowing-in-greece-an-alternative-to-silence/* (last accessed 17 May 2020).

2 --, 'Law, Liberalisation and Globalisation in India: Just a Game of Chance?' (2018) Core, *at https://core.ac.uk/download/pdf/6443369.pdf* (last accessed 11 June 2020).

3 Jeet Singh Mann, 'The Right to Information Endeavour from Secrecy to Transparency and Accountability' (2019) Commonlii, available at *http://www.commonlii.org/in/journals/NALSARLawRw/2011/8.pdf* (last accessed 13 May 2020).

4 Ayushi Kalyan and Aseem Diddee, ' Whistleblowing Policy in India' (2018) Lawmantra, *at https://journal.lawmantra.co.in/?p=153* (last accessed 19 May 2020).

5 The *Whistleblowers Protection Act*, 2014.

6 Nimisha Bhargava and Mani K. Madala, 'An Overview of Whistleblowing: Indian Perspective' (2016) Research gate, *at https://www.researchgate.net/publication/328448658_An_Overview_of_Whistleblowing_Indian_Perspective* (last accessed 21 May 2020).

1.1 Research Objectives

The objective of the paper are as follows:

- To understand the concept of HRD's with special reference to whistleblowers.
- To analyse the genesis of whistleblowers.
- To study prominent cases with respect to whistleblowing in India.
- To examine the consequences faced by whistleblowers in India and the shortcomings of the existing legal regime.

Corruption is responsible for violation of human rights, be it civil, economic, social, cultural or political[7].In *State of M.P. v. Ram Singh* , it was observed that:

> Corruption is termed as a plague which is not only contagious but if not controlled, spreads like a fire in a jungle. Its virus is compared with HIV leading to AIDS, being incurable. It has also been termed as royal thievery. The socio-political system exposed to such a dreaded communicable disease is likely to crumble under its own weight. Corruption is opposed to democracy and social order, being not only anti people, but aimed and targeted against them. It affects the economy and destroys the cultural heritage. Unless nipped in the bud at the earliest, it is likely to cause turbulence – shaking the socio-economic-political system in an otherwise healthy, wealthy, effective and vibrating society[8].

Every citizen has the fundamental right to inform and be informed as guaranteed by right to freedom of speech and expression under Article 19(1) (a) and right to personal liberty under Article 21 of the constitution[9]. These guiding posts in the Constitution expresses a compulsion to ensure conditions under which rights can be effectively enjoyed by all[10].

However, corruption undermines good governance practices and proper administration of justice thereby leading to consequential human rights

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7 Julio Bacio-Terracino, "Proceedings of the Annual Meeting (American Society of International Law)", *International Law in a Time of Change,* Vol. 104, 2010, pp. 243-246.

8 2000 (5) SCC 88:2000 SCC (Cri) 886:2000 Cri LJ 1401: AIR 2000 SC 870 ¶ 8.

9 Vratika Phogat, 'Right to Information in Consonance with Right to Privacy' (2019) Central Information Commission, *available at https://cic.gov.in/sites/default/files/Internship%20Research%20Paper-%20Vratika %20Phogat. pdf* (last accessed 17 May 2020)

10 Dr. Subhash C. Kashyap, K.V. Vishwanathan and A.K. Sharma, ' National Commission to Review the Working of the Constitution' (2019) Legalaffairs *at http://legalaffairs.gov.in/sites/default/files/%28V%29Effectuation%20of%20Fundamental%20Duties%20of%20Citizens.pdf* (last accessed 20 May 2020).

crisis[11].While on one side the rampant increase in corrupt practices is casting a shadow on the confidence that we have on our government and law enforcing authorities, however, on the other hand the 'zero tolerance approach' adopted by the responsible citizens is immensely generating a ray of hope to fight against the menace of corruption. These responsible citizens are none other than the Human Rights Defenders[12].So the question that arises here is that 'Who are the Human Rights Defenders'?

In simple terms they are basically known as a group of people or individuals fighting with bonafide intention to protect the basic rights of human beings in order to promote and preserve peace. The basic rights are the civil and political rights such as right to life, right to fair trail etc. and also economic, social and cultural rights such as right to education, right to social protection etc.[13]. They fearlessly challenge injustice and oppression faced by other individuals thereby often endangering their own existence and face victimisation [14]. Fact Sheet 29 of the Office of the United Nations High Commissioner for Human Rights.

> suggests three 'minimum standards' required for a human rights defender: that the person accepts the universality of human rights; that the person's arguments fall within the scope of human rights (regardless of whether or not the argument is technically correct); and that the person engages in 'peaceful action'. However, some essential questions remain, including: To what extent does a defender need to demonstrate that his/her actions are 'non-violent'? To what extent should a defender be expected to demonstrate knowledge of and respect for the universality of human rights? What criteria and process should be adopted to determine this?[15]

It is very difficult to answer the above set of questions. Additionally, classifying the human rights defenders also becomes an impossible task as

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11 The Second Administrative Reforms Commission, 'Ethics in Governance' (2019) Department of Administrative Reforms & Public Grievances, *at https://darpg.gov.in/sites/default/files/ethics4.pdf* (last accessed 22 May 2020).

12 NHRC, 'Journal of the National Human Rights Commission India' (2019) NHRC, *at https://nhrc.nic.in/sites/default/files/nhrc_journal_2017.pdf* (last accessed 06 June 2020)

13 --, United Nations Special Rapporteur on the status of Human Rights Defenders, (2019) Protecting defenders, *at https://www.protecting-defenders.org/en/content/what-do-human-rights-defenders-do* (last accessed 10 June 2020).

14 Mary Kreiner Ramirez, 'Blowing the Whistle on Whistleblower Protection: A Tale of Reform versus Power' (2018) Washburnlaw, *at https://washburnlaw.edu/profiles/faculty/activity/_fulltext/ramirez-mary-2007-76universitycincinnatilawreview183.pdf* (last accessed 05 June 2020)

15 Office of the UN High Commissioner for Human Rights, 'Human Rights Defenders: Protecting the Right to Defend Human Rights, Fact Sheet No. 29' (2004) refworld, *at https://www.refworld.org/docid/479477470.html* (last accessed 06 June 2020)

they can be any people from any section of the society. However, what binds all the HRD's are their inner conscience to fight for justice in a peaceful manner[16].

Hence the essential components that describe HRD are as follows[17]:

I. Action taken for better administration of justice,

II. Such action needs to be peaceful and non-violent,

III. The intent to respect the universality of other HRD's,

IV. To take necessary steps in order to promote human rights and prevent any violation.

Various activities taken up by HRD's are appended below [18]:

- "Document abuses by collecting evidence of human rights violations
- Raise awareness of abuses through public campaigns in the media, online and in their community
- Report violations to international bodies like the UN
- Put pressure on perpetrators of abuses to change their behaviour
- Lobby people in positions of influence and powereg. representatives of governments, corporations, and other non-state actors
- Pursue legal avenues for justice through casework, advice and legal representation
- Offer practical support to people who have survived human rights abuses, eg. by offering temporary shelter or advising on how to seek justice
- Educate people about their rights, teach them how to defend them and empower them to challenge those who deny them".

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16 David Banisar, 'Whistleblowing: International Standards and Developments' (2018) Research gate, *at https://www.researchgate.net/publication/228124587_Whistleblowing_International_Standards_and_Developments* (last accessed 05 June 2020)

17 *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (commonly referred to as the Declaration on human rights defenders)*, (adopted 9 December 1998) UN General Assembly resolution 53/144,. A/RES/53/144.

18 Amnesty International UK, 'Human rights defenders – some of the bravest people in the world' (2018) Peace brigades, *at https://peacebrigades.org.uk/country-groups/pbi-uk/people-we-protect/who-is-a-human-rights-defender* (last accessed 10 June 2020).

However, the HRD's instead of being considered as nation protectors are often regarded as a threat to the 'national security' and 'national interest'. Therefore, instead of considering them to be protector of democracy they are considered to be hazards, as they stand up for the right and therefore, they are subjected to harsh retaliations.

It is against this backdrop that Human Rights Defenders Alert – India (HRDA)intervened in 104 cases of human rights defenders with the National Human Rights Commission of India (NHRC) and various United Nations (UN) human rights mechanisms in 2015. During the same year, HRDA intervened in 11 cases of murder, 60 cases of harassment, physical assault, physical and verbal threat, and 33 cases of arbitrary arrest and detention[19].

Nearly 80% of these cases were of human rights defenders working on protecting land, natural resources, tribal rights and exposing corruption. Twenty-four cases were those who used Right to Information (RTI) applications and 11 cases were reprisals against journalists, writers and socio-political thinkers. In seven cases, peacefully protesting citizens faced severe crackdowns and excessive use of force by state officials. The most common tactic that the state uses to threaten and silence human rights defenders is arrests in false and fabricated cases"[20].

One such group of human rights defenders are known as the 'whistleblowers'. This immediately raises a question in our mind as to: 'who are the whistleblowers'? Many attempts have been made by scholars to define whistleblowers in different ways. In the case of *Winsters* v. *Houston Chronicle* Pub. Co.25, Doggett, J., used the term whistleblower for first time. Winster was sacked from his organisation as he blew the whistle to the senior management against the fraudulent activities carried out by his co employee.[21]

Sir Ralph Nader in the year 1971 defined whistleblowing as "*an act of a man or woman who, believing that the public interest overrides the interest of the*

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19 Mathew Jacob, 'No Middle Ground: The Risks Of Being A Human Rights Defender In India' (2016) Boom Live, *at https://www.boomlive.in/no-middle-ground-the-risks-of-being-a-human-rights-defender-in-india/*(last accessed 11 June 2020).

20 *Id.*

21 795 S.W.2d 723 (1990) Leagle, *at http://www.leagle.com/decision/19901518795SW2d723_11443/WINTERS%20v.%20HOUSTON%20CHRONICLE%20PUB.%20CO* (last accessed 11 June 2020).

organization he serves, blows the whistle that the organization is in corrupt, illegal, fraudulent or harmful activity"[22].Near and Miceli defined it as "*The disclosure by organization members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action*"[23].

Thus, it can be stated that whistleblowers are like the referee of a football match. Whenever contravention of the rules of football game committed by any player, whistle is blown by the referee to draw the attention of the other players towards such act of contravention[24]. Similarly, noble and brave people of the society also blow the whistle in order to grab the attention of the others towards any wrongdoing that is witnessed by him or her. There are many corporates which also have policies pertaining to whistleblowers[25].

In simple terms it can be said that they are the persons who have a strong sense of what is right and what is wrong[26]. They are such persons who relentlessly raise their voice against any kind of wrongdoing that is happening in the society[27]. The demise of Satyendra Dubey, one of the most remarkable whistleblower in the Indian history has revamped whistleblowing into a prominent activity[28]. Since then, the term whistleblowing has gained its prominence in Indian society. However, if we delve into the previous era, we can see that whistleblowing has been in existence since ancient times[29]. Though the

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22 Ralph Nader, Peter J. Petkas. and Kate Blackwell (eds), *Whistle Blowing. The Report of the Conference on Professional Responsibility*, Grossman, New York, 1972.

23 Marcia Miceli and Janet Near, *Blowing the Whistle: the Organisational and Legal Implications for Companies and Employees*, Lexington Books, United States of America, 1992.

24 Abhinav Chandrachud, 'Protection for Whistleblowers: Analysing the Need for Legislation in India' (2016) Supreme Court Cases, *at http://www.supremecourtcases.com/index2.php?option=com_content&itemid=5&do_pdf=1&id=623* (last accessed 01 June 2020).

25 Tata Power, 'Whistleblower Policy and Vigil Mechanis' (2020) Tata Power, *at https://www.tatapower.com /pdf/aboutus /whistle-blower-policy-and-vigil-mechanism.pdf* (last accessed 09 June 2020).

26 Indu, 'Whistle Blowing: It is so hard in India' (2019) IJAEMS, *at https://ijaems.com/upload_images/issue_files/43%20IJAEMS-DEC-2017-67-Whistle%20Blowing%20Is%20it%20So%20Hard%20in%20 India.pdf* (last accessed 04 June 2020).

27 Dr.Singam Sunitha, 'A Study on Whistle Blowing Mechanism in Corporate India' (2018) IOSR Journals, at *http://www.iosrjournals.org/iosr-jbm/papers/Conf.17037-2017/Volume-8/4.%2023-30.pdf* (last accessed 06 June 2020).

28 Madhu Sivaram Muttathil, 'An Indian Perspective of Whistleblowing' (2018) Accdocket, at *https://www.accdocket.com/articles/an-indian-perspective-on-whistleblowing.cfm* (last accessed 18 June 2020).

29 Monika Makhija and Shweta S. Kulshrestha, 'A Qualitative Study on Impact of Whistle-Blowers on Performance of the Organisation' (2018) IJESRT, *at http://www.ijesrt.com/issues%20pdf%20file/Archive-2018/February-208/74.pdf* (last accessed 06

terminologies used in regards to wrongdoing were different for e.g., 'vigil', 'watch', 'governance' etc.

History gives us ample evidence that there has always been set of people who have acted against wrongdoing. Ancient Greeks discussed about 'fearless speech or truth-telling'[30] centuries before. The character of 'Vibhishana' in the epic Ramayana, who voiced strong disagreement against his elder brother 'Ravana' in his errand to seize 'Sita' and against other unjust enactments clearly exhibits that he strongly and courageously treaded the righteous path. Vibhishana raised voices against the atrocious practices of Ravana and helped Rama to rescue Sita[31]. Even the character of 'Bidura' in another epic i.e.: Mahabharata can also be viewed in similar light. He gifted a symbolic rat to the 'Pandava' brothers stipulating them to escape by building tunnels like rats do; when 'Duryodhana' secretly conspired to burn the 'Pandava' bothers inside the house. No wonder, why they are rightly salient as the ancient whistleblowers in Indian society.

2. Instances of Victimization of Whistleblowers in India

Whistleblowers are not well protected in India and we have seen many cases of victimisation of Whistleblowers in past. Many Whistleblowers are even killed after exposing corrupt practices of person or institutions. The first such case of victimization of Whistleblowers was of Satyendra Dubey, an alumni of Indian Institute of Technology (IIT) who was deputed in Koderma division of Jharkhand for managing the construction of the Golden Quadrilateral project, during his course of employment in National Highway Authority India Limited (NHAI). He exposed series of irregular activities that happened in that particular project. There was a clear-cut nexus between the regime and exclusive officials and the local mafia's for executing the wrongful activities[32]. Even after repeated requests, his anonymity was not maintained and Dubey was killed in the year 2003

June 2020).

30 *Supra* note 1.

31 ZEE NEWS INDIA, 'Demon King Ravana's brother Vibhishana is immortal – Here's Why' (2016) Zee News, *at http://zeenews.india.com/entertainment/and-more/demon-king-ravana-s-brother-vibhishana-is-immortal-here-swhy_1875775.html* (last accessed 16 June 2020).

32 Putul Tiwari, 'Untold Story, An IES Officer who gave his own life to fuel war against corruption' (2019) Kenfolios, *at https://www. kenfolios.com/untold-story-ies-officer-gave-life-fuel-war-corruption/* (last accessed 09 June 2020).

because he exhibited the courage to speak up the truth[33].

In the case of Manjunath Shanmugham, a manager of Indian Oil Corporation who exposed the racket of adulterated fuel in Lakhimpur Kheri district of Uttar Pradesh[34]. Even he paid the same price that Satyendra Dubey had paid for exposing wrongdoing. He was shot dead inside his car in the year 2005 by Devesh Agnihotri, Rakesh Anand, Vivek Sharma, Shivesh Giri and Rajesh Sharma. The above-mentioned people are punished for life imprisonment by Supreme Court[35]. The killing of whistleblowers is not merely human rights violation but it also creates fear in mind of other whistleblowers because of which many corrupt practices are becoming rampant in India. The victimisation of whistleblowers has a long-term effect on the society.

One whistleblower who was Indian administrative officer namely Doddakoppal Kariyappa Ravi (D.K. Ravi), who during his course of employment exposed wrongdoings related to illegal sand mining and encroachment of government lands in Kolar district and Gulbarga district. Eventually when he was transferred to Bangalore, he also exposed many tax defaulters. Due to these courageous acts, he was threatened, harassed and later killed in the year 2015[36]. Another officer H Chandra bose exposed the irregularities existent in workplace in Greater Chennai Corporation. He vehemently opposed the catena between the contractors and officials in contemplation of getting the tender wraps on December 5, 2018. Since then, he has been receiving death threats and he has been under continuous police protection[37].

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33 Anuja Saraswat & Sukrati Gupta, 'Redeveloping Whistleblowing Policy in India: A Fight for Better Corporate Governance'*at* (2019) IJLMH, *https://www.ijlmh.com/wp-content/uploads/Redeveloping-Whistleblowing-Policy-in-India-A-Fight-for-Better-Corporate-Governance.pdf* (last accessed 03 June 2020)

34 --, 'Shanmughan Manjunath' (2019) Veethi, *at http://www.veethi.com/india-people/shanmughanman junathprofile-117-40.htm* (last accessed 05 June 2020).

35 Krishnadas Rajagopal, "SC Upholds life term in Manjunath murder case" *The Hindu,* 12 May, 2019, available at *https://www.thehindu.com/news/national/sc-upholds-life-term-in-manjunath-murder-case/article6983177.ece* (last accessed 06 June 2020)

36 Knowledge of India, 'Crusaders against corruption: List of whistleblowers in India' (2018) Knowledge of India, *http://knowledgeofindia.com/list-of-whistleblowers-in-india/* (last accessed 06 June 2020).

37 Komal Gautham, "Whistleblower who exposed corruption in 740 crore corporation tender gets death threats" Times of India, 04 January, 2019, available at *https://timesofindia.indiatimes.com/city/chennai/vadapalani-fire-hc-pulls-up-corpn-for-collecting-taxes/articleshow/67373532.cms/* (last accessed 06 June 2020).

3. Effects of Whistleblowing

Legendary whistleblowers like Sherron Watkins, Cynthia Cooper who exposed financial wrongdoings in their respective organisations (Enron and World.com) became 'Persons of the Year' in Times Magazine, 2002. On the contrary not every whistleblower specially in a country like India are praised for their bravery. Mostly they are subjected to threats, harassment or imprisonment. Many a times they are demoted, bullied, transferred without justification, ostracised or compelled to leave their organisations. They also face difficulty in getting a new job. Time and again their family members are also targeted. Nonetheless, Vibhishana ratified the aisle of veracity and rectitude, yet many contemplate him as 'The conspirator of the house' who 'transports the collapse of Lanka'[38]. Many whistleblowers in India are labelled as 'traitors' just like Vibhishana and their credibility is completely ruined.

The cases discussed in this paper gives us a clear picture that often the price paid for blowing the whistle gets very high as they are killed for not being silent spectators of wrongdoings. *"Corporate India suffers from the Vibhishana complex - people who side with the right, against their own who are in the wrong, are frowned upon"*[39]. It can also be seenfrom the above quoted text that the public and the private sectors join hands not only when they jointly venture to carry out a business operation but these sectors join hand for misusing public money. But the noble and responsible individuals who take the big step of exposing such illegal ventures are not provided enough protection and as a result they face severe retaliations[40].

4. Current Legal Regime

The death of Satyendra Dubey astonished the entire nation. There was a huge unrest that was observed from the citizens. The citizens appealed a regulation for protection of the whistleblowers pursuit. In 2003, the Narayan Murthy Committee report proposed that every company should have a voluntary whistleblowing

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38 Harsh Verma, 'Vibhishan Traitor Or Nation Builder?' (2019) Sulekha, *at http://creative.sulekha.com/vibhishan-traitor-or-nation-builder_98865_blog/* (last accessed 06 June 2020).

39 Anshul Dhamija & Shilpa Phadnis, 'Whistle blowing Mechanism Policy without premium' (2017) Times Crest, *at http://www.timescrest.com/coverstory/policy-without-premium-10335* (last accessed 06 May 2020).

40 G-20 Anti-Corruption Action Plan, 'Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation' (2019) OECD, *at https://www.oecd.org/corruption/48972967.pdf* (last accessed 01 June 2020)

policy as that will strengthen the governance structure of the organisations[41]. In the same lines, the provisions on 'Vigil Mechanism' have been incorporated in the Companies Act of 2013. It lays that "all listed companies, companies which accept deposits from public and companies which borrow money from banks and Public Financial Institutions in excess of Rs 50. Crore"[42] mandatorily needs to set up a vigil mechanism system in their respective organisation. The vigil mechanism system is nothing but having a proper whistleblowing policy in place. It strives to provide adequate safeguards against victimisation[43].

The Whistleblowers Protection Act (Act)[44] has been passed in the year 2014. It is the only legislation that has been passed so far which explicitly deals with whistleblowers protection. However, till date the Act has not been enforced. Also, the Act has many shortcomings as it is not inclusive of provisions like giving reward to whistleblowers. It also does not cover anonymous whistleblowing and is not inclusive of wrongdoings in private sector. It fails to define victimisation. It even fails to incorporate external whistleblowing under its preview. The Act fails to define the term whistleblowers. Although the Act talks about public interest disclosure and that such disclosures should be done in 'good faith' and with 'reasonable belief' yet it fails to define the vital term 'Public Interest'. To add on further to the existing lacunas, an amended Bill[45] has been framed in the year 2015. However, the Act instead of addressing the previous concerns makes the scope of whistleblowing more limited. Initially it has been observed that the prohibited disclosures under Official Secrets Act, 1923 (OSA) were allowed immunity from trail under the Act but the proposed amendment deliberately excludes any such immunity from any act of disclosure that is prohibited by the OSA[46]. As per the Act, the Competent Authority will refer the disclosure to an authorised

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41 ERCAS, 'Whistleblower Protection Legislation and Corruption' (2019) SEBI, *https://www.sebi.gov.in/r eports/reports/mar-2003/the-report-of-shri-n-r-narayana-murthy-committee-on-corporate-governance-for-public-com ments-_12986.html* (last accessed 02 June 2020)

42 The *Companies Act, 2013*, ss. 177(9) and (10). *See also*, Rule 7 of Companies (Meetings of Board and its Powers) Rules, 2014.

43 N R Narayana Murthy Committee on Corporate Governance, Report of the SEBI Committee on Corporate Governance (2016) Against Corruption, *at https://www.againstcorruption.eu/wp-content/uploads/2018 /12/Working-paper-52-1.pdf* (last accessed 05 June 2020).

44 The *Whistle Blowers Protection Act, 2011* .

45 The *Whistleblowers Protection (Amendment) Bill, Bill No.* 154 of 2015.

46 --, PRS Legislative Research, (2015) PRS India *at http://www.prsindia.org/uploads/media/ /Public%20Disclosure/Brief%20Whistleblowers%20Protection%20(Amendment)%20Bill%202015.pdf* (last accessed 06 June 2020)

government authority and the decision of the authorised government authority remains final and binding. "Moreover, this forbids disclosure of many categories of information in a whistle-blower complaint, such as information related to the integrity, security, strategic, scientific or economic interests of the state or information that relates to commercial confidence until and unless that information has been obtained under the RTI"[47].To fight against corruption in the year 2013, The Lokpal and Lokayuktas Act has also been passed. However, no immunity has been provided to the whistleblowers by the Act[48].

5. International Sphere

The Article 19 of the United Nations Universal Declaration of Human Rights states:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers [49].

The Article 13 of the American Convention on Human Rights (1969) states that[50]:

> Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

India has ratified to the United National Convention against Corruption[51] in the year 2011.Article 32 provides for effective protection mechanism for protection of "witnesses", "experts" and "victims" from "retaliation" or "intimidation"[52] and Article 33 provides protection for 'Reporting persons'[53].

India has also ratified to the United Nations Convention against Transnational

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47 Rinchen Norbu Wangchuk, 'An IES Officer From IIT, This Bihar Braveheart's Battle Against Corruption Cost Him His Life' (2019) The Better India, *at https://www.thebetterindia.com/163087/satyendra-dubey-iit-whistleblower-vajpayee-news* (last accessed 06 June 2020)/.

48 The Lokpal and Lokayuktas Act 2013, (Nov. 11, 2019, 10:15 AM), *at https://rajyasabha.nic.in/rsnew/publication_electronic/Lokpal_LokayuAct%202013.pdf* (last accessed 06 June 2020).

49 GA res. 217A (III), UN Doc A/810 at 71 (1948).

50 *OAS Treaty* Series No. 36; 1144 UNTS 123; 9 ILM 99 (1969).

51 *United Nations Convention against Corruption* (December 9, 2003) GA res. 58/4, UN Doc. A/58/422 (2003), S. Treaty Doc. No. 109-6, 43 I.L.M. 37 (2004) (entry into force Dec. 14, 2005).

52 *Id.,* Article 32.

53 *Id.,* Article 33.

Organised Crime (UNTOC)[54] and three of its protocols on May 2011.The convention emphases on fight against transnational organized crime and it provides witness protection, which is backed by three protocols namely: Protocol to (1) "prevent punish and suppress trafficking in persons" ;(2) "against the Smuggling of Migrants by Land, Sea and Air"; and (3) "against the Illicit Manufacturing and Trafficking in firearms. Their Parts and Components and Ammunition".[55]The Declaration also sets out the rights and protection accorded to HRDs, the duties of states, and the role and responsibilities of non-state actors.

However, even though we have these full proof set of conventions it is often witnessed that fundamental rights get restricted. Although efforts are being made at national and international level to enhance protection of human rights yet Indian whistleblowers face severe repercussions at the national and international levels.

However, neither a precise definition of a 'human rights defender' has been provided in the Declaration nor a standardized procedure for determining the status of a HRD has been provided for and hence leaving these aspects open to interpretation.

6. Conclusion And Suggestions

"You know when 1 in 2 marriages ends in divorce, 1 in 42 boys have Autism, and safety complaints from the majority of whistle-blower's are not being upheld, that you are living in a seriously dysfunctional society[56]". The flood of light these quoted words throws fits appropriately in our society. As nowadays, instead of merchandise, benefits are sold for money. As an outcome, we have bygone to act as responsible human beings. Greed is acting as a catalyst to put an end to value-based life[57]. The fight against corruption is a never-ending problem[58]. Even though we have first-hand evidence against the wrongdoers yet the investigation

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54 *United Nations Convention against Transnational Organized Crime and its Protocols* (December 13, 2000) S. Exec. Rep. No. 109-4, 40 ILM 335 (2001); UN Doc. A/55/383 at 25 (2000); UN Doc. A/RES/55/25 at 4 (2001).

55 *Id.*

56 Steven Magee, 'Whistleblower quotes' (2019) Goodreads, *at https://www.goodreads.com/quotes/tag/whistleblowers/* (last accessed 06 June 2020).

57 --, 'Online Survey on Promoting Empowerment of People in achieving poverty eradication, Social Integration and Full Employment Integration and Full Employment and decent work for all' (2019) United Nation, *at https://www.un.org/esa/socdev/publications/FullSurveyEmpowerment.pdf* (last accessed 16 June 2020)

58 Atul Dev, 'India's Supreme Court is Teetering on the Edge' (2019) The Atlantic, *at https://www.theatlantic.com/international/archive/2019/04/india-supreme-court-corruption/587152/* (last accessed 08 June 2020)

procedures are backed by dishonesty at times and as a result the anti-corruption initiative ends up setting free the corrupt. The ability to exercise one's right to freedom of free speech and expression is an essential element of democracy and it is required to be preserved. Since the rule of law is diluted by corruption, both the implementation and strengthening of legal frameworks are impeded by corrupt judges, lawyers, prosecutors, police officers, investigators and auditors therefore, leading to gross violation of human rights[59].

So it is high time that we strive towards rebuilding the corrupted system and pierce the veil of secrecy to catch hold and punish the wrongdoers. It is not only the law but also the organisations where the whistleblowers are or have been part of; contribute towards protection of whistleblowers. Support and respect from co employees and top management, pre requisite culture can contribute towards building an environment rich in encouraging whistleblowing. The government also has to play a prominent role in not only framing of legislations but in ensuring that the laws are properly enforced and implemented. The present Act brews lot of confusion as provision remains ambiguous and also many fields does not come within the scope of the Act. Therefore, the need of the hour is to make necessary amendments to the existing legislation and to enforce it immediately. Dilution of the Whistleblowers Protection Bill of 2015 is required instantly. Our focus should be not only to protect the information but also to protect the informer. So, anonymous whistleblowing should be enabled to encourage more whistleblowing. The ambit of prohibited disclosure in the Act needs to be curtailed down so that corruption in sectors like defence procurement, scientific frauds etc. can also be curbed. Systematic procedure needs to be implemented to ensure early and timely disclosure of wrongdoings. The whistleblowers should be given incentives for exposing wrongdoings and also alternative employment opportunities needs to be made available for them. Harsher punishment should be imposed in order to check frivolous complaints. Provision to provide protection to the family members of the whistleblowers should also be incorporated. External whistleblowing also needs to be encouraged. We need to establish an effective mechanism to check if the officials working as a part of the anti-corruption agencies are themselves corrupt or not.

The process of the good governance in the country has been hampered largely by the lack of public participation. Therefore, a collective partnership to fight against

[59] Massimo Tommasoli, 'Rule of Law and Democracy Addressing the Gap Between Policies and Practices' (2020) United Nations, *at https://www.un.org/en/chronicle/article/rule-law-and-democracy-addressing-gap-between-policies-and-practices* (last accessed 09 June 2020).

the corrupt practices will definitely lead to corruption free environment. Various training programmes shall be implemented in order to imbibe courage and confidence among the people so that they raise their voices against wrongdoings. More awareness needs to be created so that the inner conscience of every citizen prompts them to fight against miscreants and fitting learning shall also make citizens to hike on the honest trail.

RIGHT TO INFORMATION AND ACTIVISM: A HUMAN RIGHTS APPROACH

Ananya Sharma*

1. Introduction

Etymologically speaking, the concept of "human rights" was developed to protect the inherent dignity of man. To accord equal status to all human beings, the Universal Declaration on Human Rights (UDHR), in the year 1948, guaranteed to all person certain rights and freedoms. Human rights have been interpreted to cover various aspects of life. From the protection of inherent right to life to the recognition of the right to seek, receive and impart information, its dimensions are many. This dimension of the right to seek, receive and impart information, popularly known as the right to access information fosters the fundamentals of a democracy. As a human right, Right to Information (RTI) assures to the people good and righteous governance. The concept of good governance is the nucleus of any society which respects its citizenry. Good governance helps in achieving the objectives of RTI, i.e., transparency, accountability and openness. A well - established right to information has also been accepted as a part of various legal systems of the world, both at national and international level. At the international level, the right to information has been affirmed by the Universal Declaration of Human Rights. Article 19 of the declaration grants everyone the right to freedom of opinion and expression including the freedom to hold opinions without interference and the right to seek, receive and impart information and ideas through any media and regardless of frontiers.[1]

RTI also finds its place under the International Covenant on Civil and Political Rights (ICCPR). ICCPR under Article 19 says that: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."[2]Along with these, right to information has been affirmed by other international documents like the American and European Convention on human rights, Bangkok declaration and also the African Charter along with others.

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1 *Universal Declaration of Human Rights* (adopted by General Assembly resolution 217 A (III) of 10 December 1948.)

2 *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

At the national level, right to information has been articulated in number of domestic constitutions of the world. For the first time ever in 1766, Sweden promulgated the freedom of information legislation in the modern sense of the law. Ever since, freedom of information has been spreading in various countries of the world. From the United State to India, almost all countries of the world provide its citizens with the freedom to get information.

These national and international documents guarantee to the people of the world their inherent right to dignity. Dignity in itself is not a narrow concept; it cannot be tapered. It has to be understood comprehensively. Dignity is something which a human being is born with. It forms the substratum of human life and equals respect, worth and honour. One way in which dignity of the people is assured is through the system of an open and accountable government. In a democratic setup, people surrender their well-being to their government, so it becomes the responsibility of the government to act in a manner that is beneficial for the citizens. Accountability, transparency and openness are the three pillars upon which the government must be balanced. These pillars form the ethos of any democratic society.

In the case of *State of U.P.* v. *Raj Narain*[3], the Apex Court of the India accepted right to information as an essential part of freedom of speech and expression. It was held that the people of the country have a right to know every public act, everything that is done in public by the public functionaries. This case highlighted the role of a democracy in protecting its people's welfare.

RTI is not a benevolent gift given by the government to the people, rather it is foundational right which the people have by the virtue of their dignity. In every society, free flow of information is as essential as the protection of life. RTI puts an obligation upon the government to disclose information relating to its working. The know-how of its essential activities which have a direct bearing on the lives of the people is made known to the people through the realm of RTI. Whenever any act or activity of the government effects the lives of the people, RTI comes to the rescue. Restrictions on the uninterrupted flow of information hamper the integrity of the democratic societies. Realizing this importance of information in a society, the Indian Supreme Court in cases like Bennet Coleman[4], Namit Sharma[5]and among others has given Constitutional status to right to information.

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3 1975 AIR 865.

4 *Bennet Coleman* v. *Union of India* 1973 AIR 106.

5 *Namit Sharma* v. *Union of India*, Writ Petition (Civil) No. 210 Of 2012.

In the case of *Namit Sharma* v. *Union of India*, the Court observed that public interested can be better discharged though the implementation of right to information.[6] Along with it, the Right to Information Act 2005 has also widened the information horizons in the country.

RTI directly aids in the development of the people as it opens the gates of secrecy. Human rights and human development are inter-related. Properly asserted human rights aid in the development of humans. These rights act as the backbone of any society. A righteous governing approach founded on the principles of human rights backs good governance. The principles of good governance, indeed, directly aid, human development.

The liberated flow of information is inescapable for a representative egalitarian society. It helps the society to flourish. Freedom of information engages the members of the society in continuous public debates and discussions which involve the round the clock evaluation of the governmental activities. A democratic government cannot survive without accountability. The basic predicate of this accountability is that people should have details about the government's dynamics. Secrecy is no longer desirable. Misuse of power has to be minimized. The Right to Information Act, 2005 which was passed for making the government amenable and answerable effectively suppresses corruption. An institution riddled with malfeasance and unscathed to the issues of the citizenry calls for the effective implementation of laws that protect the civil society. RTI has the ability to transform an indifferent government to one which accommodates the needs of its people.

2. RTI as a Tool to Protect Human Dignity

RTI is the enforcer of the rights and liberties of the people. It protects, ensures and advances the people's right to live a dignified and informed life by providing them information about the government's doings.

The case of *Sumitra Devi* v. *Women and Child Development Department, GNCTD ,Delhi*[7], is a clear-cut example of how RTI saved a woman from losing her dignity. In this case, Sumitra Devi was receiving a pension of rupees one thousand per month. Living under abject poverty, her condition was not good

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6 *Id.*

7 CIC/DS/A/2013/001589SA, *available at https://Ciconline.Nic.In/Cic_Decisions/CIC_DS_A_2013_001589-SA_M_140143.Pdf*, last accessed on September 15, 2020.

and her dignity had been compromised. However, due to some change in the pension rules which required a nationalized bank account rather that a post office account for receiving pension, she stopped receiving the same. She was forced to let go of her rental accommodation and had to take shelter in a nearby temple. Numerous visits to the post office turned futile until she, with the help of Satark Nagrik Sangathan, a citizens group working in the area, filed an RTI application seeking the status of her pension. Upon receiving an insufficient response in the first application, she appealed to the Central Information Commission. The Commission ordered the requisite authority to make payment of all the arrears of pension due to her and also imposed a penalty of rupees 5000 upon the pensioning authority.

The CIC remarked that: "When a women below poverty line was surviving on pension from social welfare department, the non-payment of pension would cause a serious problem of living and that the RTI request about non-payment of pension is information about 'life and liberty' of appellant and the respondent authority should have responded to it within 48 hours."[8]

This case is just one example of how RTI protects the dignity of the individuals. Through the institutional mechanisms brought forth by this legislation, many people have been restored back with their rights. Such kind of mechanism has to be respected in all its aspects.

RTI also protects the citizens from electing nefarious representatives. The Supreme Court in the case of *Association for Democratic Rights* v. *Union of India*[9] recognized that the value of citizens vote. Citizens have the right to know the background, educational qualifications as well as the criminal past of the representatives. Since, corruption is the fountain head of the malpractices, it is very imperative that the citizens know about the person they elect to govern them. A person with criminal past cannot govern a country without a veil of secrecy on all the activities.

Recently, the scope of right to information has also been extended to the office of the Chief Justice of India. The Apex Court while giving a much wider interpretation to the RTI act has said that Chief Justice of India also comes under the purview of the act. The Court observed the importance of openness and transparency in functioning of the judiciary and held that "openness would better

[8] CIC/DS/A/2013/001589SA, *available at https://Ciconline.Nic.In/Cic_Decisions/CIC_DS_A_2013_001589-SA_M_140143.Pdf*, last accessed on September 15, 2020.

[9] AIR 2001 Delhi 126.

secure the independence of the judiciary as it would place any attempt made to influence or compromise the independence of the judiciary in the public domain. The citizens have the right to seek information about the details of any such attempt and such right has been protected by the constitution. Thus, it is disclosure and not secrecy that enhances the independence of the judiciary."[10]

3. Right to Information Activists

Cambridge dictionary defines an 'activist' as a person who believes strongly in social or political change and takes part in activities such as public protest to try to make this happen.[11]

Activism can be defined as a process by which one endeavours to further a constructive change in the social, economic, political, cultural or environmental dimension/dynamics of any society. A person may campaign for bringing about a change in the environmental policies of a country, by trying to change the outlook of the policy-makers to facilitate the betterment of the people vis-à-vis the environment. Similarly, there can be social and political activism directed to change the behaviour of the society towards certain classes, for example- towards the LGBTQ community. Economic activism can be used to bring about a change in the political or social values through the use of one's wealth or economic power.[12]No matter the category activists aim to bring a change into, it is generally directed towards radicalizing a positive change.

RTI Activists can be defined as those persons who work for bringing about more openness and transparency in the working of the government through the aid of RTI Act, 2005. Though no conclusive definition of the term exists, RTI activists can be labelled as human rights defenders, as they promote the internationally recognized human right to seek, receive, and impart information. Individuals belonging to different sectors of the society like journalists, whistle blowers, environmentalists, lawyers among others are predominantly working as RTI activists in India.

India does not house any group or organization of the RTI Activists; rather most of them work unchaperoned. Infuriated by activities such as corruption and other unlawful activities which effect the morality of the nation, these ordinary citizens

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10 *CPIO* v. *Subhash Chandra Agarwal*, Civil Appeal No. 10044 Of 2010.

11 *https://Dictionary.Cambridge.Org/Dictionary/English/Activist, available at, last accessed on* September 16, 2020.

12 Economic Activism: A Viable Long Term Strategy *, available at https://Shoppeblack.Us/2016/07/Economic-Activism-2/*, last accessed on September 16, 2020.

try to mainstream the people who dwell in illegal and unlawful acts and thereby try to reduce secrecy and bring transparency.

The essence of RTI would not be justified if it does not recognize the rights and the realities of the information seekers. RTI has been enshrined both under the UDHR as well as the ICCPR as a human right. These rights are built upon each-others existence. So, it becomes altogether necessary to protect those who seek information.

But these rights bring with themselves many dangers. Countless incidents of harassment of people working for the public welfare and the curtailment of information by the government which is intended for the citizens erodes public's faith in government and in the fundamentals of a democracy. Restrictions on the freedom of information has ostracised various sections of society and abetted the abuse of power by the select few. It amounts to unlawful withholding of information and aggravates the existing corruption.

Since the inception of the act in the year 2005, there have been numerous instances of attacks and assaults on RTI activists. Common Wealth Human Rights Initiative has created a hall of shame of attack on these users.[13] Myriad of people have been apparently subjected to brutal attacks on their lives, some have even been murdered while many have endured grave physical assaults. Seeking information relating to government initiatives like the Mahatma Gandhi Rural Employment Guarantee Act, or checking any unauthorised construction or illegal sand-mining, asking information about distribution of fake disability certificates or checking the divulsion of welfare schemes meant for the needy and the poor, information seekers have endured a lot of risks. Many have even succumbed to the psychological pressures. Every case is different. It is not necessary that every person who is abused is a habituated activist. In concerned number of cases, even a person who filed an application for the first time has been subjected to harassment or even assaults.[14]

4. Human Rights Defenders

Human rights defenders are those people who work tirelessly for protecting the cherished human rights of abused sections of the society. RTI activists can be, in a vehement manner, termed as human right defenders. Working to bring about a

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13 'Hall of Shame, Mapping Attack on RTI Users', *available at http://Attacksonrtiusers.Org/Home/Aboutus/*, last accessed on September 17, 2020.

14 *Id.*

change in the attitude of the government and its authorities, RTI activists advance the meaning of the term 'people's government'. However, due to lack of support, unorganized force and the nature of their activities, they also face the dangers of being targeted by the corrupt few. Instances of harassment against the activists are too many. Many International instruments seek to afford protection to people falling under this category. Some of them have been discussed below.

5. Declaration on Human Rights Defenders

The United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms,[15]known as the UN Declaration of Human Rights Defenders is an international instrument that systemizes the international standards relating to the protection of human rights defenders around the world. This declaration reaffirms the United Nations Charter as well as the UDHR and proclaims the right of every individual and association to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.[16] The declaration further says that every person has the right to-

- disseminate information about human rights and freedoms which also include information about how human rights are effectuated in the legislative, judicial or administrative systems at the domestic level.
- circulate information and create awareness as to human rights and fundamental freedoms and,
- initiate discussions and forming opinions about human rights and also attracting public attention towards the issue.

UN Special Rapporteur on human rights defenders has also defined human right defenders as those persons who work to protect and promote the human rights.[17] Special rapporteurs are independent experts appointed to deal with specific issues in specific countries. The first special rapporteur on human rights defenders was established by the Human Rights Commission in the year 2000.[18]

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15 *Declaration on Human Rights Defenders*, (adopted on December 9, 1998, A/RES/53/144).

16 *Id*., art. 1.

17 Special Rapporteur on the situation of human rights defenders, *available at https://www.ohchr.org/EN/Issues/SRHRDefenders* , last accessed on September 17, 2020.

18 *Ibid.*

6. RTI and Human Rights Violations

RTI can be seen as the initial step towards resisting corruption and ensuring accountability in case of human rights violations. RTI Act talks about transparency, but if those who work for ensuring this transparency are not protected, it will have a downside effect on the entire governance process.

Since the enactment of the act in 2005, many activists have lost their lives at the hands of those who do not want the information to be mainstreamed. Undeniably, with the inception of a legislation intended to bring transparency by unearthing the corrupt activities, the likelihood of negative impacts is evidentiary.

Human right activists and defenders have been made the centre of suppression and subjugation in recent times. Considering the issues of suppression and harassment of journalists and other activists, it becomes paramount to collectivize the variegated struggles and outlast the oppression.

Journalists are forced to abstain from covering critical and censorious issues by their heads, physical violence is weaned against women journalists. Threats to the like of loss of financial means and the decline of democratic freedom are employed. Especially the marginalized groups are cornered and repressed. Instances of false implications of information activists are prevalent. In 2018, Mr. Satyanarayana Goud, a toddy merchant who had filed RTI applications with the Maharashtra Excise Department seeking information regarding the sale of adulterated toddy was shot dead by unidentified personnel. He had been receiving continuous threats because his interventions and activism led to the cancellation of toddy licences of certain illegal toddy business owners. It was alleged by the superintendent of police that the dispute between Mr. Satyanarayana and the toddy mafia could be the cause of murder.[19]

In another incident of June 2020, the body of an RTI activist was found discovered near Sone river in Patna. 32-year-old Pankaj Kumar had exposed prominent misconduct and irregularities in the sand mining trade in the State. His actions had broth forth the nexus between the sand mafia and the corrupt officials in the State. He became a victim of his activism.[20]

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[19] 'Hyderabad: Toddy RTI Activist Shot Dead by Rivals', *Deccan Chronicle, available at https://www.deccanchronicle.com/Nation/Crime/110518/Hyderabad-Toddy-Rti-Activist-Shot-Dead-By-Rivals.Html*, (last accessed on September 18, 2020.)

[20] Avinash Kumar, 'RTI Activist Found Murdered in Patna', *Hindustan Times,* 5 January 2020, *available at https://Www.Hindustantimes.Com/India-News/Rti-Activist-Found-Murdered-In-Patna/Story-Vi6Umalo635qtnRoS1XxYN.Html*, last accessed on September 18, 2020.

The National Campaign for People's Right to Information reported about the death of an RTI activist Satish Shetty who had been continuously working to expose scams and fake cases. Shetty had exposed a land scam on the Mumbai-Pune expressway and also other land scams in Lonavala and Talegaon. Shetty was also involved in creating awareness about the RTI Act. [21]

These cases reflect that the incidents of harassment and assaults of RTI activists are not isolated. These instances shed a light on the capability of RTI to damper the corruption but at the same time reflect the need to assure protection to those who safeguard the law.

The murder of renowned journalist Gauri Lankesh; imprisonment of senior journalists like Sai Reddy, Lenin Kumar in Chhattisgarh and in Orissa[22] respectively ponder upon the need to protect the dissenters of information.

7. Whistleblower Protection Act, 2014

Whistleblowers can be defined as those persons who expose the faults in the working of government and its officials. A whistle blower may be a part of the organization itself or might be an outsider e.g., journalists. They play the part of an investigative journalist or an RTI activist. The complexity of their work makes them vulnerable to attacks on their lives. Blackmail or intimidation by the corrupt officials, politicians or even the mafia who do not want their wrongdoings to be exposed are continuously endured by them. Considering the need to protect these persons from the incidents of harassment, the government of India enacted the whistleblower protection act in the year 2014. The particular case of Mr. Satyendra Dubey, an engineer who was murdered because he fought corruption in the Golden Quadilateral Highway project acted as a much-needed incentive for the government to do something for the protection of the whistleblowers. The Whistle Blower Protection Act was enacted to establish a wholesome mechanism that would read into the allegations of corruption or the deliberate exploitation of power. It enquires into complaints against any public servant and attempts to safeguards the victims of such abuse. At the same time, it also offers protection to the identity of those who blow the whistle against corruption. However, the act

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21 Bhattacharjea, Ajit, et al, "Murder of RTI Activist." *Economic and Political Weekly*, vol. 45, no. 6, 2010, pp. 4–4. JSTOR, *www.jstor.org/stable/25664073* last accessed on September 18, 2020.

22 Defending the Defenders Initiative, *available at https://2019.Hrln.Org/Initiatives/Defend-The-Defenders/*, last accessed on September 17, 2020.

has not yet been implemented. Drafted after large hue and cry over the murder of whistleblower Satyendra Dubey, the government did enact this legislation but has yet to operationalise it. This failure of the government amounts to the miscarriage of justice and mocks the efforts of those who blow the whistle on the corrupt acts.

8. The Potential Misuses- RTI Sham

It is worth finding whether the harm caused by the misuse of RTI is greater than the benefits arising out of its potent use. Taking note of the recent case of *Anjali Bhardwaj v. Union of India*[23], in which the Supreme Court directed the filling up of vacancies in the offices of Central and State Information Commission, Chief Justice Bobde remarked that the unchecked use of RTI has in turn created feelings of distress and immobility among authorities.[24]

RTI, though has been used to ensue transformation into a progressive transparent society still has its dark side. The blatant abuse of RTI has not gone unnoticed. RTI has to be used to unearth the hidden atrocities and empower the citizens. It should not be misused as a potential weapon to disturb the working of the government. The fear and paralysis generated by RTI among the authorities is worth acknowledging as one of its negative aspects. Incessant and spurious RTI applications waste both the time and efficiency of the officials. There was as case in which a man had filed an RTI application asking the kind of undergarments he could wear in front of PM on being arrested for stripping. Similarly, in 2008, a girl from U.P. filed an RTI application asking the reasons why the sweets sent by her were never delivered to George Bush, the then President of United States.[25] These kinds of sham applications mock the system. There is a definite need to regulate these unbridled applications in order to prevent the mockery of the system and maintain the integrity of such welfare legislation. A wholistic approach that would tackle the negative aspects and make RTI an even more efficient piece of legislation is the need of the hour.

9. Conclusion and Suggestions

RTI acts as a strategy that advocates for inclusive development while reinforcing

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23 2019 SCC OnLine SC 205.

24 Shyamlal Yadav, 'Explained: What Supreme Court said on RTI use, abuse', *The Indian Express*, 19 Deceber 2019, *available at https://indianexpress.com/article/explained/what-sc-said-on-right-to-information-use-abuse-6173893/*, last accessed on September 18, 2020.

25 Ashish Tripathi, 'Paralysis, fear about misuse of RTI Act, says SC', *Deccan Herald,* 17 December 2019, *available at https://www.deccanherald.com/national/national-politics/paralysis-fear-about-misuse-of-rti-act-says-sc-786143.html*, last accessed on September 19, 2020.

the fundamentals of governance. The society in which we live today needs to have access to information to make primed decisions that will ensure productivity. It is only when people are able to exercise their socio-economic, political and cultural rights, they become empowered and this increases their productivity as members of the society. An informed citizenry has the potential to exert influence on the government to oblige it to obey the rights objectively.

Most contemporary societies have already made efforts to democratise information by creating channels that ensure smooth passage of information. This entire process accredits the people with an unfettered right of access to information. However, we still see instances of violation of these rights. The culture of indemnity which has been strengthening its roots in the embedded corruption is being normalized. This makes the people even more vulnerable to the attacks. A strong allegiance to the human rights of these activists is the need of the hour for battling transparency centric crimes. Tendering legal accreditation and protection to the human right defenders is pivotal to make sure that they are not subject to recurrent and incessant attacks, assaults and reprisals. It is important to provide them with a conducive environment to protect their dignity. The practicalities reflect that the gap between the objectives of the defenders declaration and its implementation are extensive. The realisation of human rights in a society depends upon the citizen's being able to scrutinise their government. RTI is one such tool as it accords the citizens the with a transparency weapon. Secrecy and mystery do not lead to a good governance; rather they facilitate doubt and misrepresentation. It is only through knowledge and information that the seeds of good governance can be germinated.[26]

In order to safeguard the interests of the human right defenders, be it the RTI activists, whistleblowers or the investigative journalists, certain concrete steps are required to be taken both national as well as international level. The steps should focus upon-

- Facilitating effective implementation of the UN Declaration of Human Right Defenders in discourse with the national governments and other actors.
- Focusing on the challenges that occur in the protection of human rights

[26] Legal Protection Of Human Right Defenders, *available at Https://Www.Ishr.Ch/News/Legal-Recognition-Protection#:~:Text=Legal%20protection%20of%20human%20rights%20defenders&Text=ISHR%20works%20to%20ensure%20that,Give%20effect%20to%20these%20norms, last accessed on September 18, 2020.*

relating to seeking, receiving and imparting information relating to the circumstances of the defenders.

- Endorsing plans and policies to afford better protection to the defenders and
- Balancing the gender outlook by paying attention to women human rights defenders.

BOOK REVIEW: KASHMIR: HISTORY, POLITICS, REPRESENTATION

Aditya Rawat*

> Concertina wire is the most widespread form of vegetation in Kashmir today. It grows everywhere, including in the mind[1]
>
> **Ranjit Hoskote**

Last month marked one year anniversary of the abrogation of Article 370. Even the most cursory look at the valley's state of affairs in the previous year shows the lamentable condition of human rights in Kashmir. For instance, 99% of habeas corpus cases are pending in SC.[2] The above lines are a sad reflection of today's Kashmir. Kashmir had been a burning political issue between India and Pakistan since the inception of both the modern nation. Contesting claims regarding Kashmir, rooted in Indian, Pakistani, and Kashmiri nationalism have resulted in the development of multiple narratives. But the most pertinent question remains - Is it possible to understand Kashmir without understanding the concept of 'Kashmiriyat'? The book in review questions it through an interdisciplinary approach.[3] The book is a collection of fourteen ground breaking scholarly essays on diverse aspects of Kashmir as a region and as an identity ('Kashmiriyat').

1. Summary of the Book

The book is categorized into three parts. Part 1 is titled, "History". The first essay is by Mridu Rai titled, *To Tear the mask off the face of the past.* She critically traces the course of the archaeological project followed by the Colonial empire since 1901. She argues that the entire endeavor was also used by different actors (Dogras for fortifying Hindu sovereignty & Kashmir Muslims for challenging Hindu hegemony) in addition to the Colonial state for furtherance of their objectives. In 'Contesting Urban Space', Zutshi takes us through the dominant Shrine Culture and its importance in the context of Kashmiri Muslim identity using the case study of *Khanqah -i- Mualla* dispute. She posits that those divisive conflicts are one of the early markers of Kashmiri nationalism and played far-reaching repercussions on the nature and trajectory of the Kashmiri nationalist

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Chitralekha Zutshi (ed.), Kashmir: History, Politics, Representation, Cambridge University Press, 2017.

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1 Ranjit Hoskote, I, Lalla, *The Poems Of Lal Ded*, Penguin India, 2013.

2 Apoorva Mandhani, "99% habeas corpus pleas filed in J&K since Article 370 move is pending, HC Bar tells CJI", *The Print* (June 28, 2020), *at https://theprint.in/judiciary/99-habeas-corpus-pleas-filed-in-jk-since-article-370-move-are-pending-hc-bar-tells-cji/450281/.*

3 Zutshi, *Supra* .

movement. Andrew Whitehead in 'The Rise and Fall of New Kashmir' examines the odyssey of the political awakening of the peasant Muslim population during the Dogra regime and the rise/ fall of Sheikh Abdullah's socialist Naya Kashmir vision to demands over the recognition of autonomy under Indian sovereignty. The author is of opinion that interference by the state and unequal relationship of Kashmir with Delhi is one of the key factors of an ongoing conflict. In 'Kashmiri Visions of Freedom' Shahla Hussain traced the many meanings of the concept of *azaadi* and argues that the underlying tenet of *azaadi* for Kashmiri remains as the presence of justice and rights that could improve human relationships and lay the foundation for a strong society.

Part II titled, "Politics" contains 6 scholarly essays. In 'Not part of Kashmir, but of the Kashmir Dispute', Martin Sökefeld throws light on the political state of Gilgit- Baltistan and how it is necessary to study the region's political dilemma in light of the multiplicity of contestations about the region. On a similar premise, Christopher Snedden through 'Azad Kashmir' examines the similar political dilemma concerning Azad Kashmir which has become a place of least importance in contemporary times. In 'Law, Gender and Governance in Kashmir', Seems Kazi examines gender overtones in the Kashmir conflict and ways in which it is distinct from other gendered conflicts in Africa and Asia. The author used the frame of rape by Indian security forces and institutional impunity directed to perpetrators to study the gender aspect of the conflict. The author remarks that institutional response to such sexual violence is representative of the general climate of impunity for state personnel and raises grave questions regarding state liability and legitimacy in Kashmir. In 'Survival is Now Our Politics', Haley Duschinski brings out a very interesting take at the Kashmir dispute from the perspective of *Kashmiri pandit* community. The author concludes that the community identity of *Kashmiri pandit* is heterogeneous and with contemporary times, divulgence in the idea of *Kashmiri pandit* is playing an important role especially in light of provisional homecoming as against imposed collective identity conditioning which was done during the early 90s by community organizations and nationalist parties which borrowed Kashmiri pandit's plight as an indicator of suppression of minority ethnicity in Muslim majority state. In 'Beyond the 'Kashmir' Meta Narrative', Mohita Bhatia argues that nationalism conflict has resulted in marginalization of caste oppression issues. She gave certain examples including the pleas of balmiki community which has fallen on deaf ears and has remained unimportant in the pretext of nationalist conflict. The only time they are invoked is to address nationalist/demographic claims by political parties who want to perturb the equilibrium of the Kashmir dispute by changing the demography of the Muslim majority state. In 'Contested Governance, Competing Nationalisms and Disenchanted Publics', Reeta Chowdhari Trembley traced the disenchantment of the

valley against Indian government.

The last Part "Representations" contains four essays. In 'Embedded Mystics', Dean Accardi explores the importance of two mystic saints, Lal Ded and Nund rishi, and how they are an essential part of Kashmiri identity. In 'Producing Paradise', Vanessa Chisti traced the Shawl economy and politics of its representation in Europe. She also touched upon the deteriorating condition of the industry owing to easily available imitation. In 'The Kashmiri as Muslim in Bollywood's New Kashmir', Ananya Jahanara Kabir contests that cinematic representation gives an overtly oversimplified version of the complex situation in Kashmir by asserting that Kashmir's issue is an outcome of jihad or pan Islamic global terrorism. One more interesting observation made by the author is regarding the upright morality of ones who are supporting or aligning with the thought of the nation-state. It is concluded that such cinematic narratives of late 90s and early 2000s, unfortunately, served well the cause of both Hindutva ideologies and the neoliberal status quo. Suvir Kaul in 'The Witness of Poetry' explores trauma-based poetry representation of distressed times in Kashmir. The author critically analyses the two poems in this essay. The first one, "Poetry and the landscape of memory" is authored by poet, Mohiuddin 'Massarat' Ghazal and the other one is by Brij Nath 'Betaab' which takes us to other side of Kashmiri suffering i.e. of Kashmiri pandit

2. Review

I have summarised my review under 4 categories –

2.1 Critical appreciation of interdisciplinary approach

The endeavor to emancipate Kashmir from mainstream discourse of it being a troubled state, centre of sub-nationalism, competing claims of nationalism, etc is praiseworthy. The book through interdisciplinary works tries to break the shackles of narratives attached to Kashmir and is a valiant effort to deconstruct Kashmir into its constituent parts. One striking example of such deconstruction is Dean Accardi's essay regarding the influence of two mystics in the identity of Kashmir.

2.2 Critical appreciation of editor's fragmentation of volume

Reviewing such a heterogeneous piece of literature is complex as the editor binds together contributions from diverse research contexts into a single cohesive volume. The synthesis and looking for common ground between parts becomes easy mainly because the editor has carefully fragmented the essays under broader sub-headings (Parts – History, Politics, and Representation). Such fragmentation is worthy of admiration because it helps the reader in empathizing with the diversity of claims over 'Kashmiriyat'

without losing sight of the dominant context of contemporary nationalist politics surrounding it. The book for majority of its content has justified the objective behind the volume i.e. to (i) bring out the limitations of reading Kashmir in light of postcolonial nationalism and citizenship and (ii) to introduce readers to new directions in Kashmir studies that have emerged in the last two decades.

2.3 Holistic treatment of complex picture of Kashmir

The book is successful in returning a complex picture of the Kashmir. The volume evokes a sense of empathy in the reader for contesting identity of Kashmir (Who is a Kashmiri? Whether the definition of 'Kashmiriyat' is antithetical to the nationalistic notion of India, Pakistan or even separate Kashmir?) & along the same lines appreciate the heterogeneity of the region. Taking an example of an essay by Suvir Kaul regarding trauma poems representing distressed times in the region using two contrasting sets of trauma poems – one by Kashmiri Muslim who is directly impacted by heavy militarization and institutional suppression of insurgency and the other of longings of Kashmiri pandit who had to flee the valley during insurgency because insurgency took a sectarian angle and are hopeful of their return someday. On a similar note, essay by Snedden and Sökefeld takes us through odyssey of conflicts in 'Azad' Kashmir and Gilgit- Baltistan regions which share same historical identity as Kashmir but their conflicts have taken a very different route.

2.4 The overwhelming presence of Sheikh Abdullah

Another common ground that was evident in all essays is the overwhelming presence of Sheikh Abdullah. There is an essay dedicated to his vision by Andrew Whitehead. On a more general note, Sheikh Abdullah's presence in Kashmir if not above but is at least of the same stature as of Lal Ded and Nund Rishi. Yes, contemporary scholars have disputed the credibility of Sheikh Abdullah as a prominent marker of Kashmiri identity but the volume in question affirms to the argument that Sheikh Abdullah is omnipotent in any Kashmir political discourse. However, it is plausible that Sheikh Abdullah's evident presence in this volume can be partly due to the editor's affinity for the person. At this juncture, it becomes important to point that Zutshi is currently working on a biography of Sheikh Abdullah.

To conclude the review, I would comment that the volume brings together some exciting perspectives and a deeper multi-layered concept of 'Kashmiriyat'. The book in itself as suggested by the editor herself is an impetus to grow academic discourse on Kashmir over and above meta-narrative of its troubled political state which should not be adjudged in isolation and chambers of political science and institutional narratives only.

MARITAL RAPE IN INDIA: THE PARADOX OF A NON-CRIMINALIZED CRIME

Manaswi*

1. Introduction

Imagine a girl as young as 18 whose dreams of sensitive companionship get shattered on the first night of marriage. The same man who vowed to protect her integrity and respect when they got married, traumatizes her with new ordeal every night by either forcing her to have sexual intercourse against her desire or asking her to imitate pornographic videos or even brutally inserting objects in her private parts for satisfying his carnal desires. Her family tells her to adjust, the police rebuke her, the Apex Court dismisses her complain as a private matter rather than a public concern, and the society shuns her for crossing the lines of sanctity in her marriage. This statement exemplifies the dark reality of marital rapes that traumatizes several married women. The element of consent[1] for the offense of rape under IPC is ironically presumed to exist[2] when the woman is married.

Across the jurisdictions defending marital rape, two of the four major justifications are relevant in today's situation. The justifications of wife being the submissive half or the unification of identities of the two have become obsolete.[3] Post the feminist revolution of 1970s, a further nuanced justification of 'implied consent'[4] was propagated. Here marriage, as a civil contract is presumed to have an implied consent element. Latest propounded justification is that of a marriage being 'private sphere', which criminal law must not trespass[5]. None of these justifications hold a firm ground.

2. Tracing the Provisions for Marital Rape Under IPC

The offense of rape has expansive definition under IPC. However, Exception 2 to this section states:

> …Sexual intercourse or sexual acts by a man with his own wife, the wife not being

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1 The *Indian Penal Code*, 1860, s.375

2 *Id.*, at s.375, exception 2

3 Anne Dailey, "To Have and to Hold: The Marital Rape Exemption and the Fourteenth amendment", Vol. 99, No. 6, 1986, *Harvard Law Review*, pp. 1255-1273, at p.1256

4 Rebecca M.Ryan, "The Sex Right : A Legal History of Marital Rape Exemption", Vol. 20, No. 4, Autumn 1995, *Law and Social Inquiry* , pp. 941-1001, at p. 964

5 *Id.,* at p.941

under fifteen years of age is not rape.[6]

The legislative intent to preserve sanctity of marriage might have vocalized the theory of implied consent amongst spouses[7]. However when the spouses under judicial separation or otherwise live separately, that is the only instance of criminalization of non –consensual marital rape.[8] Apart from this, when the spouses live under one roof, the reasons for this exemption need a deeper analysis. The 42nd Law Commission Report scrutinized marital rape via a two pronged suggestion strategy[9]. The first suggestion correlated implied consent theory to the spouses living together and ousted it when they were judicially separated or otherwise. The second suggestion presumed rape of women between 12 and 15 years as a sexual misdemeanor, rather than as rape itself. Thus the soft tone of these suggestions rhymed with seeing the marital rape as far less serious offense than rapes committed outside marriage. But, the report remained silent on the exemption clause. The validity of the exemption clause soon echoed in the 172nd Law Commission Report[10]. Ironically, the arguments for not shielding this heinous crime of husband were far outweighed by concerns for preserving the sanctity of marriage and avoiding excessive hindrance in this private sphere.

However, the 2012 *Justice Verma Committee* adopted a divergence tone, advocating criminalization of marital rape[11]. Preliminarily, the Committee suggested deletion of the exemption clause. Secondly, the committee disagreed with using marriage as a shield for "implied consent" in instances of rape. In the contemporary situation, the Committee rightly pointed out that the consent notion was outdated and the women were not a man's property to be tossed as he pleases. Tragically, the *167th Standing Committee Report* [12] opined that greater stress to the family and more injustice to spouses would be the end if the recommendation was approved. Further, the

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6 *Supra* note 1

7 The Supreme Court struck down the 15 years age exemption (for married couples) in *Independent Thought v Union of India*, AIR 2017 SC 4904

8 The *Indian Penal Code*, 1860, s.376B

9 Law Commission of India, Forty-Two Report on India Penal Code, (1971)

10 Law Commission of India, One Hundred and Seventy-two Report on 'Review of Rape Laws of the India Penal Code (2000)'

11 Justice J.S. Verma Committee, 'Report of Committee on Amendments to Criminal Law (2013)', PRS, 23 January 2013, available at *https://www.prsi ndia.org/uploads/media/Justice%20 verma%20committee/js%20verma%20committ e%20report.pdf, accessed-* on -13 April 2021.

12 Standing Committee on Home Affairs, One Hundred and Sixty - Seven Report on 'the Criminal Law (Amendment) Bill (2012)', available at *https://www.prsindia.org/sites/default/files/bill_files/SCR _Criminal_Law_Bill.pdf, accessed -on- 13* April 2021)

alternative remedy for cruelty[13] was equally efficacious in their eyes. In 2015, Ministry of Home Affairs opined on the same lines as Standing Committee, while upholding status of marriage as a sacrament.[14] Thereon, no decision going contra to the view of the Parliamentary Committee was taken. Even the judiciary sung the same chorus as the legislature on the issue of marital rape. They have either avoided the question on the constitutionality of the exception clause[15], or used the clause to avoid answering whether husband was guilty of rape[16] or simply dismisses the petition. Thus, three tier reasoning is advanced for shielding the marital rape by various state organs, i.e., the existence of alternative remedies under IPC and other statues, the concern for protection of long held patriarchal cultural set up and most essentially, the zeal for preservation of the sacred character of marriage seems sadly appalling. The author shall now argue that how this chain of reasoning is misplaced.

3. Infringement of Fundamental Rights

The bedrock of Indian society rests on the sacred institution of marriage. The private space of marriage is delicately, rather ironically, over preserved. Its one thing to not force individuals to marry or get divorced, but it's a different thing to become a mute spectator of violation of her fundamental rights under article 14 and 21 of the Indian Constitution, in the garb of blatant protection to the husband for raping his wife. Even when the right to privacy was recognized as a fundamental right[17], the Apex Court upheld upholds reasonable checks on it, then why the fictitious pane of private sphere is so protected in cases of marital rape?

The trajectory of this fictitious protection can be traced to 'Restitution of Conjugal Rights (RCR)'. Although RCR is a conception of common law it died during the course of contemporary developments there, yet we use the weapon to force a woman (mostly) to live with her husband, when she leaves his company "without reasonable excuse"[18]. Does the woman have no right on her body once she is married? Is she bound to sexually satisfy her husband, even against her desires? The Supreme Courts and High Courts have been confronted with this uncomfortable question time and

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13 The *Indian Penal Code*, 1860, s.498A

14 Press Release, Press Information Bureau, (29 April 2015), available at *http://pib.nic.in/website/PrintRelease.aspx?relid=119938*, accessed- on -13 April 2021.

15 *Nimeshbhai Bharatbhai Desai v State of Gujarat*, 2017 SCC Online Guj 1386

16 Apoorva Mandhani, 'Marital Sex Even if Forcible is not Rape: Delhi Court', *Live Law*, 14 May 2014, available at *https://www.livelaw.in/marital-sex-even-forcible-rape-delhi-court-read-judgment-close-look-law-relating-marital-rape-india/*, accessed -on- 13April 2021.

17 *K.S.Puttaswamy* v. *Union of India* , (2017) 10 SCC 1

18 The *Hindu Marriage Act*, 1956, s.9

again. In a welcoming judgment of *T.Sareetha v. T.Venkata Subbaiah* [19] , for the first time Andhra Pradesh upheld the unconstitutionality of S.9. Commenting on the violation of Articles 14, 19 and 21 committed via this section, the Court stated that "…nothing can conceivably be more degrading to human dignity and monstrous to human spirit than to subject a person by the long arm of the law to a positive sex act…"[20]

But the Court refused to draw a parallel between RCR and private sphere of marriage. However, the Delhi High Court[21], in the garb of protecting the sanctity of marriage, upheld the constitutionality of S.9. Here the court ignores the simple correlation that might exist between RCR and forced sexual relation. Thus, the regressive stance puts 'marital sanctity and private sphere' over 'individual freedom of choice and integrity'. The High Court, by creating a fictional dichotomy RCR and constitution, refused to look into this crucial area. Thus, for the court, the mere legislative policy of RCR did not provide room for debates surrounding Fundamental Rights.

4. Public-Private Dichotomy: Finding The Balance

The contemporary situation sees greater voices rising for crimes against women. Yet, there are concerns for impenetrability of the private realm. The impenetrability allows no scope for constitutional rights to function. Thus, while non-punishment of rape in ordinary circumstances would breach the fundamental right of women, the inapplicability of the same fundamental rights in instances of marital rape, subject it to a differential treatment. As per the "Feminist Critique" of Frances Oslon, those who commit crime in the private sphere get more protection than those on whom this crime gets committed[22]. Additionally, how do we forget the paradigm in which our grund norm was created? It was meant to abolish untouchability, bring equality, liberty and give a positive upheaval to all the shackles that weighed down the colonial India. Even, the provision of cruelty under S.498 of IPC and provisions under Protection of Women Against Domestic Violence Act, build a wall of build a wall of civil as well as criminal remedies , which makes the public-private dichotomy debate seem farcical. Merely because marital law is an area of discomfort for the legislature and judiciary, in the contemporary scenario, the constitutional rights cannot be divested from the private sphere in toto.

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19 AIR 1983 AP 356

20 *Id.*

21 *Harvender Kaur* v. *Harmander Singh Choudhary*, AIR 1984 Del 66

22 Frances Oslon, "Constitutional Law: Feminist Critique of the Public/ Private Distinction", Vol.10 , 1993, *Constitutional Commentary* , p. 319 (1990)

There have been State-specific instances where the cloak of private space was pierced. The divergence in the judgments of Andhra Pradesh High Court and Delhi High Court is a glaring example of the same. While the former refuses to hide the non-consensual sex under the veil of 'private marriage sphere', the later court provides this protection. Even, the Apex Court, in *Navtej Singh Johar v Union of India*[23] while striking down the portion of S.377 of IPC which criminalized consensual sex between people of same sex, upheld the constitutionality of other portions of S.377, including, non-consensual sexual acts. By the logic of non-consensual acts inviting state scrutiny, there is no reason why marital rape should remain alien to the scrutiny. Thus, the sphere of private bubble is extremely fragile and ideologically induced. State criminalizes certain acts within the state private sphere, so that establishes that the space is not water-tight, and can be molded in instances of grave injustice.

Hence, the author proposes a transition towards individual autonomy. This transformation needs a progressive concretization of private space while keeping rights of women intact[24]. The Andhra Pradesh High Court judgment aptly recognized that forced sex was not a part of private space in marital sphere. But, the court could have leaped a step ahead of the above proposition and declared S.9 of the Hindu Marriage Act unconstitutional for subliming individual autonomy of a married woman.[25] The right of self-choice and liberty should be the focal point of debate in these scenarios. That discards the possibility of the courts adopting ever changing dimensions of privacy. Thus, the basic premise of private sphere is essentially flawed and the focus needs to shift towards the realization of individual autonomy and liberty of the woman.

5. Unconstitutionality of The Exception Clause

The apparent dichotomy between the Andhra Pradesh and Delhi High Court decisions was brought up before the Supreme Court in *Saroj Rani v Sudarshan Kumar Chadha*[26].Though the decision of the court resonated with the Delhi High Court in upholding the constitutionality of RCR, yet the ground for the decision preserving the sanctity of marriage and hence RCR was held constitutional on the

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23 (2018) 10 SCC 1

24 *Supra* note 17

25 Martha C. Nussbaum, 'Is Privacy Bad for Women?', (2000) *Boston Review*, available at *http://bostonreview.net/world/martha-c-nussbaum-privacy-bad-women#:~:text=The%20central%20argument%20in%20Catharine,other%20people%2C%20from%20state%20scrutiny.* , accessed-on-13 April 2021)

26 AIR 1984 SC 1562

lines of reasonable classification under article 14. The orthodox patriarchal view of women bottled them up as a property of the husband[27] , or in the least they were treated as unequals. But the codified legislature for Hindus, Sikhs, Christians, did not place them at unequal pedestals. Even the significant advancement in laws relating to divorce, succession, and right over property, all testify against the orthodox notion of wife being the chattel of her husband. In the age where the Apex Court is traversing beyond this binary classification to include the male and female to recognize even the third gender, here treating the woman as subordinate to husband does not hold ground as reasonable classification under Article 14.

Once the equality is established between the two genders, the theory of implied consent for sexual intercourse fails. The fundamental flaw with the theory of implied consent is that the debate surrounding it runs in two extremes. The debate either propounds an inextricable relationship between marriage and sexual relationship or it completely divests the two. Totally refusing sexual intercourse amounts to 'cruelty' and can be a ground for divorce, as is witnessed in various judicial pronouncements. Contrastingly, an ambiguous contract or a contract contrary to public policy is not valid[28]. Thus, if the husband expects wife to be sexually available whenever he desires, is derogatory to the terms of a contract. By this analogy, if the wife's consent is presupposed to be implied in the marriage at all times, and then the terms of such a contract are invalid.

Also, how does the argument of preserving the society's stability by upholding the sanctity of marriage at all costs, not realize a basic fallacy in it? A physical, mental agony along with the broken marriage would cause so aggressive damage to the woman, her children and her loved ones, that no argument of society's stability can balance that disaster. Further, the Legislature via the cruelty protection laws along with PWDVA, 2005 has clarified it that sanctity of marriage is not such an impenetrable terrain that it can spread its tentacles to heinous atrocities against women. Even the Judiciary, by striking down a part of the exception clause under S.375 dealing with the rape of married girls between fifteen and eighteen years of age, un-constitutionalizes the sexual intercourse with a girl below eighteen years of age whether married or unmarried[29]. The court has not judged on similar lines for the marital rape of women above 18, yet the decision above highlights an important reasoning that women's rights cannot vanish in the garb of sanctity of marriage.

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27 Lisa R.Eskow, "The Ultimate Weapon: Demythologizing Spousal Rape and Reconceptualizing its Prosecution", *Stanford Law Review*, Vol. 48, No. 3, February 1996, pp. 677-709, at p. 680 (1996).

28 The Indian Contract Act, 1872, s.23 & s.29.

29 Independent Thought v Union of India, AIR 2017 SC 4904

Thus, on similar lines, the liberty rights of an adult married woman cannot continue to be arbitrarily classified under Article 14 of the Indian Constitution and the non-criminalized crime cannot continue to prosper forever when the basic fundamental rights of an individual are at stake.

6. Inadequate Alternate Remedies

The assumption of alternate adequate remedies is wrongly placed. The remedies for violence against married women cannot be equated to marital rape. For instance, the remedy of cruelty under S.498A of the IPC is inadequate in dealing with all instances of rape. All rape involve cruelty but the vice-versa does not hold and for the same reason feminist literature has for long propounded marital rape as a distinct crime of sui generis category[30]. Just because marital rape is not penalized, it does not shun the necessity of separate criminalization of this crime for the grounds argued above. Though, prima facie there seems to be not much difference in treating marital rape as a separate category from other sexual offences (criminalized under IPC), the difference in the latent consequences are stark. The parameters of cruelty depend on facts and circumstances of each case. The matrimonial relationships, family status, temperament status, cultural status in life, all are relevant factors to determine the boundaries of cruelty.[31] The intensity and degree of guilt required to convict a person of cruelty is of such high degree, that in several circumstances the accused walks off scot free. Even the barbaric sexual intercourse by inserting sticks and other objects which made the women unconscious and caused severe bleeding was not an act heinous enough to be considered cruelty in the eyes of law.[32] Thus, S.498A is devoid of specific evidentiary nuances of S.375 to ensure complete justice or in fact any justice at all.

Further, a continuous act or repeated instances of cruelty are required to satisfy the provisions of S.498A[33]. Also, unlike the maximum punishment for life for rape, cruelty entails a maximum punishment for commission of cruelty is just three years with or without fine. This is the major reason for the author arguing that the alternative remedy is neither efficacious nor adequate and if the defendant walks away acquitted of all charges because of the high standard of proof required establishing cruelty, the alternative remedy in fact results in further injustice.

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30 R. Whisnant, '*Feminist* Perspective on Rape', (2009) *Stanford Encyclopedia of Philosophy*, available at *https://plato.stanford.edu/entries/feminism-rape/*, accessed- on -13 April 2021.

31 *Mohd. Hoshan* v. *State of A.P.*, (2002) 7 SCC 414

32 *Bomma Ilaiah* v. *State of A.P.*, 2003 SCC OnLine AP 38

33 *Samar Ghosh* v. *Jaya Ghosh*, (2007) 4 SCC 511

The civil law-oriented remedies provide inadequate solution to gender-based violence because of their focus on public private divide. It then centers to a discussion of private sphere between the spouse rather than seeing it as a crime against the society.[34] Simultaneously, the family structure being an extremely private sphere, the importance of civil remedy cannot be completely done away with, especially in an extremely patriarchal society. But, the family law, in its present form, presents several flaws when faced with the issue of marital rape. While the archaic structure of RCR which was abolished in UK still continues to survive in India, it has become a weapon in the hands of the husband to force resumption of conjugal relationship. Further, the conceptualization of line of "cruelty" between wife's absolute refusal for sexual intercourse (which is a ground for divorce under personal laws) and her refusal to forced intercourse gets diluted, because the tone of the law places implied obligation on her for the same. This dilemma of conceptualization makes the existence of both the aspects in tandem, rather quite difficult and uncertain. Just as the refusal to engage in sexual intercourse was recognized as cruelty via judicial decisions, similarly the author suggests that the pro-women decisions can be the future course of decisions in line with the contemporary developments. Also the personal law definition of cruelty could explicitly include 'forced sexual intercourse or sexual violence', for instance under s. 13(1)(i)(ia) of the HMA. Thus, there is an urgent need for overhauling of the patriarchal ideology.

The symbiotic nexus of law and culture has been focal point of scrutiny since ages. Instead of divulging in the jurisprudential aspect, the nexus that the author discusses here moves on lines of fundamental rights of women as individuals. Because, the gender specific laws are usually not handmaidens of established cultural paragons. Hence the dichotomy of established ideologies of society with dynamic laws, in certain aspects, is not an alien concept. Having said this, the constitutional line of analogy between article 19 and obscenity laws, gives the groundwork for cultural nexus espoused above. The morality based reasonable restriction under article 19(2) implies "public morality"[35], and this morality might not be in tandem with Constitutional morality[36], especially in areas where the later phonates individual integrity by putting both the sexes on an equal footing. Public morality mimics cultural emotions of people. This subjective and normative morality cannot guide constitutional morality; else the consequences shall be disastrous. For instance, the public morality might support the rigid framework of caste system and hence shall

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[34] Lauren M.Gambier, "Entrenching Privacy: A Critique of Civil Remedies for Gender Motivated Violence", *New York Univ. Law Review*, Vol. 87, No. 6, December 2012, pp. 1934-1937

[35] *Ranjit D. Udeshi v State of Maharashtra*, AIR 1965 SC 881

[36] *Gobind* v. *State of M.P.,* (1975) 2 SCC 148

oppose any law aimed at bridging the gap or for benefitting the lower strata. In these scenarios, if the constitutional morality follows trajectory of public morality, it will be a mockery of the goals set out in our preamble. Thus, the crux is that cultural acceptability of an act is not an infinite stamp to its non-criminalization. As was mentioned in caste system above, even the illustration of Sati pratha debunks non criminalization myths for the reason that it was culturally acceptable then. On the contrary, when our ground norm is so dynamic and our judiciary assures the same zeal in its interpretation, there is no reason for the constitutional morality to give way to cultural stagnation. Rather, such blatant infractions of human rights in the veil of sanctity of marriage, demand immediate and prompt actions to ensure a proper check and balance against such abhorrent incidents of violence.

7. Conclusion: Bridging the GAP Towards Criminalization

The *J. Verma Committee report* already showed an optimistic model for addressing such grave violence. While vocalizing removal of exemption clause, the committee specifically asked for foregoing the '*consent*' presumption and for treating marital rape at par with other instances of rape. Mere removal of exception clause gives room for excessive judicial discretion, as the Verma committee rightly pointed out, which runs twin fold danger of higher burden of proof as well as presumption of *consent.* Also in the face of this particular scenario, which sees a cultural deadlock, an explicit legislation explicitly laying down the crime assumes vital importance.

Ideally, the author believes that '*consent'* should be judged on an equal footing as in other rape cases. Both extremes of presumption of consent entail huge evidentiary dilemma, given the intricacies of marital relationship. '*Consent*', as is interpreted in other rape cases, is judged on circumstantial evidence.[37]Mere absence of force does not lead to a direct conclusion of existence of consent. But given the special situation existing in cases of marriage, neither a mere lack of force nor the proof of sexual intercourse will withstand the test of sufficient evidence to qualify as marital rape. Thus, prima facie the wife's statement is attached vital importance, but the same needs to be corroborated with surrounding evidences, for example husband's history of cruelty or sexual assault, should be considered relevant (though not conclusive) facts to determine his guilt. This might contradict the Evidence Act where past conduct is not considered relevant[38], but given the peculiarities of marital rape this should be considered as significant corroborative evidence. Thus, testimonies of family, friends, and doctors (of any past mental or physical trauma) of the woman

[37] *Pradeep Kumar* v. *State of Bihar,* (2007) 7 SCC 413; *Dilip* v. *State of M.P*., (2013) 14 SCC 331

[38] The *Indian Evidence Act*, 1872, s.53 & s.54

become immensely vital. A S.114B should be inserted to the Indian Evidence Act to ensure that in accusations of rape, even if the accused is the husband, '*consent*' should not be presumed and the factors stated above should be examined closely.

The author believes that exception clause carved out under S.376B of the IPC does not withstand the test of constitutionality under article 14 of the constitution and hence should be repealed. The sentencing standard of 7 years to life imprisonment as in other cases should be evenly applied in marital rape as well. A gross violation of human rights does not deserve preferential treatment just because it happened within the walls of marriage. The explanation to S.375 also needs to explicitly state that for the purposes of *'consent'*, marriage is not a valid defense. On parallel lines, S.54 of Evidence Act needs to be amended to include an exception which ensures that 'previous bad conduct' of the accused becomes a relevant fact, if the accusation is that of marital rape and the accused is the husband.

The criminalization of marital rape goes beyond public, private or cultural discourse to recognize the intrinsic human rights of women as individuals. The analogy above clearly establishes that debates against criminalization do not withstand constitutional grounds. It fails on grounds of ensuring, equality or efficacious alternate remedy, as well as on constitutional morality (which might not stand at par with public morality). The author believes that the alternate criminalization model enunciated above, by bringing the necessary changes in IPC and The Evidence Act, would ensure that the husband, as an accused of marital rape does not get preferential treatment because the violence of the gravity derides erga omes obligations towards basic human rights, and that could never have been the intention of the founding fathers of our constitution. The institution of marriage believes in equality of both the sexes. It is an institution to be cherished and respected and no one should be allowed to use it as a veil to commit barbaric violence against another human being.

MEN: THE VICTIMS OF WOMAN ORIENTED LAWS

Trisha Bose*

1. Introduction

Gender is a powerful notion. Roles of men and women have been decided depending upon their characteristics, which are determined by their social and biological differences. In a project of UNESCO it has been stated that the word "*Gender*", being used for first time by Ann Oakley in 1970, when they were trying to describe the characteristics of men and women.[1] The same project when described the behavioral differences between men and women it stated that, " In most societies, for example, humility, submissiveness, etc., are considered feminine behavior and women are expected to behave that way. Men, on the other hand, are expected to be dominant, aggressive, etc." This also include a list which state certain characteristics of man and woman. Like where submissive, gentle, emotional, quite these kind of adjectives has been used in the feminine list, dominant, aggressive, not emotional, talkative filled the masculine list.[2]

So, it is clear from the above mentioned facts that gender roles might vary from one culture to another, one social group to another within the same culture, but the traditional concept that 'women are weaker than men' always prejudicates.[3] As India has male dominant society, so the gender biases is a deep rooted problem here. Gender biases is basically denial of parity, equal claims and benefits , and suppression in any mode.[4] Depriving women from their basics rights only on the ground of gender, can termed as gender biases, and India is facing this problem from the very beginning.[5] For curbing the problem from its root, and protecting women from any kind of exploitation, the constituent assembly added clause (3) under article 15 , while framing the *Constitution of India***.** *Article 15(3)*, guarantees the exceptional or the privilege rights to women and children. Depending upon this theory of Article 15(3), for balancing the equal status between men and women, many legislation had been enacted, e.g. *Dowry Prohibition Act", "1961"*,

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1 Wilma Guez & John Allen, Gender Sensitivity (2000), *UNESCO*, *available at, https://pdf4pro.com/view/behaviour-unesco-2bef8e.html*, accessed- 24- June 2018.

2 *Id.*

3 *Id*.

4 M.Sivakumar, Gender Discrimination And Women's Development In India (2008), *Munich Personal RePEc archive, at, https://mpra.ub.uni-muenchen.de/10901/1/*, accessed -24 -June 2018 .

5 GUEZ & ALLEN, *Supra* note 1.

"*Maternity Benefit Act", "1861"; "Births, Deaths & Marriages Registration Act", "1886"; "Medical Termination of Pregnancy Act", "1971"; "National Commission for Women Act", "1990"; "Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse)Act", "1999"; "Protection of Women from Domestic Violence Act", "2005"; "Sexual Harassment of Women at Work Place (Prevention, Prohibition & Redressal) Act", "2013"; "Hindu Widows Remarriage" Act, 1856"; and "Muslim women (protection of rights on divorce) Act, 1986"* specifically for benefit of women.[6] Except these legislations there have been many exceptions or relaxations made to the general laws, e.g. in a case of *The Honorable Supreme Court* when a question arose regarding the righteousness of *Section 497* of *Indian Penal Code, 1860*. It seems unconstitutional and against the concept of equality because this section only punishes man for adultery even though the woman may equally guilty as an abettor. However, the honorable Apex Court held this section licit because the classification was not based on the ground of sex.[7] And also, *Article 15(3)* provides for benefit women and children which isn't same as giving identical treatment enjoyed by men in similar situation.[8]

Once upon a time these exceptions were made to resolve the problem of power imbalance, which was clearly present in society that time.[9] Women had suffered a lot for centuries. But now time has changed, so do the society and its people's mindset.[10] When the law was made the position, power and status of women was far different from now.[11] Now they are more educated, they are aware about their rights and value. With evolution of time they have started understanding their actual position, i.e. they are not inferior to male but they are equally stronger and powerful than men.[12] This change has affected the social scenario. Once upon a time, which privileges were given to the women for their betterment, and most importantly for their protection against any kind of exploitation, now those are being misused by some women just to fulfill their malice intentions.[13] Eventually

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6 Tauffiqu Ahamad & Anil Kumar Mishra, Legal Status a nd Rights of Women In Indian Constitution (2016)", Vol. "1, *International Journal Of Advanced Education And Research"*, available at "*https://www.researchgate.net/publication/290691292_Legal_status_and_rights_of_women_in_Indian" _constitution*, (last "accessed" 26 June, 2018).

7 *Yusuf Abdul Aziz* v. *Sate of Bombay*, A.I.R. 1954 S.C. 321 (India).

8 J. N. Pandey, *Constitutional Law Of India,* Central Law Publication, Allahabad, 2017, p. 144.

9 Anant Kumar, "Domestic Violence Against Men in India: A Perspective", *Journal of Human Behavior in the Social Environment, Vol. 22, No. 3, March 2012, pp.* 290 -296, at p. 290.

10 *Id.*

11 *Supra* note ,9.

12 *Id.*

13 *Supra* note ,9.

this change makes the term '*violence*' gender neutral, as men too are now subjected to violence, like rape, domestic violence, marital violence.

2. Source in Constitution of India & Human Rights

As it is clear from the above discussion that the legal privilege and special rights guaranteed to women in India, get the status of constitutionality under Article 15(3). The root of this piece of rule goes into *Article 14* and *Article 15*. *Article 14* read as "the state shall not deny to any person equality before law or the equal protection of law within the territory of India."[14] *Article 14* discussed about equality before law and equal protection of law, it means, through this article a liability put on the state to ensure that every person within its territory will be treated equally, in spite of the fact that they are citizen of the state or not, because they hold equal status before the law. The first part of this article is negative in nature, because it deny any kind of privilege in favour of any individual to the ordinary law, while the later part is positive in nature as it ensure privileged right to people of the state to get equal protection by the law.[15] Though these two expressions are different in nature but it has one common dominant idea.[16] As described by *Patanjali Satsri*,"*C.J.*, in *State of West Bengal* v. *Anwar Ali Sarkar"*,[17] "the second expression is corollary of the first and it is difficult to imagine a situation in which the violation of the equal protection of laws will not be the violation of the equality before law."[18] A conflict may arise regarding the expression *'person'* used in this article - as it covers whom within its purview. The answer given by The Honorable Supreme Court in, *National legal Services Authority* v. *Union of India*,[19] that the word 'Person' doesn't restrict itself within the category of males and females, it includes Transgenders and Hijras too.[20]

Article 15, is to be read as "Prohibition of discrimination on the ground of religion", "caste", creed, "sex", "place of birth".[21] This provision is more specification of the concept stated in Article 14. The difference is, unlike Article 14, Article 15 only applies to the citizens of India.[22] This Article is divided in three clauses. The first clause state that, law will prohibit the

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14 INDIA CONST. art. 14.
15 J. N. Pandey, *Constitutional Law of India,* Central Law Publication, Allahabad, 2017, p. 83.
16 PANDEY, *Supra* note 8.
17 *State of West Bengal* v. *Anwar Ali Sarkar*, AIR 1952 S.C. 75 (India).
18 J. N. Pandey, *Constitutional Law of India,* Central Law Publication, Allahabad, 2017, pp. 83-84.
19 *National legal Services Authority* v. *Union of India*, AIR 2014 S.C. 1863 (India).
20 J. N. Pandey, *Constitutional Law of India,* Central Law Publication, Allahabad, 2017, p. 87.
21 INDIA CONST. art. 15.
22 J. N. Pandey, *Constitutional Law of India,* Central Law Publication, Allahabad, 2017, p. 142.

state from discriminating against the citizens on ground of religion, caste, creed, sex etc. and second clause says that, it will restrain citizens as well as the state from doing discrimination, related to accessing any place of public entertainment, shops, hotel etc.[23] But clause 3 of this article is different from the concept of the other two part this provision. This clause read as, "nothing in this article shall prevent the state from making any special provision for women and children."[24] While the other part of these article insist on ensuring equality, equal treatment by law, this provision of article 15 direct the state to make laws, which can ensure privilege rights for women and children. Which also ensure that nothing can prevent state authority from making such privilege rights for women and children, even though those rights are against the whole concept of equality, as described in these two Articles, and the cause behind providing these privilege rights is, securing dignity, rights and providing protection "to the weaker section of society", i.e. women and children".[25] This generous part of article 15 is the cause of all kind of women-centered law in India.[26] While describing why women are also the part of this clause, *Dr. J.N Pandey* has quoted the *Muller* v. *Oregon* case, which said,

> women's physical structure and performance of maternal functions place her at a disadvantage in the struggle for subsistence and her physical wellbeing becomes an object of public interest and care in order to preserve the strength and vigour of the race.[27]

Also, *Article 15(1)(4)* and *16(1)(4)* state the same, it also directs the state to make special laws for women and children.[28]

This privilege right which ensured to the women in India under *Article 15(3)*, is a result of India to be an active member of *United Nation*. *United Nation* as a part of its *Universal Declaration of Human Rights* enacted two covenant, respectively, the "*International Covenant on Civil and Political Rights"and"the International Covenant on Economic, Social and Cultural Rights"*, and also another "convention" named *Declaration "on the Elimination of Discrimination against Women"*, where it is directed to the state parties to ensure that every women is enjoy their human rights equally to the men without any discrimination of sex,

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23 PANDEY, *Supra* note 8.
24 INDIA CONST. art. 15, cl. 3.
25 J. N. Pandey, *Constitutional Law of India,* Central Law Publication, Allahabad, 2017, p. 143.
26 Shonee Kapoor, Article 15(3) - Where It All Began, Shonee Kapoor Legal Evangelist, *at, https://www.shoneekapoor.com/article-15-clause-3/*, (last accessed 26 June, 2018).
27 PANDEY, *Supra* note 15.
28 N. K Chakrabarti & Shachi Chakrabarti, *Gender Justice*, 2, R.Cambray and Co.,Kolkata, 2006, p25.

and it direct to the state parties to abolish any existing law, custom, regulation and practice which are discriminatory against women.[29]

Where even the preamble of Indian Constitution also state that , the aim of Constitution will be providing "*Equality of status and opportunity*" to the people of India. These women concentric laws, to some extent are creating inequality between men and women.[30] Mere legal assistance without considering the ground realities only increase the social disturbance and inequality.[31] Many law reforms which were once made from the point of view for granting legal equality to women and empowering them are now only drawing inequalities between men and women, examples, *Section 498A, 494,* and *376 of Indian Penal Code*.[32]

3. Feminist Theory

Feminism is a range of activity which is dedicated in understanding the extent of women's subordination, find out the reasons behind this subordination, and lastly taking steps to change the situation for women.[33]

Feminist movements started for reformation of women and her status in society. *Mary Wollston Craft* was the woman who fought for women's existence and their personal right separated from husband's rights, in that era when women's rights were merge within her husband's rights and women doesn't even hold any personal right separated from their husband's right. This was the first expression of feminism in India.[34] The concept of feminism is very different than how it been portrayed. Feminism doesn't implied that men and women are two different poles". Instead, feminism says that, they are not against each other, but they are complimentary to each other. Feminism believes in equality, because according to feminism there is no difference between men and women except their biological structure. It is the mindset of society which creates the difference. Uplifting of women in society is definitely necessary for growth of the country, as women are the mother of upcoming generation. The reformations of legal concepts, from enacting "Article

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29 --, Women's Rights Are Human Rights (2014), *United Nations* Publications, *at* , *https://www.ohchr.org/Documents/Events/WHRD/WomenRightsAreHR.pdf* , (last accessed 26 June 2018).

30 N.K. Chakrabarti & Shachi Chakrabarti, *Gender Justice*, 2, R. Cambray and Co., Kolkata, 2006, p. 29.

31 *Ibid.*

32 *Id.*

33 P. Ishwara Bhat, "Constitutional Feminism: An Overview", (2001) 2 *SCC (Jour)* 1.

34 Anamika & Garima Tyagi, "Feminist Movement In India", *IMPACT: International Journal of Research in Humanities, Arts and Literature,* Vol. 2, No. 11, November 2014, pp. 27 -30, at p. 28.

15(3) of Constitution of India to"making legislation solely for women in India, is a result of that feminist revolution only.[35]

There is no fault in the concept of feminism. It is the mindset of the people and how they will interpret the concept. It is the wrong interpretation of the concept of feminism which distorted the goal of feminist theory, and make it a reason of inequality between men and women. The main goal of feminism is to ending of oppression of women in society. It doesn't mean that feminism supports any act amounts to in-equal treatment to men.[36]

4. Legal Provision for Women safety and their Misuse

The conventional adjectives which are normally attached with the phrase 'man' are such in nature that they make the notion that, men are not only physically stronger than women but they have less emotion than women too. So, it will be a shame for them to express their suffering in this patriarch society. This suffering can caused by both, mental or physical cruelty. A man can tortured by a woman through various means, and we can get numerous examples of those incidents in India. Law is still centralized in the hand of a particular section of this society, and sometimes they misuse their power. In India still where most of the women population is still not aware of their privilege rights, there is a part or a group of that same gender, exploit their privileges against men just fulfill their malice intentions. Also it is possible in India because we believe in men and women playing gender roles, where it is widely assume that women can always be the victims and men can only be the perpetrators. The legal provisions which are mostly misused against men, can be divided into;

I. Anti-Dowry and Domestic Violence laws.
II. Rape laws and Sexual Harassment in workplace laws.

4.1 Anti Dowry and Domestic Violence Laws :

The dowry prohibition Act was introduced in India in 1961. This Act criminalized the whole custom of dowry, in addition to this IPC,1860[37] has Section 304B (dowry death) and 498A (cruelty or domestic violence for dowry purpose) to strengthen the law. IPC made this crime non bailable, and if anyone violate these

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35 *Id.*
36 Anamika & Garima Tyagi, "Feminist Movement In India", *IMPACT: International Journal of Research in Humanities, Arts and Literature,* Vol. 2, No. 11, November 2014, pp. 27 -30, at p. 30.
37 The *Indian Penal Code* , 1860 , No. 45 , Acts of Parliament , 1860 (India).

rules can be imprisoned for 5yrs, and fine up to 15,000.[38]

Under IPC section 498A domestic violence was officially labeled as a crime after 1983 amendment. It has criminalized any act of cruelty to a married woman by her husband or his family. Afterwards *Protection of Women from Domestic Violence Act* was introduced in India in 2005[39], which comes into force an year later. This Act brings a large set of legal provisions related to woman's right in a home without any violence, under one umbrella.[40]

No doubt dowry is a heinous crime, which is practiced in in India persistently. But there is also a other side of story, which being discounted for a long period.[41] That is why laws which were once created as a shield , now they have been used as a weapon, by sulky wives.[42] It has been seen in past few years that most of the dowry related complaints are filed in a heat of moment, just out of general ego clashes. The spouses got so blinded by their ego, that they ignore the consequences of such complaints.[43] The whole thing took such a drastic situation that Supreme Court in last week of July, 2017 forbid the rule of "direct and immediate arrest under dowry harassment laws".[44]

It was point out by "the Supreme Court in *Rajesh Sharma & Ors."*v. *"State of"UP*, wives nowadays have a growing tendency to rope in family members too, with the husband in any kind of accusation of domestic violence.[45]"The"same view was observed by *Punjab & Haryana High Court* in *Jasbir Kaur* v. *State of Haryana (1990)* and *Karnatak High Court* in *State v.. Srikanth (2002)*.[46]

When it comes to domestic violence it has been predetermined that, only women

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38 Swati Shalini, Anti Dowry Law In India (2018), *MYADVO*, *at*, *https://www.myadvo.in/blog/anti-dowry-laws-in-india/*, accessed -20- April 2020.

39 The *Protection of Women from Domestic Violence Act,* 2005, No. 43, Acts of Parliament, 2005 (India).

40 Jon, 3 Crucial Domestic Violence Laws in India: Know Them and Protect yourself, Naaree, *at*, *https://www.naaree.com/domestic-violence-laws-india/*, accessed- 21- April, 2020.

41 Bharat Chugh, Misuse of AntiDowry "Laws - The Other Side Of The Coin", "*Legal Service India"*, "*at"*, *http://www.legalserviceindia.com/article/l467 - Misuse-of-Anti-Dowry-Laws.html*, (last "accessed" 22 April,2020).

42 Jyotika Kalra, Misuse of Dowry Laws and The Failure of The System (2017), *The Hindu, available at*, *https://www.thehindu.com/opinion/open - page/misuse-of-dowry-laws-and-the-failure-of-the-system/article19435399.ece*, (last accessed 22April, 2020).

43 Riya Mishra, The Gender Advantage: Women Who Misuse It & Men who Bears It (2019), *The Times Of India*, *available at*, *https://timesofindia.indiatimes.com/readersblog/riyable/the-gender-advantage-women-who-misuse-it-men-who-bears-it-5475/,* accessed- 22 -April , 2020).

44 Kalra, *Supra* note 42.

45 *Id.*

46 Chugh, *Supra* note 41.

can be the victim in such instance.[47] Due to stereotypical belief system, it's never been accepted by the society that man can be equally mistreated by his wife. In a study it was stated that, there is 51.5% males, who has experienced physical abuse by their intimate partners once in a year, where it was claimed by *National Family Health Survey (2004)*, that when it comes to physical violence and threats against men by their partner's relatives the estimate number of victim raise to 3 crore.[48] *Save Family Foundation and My Nation* conducted a research, with 1650 men, from April 2005 to March 2006, on Domestic violence Against Men, it was concluded that there is plenty cases where men are abused and dominated by their wives. The study also shows that 98% of the total respondents had faced domestic violence once in their lives.[49] When it comes to physical violence it is a rare instance where the husband got beaten up by any weapon, while slapping was most common form of physical abuses. It is more common in case of male victims to face psychological violence than physical violence. There is incidents where husband and his family constantly threaten about false allegation of domestic violence or dowry.[50]

4.2 Rape laws and Sexual Harassment in workplace laws

There is many international frameworks were made just to ensure not only equal rights, but also equal protection to the human race, without creating"any discrimination on the ground of"sex, "color", race, "religion", "origin". For example, *Universal Declaration of Human Rights, 1948, ILO Discrimination (Employment and Occupation) Convention, 1958, International Covenant on Economic, Social and Cultural Rights, 1966; "ILO Indigenous and Tribal Peoples Convention","1989"; ILO Decent Work for Domestic Workers Convention, 2011;* and *ILO Resolution on Equal Opportunities and Equal Treatment for Men and Women in 71st Employment, ILC, Session, 1985*.[51]

The first ever legal initiative taken in India to curb the problem of Sexual Harassment and Rape, was setting guidelines for sexual harassment of women within workplace "in the case of *Vishaka and others"* v. *The "State*

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47 Sanjoy Deshpande, "Sociocultural and Legal Aspects of Violence Against Men", *Journal of Psychosexual Health,* Vol.1, No. 3 - 4, July 2019, pp. 246 -249, at p.247.

48 *Id.*, at p.9.

49 Anant Kumar, "Domestic Violence Against Men in India: A Perspective", *Journal of Human Behavior in the Social Environment, Vol. 22, No. 3, March 2012, pp.* 290 -296, at p. 292.

50 Deshpande, *Supra* note 47.

51 Martha Farrel, et al. Preventing And Responding To Sexual Harassment At Work: Guide To The Sexual Harassment Of Women At Workplace (Prevention, Prohibition and Redressal) Act, 2013, India 10-11 (ILO In India), 2014.

of"Rajasthan[52]. *Justice Krishna Iyar* has rightly said, " a murderer kills the body but a rapist kills the soul".[53] But it can be inferred from the pre-enacted rape laws in India, that only woman have the soul, which can be killed. The Indian laws for sexual harassment and rape are made solely for the female victims. Prior to the *Nirbhaya Rape Case*[54] Indian judiciary used to follow the Vishakha Guidelines with section 375 of IPC, in any sexual harassment or rape cases. After the heart wrenching incident of Nirbhaya Rape Case, the parliament passes the Criminal Law Amendment Act, 2013 and codified the Vishaka Guidelines under the name of *Sexual Harassment of women At Workplace (Prevention, Prohibition and Redressal) Act, 2013*.[55] In 2018 another new amendment brought to existing laws, known as *Criminal Law Amendment Act, 2018*.[56] This new amendment was a result of two gruesome minor rape cases.[57] The first one took place in *Unnao (2017)*, where a 17 yr old girl was raped and the other one took place in *Kathua (2018)*, where an 8 yr old girl was abducted, raped and murdered.[58]

The basic difference between the objective of Criminal Law Amendment Act, 2013 and Criminal Law Amendment Act, 2018 is, the former amendment was an initiative to make sexual harassment and rape laws more specific and it also added some new laws regarding other crimes which women generally face in India, e.g. *Assault or Use of Criminal Force to woman with intent to disrobe – Section 354B, Voyeurism – Section 354C, Stalking – Section 354D*.[59] While the other amendment was initiated to make special provision for minor rape victims specially,[60] e.g. this new amendment extended the period of punishment for rape. In this amendment, Section 376 was amended and section 376 AB was inserted in IPC.[61] Through this the minimum punishment for general offence of rape was extended from 7yr to 10 yr, where in case of minor's rape the punishment should

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52 *Vishaka and others* v. *The State of Rajasthan*, A.I.R. 1997 S.C. 3011 (India).

53 Prashanti, Sexual Harassment of Men, *Legal Service India*,"*at","http://www".legalservicesindia. "com/article"/2039/Sexual -Harassment-"of"- Men.html*, (last accessed 24 April 2020) .

54 *Mukesh* v. *State (NCT of Delhi)*, (2017) 6 SCC 1 (India).

55 Prashanti, *Supra* note 53.

56 The *Criminal Law (Amendment) Act*, 2018, No. 22, Acts of Parliament, 2018 (India).

57 Abhishek Gupta, "Decoding 'Deterrence': A Critique of The Criminal Law (Amendment) Act", *ILI Law Review,* September 2018, pp.136-155, at p. 137.

58 Abhishek Gupta, "Decoding 'Deterrence': A Critique of The Criminal Law (Amendment) Act", *ILI Law Review,* September 2018, pp.136-155, 138.

59 Yamini, Criminal Law (Amendment) Act, 2013: Sexual Offences (2015), *Academike, at*, *https://www.lawctopus.com/academike/criminal-law-amendment/*, accessed- 25 -April, 2020).

60 Abhishek Gupta, "Decoding 'Deterrence': A Critique of The Criminal Law (Amendment) Act", ILI *Law Review,* September 2018, pp.136-155, 140.

61 *Id.*

be rigorous imprisonment for not less than 20 yrs.[62]

But the saddest part about this whole thing is, even after so many changes brought to the existing laws, no such ray of hope showed up for the male victims. None of these laws were gender neutral, so there is no chance for a male victim of sexual offences to seek justice. It is true that India isn't a safe place for women now a days, from an 8-month-old baby to a 100 yr old woman, no one is really protected in-spite of having such strict laws for their protection & safety. On other hand, men are those citizens of India, who are though assured about equal protection and treatment under Indian Constitution but never get it in reality. The biggest reason of such ignorance is, the stereotypical thought of the society that, men cannot be a victim of sexual offence, they can only be the perpetrator. Insia Dariwala, the founder of Hands of Hope Foundation brought out plenty of data, on the number of men victims of sexual offence and the reasons behind less reporting of such cases. She has found out this data from a survey of male sexual abuse, done by her foundation along with another non profit organization, on an invitation of Maneka Gandhi, India's then Women and Child Development Minister .[63] She said, "of the 71% of men surveyed who said they were abused, 84.9% said they had not told anyone about the abuse and the primary reasons for this were shame (55.6%), followed by confusion (50.9%), fear (43.5%) and guilt (28.7%)".[64] When it comes to sexual harassment, men face it the most in workplaces. Such harassment even includes rape, which can be done by either a female or a male. Other than this men face sexual assaults commonly in prisons, schools even in homes.[65]

Keeping this change of circumstances in mind, senior lawyer and parliamentarian *KTS Tulsi*, proposed a private members bill in Rajya Sabha, for amendment of existing sexual offence related criminal laws to make them gender neutral.[66] This issue was previously brought before the Supreme Court, through a PIL but it denied to interfere in this matter on

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62 *Id.*

63 Rituparna Chatterjee, The Mindset Is That Boys Are Not Raped - India Ends Silence On Male Sex Abuse, *The Guardian(2018), at, https://www.theguardian.com/global - development/2018/may/23 /indian-study-male-sexual-abuse-film-"maker-insia-dariwala*", (last"accessed" 26 August, 2020).

64 *Id.*

65 Prashanti, *Supra* note 54.

66 Aneesha Mathur,"Bill to make sexual crimes gender neutral introduced in Parliament","*India Today"*(2019), *at* , "*https://www.indiatoday.in/india/story/bill - to - make-sexual-crimes-gender-neutral-introduced-in"-parliament-"1568504-2019-07-13*", ("last" accessed 26 August, 2020)

the ground that, law making is the domain of parliament.[67] This bill proposes to amend all sexual offence related laws in India, by replacing the term " *any man*" or "*any woman*" with " *any person*". It can expect that, this change will not only make the existing laws gender neutral but, it also expand the area of protection by including men as well as transgender persons.[68]

5. Conclusion and Last Thoughts

India is a place where no doubt a woman need more protection of law, than any man. According to the National Crime Records Bureau (NCRB) reports, the rate of total crime against woman in 2018 was 58.8, but the most shocking fact is , there isn't any specific data or statistic available when it comes to male victims of such crimes.

In 2016-17, journalist & men's rights activist *Deepika Narayan Bhardwaj* made it to the news through her take on the misuse of Section. 498A .[69] Her documentary "*Martyrs of Marriage*" well established the fact that, how only because of its one-sidedness a particular law became an assassin's weapon, which was intended to be used as a shield.[70]

All these problems men are facing, however have one fundamental cause behind it : mainstream thought process and lack of acceptance of society.[71] Many NGO, Activist, Societies, who supports a particular view and take stand for that, all of the sudden close their minds when it comes to accepting change of scenarios around them. For example, when *The Honorable Supreme Court* give recognition to the fact that, Indian women are indeed misusing the domestic violence laws and filling inaccurate claims, the women group and advocates shows their agony by stating that, "if you commit a traffic violation today, you will be asked to appear before a magistrate. A woman doesn't even have that right".[72]

Women have fought a lot just to achieve basic rights equal to rights enjoyed by

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67 *Id.*

68 *Supra , note* 66.

69 Geeta Pandey, Deepika Bhardwaj: The woman who fights for men's rights, *BBC News India* (2017) , *at, https://www.bbc.com/news/world-asia-india-38647822*, (last accessed 26 August, 2020).

70 *Id.*

71 Mishra, *Supra* note 43.

72 "Nimisha Jaiswal", *"*Indian court rules that men need protection from women making unsubstantiated domestic harassment claims", *The World* ("2017"), *at*, *https://www.pri.org/stories/2017-08-15/indian-court-rules-men-need-protection-women-making"-unsubstantiated-"domestic*", (Aug 26, 2020, 5:44 PM).

men. The constitution of our country vows to provide equal treatment and protection to human irrespective of any differences between them. However over years we have also come to realise that not all the problems of women can be resolved by depending upon the doctrine of right to equality. In some cases we have to rely upon the rule of equity.

RELIGIOUS BIGOTISM IN THE NAME OF ISLAMOPOBIA

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Madireddy Lakshmi Bhavana**

1. Statement of Problem

Islamophobia has been evolved through political notions since decades and it has been perceived by majority population in India. Generally, opinions on Muslim communities are spread without any consideration of evidences and statistics and solely on the conventional way of thinking of the population which is the major reason of the bigotism of Islam. Since partition, the gateway to an invisible wall between the Hindu and Muslim communities has been opened, which is growing stronger with the passage of time. Therefore, it is necessary to create awareness regarding the pertaining issue for there would be extreme violence causing loss to innocent lives in the country. Politics has become a leading platform for such violence to take place. It has played a role of putting oil to the burning fire when it comes to the faith or belief of people, creating a misrepresentation in the country. It has become the need of hour to understand the root causes of such bigotism prevailing in India and try to find a solution for the betterment of every individual so that the freedom speech and expression[1] in following any religion[2] along with the fundamental right to peace and harmony[3], equality and natural justice[4] do not get infringed in any sense whatsoever.

2. Begginning of Nuance

In India, Islam was introduced in the early period around 7th century when one of the companions of Prophet Muhammad (PBUH), Malik bin Deenar came to the western coast of the then Indian territory from Arab for trading purposes. It was then, the relations between Hindus and Muslims pondered. Later in early 15th century, Babur (first Mughal emperor, decedent of Genghis khan and Tamerlaine) came to India and established Mughal Empire by conquering Delhi Sultanate after defeating Ibrahim Lodi in the Battle of Panipat (1526).

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1 Article 19 – *Constitution of India*, 1950.
2 Chapter IV, Article 25 -28 – *Constitution of India*, 1950.
3 Article 21 – *Constitution of India*, 1950.
4 Article 14 – *Constitution of India*, 1950.

Muslims contribution to Indian society can be further seen through the period of flourishing Mughal Empire, it was well known that, India, under one of the greatest Mughal emperors, Abu'l-Fath Jalal-ud-din Muhammad Akbar (1556-1605), popularly known as Akbar- The Great, was known to be "the golden bird" because of the contributions made by the king for the welfare of the Indian society. He was known for his humble nature as well as systematic tactics for dealing the social, political and judicial disputes. However, with the passage of time followed by subsequent decedents of the emperor, the timeline of Indian history started to deteriorate with the realm of Muhi-ud-Din Muhammad, commonly known as Aurangzeb (Alamgir) (1618-1707). It is deduced from various historical incidences and massacres that the last ruler Aurangzeb was the cause behind the decline of Mughal empire in India as well as rebellious religious revolts between Hindus and Muslims because of his personal hatred and cruelty towards different classes of the then Indian society.

The seed of communal hatred was sowed soon after 1857 (end of Mughal empire) and soon after, fuel to the burning fire amongst Hindu and Muslims were induced by the Britishers during their rule in India (1858 – 1947). This was subsequently followed by the foundation of RSS and the emergence of the ideology of Hindutva. It was then decided that the two religions cannot breadth under the same roof and live on a single land. With the partition of India in 1947, the gulf between two religions enlarged tremendously causing hatemongers, riots, revolts, massacre, etc. briefly discussed in the below chapters of this paper. Following is the understanding of the condition of India after Independence of 1947.

3. Communal Riots

3.1. Gujarat Riots, 2002

Right after 1947, there was a growing hustle amidst the citizens of India, not only they were dealing with the transformation in their lives and surroundings, but after partition they also started growing hatred amongst themselves mainly because of two religion being the sole reason behind the partition of one nation i.e. Hinduism and Islam. With time, the rising hatred started taking shape and resulted into Gujarat riots. The riot started with an incident of an attack on the Sabarmati Express in Godhra, Gujarat and there were retaliation attacks against Muslims started on the same day. There was clear evidence and reports by various Non-Government Organizations, eye witnesses and also reports collected by the Human Rights Watch[5]

[5], "State Participation and Complicity in Communal Violence in Gujarat, We Have No Orders to Save You", Human Rights Watch, at *https://www.hrw.org/reports/2002/india/gujarat.pdf* .

indicated that there were voluntary actions of police regarding the damage of the places populated with Muslim community. On March 1, Chief Minister of Gujarat confidently responded to criticism stating that they were quickly brought under control and he also confirmed that he will adopt necessary measures on "riots resulting from the natural and justified anger of the people."[6]

It has to be noted that such devastation was caused due to such intolerance towards a minority community and committing such horrendous acts towards any individual especially women and children is a shame towards the democracy of the country and supporting such actions by the government itself is a defeat of democracy and most importantly disrespecting Article 25 and 26 Constitution of India.[7] It has to be noted that police bear a huge responsibility towards keeping peace and harmony in the society and in this case failure of police can be considered as negligent and sluggish towards the functioning of the Government. It could have been prevented at least to low rate after the attack on Sabarmati Express when there was a belief that some kind of violence was yet to occur when a State Bandh was enforced.

3.2. Assam Violence 2012

Ethnic tensions arose between Bodos and Bengali Muslims over the news where unidentified miscreants killed four of the Bodos youth. A report published by the Indian American Muslim Council stated that the continuous violence of Bengali Muslims in Assam and unceasing killings of thousands of Muslims by Bodo militants can be names as Ethnic Cleansing.[8] This report scrutinized that the violence during 2012 and 2014 between Bodo-Muslim Communities was considered to be the lengthiest ethnic conflicts in the North-Eastern States. Additionally, the administration of Bodo regions has persecuted through violent methods leading half a million of Muslims insecure and underprivileged, while the main culprits were not persecuted accordingly.[9]

There has been a myth that Muslims are illegal immigrants from Bangladesh that has been imbibed in the minds of Assam public since 1970s. Relief camps provided by the Government after such clashes between Bodos and Muslims have not been proper and there are serious Human Right violations occurring in such camps.[10]

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6 Asian Age, "Gujarat used as Hindutva laboratory," March 25, 2002.
7 *Id.*, at p 1.
8 Indian American Muslim Council, "Rationalizing Ethnic Cleansing in Assam".
9 *Ibid*.
10 Gojen Daimari, "Status of Human Rights: a study of Bodoland territorial autonomous districts", *Sikkim University*, at *http://14.139.206.50:8080/jspui/bitstream/1/4725/1/Gojen%20Daimari.pdf.*

Women are sexually exploited and there is a risk of Human Trafficking during the stay at these relief camps. It has been shown that the State has not been able to secure the basic rights[11] for Muslims in Assam and local people have reported that there has always a biased role of security forces. In their own country, Muslims are being considered as an immigrant or terrorist, whether the problem lies with the way public pursues a minority community or it is the way Government is treating Muslims at the border is question to be answered.

3.3 Muzaffarnagar riots 2013

Muzaffarnagar riots can be considered as one of the worst violence in Uttar Pradesh in recent history and these riots killed a huge number of people from both the communities (Hindu and Muslims). The upsurge of communal violence involved striking evidence of the elements of Institutionalized riot system to violently divide communities that have lived and worked together peace-fully through generations. Fake news or rumors can be spread easily which creates a disturbance in a society where different belief practices are followed. Here a question arises that, are these riots being pre-planned or happened on a spontaneous reaction of an event? In a state, where diversified communities have been residing together since decades it shall not be stated that such grave and violent riots occurred just based on a spontaneous reaction rather it is logical to conclude that such riots happen due to an illegal and immoral motive of few organizations[12] solely based on promoting hatred towards other religions[13]. The incidents happened in Muzaffarnagar riots clearly falls under the offense of Section 153A[14] of IPC and punishment extends to the term of three years with fine. However, there has been no such convictions based on this offense and Court has only dealt with the murders that happened during the riots where 7 Muslim men were convicted to life imprisonment.

4. Delicacy of Controversial Contention

1.1. Babri Masjid & Ayodhya Verdict [15]

Demolition of mosque at the site of alleged birth place of Ram in 1992 was one

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11 Id.

12 Ward Berenschot, "Muzaffarnagar Riots' , *Perils of a Patronage Democracy, Economic & Political Weekly*, at *https://www.jstor.org/stable/pdf/24479316.pdf.*

13 Id.

14 *IPC*, *1860*, s.153A, "Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony".

15 *M Siddiq (D) ThrLrs* v *Mahant Suresh Das & Ors*. MANU/SC/1538/2019.

of the major events that have raised the communal violence between Hindu and Muslim community. This event indicated that rule of law in the country was insubstantial and the executive officers and police officers were under control of ruling party which made them to work under the service of 'KarSevaks'.

Liberhan Commission[16] was instituted to investigate on the abolition of the mosque and it is the longest commission that has been in our country.[17] In 2019, Supreme Court gave a judgment on Ayodhya dispute[18] where some of the views of the public that it was irrelevant whether the verdict is favorable to Mosque or Temple, where Supreme Court acknowledged that demolition of the mosque was illegal then is it right to be favoring to the party who have been the cause of such demolition. It was also believed that the public would have appreciated if such disputed land could be a hospital or school which is more beneficial to the society.[19] The slogan "*Mandir wahin banayenge*" had turned this matter into a battle of egos between two communities.

1.2. Citizenship Amendment Act

CAA is one of the initiatives taken by the ruling party which has threatened the Muslim Community regarding their citizenship in India. As per the new Amendment, only non-Muslim illegal migrants from Afghanistan, Pakistan & Bangladesh will be provided with citizenship. This is a clearly proposing to place certain Indian residents at an undue-advantage because of their religion and their own country.[20] Article 14 of Indian Constitution has certain requirements to meet the necessity of equality before law and equal protection of laws which extends to any person residing in India. The classification must be at par with the Constitution of India and should be reasonable and appropriate and shall not be considered based on their religion. In accepting only some religions and only few countries violate the Constitution[21] especially the principle of

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16 Liberhan Ayodhya Commission Report, at *https://www.mha.gov.in/about-us/commissions-committees/liberhan-ayodhya-commission.*

17 Memorandum of Action Taken on the Report of the Llberhan Ayodhya Commission of Inquiry, at *https://www.mha.gov.in/sites/default/files/ATR-LibComm2009_4.pdf.*

18 *Supra* note ,15.

19 Zainab Sikander, *"*Ayodhya verdict & Babri demolition confirmed status of Muslims as second-class citizens*", The print*, at *https://theprint.in/opinion/ayodhya-verdict-babri-demolition-confirmed-muslims-as-second-class-citizens/318988/.*

20 M MohsinAlamBhat, The Constitution case against the Citizenship Amendment Bill, at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3367310.*

21 *Supra* note, 5.

Secularism.[22]

ShaheenBagh protests[23] were started in December 2019 at Delhi where protests were held against not only CAA, NCC but also unemployment and women safety. Large number of Muslim women participated in these protests. Further, other minorities also emphasized that affecting CAA is not only a threat to one community but would be a threat to other minorities in the country. Looking at these protests, we can note that public has been enraged of the discrimination carried out at upper level of the authoritative government which can be the beginning of defeat of democracy and equality in India. It can also be clearly observed that there was rush in passing such Amendment in both the Houses. With such grey area, there comes a triggering point to ask whether this could be considered as a tactic played by the Government against the Minority communities? CAA has been protested across the country with clear refusal by making an interpretation of such arbitrary Act.[24]Hence, it shall be taken into appropriate and reasonable consideration by both the parliamentary houses as well as the Supreme Court by interrupting and passing a decision subjecting to be amended highlighting the jurisprudential principles of natural justice[25] and also Constitution of India.

5. Mob Lynching

"That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." – Virginia Declaration of Rights, 1776.[26]

> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood - United Nation Charter, 1945.[27]

Mob lynching is not new to the Indian society. In earlier times, single women have been frequently lynched brutality multiple times simply in the name of witches[28].

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22 *State (NCT of Delhi)* v. *Union of India* (2018) 8 SCC 501 [308]; *Indian Young Lawyers Association* v. *State of Kerala* (2018) SC 1690 [189].

23 Shalu Nigam, "Many Dimensions of Shaheen Bagh Movement in India", SSRN, accessed at *https://dx.doi.org/10.2139/ssrn.3543398.*

24 *Id*.

25 *A.K. Kraipak* v. *UOI*, MANU/SC/0427/1969.

26 *Virginia Declaraiton of Rights, 1776* , s. 1.

27 *Universal Declaration of Human Rights, 1948*, Article 1.

28 Harsh Mander, "*Lynching, the scourge of new India"*, *The Hindu,* accessed at *https://www.thehindu.com/opinion/lead/lynching-the-scourge-of-new-india/article29693818.ece.*

Many other classes of the society such as Dalits have been lynched only if and when they tried to adjust in the so-called rich man society[29]. The problem got unmanageable when even after 2014, after elections., There were explicit guidelines given by the Supreme Court of India against such mob groups, keeping the purview of the damages suffered by the victims, the mob controlling authorities was still not in a stringent position to deal with the recent mob lynching incidences.[30]

Now that there has been Communal mob lynching in the name of cow vigilantism[31], several farmers[32] and small traders[33] of smuggling cattle for beef[34] for their livelihood especially the ones who do not have any other employment sector are the ones who are been victims[35] of such mob lynching. The cow is considered as a sacred animal by the people who follow Hindu religion. Since late 19th century, there have been many instances where Hindus have shown their rallying point of how much they hate beef eaters (mostly Muslims). Later it was often seen that Hindutva activists justify violence against any person whom they know of as an act of protection against cow smugglers and traders. Hindu dairy farmers were equally devoted in the trading of cattle as that of Muslims. Despite of that, the Muslims, even if use cattle for just dairy purposes were mob lynched by the Hindu villagers for the reason being their religion.[36] Therefore, it was simultaneously considered to be as a sacred duty to perform as in the name of cow protection, vandalism, grievous hurt, violence and murders and were committed by Hindutva activists mainly targeting Muslims and attacking them in public as well as private.[37]

The reason behind such expedite violence was the support from the government (by

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29 Caste Discrimination, Human Rights Watch, accessed at *https://www.hrw.org/reports/2001/globalcaste/caste0801 -03.htm.*

30 Justice Aditya Nath Mittal, 7th report of VII State Law Commission on Mob Lynching (07-01-2022,9:16 AM) *http://upslc.upsdc.gov.in/MediaGallery/7thReport.pdf.*

31 *Naveen Chandra Pant and ors.*v. *State of Uttarakhand and Ors*., MANU/UC/0057/2017

32 Flavia Agnes, *"the rising wave of Hindu fundamentalism",* Manupatra accessed at *http://elibrary.slsh.edu.in:2057/pers/Personalized.aspx.*

33 Shruti Jain, "*Rakbar Khan Lynching Case: What the Investigations have revealed*", *The Wire,* 10 September 2019.

34 Sudha Ramachandran, *"Hindutva Violence in India: Trends and Implications"*, *Counter Terrorist Trends and Analyses,* Vol. 12, No. 4, June 2020, pp. 15-20.

35 *Id*.

36 Mohammed Sinan Siyech, Akanksha Narain, *"Beef-related Violence in India: An Expression of Islamophobia", Islamophobia Studies Journal,* Vol.4, No.2, 2018, pp. 181-194.

37 *Supra* note 3,28.

not taking rigorous actions rather delivering hate speeches[38], hence creating a divide) as well as the public in general (Hindutva activists 'communities). The ideology and believes of people who follow Hindu religion have grown out to be as an anti-Muslim violence in the country. Even it has been clearly stated under the state list[39] of the Indian constitution in the 5th and 6th entry delivering that the states have the power to make laws regarding beef ban in India as well as article 48 of the Indian constitution[40], there still exists no uniform law under any act which explicitly prevents slaughtering of animals, further it is also not possible in the country like India with such a diversity of religions, to make stringent laws on the basis of mere worship and sentiments of one religion totally abandoning the livelihood and inter-state trade relations of the other. And even if the country comes up with an arbitrary medium of dealing things, in no way the citizens should urge to take the laws in their hands and infringe the fundamental rights of another by the way of mob lynching.

6. Psychological Aspects of Perusal of Islamophobia

Islamophobia has been spread by manipulating and influencing the minds of the public all over the world and it can only be controlled through understanding the stereotypical thoughts that have been perceived by people towards Muslim Communities. Two types of theories have been put forth by the researchers in order to understand the sensibility of Islamophobia.

6.1 Puritanical and Progressive Traditionalism Theory

Puritanical is defined as believing or involving the belief that it is important to work hard and control yourself and that pleasure is wrong or unnecessary[41]. In other words, person who can be described as a puritan believes that they should live as per the rigorous moral and religious principles. Progressive Traditionalism theory can be defined as upholding and maintaining the old aged traditions till date which also includes a liberal way of following a tradition or custom according to the differences in the region or beliefs of an individual.

There are several forms of Islam.There is multiple explanatory restructuring ofIslamic traditions which have been influenced by the culture or region of that individual/society. As there is intertwining of different communities in different

[38] National Law University, Delhi Report on 'Hate Speech Laws in India, (2018).
[39] The *Constitution of India,* 1950, Schedule 7, List II.
[40] The *Constitution of India,* 1950,Art 48.
[41] Cambridge Dictionary.

countries, communal practices or customs change constantly integrating new elements. Islam is a religion which has influenced other religions and also has been influenced by other religions as it can be observed that even Muslims from different regions or countries adopt different traditions such as South Asian Muslims might follow few traditions differently when compared to Muslims in Middle Eastern countries. For example, as we often identify Muslim women wearing a burqa or hijab, many sect. do not follow that tradition anymore. Similarly, in old times, the religion demanded to be mandatory for a man to learn sword ship, horse riding, swimming etc. but with progressive traditionalist approach, people are trying to adjust according to the latest norms of society along with sticking to some fundamental practices as well. One need not see the religion as stringent as written in Quran or Vedas or any other holy book, but have an open mindset to understand the changes as demanded by the generational developments.

There are certainly few versions of Islam which speaks on behalf of a 'pure' religion, Islam isn't the only religion in that respect as Hinduism, Buddhism and Christianity, etc. also seek to alter and misrepresent the practices of its followers, which should be challenged in this cases as well.[42] Thus, it is the social mentality of people that should be changed regarding the perception of Muslims being a puritanical whereas they have adopted new traditions and customs of different regions which makes Islam, a progressive/modern traditionalist.

6.2 Substance-Silence Theory

Hindus are the most capitalistic of all the races in the world because these group of people are fundamentally individualistic in nature. But we temper our individualism by wanting it to grow. We never want to be collective as a co ncept of identity defines. Hence, people will show are collectivism in showing hatred towards other religion to be specific as discussed above.

Substance is what connects two people, whereas, silence is what separates us. In the context of islamophobia, people tend to say the name of Rahul considering a brother but never Anwar. Historically, Hindus have always been substance, they have always known to accept other cultures say North India has accepted South India and vice versa. But they never seem to accept past Indus. It was never silence because no one matter who came from beyond Indus was still accepted in Indian culture. Similarly, since the time we did not have any access to Vedas and Puranas and there were no

[42] Rakesh Kalshian, "There are many different forms of Islam", *Outlook,* 13 October 2001.

temples to go and worship the silent (unknown) gods, people used to consider the basic 5 substance of life (earth, water, fire, air and space) as deity and perform rituals like fire sacrifice, etc. This theory highlights the basic fact of present absence of silence in the substance world.

Silence depicts the act of unnoticed excellence that carries on around substance every day but are considered to be hidden. Just like a person's sole identity, some of the personality traits are hidden and silent, just like the unseen portfolio of aspiring artist – which may be considered as a renowned masterpiece if only he puts up in substance. Hindutva's greatest contribution is that it veins in the silence and that is why it is nuance to the modern religion. It is also because it takes Hinduism as a great deal of merit in just having substance and not the silence but it deposits that one must have silence. The theory behind it is clearly seen at the present scenario of the country as discussed above in the paper. Hence, the theory lays a sign and stage of being absolutely political, silence being an essential survival to it.

6. Covid-19 Pandemic – Impact on Muslim Community

After the nationwide lockdown in the country India, Muslims became the prime focus rather the target of hate speech amongst the civilians. The reason being TablighiJamaat, a Muslim religious social gathering (13/03/20 – 15/03/20) in Delhi.[43] The event was linked to many of the covid-19 positive cases in India. Amidst the pandemic, every person belonging to Muslim religion was blamed[44] of not just attending Tablighi Jamaat but also further spreading corona virus in the country. Muslims had to face criticism all over the country, most sections of media, people on social media including the government[45] blamed the Tablighi Jamaat and Muslims for deliberately attending the gathering and spreading the Covid-19 in India.[46]

Since there were a national lockdown and people were not allowed to move without taking proper precautions, media was the only source of information in the pandemic situation. As per the reports, Muslims were beaten up by the police officials while they attended religious gatherings at their respective mosques. The vendors were bullied, beaten and chased from various Hindu activists' communities. Hospitals in few states like Ahmedabad, Gujarat, etc.

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43 *Supra* note, 16.

44 *Id*.

45 Prashant Waikar, "Reading Islamophobia in Hindutva: An Analysis of Narendra Modi's Political Discourse", *Islamophobia Studies Journal,* Vol. 4, No. 2, 2018, pp. 161-180.

46 *Id*.

had segregated Muslim patients from any other patient in the hospital. Moreover, in states like Uttar Pradesh, Delhi, etc, many hospitals refused to take patients who belonged to the Muslim community.[47]

Such discriminations based on religion were faced by the second largest population living in country like India bearing 135 crores in total. Socio-economic boycott of Muslims renders the violation of fundamental right given under the Indian Constitution[48] which clearly protects against the discrimination in access to public space. Moreover, under Indian Constitution[49] which states the practice of untouchability (which was abolished under Untouchability act, 1950), Protection of Civil Rights Act, 1955 as prohibitions of untouchability boycott on the grounds of caste and Scheduled Caste ad Scheduled Tribe (Prevention of Atrocities) Act, 1989 which defines the victim as members of scheduled castes and tribes were invoked due to such activities taking place throughout the country. In furtherance, section 153A, 156, 295A[50], 298, 505 of Indian Penal Code, 1860[51] also came into picture which states the punishment of the imputations and assertions prejudicial to national-integration.

Discrimination directly leads to perceived menace which, to an extent, develops a mindset of physically, mentally or emotionally threatened by the disgraceful and embarrassing conditions. Such bigotry behaviour towards the involvement rather interreference in the religious capacity of the people living in the same country intersects the unity and spreads the decease of communal hatred and social contact. It also develops a prejudicial mindset irrespective of the vaccine to the virus, the discrimination and religious fanatism will itself discriminate and divide the nation creating phobia amongst the society. Irrespective of Covid-19 pandemic or pre-Covid period, Muslim community faced this discrimination through social media particularly and it is necessary to curb this kind of offense to create peace and harmony in the country as well as in the world.

7. Ascendancy of Social Media on Islamophobia

The increase of technology and the need to explore the online space has indicated the usage of social media at an unpredictable rate. Right to freedom & expression has

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47 Ali-khan-Mahmudabad, "Manufacturing Conflict: Indian Muslims and the Shift from Marginalization to Exclusion", 2020, *Observer Research Foundation* accessed at *https://www.orfonline.org/expert-speak/manufacturing-conflict/*, *18 April, 2021.*

48 The *Constitution of India*, 1950, Art. 15.

49 The *Constitution of India*, 1950, Art. 17.

50 *Ramji Lal Modi v. The State Of U.P*,1957 AIR 620.

51 The *Indian Penal Code, 1860,* ss. 153A, 156 and 298.

taken major role through this development of online space where various news or incidents or any kind of information can be spread at the finger tip of a person. Social Media is a chief platform to influence people through one's views which can be subjected as hate speech in certain cases where it propagates hatred towards other's religions or cultures and leads to communal violence in a nation where secularism is a core principle of the law of the land.

"Islam is perhaps the most misunderstood religion in the world today and indeed throughout history. It is not only misunderstood by non-Muslims, but it is misunderstood by Muslims themselves."[52] Fake news or exaggerated version of an incident where a Muslim has been involved causes such a negative impression towards the whole community. WhatsApp has been responsible for major spread of Islamophobia through false news, rumours and hate speeches which increased the violence in the India and also in neighbouring country, Myanmar; it has contributed for the growth of violence against Rohingya minority.[53] It has been observed that social media plays the most important role in violating the Constitution as there has been gradual acceleration of communal riots; law enforcement agencies are dealing with the organizations which have the sole purpose to spread fake news, rumors and hurtful comments towards the minorities.[54] A student named Umar Khalid from Jawaharlal Nehru University was killed in a public event and two Hindus shared a video in the media stating, "By attacking Khalid we wanted to give a gift to the people on the occasion of Independence Day."[55] Facebook and Twitter are made responsible for their negligence to avoid such fake news or hate speech comments that are widely shared in their platforms.[56]

Recently, Bangalore has faced a severe violence due to an alleged blasphemous Facebook post about the Prophet Muhammed which triggered riots in the southern areas by a person named Naveen who is a nephew of a political leader in Bangalore. Due to violence by the protestors who were disturbed by the posts, there has been damage to thousands of lives and property. In critical times such as COVID Pandemic when public has been facing crisis mentally, financially and such kind of

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52 Mahathir Mohamad, "Islam: The misunderstood Religion", Islamic *Studies,* Vol. 36, No. 4, 1997, 691-700.

53 David Lumb, "Fake News on WhatsApp Is Inciting Lynchings in India", *Engadget*, 3 July, 2018.

54 Maya Mirchandani, Ojasvi Goel,, Dhananjay Sahai,, "Encouraging Counter-Speech by Mapping the Contours of Hate Speech on Social Media in India" ,*Observer Research Foundation*, 2018 ,accessed at *https://www.orfonline.org/research/43665 - digital-hatred-real-violence-majoritarian-radicalisation-and-social-media-in-india*,18 April ,2021.

55 Alok Singh, "Attack on Umar Khalid: Delhi Police detain duo who claimed responsibility", *The Indian Express,* 21 August, 2018.

56 *Supra* note ,48.

violence at a huge rate has made the crisis worse and unbearable. During COVID, Safoora Zargar, an activist who protested in Shaheen Bagh against CAA was character assassinated expressly stating that she is pregnant being an unwed woman through Facebook posts which was later reported that it was fake news and the activist was a married pregnant woman. She was arrested u/s 13,16,17,18 of Unlawful Prevention Activities Act, 1967[57] and u/s 16 & 18 of Prevention of Terrorism Act, 2002[58] regarding the protests and this gave an opportunity to create disturbing news and defaming a Muslim lady. OIC-IPHRC published a statement on the on-going vicious campaign in India against Muslims being accused of spreading the coronavirus. It has stated that the insistent Islamophobic posts and messages criticizing Muslims for spread of COVID 19 subjects them to discrimination and violence.[59]

As per the definition of Hate Speech stated by Observer Research Foundation 'expressions that advocate incitement to harm – discrimination, hostility, violence – based upon the targets being identified with a certain social or demographic group. It includes speech that advocates, threatens or encourages violent acts.'[60] It has been observed that social media plays the most important role in violating the Constitution as there has been gradual acceleration of communal riots; law enforcement agencies are dealing with the organizations which have the sole purpose to spread fake news, rumors and hurtful comments towards the minorities. [61]Indian Movies can also be considered as influential as large number of publics idolizes actors and actresses in the movie industry. Movies[62] have always represented Muslim Community as a negative character and venerated the Hindu rulers. These movies have represented Muslim Community in a stereotypical manner creating a standard idea among the minds of the public who are in belief of such portrayal of characters as real.

The TK Viswanantha Committee (2017) suggested amendments to the Indian Penal Code, the Code of Criminal Procedure and the Information Technology Act that includes stringent provisions for online hate speech.[63] "Supreme Court itself clearly states that hate speech must be viewed through the lens of the right to equality, and

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57 The *Unlawful Activities (Prevention) Act,* 1967, ss. 13, 16, 17 and 18.

58 The *Prevention of Terrorism Act,* 2002, ss. 16 and 18.

59 Jeyhun Aliyev, "OIC body urges India to halt Islamophobia amid COVID-19", *Anadolu Agency* 2020 , accessed at *https://www.aa.com.tr/en/asia-pacific/oic-body-urges-india-to-halt-islamophobia-amid-covid-19/1811429*,18 April ,2021.

60 *Supra* note ,56.

61 *Id*, at p. 14.

62 Padmaavat, Raees, Omerta, Tanhaji, Haseena Parker .

63 Amber Sinha, "New Recommendations to Regulate Online Hate Speech Could Pose More Problems Than Solutions", *The Wire,* 14 October, 2017.

relates to speech not merely offensive or hurtful to specific individuals, but also inciting discrimination or violence on the basis of inclusion of individuals within certain groups. It is important to note that it is the consequence of speech that is the determinative factor in interpreting hate speech, more so than even perhaps the content of the speech."[64] No proper regulation is available to curb such hate speech and people exercising their Freedom of Speech & Expression are crossing a line by targeting Muslim Community by degrading their beliefs.

8. Suggestions

These are some of the suggestions that could be accommodating for curbing Islamophobia in the country

I. First and foremost, Indian education system needs to be upgraded with relevant sections of historical events specifically focusing Mughal empire as there are still undiscussed facts which are to be taken care of. The State Education Board of Maharashtra, Rajasthan, Uttar Pradesh and Haryana have mostly removed the important historic events covering a major part in the Indian history for better understanding of culture, caste and society.[65] This has to be taken care of with changing government, it will play a major impact on developing the mindset of children from early age.

II. With the verdict of the Supreme Court in 2018[66], lynching was defined as "horrendous act of mobocracy" and laid down certain guidelines for the Centre and State governments to frame laws specifically to deal with the crime of lynching[67]. It is suggestive that the laws should be applicable to all the hate crimes and not just lynching to be specific regardless of the backward areas and the number of participations of public in general in addition which specific clauses with the gender-sensitive issue.

III. No person should be deprived of fundamental right to freedom of public space. Hence, keeping in mind the above inducement of incidences, the hospitals as well as the doctors should be incorporated with penal actions who stands accused of discriminating lay man on the basis of religion.

IV. Communal Violence (Prevention, Control and Rehabilitation of Victims)

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64 *Id*.

65 Maharashtra State Minority Commission,"Socio-Economic Profile of Muslims: A State Progile of Maharashtra ",2013.

66 *Tehseen S. Poonawalla v. Union of India* , MANU/SC/0409/2018.

67 *Kodungallur Film Society v. Union of India*, MANU/SC/1107/2018.

Bill[68]should be proposed again after making the mandatory required changes on existing ineffectiveness of the bill. Some of the key issues to be amended are as follows:

V. The primary focus should not be the minorities rather the bill should act on the provisions for prevention of every type of communal violence irrespective of the class. Communal trouble can be caused by any community irrespective of majority or minority in class group.

VI. The provisions where there is an ambiguous bias between the state officials and junior officials should be taken into consideration. The grounds that senior officials will be liable for junior officials moreover, juniors would not be able to claim immunity based on mere following orders seem vague.

VII. The definition of victim has been stated to be 'someone from minority religion or linguistic group' should be improvised taking into consideration that any person can be a victim.

VIII. The matter of state jurisdiction should be focused upon as stated in the bill that the centre will be legislating on a subject squarely within states domain. This may create a chaotic situation when put into practicality as well as directly attack on the state's autonomy.

IX. The punishment to penalise officials should be given a second thought as the provisions proposed for centre and state authorities delivering orders in itself is a legal question of authoritative administration.

X. The Protection of Human Rights Act, 1993 had been established for the basic purpose of guarding and preventing the violation of human rights in India. With the recent formation of National Human Rights Commission 2019, the body has tried to structure the process of investigation, NHRC watch and the decision-making body and administration. But with the incidents narrated in the paper, it can be clearly seen that the body is not able to function in an effective manner as it should be. Its implementation and playfield techniques are loose and lethargic. The body needs to actively investigate by taking Suo-moto cases and duly report to the authorities in charge appointed by government of India.

XI. Behavior of police handling communal riots - As much as police comes under the executive wing, it should be allowed to make its own decisions rather than influenced by political parties or any other organizations or persons

[68] The *Communal Violence (Prevention, Control and Rehabilitation of Victim s) Bill*, 2005.

XII. Implementation of immediate actions against hate speeches in the social media – Delay in filing cases against such crimes leads to intolerance among the public who might take actions themselves hurting public who are not involved in such violence

Take an action on mobs destroying public and private property – Police does not take a stringent action against people who damage public and private property and this leads to encouragement of damaging property again in other future incidents

9. Conclusion

Islamophobia is one of the controversial subjects which have to be discussed and make people aware about it. There have been negative stereotypes and prejudicial opinions about Islam as a religion since few decades which is necessary to be pointed out particularly in a secular country as ours. India, being a democratic and secularist country holds a diversified number of people where peace and harmony can be a real threat during certain religious bigotries. Thus, making it important to respect and being considerate towards the beliefs and faith of other religions. Phobia towards any religion show casts the hatred and fear towards that religion should not be encouraged as it can be the result of violence at a massive rate.

The problem comes where religious fanatism impacts in an alteration targeting to the other side of people's beliefs. One has to understand by acknowledging not just the circumstantial facts but also the historical events which led to changing mindset of people and durationally impacted the whole ethos of the country as well. The condition will get even worse in the coming decades if the people do not open the blind fold and see the discrimination and inequality prevailing rather growing on the watch of authorities.

Considering the violence and massacre occurred in past years, people have developed hatred for each other without even willing to know and understand the plight of others. This is the primary reason which one has to curb with educating everyone in the right way since childhood about every religion, cast, etc. so that a man shall think twice before making a prejudicial view point based upon half knowledge and putting blunt allegations irrespective of knowing the whole truth rather believing in rumors and media trials.

CRITICAL ANALYSIS OF CONSTITUTIONALITY OF JAMMU AND KASHMIR REORGANISATION ACT 2019 AND ITS IMPACTS ON HUMAN RIGHTS OF KASHMIRI CITIZENS

Zainab Juveriya*

1. Introduction

The Present-day India traces its origins to its historical past of collection of multiple kingdoms and states into a single Union upon Independence, which gave rise to a Quasi-Federal State with Strong Union. India derives its Quasi-Federal Structure by giving States individual status and distribution of powers by allows the Centre to be a dominating factor. The Honourable Supreme Court in the case of *S. R. Bommai v Union of India*[1] rightly pointed out that the concept of Federalism in India depends upon the distribution of power between the States and the Centre and in the Union of States. The nature of Federalism exercised in India varies vastly from countries like United States where the Centre has no say over autonomous and self-governing states. On the contrary, the concept of Quasi-Federalism in India puts the States on a lower stratum than the Centre in the matters of Administration. The Central Parliament gain precedence over states in specific matters (Union and Concurrent List) and one such power is to alter the boundaries of the States.

However, such power of Centre in a Quasi-Federal State cannot be in contradiction to the notion that India is a 'Union of States' and not a unitary state. The powers of the Centre cannot be exercised against a State's inherently vested powers. The Centre derives the legitimacy of its action from the law of the land i.e. The Constitution, which imposes restrictions to the extent of Centre's power. Other than the restriction of Federalism and Sate's autonomy, the underlining restrictions upon Centres actions is that any step taken by the Centre must be in the larger interest of the society, in consonance with fundamental rights of the citizens and in within the larger restrictions of Human Rights Protection. In the light of these restrictions, the Jammu and Kashmir Reorganisation Act 2019 which bifurcated the area of Kashmir in to two Union territories after a period of stringent lockdown, arbitrary detention of Local authorities and a prolonged imposition of President's Rule imposes questions of Violation of Human rights and destruction of Federalism thereby questioning its Constitutionality. The study of model of Union territories gains importance in the light of current passed

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1 *S. R. Bommai* v. *Union of India,* AIR 1994 SC 1918.

NCT of Delhi Amendment Act 2021 [2] which follows similar form of Central Control of special Union territories.

1.1 Methodology

The author is this research aims to conduct a critical study of Jammu and Kashmir Reorganisation Act in order to check its Constitutional legitimacy. The scales of Constitutionality of the Act will be researched by looking into whether the conversion of Kashmir into Union territory and creation of office of Governor stands true to the standards of Federalism. The author would use an analytical approach to understand the historical perspective of Special status of Kashmir and to analyse the legitimacy of the methods and processes used to revoke such status.

Further the paper gives special reference to the Human rights violations that followed during and after the revocation of the special status and imposition of Centre's control. The research will investigate impacts on administration of such inclusion of Kashmir under Union's control. The research will also critically analyse the imposition of Central laws like RTI act, Anti-Terror laws on already vulnerable citizens upon such inclusion in Centre's administration.

2. Trajectory of Events

Jammu and Kashmir had three distinct religiously polarised areas, first being 'Jammu' which had majority Hindu population, 'Kashmir' with majority of Muslim residents and Ladakh with Muslim and Buddhist residents. The 'Jammu Kashmir Reorganisation' Act 2019 [3] was passed after the revocation of Kashmir's Special status under Article 370, reorganising the state of Jammu and Kashmir into two centrally governed Union territories one called Ladakh, and another called Jammu and Kashmir. The act was mainly passed with the aim of simplification and ease of administration post inclusion of Kashmir in the Indian territory. The Jammu Kashmir Reorganisation Bill was passed on 5th August 2019 in the Lok Sabha and in the Rajya Sabha on 6th August 2019 and it became an Act on 9th August 2019 receiving President's assent.

The revocation of Article 370 comes to the picture as the Bharatiya Janata Party after being re-elected as the ruling party in the 2019 general election made revocation of Article 370 an important part of its manifesto and successfully abrogated the article through public mandate upon winning the election. Notably, the state of Jammu and Kashmir was under President's rule since 2018 December giving President the power

[2] The *Government of NCT of Delhi (Amendment) Act,* 2021.
[3] The *Jammu and Kashmir Reorganization Act,* 2019.

to function instead of the J&K Legislative Council. Exercising his emergency powers, the President passed the Constitution (Application to Jammu and Kashmir) Order 2019, followed by a resolution for repeal of Article 370 of Constitution. Prior to the revocation a prolonged lockdown was imposed on the state.

The revocation was followed by the Jammu and Kashmir Reorganization Act 2019 which was circulated only ten minutes before it was tabled and was passed in a hasty manner in 2 days without elaborate deliberation or recommendations from the parliamentary committees. This procedure was against the parliamentary procedure, not giving enough time to the opposition, curbing debates and discussions and skipping the parliamentary committee's reference[4].

3. Historical Perspectives

The necessity for reorganisation of the State of Jammu and Kashmir arose from the revocation of its special status endowed by Article 370[5]. The special status provided separate administrative autonomy to the state. The state did not fall under any central jurisdiction, law or judicial scrutiny. The state was allowed to have a separate Constitution and a separate flag of its own. The special status also provided monopoly over the land, which implied no person from other state could own or buy property there.

The special status was provided to state of Jammu and Kashmir post-independence. When the colonial rule came to an end, all the princely states were given the freedom to join either the newly made Indian territory or the territory of Pakistan. Jammu and Kashmir with vast of its majority being Muslims (77%) was ruled by a Hindu king Hari Singh which created difference of opinion in this regard. The people did not want to join either of the states and remain independent. However, Hari Singh's political actions seemed tilted towards joining India despite the peoples' opinion. In the October of 1947, Kashmir faced tribal infiltration from Pakistan which forced the king to seek military help from India. India provided military help on signing of the 'instrument of accession' which made Jammu and Kashmir an Indian territory but gave Kashmir a special autonomous status.[6]. Hence Article 370 and Kashmir's special status was a result of agreement between two sovereign states which brings into question whether or not India had the power to unilaterally revoke an agreement binding

4 Peoples Union for Democratic Rights report on 'Fast-Track Parliament, Undemocratic laws, The 2019 Monsoon session', (December 2019).

5 INDIAN CONST. Article.370.

6 Medha, "The Revocation of Kashmir's Autonomy: High risk Hindutva Politics at Play" *GIGA FOCUS,* August 2019, pp. 2-3.

relations of two sovereign states.

4. Provisions of the Jammu and Kashmir Reorganization Act 2019

The Act[7] lays down provisions for the following changes in the administration:

I. **Reorganization of Territories:** The Act provides for conversion of state of Jammu and Kashmir into two Union territories. The Union territory of Ladakh was given the districts of Kargil and Leh and the Union territory of Jammu and Kashmir encompassed all the other territories of the previous state of Jammu and Kashmir apart from the two districts.

II. **Creation of a Legislative Assembly:** The Act firstly abolished the autonomous state legislature previously functional in the State of Jammu and Kashmir, this resulted in all the pending bills in the house lapsing. Parallelly, the Act provided for creation of a legislative assembly commonly administrating the law-making procedure for the newly made Union territories. The Legislature will function from the Union territory of Jammu and Kashmir. The Legislative Assembly has the tenure of 5 years and has 107 members in total which will be filled through direct elections. 24 seats are left vacant to be filled through direct elections if the area currently under Pakistan's control is gained by India. Out of these 107 seats there is provision of reservation for SCs and STs. There is also provision for reservation of 2 women if not adequately represented.

    The Legislative Assembly is empowered to make laws on the subject matter falling in the state list of the constitution apart from matters of "police", "public order" and any matter falling in the concurrent list[8].

III. **Powers of Lieutenant**: The Act provided for creation of office of the Lieutenant Governor as per the Article 239A which lays down provisions for administration of Union territories. Accordingly, the President will appoint the Lieutenant Governor for both the Union territories. The territory of Ladakh will be governed by Governor alone as there is no legislature. The Governor will monitor the functioning of the legislative assembly and hence will summon the legislative assembly once in 6 months mandatorily.

IV. **Chief Minister and Council of Ministers**: The Council of Ministers will form not more than 10% of total legislative assembly members. The Council

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7 *Supra* note 1, pp.1.

8 "The Jammu and Kashmir Reorganisation bill, 2019", prsindia.org, *at https://prsindia.org/billtrack/jammu-and-kashmir-reorganisation-bill-2019*, accessed - on - 10 August ,2020.

of Ministers will be led by the Chief Minister and will work under his direction and discretion. The work of Chief Minister is to bridge the communication between the Council and the Governor. The function of Council of Ministers is to advise the Lieutenant Governor on policy matters and law making falling in the purview of the legislative assembly.

V. **High Court:** The High Court of Jammu and Kashmir will function as a common high court for both the Union territories.

5. Constitutional Validity of the Act

The passage of Jammu and Kashmir Reorganisation Act must be read in the context of revocation of Kashmir's special status under Article 370. The revocation of Article 370 is an antecedent of the Jammu and Kashmir Reorganisation Act as the former revokes its special status and the latter brings it under the Center's control. The lock down of the Kashmir valley, military imposition, shutting down of internet services and house arrest of the state representatives prior to revocation of Kashmir's special status raises questions about the legitimacy of actions of the government and its intensions for the unilateral revocation. The act prima facie seems to be for the benefit for state, providing for inclusion in Indian territory, administration, and applicability of laws. However, the constitutionality of the same remains largely doubtful.

The Central Government seeks its power to convert the state into Union territory under Article 3 and to administer it under Article 239.[9] Article 3 of the Indian Constitution gives the Parliament the power to separate a territory, determine its boundaries and alter it. It also provides for changing name and area of state and union territories and creation of new state however it is silent on conversation of states into Union Territories. The purpose of the provision is to provide the Parliament with power of creating new independent states corresponding to federal nature of India and not to give arbitrary power to the Central Government to create territories under its control.

The proviso of the Article 3 states that the state legislature must be consulted if the proposal intends to "affects the area, boundaries or name of any of the states". However this is not mandatory, as the article doesn't require "consent" of state but rather a mere reference to the state legislature. Hence the President must give time to the state legislature to put forth its views. Even though it is not mandatory, the reference to the state legislature must be given due importance as stated in the case of Babulal Parate v.

[9] *Indian Const*. Article. 239.

State of Bombay[10].

In the present case while converting Jammu and Kashmir into Union territories, there was no state legislature as President's rule was imposed. Whose view would be considered then? Does the President take over the power to put forth the state's view instead of the state legislature?

The answer to the question is in negative, the President undertakes all the powers of state legislature under Article 356 1(b)[11] i.e., to make laws. However, giving opinion is not a determinant power of state legislature given under Article 356 1(b) and President's opinion on the bill cannot be a replacement of state legislature's views. The necessity to gain majority opinion gains importance especially in cases of special status states such as Kashmir and Delhi. Supreme Court held the significance of the majority opinion of the State in the case of Government of NCT Delhi v Union of India, and defending the Union territory of Delhi stated that, the aim of maintain majority opinion of the State is to establish a democratic and representative form of Government. Such government vests the power of voicing opinion on law and policies of the state in the hands of States majority subject to reasonable restrictions of the Constitution and not in the hands of Central executive.[12]

The act of the Central Government converting the state into Union territory, under President's rule, by dissolving the former state legislature and before a new state legislature could be created and its opinion on the bill could be taken is not just ultra vires of government's power[13] derived by the Constitution but also deterrent to civil and political rights of Kashmiri citizens. The act overlooks public choice by suppressing voices of publicly elected state representative, further violating public trust.

6. Violation of Federalism or Necessary Centralisation

The author of the Article would look into whether there was a lack of central power that legitimised the creation of Union territories to maintain Functional efficiency of the territory and was the Kashmir's former constituent assembly and constitution a threat to Indian union and federalism that necessitated the creation of Union territory? The negation of these questions would explain whether it was an arbitrary conversion of a state into Union territory breaching principles of Federalism and Self-Autonomy of

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10 *Babulal Parate* v. *The State of Bombay and Another*, 1960 AIR 51.
11 *Indian Const*. Article.356 (1) b.
12 CIVIL APPEAL NOS. 2357 OF 2017.
13 P.D.T Achary, 'J&K's Demotion to Union Territory Status is a Violation of the Constitution', The Wire, *at https://thewire.in/government/kashmir-news-union-territory-indian-constitution* (30 August 2020).

states.

To answer the former question, an interpretation of Article 238 (repealed) and Article 239 of the constitution explained the objective of creation of Union territories. The present day Union territories were recognised as Part C States before 1955. The States Reorganization Commission 1955 stated that these states must be converted to centrally governed units as they were neither *'financially viable'* nor '*functionally efficient'*. Hence the objective of Article 239 of the Constitution which provides for administration of Union territories becomes two fold; Firstly to provide for central governance if the territories are not functionally efficient and secondly to protect its financial viability. The objective was not to allow arbitrary conversion of states into union territories, this objective is supplementary and not in contradiction to the concept of federalism. India is a union of 'States' and its federal nature remains the basic structure of Indian constitution.

The 'Instrument of Accession' is the primary and most reliable source to trace the powers of Central Government and Kashmir's constituent assembly respectively over administration of Kashmir before conversion into Union Territory. It was later adopted in the Constitution of Kashmir (Application to Jammu and Kashmir) Order, 1950. The said document states that the matters of 'Defence', 'Communication' and 'Foreign Affairs' are under the jurisdiction of Indian Union Parliament i.e. Central Government. Other matters relating to internal administration, socio-economic welfare and intrastate trade and commerce fell under jurisdiction of Kashmir's constituent assembly. The Indian Union had the unilateral power to determine defence, communication and foreign policy of Kashmir as a state. The authority needed to maintain a functionally efficient territory in India already existed with the Indian Parliament. However, the special status reserved the right to legislate over its internal administration with the Kashmir constituent assembly and this right is in consonance with the concept of federalism where the states have the autonomy to determine its internal administration. Hence the necessity of conversion on the ground of maintaining functional efficiency stands redundant considering the Centre was already vested with powers to maintain 'functional efficiency'.

The second factor determining the legitimacy of converting Kashmir into a Union territory is whether the Central Government aimed to protect Jammu and Kashmir's financial viability, one is the ownership over lands and control over industries.

By conversion in to a Union territory, as per Article 239A, the Central Government becomes the 'Appropriate Government' for the application of Industrial Disputes Act. The appropriate government is empowered to control and manage the industries on the

territory henceforth. The financial subjugation of Kashmir is further destructive to the already declining economy of the state due to continued lockdown, imposition of curfew and political turmoil. Pre abrogation scenario showcased that the government's priority was not financial safeguarding of Kashmir. Continued lockdown and military imposition was a direct hindrance to right of occupation and economic freedom of citizens in the garb of National security. The wrongful suspension of occupational rights deprived people of livelihoods subjecting them to hunger and poverty. The act brings the tourism industry which was a chief contribution for the state's economy is under the Central Government's control. The tourism industry faces serious threats as it is challenged to by two extensive lockdowns, one prior to abrogation of Article 370 and the second due to Covid-19 restrictions. The said scenarios in which the act was passed clarify that Control by Central Government is not the remedy to revive Kashmir's financial viability rather the cause of its decline.

Answering the second question whether the former State Constituent Assembly was a threat to Indian Union given the historical advertence to Indian Union and as the narrative of ruling party, The instrument of accession and the Kashmir's Constitution gave India the rightful territorial title over the state, if any country invades it, it would amount as act of aggression making Kashmir an integrated part of Indian internal sovereignty. Secondly, by signing the instrument the sovereign of the state agreed to this provision and by further sending representatives to Constituent Assembly of Indian reiterated that Kashmir was a state of Indian Union. The instrument divided central powers giving enough power to Central Government to exercise control over Kashmir and maintain it as an Indian state.

7. Impacts of the Legislation on Human Rights of Kashmiri Citizens

The inconsistency of the act with the Constitution gives us a prima facie expression that the Act is inconsistent with human rights enshrined in the law. The probability of violations is escalated as the conversion of Jammu and Kashmir from state to Union territories is preceded by the abrogation of its autonomous status. While the abrogation pulls the state under scrutiny of central laws, the legislation in question further erodes the state of its autonomy and political will by allowing the central political executive to be in control of the state unilaterally. The abrogation brings the state under the central laws; all the laws governing crime, civil matters and even laws governing property to contracts are imposed on the state in a sweeping manner.

While this brings ease of administration, uniformity of laws, it comes along the disadvantages that outweigh the advantages as it allows imposition of central laws on a land which has been stripped out of its autonomy in the most questionable and

unconstitutional manner. Can the Centre then deemed to have bonafide intentions while imposing laws or does that leave further ways to misuse laws?

7.1 Application of Public Order and Anti-Terrorism Laws. (UAPA, AFSPA)

The Central Legislature even prior to abrogation of Article 370 has passed acts which provide for arbitrary centralised control. The deployment of Armed Forces through AFSPA-the Armed Forces (Special Powers) Act 1958[14] is one such example. The armed forces are deployed to control situations in 'disturbed areas' classified as insurgency zones. The law equipped the armed forces with power of arrest and detention without warrant. The Act allows the Armed forces to enter any area without warrant under the power of search and seizure. Section 4 of the act[15] allows the authorised officers to even open fire and 'shoot to kill' any individual on the mere suspicion of carrying weapon or wrongful assembly. The arbitrary powers vested with the Armed forces to curb the insurgencies instead has led to grave human rights violation including wrongful arrests, wrongful prosecution of minorities and many years of pre-trial detention. The Act was and continues to be violative of fundamental rights of Kashmiri citizens. Application of Anti-terrorism laws like AFSPA[16], National Security Act 1980[17], TADA [18] were heavily criticised by human rights lawyers, activists, scholars, and constitutional law experts who believed these laws were mere instruments of human rights violations.

The application of these laws on a state with special status was considered ultra vires of Central Government's powers as it violated the state's autonomy by overriding the civil powers of the state. However, the Supreme Court in many instances upheld the validity of anti-terrorism laws by stating the Union had the power to enact the legislation under the Union's residuary powers which supersedes State list.

In the backdrop of such laws providing for central management of insurgency areas, a further imposition of central law like UAPA 2019 Amendment Act whose validity is still under question is a huge blow to the already threatened rights of the citizens.

The UAPA- Unlawful Activities Prohibition Act 2019[19] is an extraordinary law which provides for exceptions to ordinary criminal jurisprudence. The exceptions are

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14 The *Armed Forces (Special Powers) Act,* 1958.
15 section 4 of the *Armed Forces (Special Powers) Act*, 1958.
16 *Ibid.*
17 The *National Security Act,* 1980.
18 The *Terrorist and Disruptive Activities (Prevention) Act,* 1987.
19 The *Unlawful Activities (Prevention) Amendment Act*, 2019.

validated on the grounds of 'overwhelming need' to counter terrorism.[20] However the exceptions leave a lot of grey area paving way for its misuse.[21] The UAPA allows arrest without warrant and the 2019 amendment further allows individual to be termed as terrorists giving scope to wrongful arrests to curb dissent or prosecution of minorities violating Right to life and Liberty under Article 21[22].The procedural exceptions allowing statements made to police admissible in the court of law allows statements by coercion and torture to be used against an individual to wrongfully convict him in court of law. This exception removes the legal safeguard against self-incrimination provided by Article 20 (3)[23]. The provisions also allow the accused to be detained without producing any evidence or being produced to a magistrate up to 6 months and can be extended. Wrongful detention of an accused for unreasonable period of time without a fair trial on a mere suspicion of threat is a clear violation of human rights guaranteed under Article 22 (2)[24].The bail provisions (Section 43 D (5) under the act gives the power to the prosecution to raise questions on the bail of the accused further making the bail allowance rigid and rendering the accused to extended pre-trial detention.

Exception such as these conceptually reverses the principle of 'Innocent until proven Guilty' to 'Guilty until proven Innocent' and are a stark violation of Human rights guaranteed through Fundamental rights in the Constitution.

7.2 Impact of RTI Amendment Act 2019

Another act which worsens constitutional and human rights violation in the newly made Union territories is the Right to Information Amendment Act 2019[25]. An analysis of Right to Information Amendment Act is necessary while understanding the impacts on human rights as the fundamental Right to Information forms the basis of rights of citizens in grievance redressal system. The citizen must have the right to information about actions and functions of the government authorities.

The central Right to Information Act 2019 replaces the Jammu and Kashmir Right to Information Act 2009 upon abrogation. However the application doesn't answer the fate of pending RTI bills under the former legislation. About 364 cases are pending and 233 second appeals and 131 complaints are yet to be heard. There is currently no

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20 *Kartar Singh* v. *State of Punjab*, WP no.1833 of 1984.

21 Ujjwal Kumar Singh, *Mapping anti-terror legal regimes in India,* Global Anti-terrorism Law and Policy Cambridge University Press, 2012, pp. 420-446.

22 *Indian Const.* Article. 21.

23 *Indian const*. Article. 20 (3).

24 *Indian const*. Article. 22 (2).

25 The *Right to Information (Amendment) Act*, 2019.

machinery or any provision to transfer the cases to the Central RTI authorities- CIC Chief Information commissioner. Letting the RTI applications lapse conveniently is violation of fundamental right to information of Kashmiri citizens and is a disregard of instruments to achieve redressal for violation of human rights.

Apart from the procedural lacunas and inefficient policy making the amended provisions of the 2019 act are a threat to independence of RTI authorities in itself. The 2005 RTI Act provided for fixed tenure of five years for the Chief Information Commissioner (CIC) and the Information Commissioners (ICs) and their salaries were equivalent to the salaries of the Chief Election Commissioner and the Election Commissioners respectively. The 2019 amendment act puts the removal, tenure and payment of salaries of the Chief information officer and other officials under the ruling government's discretion which is a direct hindrance to the independence of RTI authorities.

With the threatened independence of RTI authorities, the fundament right of Information of citizens is directly affected. The application of this law in Kashmir's reorganised union territories will promote concealment of data by the government bodies including legislative, executive, and judiciary. In territories where the powers are abused resulting in arbitrary arrest and detention the one of the most important instrument to achieve justice i.e. the right to information is threatened by this act harming tenants of human rights in its entirety.

8. Policy Making

The right of citizens of a state to participate in administration and policy making is the cornerstone of democracy. Conversion of a State into a Union territory doesn't by any means forfeit the citizens of this right. The administrative setup of the Union territory must be so to complement the welfare of citizens and not conveniently ignore their democratic rights and demands. Policy making is the instrument to institutionalise and put into actions the human rights safeguards hence, for the protection of human rights, citizens of the said territory must be given due standing in the policy making procedures through elected representatives.

Section 96 of the Jammu and Kashmir Reorganisation Act 2019[26] consisting legal and miscellaneous provisions of the act states that 'The Central Government within one year make such adaptations and modifications of any law by repealing or amending when necessary and such amended law will have same effect as made by the competent

[26] Section 96 of the *Jammu and Kashmir Reorganisation Act,* 2019.

legislature. This gives the power to the Central Government to amend any law. This provision goes against the rationale arrived in the case of *Government of NCT of Delhi* v. *Union of India* [27] where the Supreme Court held that an elected legislature shall bind the Lieutenant Governor for all matters within its legislative domain.

With an already imposed President's rule and with the application of S96 giving Central Government overriding powers even over an elected legislature has created an unending and indefinite extension of Central Government's power, granting it a "Carte Blanche"[28]

9. Critical Analysis of the Act

9.1 Procedural Critique

The act further engrains Central Control over Kashmir after the revocation of its special status. Such arbitrary stripping of autonomous status of a region by itself in contradiction to democratic ideals. A democratic state must not act in way which is in violation of internal or external sovereignty of other state. Here even if Kashmir was not a separate state, its autonomous status inherently carries the notions of External Sovereignty. It becomes necessary to emphasis that Kashmir signed the succession agreement upon condition of maintaining its autonomous status in its Sovereign Capacity. The agreement was between sovereigns of two separate states rendering special status a result of a Binding Agreement between two sovereign states. The act of Govt, violating the agreement, abridging sovereign rights of sovereign state and imposing its control in this context seems to fulfill elements similar to Act of War.

Further the non-adherence of Parliamentary procedure showcases the arbitrariness of the Executive. The parliamentary procedure which ensures debate from opposition and committee suggestions were sidelined by the executive resulting to complete ignorance of any contrary view.

The largest procedural critique of the act in hand is the arbitrary creation and grant of powers in office of Lieutenant Governor. The special status of states like Delhi, Kashmir carries the inherent right to be consulted before passage of any act and policy. The arbitrary creation of Governors office and blanket power of administration vested in him is in violation of Representative and democratic form of administration in India. Such an action must be read in consonance with Central Government's recently passed

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27 *Government of NCT of Delhi* v. *Union of India*, CIVIL APPEAL NOS. 2357 OF 2017.

28 Varun Kannan, 'Jammu and Kashmir's New Domicile Reservation Policy -Some Constitutional Concerns', Indian Constitutional Law and Philosophy, *at https://indconlawphil.wordpress.com /category/federalism/article-239/* (10 September 2020).

NCT of Delhi (Amendment) Act 2021 which equated the office of Governor to the Delhi Government. Such blatant steps of the Central Executive stands against the face of 'Collaborative Federalism' and further corroborates the idea that Central Executive withholds the respect towards Federalism in general and moves towards an idea of Unitary Form of Government.

9.2 Substantive Critique

Further the conversion of Kashmir into a Union Territory and not merely a State stripped the chance of any internal administration. The inclusion and revocation would per se be sufficient to fulfill promises of the Government to include Kashmir in the mainland but conversion in a Union Territory causes the state that suffered the loss of special status to further being deprived of any power to administer subjects coming under the State list.

Secondly, the most drastic violation of Constitution can be seen by the impacts of the Act. The act imposes a blanket imposes of Central laws which is a. prejudicial to rights of Kashmir Citizens b. lacks provision of alternate remedy or transfer of cases pending under laws of autonomous Kashmir.

The first impact is a stark attack on Human rights of Kashmiri Citizens. Already vulnerable minorities are brought under a stricter and draconian laws like UAPA which have failed the tests of Constitutionality time and again. The UAPA with acquittal rate of only 1% is certainly a weapon of oppression rather than one for maintenance of National security. Under such an act, a state suffering from human rights violations under conventional laws like AFSPA are at the receiv ing end of its misuses.

The second impact is also a violation of Human rights by harming fundamental rights of the citizens to approach courts for Justice. The blanket lapse of entire body of Law under Autonomous Kashmir causes a huge backlog of cases. Central Acts like RTI do not provide for an alternate forum or transfer of the pending RTIs under the abrogated laws.

10. Conclusion:

Jammu and Kashmir Reorganisation Act 2019 although passed with the objective of efficient inclusion of Kashmir in Indian Union both in the Indian territory and administration casts a doubt on the intention of the Central Government considering the context of political turmoil it was passed in and analysing the methods used for passage of the act.

The Indian Constitution is an instrument to protect rights of citizens and limit the states authority to democratic ideals of action. The Constitution ensures Human rights which are inalienable and fundamental in nature by the virtue of one being a Human are vested by birth and citizenship. These rights are enforceable in the court of law even against the state through mechanism of Fundamental Rights. India as a parliamentary democracy sets the parliamentary procedure and the passage of bills to be in consonance with the voice of the public, the former protected by power of debate vesting in the opposition party and reference to parliamentary committees while the latter is protected by the Constitution itself. Every bill that becomes an act must seek its legitimacy from the Constitution and must be in line with the fundamental rights provided there in.

The ruling party in its present tenure has passed major acts like RTI[29], UAPA[30], Transgender Persons Act[31] and Jammu and Kashmir Reorganization Act[32] without giving enough time to the opposition, curbing debates and discussions and skipping the parliamentary committee's reference. Apart from the fact that the government has conveniently refrained from following appropriate parliamentary procedure, the executive has failed to pass such acts as per the Constitution, going against the concepts of federalism, fundamental rights, and democracy itself.

The Act was passed under President's rule and amidst a lockdown when the states representatives were on house arrest, this excluded any chance of state's voice being heard. The Constitution of India authorises the federal states to preserve their self-autonomy and hence provides for creation of State governments to represent the state perspective at the central level and state level dictating their own administrative terms. The severe violation of civil and political rights occurring due to military deployment and continued curfew prior to abrogation further cast a doubt on abuse of power that might continue under the Central laws which will now be imposed on the state post abrogation of Article 370 and is complete gamble of rights of the citizens.

After analysing the constitutional grounds of converting state into Union territory and determining its legitimacy it can be concluded that the Central Government by strategically breaching the federal nature of Indian Union and acting ultra-vires to Constitution has severely threatened Federalism, Fundamental rights and Human rights of the citizens.

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29 *Supra* note 23, pp.12.
30 *Supra* note 17, pp.11.
31 The *Transgender Persons (Protection of Rights) Act*, 2019.
32 *Supra* note 1, pp.1.

ROLE OF LAW AND GOVERNANCE IN SECURING CLIMATE JUSTICE IN SOUTH ASIAN COUNTRIES: A HUMAN RIGHT'S PERSPECTIVE

Gyanda Kakar*

1. Introduction

Climate change occurs when changes in the climate system of the Earth lead to changes in weather patterns which last for a long time. They are often attributed to very small variations in Earth's orbit. Nevertheless, human activities are also a critical factor attributing to such variations.

Climate change can have an adverse effect on individual and social health, environmental refugees may be created by climate change, reckless use of natural resources may ruin entire societies. The Bolivian, Arctic (Siberian) water wars of the 1990s and Australian fires show that the failure to meet environmental or human needs can also endanger rule of law and democratic rule.

The first Climate Justice Summit in Hague sought to build unambiguous alliances across countries to combat climate change and ensure sustainability to confirm the 'rights issue'. 894 on-going global legal activities for climate justice have been listed in a UN Environment Program survey. Former NASA scientist James Hansen has gone to the extent of stating that the '*Litigate to Mitigate*' campaign is the need of the hour in conjunction with political /governmental determination.[1]

The main agenda of climate justice is to focus on increasing debates and speeches regarding greenhouse gas emissions and ice-cap melting issues and converting this into a human rights movement by involving those who are majorly affected by this change. The main issue is that those who are least responsible for this climate change are the worst impacted by climate change. The world has primarily talked about climate change as an environmental issue. This paper aims to understand climate change from a perspective of climate justice and human rights.

This paper will primarily discuss the climate justice as a human right. Secondly, it will discuss the role of law and governance in securing climate justice, aspects of intergenerational justice, some responsibilities for securing this. Subsequently, this

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1 *Watts, J. (2017) 'We should be on the offensive' – James Hansen calls for wave of climate lawsuits, the Guardian. Available at: https://www.theguardian.com/environment/2017/nov/17/we -should-be -on-the- offensive-james-hansen-calls-for-wave-of-climate-lawsuits (Accessed: 10 July 2020).*

paper will briefly discuss some case-laws of some South Asian countries. The paper will conclude by discussing the 'Litigate to Mitigate' campaign.

2. Historical Background

Legal advances around emissions and other environmental issues can be traced back to ancient times. It has been noted that man lived in complete harmony with nature in the Vedic, Upanishads, Smritis and other ancient works of literature. The old scriptures of Hindu religion show that people gave trees, plants, wildlife and other natural things so much importance that they formed a tradition of nature conservation by worship. Historical Indian state law and jurisprudence, Yajnavalkya Smriti written before the 5th century AD indicated the prohibition to cut and specified punishment for such actions.[2]

Arthashastra of Kautilya, written in the Mauryan era, stressed the need for the management of the forests. Ashoka has gone further and shared his views on the environment and biodiversity conservation through his Edicts inscribed in the pillars. Ancient India thus had an ecosystem conservation philosophy enshrined in ancient injunctions in various scriptures and texts.

Ancient Indian literature includes several references to various environmental issues, including preservation and protection. From the beginning, the signs of environmental conservation have been evident in India. During the early stages of human history in India, each man regarded the world as highly dominant and thus he adorned various aspects including trees, woods, animals, mountains, waterways, etc.

Pieces of evidence suggest that environmental consciousness is also existed in the pre-Vedic civilizations, that prospered in India about 5, 000 years ago. That is clear from geological evidence gathered from the famous historical sites of, Harappa and Mohenjo-Daro.[3]

While the ancient Indian Scriptures regarded high value to the earth and its atmosphere, the Constitution of India which was adopted in 1949 hardly values an ancient culture of the nature of the earth's natural surroundings and its resilience in health.[4]

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[2] Bhaskar Kumar Chakravarty, "Environmentalism: Indian Constitution and Judiciary",*Journal of Indian Law Institute*, vol. 48, Jan-Mar 2006, p. 99.

[3] Evolution of Environmental Law and Policies in India (2019). Available at: https://legaldesire.com/evolution-of-environmental-law-and-policies-in-india/ (Accessed: 13th November 2019).

[4] Shanthakumar S, Introduction to Environmental Law, Wadhwa and Company, Reprint 2009, ed. 2 p. 75

3. Climate Justice as a Human Right

Human rights express the right of all people to have equal care, to live their lives in protection and equality, and to have their rights safeguarded by the governments. There are so many human rights that are threatened by the climate change, such as the right to life, to health, to food and an adequate standard of living. This can be shown by any new severe weather event and the resulting devastation, for example death and loss of crops and property. Climate change will continue to devastate people and the world without further intervention, and human rights will continue to be abused.

Climate change would explicitly and indirectly influence the enjoyment of human rights. Popular examples include an increase in sea level, changes in temperature, and extreme weather events, including health, food, water and life rights. These impacts are not felt equally across the world. The world's most disadvantaged divisions will be affected most seriously. In his study on climate change and poverty, UN Special Rapporteur Philip Alston stressed the 'increasing danger of apartheid climate'.[5] The growing threat of climate change was connected by Alston with threats to civil and political rights and even democracy and the rule of law.[6]

As climate crisis activities and the defence of human rights are becoming more and more interlinked, their importance and their effect on each other should be closely examined. Climate change and human rights policies are still being developed, leading to new perspectives, definition and new challenges for human rights and environmental workers.[7]

In 1948, the Universal Declaration of Human Rights was founded to uphold the climate justice principles as a collection of rights that enable all citizens to live with equality, liberty, fairness, justice and peace.[8] This collection of inalienable human rights remains the cornerstone of our commitment to a greener, healthier and more prosperous planet beyond decades. It is possible to associate human rights with a

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5 *OHCHR | UN expert condemns failure to address impact of climate change on poverty (2021). Available at: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24735 (Accessed: 3 February 2021).*

6 *Ibid.*

7 *Climate change, justice and human rights - Amnesty International (2020). Available at: https://www.amnesty.nl/actueel/climate-change-justice-and-human-rights#:~:text=The%20impacts%20of%20climate%20change,water%20and%20life%20amongst%20others. (Accessed: 20 September 2020).*

8 Preamble, United Nations Declaration on Human Rights, 1948.

harmonious, safe world if we start to consider the implications of climate change and how those results impact us, our families and communities and future communities.

Human rights express the right of all people to have equal care, to live their lives in protection and equality, and to have their rights safeguarded by the governments. There are so many human rights that are threatened by the climate change, such as the right to life, to health, to food and an adequate standard of living. This can be shown by any new severe weather event and the resulting devastation, for example death and loss of crops and property. Climate change will continue to devastate people and the world without further intervention, and human rights will continue to be abused.

During the United Nations Climate Change Conference, 2020, 34 UN human rights experts – from industry, development, environmental concerns – called on countries to take climate action based on human rights in line with the Paris Agreement's temperature goal.[9]

4. Intergenerational Justice

The issue of what climate target to aim would also depend on what commitments and obligations one generation's leaders have for future generations. Some greenhouse gas emissions may have a potential effect. For instance, CO_2 lasts 'hundreds of thousands of years' in the atmosphere. Thus, while climate change is impacting many people now alive, many of the consequences of climate change will be increased for future generations. It is therefore important to take into account our obligations to future generations and will have to be decided to know what temperature targets are acceptable. Such an account is also needed for two other reasons. Primarily Next, there is a social aspect to the issue of who will bear the pressures of climate change. Many, for instance, claim that it is fair to force on future generations some of the costs of mitigating (and adapting).

Then, it is possible to release a certain fixed amount of greenhouse gases. Regarding how this should be done, inter-generation justice also raises questions because if a stable greenhouse gas emission record exists we need to consider what arguments if any, those future individuals should produce greenhouse gases.

4.1 Principles of Intergenerational Justice

A variety of ideas have been proposed for inter-generational justice. Most

[9] *Understanding Human Rights and Climate Change (2020) Ohchr.org. Available at: https://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf (Accessed: 20 September 2020).*

individuals, for example, take a view that justice necessarily allows anyone to reach a certain threshold.

Of course, one challenge in this respect is how this threshold can be defined. However, many will expect an adequacy requirement, even if it is difficult to specify.[10]

An appropriate view, for example, will allow one generation to leave future generations worse off than them only when they are above a certain threshold.

Consider a scenario in which one generation could leave future citizens at no (or little) expense much better than the appropriate threshold. It would be insufficient to claim in this regard that current generations just need to ensure that future citizens will not slip under the defined level of the sufficiency. The main concept is to improve current generations' living conditions and also to make the future a little better.

Nevertheless, much of the literature on intergenerational justice and climate change has included economic analyzes on climate change effects, and economic analyzes tend to use the idea of a social reduction rate to determine how people will handle future generations.[11]

4.2 Risks and Concerns

The previous statements were focused on the fact that justice to future generations exists. It should be recognized that there is some confusion. The causes are not uncommon for climate change and are well-known in general discussions regarding inter-generational justice. Take adequate account, for example, of our future obligations. They maintain that there is an obligation to behave in a way which exceeds a certain level of living standards for those who live in the future. According to earlier statements, persons only act unjustly if they make someone worse than they would otherwise be (future or present).

The fact that climate forecasts are marked by uncertainty and uncertainties poses a variety of other regulatory concerns. Therefore, a detailed study of the needs of climate justice to tackle risk and vulnerability. To underline this, it is necessary to take the United Nations Intergovernmental Panel on Climate Change' Fifth Assessment Report into consideration. First of all, some are using the conventional

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[10] *Farnham: Ashgate, 2012,* Intergenerational *Justice,* Routledge *edited by Lukas Meyer.*

[11] *Climate Justice (Stanford Encyclopedia of Philosophy) (2020). Available at: https://plato.stanford.edu/entries/justiceclimate/#InteJust (Accessed: 01 July 2020).*

cost-benefit model and are trying to calculate the 'economic benefits' of various situations by comparing each situation's likelihood and value with the most anticipated value of that program. Second, some of them adopt the 'principle of precaution'.[12]

5. Responsibilities

Suppose we have established what kinds of priorities should be included in the justice philosophy, we still need to decide what obligations potential citizens will have and how risk and uncertainty should be treated. This will help us in deciding our objectives. The next question is who has the responsibility for achieving these goals? We can identify four other questions that will allow us together to address this question and tell us what a fair distribution of climate responsibility will be.

First, the details of the duties should be clearly understood. As stated earlier, climate scientists and policymakers mainly (but not exclusively) focus on two policy types: mitigation and adjustment. The first question is 'who should and to what degree would minimize and adapt?' Consider this s the problem of climate change.

A second issue is 'who is to bear the modification and mitigation costs'? Financial (and other) expense forms are also part of mitigation. For example, the purchasers of such items become financially worse off if a carbon tax is imposed on goods. Often mitigation policies provide advantages (e.g. car-discouraging regulations may enhance air quality and enable people to go on a walk rather than a drive), yet the programs in many situations are expensive. Adaptation policies will also be costly (such as the design of cities to better deal with heatwaves). Thus, we need to know who ought to pay in these conditions. Consider this the problem of burden-sharing.

Thirdly, who is responsible for ensuring that who all are responsible for this, including those who are appointed for prevention and adaptation, carry out their responsibilities? Consider this the problem of political intervention.

The fourth problem is very different. This discusses what kind of institutions are the duty-bearers for all the above questions. Most would believe the states, but what about other actors? Are there any people who bear duty? For example, do citizens have mitigation duties? Or is it the responsibility of other actors exclusively?[13]

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[12] *Ibid*.
[13] *Supra* at 7.

5.1 Climate Action Question

Taking the first two questions into consideration. These are very similar, but not the same. They are handled together. Some might assume, for example, that one agent is responsible for reducing (because it is an efficient way to minimize greenhouse gas emissions significantly) but that others should cover costs.

One might think that present generations can actively reduce climate change but can pass on some of the costs to future generations. Of course, although the questions are different, they should not be viewed completely separately. One might think that X will minimize for example, but only if others pay some (or even all) of the costs at least, and that if there is not adequate financial help, then X is not obliged. Through that way, the Burden-Sharing Problem should be answered. Significant literature on who should bear the cost of fighting climate change has developed.

5.2 Burden Sharing Question[14]

5.2.1 The Polluter Pays Principle

The Polluter Pays principle states that burdens should be faced according to how much an individual has contributed to the emission. This is a plausible approach intuitively. It represents a widely held belief that we should keep agents accountable for their acts subject to certain conditions. There are several problems, it has been noted. Second, some argue that, if they are excusably unaware of the effects of their actions, agents are not responsible for the damage resulting from their greenhouse gas emissions. They claim instead that other people who have released greenhouse gases previously were unreasonable and thus not responsible.

This line of reasoning has provided many responses. First of all, we may conclude that people cannot continue to be ignorant of the consequences of greenhouse gas pollution for many decades. It is hard to say exactly when one can no longer excusably pretend to be ignorant, but the main point is that there are limits in the manner in which ignorance can be excused.

Additionally, others argue that the blame should be put justly upon those who were excusably unaware of the harm of their emissions if the issuers benefited from the emissions adequately. The rough idea here is that when anyone may fairly argue that it is unjust to criminalize them for not guilty of harm, the harmful conduct which generates benefits for them is substantially weakened. When they benefitted it

[14] *Supra* at 7.

wouldn't be too burdensome to get them paid and couldn't make them any worse than when they didn't.[15]

A second problem is that many emitters have ceased to be alive. Why should those living now pay the price for actions of previous generations, the objection goes? Replies were forthcoming again. A third challenge lies ahead. What if people are to engage in greenhouse gas-emitting activities to achieve decent minimum living standards? Some claim that paying for the issuing of greenhouse gases for extremely poor citizens would drive them below a dignified standard of life which would be unjust.

5.2.2 The Beneficiary Pays Principle

Many people believe that the Polluter Pays Principle should be complemented by other principles with this type of challenge. As we saw in the previous article, what is called the Beneficiary Pays Principle. In this respect, agents are required to pay because they have benefited from the activities involving greenhouse gas emissions. One could ask whether the benefit is always enough to make someone liable to pay. For example, someone might benefit from pollution and remain very poor. If one agrees that the concept of polluter pays should not be enforced because it places people below the decent level of residency, one may also agree that the concept of beneficiary pays principle is equally limited for that reason.[16]

5.2.3 The Ability to Principle

It takes us to a third concept. Some have suggested that mitigation and adaptation pressures should be allocated according to the ability of agents to pay. This theory is widely understood that the higher the willingness of an agent to pay the greater the proportion of its costs. Another critique of this theory is that the question of who pays for problems as to who created or gained from the problem has been removed. Besides, some suggest that the wealthy have a strong obligation to help them on account of moral beliefs.[17]

If one thinks about the payment capacity concept, one may rely on global distributive

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[15] *What is the polluter pays principle? (2020). Available at: http://www.lse.ac.uk/granthaminstitute/explainers/what-is-the-polluter-pays-principle (Accessed: 01 July 2020).*

[16] *"Should the beneficiaries pay?- Robert Huseby, 2015" (2020), p. Available at: https://journals.sagepub.com/doi/abs/10.1177/1470594X13506366?journalCode=ppea (Accessed: 01 July 2020).*

[17] Mizan R. Khan, Polluter-Pays-Principle: The Cardinal Instrument for Addressing Climate Change, Laws 2015, 4, 638–653; doi:10.3390/laws4030638.

justice. Many who think that global justice requires more equality should, for example, support a suggestion that the costs will be primarily met by the more advantaged and not by the poorest in the world.

5.3 First Order and Second Order Responsibilities

While much of the literature focuses on who will pay, there are many considerations when checking obligations. In addressing this, it is important to distinguish between primary and secondary obligations where the duty of first order is, in this case, either (i) to mitigate climate change, promote adaptation or (ii) to bear the expense of adaptation or mitigation. In this sense, a second-order obligation is responsible for taking steps to ensure that others are in line with their obligations of first-order (climate).

The second order is responsible for altering the social, economic and political setting, to ensure that actors fulfil their obligations in the first place. There are two additional things to remember.[18]

6. Role of Law and Governance

The earth and its inhabitants are seriously impacted by climate change. Governments have responded to the climate crisis in different degrees and with varying efficiency with legislation and strategies to alleviate the causes. The word Governance encompasses the engagement and intervention of both government and non-governmental organisations. Law determines the boundaries or structures for defined government action and thereby becomes a focal point for an analysis of barriers to adaptation as effects of climate change are felt. The legislation must also allow for a degree of flexibility to grow beyond what is currently found in other political structures of policy practice.

It needs to improve to provide new solutions for emerging climate change problems. The author analyses, in this paper the role of legislation in environmental governance to find ways to change and amend laws to guarantee climate justice. Law itself is a part of formal governance which can control private and non-governmental actions in the environmental legislation. For example, how do local, state, tribal and federal authorities act in a particular situation? Which processes do governmental agencies have to operate in a specific situation? The law governs all these processes.

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[18] Environmental Degradation, Reparations, and the Moral Significanceof History', *Journal of Social Philosophy*, vol.37 no.3 (2006), pp.464-482. [This examines the moral significance of historic emissions.]

The majority of structures are currently in a state that the adaptive potential may be improved if appropriate tools and legal instruments are used, although they are vulnerable to climate change. Regulatory laws are essential for providing a forum to tackle environmental degradation and economic aspirations, requiring individuals or organisations to use capital to avoid or clean up this degradation. The courts need to play a crucial role in this regard. Laws can be disregarded without courts; since provisions are left unchecked by executives, people will be left without a recourse.

6.1 Environmental Constitutionalism

Environmental constitutionalism, by the application of national and sub-national constitutional law, is a modern idea that protects local and global environmental conditions.

Organizations and Supreme Courts have hardly spoken about environmental constitutionalism in many countries. Yet, even these episodic statements are significant because they reflect an increased global understanding of the potential of environmental constitutionalism.[19] Owing to the fact, that courts focus on the substantive attributes of environmental issues makes it easier for present and future generations to achieve environmental awareness. A little goes a long way in environmental constitutionalism. This represents an acknowledgment that the environment must be protected by constitutional provisions and pursued by constitutional courts across the world. Environmental constitutionalism is one approach to addressing environmental challenges that are outside the scope of conventional legal institutions. It has the potential to function as a coalescent process, merging policy systems and approaches to individual and societal norms and policies. It may be used to safeguard locally — such as access to fresh food, clean water, and clean air — or globally — such as biodiversity and climate change, which share human and environmental conservation features.[20]

Environmental Constitutionalism is variable, covering the fundamental rights, procedural rights, policy directives, reciprocal tasks, etc. Certain aspects are quite common. For example, over half of the world's countries officially or tacitly acknowledge a constitutional right to a healthy environment. Approximately the same number provide folks with a correspondingly safe atmosphere.

In recognizing the human rights consequences of environmental degradation and

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[19] Barbara A. Cosens, Robin K. and Edella Schlage, *The Role of Law in Adaptive Governance*, Ecol Soc. 2017 March 1; 22(1): l–30. doi:10.5751/ES-08731-220130.

[20] Global Judicial Handbook on Environmental Constitutionalism (3rd edn), 94-101.

climate disturbance, environmental constituency plays a major role; in that sense, it can address the types of environmental problems most accurately felt by those that are frequently ignored by existing legal structures.

The discrepancies left by these other legal systems can also be bridged by environmental constitutionalism. Environmental constitutionalism, alongside national regulatory schemes such as environmental assessment and Water Framework Act, and adherence to international, multi or bilateral treation as well as regional treaties and standards, as well as dialogues with sub-national and local governments, is an integral element of the national environmental management network. This can complement the various regimes at the different governance levels.

6.2 Provisions for Climate Justice under Indian Constitution

In this way, the creators of the Constitution tended to be untouched by a legislative requirement to protect and conserve natural ecosystems.[21] There were, however, other provisions which had a direct impact on the environment such as improved public health, organizing farming and animal husbandry under modern and scientific guidelines and protecting natural monuments from dispossession, and there are no clear provisions on climate, and even the word environment has been found no place in the Constitution.

Article 47 is more important as its principal responsibility is to raise the state's standard of living, which is considered to be the primary task of increasing its standards of living. Many laws, such as those for the conservation of natural rights or drinking water or other natural resources, are very broad. Some are more ephemeral, recognize the responsibility for natural resources and future generations or address related issues, such as sustainable development or climate change.[22]

Some consider environmental protection as a national policy issue. In 1984, the Supreme Court of India was one of the first to find that the right to a healthy environment was enshrined in a right to life.

7. Justice and Climate Policies

When looking at the strategies for mitigation (and adaptation to) climate change, we have a range of legislative concerns. Many recommended or adopted policies raise questions of justice.

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21 S Shanthakumar, 'Introduction to Environmental Law', 2nd edn, Nagpur, Wadhwa and Company, p.73.

22 INDIAN CONSTI., Article 47.

7.1 From Energy Sources

Firstly, other sources of energy are the main concern. These may create justice concerns. For example, the construction of hydropower plants that lead to the displacement of people from their homes and the displacement of indigenous people from their place of origin. When plants are used to produce fuel, the use of biofuels can contribute to higher food prices. The use of nuclear power will lead to risks to health.

The main point is that policy mitigation (and adjustment) may raise ethical concerns. How could one deal with this? One suggestion is that the same principles and values that are used to assess impacts on the environment should be used. So, if you think, for example, that climate change is partly unfair because it undermines the issue. It would then appear to conclude from the discovery of individual human rights that the mitigation (and accommodation) strategies that respect these individual human rights should be enforced.

7.2 International Law About Climate Justice

International treaties, principles and customs are of little use to promote local and subsidiary environmental rights. A formal agreement on environmental protection has not yet been reached. Also, multilateral and bilateral environmental treaties tend to be of little use to individuals.

Although in many states domestic laws and regulations that protect the environment and preserve resources are well advanced, these laws are seldom aimed at fostering environmental rights or social rights relevant to the climate. Furthermore, even though international human rights regimes frequently follow the notion of individuals as a basic right for a sustainable world, they are still out of reach for people to achieve constitutional recognition of the rights of the setting. These developments reflect the wider and increasingly growing global environmental constitutionalism that looks at the constitutional incorporation of environmental rights , obligations, procedures , policies and other provisions relating to environmental protection.

Also, about 100 nations considered it necessary for their constitution to include an express environmental right. The constitutionalism of the environment may lead to new causes or expand established environmental rights in new ways. This may also encourage procedural protections, redress as well as judicial participation, as human and environmental rights.

The ethical effect of environmental constitutionalism is often correlated with lower emissions of greenhouse gases. Yet environmental constitutionalism is still young and inconsistent in fundamental timescales. So far, it has been short of dealing with 'overwhelming global environmental issues,' for example climate justice.

8. Role of Judiciary in Securing Climate Justice

In some nations, the courts are trained precisely to maximise power over the government by broadening the universe of prospective claimants.

Courts in India, Pakistan , Bangladesh and Nepal have recognised the openness of public interest to environmental harms.

Where protecting against soil or water contamination requires closing a manufacturing plant or increasing regulation of a whole sector, ecologists may reward the results, but the poor people may become less sanguinary when they lose employment and benefits associated with private investment by the government.

Moreover, judicial discretion diminishes over time, as legal principles become settled and case law gives substance to those amorphous terms. When courts implement environmental rights, in particular, they tend to import many of the principles and values of environmental law that has become widely accepted throughout the world in similar cases, such as the precautionary principle, the principle that the polluter should pay for the damage, principles of sustainable development and intergenerational equity, and sometimes procedural principles that are unique to environmental litigation including the reversal of the burden of proof and the acceptance of probabilistic evidence. The incremental growth of a body of law through case-by-case application can ensure that the law develops progressively and relatively smoothly over time and this, in turn, increases its acceptance in the local society. That some constitutional provisions remain underutilized or judicially dormant is perhaps less consequential than it might seem at first blush.

Even where courts have not found a constitutional environmental violation, the mere fact that such arguments are being made and considered augments the attention that environmental constitutionalism receives in public discourse and this, in itself, can contribute to the success of environmental outcomes in meaningful ways.

Given the complexity of the issues involved—the necessary involvement of all branches of government as well as a multiplicity of private and public actors in all

facets of public life—the judicial role will be necessary, though not sufficient, to implement the progress and protections promised by environmental constitutionalism. some constitutions connect environmental to other constitutionally protected human rights, such as rights to dignity, health, life, or shelter.

Once absorbed into constitutional texts, courts can impel action by enforcing these provisions even though progressive realization. However, courts are increasingly incorporating a right to protection against climate change even in the absence of a direct constitutional mandate.

9. Judicial Precedents from Some South Asian Countries

In particular, courts in India, Pakistan, Bangladesh and Nepal each have read fundamental rights to life in accordance with guiding principles aimed at fostering a practical environmental law policy. India was especially active among these countries.

9.1 Stand Taken by Indian Judiciary

In 1984, the Supreme Court of India was among the first to rule that right to a healthy environment was enshrined in a right to life.

9.1.1 Subhash Kumar v. State of Bihar

The complainants brought proceedings in the *Subhash Kumar* v. *State of Bihar*,[23] against the discharge of tanneries in the River Ganges. It was held that the discharge of pollutants was enough to render the Bokaro river unsuitable for consumption or irrigation in the state of Bihar unfit for the protection of constitutional 'right to life.' The Court, however, dismissed the request and held that the petitioner's self-interest was motivated and thus was not eligible to file a complaint in the name of the public interest.

9.1.2 M.C. Mehta v. Union of India

In this case,[24] the tanneries were ordered to be shut down until the effluent was already pre-treated and acknowledged the right to life, health and ecology and more tangible benefits of work and benefits, as accepted by the relevant environment body.

23 Subhash Kumar v. State of Bihar, 1991 AIR 420, 1991 SCR (1) 5.
24 M.C. Mehta v. Union of India, 1987 SCR (1) 819.

9.1.3 Charan Lal Sahu v. Union of India

A question was raised by the case *Charan Lal Sahu* v. *Union of India*[25] in the Bhopal Gas Disaster Act, regarding the Federal government's response to the Bhopal tragedy, in which over 3,000 people died due to exposure to methyl isocyanate. The petitioners belonging to some groups affected by the accident, objected on behalf of all those affected, the majority of whom were poor and illiterate, to the federal administration's exclusive recognition of claims *as parens patriae*.[26] The Apex Court of India construed the right to live inherent in Article 21 of the Constitution to include the right to a safe environment in accordance with the law.

9.1.4 In Re: Delhi Transportation Department

The Suo Motu procedure *In Re: Delhi Transportation Department*,[27] where the Supreme Court dealt with air pollution of New Delhi, creates a case of recent implementation of the principles of precautions. The Supreme Court held that state governments should take responsibility for the precautionary principle, which form part of a 'sustainable development' definition. The state government has a constitutional duty, according to the Supreme Court, to regulate emissions and, if possible, predict and reduce pollution sources. In another recently filed case , the High Court reaffirmed the customary stance of the precautionary principle and added that both the Constitution and the various environmental laws are firmly founded on this principle.[28]

9.2 Stand taken by Judiciary in Pakistan

In respect to environmental protection, Pakistani courts have clarified the right to life and the right to dignity.

9.2.1 Ashgar Leghari v. The Federation of Pakistan

In this case, the work of the Commission on Climate Change, which was established according to a ruling in 2015, was assessed.[29] under the continuing

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25 Charan Lal Sahu v. Union of India, 1990 AIR 1480.

26 *parens patriae (2020). Available at: https://www.law.cornell.edu/wex/parens_patriae (Accessed: 10 July 2020).*

27 *Nongkynrih, B., Gupta, S. and Rizwan, S. (2013) "Air pollution in Delhi: Its Magnitude and Effects onHealth",Indian Journal of Community Medicine, 38(1), p. 4. doi: 10.4103/0970-0218.106617.*

28 Chapter 7; Legal Regulation of Global Warming in India; https://shodhganga.inflibnet.ac.in/bitstream/10603/37821/16/16%20chapter%207.pdf.

29 Ashgar Leghari v. The Federation of Pakistan (2015) W.P. No. 25501/201.

mandamus jurisdiction of the High Court of Lahore. In the 2015 ruling, the court requested that the state implement mitigation and adaptation plan on climate change to achieve the constitutional right to life and dignity. In its 2018 judgment, the Court reviewed and re-examined the risks to climate change in Pakistan, taking into account their effects on water supplies, forestry and agriculture, among others, found that Commission had achieved 66 per cent of the goal as a guiding force in raising public consciousness of the impact of climate change and its significance.

9.2.2 In Re: Human Rights case (Baluchistan Environmental Pollution)

The Pakistan Supreme Court held that environmental protections are part of the fundamental right to life of that country. In this case,[30] the Court took in view a newspaper article and declared that "financial tycoons were attempting to buy and dump nuclear and extremely hazardous waste in coastal Baluchistan." The Court ordered the agency responsible for the implementation of environmental laws in the area to track and prohibit land transfers in the affected region, not recognizing the extent of the constitutional rights involved.

9.2.3 Western Pakistan, Salt Miners v. Industries and the Production of Minerals, Punjab

In this case,[31] the Court upheld the arguments that the right to life included the provision to have water free from mining contamination. The Court further ruled that the right to have unpolluted water belongs to everyone wherever they reside.

9.2.4 Ms Shehla Zia and Anr. v. WAPDA

In this case,[32] the Court held that the right to constitutional existence constitutes an act for electromagnetic hazards related to building a power plant.

The Lahore Higher Court acknowledged in 2015, and then again in 2018, the indivisibility of fundamental rights, such as the right to living (article 9), which comprises the right to a safe environment and the rights to human dignity (Article 14), as set out in the constitutional principles of democracy. In our fundamental rights system, the climate and its security have played a central role.[33]

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30 In Re: Human Rights case (Baluchistan Environmental Pollution) PLD 1994 SC 102.

31 Western Pakistan, Salt Miners v. Industries and the Production of Minerals, Punjab WP 35/1992.

32 Ms Shehla Zia and Anr. v. WAPDA PLD 1994 SC 693.

33 *May, J. and Daly, E. (2019) Human Dignity and Environmental Outcomes in Pakistan, Papers.ssrn.com. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=350-4768 (Accessed: 01 July 2020).*

9.3 Role played by Judiciary in Philippines

9.3.1 Manila Bay Case

In the *Manila Bay Case*,[34] a complete 12-point injunctive order was issued by the Philippines High Court, which discussed the results to be obtained but also the process to be followed to ensure its fulfilment. The court ordered mandated meetings coordinated by government agencies, studies to assess the adequacy of wastewater facilities, the detection of environmental violations and legislation, and the enforcement of licensing requirements.

9.3.2 Minors Oposa v. Factoran

In *Minors Oposa* v. *Factoran*,[35] the Philippine Supreme Court acknowledged that the constitutional mandate of 'a balanced and healthy ecology' is not easily limited. The right to a safe and sustainable environment is granted to citizens by the constitution. The rules also clearly describe the types of proof which in environmental causes may be admissible.

9.3.3 Metropolitan Manila Development Authority v. Concerned citizens of Manila Bay

In this case,[36] an appeal by the same counsel as in Minors Oposa for multi-faceted injunctive relief was upheld by the same court to avoid and cleanse Manila Bay and to protect it for the good of future generations in terms of major pollution discharges.

A collection of 'Rules of Procedure for Environmental Cases' has been created by the Supreme Court in the Philippines that promote exceptional demands on constitutional and other environmental rights.[37] Among these provisions are permissions on citizens' suits where 'any Philippine citizen may bring in suits on behalf of others including the young or the unborn';[38] permissions for issuance of an Environmental Protection Temporary Order[39]; conditions on the courts to

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34 Manila Bay Case G.R. Nos. 171947-48.
35 Minors Oposa v. Factoran 224 SCRA 792.
36 Metropolitan Manila Development Authority v. Concerned citizens of Manila Bay G.R. Nos. 171947-48.
37 Supra at 29.
38 Rules of Procedure for Environmental Cases (Rule 2, s. 5).
39 Rules of Procedure for Environmental Cases (Rule 2, s. 8).

"prioritize and take decisions on environmental cases;" and immunity from Strategic Lawsuits Against Public Participation to circumvent environmental rights (Rule 6). Such a text can be used for 'persons whose constitutional right to a safe and fair environmental environment is being violated or endangered by a public official or private body' with an 'implication of environmental harms of the magnitude that is prejudicial to the existence of cases brought on behalf of existence, known as' the Kalikasan Writ. [40]

9.4 Role played by Judiciary in Bangladesh

9.4.1 Dr Mohiudedin Farooque v. Bangladesh

In Bangladesh too, the Supreme Court in the case of *Dr Mohiudedin Farooque* v. *Bangladesh*,[41] found that, despite its terminology, the court rejected the acts due to lack of status, the citizens deserve a right to a better atmosphere which is derived from a constitutional guarantee to a right to life. The plaintiff argued that a comprehensive proposal for flood control would threaten the life, property, and environmental protection of the communities in question in addition to violate the fundamental right to life. The court further emphasised,

"Articles 31 and 32 of our constitution protects the right to life as a fundamental law."

The Constitution guarantees that environmental rights are included in the 'right to life'.[42] It includes the safety and sustainability of the environment, ecological equilibrium free from air and water pollution, and sanitation, without which it is difficult to enjoy life. An act or failure to do so would violate the right to life.

9.4.2 Bangladeshi Environmental Lawyers Association (BELA) Case

Bangladesh's Supreme Court expressed its gratitude to the environmental NGO, the Bangladeshi Environmental Lawyers Association (BELA), for clarifying problems, in particular to bringing a constitutional argument against a failure of the government.[43]

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40 Hilario G. Davide Jr, The Environment as Life Sources and the Writ of Kalikasan in the Philippines, Vol. 29, Issue 2, *Pace Environmental Law Review* p. 66-98.

41 Dr Mohiudedin Farooque v. Bangladesh 22 BLD (HDC) (2002) 534.

42 *Ibid*.

43 *BELA as a Symbol of Courage for Promoting Environmental Justice in Ne'er-do-well Bangladesh (2019). Available at: https://www.iucn.org/news/world-commission-environmental-law/201909/bela-a-symbol-courage-promoting-environmental-justice-neer-do-well-bangladesh (Accessed: 01 July 2020).*

9.5 Role of Judiciary in Nepal

9.5.1 Godavri Marble case

A ruling of Supreme Court of Nepal explicitly states how environmental rights issues emerge from a recognized fundamental right to existence. *'Since a clean, healthy environment is an essential component of human existence, the right to a clean, healthy environment is indisputably part of the Right to Life*.'[44]

9.5.2 Naraharian Yuga Nath and others v. Honourable Prime Minister Girija Prasad Koirala and others

The Court issued a warrant to stop giving a rental to set up a college of medical sciences on an ecological or archaeological site.[45] The Court ruled that this lease breached the fundamental 'right to life'. It claimed in its ruling that it required an atmosphere free of pollution: *the environment is an essential component of human life.*'

9.6 Position in Constitutions of Some South Asian Countries

Many Asian Constitutions thereby express environmental values, for example, the Bangladesh Constitution states that the State shall seek to conserve, improve the environment and protect the current and future citizens' national resources, biodiversity, wetlands, forests and wildlife.[46] The Bhutan Constitution states that the Royal Government shall ensure sustainable development with an ecological balance whilst promoting justifiable economic and social development.[47]

Under the Philippine Constitution, "*The state shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens*."[48]

All of these judicial pronouncements emphasize on the fact that climate justice is equivalent to socio, political and economic justice and rather it is a panacea for achieving the latter.

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44 Godavri Marble Case WP 35/1992.
45 Naraharian Yuga Nath and others v. Honourable Prime Minister Girija Prasad Koirala and Others 33NLR 1955.
46 Article 18A, Constitution of the People's Republic of Bangladesh, 1972.
47 Article 5, Constitution of Kingdom of Bhutan, 2005.
48 Article XII, Constitution of Republic of Philippines, 1987.

10. Litigate to Mitigate Campaign

Litigate to mitigate campaign is a campaign to reach a larger number of people and spread awareness. The campaign does not take place by way of protests but by awareness campaigns. The campaign was started by former Nasa Scientist James Hansen, who was alarmed by the disastrous effects of climate change. Former NASA scientist James Hansen has gone to the extent of stating that the '*Litigate to Mitigate*' campaign is the need of the hour in conjunction with political/governmental determination.[49] It mainly involves those people who have the resources to go to the courts and secure the rights of those who are unable to do it for themselves. *Litigate to Mitigate* appears to be a panacea to this predicament of climate justice.

11. Conclusion

The adverse effects of climate change on agriculture , aquaculture, livelihoods, health and a wide range of human rights in a significant section of the global population are already or are in some way being affected. The industrial revolution which started in the 19th century has increasingly affected the activities driven by humans which drives global warming. It is a transition in weather variables' statistical properties when taken into account over time.

The impacts of these changes are already being felt by millions in the world's most marginalised communities. Climate change affects communities everywhere. The impoverished people of developing nations will likely be hit the hardest. This is because such nations, by entering into agreements, with the developed nations to secure a place in the developed first-world countries. The South Asian countries of India, Maldives, Sri Lanka, Bangladesh, Bhutan, Nepal and Pakistan are mainly the worst-hit affected due to such treaties and agreements made in the wake of the development and hoping for the transition from third-world countries to first-world countries.[50]

It is more likely that the disadvantaged and the prosperous are affected. The least accountable of greenhouse gas emissions are often the ones who are most impacted

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[49] *Watts, J. (2017) 'We should be on the offensive' – James Hansen calls for wave of climate lawsuits, the Guardian. Available at: https://www.theguardian.com/environment/2017/nov/17/we-should-be-on-the- offensive-james-hansen-calls-for-wave-of-climate-lawsuits (Accessed: 10 July 2020).*

[50] Nicholas, P. K. and Breakey, S. (2017), Climate Change, Climate Justice, and Environmental Health: Implications for the Nursing Profession. Journal of Nursing Scholarship, 49: 606-616.

by impaired health, financial and social and cultural disturbances.[51] They have a lesser impact on environmental degradation and are the most affected by it.

Thus, climate change must be addressed not only as an environmental concern but also as a climate justice and human rights problem based on the effect on people, particularly the most vulnerable. This is a critical issue of local and international human rights and environmental justice. It is also known as the biggest obstacle for humanity. It is a question of economic and political supremacy in social and environmental justice.

Although climate change is faced globally, the social , economic and environment impacts of developing countries would have to bear the brunt of their consequences. Developing countries, particularly because less financial, social and technical resources are required to adapt, are vulnerable to the impacts of climate change. Improvements to policy and governance may be part of the solution or barriers to progress in climate change management, below hazardous global temperature changes, and foster resilience. This situation needs to be resolved quickly if a tragedy is to be avoided.[52]

We must resolve the deep-rooted ties that connect it to the myriad crises that we face to tackle the climate crisis. These problems are united with their common origins in an economic environment that allows businesses to disregard ethical and moral considerations in their pursuit of higher gains and play with the earth and our collective future. Although the situation is contextually relevant, the effects of environmental problems are important and affect virtually all facets of life.[53] Climate change will create environment refugees; reckless use of natural resources is capable of destroying entire cultures; and, as the 1990s water war in Bolivia shows that failures to balance the environment and human needs could also put the rule of law and the democracy at a risk.

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51 Greenhouse gas emissions by China in the Year 2017-27.51%; Greenhouse gas emissions by USA in the Year 2017-14.75%; Greenhouse gas emissions by India in the Year-2017-6.43% ; Greenhouse gas emissions by Afghanistan in the Year-2017-0.10%; Greenhouse gas emissions by Pakistan in the Year-2017-0.72%; Greenhouse gas emissions by Bangladesh in the Year-2017-0.36% ; Green house gas emissions by Sri Lanka in the Year-2017-0.08%; Greenhouse gas emissions by Nepal in the Year-2017-0.08% ; Greenhouse gas emissions by Japan in the Year-2017-2.99%; Greenhouse gas emissions by Philippines in the Year-2017-0.38% ; Greenhouse gas emissions by Maldives in the Year-2017-0.001%. *Source:* "Climate Analysis Indicators Tool (CAIT) Version 2.0. (Washington, DC: World Resources Institute, 2014)". World Resources Institute . Retrieved: September 11, 2019.

52 Climate Change, 2014, Synthesis Report Summary for Policymakers; International Institutions and Global Governance Program.

53 James R. May and Erin Daly; Global Environmental Constitutionalism; p. 9-16 Cambridge University Press.

In the face of climate change, climate justice is the protection of human rights. This is a mechanism to tackle the climate problem as a human rights problem and to keep businesses and governments responsible through the Court of Justice. The impunity, profit-oriented and the connexion between their duty in protecting human rights and climate change, cannot be ignored by fossil-fuel companies. *It is not only necessary but also important to find new ways of life through Climate Justice.* [54]

[54] *Sparrow, M. et al. (2018) What does climate change have to do with human rights?- Greenpeace International, Greenpeace International. Available at: https://www.greenpeace.org/international/story/19885/what-does-climate-change-have-to-do-with-human-rights/ (Accessed: 20 September 2020).*