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EDITORIAL

Ever since the dawn of civilization, human beings have been constantly grappling with various challenges in their quest to seek the truth that governs the way our globe, nation, society and other organizations coordinate and work. As time passed by, these challenges started getting intricate and the need to address them augmented. This brought to the fore a need to foster legal scholarship which not only apprise the putative audience of such concerns but also posit a way-forward by undertaking a thorough research. To that end, the prime objective of this Journal is to inspire publication from different streams of research that aids to enrich further the discourse in Legal Jurisprudence. With this novel objective in mind, RGNUL Law Review (RLR) Journal has embarked on a journey that critically reflects upon such issues which are not just coeval but are exponentially gaining traction.

In light of the above, various manuscripts under RLR Volume XI, January-June 2021, Number 1 have been painstakingly scrutinized and edited through its Editorial Team and is published by the Eastern Book Company (EBC). This endeavour resonates a continual collaboration between Rajiv Gandhi National University of Law and EBC to publish a quality paper in the RLR Journal. It is no gainsaying that, the present issue is culmination of various manuscripts dealing with range of issues such as state responsibilities under International Law with reference to Covid-19 pandemic, Domestic Violence, Corporate Governance Principles, Evils of femininity test in sports, judicialization of Transplantation of Human Organ Act, review of Human Rights in varying circumstances, devising regulatory framework for online pharmacy and consumer protection, witch hunting and allied brutalities committed against women in India, and the concept of fraternity as espoused by Dr. B.R. Ambedkar in Constitution of India.

To build more upon the above-said proposition, in the opening submission titled "Enforcing Strict Liability Under the Principle of State Responsibility: An Argument for Fixing Responsibility of Covid-19" author seemingly discusses the principle of State responsibility under International Law and contends that its normative underpinnings lie in state sovereignty and equality of states. In this regard, the current paper intends to further the responsibility of the states in the wake of breach of international obligation to be undertaken during the time of Covid-19 pandemic.

In the second paper titled "Eliminating Domestic Violence: The Prevailing Efforts and the Future Vision, the author evokes an important concern, i.e., has India made any efforts in its mode towards the target of eliminating violence against women within the broader Sustainable Development Goals of gender equality. The author discusses the implications of addressing domestic violence, and the normalization of domestic violence and then points out India's efforts at eliminating Domestic Violence from the context of SDGs, specifically gender equality and quality education as means to address those concerns. To conclude, the author also evaluates the school's educational curriculum and attaches great importance to the potential for change in the syllabus so that children could be sensitized about this social issue.

In the paper titled "Implementation of Corporate Governance Principles by the Companies Act, 2013" author at the onset introduces the principle of corporate governance and then goes on to discuss varied facets of corporate governance frameworks as established under Companies Act, 2013. This includes transparency, fairness, accountability, disclosure, and checks and balances. The author hypothesizes that corrupt practices in companies shall continue unabated. The Act shall provide for the collective duty of management, board of directors, audit committee, internal auditor, and statutory auditors in order to promote corporate governance in the country. Conducting that in order to effectively combat corruption, laws must be enforced at all levels of government.

The next paper titled "Femininity Test in Sports: Are Players Actually Getting Levelled Field to Play?" starts with an anecdote involving forceful sex verification test of Dutee Chand, a sprinter of international repute and Indian champion and imposition of ban on upon her. Apart from highlighting a gloomy picture, the authors acquaint the readers with legalities of Gender Verification Test, questions veracity of Femininity Test, equate such test with notion of "Fair Play", casts doubts on sports administration violating human right of female athletes and criticizes the misogynist approach undertaken through these Tests, and finally goes on to suggest that a holistic approach in societal interpretations of 'sex' is the need of the hour.

The paper titled "Judicial Approach Towards the Transplantation of Human Organs Act in India" deliberates critically upon the legal regime established to approve the removal and transplantation of human organs under this Act and the 2011 Amendments made under this Act. The focal point of the research is to identify the role of judiciary in the implementation of the Transplantation of Human Organs Act, 1994 and this analysis reviews the judgments against the primary objectives of the law to ascertain whether they will have a positive impact on orders

passed by the Authorisation Committee constituted under section 9 of the Act to grant approval or refusal for removal of human organs.

"Dialogic Review of Health Rights in Normal Times and Crisis" is another fascinating submission in which the author appraises the deliberative model, focusing more on the value of the process of deliberation in courts and participation of the (concerned) public for the kind of deliberative democracy understood beyond majoritarian politics, in better appreciating human rights under varying circumstances.

To cater the legal interest and protection of online consumer purchasing pharmaceutical products, the next paper titled "Online Pharmacy and Consumer Protection: An Attempt to Balance the Legal Regulatory Framework" by first accentuating on current business model and the market practices through which Online Pharmacy is conducted and then putting forth the legal challenges. The authors undoubtedly vouches for online pharmacy for its inclusivity, broad access and various other benefits but cautions that without regulatory bodies, legislation and extant guidelines, it would not be possible to prevent consumers from suffering serious harm due to the consumption of fake medicines purchased online.

The evils of witch-hunting have haunted India and more specifically one half its humanity, i.e., women and authors in their seminal work titled "The Witches, Witch-Hunting and Witch-Craft: The Lesser Perceptible Zone of Women's Brutalities in India" narrates those horrific instances where such social-evil still prevails. For attaining legal understanding of such terms, the authors delve deeper into the etymology of the term 'witchcraft' and also analyse its historical evolution. While ending on the good note, they suggest various measure which will be helpful in addressing these issues and opine that introspection at the social level is much necessitated, only then we could dream of a society where these practices could be eroded.

In the final paper, titled "Analysing the Idea of Fraternity Introduced by Dr. B.R. Ambedkar Under the Constitution of India" authors articulate the historical relevance of the concepts such as idea of equality, liberty, and fraternity. They then go on to decipher it's meaning and institutionalization of fraternity under the dynamics of the Constitution. They also lay down the challenges to the idea of fraternity in India and finally conclude that all the three organs of the government must be made duty bound and responsible for promoting and flourishing the idea of fraternity and the brotherhood.

The Editorial team is immensely thankful to all the contributors for their patience and extremely insightful contributions. We also sincerely hope that the collection of articles encompassing various contemporary issues are beneficial and perceptible to the readers.

Dr. Kamaljit Kaur

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ENFORCING STRICT LIABILITY UNDER THE PRINCIPLE OF STATE RESPONSIBILITY: AN ARGUMENT FOR FIXING RESPONSIBILITY OF COVID-19

Jasmeet Gulati[*]

1. INTRODUCTION

The principle of State responsibility under international law has been recognized by the community of states. The basis of state responsibility lies in the twin principles of state sovereignty and equality of states. International law respects sovereign equality of states, according to which no state can bring any harm or injury to any other state, else it will have to compensate for the harm done and be responsible for its conduct with such other state/s. With regard to the law relating to state responsibility specifically for internationally wrongful acts, it is well established under the Articles, known as "Articles on Responsibility of States for Internationally Wrongful Acts" which were adopted by the International Law Commission (ILC) and later submitted to the General Assembly in 2001. According to these Articles, a state is responsible for every internationally wrongful act which is attributable to the state. Further, State responsibility is invoked when there is a breach of international obligation. The international obligation is the one by which a state is indebted to another state or the community of states either under treaty provisions including the provisions of United Nations charter or under customary international law. Every breach of international obligation would amount to an internationally wrongful act. It would also include any breach of '*jus cogens*' norms.

2. LAW ON RESPONSIBILITY OF STATE

The law on responsibility of a state is recognized by the courts and tribunals, as can be analyzed from the decisions in various cases. In the important case of '*Rainbow Warrior Arbitration' (1990)*[1] between France and New Zealand, the Arbitral Tribunal observed that the law relating to treaties for bringing about international responsibility of state was "relevant, but the legal consequences of a breach of treaty, including the determination of circumstances that may exclude wrongfulness and the appropriate remedies for breach, are subjects that are

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1 82 ILR, p. 551.

covered under the customary law of state responsibility".[2] Therefore, principle of state responsibility is an integral part of treaty-based law as also customary law.

It is important to highlight that to invoke state responsibility, the wrongful act or omission must be proved beyond reasonable doubt for imputing responsibility on a state.[3] This was stated by the '*Eritrea- Ethiopia Claims Commission'* that the evidence must be clear and convincing to support the findings for making a state responsible under international law. This ruling lays down the standard to fix responsibility of a state.

There are three essentials for implicating responsibility onto a state: *first*, existence of an international legal obligation- which means that there must be an obligation of a state established under international law; *second*, an unlawful act or omission on the part of a state violating the international legal obligation; and *third*, is the loss or damage resulting from such an act or omission, which means that the loss or damage must be directly attributable to the act or omission by a state violating that obligation under international law. The invoking of state responsibility is followed by certain consequences. Whenever a legal obligation is violated by a state through its unlawful act or omission resulting in damage, that damage must be compensated. This has been reiterated by the world court. In the "*Chorzow Factory (Indemnity)'*"[4] case, the PCIJ observed that, "it is a principle of international law … that any breach of engagement involves an obligation to make reparation". Apart from the above observations by the court, the International Law Commission's (ILC) Articles on State Responsibility also elaborate the requirements for attributing international responsibility to a state. According to Article 3 of the ILC Articles on State Responsibility 2001, "it is international law that determines what constitutes an internationally wrongful act, irrespective of any provisions of municipal law". Thus, to attract responsibility of a state under the international law, wrongful act or omission that is attributable to a state must breach an international legal obligation of a state. Such an obligation may arise under a treaty/ international convention or customary international law.

3. INTERNATIONAL LIABILITY VIS-A-VIS PRINCIPLE OF STATE RESPONSIBILITY

The terms "responsibility and liability" are distinct. In international law, liability arises if state responsibility is established, that is liability arises as one of the consequences of State responsibility. The responsibility of state is based on the breach of international obligation, that is wrongfulness, even though there may be no harm or injury to a state. But international liability is based on

[2] Malcolm N. Shaw *International Law,* 6th Edn., Cambridge University Press, 2008, p. 779.

[3] Genocide Convention (*Bosnia* v. *Serbia*) case, ICJ Reports, 2007, para 204 in Malcolm N. Shaw *International Law* 6th Edn. Cambridge University Press, 2008, p. 779.

[4] PCIJ, Series A, No. 17, 1928, p. 29.

appreciable harm or injurious consequence arising out of the act or omission by the state. A state is held internationally liable if it fails to abate the harm. Therefore, liability arises to repair the material damage. "The liability of a state does not come from the fault or the wrongfulness of the act but by the injurious consequences suffered".[5] The liability arises when the harm is caused *whereas* in case of state responsibility, there is an absence of injury requirement. In other words, a state may be held liable for injury caused to another state even though it might have been caused in the exercise of its legitimate vested right e.g. peaceful nuclear explosion, the effects of which may travel to the environment of neighbouring state making it unfit for human habitation. Thus, liability is based on responsibility for harm alone and is subjected to very limited exceptions.

The international liability of a state is further developing into strict liability through various regional conventions. Strict liability arises even when there is no-fault (also called no-fault liability) of the state. Under various municipal jurisdictions like in India, the principle of strict liability has further evolved into principle of absolute liability under which there are no exceptions.

The liability of a state is set on various theories: first is the no-fault liability (risk theory) and second is the liability for fault (fault theory) which is grounded on negligence of a duty to take care. The first theory (i.e. risk theory) fixes liability on a state for unlawful act or omission. This is a principle of strict liability i.e. even if there is no-fault but the wrongfulness exists. The second theory which is based on fault of the state, brings in the responsibility of the state when the act or omission on the part of the state manifests negligent behaviour. The negligent behaviour arises out of duty to act in a particular way and when the duty is ignored, it gives rise to liability based on fault of the state. Thus, liability under fault theory is based on negligence (culpa). Another liability that arises as part of fault theory is based on *intention* that may be attributed to the officials concerned. The act or omission is attributable to a state when it is conducted by the organs of the state, and it may also be attributed to a state, in certain cases, when they are conducted by non-state actors. The famous case of Trail Smelter arbitration manifestly demonstrates as to how non state actors, in this case a mining company on one side (and farmers community on the other side which suffered damages), was responsible for transnational dispute eventually being litigated between two federal governments. The ILC Articles on State Responsibility are clear so far as the liability of a state is concerned, for its conduct which is based on the fault theory.

According to the chapter V of the "Articles on State Responsibility",[6] state responsibility is excluded under certain circumstances. The exceptions include- "valid consent by a state, acts amounting to self-defence, counter-measures in respect of internationally wrongful act, *force majeure* which results in an

[5] Sompong Sucharitkul, "State Responsibility and International Liability under International Law" 18 Loyola of Los Angeles International & Comparative Law Journal 821 (1996).

[6] Arts. 20–27, under Ch. V of the Articles on State Responsibility.

unforeseen event that is beyond the control of the State and thus making it materially impossible in the circumstances to perform the obligation, distress, necessity and compliance with peremptory norms". The principle of state responsibility can be invoked by the injured state individually or by a group of states when the obligation is towards the entire international community. According to Article 46 of the ILC Articles, "where many states are injured by the same unlawful act of a state, each state may separately invoke the responsibility". Article 48 further entails that, "a state not being an injured state may also invoke responsibility of another state if the obligation is owed to a group of states and it is for the protection of a collective interest of the group, or if the obligation breached is owed to the international community as a whole". Responsibility of a state may not be invoked, "if the injured state has validly waived the claim or is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim",[7] which are the exceptions as highlighted above.

4. PRINCIPLE OF STRICT AND ABSOLUTE LIABILITY UNDER DOMESTIC LAW

There are many municipal systems that recognize in their domestic jurisdiction, a principle of liability which is a no-fault liability under the law of torts commonly called the rule/ principle of strict liability. The principle of strict liability is well established under the national jurisdictions and it holds a party responsible for their acts without having to prove negligence or fault. For instance, if a party is involved in ultra-hazardous activities, it can be held liable when someone gets injured or harmed because of the same. The ultra-hazardous activities form a separate category in which a higher form of the principle of strict liability operates i.e. absolute liability. The definition of what would constitute ultra-hazardous activity is unclear, but the classification can be taken to revolve around some serious consequences that are likely to come out of any damage that results, rather than upon the likelihood of pollution occurring from the activity in question.[8] It could also include using explosives, keeping wild animals or making defective products. The emphasis is upon the significant risk of severe transnational damage by that activity. The party or the defendant may be held liable if any other person gets injured because of the said ultra-hazardous activity, even if the defendant took necessary precautions and followed safety requirements, hence known as the no-fault liability. In an important case of *'Rylands* v. *Fletcher' (1868)*, the principle of strict liability was recognized in which case the defendant was held liable even though he did not know of the shaft which burst in his premises, thereby flooding the plaintiff's adjoining coal mines despite the defendant not being negligent in that case. The three essentials for the application of the rule are- "(1) Dangerous thing, (2) Escape of the dangerous thing, and (3) Non-natural use of land". The

[7] Malcolm N. Shaw *International Law* 6th Edn. Cambridge University Press, 2008, p. 799.
[8] *Id.,* at 887.

exceptions include- "the Act of God, Consent of the Plaintiff, Act of Third Party, Statutory Authority and Plaintiff's own fault".

Similar to the principle of strict liability is the rule/ principle of Absolute Liability, in which there are no exceptions as are provided under the rule of strict liability. The principle of absolute liability emerged in India in the case of *M.C. Mehta* v. *Union of India,*[9] also known as Oleum Gas Leak case. In this case a writ petition was filed by an activist lawyer, Mr. M.C. Mehta, for closure of Shriram Industries which was manufacturing hazardous substances. One of the units of this industry was in the close knit, densely populated area in Delhi. There was a leakage of oleum gas out of this industry from its unit causing one death and several other injuries. Because it was engaged in manufacturing hazardous substances, the court realized the need to recognize the rule of absolute liability. The new rule of absolute liability was similar to that of struct liability but without any exceptions. This was followed by another judgment in the case of *Union Carbide Corporation* v. *Union of India*, popularly known as the Bhopal Gas Leak case. In this case, the toxic gas- methyl isocyanate leaked from the pesticide manufacturing plant of the Union Carbide Corporation located in Bhopal, Madhya Pradesh. This leakage caused death of approximately 4000 people in Bhopal and incapacitated nearly 1.5 lakh people. The Supreme Court held that even if the corporation took all the precautions which were necessary for preventing such an outbreak, the responsibility still lies with the corporation. This decision further recognized the principle of absolute liability for all damages and casualties caused by hazardous substances/activities. The rule of absolute liability was applied in India, in the case of Uphaar cinema fire tragedy of 1997 and also Vizag gas leak in 2020. The justification for establishment of this principle of absolute liability emerged out of two points- first, the enterprise which is involved in dangerous activities has a social obligation to compensate people suffering due to their activities and second, the enterprise alone has the power and resources to invent and install safeguards against such hazards and dangers.

5. INVOKING STRICT LIABILITY UNDER INTERNATIONAL LAW

In International law, the rule of strict liability implies liability of a state even though there is no fault of a state. The rule of strict liability has certain exceptions too but they are limited as compared to those that are mentioned in the ILC Articles on State responsibility. The international law recognized this principle of state responsibility based on strict liability to some extent, in a land-mark case of *Trail Smelter*, wherein the liability of Canada was established for the harm caused by the non-state actor, into the territory of US. The principle recognized was the liability of a state for trans-border harm and polluter pays.

[9] (1987) 1 SCC 395 : AIR 1987 SC 1086.

The origin of liability can be traced to Roman Law as per the latin maxim- *"sic utere tuo ut alienum non laedas"* which means "use your property in such a way as not to harm others".[10] This reflects the principle of liability based on "restrictive enjoyment of property and regulated use of proprietary rights which is subject to the avoidance of harm to one's neighbours".[11] The principle of strict liability is recognized under various international conventions which deals with activities that are considered dangerous or new. For example, the "Convention on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other celestial bodies" have provisions dealing with state responsibility as well as strict liability. Article VI of the Convention provides that the States Parties bear "international responsibility for national activities in outer space, including the moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities". The "Convention on International Liability for Damage Caused by Space Objects" is another international convention that recognizes strict liability of a launching state. According to the provisions of this convention, "a launching State is liable to pay compensation for damage caused by its space object". The exemption from strict liability is granted if a launching State establishes that "the damage has resulted from another's gross negligence or from its intentional act or omission".

The principle of strict liability is also recognized under various regional treaties. An important convention in this regard is the "Lugano Convention on Civil Liability for Damages Resulting from the Exercise of Activities Dangerous for the Environment" of 1993. In the definition clause of the Convention, dangerous activity has been defined as:

> "…. one or more of the following activities provided that it is performed professionally, including activities conducted by public authorities:
>
> a) the production, handling, storage, use or discharge of one or more dangerous substances or any operation of a similar nature dealing with such substances;
>
> b) the production, culturing, handling, storage, use, destruction, disposal, release or any other operation dealing with one or more:
>
> i genetically modified organisms which as a result of the properties of the organism, the genetic modification and the conditions under which the operation is exercised, pose a significant risk for man, the environment or property;

[10] *Black's Law Dictionary* 1380 (6th Edn., 1990).
[11] *Supra* note 5.

ii micro-organisms which as a result of their properties and the conditions under which the operation is exercised pose a significant risk for man, the environment or property, such as those micro-organisms which are pathogenic or which produce toxins;

c) the operation of an installation or site for the incineration, treatment, handling or recycling of waste, such as those installations or sites specified in Annex II, provided that the quantities involved pose a significant risk for man, the environment or property;

d) the operation of a site for the permanent deposit of waste".

It needs to be highlighted here that activities concerning micro-organisms have also been included in the definition of dangerous activity and the convention further provides for the compensation for those who are injured by hazardous activities. The Convention further provides "responsibility on all persons, companies, State and all agencies exercising control over dangerous activities, irrespective of the place of the harm".[12] The exception to liability is limited to the damage occurring because of "armed conflict, a natural disaster, an intentional act of a third party, a State command, pollution of a level acceptable having regard to the relevant local circumstances, or if the activity was taken for the benefit of the person damaged, to the extent it was reasonable for the latter to be exposed to the risks of the dangerous activity, or if the injured party was at fault".

This Convention is important to make out a case against the People's Republic of China from where the novel Corona virus started spreading in 2019 and resulting into a pandemic that the world is facing today. The effects of novel Corona virus have not only been health related, though many people have died attributing the death directly to this new virus, but the effects have been devastating on economy and the people in poor countries who have lost their jobs and livelihood, making them poorer and leaving them to starvation and death.

6. COVID 19 - A CASE FOR INVOKING STATE RESPONSIBILITY AGAINST PEOPLE'S REPUBLIC OF CHINA

Being a regional treaty, the Lugano convention does recognize the principle of strict liability against a state in case of damage that results out of dangerous activities which also includes the danger caused by micro-organisms. Drawing from the treaties and state practise attracting rule of strict liability for the damage caused due to dangerous activities including that of micro-organisms, it becomes imperative to invoke and enforce strict liability as a consequence of state responsibility for the spread of novel Corona virus, which is for causing deaths

[12] Kiss, Alex and Shelton, Dinah L., "Strict Liability in International Environmental Law", GWU Legal Studies Research Paper No. 345; GWU Law School Public Law Research Paper No. 345.

and health concerns because of the disease on an unprecedented global scale. The corona virus, a micro-organism causes the disease (COVID-19) which is lethal. It has affected day to day lives of thousands of families apart from hitting the global economy, businesses, disruption of world trade and human movements. The states even had to shut their borders because of the pandemic. In view of the unprecedented scale of damage/injury caused to international community, it becomes important to fix the responsibility of a state from where the disease emerged and strict liability imposed under international law for this dangerous activity.

It is a known fact that the novel Corona virus had come out of China's Wuhan city[13] although its clear origin remains in the realm of probability. Though corona virus is a disease of bats and pangolins but the human transmission of this virus happened in the city of Wuhan in China which then rapidly spread world over resulting in more than 200 states being in lock-down situation. The pandemic affected not only the health, but it also hit the world economy like never before, apart from its effects on society and culture. It has further widened the inequalities in every field of life including economic, employment opportunities, in accessing education, health facilities, so on and so forth.

China steadfastly refuses any possibility of an engineered pandemic, especially through lab-based research. Although China has collaborated with World Health Organization (WHO) to investigate the reasons for origin of COVID-19, it is also a fact that such a collaboration has come only after sustained international pressure and not as a voluntary measure. Furthermore, the current Director-General of WHO himself is in chair due to China's support. There is thus a question mark on the impartiality of the investigative reports. Even assuming the best in favour of China i.e. the spread of corona virus was due to animal/ cold food chain-human interface, still on April 1st, 2020 China re-opened the markets selling bats, pangolins and other wild animals in Wuhan[14] from where the COVID-19 had erupted and subsequently killed over 5,000,000[15] people around the world and infected more than 250,000,000 as on 8th November 2021 with the numbers still increasing every day. Inspite of the consequences that the world has seen during the global lock-down and thereafter, China re-opened the wet markets in the year 2020. This amounts to gross negligence and clear abdication of duty to take care. Alternatively, if wet markets were not the reason for spread of corona virus, then the most plausible reason for spread of corona virus is lab engineered version, which finds a support from number of scientists all over the world, especially keeping in view the rapid mutations that the virus is able to manage which, as per

[13] <https://www.who.int/publications/i/item/who-convened-global-study-of-origins-of-sars-cov-2-china-part>.

[14] <https://economictimes.indiatimes.com/news/international/world-news/covid-19-effect-dips-china-reopens-markets-selling-bats-cats-and-dogs/chinas-deadly-wet-markets-are-back/slideshow/ 74925019.cms>.

[15] <https://www.worldometers.info/coronavirus/coronavirus-death-toll/.> last accessed on November 9, 2021.

the scientific experts, is unlikely in a naturally occurring virus. In either case, strict liability of People's Republic of China would arise. Wuhan lab is operated and controlled by the Chinese Academy of Sciences which in turn is an instrumentality of the PRC. Not only due to its role in the origin of COVID 19, role of China also calls for enforcement of strict liability against it for failure to disclose timely and proper information regarding the spread of corona virus as a result of which the international community was completely taken off guard.

However, despite the harm that has been caused and China's palpable role in emergence of the deadly virus (whether through state actor or non-state actor), no case for attributing strict liability has been instituted against China till date. The micro-organism spreading COVID-19 is dangerous to human life and in view of the devastation which it has already caused, same amounts to irreparable environmental harm. Even if it is not under any international convention, but as a part of customary international environment law, trans boundary harm to environment is well recognized. As the emergence of corona virus is established to be from Wuhan, it becomes imperative to hold China responsible for its acts. Once responsibility is established, China would be bound by the liability as part of consequence of state responsibility which includes "cessation of the wrongful act, assurances and guarantees of non-repetition and most importantly, reparation", at least to the poor countries. A state after having brought harm to others in the international community because of its conduct cannot be allowed to get away with its fancies after infecting the whole world.[16]

Considering the importance of recognizing the principle of transboundary harm from hazardous activities, the General Assembly adopted a resolution in 2006 on "Allocation of loss in case of transboundary harm arising out of hazardous activities" and adopted another resolution in 2007 on "Prevention of transboundary harm from hazardous activities". The International Law Commission had earlier compiled its report on allocation of loss in case of transboundary harm caused by hazardous activities. Since China is holding a permanent seat at the Security Council, it must honour the resolution passed by the General Assembly and resultantly, own the responsibility towards the harm caused by the novel COVID-19 across many states. The principle relating to reparation was laid down in *Chorzow Factory case* where the PCIJ observed that "the essential principle contained in the actual notion of an illegal act is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed". Though restitution will not be possible but compensation can help to some extent in restoring the pre-harm stage, in addition to enabling a new start. It is no secret that there has been a huge health divide between the developed and developing countries in regard to treatment of COVID-19. A large number of

[16] This obligation would be a part of *obligationes erga omnes*, an obligation which a State under international law owes to all alike.

countries continue to remain without vaccinations resulting in a large proportion of global population severely susceptible to infection from corona virus. Effective compensation from China which is a global economic giant, will result in poor countries being able to purchase vaccine for its general population which otherwise remain outside their reach due to patent laws. Though it is impossible for China to compensate the entire world for the economic losses but establishing its responsibility under international law for the wrongful act and obliging it to cease and seeking assurance for non-repetition must be held paramount.

7. CONCLUSION

The need for the international community to recognize and accept the principle of strict liability and bringing about changes in the present treaties to include a situation as that of emergence and spread of COVID-19 which the world had not anticipated, is a must now. Even if it is unacceptable as a treaty by most of the states, the principle can be established as a general principle of law recognized by civilized states, for the court to apply as the third source of international law under Article 38 of Statute of the International Court of Justice. The principle may also be established through the customary international law by invoking the "Lugano Convention on Civil Liability for Damages Resulting from the Exercise of Activities Dangerous for the Environment", 1993 to hold China responsible and this would add to state practice, thereby accepting the principle of strict liability as part of customary international law. The principle of strict liability has found expression in state practice in cases such as *Trail Smelter*, *Lake Lanoux Arbitration*, the *Corfu Channel* case and *Settlement of Gut Dam Claims* case. It is time that the international community rises together in the pursuit of not only recognizing but also enforcing the principle of strict liability whether under treaty provisions or under customary international law, against the Peoples Republic of China for its gross negligence.

ELIMINATING DOMESTIC VIOLENCE: THE PREVAILING EFFORTS AND THE FUTURE VISION

*Amita Punj**

1. INTRODUCTION

Unlike human life, which is led at the confluence of varied nodes in a seamless web, efforts at improving the same seem to be made in silos with particular law or policy initiative focusing on a particular node in the web. This may be on account of clarity secured through categorization and the ease of identification of right holders, duty bearers and the delineation of varied duties envisaged therein, thus enabling stocktaking of various initiatives. However, Sustainable Development Goals (hereinafter referred to as SDGs) despite identifying 17 distinct goals, foreground the notion that all these goals are inter-related and interdependent.[1] Apart from guaranteeing that the initiatives for achieving these goals are streamlined, it also seeks to ensure that certain sections of people and certain issues do not slip the coverage on account of being positioned at the intersection of two or more goals. Moreover, since women's rights more often than not reside at the intersection of two or more categories of rights,[2] approaching SDGs holistically as inter-related and interdependent ensures effectiveness of the efforts. The strategy seems suitable especially with regard to violence against women which is internationally recognized as a form of discrimination against women, which primarily arises out of negative socio-cultural assumptions attached to being a 'female'.[3] Therefore any effort at eliminating such violence necessitates changing these negative socio-cultural assumptions.[4] Such changes in socio-cultural assumptions require constant dialogical engagement by encouraging people to critically reflect on their own assumptions and inherited or socially prevailing

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1 "Transforming our World: The 2030 Agenda for Sustainable Development", Resolution adopted by the General Assembly on 25-9-2015, A/RES/70/1, paras 3, 5, 17 18 and 55, available at <http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E> accessed on 3-2-2022.

2 For instance, the right to dress is positioned at the intersection of right to freedom of expression and right to practice one's culture.

3 General Recommendation No. 19 to the Convention on the Elimination of All Forms of Discrimination Against Women, para 11 available at <https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf > accessed 3-2-2022. Also see Madhu Mehra and Amita Punj, "CEDAW: Restoring Rights to Women" (United Nations Development Fund for Women and Partners for Law in Development 2004, p. 28).

4 Assumptions like women are weak and are therefore not suitable for certain kinds of activities. They are caring and therefore their primary activities are care giving and home-making.

value system. Both law and education are probable sites for such an engagement. Without going into the assessment of whether and if so, how and to what extent law and education have encouraged such an engagement, this paper seeks to evaluate the efforts made by India in its move towards the target of eliminating violence against women within the broader SDG of gender equality. The focus for such assessment are the initiatives identified in the latest Voluntary National Review (hereinafter referred to as India VNR) presented by India in 2020. The paper thus seeks to review the efforts delineated in India VNR under the two SDGs i.e. SDG 5 – gender equality and SDG 4 – quality education from the standpoint of their potential in eliminating violence against women in terms of what is essential to be addressed as per international standards.

The first part of the paper dwells on the notion of violence against women, its identification as discrimination and factors that have been internationally identified as encouraging the same. Part II of the paper seeks to present the normalization of domestic violence as it prevails in India and builds a case for the need to dismantle structures that seek to normalize domestic violence and the extent to which they resonate with the internationally recognised factors that encourage it. The measures towards achieving SDG 5 as delineated in the India VNR along with the resonance, if any, of addressing socio-cultural assumptions in efforts made under SDG 4 are evaluated in part III of the paper. Part IV concludes with the identification of gaps in achieving SDG 5, especially its target which aims at eliminating violence against women[5] in general and domestic violence in particular and offers some policy guidelines.

Before embarking on this journey it is necessary to clarify certain methodological concerns that run across this paper on account of data sources that it relies on. Firstly, the paper makes do with the data from the fifth National Family Health Survey (hereinafter referred to as NFHS 5) as available up to December 2021, which is limited to 30 states/Union Territories.[6] Secondly, since the paper engages with the prevalence of attitude that normalizes domestic violence, it relies on NFHS survey that collects data specific to attitudes towards beating of wife by the husband. Thus, the data does not provide an insight into domestic violence in general but is limited to wife beating by husband. Howsoever, truncated it may be, it is the only large-scale survey conducted every five years that offers this kind of an insight. Moreover, it will not be too far-fetched to believe that the gender relations that this data captures would prevail in other domestic relations as well. Thirdly, since the paper seeks to delve into the efforts made at the national level to eliminate domestic violence as enshrined in target 5.2 of SDG 5, it identifies normalization of the same as encouraging and perpetuating domestic violence further

[5] Target 5.2 under SDG 5.

[6] The data relied on for this analysis is found in the State/UT level reports and not in the fact sheets that have been published for all the States and union territories. Therefore it does not cover all the States and union territories.

rendering it difficult to eliminate. Finally, India VNR is adopted as comprehensively delineating India's efforts towards achieving *inter alia* target 5.2. This is because it is an official document shared with the international community by India presenting "a comprehensive view of the country's efforts."[7] India VNR is therefore expected to comprehensively cover all the substantial programmes and measures that the country has adopted in its zeal to achieve the targets. It's highly unlikely for a document like this, prepared after "long drawn process, which saw coming together of all key stakeholders"[8] to neglect, forget or skip mention and elaboration of any crucial step taken in this regard.

2. VIOLENCE AGAINST WOMEN AS DISCRIMINATION: IMPLICATIONS FOR ADDRESSING DOMESTIC VIOLENCE

Law may be enshrined in texts, but the texts are never read to the exclusion of their spirit. Spirit, being inextricable from the text, forms integral part of law. Moreover, like all legal documents International Conventions are also living documents, with their understanding, interpretation and implications geared to keep pace with changing times. Aforesaid notions explain the relationship between the International Convention on the Elimination of All forms of Discrimination against Women (hereinafter referred to as CEDAW) and the issue of violence against women. As such the text of CEDAW, as adopted did not contain any provision on elimination of violence against women even if it may have been integral to its spirit. However, in 1992 the CEDAW committee through its general recommendation 19 on 'violence against women'[9] clearly identified 'gender-based violence' as a form of discrimination.[10]

Gender- based violence is defined as "violence that is directed against a woman because she is a woman or that affects women disproportionately."[11] The expression 'because she is a woman' used while defining gender based violence essentially encompasses within itself the notions emerging from the ideology of gender which determine 'what is allowed to women,' 'what is expected of them'

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7 Government of India, 'India VNR 2020 – Decade of Action, Taking SDGs from Global to Local' (NITI Aayog, 2021, p. (ii) available at <https://www.niti.gov.in/sites/default/files/2020-07/26281VNR_2020_India_Report.pdf> accessed 3-2-2022.

8 Government of India, India VNR 2020 – Decade of Action, Taking SDGs from Global to Local (p. iv NITI Aayog, 2021, p. iv) available at <https://www.niti.gov.in/sites/default/files/2020-07/26281VNR_2020_India_Report.pdf> accessed 3-2-2022.

9 The CEDAW committee seems to have used the expression 'violence against women' broadly as implying 'gender-based violence'.

10 General Recommendation No. 19 to the Convention on the Elimination of All Forms of Discrimination Against Women, para 1 available at <https://tbinternet.ohchr.org/Treaties/CEDAW/ Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf> accessed 3-2-2022.

11 General Recommendation No. 19 to the Convention on the Elimination of All Forms of Discrimination Against Women, para 6 available at <https://tbinternet.ohchr.org/Treaties/CEDAW/ Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf> accessed 3-2-2022.

and 'what is valued in them' and thus socially define 'womanhood' leading to the determination of acts that need to be reprimanded or eulogized. This understanding is further reinforced on account of the recognition by the committee that traditional attitudes that regard women as subordinate to men or having stereotyped roles "perpetuate widespread practices involving violence or coercion."[12] It goes on to acknowledge that "such prejudices and practices may justify gender-based violence as a form of protection or control of women."[13] Prevalence of gender-based violence therefore can neither be understood nor prevented or addressed if the prevailing ideology of gender that enables, encourages or normalizes the same is ignored. Multiple mentions of such traditional and cultural attitudes and practices not only find place in the general recommendation but exists in the text of the convention as well while delineating the general as well as specific obligations of States Parties.

Article 5 of CEDAW enjoins the States Parties to "eliminate prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles of men and women." Considering this within the family sphere, the CEDAW Committee further acknowledged that "within family relationships women of all ages are subjected to violence of all kinds . . . which are perpetuated by traditional attitudes"[14] and therefore obligates the States Parties to identify the nature and extent of attitudes, customs and practices that perpetuate violence against women and the kinds of violence that result there from in their reports filed under the Convention.[15] Since CEDAW aims *inter alia* at elimination of all forms of violence against women[16] it requires the states to take all legal and other measures including "preventive measures, including public information and education programmes to change attitudes concerning the roles and status of men and women."[17] International normative framework, therefore amply establishes not only that changing of attitudes is

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[12] General Recommendation No.19 to the Convention on the Elimination of All Forms of Discrimination Against Women, para 11 available at <https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf> accessed 3-2-2022.

[13] *Ibid*.

[14] General Recommendation No. 19 to the Convention on the Elimination of All Forms of Discrimination Against Women, para 23 available at <https://tbinternet.ohchr.org/Treaties/CEDAW /Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf> accessed 3-2-2022.

[15] General Recommendation No. 19 to the Convention on the Elimination of All Forms of Discrimination Against Women, para 24 available at <https://tbinternet.ohchr.org/Treaties/CEDAW /Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf > accessed 3-2-2022.

[16] General Recommendation No. 19 to the Convention on the Elimination of All Forms of Discrimination Against Women, para 4 available at <https://tbinternet.ohchr.org/Treaties/CEDAW /Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf> accessed 3-2-2022.

[17] General Recommendation No. 19 to the Convention on the Elimination of All Forms of Discrimination Against Women, para 24(t) available at <https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf> accessed 3-2-2022.

integral to the move towards achieving elimination of violence against women, but that it is a legally binding obligation.[18]

The focus of SDG 5 being gender equality, it is not surprising that target 5.2 under SDG 5 calls upon the states to "eliminate all forms of violence against women and girls in public and private spheres. . ." In tune with the internationally recognized inter-connection between socio-cultural assumptions and violence against women, target 5.4 focuses on recognition and valuing of unpaid care and domestic work through the provision of public services, infrastructure and social protection policies and the promotion of shared responsibility within the household and the family as nationally appropriate. Target 5.4 is aimed at changing attitudes towards stereotyped roles of men and women as well as revaluation of unpaid care and domestic work.

3. NORMALISATION OF DOMESTIC VIOLENCE: MAGNITUDE AND TREND

Having noticed the strong relationship between violence against women and the traditional, cultural and social norms pertaining to the inferiority and superiority and stereotyped roles of men and women, it is desirable to have an insight into the attitudes reflecting prevalence of these norms in India. As mentioned earlier, NFHS offers valuable insight into prevailing attitudes with respect to wife beating by husband. The survey collects data *inter alia* on the experience of gender-based violence perpetrated on women by known and unknown persons,[19] level to which instances of violence on women are reported[20] as well as attitudes towards spousal violence.[21] After the completion of the survey fact sheets providing data on key indicators are published followed by a detailed all India and state level reports, including tables collating the responses of the respondents. There is generally a gap in publication of fact sheets and all India level report. The survey is conducted in 2 phases covering all the states and Union Territories. The fact sheets and reports from many states pertaining to the second phase of the latest NFHS were published on November 25, 2021. In the absence of the country level report the available state level data and reports[22] are used for analysis here along with all India level report of the earlier survey (NFHS 4) of 2015-16.

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[18] India is a Party to CEDAW having Ratified the Same in 1993.

[19] See Table 104 of each state report available at <http://rchiips.org/nfhs/> accessed 3-2-2022.

[20] See Table 110 of each state report available at <http://rchiips.org/nfhs/> accessed 3-2-2022; Also see Suraj Jacob and Sreeparna, Chattopadhyay, "Speaking of Abuse: The Pyramid of Reporting Domestic Violence in India" EPW (1) 2019, p. 53.

[21] See Table 102 of each state report available at <http://rchiips.org/nfhs/> accessed 3-2-2022.

[22] These are limited to those available at the official website available at <http://rchiips.org/nfhs/> accessed 3-2-2022.

The survey is immensely insightful with respect to attitudes towards domestic violence.[23] Data is collected from both men and women regarding the grounds on which the respondent thinks wife beating is justified. The justifications for wife beating include following actions/inactions on the part of the wife –

1. going out without telling the husband
2. neglecting the house or the children
3. arguing with the husband
4. refuses to have sex with him
5. doesn't cook food properly
6. she is suspected to be unfaithful
7. shows disrespect for in-laws

These grounds themselves are based on stereotypical roles[24] attributed to women as well as the idea of inferiority especially vis-à-vis the husband. Guided by the 'ideology of gender', they are based on what women are allowed or expected to be, what they are expected to do and how they are expected to behave. The first, third and the fourth grounds of justification assume women as incapable of taking their own decisions or having a 'will' of their own. Their will and choices are subordinated to the expectations and control of the husband. The grounds second and fifth indicate attribution of certain roles specifically to women like cooking, taking care of the house and children. These are specifically quite revealing against target 5.4 of SDG 5 which emphasizes recognition and valuing of unpaid care and domestic work and promotion of shared responsibility within the household and the family. NFHS 4 report rightly recognizes that one of the indicators of women empowerment is the rejection of norms that underlie and reinforce gender inequality, one such norm being control of wife by husband, including violent control.[25]

The percentage of women and men justifying violence against wife on at least any one of the above stated grounds has declined at the national level over the years, but there exist huge variations at the state level in this regard. The percentage of women justifying violence against wife by the husband on at least any one of the above stated grounds has declined from 54.4% in 2011-12 to 52%

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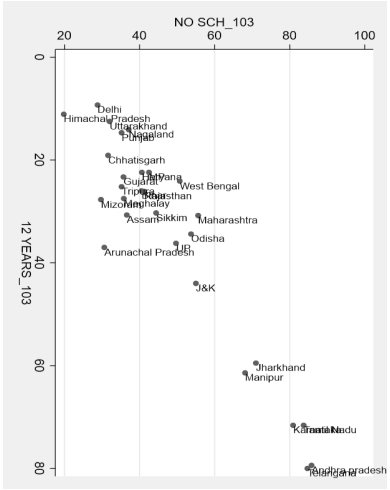
[23] The data is limited to spousal violence as revealed by the questionnaire used for data collection, available at <http://rchiips.org/nfhs/> accessed 3-2-2022.

[24] For a detailed analysis of gender stereotyping see Rebecca Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press, 2011); Eva Brems and Alexandra Timmer (ed.), *Stereotypes and Human Rights Law* (Intersentia, 2016).

[25] International Institute for Population Sciences, National Family Health Survey (NFHS – 4) 2015-2016 (p. 514 Government of India 2017) available at <http://rchiips.org/nfhs/NFHS-4Reports/India.pdf> accessed 3-2-2022.

in 2015-16 and further to 42% in 2019-20[26] and the decline among men has been witnessed from 51% to 42% to 41% over the same period. These being the average they hide the high prevalence of normalization of violence among women with over 83% in both Andhra Pradesh and Telangana in 2019-20 NFHS survey. In 2015-16 survey also these two states reported similar levels of normalization of violence against wife. Among males the prevalence of normalization was highest in Karnataka (81.9%) followed by Telangana (70.4%) in the year 2019-20. Unlike the last NFHS none of the states indicate justification of violence against wife on at least any one of the grounds in a single digit numeral.

The trend indicated in the India report of NFHS 4 that normalization of wife beating among women tends to decrease with education and wealth is also manifested by NFHS 5 data. As per NFHS 5 data normalization of wife beating among women tends to decline strongly with access to and control over money and moderately with access to and control over money in bank. This emerges from the moderately negative correlation between normalization of violence and control over money exercised by women[27] i.e. normalization moderately tends to reduce with increase in control over money exercised by women. As far as education is concerned one witnesses a decline of an average of 12.5 percentage points nationally between the degree of normalization of wife beating among women with no education as compared to those with more than 12 years of education.



Graph showing comparative variation in the attitude of normalization (among women) of wife beating by husband with education[28]

[26] The figures from 2019-20 as of now are based on the survey of 30 states/Union Territories. The figure is susceptible to certain variation once the data from all the states and Union Territories is available.

[27] Correlation coefficient being -0.34.

[28] The author is extremely grateful to Mr Satheesh Menon for preparing this graph. X axis presents percentage of normalization prevalent among women with more than 12 years of schooling and Y

The graph compares normalisation of violence prevalent among women with no schooling and normalisation nurtured by women with 12 years of schooling. The position of states indicates the difference that education seems to make in changing attitude of normalization. For instance 20% women with no schooling in Himachal Pradesh normalise wife beating but among women with 12 years of schooling the corresponding percentage is 11%. For all the states the normalization among women with 12 years of education is lower than normalization among women with no education. In majority of the states/UTs, except 7 the normalization of wife beating among women with 12 years of education is less than the national average.

The data may not be read as offering insight into the causes of domestic violence, which may be diverse leading to domestic violence prevailing among different categories of population, including households with educated and financially independent women. As the previous section demonstrated, cultural and social norms prevailing in any society may endorse beating of wife by husband, or even justify the same if the wife does not behave as is predominantly socially desired. However the data does offer policy level insight into what might be a reasonable and feasible strategy to counter and eliminate the occurrence of domestic violence.

Criminalisation[29] or even civil responses to domestic violence[30] do manifest the ethical stand taken by law in saying loud and clear that domestic violence is illegal and unacceptable[31] and that law is there to punish the perpetrator and offer support to the survivor. However the deterrent effect of such legal measures and their potential to eliminate domestic violence is limited[32] in a context where such violence is socially viewed as justified not only by the perpetrators but by the victims as well. Such a context invariably leads to lack of reporting of instances of domestic violence leaving the law incapable of addressing the same. NFHS data offers valuable insight into how violence against women in general (including but not limited to domestic violence) remains unreported. On an average, 68.2% women all over India who experienced violence, as per the NFHS 5 survey not only did not seek help[33] but also did not talk about it to anybody,[34] indicating the extent to which violence as well as silence around violence against

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axis presents the percentage of normalisation prevalent among women with no schooling. It must be noted that the Y axis starts at 20 while the X axis starts from zero.

29 Penal Code, Ss. 498-A and 304-B.

30 Protection of Women from Domestic Violence Act, 2005.

31 Generally, see Indira Jaising, "Bringing Rights Home: Review of the Campaign for a Law on Domestic Violence" EPW (44) 2009, p. 50.

32 For insights into the limitations of the existing legal framework please see Flavia Agnes, Audrey De Mello, "Protection of Women from Domestic Violence" EPW (44) 2015, p. 76; Werner Menski, "Legal Realism and the Dowry Problem" *Kali's Yug*, 2001, p. 11; Bhumika Jhamb, "The Missing Link in the Domestic Violence Act" EPW 46(33) 2011, p. 45.

33 See Table 110 of each State Report available at <http://rchiips.org/nfhs/> accessed 3-2-2022.

34 *Ibid*.

women prevails. There may be multiple factors resulting in non-reporting two of which in general could be normalization as well as the concern emerging from the misplaced idea of 'honour' being attached to the bodies of females.

NFHS data therefore provides compelling evidence of the role that efforts geared at securing financial independence and education of women can play for bringing about this attitudinal change if one seeks to completely eliminate violence against women. The potential of education in ushering attitudinal change is well established. However, the degree to which such potential may be realised is likely to be influenced by the kind of education that is imparted i.e. the strength of the curriculum to break the prevailing mindset by encouraging progressive ways of thinking. It may be on this account that different levels of schooling in different states do not manifest a consistent trend i.e. the attitude of normalization of violence against wife among women does not consistently decline with the number of years of schooling as indicated by the NFHS 5 data.[35] Moreover there is a huge variation among states and union territories with respect to the degree to which it changes with the number of years of schooling. Even with respect to 12 or more years of schooling though most of the states are seen in lower left hand side corner in the graph indicating the role of education in challenging normalization, yet some states like Andhra Pradesh, Telangana and Manipur, the impact of education seems to be negligible. The data therefore compels an exploration and comparison of school educational curriculum of different states as one entry points among many to be able to identify the variation in approaches and encourage re-imagination of educational curriculum geared towards securing gender justice.

Apart from inter-state variation, the continuation of normalization of violence against wife emerges as a major impediment to the achievement of target 5.2 under SDG 5 which aims at complete elimination of all forms of violence against women and girls in public and private spheres. Decrease of 12 percentage points with respect to attitude of normalization of violence against wife by husband with variable performance of states over a period of 15 years from 2005-2006 to 2019-2021 indicates slow pace of progress in this regard. It is therefore desirable to review the efforts made by India in its move towards SDG 5, especially from the standpoint of target 5.2 to evaluate the direction of these efforts, the thrust areas, the approach and their likely implications in terms of eliminating violence against women.

[35] NFHS 5 provides disaggregated data with respect to normalisation of violence among women with different levels of education starting from no schooling, less than 5 years of schooling, 5-7 years of schooling 8-9 years of schooling, 10-11 years of schooling, 12 years or more of schooling.

4. INDIA'S EFFORTS AT ELIMINATING DOMESTIC VIOLENCE: MEASURES UNDER SDG 5 AND 4

4.1. SDG 5: Gender Equality

Along with other targets identified under SDG 5, India is equally committed to achieving target 5.2 i.e. elimination of all forms of violence against women and girls in public and private spheres. The introductory paragraph to the portion on SDG 5 in India VNR identifies the aim as ensuring that "women and girls are not excluded from India's growth and prosperity and are able to benefit from and contribute to it." Further it also identifies meeting the "aspirations of all generations of women and girls" as a goal. Expressed in broad language, the aim seems to encompass twin aspects of human existence, 'having' and 'being'.[36] Inclusion, benefit and meeting of aspirations seek to ensure that women benefit from India's growth and for ensuring that women are able to contribute towards growth it is necessary to create enabling conditions which allow women to realise their potential. Creation of enabling conditions require that prevailing prejudices, stereotypes and notions of superiority or inferiority between sexes be dismantled.

India VNR discusses the efforts made by India in this direction under 4 broad heads viz., Social Protection and Livelihoods, Skilling and Financial Inclusion, Political and Economic Participation and Social Empowerment. Most of the programmes under the first two heads pertain to financial inclusion, access to credit, marketing and livelihood services, skill development and social assistance.[37] The political and economic participation section only offers data on political and economic participation of women rather than mentioning any initiative or programme undertaken by the state to promote the same. The section pertaining to social empowerment recognizes drop in the child sex ratio, increasing violence against women and health and nutrition of women as areas of concern. For improving health and nutrition *POSHAN Abhiyan* (National Nutrition Mission), the scheme for adolescent girls and *Pradhan Mantri Matru Vandana Yojana* (Maternity Benefit Programme) have been initiated. Low child sex ratio is sought to be addressed through *Beti Bachao Beti Padhao* (Save the girl child, Enable her Education) which aims at preventing gender biased sex selective elimination, ensuring survival, protection, education and participation of the girl child.[38] Child Protection units have been established to create awareness on pre and post-natal

[36] Nancy Fraser uses the terms to express the ideas of redistribution and identity in her work "Justice Interruptus: Critical Reflections on the 'Post-Socialist' Condition" (Routledge 2007).

[37] References are made to Mahatma Gandhi National Rural Employment Guarantee Act, 2005, Deen Dayal Antyodaya Yojana, Pradhan Mantri Jan Dhan Yojana, Pradhan Mantri Kaushal Vikas Yojana, Mudra Yojana, National Social Assistance Programme. Most of these programmes are general and applicable to everyone including women.

[38] Ministry of Women and Child Development, Beti Bachao Beti Padhao, Government of India, available at <https://wcd.nic.in/bbbp-schemes> accessed 3-2-2022.

mother and child healthcare. *ASHA Ek Umeed ki Kiran*, women empowerment centres have been established to improve the employability of women and generate awareness about various government schemes.

Broadly the initiatives seek to offer support to women in economic and health spheres. In the context of normalization of violence, we have already noticed the positive impact that control over money has in dismantling this attitude. Access to credit, insurance and skill building sought to be achieved through the programmes mentioned in India VNR does enhance the livelihood opportunities of women and dismantles the attitude of normalization of violence, however, the ecosystem in which women need to operate and perform also needs to be restructured. India VNR recognizes the need to do the same especially in the context of "structural transformation of the economy." Though India VNR does not elaborate upon specific measures being taken in this regard but one may imagine such a structural transformation as necessitating revisiting the notion of work, the prevailing dichotomy between paid and unpaid work, the ways in which different kinds of work are valued, the interface between the institution of family and market, the gendered division of labour in family and similar norms determining the jobs that are generally performed by women in the economy. The existing initiatives mentioned in India VNR whether pertaining to livelihood, financial inclusion or social empowerment merely seek to support women in performing within the existing structure rather than revisiting the economic or social structure. The identified challenges like dwindling sex ratio, increasing violence against women, low female workforce participation, unequal access to and ownership of land are not unconnected independent 'lacks' only demanding inclusion of women in the respective fields but are an effect of systemic subordination of women emerging from our deeply entrenched ways of thinking and valuation. Sustainable ways of addressing exclusion of women therefore demand challenging these ways of thinking and valuation. Changing ways of thinking requires education that challenges these ways of thinking, exposes and engages people into dialogue with respect to prevailing beliefs, possible alternatives etc. This necessitates education that strategically encourages learners to stand in a critical position to themselves and their ways of thinking rather than the one that reinforces and perpetuates prevailing gendered notions. In the context of India's move towards gender equality, the question that arises is whether any of the initiatives undertaken by the state seeks to systematically dismantle globally identified underlying factors that encourage exclusion or unequal participation of women in different fields or just seek to promote inclusion through piecemeal support without questioning the structures that manifest themselves through deeply prevailing inequality. *Beti Padhao Beti Bachao* that aims at securing education of girl child also does not entail revisiting educational curriculum but only focusses on inclusion of girls into the school education system. The task of changing traditionally prevailing attitudes is no doubt onerous and long drawn out but absolute absence of organized efforts at the same manifest the ad-hoc approach adopted by India in its move towards achieving SDG

5. Prevailing efforts are geared towards thrusting equal participation through temporary, sectoral initiatives onto a deeply unequal structural framework.

As mentioned earlier, the role of education in challenging and dismantling the unequal structural framework cannot be under-estimated. However, before finally inferring the absence of such efforts and on account of the fact that the SDGs are interrelated and indivisible, one must consider the initiatives under SDG 4 to ascertain whether any of those initiatives entail efforts at dismantling notions promoting gender inequality.

4.2. SDG 4 – Quality Education

Quality education for improving the lives of 1.3 billion Indians is viewed as the sheet anchor of India's education policy.[39] For bringing gender parity in education, scholarships are offered to girls and efforts have been made at securing gender sensitive physical infrastructure.[40] Residential schools have been set up for girls in educationally backward blocks.[41] The aim of improving learning outcomes has encouraged focus on content with emphasis on functional literacy and numeracy, critical thinking and cognitive skills.[42] Critical thinking is crucial for dismantling gendered ways of thinking. However, India VNR is silent on the degree to which this particular outcome is being systematically promoted through a dedicated programme or initiative, detailed features of the programme, its operationalization as well as any stocktaking of its impact. As against programmes like *Pradhan Mantri Jan Dhan Yojana, Pradhan Mantri Kaushal Vikas Yojana* etc. with respect to which IndiaVNR elaborates on all the aforementioned aspects complete silence on all these aspects establishes absence of linkage between education as an instrument to promote gender equality within India's vision of its journey towards securing SDG 5.

5. CONCLUSION

Domestic violence, especially spousal violence against women is demonstrably deeply entrenched in India as indicated by the NFHS surveys conducted over the years. NFHS 5 shows high degree of silence with respect to

[39] Government of India, India VNR 2020 – Decade of Action, Taking SDGs from Global to Local (NITI Aayog, 2021 p. 51) available at <https://www.niti.gov.in/sites/default/files/2020-07/26281VNR_2020_India_Report.pdf> accessed 3-2-2022.

[40] Government of India, India VNR 2020 – Decade of Action, Taking SDGs from Global to Local (NITI Aayog, 2021 p. 52) available at <https://www.niti.gov.in/sites/default/files/2020-07/26281VNR_2020_India_Report.pdf> accessed 3-2-2022.

[41] *Ibid*.

[42] Government of India, India VNR 2020 – Decade of Action, Taking SDGs from Global to Local (NITI Aayog, 2021, p. 53) available at <https://www.niti.gov.in/sites/default/files/2020-07/26281VNR_2020_India_Report.pdf> accessed 3-2-2022.

violence against women in general since, 68% out of those women who reported having been victims of violence mentioned that neither did they ask for help nor told anyone about it. 41.5% men and women in India justified beating of wife by husband on at least one of the seven grounds surveyed, with the figures being around 80% in some of the states. Penalties under criminal law together with civil remedies under the Protection of Women from Domestic Violence Act, 2005 no doubt seek to check the menace, however, with low level of legalism in India, the effectiveness of the law in completely eliminating domestic violence is severely limited, especially when people consider it justified.

Inter alia, SDG 5 targets elimination of violence against women in both public and private spheres. International norms pertaining to the same identify traditional attitudes that regard women as inferior to men and stereotyped roles as perpetuating violence against women and further being used to justify violence as a form of protection or control of women. Formidable move towards elimination of domestic violence therefore necessitates dismantling such traditional attitudes and the role of education in ensuring the same cannot be underestimated. NFHS data also indicates the variable impact of 12 years of education with respect to countering normalisation of domestic violence in different states. Therefore mere inclusion of women in the existing education system can only be the first step. The second and a more promising step requires revisiting the educational curriculum to ensure that it leads to a substantial change in ways of thinking.

A survey of programmes and initiatives undertaken by India in its move towards achieving SDG 5 as comprehensively delineated in India VNR indicates that the primary focus of the programmes have been financial inclusion, livelihood services and health and nutrition of women. *Beti Bachao Beti Padhao*, the programme to address low child sex ratio seeks to ensure survival, protection, education and participation of the girl child. Even in this programme the focus remains inclusion of girls into the school education system which is a valuable first step but also necessitates further ensuring that the education that is imparted in schools is geared towards countering attitudes that are discriminatory. Even initiatives with respect to SDG 4 do not specifically focus on securing education that fulfills aforementioned objective. The initiatives undertaken in India therefore appear to be offering piecemeal support to women for their inclusion in various arenas without questioning, revisiting and moving towards reconstitution of the prevailing gender norms from the standpoint of equality.

An evaluation of existing school educational curriculum, its potential to change attitudes and its effectiveness in doing so is necessary. Assessment of the curriculum from gender perspective has been undertaken at different scales by different entities in the past, which has rendered valuable insight into

the prevailing gendered structure of school education.[43] The National Council of Educational Research and Training undertook a revision of the National Curriculum Framework in 2004, in which 'gender' was part of the national focus group titled 'National Concerns' out of the 21 groups established in total. The position paper on gender issues in education deeply undertakes a comprehensive review of the gender concerns in educational curriculum.[44] However, as identified in the 2009 study by Nirantar, "the 'National Concerns' category has been the most vague and undefined in the concrete domain of effecting a change at the level of the teacher and the curriculum."[45] It was also recognized that the report of the gender focus group did not feed into various subject areas that constitute the educational curriculum. Therefore, as identified, the task at hand is to seriously operationalize the concretization of gender just curriculum. However, presence of multiple school education boards at the national and state level adds further complexity to the efforts and demands that curriculum analysis and revision be undertaken at both the levels as a mission. Moreover to ensure a further move towards realisation of SDG 5 gender sensitization of teachers is necessary so that gender just curriculum does not lose its spirit in delivery and monitoring of these efforts for assessing their outcomes as well as to introduce mid-term corrections if required are likely to contribute immensely.

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[43] The more recent and comprehensive among them has been a four volume publication titled "Textbook Regimes: A Feminist Critique of Nation and Identity" (Nirantar 2009). This text critiques the gender sensitisation approach suggested to teachers by NCERT in "Status of Women though Curriculum for Elementary and Secondary and Senior Secondary School Stages" published in 1982 and 1984.

[44] National Council of Educational Research & Training, National Curriculum Frameworks and XXI National Focus Group Position Papers, available at <https://ncert.nic.in/focus-group.php?ln=#> accessed in 3-2-2022.

[45] Dipta Bhog et al., "Textbook Regimes: A Feminist Critique of Nation and Identity – An Overall Analysis" (Nirantar 2009, p. 14).

IMPLEMENTATION OF CORPORATE GOVERNANCE PRINCIPLES BY THE COMPANIES ACT, 2013

*Ravidasan NS**

1. INTRODUCTION

Although corporate governance frameworks vary from country to country, they are generally quite dynamic. Due to different business scams, countries throughout the world have been affected. There are innocent victims of corporate fraud, which rips out entire families' life savings and produces enormous losses for investors, all of which have a cascading effect on the economy. An effective corporate governance system has become an essential part of business practise across the world. 90 percent of the nations surveyed by the OECD have corporate governance concepts in their legislation.[1] The Indian Company Law was also revised in 2013 to bring it into accordance with global standards for good corporate governance. Transparency, fairness, accountability, disclosure, and checks and balances are all addressed under the Companies Act, 2013, according to the author of this article.

2. TRANSPARENCY

2.1. E-Governance

E-governance allows the organisation to communicate information with all of its stakeholders in an efficient and transparent manner. With the aid of technology, the costs of disseminating information are decreased, allowing for a more efficient flow of information to all stakeholders. The Companies Act of 2013 mandated the use of electronic governance, and as a result:

(i) Accounts may be stored in an electronic format.[2]

(ii) Financial statements are distributed online.[3]

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1 Corporate Governance Factbook 2021, OECD at p. 33 available at <https://www.oecd.org/corporate/Corporate-Governance-Factbook.pdf> visited on 20-7-2021 at 10.29 a.m.

2 R. 3(1) of the Companies (Accounts) Rules, 2014.

3 R. 11 of the Companies (Accounts) Rules, 2014.

(iii) Company annual reports are made available on the company's web site every year.[4]

(iv) Notice of meetings may be sent by electronic mode.[5]

(v) At the meeting, electronic voting was allowed.[6]

(vi) Video conferencing or other audio-visual tools that record and store the sessions are acceptable methods of participation for directors.[7]

(vii) Dividends may be paid in a variety of ways, including electronically.[8]

Although E-governance methods are being implemented in India, there are challenges. The introduction of e-governance in India has a number of difficulties, including language barriers, public ignorance, and concerns about the protection of citizens' personal data.[9]

2.2. Independent Directors

As trustees for the company's shareholders, independent directors keep tabs on the Board of Directors' activities. Independent directors have a responsibility to scrutinise management's actions and ask probing questions about their motives. Stakeholder interests must be protected, which necessitates a transparent selection procedure for independent directors. The Companies Act provides for the fair selection of independent directors through the following sections:

(i) The Companies Act outlines the requirements for independent directors. Individuals who serve as independent directors of corporations are expected to have a high degree of moral integrity as well as appropriate professional and academic credentials. Managing Director, nominated director, or full-time director are all roles that independent directors will be unable to occupy. Individuals who are related to a director or promoter of the firm cannot be independent directors. There should be no financial connections between independent directors and the corporation. There must be no financial or management connections between the firm and the independent directors' relatives.[10]

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4 S. 136 of the Companies Act, 2013.

5 S. 101 of the Companies Act, 2013.

6 S. 108 of the Companies Act, 2013.

7 S. 173(2) of the Companies Act, 2013.

8 S. 123(5) of the Companies Act, 2013.

9 Dr. Pardeep Mittal and Amandeep Kaur, "E-Governance-A Challenge for India", International Journal of Advanced Research in Computer Engineering & Technology (IJARCET), Vol. 2, Issue 3, March 2013, ISSN: 2278–1323 available at <http://egovstandards.gov.in/sites/default/files/IJARCET-VOL-2-ISSUE-3-1196-1199_1.pdf> (last visited on 6-10-2021 at 12.36 p.m.).

10 S. 149(6) of the Companies Act, 2013.

(ii) For up to five consecutive years, independent directors can serve and can be re-elected for another term of up to five years, respectively. After two consecutive terms as an independent director, a three-year cooling-off period is granted for re-appointment.[11]

(iii) Independent directors were given a code to follow.[12]

(iv) The corporation can nominate an independent director from a list or database kept by the Ministry of Corporate Affairs.[13]

Risk management and financial controls must be thoroughly examined by independent directors to ensure that the firm has a solid system in place. In order to protect the interests of all stakeholders, including minority shareholders, independent directors are essential. They are tasked for reconciling the competing interests of all parties involved. When the interests of the firm as a whole are in jeopardy, the independent directors must mediate and arbitrate the problem. Independent directors are obliged to report any immoral conduct, whether it is genuine or suspected, or any breach of an ethical policy or code of conduct that they learn about.

The substantial fees given to independent directors' function as a barrier to their individual liberty. A restriction on director fees has been established by SEBI (the Securities and Exchange Board of India) through the payment of commissions. Ex-bureaucrats are appointed as independent directors by the corporations. Improved network and less bureaucracy in the anticipation of stable corporate employment after retirement benefit the companies in this approach.[14] The profit-based commission is left in place by the Companies Act. The payment of profit-related commissions to independent directors may create a conflict of interest because commissions are tied to the success of the firm. This might encourage a focus on the short term and impair the ability of employees to make independent judgments on the company's success. Independent directors' compensation should be determined by their ideals, time commitment, and performance, not by the company's profits.[15] A golden handcuff is the payment of high convenience commissions, and it may obstruct or undermine the real purpose of independent directors.[16]

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[11] Ss. 149(10) and (11) of the Companies Act, 2013.

[12] Schedule IV of the Companies Act, 2013.

[13] S. 150(1) of the Companies Act, 2013.

[14] Sourav Datta, "Bad Corporate Governance: Are Independent Directors Truly Independent?", *Swarajya* (19-8-2021), <https://swarajyamag.com/business/bad-corporate-governance-are-independent-directors-truly-independent>.

[15] Sanya Chandela, "Strengthening the Statutory Regime for Independent Directors", Taxguru (20-6-2021), <https://taxguru.in/company-law/strenghthening-statutory-regime-independent-directors. html>.

[16] Palak Shah, "India Inc Pampering Independent Directors with Fat Pay-Cheques", *Business Line* (17-8-2021), <https://www.thehindubusinessline.com/markets/stock-markets/india-inc-pampering-independent-directors-with-fat-pay-cheques/article35945739.ece>.

Independent directors' independence has been questioned in recent years. Three judges from India's Supreme Court, chaired by Hon'ble Chief Justice of India, resolved a corporate issue involving the fallout between Tata and Cyrus Mistry in March 2021. The Tata-Mistry-Wadia saga exemplifies the legal limitations connected with independent directors. Directors that aren't independent can be ousted by the majority owner of the firm. Company law allows for the appointment of a neutral director, but no safeguards are in place to assure or protect that director's independence once they have been appointed. The removal of the independent director is not subject to a distinct regulatory system that ensures visibility and safeguards their impartiality after their appointment.[17]

3. FAIRNESS

The audit report provides creditors and investors with an accurate and fair perspective of the company's financial reporting, which is essential for making educated decisions. All information regarding the audited firm, good or bad, must be reported by the auditors. The involvement of the Audit Committee at the Annual General Meeting (AGM) and the rotation of auditors guarantee transparency in the auditor selection process.

Because of the significance of the position, the Audit Committee appoints the auditors. The Audit Committee recommends the auditor to the board of directors[18] and their appointment is made at the AGM. The board of directors' report must explain why the Audit Committee's suggestion was turned down.[19]

The Companies Act mandates the rotation of auditors for publicly traded companies after five years for individuals and 10 years for firms, regardless of the auditor's tenure. Re-appointment of auditors is subject to a five-year cooling-off period.[20]

In order to ensure independence and accountability of the auditors, provision of the following non-auditing services[21] by auditors are prohibited:

(a) accounting and bookkeeping services;

(b) internal audit;

(c) implementation of any financial information system;

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17 Trisha Shreyashi, "Is an Independent Director Indeed Independent?", *Deccan Herald* (31-5-2021), <https://www.deccanherald.com/opinion/is-an-independent-director-indeed-independent-991857.html>.

18 S. 177(4) of the Companies Act, 2013.

19 S. 177(8) of the Companies Act, 2013.

20 S. 139(2) of the Companies Act, 2013.

21 S. 144 of the Companies Act, 2013.

(d) actuarial services;

(e) investment advisory services;

(f) investment banking services;

(g) rendering of outsourced financial services;

(h) management services; and

(i) any other kind of services.

Auditor misconduct is punishable by heavy fines, which in turn encourages more transparency in the accounting process.

4. ACCOUNTABILITY

The board of directors has a fiduciary duty to the company's stockholders and investors. Management is accountable to the board of directors just like workers are accountable to their managers.

4.1. Accountability of Management

'"Offences by corporations' are frequently included in the legislation covering numerous offences in India. Legislative mandates state this:

(i) at the time of the offence, every person in charge of and accountable for the conduct of the company shall be judged guilty and be susceptible to penalty. Liability can be limited if the offender can show that he or she was unaware of the crime being committed against them or that he or she took reasonable steps to avoid the crime being committed against them.

(ii) an officer or director of the firm could face criminal prosecution if it is demonstrated that they had awareness, consent, or connivance in the offence being committed by the firm.[22]

If a director or officer is in control of or liable for the company's operations, they bear vicarious liability. It's not necessary for the directors to actually do any misconduct in order for them to be held liable under this vicarious

[22] Debanshu Mukherjee and Astha Pandey, The Liability Regime for Non-Executive and Independent Directors in India: A Case for Reform, Vidhi Centre for Legal Policy, available at <https://vidhi-legalpolicy.in/wp-content/uploads/2019/09/Final-Director-Liability-Report-September-19-2019.pdf> visited on 30-3-2021 at 21.03 at p. 21.

responsibility. Directors are held liable for any misconduct that occurs as a result of their consent, connivance, or negligence.[23]

Companies Act legal causation falls on the 'officer who is in default.' One of the following categories describes officers who have fallen behind in their responsibilities:

(i) Whole time director and members of management

(ii) When a person in charge of keeping, filing, or disseminating records and he authorises, permit, or actively engage in a default;

(iii) An advisor to the board except one who provides professional advice;

(iv) It also means that any board member who participated in board meetings without raising an issue about the company's transgression or when the breach occurred with his consent or connivance is guilty of that crime;

(v) a party involved in the transfer of the company's stock.[24]

The Supreme Court in *Sunil Bharti Mittal* v. *CBI*[25] asserted that individuals can be held accountable for a company's misconduct, provided the individual's active engagement and criminal intent are shown, and the law itself explicitly specifies the legal obligation of directors and other executives.

4.2. Accountability of Audit Committee

The Audit Committee is a key component of a company's corporate governance structure.[26] The Audit Committee is the foundation of every company's successful corporate governance.[27] Corporate governance has always included audit committees as an important component. Raising the bar for corporate governance is one of the many responsibilities of the Audit Committee. The efficacy of the Audit Committee is highly reliant on its membership. The Audit

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[23] Debanshu Mukherjee and Astha Pandey, The Liability Regime for Non-Executive and Independent Directors in India: A Case for Reform, Vidhi Centre for Legal Policy, available at <https://vidhi-legalpolicy.in/wp-content/uploads/2019/09/Final-Director-Liability-Report-September-19-2019.pdf> visited on 30-3-21 at 21.03 at p. 21.

[24] S. 2(60) of the Companies Act, 2013.

[25] (2015) 4 SCC 609 : AIR 2015 SC 923.

[26] The Institute of Company Secretaries of India, Board Committees - A Hand Book, available at <https://www.icsi.edu/media/webmodules/companiesact2013/BOARD%20COMMIT TEES.pdf> visited on 19-3-21 at p. 8.

[27] Nicholas J. Price, Role of the Audit Committee in Corporate Governance, February 5th, 2019, available at <https://insights.diligent.com/audit-committee/role-of-the-audit-committee-in-corporate-governance> visited on 19-3-2021at 12.06 p.m.

Committee's composition and qualifications are outlined in both the statutes and the criteria for listing on the Stock Exchange.

A company's commitment to corporate governance is demonstrated by the independence and expertise of its Audit Committee members. Companies are more responsible when they have an audit committee. Financial reporting's credibility is rebuilt as a consequence of this. An Audit Committee's efficiency is only as good as its members. Unless they have the requisite experience, expertise, talent, and understanding to dispute management's judgements and actions regarding the financial reporting process, they cannot contribute to improving corporate governance.

Following are the four ways in which the Audit Committee assists the Board of Directors:

4.2.1. Review

(i) Assess the auditor's independence, performance, and general efficacy.[28]

(ii) Ensure that internal audits are adequate.[29]

(iii) Review the statutory auditor's internal control weakness letter as a matter of routine.[30]

(iv) Review the internal audit's report on weak internal control.[31]

(v) Ensure that the Chief Internal Auditor's appointment, dismissal, and salary are reviewed on a regular basis.[32]

(vi) Before submitting them to the board of directors, go over the financial statements.[33]

(vii) Evaluate the internal financial control.[34] Internal financial control refers to the company's policies and procedures for preventing and detecting fraud and errors, as well as the timely preparation of financial information and the quality and completeness of accounting records.[35]

(viii) Look more closely at the specifics related to

[28] S. 177(4)(*ii*) of the Companies Act, 2013.
[29] Cl. 49(II)(D)(7) of the Listing Agreement.
[30] Cl. 49(II)(E)(3) of the Listing Agreement.
[31] Cl. 49(II)(E)(4) of the Listing Agreement.
[32] Cl. 49(II)(E)(5) of the Listing Agreement.
[33] S. 177(5) of the Companies Act, 2013.
[34] S. 177(4)(*vii*) of the Companies Act, 2013.
[35] S. 134(5) of the Companies Act, 2013.

(a) a list of things the director is responsible for.[36]

(b) changes in the accounting regulations and procedures.[37]

(c) discrepancies in the financial accounts were prompted by an audit discovery.[38]

(d) complying with the listing requirements and any other relevant laws.[39]

(e) qualifications in the draft audit report.[40]

(f) Review the findings of internal investigations.[41]

(g) Evaluate the operating of the whistleblower framework.[42]

4.2.2. Approval

(i) Approval of deals involving related parties [43]

(ii) Statutory auditors' fees must be set. [44]

4.2.3. Recommendation

(i) recommend the statutory auditor be elected or re-appointed; remove or replace him/her; or recommend someone else.[45]

4.2.4. Other Functions

(i) Carry out the audit committee's responsibilities as stated in its charter.[46]

(ii) Approach any employee for assistance.[47]

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[36] Cl. 49(II)(D)(4)(a) of the Listing Agreement.
[37] Cl. 49(II)(D)(4)(b) of the Listing Agreement.
[38] Cl. 49(II)(D)(4)(d) of the Listing Agreement.
[39] Cl. 49(II)(D)(4)(e) of the Listing Agreement.
[40] Cl. 49(II)(D)(4)(g) of the Listing Agreement.
[41] Cl. 49(II)(D)(9) of the Listing Agreement.
[42] Cl. 49(II)(D)(12) of the Listing Agreement.
[43] S. 177(4)(*iv*) of the Companies Act, 2013.
[44] Cl. 49(II)(D)(3) of the Listing Agreement.
[45] Cl. 49(II)(D)(2) of the Listing Agreement.
[46] Cl. 49(II)(D)(13) of the Listing Agreement.
[47] Cl. 49(II)(C)(2) of the Listing Agreement.

(iii) Obtain outside legal or professional analysis.[48]

(iv) Analysis of loans and investments made between companies.[49]

(v) Valuation of assets and undertakings of the company.[50]

(vi) Consult the statutory and internal auditors on any concerns.[51]

(vii) Answer the queries of shareholders at the annual general meeting.[52]

4.3. Accountability of Internal Auditor

An essential component of overall company governance is that auditing reduces agency costs while also improving financial reporting. Internal auditing is a significant tool for achieving a company's goals.

In corporate governance, the board of directors, the management, the external audit, and the internal audit all play a significant role. Internal audit acts as a resource for all the components referred above.[53] Internal audit plays a vital role in governance of an organisation. A company's governance, risk management, and internal control procedures are evaluated and reported on to assist with compliance, financial stability, and operational efficiency.[54] Internal auditors must perform their duties independently and efficiently if the firm needs to enhance its corporate governance.

An organisation institutes systematic internal control measure to:

(i) deter and detect fraud, error, and theft

(ii) safeguard its properties and resources

(iii) observe companies polices

(iv) ensure correct and complete accounting data

(v) conduct trade in a disciplined and effective manner.[55]

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48 Cl. 49(II)(C)(3) of the Listing Agreement.

49 S. 177(4)(*v*) of the Companies Act, 2013.

50 S. 177(4)(*vii*) of the Companies Act, 2013.

51 S. 177(5) of the Companies Act, 2013.

52 Cl. 49(II)(A)(*iv*) of the Listing Agreement.

53 Dessalegn Getie Mihret and Mengistu Amare Admassu, "Reliance of External Auditors on Internal Audit Work: A Corporate Governance Perspective" International Business Research, 2011 4(2), April, 67-74 at p. 67.

54 The Institute of Internal Auditors, IIA Position Paper, Internal Auditing's Role in Corporate Governance, available at <https://na.theiia.org/about-ia/PublicDocuments/Internal-Auditings-Role-in-Corporate-Governance.pdf> visited on 24-4-21at 22.58.

55 S. 134(5) of the Companies Act, 2013.

Risk management and internal control system implementation are evaluated for their effectiveness through use of internal audit. It gives a critical evaluation of the organization's operations and process efficiency.[56]

Internal audit is specifically mentioned in the Companies Act of 2013.[57] Internal audit's scope, function, technique, and frequency are established by the audit committee or board of directors working with the auditor.[58]

The limitation of internal control over financial reporting is:

(i) Possibility of collusion

(ii) Overriding of control by ineffective management

(iii) Material error or fraud in a financial statement goes unchecked.[59]

4.4. Accountability of Statutory Auditor

The Audit Committee has no authority to impose restrictions on the work of the Statutory Auditor. The Companies Act, 2013, and other relevant laws require that a statutory audit be performed.

An organization's financial statements are audited by statutory auditors to assure compliance with applicable laws and ethical standards. The financial accounts of the organisation should be accurately, fairly, and reliably reported in the auditor's report.

In the company's annual general meeting, shareholders appoint a statutory auditor.[60] Every auditor of the company shall have the following powers:

(i) Account books or other necessary vouchers are always accessible.

(ii) The right to demand information and explanations from the company's officers.

(iii) Inquire about the company's loans and advances.

(iv) Verify that the financial records and the balance sheet are correct and not misleading.

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[56] Ankitha V.A., "Internal Audit as per Companies Act, 2013", *Taxguru* (April 21, 2020), <https://taxguru.in/company-law/internal-audit-companies-act-2013.html>.

[57] S. 138 of the Companies Act, 2013.

[58] R. 13(2) of the Companies (Accounts) Rules, 2014.

[59] Ankitha V.A., "Internal Audit as per Companies Act, 2013", *Taxguru*, (April 21, 2020), <https://taxguru.in/company-law/internal-audit-companies-act-2013.html>.

[60] S. 139(1) of the Companies Act, 2013.

(v) Access to integrated financial statements: right of access to all subsidiaries' records.[61]

Auditors are tasked with determining if the accounts they have examined accurately depict a company's financial situation, including its net income or loss, as well as its cash flow for the year.[62]

The company's statutory auditor will not provide any kind of internal audit service to the holding company or any of its subsidiaries.[63]

There would be a penalty in the range of twenty-five thousand rupees to five lakh rupees if a corporate auditor violates any legislative provision relating to the appointment, rotation, responsibilities and powers, signature of an audit report, or forbidden service. If an auditor violates the law with the aim to mislead shareholders, the company, tax authorities, or creditors, he will be sentenced to jail for up to one year and a fine of not less than one lakh rupees but up to twenty-five lakh rupees if he is found guilty.[64] Auditor may be forced to return remuneration and pay damages to firm, statutory authorities, or anyone else impacted by fraud if convicted of wilful deceit.[65]

The auditor has a fiduciary duty to the shareholders of the firm, thus they must perform their investigations and provide reports with the highest care and regard. In the case of *Tri-Sure India Ltd.* v. *A.F. Ferguson*[66], the Court imparted a very cautious approach to auditor's liability. The court outlined the primary goals of auditing as well as the responsibilities and roles of the auditor. The audit will evaluate if the financial statement accurately reflects the company's real financial status. Management is responsible for putting together financial accounts, while the auditor provides an opinion. Management is not exempted from its own duties and responsibilities just because the auditor is doing his or her job.

4.5. Accountability of Board of Directors

The Board of Directors oversees, controls, and directs the company's operations. Directors of a company include its board of directors and trustees. Directors are responsible for the company's conduct and can be held liable if they mismanage cash or break the company's policies. They shall act in good faith for all stakeholders, promote the company's goals, and safeguard the environment. While executing their duties, directors are expected to apply independent

[61] S. 143(1) of the Companies Act, 2013.
[62] S. 143(2) of the Companies Act, 2013.
[63] S. 144 of the Companies Act, 2013.
[64] S. 147(2) of the Companies Act, 2013.
[65] S. 147(3) of the Companies Act, 2013.
[66] 1985 SCC OnLine Bom 342 : (1987) 61 Comp Cas 548.

judgement, due diligence, and skill.[67] Directors shall not do or attempt to do any act to gain undue advantage for himself, relatives, partners or associates[68] and shall avoid a situation which would involve direct or indirect conflict with the interest of the company.[69] It is illegal for a director to delegate his position to another person.[70] A director must be a resident of India in order to assure the board's availability and responsibility.[71]

If it's in the public's best interest, officials at the federal level can remove a company's directors.[72] Nominee directors can be chosen even if there is no provision in the company's articles of association.[73]

Directors are subject to legal responsibility for any violations of their fiduciary obligations, which can result in a fine of up to five lakh rupees for each violation.[74]

4.5.1. Accountability of Independent Directors

Non-executive directors, such as independent directors, are those that have no financial or material ties to the corporation apart from their fees as board members. Independent directors are appointed by the board of directors of a corporation and given the responsibility of overseeing and advising the board of directors on risk management. Many of the firm's committees rely on them to keep an eye on things like corporate credibility and accountability, as well as image and goodwill. They also assist to make sure the organisation goes smoothly. Independent directors serve as an intermediary between shareholders and management, encouraging good corporate governance by promoting transparency and responsibility in the workplace.[75] An independent director serves as a mentor, coach, and advisor to the company.[76]

Organizational value is passed through management, members of the board and audit committee members as well as internal and statutory auditors. Everyone has a responsibility to assist regulators and other authorities in

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67 S. 166(3) of the Companies Act, 2013.

68 S. 166(5) of the Companies Act, 2013.

69 S. 166(4) of the Companies Act, 2013.

70 S. 166(6) of the Companies Act, 2013.

71 S. 149(3) of the Companies Act, 2013.

72 S. 242(2)(*h*) of the Companies Act, 2013.

73 Kamal Garg, "Directors Appointed by Central Government – What is their Status", *Taxguru* (5-2-2020), <https://taxguru.in/company-law/directors-appointed-central-government-status.html>.

74 S. 166(7) of the Companies Act, 2013.

75 Bharti Gupta, "Understanding Responsibilities and Importance of Independent Director in a Company", *Taxguru* (4-3-2020), <https://taxguru.in/company-law/understanding-responsibilities-importance-independent-director-company.html>.

76 Mehak Bisht, "Independent Director under Companies Act 2013 and Rules", *Taxguru* (12-4-2020), <https://taxguru.in/company-law/independent-director-companies-act-2013-rules.html>.

identifying the root causes of corruption. Neither the Companies Act nor the rules directly mention the identification and prevention of fraud, the accountability of perpetrators, etc. in the whole value chain of financial reporting.[77]

5. DISCLOSURE AND PREVENTION OF CONFLICT OF INTEREST

The disclosure of information by company is by way of

1. Annual report
2. Annual General Meeting
3. Website

Directors are required by the Companies Act to disclose any potential conflicts that might well have. It is essential for each board member to disclose his or her personal stake in the firm at the board's first meeting.[78] The details of the contract or prospective contract will be made public:

(i) with a firm in which the director in question controls 2% of the stock either alone or jointly with another director.

(ii) with a corporation in which the director is a founder or CEO

(iii) director is a partner, member, or owner of the company/organization.

The director who has an interest in the board meeting should not participate in such meeting.[79] The 'interest' shall not conflict with the responsibilities as a director. In addition to financial interests, those arising from fiduciary obligations or closeness of relationship must also be declared as conflicts of interest.[80] A transaction-specific disclosure is the subject of the company's disclosure.[81] If a director has any concerns or interests after the contract is awarded, he or she must notify the board of directors immediately. The contract shall be voidable, if the disclosure of the agreement or arrangement is not made out or a director interested in the subject involved in a board meeting.[82] Fail to abide with the direc-

[77] Dr Ashok Haldia, "Preventing Corporate Frauds: Focus on Accountability of Entire Value Chain, not the Auditor Alone", *The Economic Times* (29-7-2021), <https://economictimes.indiatimes.com/news/company/corporate-trends/preventing-corporate-frauds-focus-on-accountability-of-entire-value-chain-not-the-auditor-alone/articleshow/84849104.cms?from=mdr>.

[78] S. 184(1) of the Companies Act, 2013.

[79] S. 184(2) of the Companies Act, 2013.

[80] *Mukkattukara Catholic Co. Ltd.* v. *H.V. Thomas*, 1995 SCC OnLine Ker 163 : AIR 1997 Ker 51

[81] Gaurav N. Pingle, Checklist for Disclosure of Interest by Directors, SCC Online blog, available at <https://www.scconline.com/blog/post/2019/05/01/checklist-for-disclosure-of-interest-by-directors/> visited on 25-3-2021 at 22.10.

[82] S. 184(3) of the Companies Act, 2013.

tor's disclosure of interests would result in a fine as well as imprisonment.[83] Any contract or agreement in breach of section 184 of the Companies Act, 2013 will be void if a director fails to disclose his involvement in it.[84] If all of the company's directors resign due to ineligibility, the Central Government or the promoter will appoint the required number of directors until the company's general body appoints directors.[85]

Every corporation must keep separate records for any relevant contracts, agreements, or transactions involving the company and its subsidiaries.[86] The board member must also refrain from having involved in anything that could harm the company's interests.[87] As part of its financial disclosure, a company must provide details of the remuneration paid to each director, which is subject to shareholder approval.

5.1. Disclosure in Directors Report

The Board of Directors' report will be appended to the firm's annual financial report. The directors' report should provide an overview of the company's financial situation, as well as its operations and scope of work. The Board of Directors' report should include any fraud reports received from auditors.[88]

The director's responsibility statement[89] shall state that:

(i) In the production of annual accounts, accounting principles are followed.

(ii) Accounting policies are used to provide a fair and accurate view of the company's finances.

(iii) Proper and sufficient care was taken for

  (a) the maintenance of accounting records and assets of the company

  (b) prevention and detection of fraud and other irregularities

(iv) Prepared on a going concern basis, annual financial statements

(v) Set up the company's internal financial controls.

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83 S. 184(4) of the Companies Act , 2013.
84 S. 167(1)(*c*) of the Companies Act, 2013.
85 S. 167(3) of the Companies Act, 2013.
86 S. 189 of the Companies Act, 2013.
87 S. 166(4) of the Companies Act, 2013.
88 S. 134(3)(*ca*) of the Companies Act, 2013.
89 S. 134(3)(C) of the Companies Act, 2013.

(vi) Adequate systems are in place to ensure that applicable laws are followed.[90]

There should be an audit report connected to the financial statement.[91]

Updated websites have been ordered by the Securities and Exchange Board of India (SEBI). On their websites, the listed firms must include the following information:

A. Financial Disclosure

(i) Copy of annual report[92]

(ii) Separate audited financial statements of each subsidiary[93]

B. .Stakeholder Relationship

(i) In case of complaints or questions, the email, and the name of the person to contact.[94]

(ii) Notice of voting through electronic means[95]

(iii) Notice of postal ballot[96]

(iv) Notice of general meeting[97]

C. Policies

(i) Details of establishment of vigil mechanism[98] and whistleblower policy[99]

(ii) Code of Conduct of Senior Management and Board of Directors[100]

D. Other

(i) Appointment terms of independent directors[101]

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90 S. 134(5) of the Companies Act, 2013.
91 S. 134(2) of the Companies Act, 2013.
92 Regn. 24 of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.
93 S. 136(1) of the Companies Act, 2013.
94 R. 26 of the Companies (Incorporation) Rules, 2014.
95 R.20 of the Companies (Management and Administration) Rules, 2014.
96 R. 22(4) of the Companies (Management and Administration) Rules, 2014.
97 R. 18(3)(ix) of the Companies (Management and Administration) Rules, 2014.
98 S. 177 of the *Companies Act*, 2013.
99 Regn. 46 of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.
100 Regn. 46 of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.
101 S. 149 read with Schedule V of the Companies Act, 2013.

(ii) The structure of the board of directors' various committees [102]

(iii) Related party transactions[103]

Section 450 of the Companies Act, 2013 penalises any business official or firm for failure to obey with any obligation of the Act.

6. CHECKS AND BALANCE

Personal and societal biases can have a negative impact on productivity and efficiency if they aren't checked and balanced. The preservation of sound judgement and action is essential. People can be trained to supervise each other thereby and provide a system of checks and balance.[104]

Management is in charge of the company's internal control system, which they design and implement in order to meet the company's goals. These rules and procedures are reviewed by internal auditors, who make recommendations to enhance them. A company's internal control procedure aims to ensure:

(i) Effectiveness and efficiency of operation

(ii) Reliability of financial reporting

(iii) Compliance with laws and regulations.[105]

Internal auditing serves as a technique for rapidly identifying and correcting errors on the inside. Errors can be reduced in the long run if they are spotted and corrected early on. There are a variety of reasons why an audit report from an internal audit might be useful to a firm's auditor. Because the internal auditor is constantly checking in on their work, employees will be more aware, vigilant, and sincere in their attempts. The perpetration of fraud through collusion will be avoided and detected since the internal auditor examines every transaction.

The independent directors will be responsible for the following responsibilities in order to prevent fraudulent practises:

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[102] Regn. 46 of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.

[103] Regn. 23 of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.

[104] Gerry Ferguson, *Global Corruption: Law, Theory and Practise, An Open Access Coursebook on Legal Regulation of Global Corruption under International Conventions and under US, UK and Canadian Law*, (2nd Edn., January 2017) at pp. 1-79.

[105] Internal Control: Definition, Types, Principles, Components, available at <https://www.iedunote.com/internal-control> visited on 3-4-2021 at 21.10.

(i) Check out if the firm has a working whistleblower mechanism and that the whistleblower's interests are not affected by the use of a vigil mechanism;[106]

(ii) Report any instances of fraud, dishonesty, or other unethical behaviour, as well as any suspected or actual violations of the company's code of ethics or ethics policy.;[107]

(iii) Protect the legitimate interests of the firm, its employees, and its shareholders by acting in accordance with his authority,[108] and

(iv) Not to disclose confidential information.[109]

A least of one-third of the directors of any publicly traded company must be independent directors, according to the Companies Act.[110] Companies' boards benefit from the neutrality offered by independent directors, who act as a balancing check and dispute the board's choices. An important function of the board of directors is to serve as a monitor over the company's management and provide strategic advice and protection for the company's minority stockholders.[111]

Independent director is a person of integrity, bring relevant expertise and experience to the board[112] and acts in an impartial manner. The independent director should have no financial connections to the firm.[113] His role in settling shareholder-company disputes is essential.

A "safe harbour" developed by the courts is known as the "best judgement rule," and it shields directors from becoming held accountable for their decisions. Directors are expected to make decisions in the interest of the company out of a sense of objectivity and impartiality.[114]

For the independent directors, the Companies Act provides a safe harbour. When an independent or non-executive director does not have an important management position, they are only accountable for the company's actions or omissions that occurred with their knowledge and approval or cooperation, or

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[106] Sch. IV(III)(10) of the Companies Act, 2013.
[107] Sch. IV(III)(11) of the Companies Act, 2013.
[108] Sch. IV(III)(12) of the Companies Act, 2013.
[109] Sch. IV(III)(13) of the Companies Act, 2013.
[110] S. 149(4) of the Companies Act, 2013.
[111] Debanshu Mukherjee and Astha Pandey, The Liability Regime for Non-Executive and Independent Directors in India: A Case for Reform, Vidhi Centre for Legal Policy, available at <https://vidhi-legalpolicy.in/wp-content/uploads/2019/09/Final-Director-Liability-Report-September-19-2019.pdf> visited on 30-3-21 at 21.03 at p. 27.
[112] S. 149(6)(*a*) of the Companies Act, 2013.
[113] S. 149(6)(*c*) of the Companies Act, 2013.
[114] Rebecca Grapsas, Claire H. Holland and Holly J. Gregory, Corporate Governance in the USA, Lexology Newsfeed, Sidley Austin LLP, (Apr. 18, 2019), https://www.lexology.com/library/detail.aspx?g=e295afc9-da23-4824-9025-9772e3438ebe.

even if they failed to exercise reasonable diligence.[115] If a listed company's actions were done or omitted while independent directors were aware of them and consented to them, or if he failed to follow SEBI LODR Regulations carefully, they could be found accountable.[116] The term 'process of board of directors' are the legal and behavioural attributes of the board like considered decision making and compliance with shareholder and corporate obligations.[117]

A number of variables in the existing legal regime contribute to and support the weakening of independent directors' independence. Implications that undermine the basis of the concept of 'independence' can be found:

(i) The company's independent directors are chosen by the board of directors, who are then authorised by the company's shareholders in a general meeting.[118] In order to reappoint an independent board member, a specific resolution must be approved at a shareholders' meeting.[119]

(ii) The independent director's right to collect compensation for attending board meetings, reimbursement of costs, and profit-related commissions requires board permission.[120] For non-executive director compensation, the board of directors must make a recommendation to shareholders at a general meeting concerning the amount of compensation.[121]

(iii) Ordinary resolutions can be used to remove an independent director from a firm once he has a reasonable opportunity to respond.[122]

The independent directors' appointments, re-appointments, and removals are influenced heavily by the company's controlling or majority shareholders. Due to the above-mentioned issues, independent directors are unable to effectively perform their tasks. An independent director's lack of time, adequate resource, industry specific knowledge and comprehension and analysis of complex information affect the effective monitoring of the boards performance. Information provided, concealed, or disclosed before the independent directors has a significant impact on the independent director's independence and advising function.[123]

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115 S. 149(12) of the Companies Act, 2013.

116 Regn. 25(5) of the SEBI [Listing Obligations and Disclosure Requirements] Regulations, 2015.

117 Raagini Ramachandran, "Reviewing the Standard of Liability of Independent Directors", The CBCL Blog, (20-9-2020), <https://cbcl.nliu.ac.in/company-law/reviewing-the-standard-of-liability-of-independent-directors/>.

118 S. 150 of the Companies Act, 2013.

119 S. 149(10) of the Companies Act, 2013.

120 S. 197(7) of the Companies Act, 2013.

121 Regn. 17(6)(*a*) of the SEBI [Listing Obligations and Disclosure Requirements] Regulations, 2015.

122 S. 169(1) of the Companies Act, 2013.

123 Debanshu Mukherjee and Astha Pandey, The Liability Regime for Non-Executive and Independent Directors in India: A Case for Reform, Vidhi Centre for Legal Policy, available at <https://vidhi-legalpolicy.in/wp-content/uploads/2019/09/Final-Director-Liability-Report-September-19-2019.pdf> visited on 30-3-2021 at 21.03 at p. 28.

7. CLASS ACTION SUITS

A class action suit can be filed by a

(a) member or

(b) depositor

if they believe the company's affairs or management are being conducted in a manner prejudicial to

(i) the company's interest or

(ii) its depositors or members.[124]

The charter documents of a corporation must be followed at all occasions. Under no circumstances shall it obstruct the disclosure of material facts to shareholders or deceive depositors.

A variety of remedies are available to members and depositors who believe they have been mistreated. The aggrieved members or depositors can seek different remedies from the National Company Law Tribunal ranging from:

(a) seeking injunctive orders restraining company from executing any act which is *ultra vires* of its charter documents,[125] applicable law[126] or actions contrary to adopted resolutions.[127]

(b) Declare resolutions as void if they are obtained through misrepresentation or misstatements.[128]

(c) Claim damages or other appropriate actions from directors, external advisors, auditors or any other person who made misleading statements, or who engaged in wrongful, unlawful, or fraudulent conduct, or suppression of material facts.[129]

(d) Seek any other remedy.[130]

[124] S. 245(1) of the Companies Act, 2013.
[125] S. 245(1)(*a*) and (*b*) of the Companies Act, 2013.
[126] S. 245(1)(*e*) of the Companies Act, 2013.
[127] S. 245(1)(*f*) of the Companies Act, 2013.
[128] S. 245(1)(*c*) of the Companies Act, 2013.
[129] S. 245(1)(*g*) of the Companies Act, 2013.
[130] S. 245(1)(*h)* of the Companies Act, 2013.

8. CONCLUSION

Corporate governance-related concerns in India are handled using a variety of legislative and regulatory mechanisms. India relies upon laws, regulations and listing rules as corporate governance legal framework and do not have national codes or principles under the "comply or explain" framework. Internal controls, the independence of directors, the audit committee, and shareholder activism have all been incorporated into Indian law. Corrupt practises inside corporations continue to occur, even when they are protected by a strict legal framework. The Companies Act shall consider prohibition profit-based commission to independent directors as it acts as golden handcuffs and undermine the independence of the independent directors. While appointing ex-bureaucrats as independent directors, a thorough conflict check must be performed. The Companies Act shall provide for the collective duty of management, board of directors, audit committee, internal auditor, and statutory auditors in order to promote corporate governance in the country. In order to effectively combat corruption, laws must be enforced at all levels of government.

FEMININITY TEST IN SPORTS: ARE PLAYERS ACTUALLY GETTING LEVELLED FIELD TO PLAY?

Aman A. Cheema[*] *& Ankur Taya*[**]

1. INTRODUCTION

"I'm not changing for anyone" said Dutee Chand, a sprinter of international repute and Indian champion, on her being banned by the International Association of Athletics Federation (IAAF) in 2014 for competing in the female category. She was told by IAAF that as per the regulations, she would have to alter her body medically. The medical alteration, in this case, meant that she has to lower down her testosterone levels so as to become eligible for competing in 'female' category. She was born in 1996 in a family which even struggled for getting a meal for a day. Saraswati, Dutee's elder sister and a competitive athlete, used to run along the banks of the Brahmini River. Dutee stepped into the world of athletics by following Saraswati's footsteps. As her elder sister knew the facets of this game, she put Dutee in a Sports Hostel in Bhubaneshwar. Within very less time, she broke 100m national record in India.[1] It was after this feat she was made to undergo sex verification test, without her consent and knowledge, which resulted in putting a ban on the sprinter. It was declared that her testosterone, androsterone, and androstenedione were all found to be in excess in her body, making her ineligible to compete in the women category. She was asked to either take hormone-suppressing drugs or to undergo a surgery which would limit the amount of testosterone her body was producing. But, Dutee Chand was not to be deterred. She chose to fight the ban and filed an appeal before the Court of Arbitration in Sports. Although Dutee qualified for Glasgow Commonwealth Games, but unfortunately she had to go to Switzerland for her case hearing at CAS (Court of Arbitration in Sports). The Athletic Federation of India dropped her from the Glasgow Commonwealth Games contingent and Asian Games citing her violation of IOC's (International Olympic Committee) policy of 'hyperandrogenism'.[2] Though her appeal to CAS was accepted and the ban was revoked, but it left undisputable scar in her life from multifarious angles. Though Dutee Chand became voice for all those female athletes who were being discriminated by the

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1 Gautam Chintamani, "The Dutee Chand Story: A true modern sporting icon and her unlikely David vs Goliath story" *The New Indian Express* July 25th, 2021 available at: pm.

2 "Hyperandrogenism", *Medical Dictionary* available at: https://www.topdoctors.co.uk/medical-dictionary/hyperandrogenism# last accessed on 11/11/2021.

international athletics governing authority but she was psychologically, sociologically and physiologically traumatised.

The IAAF came up with the gender verification test on the pretext of catching impostors mainly males who impersonate as females and try to win the competitions as the male body has an edge over female players in games that involve strength, speed and cardiovascular capacity. Though till now, we have never come across a single case where a male has impersonated as a female and played or attempted to participate in elite sports. This practice of gender testing has been going on since women started actively participating in sports during 1920s.[3] Zhang Shan of China was the first female to win mixed skeet shooting event. But, the very fact that women outperforming men always caused 'raised-eyebrows' from the crowd/spectators. Since these performances, where female out shined males, the concept of the gender verification test began and it caused a lot of furore.

2. GENDER VERIFICATION TEST: CHRONOLOGICAL SEQUENCE

Women were demotivated to join sports and they were not allowed to participate in sports even in 20th century. " Women's reproductive ability and their delicate mental states would be harmed by violent exercise, rendering them secular, mannish, and undesirable to males" according to some medical specialists.[4] Even detractors claimed that sports would "unbind women from femininity's modesty and self-control."[5] It all began with the 1936 Berlin Olympics, when Stella Walsh of Poland and Helen Stephens of the United States were labelled as "masculine" athletes due to their exceptional performance, muscular bodies, and angular faces. Helen Stephens beat Stella Walsh in 100 meters to make a record and was accused to be a man though the German officials had tested Stephen's genitals before the event. Thereafter, in 1938, Germany secretly returned the medal after the country's high jumper Dora Ratjen, who had won the gold medal at the European Athletics Championship, was alleged to have cheated since she was mistakenly identified as a man. The high jumper later claimed that she was pressurised by Nazi's to pose as a woman, forcing the sports governing bodies to find ways to give a levelling field to play to the sports persons. In 2009, a Magazine named 'Der Spiegal' examined the medical and police records of Ratjen and stated that Ratjen

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[3] Ljungqvist, Arne & Patiño *et.al.* "The History and Current Policies on Gender Testing in Elite Athletes." *International SportMed Journal* 2006 Pg-225-230. available at: https://www.researchgate.net/publication/289604595_The_history_and_current_policies_on_gender_testing_in_elite_athletes/link/5c8a43df45851564fadd204d last accessed on 24/10/2021 at 9:28 am.

[4] Ruth Padawer, "The Humiliating Practice of Sex-Testing Female Athletes" *The New York Times* June 28th, 2016 available at: https://www.nytimes.com/2016/07/03/magazine/the-humiliating-practice-of-sex-testing-female-athletes.html last accessed on 19/11/2021 at 1:45 pm.

[5] *Ibid.*

was born with ambiguous genitals but was always brought up as girl and went to girls' school too.

To catch the impostors, pressure mounted on the sports governing bodies, which led IAAF, now known as World Athletics, which is the world's track and field governing body, in July 1950, to make gender verification test compulsorily for all female athletics. All the participant countries had to conduct this test on their athletes before entering the host country and all the female athletes had to carry their 'femininity certificates' to verify their sex. It was the first of its kind.

The huge financial gain, fame and career of the elite sports has a political edge too. The countries and their citizens attach these sports with nationalism and nationalist feelings. The Olympics became another front of the cold war when from 1952 till 1966, two Soviet Union medal winners, Tamara and Irina Press went on to set 26 world records between them. The soviet female accounted for 23 of the Soviet Union's total tally of 71 medals compared to 8 of America's 76 medals in 1952 Olympics became an eye sore and it was rumoured that female athletes in the former Soviet Union were guys who tied their genitals to rake in order to win games.[6] These claims, however, were never proven.

As the stakes of nations and nationalism are so high, sports administrators have shown their distrust in individual nations' ability to certify femininity by requiring every female athlete competing in international sports to undergo an obligatory genital check. Four previous athletes who competed as women years ago but later underwent sexual reassignment surgery and became men served as further basis for these tests.[7] In 1960s, the female players had to parade 'naked' in front of some gynaecologists who were on the panel of sports authority. These tests caused a lot of humiliation to the players and were highly criticised as they were portrayed by media as 'naked parades'. It was only when these tests were faced with harsh opposition, the International Olympic Committee tried to find some new measures for these tests. This was the period when gender of some female athletes came under close scrutiny. The sex testing at the actual games began in 1966 at European Athletics Championship. Before this championship, two soviet female athletes, Tamara and Irina Press did not participate as they feared that they would get caught and they mysteriously disappeared from the international scenario. It was speculated that they were men and gender testing had refrained them from participating. The IAAF banned and stripped Ewa Klobukowska, a polish athlete of her Olympic and European track and field medallist, off her medals after a gender verification test in 1967 and labelled her as not female. The test procedure was found to be inadequate.

The same process was followed at Olympics in 1968, during the Mexico City Olympic Games, but this time the 'sex chromatin test' was introduced.

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[6] *Ibid.*

[7] Alison Carlson, "Essay: Suspect Sex", *Lancet (Med. & Sport, Special Issue)* S39 (2005).

In this test, the cells were scrapped from the inner lining of the cheek of the player (sometimes from the vaginal wall) and were tested to check whether the players are male or female. Chromosome screening was implemented with the intention of preventing unfair competition, yet it caused significant harm to women who were born with sex differences that do not provide them an unfair advantage. In other words, not all sex distinctions are physical superiorities; rather, some are entirely biological variances. Furthermore, it has never been demonstrated that individuals whose biological sex is uncertain possess qualities above those of the genetically typical female. Additionally, XX female athletes have eclipsed the records of known athletes of an unknown sex.[8] World Athletics vide this test not only banned the female players from competing but also forced them to undergo surgeries, in case they wished to play further, to become suitable for participation.

Due to massive criticism by the world community, in 2000s, all the sex verification test lost their credibility. The female players were not only debarred from creating a career in sports but also faced grave humiliation and human rights violations. In1980's Chairperson of IAAF Medical Commission initiated discussions on discrimination being accentuated against the female athletes with rare genetic disorder of sexual development. Scientifically, the chromosome pairing of XX and XY are females and males respectively. But there are some Disorders of Sex Development (DSDs) which makes the scenario somewhat different. In some cases, the male hormones do not get developed fully and vice versa. An XX chromosome mostly means that the person is female. But it is possible that she may have the external characteristics of female and also the internal testes. There are different types of abnormalities of sex development. Same is the case of sex chromosome abnormality in a male. Following this, the IAAF Council stopped conducting gender verification tests in 1991 on the grounds that women with congenital sex chromosomal anomalies do not have an unfair advantage and should be permitted to compete with other females. But the IAAF advocated the requirement of pre-participation exams for female athletes.[9] Although gender verification testing was recommended to be discontinued, it did not end. However, it was in 1996 Olympic games in Atlanta, Georgia that the last time, a mandatory gender testing of female athletes was conducted, where out of 3000 tests administered, 8 female athletes failed the test. In this test, 7 were found to have androgen insensitivity syndrome and 1 had an enzyme deficiency and yet all were allowed to compete.[10]

It was in the year 2011, the IAAF introduced new set of rules for testing. According to the new rules, a girl would be classified as a male if she had higher amounts of the androgen 'testosterone'. The IOC issued IOC Regulations on Female Hyperandrogenism in 2012. According to the report, these guidelines

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8 *Ibid*.

9 *Supra* note 3.

10 Ian O"Reilly, "Gender Testing in Sport: A case for treatment" *BBCNEWS*, Feb. 15, 2010, available at: http://news.bbc.co.uk/2/hi/in_depth/8511176.stm. Last accessed on 11/11/2021 at 4:22 pm.

would not be used to determine sex. Instead, they would investigate the conditions that might prevent the athlete from competing in the female division of the 2012 Olympic Games. If an athlete is judged unable to compete in the female category, he or she may be permitted to compete as a male or intersex athlete (if one exists) if they qualify for the sport's male event.[11] These 2012 regulations were suspended by the IOC in the aftermath of *Dutee Chand* v. *AFI & IAAF*[12] on the ground that the IAAF is provided two years' time period to give a fool proof scientific study to prove that high testosterone level in females leads to high performance in all the levels of play in athletic events.

In 2015, the IOC held a meeting on 'Sex Reassignment and Hyperandrogenism'.[13] It established rules for gender testing in female athletes, stating that a female athlete with AIS (Androgen Insensitivity Syndrome) who has testosterone levels in the masculine range (as assessed by a blood test) is ineligible to compete as a woman. The IOC declared '5 nmol/L' as the cut-off levels for being in the female category although they had earlier in the 'IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism' declared 10 nmol/L to be the level. The reduction from 5 nmol/L to 10 nmol/L raised suspicion on the intent of the IAAF which still seemed to demotivate female from participating in international games. When consensus meeting was held in 2015,[14] they held the limit to be 10 nmol/L but when, in 2018, the official notification appeared, the testosterone levels got reduced to 5 nmol/L. The normal range of total testosterone in blood for an adult premenopausal woman is 0.12 to 1.79 nmol/L, while the normal range for an adult male is 7.7 to 29.4 nmol/L.[15]

In 2018, the IAAF released new 'Eligibility Regulations for Female Classification'. On the basis of the study conducted by Stephane Bermon and Pierre-Yves Garnier published in the year 2017,[16] the IAAF came to the conclusion

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[11] IOC Regulations on Female Hyperandrogenism, Games of the XXX Olympiad in London, 2012, available at: https://stillmed.olympic.org/Documents/Commissions_PDFfiles/ Medical_ commission/ 2012-06-22-IOC-Regulations-on-Female-Hyperandrogenism-eng.pdf last accessed on 17/11/2021 at 2:51 pm.

[12] Dutee Chand Vs. Athletic Federation of India (AFI) & the International Association of Athletics Federations (IAAF) CAS 2014/A/3759 available at: https://plawyered.files.wordpress.com/2015/09/ dutee-chand-v-athletics-federation-of-india-afi-the-international-association-of-athletics-federations-iaaf.pdf last accessed on 17/11/2021 at 3:02 pm.

[13] IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism November 2015, available at: https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf last accessed on 22/11/2021.

[14] *Ibid*.

[15] Joanna Marchant, "Women with High Male Hormone Levels Face Sport Ban". Nature (2011) available at: https://www.nature.com/articles/news.2011.237 last accessed on 25/10/2021 at 1:29 pm.

[16] *Stéphane Bermon* and *Pierre-Yves Garnier* analysed 2, 127 performances and hormone concentrations in male and female elite track and field athletes during the 2011 and 2013 *Track and Field World Championships*. When compared with women with lower levels of the hormone free

that female athletes with high testosterone levels are significantly more efficient than those with normal testosterone levels.[17] This competitive advantage is in 'restricted events' only. And, the restricted events are the events ranging from 400m to the mile events which includes 400m, hurdle 400m, 800m, 1500m and 1 mile events. Therefore, these regulations require that any female athlete who is androgen sensitive and has testosterone levels above 5 nmol/L along with DSD, then that female athlete has to maintain her testosterone levels within the 5 nmol/L range for continuous 6 months by using hormonal contraceptives. Also, if she wants to continue competing in athletic events, she would have to maintain her testosterone levels within 5 nmol/L as long as she wants to be in the game. Furthermore, the 2018 regulations held that the female athletes coming in the upper mentioned criteria to be recognised as male or intersex.[18]

3. IS THE SCIENTIFIC CREDIBILITY OF FEMININITY TEST QUESTIONABLE?

> *We have strong reservations about the ethical validity of these regulations. They are based on weak evidence from a single study, which is currently being widely debated by the scientific community.*
>
> —Leonid Eidelman[19]

Mr. Leonid Eidelman, the Chairman of the World Medical Association has stated that basing IAAF regulations on a small yet flawed data, is a grave injustice cast upon the female athletes with hyperandrogenism and DSD (Disorder of Sexual Development). Alun Williams, a sports geneticist[20] agrees that women with DSDs and hyperandrogenism should be treated the same as those with any other genetic trait that enhances athletic ability.

He pointed out, that

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testosterone (fT), women with the highest fT levels performed significantly better in the 400 m, 400 m hurdles, 800 m, hammer throw, and pole vault with margins of 2.73%, 2.78%, 1.78%, 4.53%, and 2.94%, respectively. Such a pattern was not found in any of the male athletic events.

17 *Ibid*.

18 Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development), (Published on 23 April 2018, coming into effect as from 1 November 2018) available at: https://www.worldathletics.org/news/press-release/eligibility-regulations-for-female-classifica last accessed on 22/11/2021 at 4:43 pm.

19 Jonathan Liew, "Caster Semenya: Athletics has been trying to sabotage her for a decade. It may finally have succeeded." Independent May 4th, 2019 available at: https://www.independent.co.uk/sport/general/athletics/caster-semenya-iaaf-cas-testosterone-levels-hormone-therapy-olympics-800m-a8898816.html last accessed on 18/11/2021 at 2:32 pm.

20 A sports geneticist at Manchester Metropolitan University, UK.

The mutations found in DSD athletes don't affect performance to an exceptional degree.[21]

It is not expected from a big institution like IAAF to rely on a study which has been conducted only once and which has implications at a very high level internationally. The study must be based on concrete evidence and with a solid foundation. But, sadly, this is not the case with World Athletics.

In some cases of hyperandrogenism, the embryo may not fully develop into a man, resulting in a person with exterior female traits and testes in place of ovaries. In some cases, the development of the testes is inside the abdomen only. The testes doesn't get developed into scrotum.[22] It is only because of the DSDs, a female can have testosterone levels more than a male. Whenever the regular tests like blood, sugar are done upon the athletes and if some suspicion is raised on the testosterone levels, then the player would have to go through the sex verification test. On the IAAF report on sex verification, Dr. Ross Tucker stated:

I cannot accept the fact that the data is so poor and IAAF's policy is built on such a deeply compromised research study.

4. DOES GENDER VERIFICATION TEST ACCOMPLISH THE NOTION OF 'FAIR PLAY'?

The notion of 'fair play' is generally understood to be important in sport and in life yet it is not clear what precisely it refers to, why it is valued, what ethical principles, if any, it is grounded upon and what kinds of good it involves.

—Heather Sheridan[23]

The International governing bodies guarantee fairness in the sports events organised by them. The International Olympics Committee (IOC) in its official website states its role to "encourage and support the promotion of ethics in sports as well as education of youth through sport and to dedicate its efforts in

[21] Julianna Photopoulos, "The Future of Sex in Elite Sports" nature.com March 31, 2021 available at: https://www.nature.com/articles/d41586-021-00819-0?proof=t%3B last accessed on 3/11/2021 at 4:29 pm.

[22] Ross Tucker and Malcolm Collins "The science and management of sex verification in sport" South African Journal of Sports Medicine vol 21 No. 4 2009 available at: https://www.researchgate.net/publication/279651531_The_science_and_management_of_sex_verification_in_sport/citation/download last accessed on 17/11/2021 at 3:51 pm.

[23] Claire F. Sullivan "Gender Verification and Gender Policies in Elite Sport: Eligibility and "Fair Play" Journal of Sport and Social Issues 35(4) 400–419 p.401. See also Heather Sheridan, "Conceptualizing "fair play": A review of the literature." European Physical Education Review 2003, 9, p. 163-184.

ensuring that, in sport, the spirit of fair play prevails and violence is banned".[24] Even the International Association of Athletics Federation (IAAF), the international body governing sports for athletics (track and field) in its website states that its primary role is "first and foremost to ensure the fairness and integrity of the competitions that are organised under its rules.[25] Hence, in order to keep the ethics of 'fair play' in sports, these international bodies try to level the field by organising the sports events on sex-segregated lines. As these sports events involve high financial gains, laurels and international policies, hence the stakes are very high.

The continuous premise that all males (born or "made") have a physical advantage over all females (born or "made") is embedded in this 'fair play' rhetoric.[26] It is widely believed that some naturally male could feel pressured or be driven to switch their gender in order to play women's sports and benefit from the success, popularity, and financial rewards that come with competing in sports. Hence, the sports governing bodies are entangled in their endeavour to scientifically and medically segregate humans in first two categories male/females according to the cultural belief of the society. In order to abide by the responsibilities, which are set only for them by the International Committee of Fair Play's document "Fair Play for All" (1992) to establish that competitors are equivalent in terms of size, strength, and capacities for athletics. These sports governing bodies have come up with gender verification tests which put male and female in straight jacket compartments and thus putting all humans into traditional binary.

Forgetting that in their endeavour to create a climate of fair play, they actually are creating unfairness to the play. Levelling the playing field on first one determinant, the sex of the players has not brought any good to the play. Several sex markers have been used to determine who can compete as a woman in athletic events. The criteria used by the IAAF to determine a person's sex have changed over time as science and technology has advanced. This shift proved that the previously adopted marker was completely wrong way of gender testing. Have these sports authorities been able to provide fair play to competitors banned on the basis of the wrong gender testing technique? Take, for example, Santhi Soundarajan's case, where she was stripped off her silver medal which she had won in the women's 800m at the 2006 Asian Games in Doha, Qatar, after failing the femininity test in December of that year. According to reports, an official grew "suspicious" after seeing Soundarajan perform a urine-voiding drug test. Regarding the kind of gender testing that took place, neither the Athletics Federation of India nor the Olympic Council of Asia issued an official statement.

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[24] International Olympic Committee. (2007a). The Olympic charter p.14 available at: http://www.olympic.org/olympic-charter/documents-reports-studies-publications last accessed on 25/11/2021 at 11;56 am.

[25] International Association of Athletics Federations, "IAAF Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competition 2011" available at: http://www.iaaf.org/medical/policy/index.html last accessed on 25/11/2021 at 11:40 am.

[26] *Supra* note 23.

In a report from 2006 by the Associated Press, an unnamed Indian athletics official claimed that Soundarajan had "abnormal chromosomes" and more Y chromosomes than was permitted. If true, it's possible that Santhi was born with androgen insensitivity syndrome (AIS) and might have participated in 1996 Olympic games because seven other athletes with AIS were allowed to participate.[27]

5. DOES SPORTS ADMINISTRATORS PROTECT THE HUMAN RIGHTS OF THE FEMALE ATHLETES?

Article 2 of Universal Declaration of Human Rights (UDHR) provides:

> *Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional, or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing, or any other limitation of sovereignty.*[28]

Every human being has an inherent right not to be discriminated against because of his or her "nationality, place of residence, gender, national or ethnic origin, colour, religion, language, or any other status."[29] It is not only the fundamental duty of the sports governing bodies to uphold the human rights of the athletes but they also have the responsibility to respect their human rights. The UN Guiding Principles on Business and Human Rights are intended to be followed by governing organisations that engage in commercial activity. Governments hosting sporting events are responsible for ensuring that all athletes are protected from human rights breaches while on their territory.[30] Although the sex verification tests were introduced to catch the male impostors, instead it has incurably violated the human rights of the female athletes.

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[27] *Ibid*. at p.413.

[28] Universal Declaration of Human Rights art. 1, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at http://www.un.org/-en/documents/udhr/ [hereinafter Declaration].

[29] UNITED NATIONS HUMAN RIGHTS available at: http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx last accessed on 24/11/2021 at 4:12 pm.

[30] Payoshni Mitra and Katrina Karkazis et. al. "They're Chasing Us Away from Sport" *Human Rights Watch* December 4, 2020 available at: <https://www.hrw.org/report/2020/12/04/theyre-chasing-us-away-sport/human-rights-violations-sex-testing-elite-women> last accessed on 25-10-2021 at 1.58 p.m.

5.1. Gender Verification Test Only for Females

> *Mäntyranta's naturally doped blood is completely acceptable.*[31]
>
> —David Epstein

The statement was made by David Epstein who is one of the leading researcher on sportspersons' genes and has written best-selling book *The Sports Gene*. Eero Mantyranta, the legend of Nordic Skiing game, had extraordinary level of haemoglobin which is required to play at the high altitude level. When it comes to female athletes who naturally produce more testosterone than male athletes, this kind of acceptability has never been made. So, if he can compete along with the high levels of hormones which he produces naturally and it further helps him in having an upper edge over other participants, then why IAAF has been so keen on banning female athletes? Therefore, banning a female athlete simply by having high level of testosterones is completely uncalled for. This is the discrimination which has been affecting the participation of many female athletes.

The fact that these "sex verification tests" discriminate against the feminine sex is extremely concerning. When the testosterone levels are 'naturally occurring' in the female athletes, then on what ground IAAF ban them and put them in male category? There are cases where even the male athletes have some extra-ordinary or say abnormal characteristics which makes them superior to other athletes. Take the cases of Michael Phelps or many basketball players who have abnormally bigger hands and feet than the common man. Phelps outperforms his rivals in the pool with an unusually biomechanical effectiveness. His freakish physique structure gives him a huge edge which includes huge wingspan, shorter legs, big feet, more flexibility and most surprisingly he produces less lactic acid (it causes faster recovery time). These abnormal characteristics of his body play a big role in his extraordinary talent. All these abnormalities make him a step ahead of his competitors.[32]

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[31] David Epstein, "Magic Blood and Carbon-Fiber Legs at the Brave New Olympics" *scientificamerican.com* August 5th, 2016 available at: last accessed on 26/11/2021 at 2:15 pm.

[32] Chris Adams, "How Michael Phelps' Body Made Him the Perfect Swimmer" liveabout.com January 15th, 2020 available at: https://www.liveabout.com/michael-phelps-body-proportions-and-swimming-1206744 last accessed on 23/11/2021 at 5:00 pm.

5.2. Sex Verification Test Only for 'Look Like Males' Females

> *I cried for three straight days after reading what people were saying about me. They were saying, 'Dutee: Boy or girl?' and I thought, how can you say those things? I have always been a girl.*[33]
>
> —Dutee Chand

Dutee Chand made this heart wrenching statement when she was being trolled mercilessly on social media. The CAS decision in Dutee Chand Case further fuelled the racial and physical abuse of female athletes as the decision held that those athletes who are 'suspicious' must be verified. It is only through the physical appearance of a female in athletics championships, a presumption is raised about her being male or female. Players like Dutee Chand, Caster Semenya and many others were doubted because of their physical appearance. Doubts are raised over their being female. In an interview to *Human Rights Watch* Caster told:

> *One time I went to a competition and they were saying, 'You're not a woman, you're a man. Take off your clothes and we'll check you.*[34]

Caster Semenya had to face the suspicion because of having unshaved armpit hair, preferring shorts instead of bikini and having a muscular physique. The policy on 'hyperandrogenism' remained unchanged for a long time and when they were changed in 2018, they targeted only one player named Caster Semenya. Therefore, if a policy is made to stop unfair competition and that policy is zeroing on only one player, it can't be said to be a good policy. Rather, it has huge implications which convey that the African and the South Asian athletes are targeted. Restricting one player under the garb of 'fairness' is 'unfair'.

5.3. Disrespect of 'Right to Privacy'

While the World Athletics regulations mention confidentiality measures, and World Athletics officials have stated that they always intend to respect women's privacy, the public controversy about the laws has been fuelled by officials and related parties releasing private information. The cases of Caster and Dutee burnt like fire in the media, print, visual, audio and social, due to the leakage of private information.[35]

The rules regarding 'hyperandrogenism' states that anyone can make complaint regarding a female athlete's gender with the World Athletics' medical

[33] *Supra* note 4.
[34] *Supra* note 30.
[35] *Supra* note 30.

manager. This puts all female athletes under constant and arbitrary surveillance. In other words, someone could be singled out for being too "masculine," a subjective and arbitrary criterion that could lead to disclosures of confidential health information or rumours that lead to an investigation.

The sports bodies still have not learned from the past incidents where the athletes have even committed suicide because of the public humiliation which they had to face because of their leaked private information. Pratima Gaonkar committed suicide in 2001[36] and Santhi Soundarajan was stripped of her Asian Games medal and the prize money. Santhi attempted suicide. In her attempted suicide note, she provided,

> *I was shattered by the failed test. The AFI did not support me, did not fight my cause. I was hoping they would. I was depressed. I felt like I had lost everything. It still hurts. I loved the sport so much. My dream broken, I attempted suicide.*[37]

Santhi consumed poison used by vegetarians and her friend found her vomiting and took her to hospital. She was hurt as the AFI did not support her and went into depression which led her to go for suicide, although she was saved. For decades, sport regulatory bodies have used "sex testing" procedures to limit women's participation in sports, infringing on their fundamental rights to privacy and dignity.[38]

5.4. Contravention of The Principle of 'Informed Consent'

When it comes to giving 'informed consent', the British Medical Association provides some useful guidelines:

> *A fundamental ethical principle guiding medical practice is that no examination, diagnosis or treatment of a competent adult should be undertaken without the person's consent. The ethical obligation to seek consent applies even where this is not a legal requirement. In order for consent to be 'valid' the individual must have been given sufficient, accurate and relevant information; the individual must have the competence to consider the issues*

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[36] Nihal Koshie, "The Rising Star Who Ended her Life much before Dutee Chand Challenged the Rules" *The Indian Express* Sept. 9th, 2010.

[37] Abhishek Dubey, "How Santhi Soundarajan was let down by India "for not being a Woman." *thebridge.in* June 24th, 2021 available at: https://thebridge.in/athletics/how-santhi-soundarajan-let-down-india-not-woman/ last accessed on 20/11/2021 at 10:31 am.

[38] *Supra* note 30.

and to reach a decision; and that decision must be voluntary in terms of not being coerced.[39]

A core principle of medical ethics is 'informed consent' which is upheld by international human rights law, and is a component of global medical standards. Although, the IAAF 2018 regulations mandates the consent of the athlete to be taken to make them undergo sex verification test but, sadly, the reality is that the athletes are made to undergo these tests on the pretext of some regular tests without letting it known to them that their sex verification test is being done. This rule was not followed by the authorities as we witnessed in the cases of Dutee Chand and Caster Semenya. In Delhi, the AFI, which is bound by the IAAF's regulations, compelled Chand to undergo intrusive exams without her knowledge or agreement.[40] According to a report published by Ruth Padawer in *New York Times*, Chand told that she was called by the Athletic Federation of India (AFI) to New Delhi. The Director, AFI told her to meet the doctor on pretext of some regular tests. As told to *New York Times,*[41] Dutee had some doubt raised when the doctor told her that her ultrasound would be done but she was told that it was part of routine tests which are required before going to international games. She was never informed that her sex verification test was being done and rather came to know about it from the media in the days to follow that gender test has been conducted upon her body.[42] She felt humiliated and appealed to CAS against the decision of her being banned.

Caster Semenya's gender test was also conducted in the circumstances which were similar to Dutee Chand. Her test was also taken without her being 'informed' about the same. Indeed, she was forced to give her consent. Not only this, the reports from blood, sugar tests etc are used by the authorities to determine the gender. In his study, Wonkham[43] and his colleagues are absolutely on target when they note that any attempt to use genetic information for gender identification purposes ought to be accompanied by adequate counselling, 'informed consent', and respect for confidentiality. It should be noted that genetic testing must be linked to qualified counselling, accurate testing, confidentiality, and "informed consent" when used for any purpose in athletics, including basic identity verification, screening for injury risk factors, or determining the likelihood of adverse side-effects from competition. The testing and counselling must also be carried out by professionals who are not directly connected to the teams,

[39] BMA Ethics, "Recommendations for Healthcare Professionals Asked to Perform Intimate Body Searches: Guidance for Doctors from the British Medical Association and the Faculty of Forensic and Legal Medicine, " July 2010, available at: http://www.bma.org.uk//media/files/pdfs/ practical%20advice%20at%20work/ethics/intimatebodysearchesjuly2010.pdf last accessed on 21/11/2021 at 3:55 pm.

[40] *Supra* note 4.

[41] *Supra* note 4.

[42] *Supra* note 4.

[43] A. Wonkham & K. Fieggen *et. al,* "Beyond the Caster Semenya controversy: The case of the use of genetics for gender testing in sport" *Journal of Genetic Counseling*, 2010 (in press).

coaches, national sports organisations, or any other body that would have a direct conflict of interest regarding the results of such testing.[44]

The 'informed consent' to a medical intervention, surgery etc is a basic human right and must be available to all the athletes at all times.

5.5. Encroachment of 'Right to Health'

When Dutee was asked to go for medical intervention in order to become eligible, she declined by stating that she was not going to change anything in her body. Her claim was that she was born a girl and would remain so. Also, in her case at CAS, she provided various scientific reports which clearly stated that the medical intervention in sports persons can cause a harmful effect on performance.

The IAAF regulations also affects the 'right to health' of players. The UN Committee on Economic, Social and Cultural Rights (CESCR) ensures that there should be no compromise with the health of athletes. The CESCR held in its General Comment 14 that:

> *The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body... and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation.*[45]

The medical practice of lowering down testosterones has very severe effect on the body of female athlete. It shocks the body into 'menopause'. When the body has been forced to suppress its testosterone levels, the athlete must use Hormone Replacement Therapy (HRT) for the rest of his or her life. Furthermore, HRT causes excessive thirst, urination, electrolyte imbalances, headaches, fatigue, nausea, hot flashes etc.[46]

The tests and the process of performing these tests is very degrading and stigmatising. The test is performed on these women only because of the

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[44] S. Callandrillo, "Sports medicine conflicts" *St Louis University Law Journal*, 2005 p. 25–47.

[45] CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health, art. 12, U.N. Doc. E/C.12/2000/4 (2000), available at: http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1AVC1NkPsgUedPlF1vfPMJ2c7ey6PAz2qaojTzDJmC0y%2B9t%2BsAtGDNzdEqA6SuP2r0w%2F6sVBGTpvTSCbiOr4XVFTqhQY65auTFbQRPWNDxL last accessed on 20/11/2021 at 11:25 pm.

[46] Mandates of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and the Working Group on the issue of discrimination against women in law and in practice available at: https://www.ohchr.org/ Documents/Issues/Health/Letter_IAAF_Sept2018.pdf last accessed on 20/11/2021 at 11:44 pm.

suspicion. These tests are invasive and not medically necessary. The experts in special rapporteur on the 'right to health' wrote:

> *The regulations reinforce negative stereotypes and stigma that women in the targeted category are not women and that they either need to be "fixed" through medically unnecessary treatment with negative health impacts....*[47]

When Caster Semenya was told to lower down her testosterone levels. She said:

> *Despite the fact that the hormonal drugs made me sick all the time, World Athletics now wants to impose even harsher limits with unidentified health consequences. I would not enable World Athletics is using my body or me again. However, I am worried that some women players will feel compelled to allow World Athletics to drug them and test the efficacy and adverse health effects of various hormonal drugs. This cannot be authorised to take place.*[48]

These examinations are unjustified, intrusive, and humiliating. They undermine the fundamental rights of women and are not supported by recognised research. They are used in coercive settings when women must choose between pursuing their profession and exercising their fundamental human rights. It is this coercive environment which forces, indirectly, the female athletes to go for medical intervention in order to make them eligible for the sport. Scientifically it has been proven that women are forced to have drugs and surgeries are done which sometimes destroy the sensation in their genitalia.

5.6. Violation of 'Right to Dignified Living'

Due to the extreme harassment, intimidation, and online bullying that Dutee Chand experienced as a result of social media, her reputation as well as her mental health were further damaged. The aftermath of these humiliating situations have a deep impact on the mental health of an athlete. Katrina Karkazis,[49] wrote in the report in Human Rights Watch,

> *Women may have limited understanding about their bodies as a result of a mix of release of information and poor direct contact with affected athletes, resulting in intense self-questioning. The attention around sex testing regulations, as well as the methods employed in enforcing the regulations, can leave athletes deeply wounded.*[50]

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47 *Ibid*.

48 *Supra* note 30.

49 A cultural anthropologist and visiting assistant professor of women's, gender, and sexuality studies at Emory University, and fellow at the Yale Global Health Justice Partnership.

50 *Supra* note 30.

Everyone on this planet has a right to 'dignified living'. The gender test policies are a slap on the Olympic movements' commitments to dignity and equality for all. In order to establish who is a "genuine" woman, the 2018 regulations adopted a restrictive definition of femininity. It is a system that forces unfair gender norms on all athletes, infringing on their liberty, privacy, and dignity, as well as their right to be free of prejudice. It also projects a stereotypical picture of "femininity" to the rest of society, which has a negative impact on all women.

The UN High Commissioner on Human Rights noted in a 2020 report stated that:

I. Detecting and studying an athlete's sex features, as well as determining her level of "virilisation," are fundamentally subjective and degrading processes. They compel arbitrary examination of women's sex traits and gender presentation, jeopardising their privacy and dignity.[51]

II. The regulations have the potential to reveal any woman who is being scrutinised as having a sex characteristic variance.[52]

III. Gender stereotypes have been enforced by the legislation throughout their history.

The report vehemently states that detecting an athlete's sex characteristics are demeaning. We have examples where athletes told *Human Rights Watch*[53] that rumours fuelled by the regulations were ruinous for them. For instance, one runner anonymously stated that people in her community started talking about her femaleness even before the reports were leaked to the media.

6. CAN DSD INDIVIDUAL'S 'RIGHT TO PLAY SPORTS' BE TRUNCATED?

Studies have suggested that 'sex' cannot be classified into two categories namely males and females. The scientific temperament has analysed that there is more to a simple binary sex and gender categories. Stephane Bermon in an interview for *The Guardian* stated that He supports adding "a third category for intersex athletes" to the binary divide of male and female categories.[54] He noted that there are many athletes who though compete in female category but should presumably compete in intersex category. The DSD occurring due to various genetic and biological reasons leads one to sustain that sports should not be just

[51] OHCHR, "Intersection of Race and Gender Discrimination in Sport, " A/HRC/44/26 available at: https://undocs.org/en/A/HRC/44/26. Last accessed on 24/11/2021 at 1:11 pm.

[52] *Ibid*.

[53] *Supra* note 30.

[54] Sonja Erikainen, "Gender Verification and the Making of the Female Body in Sport: A History of the Present" 2019 10.4324/9780429316159.

regulated for male and female only. On the scientific analysis of Stephane Bermon**,** the IAAF has enacted 'hyperandrogenism and DSD regulations'[55] in the year 2018 whereby they have included a new provision stating that if an athlete is not eligible to compete in the female category due to the DSD regulations, she may still compete either in the male category or in an "intersex or similar classification that may be offered" in the future.[56]

But, this provision of the IAAF is a far cry for intersex individuals. Even though many countries have given green flag to legal categorisation beyond the binary male and female but other civil, social, economic and political rights to intersex individuals is a distant dream. Furthermore, Bermon acknowledged that it would probably take "five or ten years" to establish 'intersex' as a category in elite sports. Although, there is no such assurance for this classification, though. The studies have concluded that the remarkable athletic performance is not based upon one factor but is the cumulative effect of various ingredients like diet, coaching and the like. Sports is a combination of skill and athletic capacity.[57] Isolating the testosterone level in one's body does not help. Speed, flexibility, endurance, strategy, communication, use of particular body part, the type of sports are all important factors.[58] Hence, gender verification test based on testosterone level alone cannot be used to the disadvantage of the DSD athletes who have lived through their lives considering themselves as females. Till the international and national sports authorities and federations do not create a third category of contestants, the DSD regulations cannot be discriminated and their 'right to play sports' cannot be truncated.

7. CONCLUSION AND SUGGESTIONS

The femininity test procedure has changed over the past 70 years. It first started as a way to prevent deliberate cheating and later developed into standards that are intended to assure fair play. Since the very inception of gender verification testing process, it has remained in controversies and hullabaloos. Gender screening indicators such as a simple examination of external genitalia, chromosomal testing to confirm eligibility to compete as a woman, or testosterone level testing have yet to be scientifically proven to lead to improved performance. The method and management of sex verification are tremendously complicated, posing problems not only to the scientific description of male and female, but also to social and cultural gender and sex characterisations. The gender verification

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55 *Supra* note 18.

56 *Supra* note 54.

57 Doriane Lambelet Coleman, "A Victory for Female Athletes Everywhere" Quillette (May 3, 2019) available at: https://quillette.com/2019/05/03/a-victory-for-female-athletes-everywhere/ last accessed on 23/11/2021 at 10:11 am.

58 Adeeti Singh, "Gender Verification Test: Analyzing The Legal Ramifications On Women Athletes" 2(1) *J. For Sports L. Pol'y & Gov.* 145 (2020).

test completely ignores the fact that, irrespective of their chromosomal, gonadal, or hormonal sex, individuals who have been raised as girls and are emotionally and socially females since infancy should be allowed to compete in women's competition.

On historical analysis of gender verification test, we come across many athletes who have faced the brunt and been wrongly been banned following incomplete research. Furthermore, these tests have created havoc in the lives of the athletes not only by destroying their innumerable human rights but also causing humiliation, stigma and severe mental stress. The sports governing bodies in their endeavour to provide a levelled field to play for all the players itself is creating unfairness in sports. The continuous shifting of markers to define sex, adopted by International sports authorities have left behind many players wrongly stripped of their medals. The remarkable athletic performance by the males has always sought accolades whereas such performance by females have landed them in peril. Judging a female merely on her physical appearance and subjecting her to physical and racial abuse is transgression on her right to life. The IAAF vide its regulations encroach upon the right to health of the women athlete whereby they are forced to take testosterone suppressing drugs or undergo surgery to reduce testosterone and make them more feminine. These sports authorities have gone to the extent of violating the International human rights law by conducting gender testing invasive examination upon female athletes without their consent and knowledge even.

Olympic athletes are gifted persons as they are a very rare species. They reach to the international stage only because they have an upper edge over other persons. The athlete may have 'high level of testosterone' or 'other performance enhancing hormones' and all these traits are naturally occurring in their bodies, in most of the cases. That's the reason they are at the international stage as they are far superior in athleticism than general population. Moreover, there are other elements too, that enhance the performance of the athlete. There is no scientific justification for requiring a female to play in the category of the males in case of high testosterone level more so, when the males having a relatively higher level of testosterone are not refrained from competing in the male category.

The World Athletics should put on hold the Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development) 2018 and refrain from banning the female athletes on the ground of hyperandrogenism and DSD unless and until various scientific studies do not suggest with a concrete evidence that such a biological condition even though naturally accruing, causes magnanimous enhanced performance.

The International sports federations should replace gender testing with individual athlete profiles both for men and women and include a measure for androgen levels. They need to accommodate different body types with the therapeutic use exemption model. The sports federations need to determine their

own classification (i.e. weight, height or other physical differentiations) and keep a profile on each athlete similar to the para-olympic games classification. They should make certain that the competitors competing against each other are in the same classification.

The top sporting body must implement a policy that complies with the United Nations Guiding Principles on Business and Human Rights, as well as follow all of the rules and regulations established by the international human rights council with proper research in order to assess practises governing women's competition eligibility. The policies should also conform to the Olympic Charter which guarantees that the practice of sports is a human right and that every individual must have the possibility of practising sport, without discrimination of race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play.

Any future policy should adopt clear, transparent, and democratic policymaking processes, as well as assure the participation of affected athletes and impartial experts. There should be a 'precise' policy to protect athletes from human rights violations so that the affiliating federations also follow the same.

Any rules and regulations that require unnecessary medical interventions should be deleted. Every individual has 'right to life' which is acknowledged all over the world. Therefore, the female athletes, also, should not be forced to take medications in order to make them 'eligible' to compete in the sports. Also, For the purposes of complying with World Athletics' regulations, physicians should not prescribe medications or execute medical treatments to suppress women athletes' endogenous testosterone levels.

The World Anti-Doping Agency must be 'limited' to use the anti-doping test only for anti-doping and not for sex verification. Using the results of the urine voiding doping test procedure for the 'sex verification' as it occurred in various cases especially in Caster Semenya case, is an unethical and wrong practice undertaken with malafide intention. The athletes have the right to know as to what tests are being conducted upon his/her body.

The top governing bodies, regional sports ministries and regional sports federations must educate every athlete regarding their rights, duties and the remedial measures that are available to them with regard to various eligibility regulations. Moreover, the athletes must be made aware of all the procedures and bodies to approach in case of any human rights violations. There should be a provision to allow for any appeals to be heard by an impartial panel of experts, give credibility to the athletes' human rights, and emphasise the values of transparency and accountability, with the promise of privacy and secrecy.

Whilst studying the scientific and the societal interpretations of 'sex', the truth is that it becomes more and more controversial because, till now, there is no fundamental, medical, or scientific way to categorise all humans as female or male. There is diversity in the word 'sex' and the science need to further its research for more and more information regarding the diversity of sex. The sex verification tests have put into question the very meaning of "man" and "woman". Until now, all gender rules have governed entry to sporting activities using binary classifications, despite the lack of scientific or biological evidence that only male and female exist under the term 'sex.' Therefore, the discussions on respect and tolerance towards individuals with DSD's must continue around the globe. The international and national sports governing bodies should be pressurised to include 'third category i.e. intersex' or non-binary gender category in the elite sports on lines of Scottish Athletics.

JUDICIAL APPROACH TOWARDS THE TRANSPLANTATION OF HUMAN ORGANS ACT IN INDIA

Neelam Batra[*]

1. INTRODUCTION

In India, human organ donations and transplantations have been regulated by the Transplantation of Human Organs Act, 1994. This Act was amended in the year 2011 and now the Act is named as Transplantation of Human Organs and Tissues Act, 1994. On 27th March, 2014, the Transplantation of Human Organs and Tissues Rules have been notified in pursuance thereof. It is noteworthy that like other countries, brain stem death is recognized as legal death under the Act. Only few organs can be donated after natural death, but almost thirty-three organs and tissues can be donated after brain stem death. In the amended Act, the word 'tissues' has been added along with the organs as clear from the title of the Act. The amendment Act has even expanded the definition of the term 'near relative' by including grandparents and grandchildren. A provision relating to 'Retrieval Centres' has been made to retrieve the organs from the deceased donors. A provision has also been made in the amended Act for providing higher penalties in case of trading of organs which is a remarkable step in order to protect the poor people. The procedure to approve the removal and transplantation of human organs has been established under this Act. The Authorisation Committee referred under the Act has a right to grant approval or denial after conducting an inquiry for the removal of human organs from a person's body. The order of such an authority has been challenged a number of times by the aggrieved party in the Court wherein it was decided by the Court whether the authority's decision for grant of approval or refusal was justifiable or not. It is very important that the courts must maintain a balance between the provisions of the Transplantation of Human Organs Act, 1994 and the rights of the parties to avail the benefits given under the Act. The objective of this research paper is to identify the role of judiciary in the implementation of the Transplantation of Human Organs Act, 1994. The judgments of higher judiciary have been gathered and analyzed. This paper focuses only on those decisions that resolve some significant concerns rather than analyzing all of the higher judiciary's rulings. The analysis compares the court rulings to the major purposes of the law to determine if they would have a beneficial effect on the orders made by the Authorisation Committee, which was established in accordance with section 9 of the Act to approve or deny the removal of human organs. While the Act

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empowers the Authorisation Committee with the authority to consider applications and issue orders, cases that are appealed to higher courts help to elucidate and support the law.

2. SUBSTANTIVE AND PROCEDURAL ISSUES

2.1. Autonomy Over One's Body and the Transplantation Act

While invoking court's jurisdiction under Article 226 of the Constitution of India in the case of *Nagendra Mohan Patnaik and Ors* v. *Government of A.P.,*[1] it was alleged by the petitioners that there are certain provisions in the Andhra Pradesh Transplantation of Human Organs Act, 1995 violating Articles 21 and 14 of the Constitution and therefore, are ultra vires to the Constitution of India. It was contended that everyone should have the freedom to decide about oneself including the decision to donate his organs. If the donor is willing to donate his organs to the recipient, then Authorisation Committee should not delay the approval of such applications. The Hon'ble Court while clearing all these doubts observed that the recipient has the same freedom to protect his life as the donor has including the transplantation of an organ for therapeutic purposes of a living person or deceased person for the methodical treatment of any disease. But this cannot, however, by any stretch of imagination be extended to taking someone else's life to save one's own life. The restriction on the removal and transplantation of organs is required due to various factors such as wide-ranging illegal removal of human organs, and commercialization which is affecting the poor sections of the society. Further, the High Court refused to lay down any strict criteria for rejection of applications for organ transplantation.[2]

2.2. Transplantation Between near Relatives

In the case of *Miss Sonia Ajit Vayklip and Another* v. *Hospital Committee, Lilavati Hospital and Research Centre and Others,*[3] it was held that when the donor and beneficiary are close relatives,[4] as defined by the Act, the Authorization Committee is not obliged to conduct an inquiry to determine whether there is a commercial component and approval of the Authorisation Committee would not be necessary in such cases. In this case, considering they relied on the supporting documentation provided by the petitioners, neither the hospital Committee nor the state authorization committee had challenged their

1 1997 (1) ALT 504.
2 *Ibid*.
3 AIR 2012 Bom 91.
4 The Transplantation of Human Organs Act, 1994, sec 2(i) "near relative" means spouse, son, daughter, father, mother, brother, sister, grandfather, grandmother, grandson or granddaughter.

claim that the petitioners were close relatives i.e. sister and brother. Neither the petitioners were foreign nationals or minors. The Court determined that since the donor and the recipient were close relatives, the petitioners' case came under the purview of Section 9(1) of the Act, and as a result, the restrictions outlined in Section 9(3), which call for taking the Authorization Committee's approval, do not apply in the present instance. The Court in consideration of the above facts and circumstances approved the kidney transplantation.[5]

It is also clearly provided in Rule 19 of the Transplantation of Human Organs and Tissues Rules, 2014 that in case the transplantation is to be done through the unrelated donor, only then the necessary permission is to be granted by either the Authorisation Committee of the hospital or the District or State level Committee constituted by the Government which is also established in a number of cases.[6]

2.3. Transplantation and Economic Disparity between the Donor and the Recipient

Many a time the Authorisation Committee refuses to grant approval for transplantation when there is great economic disparity between the donor and receiver. The Court, however, granted relief to patients who are denied by the Authorisation Committee to receive the organs despite their economic differences. Thus, a conflict arises whether in a certain case approval should be given or not. There is no strait-jacket formula to determine the illegal commercial transaction in cases where there is a difference in the financial conditions of the parties**.** However, 'Economies makes and breaks relations' was the belief of the Court in the case of *Poonam Gupta* v. *State of Punjab and Others*.[7]

In the above said case, the petitioner was advised by the doctors for the transplantation of her kidneys as both of her kidneys had stopped functioning completely. The petitioner found a willing donor for the same. The petitioner sought prior approval of the Authorisation Committee as per section 3 of the Transplantation of Human Organs Act, 1994. However, the Authorisation Committee declined the permission. The petitioner preferred an appeal as provided under Section 17 of the Act but the same was also dismissed by the Appellate Authority. Aggrieved by the order of the Appellate Authority, the petitioner filed a writ petition before the Hon'ble High Court of Punjab & Haryana. After hearing both the parties, the Court concluded that the relationship between the families of the petitioner and proposed donor or the cause of their affection and attachment

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5 AIR 2012 Bom 91.

6 *F. Irfanudeen* v. *The Authorisation Committee,* W.P No 4180 of 2021. Available at <https://www.mhc.tn.gov.in/judis/W.P. No.4180 of 2021> (plz chk).

7 AIR 2009 P&H 162.

appears to be too hazy to be accepted out rightly. The plea that the petitioner helped in performing the donor's love marriage against the wishes of her parents, has no material support nor such an incident could tie them together so strongly that the donor would donate her kidney to the petitioner over and above to the latter's family members. While upholding the decision of the Authorisation Committee and Appellate Authority regarding the rejection of permission for kidney donation on the ground of love and affection, the Court took note of the fact of small children of the donor and lack of any steady income/regular job of donor's husband. The Court opined that economies make and break relations. The Court could not see any convincing reason for the respondent to have volunteered to donate her kidney on account of love and affection only. So, the petition was dismissed.

In *Rajinder Kumar v. the State of Punjab,*[8] The prospective donor and his wife were not linked to the petitioner in any way, according to the findings of the Authorisation Committee, but rather served the petitioner as house servants. On that basis, it was inferred that since there was a great economic disparity between the recipient and the donor, the donor and his wife being servants of the recipient's family the money involvement could not be ruled out. Accordingly, the request of the petitioner seeking approval was rejected by the Committee.[9]

However, the Punjab and Haryana High Court rejected and quashed the order of the Authorisation Committee and observed that the Committee could not disprove the aforesaid donation on the said ground. The Court found the aforesaid ground to be totally extraneous and out rightly disproved the economic disparity between the petitioner and the proposed donor to be the basis of such inference that the petitioner was actually receiving the donated organ on money consideration. Furthermore, the Court held that human behaviour and response cannot be quantified mathematically. People frequently take action for the well-being of the poor out of pure love and devotion or out of humanitarian concern. Therefore, such action of the good-doers cannot be suspected and need not be always viewed with a skeptical approach. There was absolutely no material with the Authorisation Committee or the Appellate Authority to reject the claim of the petitioner. The court ruled that it is obvious that the authorization committee and the appellate authority had been influenced by the suspicious ambiance in the wake of several abnormalities in kidney transplantation witnessed in the past. However, the outcome of the aforementioned suspicious environment cannot be permitted to become a brick block for gravely ill individuals like the petitioner.[10]

Further, in the case of *Parveen Begum and Others* v. *Appellate Authority and others*,[11] the court ruled that when adequate evidence of association

[8] AIR 2005 P&H 172.
[9] *Id* at 642.
[10] *Id* at 642.
[11] (2012) 189 DLT 427.

was presented, the economic discrepancy could not be the only reason to deny the transplant.

2.4. Donation out of Love and Affection

In the case of *B.L.Nagaraj and others v. Kantha and others,*[12] the question before the Karnataka High Court in a writ petition was whether donating out of love and compassion can be considered in the first place if the "close relatives" have not been designated as donors for transplantation by the family. The Authorization Committee in this instance denied the transplantation request on the grounds that close family members were not prioritised as potential donors. The High Court allowed the writ petition and ruled that there is no provision in the Act that forbids someone who is not a "close relative" from donating his kidney for the simple reason that "near relatives" have not principally been thought of as organ donors for transplants. Additionally, it was noted that relationships between donors and recipients, duration of acquaintance, degree of association, shared emotions, gratitude, and other human ties may be some of the elements that support "affection and attachment" between two people. Despite the major goal of the Act being to prevent the commercialization of human organs, the Committee is duty-bound to ensure the same. The Authorisation Committee has to take into consideration all the surrounding circumstances while considering the applications of the petitioners seeking permission for kidney transplantation."[13]

S. Malligamma and Others v. *State of Karnataka and Others*[14] is another case where the Authorisation Committee refused a donation of a kidney on the ground of love and affection. The petitioner in this case had chronic renal disease, therefore kidney transplantation was suggested. Three people who were not related to her nor familiar with her offered to give their kidneys despite the fact that none of her close relatives freely wanted to do so. They belonged to a different location and community, therefore conclusive evidence of a donation made out of love and compassion could not be proven beyond a reasonable doubt. The Court noted that it would be hard to imagine that someone who is a resident of another location sought the appropriate authority asking authorization to donate his kidney out of love and devotion when, in particular, the kith and relatives of the donees are not willing to do so freely. In these circumstances, this Court entertained a strong scepticism regarding the kidney donation offer made by the donor to the patient who resided in a different location and belonged to a different community. Regarding the provisions of the Transplantation of Human Organs Act, 1994, the Hon'ble Court opined that human organ cannot be sold for extraneous consideration. The Court took serious note of the fact that in several applications, the donors

[12] AIR 1996 Kant 82.
[13] *Ibid*.
[14] AIR 2005 Kant 74.

were from a particular Bangalore District. The Court, however, recommended holding a detailed inquiry regarding the genuineness of these transactions to prevent future illegal transactions or the sale of human organs for considerations or other reasons.

In Smt. R. Shailaja v. *State of Karnataka*,[15] the recipient was suffering from renal failure and she required dialysis twice a week which costs Rs. 25,000/- per month. The petitioner made a joint application along with recepient before the Authorisation Committee under Section 9 (5)[16] of Transplantation of Human Organs Act, 1994. The application was rejected by the Committee on the ground that the proposed donor had not produced proof to show that he had been residing with the proposed recipient, and therefore held that the donor was not the servant in the house of the recipient and there was no affinity between them. It was suspected that the donor's pact with his vital organ kidney might be due to monetary consideration. While deciding the petition against the order of rejection, the Court referred to the decision of Karnataka High Court in *S. Malligamma and Others v. State of Karnataka and Others*[17] Considering the decision of the Malligamma's case, the Court in the present case did not appreciate that the Authorisation Committee had rejected the application solely on the ground of the absence of proof of residence on the part of the donor to be actually residing with the recipient, thus ignoring the human problems. Therefore, the order of the Committee was quashed by allowing this writ petition.

Equalities and arbitrariness are sworn, adversaries. Arbitrariness always exists in the absence of equality, and equality always exists in the absence of arbitrariness. An order without following the principles of natural justice is an order which is *void ab-initio*. It is *non-est*.[18] The Court in the case of *Mehul Kishorsinh Jadeja* v. *Amarjit Singh (I.A.S.)*[19] held the appellate authority's decision as arbitrary and against principles of natural justice. In this case, the Authorisation Committee rejected the petition for transplantation on the ground that the donor was not the near relative of the petitioner. Further, an appeal was made from such order to the Appellate Authority under Section 17 of the Act. Without giving the party a reasonable opportunity of being heard, the Appellate Authority upheld the order of the Authorisation Committee. Hence the petitioner filed an appeal to the learned Court. It was apprehended by the court that the petitioner submitted an application under Section 9(3) of the Act, which allows a donor to give to a recipient

[15] 2005 (1) Kar LJ 60.

[16] Section 9(5) states- On an application jointly made, in such form and in such manner as may be prescribed, by the donor and the recipient, the Authorisation Committee shall, after holding an inquiry and after satisfying itself that the applicants have complied with all the requirements of this Act and tile rules made thereunder, grant to the applicants approval for the removal and transplantation of the human organ.

[17] AIR 2005 Kant 74.

[18] *Fortis Hospitals Ltd.* v *State of Karnataka*, Writ Appeal no. 8767 of 2013 (GM-RES), 17th September, 2013 (Karnataka High Court).

[19] (2007) 2 GLR 1780.

out of love and attachment or for any other unique circumstances. This fact has not been properly appreciated by the Committee and extraneous reason has been shown by the Committee. Therefore, the order that has been passed deserves to be quashed and set aside. The Court held that one will be of the view that the Authorisation Committee should give the parties a reasonable opportunity of being heard and since no such opportunity was given, it can be rightly said that the order passed by Authorisation Committee is in breach of the principles of natural justice and, hence, is an arbitrary award. The Authorisation Committee fails to give any reason for rejecting the application for transplantation of the kidney under Section 9(3) of the Act of 1994. Even the Appellate Authority ought to have heard the petitioner personally. Personal hearing in such type of delicate matter is necessary and therefore the order passed by the Appellate Authority is in breach of the principles of justice.[20]

2.5. Time as an Essence in Transplantation Procedure

The Court in *Balbir Singh vs. Authorization Committee,*[21] had noted the emergency aspect in the cases of transplantation and commented on the delay caused by the authorities in dealing with the application. Such delays can be fatal in cases of transplant. If the Authorisation Committee of each of the places i.e. the place where the parties belong and where the transplantation is to be held is required to evaluate the question of approval for transplantation, then that would inevitably lead to delays.

It is evident that the relevant provisions enshrined under the Act intend to impose some limitations on the removal and transplantation of human organs in order to prevent any irregularities in this area. Clause (6) of Section 9[22] provides that if the applicant applies for seeking approval for transplantation, then the Authorisation Committee shall inquire into the case. Additionally, it must give applicants the opportunity for a personal hearing. The Authorization Committee must determine whether the provisions of the Act and the rules have been followed and if not, it must reject the application while providing the rationale for such rejections.[23] In *Dr. Manoranjan Rout and Others.* v. *State of Orissa and Others*,[24] The requisite approval cannot be withheld on the basis of mere suspicion where there is no evidence in the record to refute the relationship between the donor and the beneficiary. While it is important to remember that organ donation aims to provide urgent aid to the needy person whose life is in danger. It is also pertinent to note that since time is of the essence in a situation of this sort, the donation should be given at the right time and in the way specified.

[20] Kataria & Sriniwas, 2014.
[21] AIR 2004 Delhi 413.
[22] The Transplantation of Human Organs Act, 1994, s. 9.
[23] *S Samson v. Authoritation Committee*, AIR 2008 Mad 227.
[24] AIR 2010 Ori 99.

In another case of *S Samson v. Authorisation Committee for Implementation of Human Organ Transplantation*,[25] the petitioner was not able to get a donation of an organ from his wife, children and aged parents because of a mismatch of blood groups and age factors. The donor was willing to donate and he and the petitioner were friends. The Authorisation Committee rejected the petitioner's request for kidney transplantation on the suspecting ground that there appears to be financial bonding between the donor and petitioner and they were acquainted for two years only. The Court held that Authorisation Committee ought to have given cogent and convincing reasoning for concluding that there exists a financial bonding between the petitioner and the donor. While taking note of the actuality of the situation, the Hon'ble Court directed the Authorisation Committee to reconsider the petitioner's case expeditiously.

2.6. Implementation of the Act

From time-to-time Courts have been issuing certain directions to the State Governments for the proper implementation of the provisions of the Transplantation of Human Organs Act, 1994. In *Arup Kumar Das v. State of Orissa and Others*,[26] the Orissa High Court observed that despite the Transplantation of Human Organs Act, 1994 being more than 16 years of existence, its goals and objectives have mostly not been achieved. The statutory entities charged with executing the Transplantation of Human Organs Act, 1994 do not appear to have a thorough understanding of the Act's many goals or the Parliament's intent when it passed the current legislation. The transplantation of human organs has not been outlawed; rather, it has been regulated under the parameters of the aforementioned statute, which must not be overlooked. Commercial use of human organs, as well as the prevention of and exploitation of people for financial gain, have been criminalised by the law. The Transplantation of Human Organs Act, 1994 itself permits both relatives and non-relative donors, so the Authorization Committee and the Appellate body must strive to ensure that while exploitation must be prevented and commercial dealing in human organs is forbidden, bona fide applicants may not be viewed with suspicion.[27]

In the above case, the Hon'ble Court issued to the State Government directions to attain the objectives behind the legislations which are as follows:

(i) In order to cope with requests for kidney transplants between non-relatives, Authorisation Committees may get appropriate instructions from

[25] AIR 2008 Mad 227.
[26] AIR 2011 Ori 21.
[27] AIR 1996 Kant 82.

State Governments that HLA[28] matching should not be a justification for withholding approval for renal transplantation.

(ii) At the time of dealing with the applications for kidney transplantation between non-relatives, the State Government can reconstitute the Authorisation Committee which comprises competent members who possess up-to-date knowledge and have kept pace with scientific developments that are taking place from time to time. Additionally, the Secretary of Health Department, Union of India, convenes a quarterly meeting of all Authorisation Committees of States to keep them updated of all scientific advancements that are likely to have an impact on their ability to exercise their jurisdiction under the Transplantation of Human Organs Act, 1994.

(iii) The State Government is mandated to issue the requisite notices setting the deadline for the Authorization Committee to consider applications for human organ transplants, as well as a timeframe for the resolution of statutory appeals.

(iv) It is mandated that all three of the state's medical colleges have facilities for removal, storage, and transplanting. For such purpose financial support and competent medical personnel must be provided to such government hospitals.

There is no clarity about certain important questions like in which hospital organ shall be removed and where shall the transplantation be conducted. Sometimes ambiguity in legal provisions causes an undue delay in conducting transplantation. putting the life of the patient in peril. This question came before the Hon'ble Supreme Court in the case of *Kuldeep Singh and Ors. v. State of Tamil Nadu*.[29] wherein the confusion regarding the provisions in this regard was cleared by exhaustive interpretation of the Act. In the instant case, the ambiguity regarding the ticklish yet critical issue of competence of the authorities of a particular state had put the transplantation on hold despite the availability of a willing donor and the precarious health condition of the recipient.

In the instant case, doubts had arisen between the Authorisation Committees of two states regarding the issuance of a no-objection certificate to approve transplantation. Petitioner no. 1 and 2 belonged to the State of Punjab. Petitioner No.1 was undergoing treatment in a Chennai hospital for a renal disorder. The hospital was duly approved under the Act of 1994. Petitioner No. 1's both

[28] Human leukocyte antigen (HLA) typing is used to match patients and donors for bone marrow or cord blood transplants. HLA are proteins -- or markers -- found on most cells in the human body. The immune system uses these markers to recognize which cells belong in person's body and which do not. *Available* at: https://bethematch.org/transplant-basics/matching-patients-with-donors/how-donors-and-patients-are-matched/hla-basics/ (visited on dec 21, 2019).

[29] AIR 2005 SC 2106.

kidneys were dysfunctional. The second petitioner wished to save his life by giving him one of his kidneys. No other considerations were factored into the equation; the conduct was motivated solely by love and affection. Doubts had arisen between the Authorisation Committees of two States regarding the issuance of no objection certificate to grant the approval for transplantation. Considering that both the petitioner and the donor belonged to the State of Punjab in this instance, the Court concluded that the Authorisation Committee of the State of Punjab must review the petitioners' claims.

While deciding the petition, the Supreme Court explained that the object of the Transplantation of Human Organs Act is intended to prevent commercial dealings in human organs. The Hon'ble Court clarified that, in light of the law, the Authorization Committee of the State that the intended donor and the receiver belong to must carry out the investigation to determine whether approval is to be accorded. This Committee will be in a better position to determine the real motivation for the authorization to remove the organs, including whether or not there is a commercial component. The onus is on the applicants to prove their sincerity by submitting pertinent information for the Authorization Committee's assessment. The Court additionally emphasised that the operative executive orders/government orders will hold the field in the event that any state is not covered by the application of the Act or the Rules.

In *Balvir Singh v. The Authorisation Committee and Ors,*[30] *the Hon'ble Delhi High Court clarified that* a comprehensive legislation was required to control malpractice and business operations involving human organs. In India, where a sizeable portion of the population lives below the poverty line, the risk of organ exploitation because of extreme economic necessity is high. In light of this, the Transplantation of Human Organs Act, 1994, a comprehensive law governing the removal and transplant of human organs, was adopted. Despite the protections offered by the Act, there have been instances of poor people being taken advantage of when organ transplantation is carried out for consideration under the guise of contributions, affection, or unique circumstances with the participation or complicity of medical professionals, particularly in the context of kidney transplant. The intermediary and others keep the cream, while the contributors receive a pitiful amount. There have also been reports of fraud or clandestine organ removal from ignorant and unwary people. According to the Act's framework, instances that do not involve donations from "close relatives" must be presented to the Authorisation Committee for approval. Only if the Authorization Committee is certain that there is love or attachment between the donor and recipient, or for any other unique circumstances, can it allow such situations. In these situations, it is left up to scientific and medical testing to decide whether the tissue compatibility and acceptance of the organ being transplanted.[31]

[30] AIR 2004 Del 413.

[31] *Id* at 414.

3. CONCLUSION

Judiciary plays a prime role in providing a safe, healthy environment and ensuring a crimeless society. India being a diverse country, the protection of human rights is the *sine qua non* for the peaceful existence of human beings. Judiciary has always proved to be a saviour in cases of human rights violations. The judiciary has a responsibility to interpret the law correctly and uphold these rights for the benefit of society. Court rulings should be written in such a way that they accommodate human rights whenever possible. After the analysis of various cases under the Transplantation of Human Organs Act, it can be finally concluded that the judiciary has been performing its duty very well to protect human rights and protecting human beings from exploitation. The antagonism resulting from the commercial dealings can be seen in some of the decisions of the Courts. Such types of practices should not only be abated but also checked with an iron hand, otherwise, it would become difficult to maintain the confidence of the society in the persons linked with the medical profession. Since the life of a person is in the hands of the doctors, there is a need to keep a check on their work, so that their work should not be converted into atrocious activities for their personal well-being.

DIALOGIC REVIEW OF HEALTH RIGHTS IN NORMAL TIMES AND CRISIS

Mariam Begadze[*]

1. INTRODUCTION: DIALOGIC REVIEW AND HEALTH RIGHTS

Many have written about social rights jurisprudence in India, however, only few have attempted to identify a systemic theory behind it. Khosla was one of them arguing that the logic behind court adjudication of social rights is enforcement of prior state action or commitment by elevating such failures to violation of a constitutional right. This he characterizes as 'adjudication of a conditional social right'.[1] This article investigating health rights jurisprudence in the Indian Supreme Court (SC) confirms Khosla's claim that the method is conditional social rights. However, there is more nuances to the judicial approach of the SC conveniently captured in the crisis-jurisprudence during COVID-19 pandemic, which this article will bring light to. The hypothesis defended in this article is that the SC enforces existing duties, political will or undertaken assurances, Separation of Powers (SoP) has not been revolutionized and a concept of Rule of Law (RoL) including judicial deference combined with verbal grandstanding prevails in the health rights jurisprudence. At best, the Court has been dialogic, although in a distinct manner as will be elaborated here.

The theory of constitutional dialogue originally emerged in Western common law jurisdictions in relation to the practice of judicial review in Canada[2] and the U. K.[3] As Yap defines, constitutional dialogue consists in an interaction between judicial and legislative branches, whereby the former achieves 'constructive' modification of the policy pursued, falling short of impeding, foreclosing a particular outcome.[4] In other words, dialogic review came to signify judicial role of focusing attention to constitutional values, often prone to be overlooked in the legislative process without having final say, but capable of provoking a response from the political branches. This differs from strong form review when the Court's

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[1] M. Khosla, "Making Social Rights Conditional: Lessons from India", *International Journal of Constitutional Law* Vol. 8, no. 4, 2010, p. 739.

[2] P.W. Hogg, A.A. Bushell, "The Charter Dialogue between Courts and Legislatures, The (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)," *Osgoode Hall Law Journal*, Vol. 35, no. 1, Spring 1997, pp. 75-124.

[3] A. Kavanagh "What's so weak about "weak-form review"? The case of the UK Human Rights Act 1998", *International Journal of Constitutional Law*, Vol. 13, Issue 4, October 2015, pp. 1008–1039.

[4] P.J Yap, *Constitutional Dialogue in Common Law Asia*, Oxford University Press, 2015, p. 3.

directions are conclusive. However, non-finality of decisions and dialogic review are multifaceted phenomena and manifests itself in different forms with differing effectiveness and desirability in varying contexts.[5] Even courts exercising strong form review cannot completely escape an iterative interaction with political branches about constitutional meaning.[6] On the other hand, dialogic remedies will differ in strength, and the weak remedy might be designed to be aggressive to be capable of incentivizing actual political reaction.[7]

Deliberative model as an extension of a dialogic one focuses more on the value of the process of deliberation in courts and participation of the (concerned) public. This squares nicely with the conception of deliberative democracy that objects to the narrow view of majoritarian politics without deliberative dimension.[8] Elements of such deliberative model were well captured in the juxtaposition of 'culture of justification' versus 'culture of authority' first voiced in the South African context.[9] Scholars have also used the analogy of 'fire alarm' to describe the role courts can play in focusing public attention that enables popular control over the actions and inactions of government.[10] Some theorize that through a dialogic review courts and legislatures play the specialized role for which they are better placed and in that way capitalize on their institutional strengths,[11] which on its own corresponds to an acceptable theoretical conceptions of Separation of Powers (SoP) in the literature.[12] It may seem a paradox to democratize political processes through a non-democratic body like a court, however, once the inherent

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5 R. Dixon, "The Forms, Functions, and Varieties of Weak(Ened) Judicial Review, " *International Journal of Constitutional Law,* Vol. 17, no. 3, September 9, 2019, pp. 904–30,

6 R. Chakraborty, "Judiciary in India: The Dialogic Space", *Journal of Political Studies*, Vol. 11, March-October 2015, p. 139.

7 D. Landau, "Aggressive Weak-Form Remedies", *Constitutional Court Review,* Vol. 5, 2013, pp. 244-245.

8 S. Fredman "Adjudication as Accountability: A Deliberative Approach", N. Bamforth, and P. Leyland (eds.), *Accountability in the Contemporary Constitution*, Oxford University Press, 2013, pp. 106-123; R. Gargarella, "'We the People' Outside of the Constitution: The Dialogic Model of Constitutionalism and the System of Checks and Balances, " *Current Legal Problems*, Vol. 67, no. 1, January 1, 2014, pp. 1–47.

9 E Mureinik, "Beyond a Charter of Luxuries: Economic Rights in the Constitution" *South African Journal on Human Rights*, Vol. 8, No. 4, 1992 pp. 464, 471; D Dyzenhaus "Law as Justification: Etienne Mureinik's Conception of Legal Culture", *South African Journal on Human Rights*, Vol. 14, No. 1, 1998, pp. 11-37.

10 DS Law "A Theory of Judicial Power and Judicial Review" *Georgetown Law Journal*, Vol. 97 no. 3, 2009, pp. 723, 731-732; D Landau 'Political Support and Structural Constitutional Law' *Alabama Law Review*, Vol. 67, No. 4, 2016, pp. 1069, 1121.

11 A. Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication,* Oxford University Press, 2012, pp. 35, 38, 48, 51, 53-54. P. O'Connell, *Vindicating Socio-economic Rights: International Standards and Comparative Experiences*, Routledge, London, October 2013, pp. 174-175, 184, 186.

12 Scholars working on SoP theory have emphasized the need for turning 'the limited capacities of institutions into complementary strengths' and combining the virtues of the legislature and the judiciary, see N. W. Barber, "Self-defense for Institutions" *The Cambridge Law Journal* Vol. 72, no. 3, 2013, p. 576. D. Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review*, Oxford University Press 2017, p. 138.

possibility of abuses in the political process is recognized, the same political process cannot be expected to act upon own failures - an underpinning idea behind Ely's theory of judicial review.[13]

What makes dialogic review relevant for this paper is its application to social rights adjudication.[14] The framework of democratic experimentalism expressed in the metaphor of 'destabilisation rights'[15] which stresses the benefits of judicial engagement in a dialogue over 'change-resistant institutions' makes such application more tailored[16] to social and health rights often impeded by such path-dependencies. Broadening this view about necessary destabilizing effect of judicial review, Dixon introduced terms such as 'blind spots' and 'burdens of inertia' and argued that courts have both capacity and responsibility to react to such defects of a political process.[17]

Even though formally India ascribes to a model of judicial supremacy, dialogic review has been discussed in the Indian context, too.[18] Apart from the use of interim orders and continuing mandamus this has been linked to the motives behind introduction of PIL,[19] namely to bring the voice of the poor in this dialogue, more in line with the deliberative model of adjudication. Without explicitly characterizing it as a dialogic review, the Court describing judicial role suggested that, even when the resource allocation issues and state inaction are concerned, at minimum, the Court could issue recommendations to 'prod' other branches into action if they shortfall in their duties.[20] Such advice-giving is a particularly weak form of dialogic review.

The paper will examine whether and in what form dialogic review takes place in the health rights litigation, whether the Court's approach is more

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[13] J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review*, Harvard University Press, Cambridge, Mass., 1980.

[14] Arguments about dialogic justice have often been applied to adjudication of socio-economic rights, see R. Gargarella, "Dialogic Justice in the Enforcement of Social Rights: Some Initial Arguments", A.E. Yamin and S. Gloppen (eds.) *Litigating Health Rights: Can Courts Bring More Justice to Health*, Cambridge: Harvard University Press, 2011, pp. 233 – 237, 243; S. Liebenberg and K. Young, "Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help?" H.A. García, K. Klare and L.A. Williams (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries*, Routledge London, 2015, pp. 237-257.

[15] C.F. Sabel and W.H. Simon, "Destabilization Rights: How Public Law Litigation Succeeds", *Harvard Law Review,* Vol. 117, Issue 4, 2004, p. 1020.

[16] S. Liebenberg, "Participatory Justice in Social Rights Adjudication", *Human Rights Law Review*, Vol. 18, no. 4, December 14, 2018, pp. 631-632.

[17] R Dixon 'Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited' *International Journal of Constitutional Law,* Vol. 5, No. 3, July 2007, pp. 391, 402-403, 418.

[18] R. Abeyratne and D. Misri, "Separation of Powers and the Potential for Constitutional Dialogue in India, " *Journal of International and Comparative Law* Vol. 5, no. 2, December 2018, pp. 363-386.

[19] R. Chakraborty, "Judiciary in India: The Dialogic Space" *Journal of Political Studies*, Vol. 11, March-October 2015, pp. 125-147.

[20] *State of Uttar Pradesh* v *Jeet S Bisht* (2007) 6 SCC 586.

nuanced than Khosla's conditional social rights framework or mere advice-giving as envisaged under the Court's SoP doctrine, and to what extent has the health crisis like COVID-19 pandemic pushed the Court to depart from its initial path. To answer the above questions, in the first section of the paper, founding decisions of the Indian SC on the right to health will be analysed. The second section will explore recent judgements issued in the context of COVID-19 pandemic. This will allow to explore possible convergences and divergences in normal times and crisis. As widely accepted, the crisis situations can be an opening for previously infeasible developments, including in the context of SoP and judicial power,[21] therefore, analysis of the COVID jurisprudence must provide reliable basis for evaluating the dynamics of dialogic review in health rights adjudication in India.

2. NUDGING FOR THE RIGHT TO HEALTH

Right to health was not included in the Constitution of India but was created through judicial interpretation in 1990s. As will be shown below, when the Court did recognize the right to health, it was given more expressive force than content.

The right to health was read in the right to life under article 21 gradually first in a 1995 case on workers in asbestos industry[22] and next in a 1996 case that concerned denial of emergency health care discussed below. However, in essence, both resembled tort cases that ended with compensation for the petitioners. In the first case, international documents, such as UDHR and the International Covenant on Economic, Social and Cultural Rights (ICESCR), specifically its guarantee of safe and healthy working conditions (though not the right to the highest attainable standard of health) were referenced when a right was created through interpretation of domestic constitutional provisions on state duties to provide welfare and just and humane conditions of work.[23] The second case concerning denial of emergency medical care in a state-run hospital due to non-availability of beds entrenched the right to health for all. The Court stated that '*[f]ailure on the part of a Government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life.*'[24] This decision did not include theoretical discussion of the right to health, its limits, or refer to relevant international norms as would be expected. Although scholars also mark this as the point of departure for the right to health, in view of the specifics of the case, that the situation was eminently life-threatening, it is doubtable to what extent this case introduced positive duties under the right to health. In *Samity*, the Court

[21] J. Vedaschi, "Introduction to Part III Separation of Powers in Times of Crisis", A. Baraggia, C. Fasone, and L. Vanoni (eds.), *New Challenges to the Separation of Powers*, Edward Elgar Publishing, 2020, p. 173.

[22] Consumer Education and Research Centre v. Union of India, AIR 1995 SC 922.

[23] *Id*, para 25:

[24] *Paschim Banga Khet Samity* v. *State of West Bengal,* AIR 1996 SC 2426, para 9.

comparing the situation of a patient to that of a poor defendant in need of free legal aid stated that despite costs, India as a welfare state had a duty to make primary health facilities available in the whole country. Understood in the context of the factual circumstances, this, at best meant that arguments of financial constraint could not be accepted if there were imminent risks to life. This did not extend to an ordinary health care, as will be shown below.

Further evidence for the contention that *Samity* was primarily a right to life case can be found in similar cases on emergency care decided in 1989,[25] and 2009,[26] which instead of the right to health, referred to the right to life. Other cases also confirm that the emergency is an exceptional consideration, for instance, courts order reimbursement of medical expenses at private hospitals regardless of fulfilling formal requirements, such that the hospital is approved by the state.[27] Furthermore, these cases on denial of emergency health care can be read similarly as the decision on the conditions in existing mental hospitals in *Bihar*, namely here as well the Court granted compensation due to negligent way of running existing hospitals without proper coordination or preoccupation with technical barriers resulting into avoidable harm.[28]

The Court in *Samity* discussed systemic problems that called for a positive state action, such as lack of facilities and beds in public hospitals and incorporated recommendations of the court-appointed committee (e.g., increasing availability of beds, the establishment of a centralized referral system amongst hospitals) in its orders. Significantly, the systemic problems in *Samity* had attracted the attention of political branches by the time it was decided, even a government committee had confirmed problems of availability. Nevertheless, the Court merely recommended that 'time-bound plan' is formulated in accordance with Committee directions and did not keep the jurisdiction to ensure appropriate steps would be taken, did not request submission of information regarding public investments or other measures for improvement of the public health care infrastructure.[29] Without the Court's monitoring, only minor, formal changes were made in law, namely in the Code of Medical Ethics[30] and most importantly, Clinical Establishments Act 2010, which imposed a duty on private facilities to provide health services in

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[25] *Pt. Paramanada Katara* v. *Union of India* AIR 1989 SC 2039.

[26] *Martin F. D'Souza* v. *Mohd. Ishfaq* (2009) 3 SCC 1.

[27] *Suman Rakheja* v. *State of Haryana*, 2004 13 SCC 562.

[28] Khosla, p. 755.

[29] *Paschim banga Khet Samity v. State of West Bengal,* AIR 1996 SC 2426; see also P. Singh, "Enforcing Social Rights through Public Interest Litigation: An Overview of the Indian Experience", S. Deva (ed.) Socio-Economic Rights in Emerging Free Markets: Comparative Insights from India and China, Routledge, New York, 2016, p. 112.

[30] Code of Medical Ethics Regulations 2002 drawn by the Medical Council of India also included an exception of emergency, when a physician has the duty to treat the patient, see Code of Ethics Regulations, 2002, *at* http://wbconsumers.gov.in/writereaddata/ACT%20&%20RULES/Relevant% 20Act%20&%20Rules/Code%20of%20Medical%20Ethics%20Regulations.pdf (last accessed 30 November 2021).

case of emergency medical condition, however, specified that this was to be done' within the staff and facilities available'.[31] The law did not refer to the proposed referral or coordination system discussed in the judgment either.[32] In this manner, the root problem of the lacking facilities and coordination mechanism for more efficient use of the existing capacity was left unaddressed.

The right to health was also referenced in cases, in which the Court merely enforced existing state duties, most commonly those related to reimbursement of government employees' health care expenditures. Even when the main question to be decided was whether the pay for staying in the hospital was integral part of the treatment and the actual amount charged exceeded the rate allowed per the state policy, the Court still framed this as a question of constitutional obligations. By reference to the constitutional duty to bear such expenses, the Court denied the relevance of financial burden and seemingly, to strengthen the symbolic meaning of the right to health, clarified that by now it was 'settled law' that the right to health was an integral part of the right to life.[33] Considering the shaky statement of the right to health in the prior cases discussed, this seemed to be an unwarranted jump that now entrenched the constitutional right to health, but still without theoretical elaboration. The pre-existing duty could be understood to be constitutional to the extent that the state had to, at minimum, provide what it had already undertaken, resembling the duty of non-regression under ICESCR, however, this was not explicitly acknowledged in the judgment. Subsequent case-law confirmed that the Court would not modify a non-arbitrary policy, especially if advised by experts[34] to provide even the guarantees included in the previous versions of the policy emphasizing that no right was absolute but subject to '*permissible reasonable restrictions*'.[35] The Court also identified constitutional basis for consideration of costs, namely article 41 of the Constitution, which recognizes limits of 'economic capacity and development' when providing for the right to public assistance in certain cases (e.g. unemployment, sickness).[36] It is noteworthy that the Court in this case was reluctant to completely denounce the constitutional duty to provide medical facility by clarifying that '*the State can neither urge nor say that it has no obligation to provide medical facility. If that were so it would be ex facie violative of Article 21. Under the new policy, medical facility continues to be given* [..] *but the amount of payment towards reimbursement is regulated*.'[37] Despite the ambiguity regarding the possibility to revoke medical coverage of government employees if the resource constraints so required, it is evident that regressive changes

[31] The Clinical Establishments (Registration And Regulation) Act, 2010, section 12 (2).

[32] B. Kajal, V. Johari and V. Divan, "The Right to Health: A Winding Road to Actualization", P. Prasad, and A. Jesani (eds.) *Equity and Access: Health Care Studies in India*, Oxford University Press, Delhi, 2018, p. 372.

[33] *State of Punjab* v. *Mohinder Singh Chawla*, (1997) 2 SCC 83, para 4.

[34] *State of Punjab* v. *Ram Lubhaya Bagga*, (1998) 1 SCR 1120, paras 25-26, 29, 31.

[35] *Id*, para 35.

[36] *Id*, para 32.

[37] *Id*, para 27-28.

to the policy were acceptable, could not be revoked on the basis of constitutional right to health, thus the Court did not overstep the boundaries of traditional SoP doctrine.

An important area in which the Court's involvement had impact on financial allocations for ordinary health care is free access to HIV/AIDS medication.[38] First PIL[39] on the issue was filed in 1998.[40] Government formally started a National AIDs Control Program in 1987, but the fight against AIDs became serious around 1992, when National AIDS Control Organization (NACO) was established. Still, the treatment dimension of the policy was lacking. Official justification for the failure to provide a universal treatment program was the cost of universal provision. When the treatment program was still absent from the 2002 policy, the Court demanded explanations from NACO. Soon, the policy to provide treatment to around 100 000 people for the first year in the six high-burden states was announced, however, year and a half later only 10 000 patients were enrolled. In 2005, NACO head was replaced by Sujata Rao, who engaged with the issue more proactively. Treatment numbers increased substantially in 2006 and death rates also started to decrease.[41] By 2008, 172 HIV treatment centers were available and treatment program included second-line drugs. In 2008, anti-retro viral therapy (ART) guidelines were developed in the 'Office Memorandum' issued by NACO, which restricted access to treatment if the first-line treatment was not received in health centers registered with NACO. This aspect of the policy was questioned in the Court, which directed the parties to engage in consultations and produce an agreement. Although NACO was reluctant initially, in the end, agreement was reached to extend access to all HIV patients regardless of the way first-line treatment was received, which was endorsed by the Court. It is important that from the outset the Court held equal access to second line treatment as a condition of the consultations and in one of its orders rejected fiscal and capacity related concerns as reasons for denial of access to second line treatment.[42] Until 2013, when

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[38] First HIV case in India was identified in 1986. As elsewhere, the first period of HIV policy was characterized by blame shifting and took a punitive turn towards the diseased. On the basis of the 1989 National AIDS Prevention Bill, 'high risk' people could be subject to compulsory HIV testing and isolation, if found HIV positive. Only in 2002, was the shift to human rights-based approach visible in the National AIDS Prevention and Control Policy (NAPCP).

[39] Sahara House filed PIL in 1998. Two more PILs by Sankalp Trust and Human Rights Law Network were filed in 1999 and 2003, respectively. The PILs were joined together.

[40] *Sankalp Rehabilitation Trust* v. *Union of India* 1999, Writ Petition (C) No. 512/1999 *at* <https://www.escr-net.org/caselaw/2020/sankalp-rehabilitation-trust-and-anr-v-union-india-writ-petition-c-no-5121999> (last accessed 30 November 2021).

[41] M. Kavanagh, "Constitutionalizing Health: Rights, Democracy and the Political Economy of Health Policy" (2017). Dissertations available from ProQuest. AAI10638897. Available at https://repository.upenn.edu/dissertations/AAI10638897 (last accessed 30 November 2021), pp. 235, 237, 244, 246, also Figure 5.7 at 239.

[42] A. Grover, M. Misra and L. Rangarajanin, "Right to Health: Addressing Inequities through Litigation in India" C.M. Flood and A.M. Gross (eds) *The Right to Health at the Public/Private Divide: A Global Comparative Study*, Cambridge University Press, New York, 2014, p. 439; P. Anashri, "Revisiting the Indian Experience of Economic and Social Rights Adjudication:

the case was closed, multiple orders were issued, including requests of progress reports and plans.[43] Four years after the case was closed, in 2017 HIV bill was adopted with a robust treatment commitment, which extends care to all PLHIV.[44]

It has been argued that the Court's involvement and the orders it issued, has pushed the universal rollout of the treatment program. It is true that although there was no principled opposition to the Court orders, with a specific agency working on the universal rollout, the success in implementation of the policy seemed rather slow before the Court's intervention. The Court did seem to accelerate the process by increasing the pressure on the Government and NACO, as well as by strengthening the latter, as a body more favorable towards rollout of universal treatment. However, the policy change achieved could not be traceable to an authoritative judgement, rather the pressure generated by the SC through interim orders. Thus, in these circumstances, the Court did not generate political attention from scratch or confront an opposing executive but seemed to act upon initial political will increasing the political cost of inaction through interim court orders.

To sum up, the right to health in India is situated between non-justiciability and weak substantive rights.[45] Initial cases that recognized the right to health were, in essence, either right to life cases, setting minimal rules regarding emergency health care or were limited to duties of compensation when there were statutory duties already in force. Although the Court tried to focus attention on a structural problem such as lack of facilities and beds when the right to life was also engaged (a problem that the government also acknowledged), jurisdiction was still not retained. The judgements that followed merely required enforcement of existing state duties, which meant that once the political decisions changed, the judiciary accepted the change without holding it in contradiction with some systemic theory of the right to health. Finally, the Court's involvement on the issue of access to HIV/AIDs medicines and, especially its norm-setting role for negotiations, could be taken as an exception, when what followed was increased budgetary allocation for one type of a health problem. However, the case did not result into a conclusive judgement to that effect, rather defined the environment, in which the final decisions were made by political branches. This case illustrates the approach of the Court to seriously engage with issues unaddressed in statute or policy when there is some political will to build on. Below discussion of court jurisprudence

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The Need for a Principled Approach to Judicial Activism and Restraint", *International and Comparative Law Quarterly*, Vol. 63, Issue 2, April 2014, pp. 398-399.

43 Sankalp Rehabilitation Trust v. Union of India 1999, Writ Petition (C) No. 512/1999 *at* <https://www.escr-net.org/caselaw/2020/sankalp-rehabilitation-trust-and-anr-v-union-india-writ-petition-c-no-5121999> (last accessed 30 November 2021).

44 Kavanagh, p. 250.

45 S. Shankar, "Scaling Justice: India's Supreme Court, Social Rights, and Civil Liberties", *Oxford University Press*, 2009, p. 149.

related to COVID-19 pandemic will show whether any changes followed in health rights adjudication during such crisis.

3. COVID-19 AND RIGHT TO HEALTH IN INDIA

Pandemic of communicable diseases such as COVID-19 poses rather extraordinary problems and is different from regular health challenges in normal conditions. While in the former situation governments cannot benefit from prior planning (though general preparedness will still help) and due to communicable nature of the disease are inevitably faced with crisis, in the latter situation governments are even obligated to plan based on epidemiological evidence as the standards of the ICESCR calls for.[46] However, on the flip side, health crisis attracts concentrated attention of all, including political branches which might sideline regular health care for other diseases.[47] Furthermore, emergency nature of such a pandemic is conducive to centralization of power. Similarly, this is a double-edged sword, with prospects of effectiveness, mistakes and abuses simultaneously. Bearing in mind this specific nature of COVID-19 pandemic, the article will look at health rights cases to examine the role conception of Indian judiciary during a crisis like pandemic, namely whether the health crisis changed the way the court dealt with health rights before. As noted, during such crisis, changes to traditional frameworks, including of judicial self-conception are more likely. Therefore, cases during this period can best check whether the SC is inclined to enter territory of political branches reconsidering SoP theory. Before these cases are analyzed, a brief introduction to the pandemic management in India and the legislative framework invoked is needed.

Unlike health in normal conditions, states, and the central government share competencies in responding to a pandemic like COVID-19. In the circumstances, when emergency on public health grounds is not envisaged under the Constitution, and there is no national public health law, Central Government resorted to Disaster Management Act (DMA) qualifying pandemic as a disaster, interpretation held controversial by many.[48] DMA pursues a central command model and vests disaster management authorities in a National Disaster Management Authority (NDMA) chaired by the prime minister of India. DMA allowed the central government to take measures it deemed expedient without declaring emergency and prior legislative scrutiny. While the rules issued by DMA are subject to modification or annulment by agreement of both houses of Parliament, in essence

[46] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, available at: https://www.refworld.org/docid/4538838d0.html (accessed 30 November 2021).

[47] J.W.T. Elston et al., "The Health Impact of the 2014-15 Ebo0la Outbreak," Public Health, Vol. 143, February 2017, pp. 6-70.

[48] *Disaster Management Act*, 2005, s. 6, 10, 38, 62, 72.

it amounted to rule by decree, including in states.[49] Similarly, state governments relied on an outdated Epidemic Diseases Act 1897 to enact necessary public health measures without legislative oversight. Invoking DMA, on 24 March 2020, the federal government imposed sudden and nationwide strict lockdown taking effect within four hours.[50] The Union government had capped vaccine prices and services charges for vaccination at private hospitals,[51] while some states (10 by August 4, 2020)[52] have capped rates for COVID-19 treatments in private hospitals.[53] Adoption of these coercive rules by the Union were made possible by the nature of DMA, which allowed centralization of power both on a vertical and horizontal level.[54]

First case of COVID-19 in India was reported on January 20, 2020. Total number of cases[55] and deaths peaked (3 per million) in May 2021.[56] While production of vaccines, the start of inoculation in January 2021 and 30% of complete vaccinations,[57] as well as central measures for provision of medical equipment and PPE kits,[58] was a sign of an improving capacity, vulnerability of the health care system that works to its full capacity during normal times, was dramatically exposed during the crisis. After initial grip on the pandemic management, and blame shifting between the Centre and opposition-ruled states, the central government relinquished control, including on the vaccination process. As commentators described 'the pendulum moved from outright centralisation to

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[49] Parliament was not convened for prolonged period of time and when assembling laws were passed without much deliberation, K. Raj, Thulasi: COVID-19 and the Crisis in Indian Democracy, VerfBlog, 2021/2/26, available at <https://verfassungsblog.de/covid-19-and-the-crisis-in-indian-democracy/> (last accessed 30 November 2021).

[50] Lockdown in India meant 'stay at home' orders, complete ban on transport and flights, closure of schools, non-essential shops and prohibition on assembly and events. Sudden national lockdown had disproportionate effect on the most vulnerable, including around 450 million migrant workers, compelled to walk from urban centers to home states. From April 29, exceptions were made to the lockdown for certain groups, including migrant workers and the restriction of movement was further relaxed in phases from June 2020.

[51] "*Government Caps Prices of COVID-19 Vaccines at Private Hospitals", The Hindu*, June 9, 2021.

[52] A. Bhuyan "'Exorbitant' COVID-19 Treatment Prices Slashed As State Governments Step Up", *IndiaSpend,* August 4, 2020.

[53] *"Govt Caps per-day Package Rates of Private Hospitals" The Hindu,* June 21st, 2020.

[54] S. Thomson and E. C Ip, "COVID-19 Emergency Measures and the Impending Authoritarian Pandemic, Journal of Law and the Biosciences Vol. 7, no. 1, July 25 2020, pp. 20-22; T.R. Chowdhari, and N. George. "India: Federalism, Majoritarian Nationalism, and the Vulnerable and Marginalized", V.V. Ramraj (ed.) *Covid-19 in Asia: Law and Policy Contexts*, Oxford University Press, New York, 2021. K. Raj, Thulasi: COVID-19 and the Crisis in Indian Democracy, VerfBlog, 2021/2/26, available at <https://verfassungsblog.de/covid-19-and-the-crisis-in-indian-democracy/> (last accessed 30 November 2021) Bhatia, Gautam: An Executive Emergency: India's Response to Covid-19, VerfBlog, 2020/4/13, available at <https://verfassungsblog.de/an-executive-emergency-indias-response-to-covid-19/> (last accessed 30 November 2021).

[55] Data *at* <https://ourworldindata.org/covid-cases> (last accessed 30 November 2021).

[56] Data *at* <https://ourworldindata.org/covid-deaths> (last accessed 30 November 2021).

[57] Data *at* <https://ourworldindata.org/covid-vaccinations> (last accessed 30 November 2021).

[58] India approved use of two vaccines: Covishield vaccine of Oxford AstraZeneca manufactured in India by the Serum Institute in Pune, and Covaxin, from the Indian company Bharat Biotech.

unilateral decentralisation.'[59] Such retreat was controversial as this was done when the shortage of oxygen medicines and other supplies were most acute requiring central coordination.

3.1. Negotiating Right to Health in a Crisis

By initiating suo moto cases, the Court marked itself as a central actor in the management of COVID-19 pandemic within the first month of a WHO declaration of a global pandemic.[60] Soon, the Court started to address various issues in relation to the pandemic, including situation of migrant workers,[61] reduced labor protection for workers based on health emergency (in the State of Gujarat),[62] congestion in prisons,[63] situation of children in protective homes[64] and general situation of orphaned kids during the pandemic,[65] issues of running the hospitals.[66] Some of the court orders aimed implementation of existing guidelines (e.g., uniform discharge policies, policy on supply of PPE)[67] or reflection of government commissioner expert opinions in them (e.g. reasonable rates of Covid facilities/ tests).[68] Most importantly, the Court discussed costs of medical care, supply of essential drugs, of medical oxygen, vaccination policy.

During the COVID-19 pandemic, common reading of the right to health by the Indian SC was programmatic, used as a ground for holding political branches accountable by requesting clarifications and suggesting policies, without direct and individual remedies. In a suo moto initiated during the second wave in

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[59] N. Sahoo and A. K. Ghosh 'COVID-19 Challenge to Indian Federalism' (2021), orfonline, available at <https://www.orfonline.org/wp-content/uploads/2021/06/ORF_OccasionalPaper_322_Covid-Federalism.pdf> (last accessed 30 November 2021).

[60] *Re Contagion of COVID-19 Virus in Prisons, suo motu writ petition* (civil) 1/2020 (order of March 23, 2020).

[61] *Problems & Miseries of Migrant Labourers* (2020) 7 SCC 231 (order of June 29, 2021).

[62] *Gujarat Majdoor Sabha* v. *State of Gujarat*, IVLLJ 257 SC (2020).

[63] *Re Contagion of COVID-19 Virus in Prisons, suo motu writ petition* (civil) 1/2020 (order of March 23, 2020).

[64] The Court in a *suo moto* case discussed the situation of orphaned kids in a protection home, sent out a formular annexed to the order to state governments for monitoring in relation to care of children in conflict with law and advised necessary preventive measures during the pandemic, Re Contagion of *Covid 19 Virus in Children Protection Homes* (2020) 15 SCC 280 (order of April 3, 2020) and SCC 289 (order of June 11, 2020).

[65] In subsequent orders, it asked the Union government to care for children who had become orphaned during pandemic and recommended specific measures, following the announcement of a corresponding scheme by the Union Government on May 29, see *In Re: Contagion of COVID 19 Virus in Children Protection Homes* (order of June 1, 2021).

[66] The Court ordered creation of help desks in hospitals and ordered that free-help lines were run to collect grievances, see *Proper Treatment of COVID-19 Patients & Dignified Handling of Dead Bodies in the Hospitals* (order of June 19, 2020, Order of December 18, 2020).

[67] *Jerryl Banait* v *Union of India*, writ petition (civil) 10795/2020 (8 April 2020).

[68] *Proper Treatment of COVID-19 Patients & Dignified Handling of Dead Bodies in the Hospitals* (order of June 19, 2020).

April 2021 by a 3-judge bench, the Court offered a theoretical support to such mode of adjudication. While initiating the case, the Court stated that the jurisdiction aimed at facilitating a *'dialogue of relevant stakeholders, the UOI, the States and this Court'* and did not intend '*to usurp the role of the executive and the legislature*.' According to the Court, applying Fredman's bounded deliberative approach, state authorities had to 'justify the rationale behind their policy approach'.[69] Even before making this statement, the Court was limiting itself to general directions, for instance, to increase testing,[70] domestic production and stock of PPE, suggesting restriction of import.[71] After laying this theoretical ground, the Court continued with requests of clarifications, suggestions and recommendations. For instance, the Court inquired whether there was an alternative way of registering other than through a digital portal; to what extent rural areas were covered; what the percentage of government participation was in funding Research and Development (R&D) costs. The Court made various suggestions, some of them presented as a mere possibility that the Central Government could consider, for instance, constituting a special team to prosecute those who sell medicines at exorbitant prices or are involved in black marketing, stressing that it was up to the Government to decide.[72] The Court also discussed the possibility of invoking Patents Act, 1970 and Drugs Price Control Order, 2013 for granting compulsory licenses and regulating drug prices, respectively. The Court made recommendations as general as increasing supply of oxygen from outside India. Apart from these, the Court also ordered to devise plans, for instance, a uniform national policy on admission to hospitals in exercise of its statutory powers under the DMA, specifying the issues that had to be addressed in the policy, sometimes also indicating impermissible rules, for instance, that for admission a person needed to arrive in the government-run ambulances or had to have a valid ID card. The Court's orders of the same period reveal similar emphasis on judicial restraint. In an unreported ruling of May 21, a two-judge bench disapproved of the Allahabad high court's order that each of the 97, 000 villages must be provided with two ambulances with Intensive Care Unit (ICU) facilities, which according to the SC would not be 'humanely impossible' stating that courts should not issue orders that cannot be implemented.[73] Posing the

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[69] *Distribution of Essential Supplies and Services During Pandemic Suo Motu Writ Petition* (Civil) No. 3 (order of April 30), para 35.

[70] *Proper Treatment of COVID-19 Patients & Dignified Handling of Dead Bodies in the Hospitals* (order of December 18, 2020).

[71] *Jerryl Banait* v *Union of India*, writ petition (civil) 10795/2020 (8 April 2020).

[72] *Distribution of Essential Supplies and Services During Pandemic Suo Motu Writ Petition* (Civil) No. 3 (order of April 30), para 61.

[73] (--) "Supreme Court stays Allahabad HC's 'Ram bharose' Covid Order, says 'not implementable'" Hindustan Times available at https://www.hindustantimes.com/india-news/supreme-court-stays-allahabad-high-court-s-ram-bharose-covid-order-101621612584654.html (last accessed 30 November 2021)

(--) 'High Courts must not pass unrealistic orders: Supreme Court' available at https://economictimes.indiatimes.com/news/india/high-courts-must-not-pass-unrealistic-orders-supreme-court/articleshow/82851614.cms?utm_source=contentofinterest&utm_medium=text&utm _campaign=cppst (last accessed 30 November 2021).

question how far can courts enter the issues which are exclusively in the domain of the executive, the Court stated that High Court orders shall be treated as advice rather than directives to the state Government.[74]

When it came to petitions regarding easing financial burden of patients by regulating prices of treatment for COVID-19 and covering cost for the poor and vulnerable by expanding Public Health Schemes, the Court again showed restraint. Concluding that the Union can issue certain directions under DMA, the Court made interim orders, limited to ordering a plan focused on the marginalized sections of society and sharing of information between the Centre and the states. The decision included a lengthy consideration of the provisions in the National Health Bill, 2009, which 'did not see the light of the day', implying that it would have been useful in solving the problems at hand.[75] In a case on COVID testing, the Court initially found *prima facie* substance in the petition to make testing free in private Labs of COVID-19, without discussing relevant constitutional standards.[76] However, in a subsequent order again without elaborating on relevant standards merely clarified that it only meant that to apply to economically weaker sections of the society. Noting that 'framing of the scheme and its implementation are in the Government domain, who are the best experts in such matters', the Court only suggested that Government considers if 'any other categories of persons belonging to economically weaker sections of the society' beyond those already covered by a government scheme (Ayushman Bharat Pradhan Mantri Jan Aarogya Yojana) can be extended benefit of free testing. Other orders were framed in a similar language, although private labs could continue to charge fees as before, the Court stated that central government 'may issue' necessary guidelines for reimbursement of cost of free testing done performed by private Labs.[77] Although there were signs of more direct interference in policy making in this case, the nature of adjudication through interim orders allowed the Court to reverse its statements once there were met with objections.

Particularly significant was the decision made by Indian SC concerning the New Liberalized Vaccine Policy, which both confirms the dominant pattern, however, also departs from previous orders of the Court. Namely, unlike previous jurisprudence, the Court in this case explicitly contradicted the firm government position unchanged despite prior opposition criticism[78] or the

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[74] (--) 'Can courts venture into executive domain on COVID-19 management and how far, SC to examine' available at https://economictimes.indiatimes.com/news/india/can-courts-venture-into-executive-domain-on-covid-19-management-and-how-far-sc-to-examine/articleshow/84407445.cms? utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (last accessed 30 November 2021).

[75] *Sachin Jain* v. *Union of India*, 2020 SC 1085.

[76] M.Z.M. Nomani and F. Sherwani, "Legal Control of Covid-19 Pandemic and National Lockdown in India" *Journal of Cardiovascular Disease Research*. Vol 11, no. 4, 2020, pp. 32-35.

[77] *Shashank Deo Sudhi* v. *Union of India*, (2020) 5 SCC 134.

[78] The President of the Congress Party had sent a letter to the Prime-Minister asking to reverse the policy, see (--) 'Vaccine policy discriminatory, reverse it: Sonia Gandhi to PM Modi' (2021)

Court's concerns already expressed in a previous interim order.[79] In this case, alongside its deliberative approach asking for clarifications and justifications,[80] the Court declared a new government policy on vaccination procurement and possibility of paid vaccination for the 18-44 age group *prima facie* irrational and arbitrary. Importantly, right to life as encompassing right to health was mentioned by passing and was not elaborated on. Based on the new policy, vaccine quantity to be procured by States were preset proportionately to their population, the price charged for vaccines procured by states was more than double the amount charged to the Union[81] with no guarantee that vaccines would be provided free of charge to the relevant age group. Apart from 25% procured by states, the other 25% would be procured and distributed by private hospitals. This meant that vaccine manufacturers could charge higher prices to states and private hospitals than it did for the Union.[82] Various concerns were expressed in this order,[83] however, the Court

Business Standard available at https://www.business-standard.com/article/current-affairs/vaccine-policy-discriminatory-reverse-it-sonia-gandhi-to-pm-modi-121042200598_1.html.

79 Questions asked by the Court indicated its concerns with the policy, for instance, the Court asked, whether studies were conducted that found that decentralized procurement would promote competitive markets, increase production and eventually reduce the prices of the vaccines, see *Re: Distribution of Essential Supplies and Services During Pandemic*, 2021 SC 355 (April 30, 2020).

80 The Court asked why the earmarked funds could not be utilized for vaccinating persons in the aged group 18-44. The Court requested clarification from all State/UT Governments whether vaccines would be provided free of charge for this age group. It was also asked how government participation in R&D costs was reflected in the procurement price. The Court also asked whether a 'means-test' was conducted to conclude that 50% of the population in the 18-44 age group would be able to afford to purchase vaccines from private hospitals and if not, asked what the rationale behind private hospitals being provided a quota for procurement equal to the State/UT Governments was. The Court also inquired about future monitoring of vaccine provision by private hospitals and asked to submit 'any written policy' on this. The Court also asked more general questions regarding the progress of vaccination in the country disaggregated into urban/rural categories, as well as vaccination plans, complete data on purchase history of all vaccines etc. see *Distribution of Essential Supplies and Services During Pandemic Suo Motu Writ Petition* (Civil) No. 3 (May 31).

81 It was Rs 150 per dose for the Central Government, Rs 400 per dose for the State Government and Rs 600 per dose for private hospitals.

82 *Distribution of Essential Supplies and Services During Pandemic Suo Motu Writ Petition* (Civil) No. 3 (order of April 30), paras 39-43.

83 The Court also shared the concerns expressed by amici that in a competition for a scarce resource state governments would be in a much worse negotiating position than the Union. Most importantly, the Court explained that even if vaccines were provided to individuals free of charge, spending public money on an avoidable expense (also not foreseeable by states before the policy was adopted) eventually harmed the interests of individuals, particularly in financially distressed States/UTs. Furthermore, the Court also questioned the feasibility of incentivizing increased production of vaccines by producing competitive prices as the two conditions for negotiation with the two manufacturers, price and quantity were preset by the Central Government. The Court also seriously questioned exclusive reliance on a digital platform for vaccination between the ages of 18-44 vis a vis the right to equality and the right to health and the policy which entrusted procurement of 25% of all available vaccines to private hospitals. However, none of these aspects of policy were declared prima facie arbitrary or irrational. The Court emphasized that half of those in the 18-44 age group could not be expected to afford to pay for the vaccination in private hospitals and that those who could afford it, having better access to the digital platforms, were likely to get free access to scarce vaccines first, leaving vaccines in private hospitals unutilized. Finally, due to

primarily based its conclusions on the facts that with the mutation of the virus, the 18-44 age group was also in serious need of vaccines and that the policy did not prioritize the more vulnerable even within that group.[84] Although the reasoning implied that the current form of the policy was not constitutionally acceptable, even the statement about its irrational and arbitrary nature was qualified by the phrase *'prima facie'*. This allowed the Court to order revisitation, rather than declaration of it as void. In line with the previous order, the Court reiterated its dialogic role, following a bounded-deliberative model.[85] The Court explains that in such a dialogic review 'various stakeholders are provided a forum' in an open deliberative judicial process to demonstrate that policies chosen, and justifications provided meet the standards of reasonableness and are not manifestly arbitrary.[86] Given the weakness of the final direction to merely revise the policy (rather than make it void), which were declared irrational and arbitrary, but with a prima facie characterization, judicial role remained limited and did not revolutionize SoP doctrine in this case either.

The Government reversed the new policy and returned to centralized procurement of vaccinations a week after the Court order,[87] and even before this ruling, considering the Court's concerns in an earlier interim order, abandoned exclusive reliance on digital platforms.[88] Despite pre-existing opposition criticism, the Prime Minister made the reversal in the spirit of shifting the blame on Opposition-ruled states as drivers for the old, now discarded decentralized policy.[89] This exchange indicates that the Court decision had increased the political cost of maintaining the policy to an extent that now the Government was disassociating itself from it, while prior objection from the opposition had not been sufficient for such a change.

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geographic location of most private hospitals, residents of rural areas would be in an unequal situation, *Distribution of Essential Supplies and Services During Pandemic Suo Motu Writ Petition* (Civil) No. 3 (May 31), paras 9, 29, 32, 33.

84 *Distribution of Essential Supplies and Services During Pandemic Suo Motu Writ Petition* (Civil) No. 3 (May 31), para 22.

85 *Id*, para 15.

86 *Id*, para 19.

87 The Union Government would purchase 75% of vaccines. However, what remained unchanged was the quota for the private sector, namely the 25% of all vaccine, H. Sharma 'After adverse reaction, a change in dose: Free Covid vaccines for all, only Centre to procure' (2021) the Indian Express available at https://indianexpress.com/article/india/pm-narendra-modi-address-free-jabs-centre-to-procure-covid-vaccines-7348171/.

88 (--) 'On-site registration for Covid-19 vaccination for 18-44 years age group now enabled on CoWin' (2021) *The Economic Times* available at https://economictimes.indiatimes.com/news/india/on-site-registration-for-covid-19-vaccination-for-18-44-years-age-group-now-enabled-on-cowin/articleshow/82905457.cms?from=mdr.

89 H. Sharma 'After adverse reaction, a change in dose: Free Covid vaccines for all, only Centre to procure' (2021) *The Indian Express* available at https://indianexpress.com/article/india/pm-narendra-modi-address-free-jabs-centre-to-procure-covid-vaccines-7348171/.

Nevertheless, a traditional SoP framework was not completely intact in the stressful pandemic situation. Exceptionally, the Court seemed to engage in a strong form review, however, this was done only in situations in which the state authorities had made appropriate assurances. For instance, the Court without referring to the right to health directed the Central Government, in line with its assurances, to solve the deficit in the supply of oxygen in the National Capital Territory of Delhi (NCT) within 2 days, also to create a decentralized emergency stocks of oxygen within the next four days, to be refilled daily, in collaboration with the States. The Central Government admitted that the allocation remained the same despite rising demand, gave assurance that the supply would align with demand and 'the issue will be resolved completely in a spirit of co-operation'.[90] When the Government raised the issue of limited supply, the Court referred back to previous affidavits admitting the issue was not scarcity of oxygen, rather deficiencies in distribution.[91] Thus, in the limited cases, in which 'strong form' review was employed, remedies were issued in the context of government assurances made within the proceedings, the scope of the right to health was not expanded and again it corresponded to the framework of the dialogic review even if distinctive for India.

4. CONCLUSION: A DISTINCTIVELY INDIAN DIALOGUE

Contrary to dominant scholarly opinion, non-legislated right to health in India is still situated 'between non-justiciability and weak substantive rights'.[92] As the analysis of the cases decided in relation to COVID-19 indicate, neither did such a public health crisis bring a substantive change.

In its early jurisprudence, the Court was cautious about the scope of the right and importantly, did not attempt to disengage the right to health from the right to life, even after the fundamental nature of the right to health was established. Although due to its characteristic concentration of political attention, COVID-19 pandemic did push the health rights jurisprudence to its limits (e.g., SC initiated cases, retained jurisdiction over them), in principle, the jurisprudence on health rights converged in normal times and crisis. Namely, initial strict interim orders were modified when met with objections from the other interested parties (from private labs in the case on testing) and was managerial only when it was acting upon existing political assurances. There was an exception to this dominant pattern in the case on the new vaccination policy, however, for retaining the fine line, in the context of evident commitment of the political branches to the policy (later blamed on pressures from the states), the Court issued a rather weak remedy

[90] *Distribution of Essential Supplies and Services During Pandemic Suo Motu Writ Petition* (Civil) No. 3 (order of April 30), paras 19-21.

[91] *Id*, para 32.

[92] S. Shankar *Scaling Justice: India's Supreme Court, Social Rights, and Civil Liberties*. Oxford University Press, Delhi, 2009, p. 149.

to merely revisit it, furthermore, the case itself simultaneously implicated right to equality issues. Shankar makes similar observation when she notes that judgements in health inclined to 'committee-style collaborative measures (rather than strong penalties) to elicit actions from the government.'[93] That even the health crisis jurisprudence remained within the 'bounded deliberative model' only supports the proposition above, that health rights essentially oscillate between non-justiciability and weak substantive rights in India. In this manner, the right to health is brought from the backdoor, through negotiated remedies following broad enunciation of its fundamental significance, are not authoritatively demanded as of right, through elaboration of its immediately enforceable scope, and accordingly, does not reframe the essence of the SoP theory. While the framework of Khosla's 'conditional social rights' still applies, this analysis also reveals that conditionality alongside existing legislative obligations extends to nuanced political will. It is not only existing legal basis that the Court relies on, but political will/assurances that is often manufactured by the Court during the proceedings, which it then acts upon through the flexibility of interim orders without establishing precedents, often merely formalizing political assurances in seemingly managerial judicial orders. This co-exists with soft and reasoned remedies at the opposite end of the spectrum. Both streams of jurisprudence correspond to dialogic review, though acquiring a distinctive form in India.

The coexistence of managerial interim orders without rights analysis and extensively reasoned weak directions seems counter intuitive at once. Nevertheless, when seen in the context of the Court's pragmatism to prevent harm to itself, whilst increasing political cost of inaction by political branches, such variable strength of remedies makes more sense. To elaborate, with such strategy of oscillating between principled weak remedies and strong unprincipled ones, the Court mitigates damage to its legitimacy, while makes most of the political costs of inaction by either being managerial when direct objection is unlikely, and or restrained, but principled, when the opposite is the case. Political cost of inaction is higher than usual when direct benefits to the masses are concerned. This can explain why seemingly weak remedies in the vaccination case still was effective, while despite seeming political commitment, universal rollout of HIV/AIDs medicines affecting a small and stigmatized segment of the society was more protracted. In this light, 'nudging' by courts, changing the political cost of inaction (even, if theoretically possible to be overcome) is not an insignificant addition to the judicial toolkit for effective dialogue and spurring policy making by previously inert, or even opposed political branches. Through such strategy of the Court extracting political action safely, without establishing non-negotiable standards from above, policy making is left to the political branches. This is not to say that SoP is not affected. PIL, frequent use of expert input, also of interim orders would suffice

[93] Shylashri Shankar, "India's Judiciary: Imperium in Imperio?" in *Routledge Handbook of South Asian Politics: India, Pakistan, Bangladesh*, Sri Lanka, and Nepal, ed. Paul R. Brass (Milton Park, Abingdon, Oxon: New York: Routledge, 2010), 171.

for that assertion. However, that change had not led to revolutionizing the core of SoP in India, that executive decides policy. Through such a distinctive dialogic review, despite appearances, SoP doctrine and the concept of RoL including judicial deference combined with verbal grandstanding prevails.

Finally, it can be speculated that the judicial 'taste' of such distinctive form of dialogic review, and at times unexpected effectiveness of extremely weak remedies is traceable to the distinctive nature of democracy in India, namely that 27.9%[94] of the population is below poverty line. This reality increases the political cost of inaction when issues of direct benefits to the poor are concerned and makes the political branches more likely to make assurances even during proceedings often in response to interim measures, in turn, leading to occasional categorical judicial review when such signs of political acquiescence are evident. The structural reality could also account for the counter intuitive situation when extremely weak remedies (e.g., order to revisit the policy) in India is still not without teeth. Even if this is not an exhaustive explanation behind the distinctively dialogic review in India, it must be a plausible one to consider.

[94] MPI was same and national measure was 21.9% in 2020, Information is available at <https://ophi.org.uk/wp-content/uploads/CB_IND_2020.pdf >.

ONLINE PHARMACY AND CONSUMER PROTECTION: AN ATTEMPT TO BALANCE THE LEGAL REGULATORY FRAMEWORK

Nagarathna A[*] *& Deepti Susan Thomas*[**]

1. INTRODUCTION

Information and Communication Technology has improved the manner in which business is conducted, education is imparted and healthcare services are provided in India. In particular, the effect of technology in enabling communication with distant areas has been a key driver for the development of E-Commerce in countries like India. Like any other technology, Information Technology too is neutral in nature.[1]

With the expansion of e-market place, India has also seen a fast expansion of online pharmacy. These platforms have proved to be of extreme advantages since at one online click or order a consumer gets home delivery of pharmaceutical products. Post covid in fact, there has been voluminous increase in online sale of medicines in India. While Covid-19 and the subsequent behavioral shift towards e-commerce may have catalyzed growth for online pharmacies, the sector was already poised to grow seven-fold by 2023 to $2.7 billion.[2] Since it was not possible for many to venture out to purchase medicines, online pharmacies came as a blessing.

Online pharmacy is good as it enables every one including senior citizens to get the medicines delivered at their door steps, it provides access to medicines that might not be available in the local pharmacies, due to reduced cost, entities are able to supply medicines at competitive prices etc. But it poses a lot of challenges as well in the form of anonymity, jurisdictional issues, possibility of selling counterfeit goods without being caught, and easy access to prescription or habit forming drugs, fraudulently procuring medicines using fake prescriptions etc. Especially in the healthcare sector these challenges pose a great threat to the public health and safety of consumers, if websites are permitted to sell medicines

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1 Melvin Kranzberg "Technology and History: "Kranzberg's Laws" Technology and Culture , July 1986, Vol. 27, No. 3 (July 1986), pp. 544-560.

2 Pranav Mukul and Prabha Raghavan, Explained: How India's Online Pharmacy Market is Regulated, New Delhi, 21-8-2020, available at <https://indianexpress.com/article/explained/explained-how-the-online-pharmacy-space-is-regulated-in-india-6562777/>.

without proper regulations in place. This paper analyses the consumer related issues that arise while transacting with online pharmacies or e-pharmacies.

One of the major concerns associated with online pharmacy is in relation to the possible abuse of the online platform by illicit pharmacies, who sell outdated and counterfeit medicines for making profits. In fact the possibility of procuring prescription drugs without proper prescription was illustrated in the United States where a boy died due to overdose of prescription drugs which led to the enactment of the Ryan Haight *Consumer Protection Act*, 2008.[3] In India, too there is a need felt to have an appropriate law framework specific to regulate online pharmacies. Such a law is important to ensure protection of consumers especially those who are incapable of understanding the after effects of the ingredients that are displayed on a medicine's packaging.

The paper discusses the concept of online pharmacies as understood in the national and global regulatory frameworks and the regulatory mechanism followed. The analysis is followed by the consumer related issues that needs to be addressed while regulating online pharmacies. These issues are then analysed under the Indian Consumer Protection Laws to identify the grey areas that may have been left unaddressed and needs the attention of the policy makers. The paper does not consider the liability of pharmaceutical companies as the *Drugs and Cosmetics Act*, 1940 and the Drugs and Cosmetic Rules, 1945 lay down the relevant provisions. However, the provisions that deal with the distribution of the medicines through the online pharmacies are the main subject of discussion in this paper.

2. ONLINE PHARMACIES

In India, since internet based pharmacies were not contemplated when the *Drugs and Cosmetics Act*, 1940 or the Drugs and Cosmetics Rules, 1945 were enacted, it is not explicitly defined. This is one of the reasons for online pharmacies flourishing without strict regulations in India. Online pharmacies are e-commerce entities that sell medicines through their website. These entities might be running an online portal as an extension of their offline business, they might be selling medicines by entering into agreement with local pharmacies or they might be purchasing medicines and then selling them online.[4] For example, in India Apollo247.com is the online extension of the offline Apollo pharmacies whereas Netmeds.com is an online marketplace that merely acts as an intermediary and provides a platform for buyers and sellers to interact.[5] There is a third

[3] Bob Schultz, "Online Pharmacy Regulation: How the Ryan Haight Online Pharmacy Consumer Protection Act can Help Solve an International Problem", 16 San Diego Int'l L.J. 381 (2015).

[4] Fung C.H., Woo H., Asch S. "Controversies and Legal Issues of Prescribing and Dispensing Medications using the Internet" Mayo Clinic Proceedings Vol. 79, Issue 2, 2004 pp. 188-194.

[5] Terms and Conditions of use of Netmeds available at <https://www.netmeds.com/seller-terms-and-conditions>.

model of online pharmacy that follows an inventory model such as Flipkart.com and Amazon[6] wherein the e-commerce entity maintains an inventory of medicines by entering into a tie up with a registered pharmacist, which is then sold through their online platform.[7]

As far the definition of pharmacy is concerned, 2018 Draft Rules[8] which are pending notification, defines an e-pharmacy as a business of distribution, sale or offer to sell or exhibit for sale, any drugs through a web portal.[9] Since they were not defined in the existing laws that regulate pharmacies, it was not clear if they could sell medicines without a licence. This is a major concern from the point of view of consumer protection. One of the reasons for regulating the sale of medicines is the after effects of drug administration. History has instances wherein use of chemical substances, even though they were extracted from plant products, led to mass poisoning, especially when these substances are administered without proper testing for safety.[10]

3. CONSUMERS RELATED RISKS WHILE TRANSACTING WITH ONLINE PHARMACIES

Drugs cannot be compared with ordinary consumer products. The main reason for treating drugs as a different category for consumer protection laws is that consumers are not in position to decide when and how much to consume a particular medicine. They cannot gaze at the side effects of the medication and the pharmaceutical industry believes that no medicine is free of side effects.[11] Even in the present times, the Covid Vaccines that have been developed by pharmaceutical companies and biomedical research institutions are tested, to decide the safety and efficacy of the medicines as well as the appropriate dosage that must be given. Sometimes in spite of these tests, the side effects are known after the medicine is administered to many patients.[12] Therefore Professional advice from a medical practitioner or sometimes even the sellers or dispensers of the medicines is essential before certain medicines can be consumed. This means that along with the doctors, even the dispenser or the pharmacists must be professionally qualified and have the capacity to advise consumers when medicines are sold.

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6 <https://www.flipkart.com/health-care/apollo-pharmacy~brand/pr?sid=hlc>.

7 FICCI E-Pharmacy in India: Last Mile Access to Medicines Frost and Sullivan Outlook on E-Pharmacy Market in India Report, 2020.

8 GSR 817 (E) Drugs and Cosmetics Amendment Rules, 2018 available at <www.cdsco.gov.in>.

9 R. 67(I)(*a*) of the Draft Rules, 2018.

10 Lembit Rago "Chapter 2 Drug Regulation: History Present and Future" in *Drug Benefits and Risks: The International Text Book of Clinical Pharmacology* 2nd Edn. 2008.

11 *Ibid*.

12 Germany Reports more Blood Clot Cases after AstraZeneca Covid 19 Vaccine Shot, Reported in CNN IBN on March 21, 2021 available at <https://www.news18.com/news/world/germany-reports-more-blood-clot-cases-after-astrazeneca-covid-19-vaccine-shot-3586256.html>.

In case of offline sale, exhibition for sale or distribution of drugs is concerned, the Drugs and Cosmetics Rules, 1945 mandates a license before such sales can be taken up by commercial entities.[13] In case of the drugs which are categorized as over the counter drugs, this is a special category of license that is issued under the aforementioned Rules.[14] In particular for entities that intend to sell medicines to multiple places, each place would require a separate license. This means that an online entity selling medicines would have to apply for such licenses in each of the States where the drugs would be sold.[15] The conditions for granting the license include proper storage and supervision of a registered pharmacist.[16] The Explanation to this Rule also specifies who would fall within the definition of a pharmacy. As per the explanation the online pharmacies are falling within the explanation and so must sell medicines only after procuring a license. Therefore from the law regulating sale of medicines offline, it is quite clear that only a professional who has the requisite qualifications to be a pharmacist can register as a pharmacist.[17] This registration with the State Registration Authority is mandatory for selling medicines in India.[18] The Law in India requires a license to sell medicines and a registered pharmacist to be present when medicines, especially prescription drugs are being sold through these pharmacies.

Risks to consumers associated with Online Pharmacies may include the following:

3.1. Sale of Prescription Drugs without Medical Supervision.

Certain categories of medicines are categorized as prescription drugs because of the side effects when there is an overdose or when it is administered in combination with other medications.[19] The sale of such drugs is strictly regulated by mandating that the sale of this category of drugs would be carried out only on the presentation of a prescription, written by a registered medical practitioner.[20] Since the consumers might not be aware of the adverse effect of these drugs, it becomes the responsibility of the medical Practitioner and the Pharmacist to ensure that such medicines are sold strictly on the basis of a prescription. The regulation is possible as far as offline sales are concerned but when it comes to online pharmacies, there is no mechanism to verify the genuineness of a prescription. Also under the Draft Rules, prescription includes online prescription as well as a soft copy or

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13 S. 18(*c*) of the Drugs and Cosmetics Act, 1940 read with R. 62 of the Drugs and Cosmetics Rules, 1945.
14 R. 62-A Drugs and Cosmetics Rules, 1945.
15 R. 62 Drugs and Cosmetics Rules, 1945.
16 R. 64 Drugs and Cosmetics Rules, 1945.
17 S. 45 Pharmacy Act, 1948.
18 S. 29 read with S. 31 Pharmacy Act, 1948.
19 *Supra* note 9.
20 Schs. H, H-1 and X Drugs and Cosmetics Rules, 1945.

a physical prescription. But it doesn't impose any liability on the pharmacist or the consumer if a fake prescription is used for procuring prescription drugs.

This means that regulating the sale of prescription drugs, through the online platform needs to be strictly regulated.

3.2. Counterfeit Drugs through Websites

The second risk is the sale of counterfeit drugs through the online platform. Since the internet provides anonymity and it is difficult to regulate cyberspace due to the complexity of this technology, it is possible for online pharmacies to sell medicines without a license. If they do so, there is no mechanism to differentiate a fake website from a genuine one. In other jurisdictions such as in the United States, the National Association of Boards of Pharmacies has an accreditation system in place that guarantees genuine medicines being sold to consumers. The accreditation system known as the Verified Internet Pharmacy practices Site (VIPPS) logo[21] is issued after thorough scrutiny of the pharmacy practices of the website. This system has been useful in making consumers aware about genuine online pharmacies. They also have a reporting mechanism whereby the consumer can report a website as an illegal pharmacy which is then investigated by the Food and Drugs Administration. In the European Union, they have introduced EU logos[22] for online pharmacies. This logo which has the flag of one of the four countries, authenticates an online pharmacy as genuine and holds the website accountable for any pharmacy related concerns. These measures keep a check on sale of counterfeit medicines to consumers which are a major concern in India as far as online pharmacies are concerned.

3.3. Sale of Habit Forming Drugs through Online Pharmacies

Schedule X of the Drugs and Cosmetics Rules read with the *Narcotics Drugs and Psychotropic Substances Act*, 1985 regulates the sale of habit forming drugs in India. In case of offline sales, it is possible to regulate the pharmacies and control the sale and control of such categories of drugs but in the online platform, since jurisdiction itself is an issue, the sale and regulation of pharmacies that supply drugs to consumers is a challenge. Another category of Drugs under Schedule H1 of the Drugs and Cosmetics Rules, 1945 are the habit forming drugs which includes antibiotics, painkillers and sleeping pills. The main reason for restricting the sale of such drugs is to prevent the health hazard caused by indiscriminate use

[21] National Association of Boards of Pharmacy "Digital Pharmacies" available at <https://nabp.pharmacy/programs/accreditations-inspections/digital-pharmacy/>.

[22] European Commission "EU Logo on Sale of Medicines by Internet Pharmacies" <https://ec.europa.eu/health/human-use/eu-logo_en>.

of these drugs such as antibiotics that may result in spreading of mutated bacteria or viruses.

According to the United Nations Report on the Misuse of prescription drugs, India is responsible for facilitating drug diversions in some other countries mainly because of the large pharmaceutical industry.[23] Prescription drugs which use substances of narcotics and psychotropic potency such as cough syrups, pain killers etc., are smuggled to neighboring countries from India. This is a major cause of concern especially when it is procured from online websites. The offline pharmacies are regulated by mandatory data entry for sale of prescription drugs and in case of non-compliance the State regulatory Body is empowered to take action. But in Case of Online Pharmacies, especially those that work on the marketplace model, it would be difficult to keep a track of such sales by the State Regulatory bodies. Thus online Pharmacies might pose a hindrance in the effective implementation of these legislations so as to protect the interest of the consumers.

3.4. False Claims and Advertisements through the Online Pharmacies

An e-consumer usually purchases products by looking at the product description and the customer reviews. When it comes to purchasing drugs and medicines online, these become even more crucial. The product description of a particular medicine is regulated by the labeling requirements under the *Drugs and Cosmetics Act*, 1940 and Rules, 1945. Drugs that fall under Schedule G, H, H1 and X of the Drugs and Cosmetics Rules, have to be labeled accordingly. This labeling is done by the manufacturer and the pharmacist has to ensure that the drugs are sold as per the requirements specified under these schedules. However, when it comes to a different category of drugs which are known as lifestyle drugs, the claims made by the medicines may pose health related risks to the consumers.[24] These drugs are sold for treating lifestyle related illnesses such as hair fall, obesity, smoking, alcoholism etc. There are medicines that claim to treat these lifestyle related disorders and these are sold by the pharmacies. However, some of these drugs may have adverse effects when taken in combination with other medications or when they are consumed by a person with certain specific medical conditions.[25] These claims may be covered by the *Drugs and Magic Remedies (Objectionable Advertisement) Act*, 1954. The Act prohibits advertisements of certain drugs for certain treatments[26] as well as false and misleading claims relating to the drugs

[23] UNODC Misuse of Prescription Drugs: A South Asia Perspective Report 2011.

[24] S.Z. Rehman et. al., "Lifestyle Drugs: Concept and Impact on the Society" India Journal of Pharmacy, Vol. 72 Ed 4, 2010 pp. 409-413.

[25] *Ibid*.

[26] S. 3 Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954.

being sold.[27] These provisions are in line with *Consumer Protection Act*, 2019 as well.[28] The purpose of imposing such regulations is to protect consumers from the effects of spurious and misleading advertisements that may have a harmful effect on their health. The implementation of these provisions is challenging, when it comes to online pharmacies as they may advertise and sell drugs without cross checking the claims made by the manufacturers. This is possible especially in cases where the website portal follows an inventory based on a marketplace based model of e-commerce. If these advertisements are not regulated by the drug regulatory authorities, it may have an adverse effect on the consumers, who would have purchased these medicines based on the description and fake reviews.

3.5. Data Protection and Possible Violations by the Pharmacies

With the advent of the online platform, the method of business has also changed drastically. In today's times data has become more valuable than petroleum.[29] It is a great concern in all sectors of trade. In the healthcare sector, personal information of the consumer such as medical history is considered sensitive personal data and needs to be protected more by the entities that are handling such data. India has been aware of the possible misuse by an entire that has access to such data, is capable of. It is because of this reason that the India legislature as well as the legislative bodies across the globe has been active in regulating how data must be stored, shared, distributed and processed.

However, just like the lack of clarity on the regulation of online pharmacies, there are only limited regulations that protect the data of healthcare consumers in India. Though there have been draft bills such as the Personal Data Protection Bill, 2019 and the Digital Information Security in Healthcare Bill, 2019, these are still in the draft stage. In case of online pharmacies, consumers share medical history, financial account details as well as the details of the insurance they have and the doctors they visited. Since there are prescriptions that are shared and at times consultations with doctors are also made possible, it is important for the data privacy to be followed by these entities as well.

In the Draft rules, 2018, there are rules that mandate data protection safeguards that need to be followed by the online pharmacies.[30] At present data protection rules are provided for under the *Information Technology Act*, 2000[31] read with the Information Technology Rules on Sensitive Personal Information,

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27 S. 4 Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954.
28 S. 89 read with S. 2 (47) Consumer Protection Act, 2019.
29 Kiran Bhageshpur "Data is the New Oil and that is a Good Thing".
30 R. 67(*k*) Draft Drugs and Cosmetics Amendment Rules, 2018.
31 Ss. 43-A and 72-A Information Technology Act, 2000.

2011.[32] These provisions are broad in nature and would require interpretations by the enforcement agencies while implementing them online pharmacies. With the Pandemic, however, the Indian Government became active in putting in place guidelines that would ensure data protection in the healthcare sector. In particular the Health Data Policy of 2020 which is based on the principles of the Personal Data Protection Bill, 2019. The Policy imposes liabilities on entities that are engaged in collection, storage, processing and transmitting of the healthcare related information. Therefore the pharmaceutical and the online pharmacies, in particular, have to comply with these provisions and put in place proper safeguards while handling healthcare related information. However, pending the enactment of these legislations, the online pharmacies have access to sensitive personal information of consumers in India, which can be sold to third parties, thereby violating the consumer privacy.

4. CONSUMER PROTECTION ACT AND CONSUMER PROTECTION GUIDELINES TO ADDRESS THESE ISSUES

As a consumer of online pharmacies, the drugs purchased from these websites, as well as the services in the form of online consultation with doctors, telemedicine etc., the *Consumer Protection Act*, 2019 and the Consumer Protection E-Commerce Guidelines, of 2020 become important legislations to consider. As far as a registered pharmacy, having an online portal is concerned, it is well regulated by the above discussed legislations. However, the inventory model pharmacies or those that have agreements with local registered pharmacists and the marketplace or intermediary websites providing a platform for sale of medicines, are a cause of concern. In the matter before the Delhi High Court[33] and the Madras High Court Division Bench[34] where the legality of selling medicines through the online platform was challenged. The courts considered the risks associated with permitting the medicines being sold by these entities to consumers. They observed the possibility of procuring medicines which are difficult to procure through the offline medium due to the strict regulations. While the Delhi High Court imposed a ban on unlicensed websites selling medicines online, the Madras High Court Division Bench, recognized the importance of online platforms, when it comes to dispensing of medicines to patients who might otherwise find it difficult to go to an offline local pharmacy.

The arguments made by the online pharmacies especially the market place model websites was, that they were within the definition of intermediaries under the *Information Technology Act*, 2000.[35] Hence as intermediaries they argue

[32] The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011.

[33] *Zaheer Ahmed* v. *Union of India* WP No. 11711/2018 (plz chk).

[34] *Tamil Nadu Chemists and Druggists Assn.* v. *Union of India*, 2018 SCC OnLine Mad 3515.

[35] S. 2(1)(*w*), read with S. 79 Information Technology Act, 2000.

of not being bound to have a license as they only provided a platform for consumers to connect with pharmacies. They argument that they were not practicing the profession of pharmacy but were only providing the technology for practicing the profession in the online platform is commonly made. This argument may have been accepted but if so i would mean that they are not liable for the concern discussed above and this might adversely affect the interests of e-consumers. It is interestingly to however notice that this concern to an extent is addressed today by the Consumer Protection E-Commerce Rules, 2020. The rules provide a framework to regulate the marketing, sale and purchase of medicines as well as medical services through the online platform.

The *Consumer Protection Act*, 2019 has also been a positive step in protecting the rights of consumers in the online platform. It is specifically useful in cases of purchasing medicines online as the areas where the pharmacy regulations are weak, the consumers may resort to the *Consumer Protection Act* and the Consumer Protection E-Commerce Rules, 2020. The rules are applicable to e-commerce entities that follow the inventory as well as the marketplace model. This means that even though they may exempt themselves from the ;liabilities under the Drug regulatory compliances, they may still be held liable under the Guidelines These along with the intermediary Guidelines rules 2011[36] impose regulations on online pharmacies that adopt the marketplace model to exempt liability. They would be still held liable.

According to Sec 92 of the *Consumer Protection Act*, 2019 sale of spurious goods as well as goods that cause harm, injury or death are punishable with imprisonment. This means that the sale of drugs prohibited or restricted due to health related effects may still be covered by the *Consumer Protection Act*. The only confusion is in relation to the consumers who would be purchasing medicines from the online pharmacies for commercial use such as hospitals, health centers and clinics. Whether they would be protected by the *Consumer Protection Act*, 2019 is not clear. Also websites that have a business to business model, such as the online pharmacies who transact with registered pharmacies or provide a platform for sales, whether they would be protected against fake or fraudulent websites is also not clear. However, the Rules define the word user which is wider than the word consumer.

5. CONCLUSION AND SUGGESTIONS

Online pharmacies use information technology to sell medicines. They have a lot of benefits such as providing access to medicines which might not be available at the local pharmacy. Providing medication to remote areas,

[36] The Information Technology (Intermediary Guidelines) Rules, 2011 as well as under Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.

providing medicines at the doorstep of the consumer, which was a boon during the pandemic especially for the senior citizens and people who were in quarantine and could not travel. They do provide an advantage but they can also impose serious threats to the consumers, if they are not registered by the drug regulatory agencies. Due to the infrastructure and the related concerns such as application of the rules on one State on the entities registered in another State, the difficulty in preventing supply of prescription drugs through fake prescriptions, possibility of selling medicines without a license and lack of a formal identification process agave to be addressed before permitting the online pharmacies to function on abrader scale.

The present Consumer Protection Laws in India and the pending data protection laws would together provide a strong regulatory framework for protection of consumers in India. This along with the Draft Guidelines that would be regulating the online pharmacies, would provide a strict regulatory framework that offers protection to consumers who purchase medicines from the online platforms irrespective of the model of business they follow. The current pandemic has made it clear that online pharmacies are here to stay. The consumers who purchased medicines online realized the advantages they have to offer, so much so that a survey with some of the consumers, illustrated that there is a presumption that these pharmacies are licensed if they are selling medicines online. This belief must be taken seriously by the regulatory bodies and the draft bills and rules must be notified as early as possible to prevent consumers suffering serious harm due to the consumption of medicines purchased online.

THE WITCHES, WITCH-HUNTING AND WITCH-CRAFT: THE LESSER PERCEPTIBLE ZONE OF WOMEN'S BRUTALITIES IN INDIA

Ashish Virk[*] *& Neha Dewan*[**]

Magic or Black Art, an art which was used for controlling nature and spirits, was intertwined with medicine as well as religion. Traditionally, it was believed that magic which involves sacrifices is helpful in sustaining the equilibrium of human survival. However, the art in wrong hands resulted in causing terrible human suffering. The greatest spate of magic, occurred in Europe from 1500's to 1700's.[1] However, the question is why should we speak of Witch-Hunting again? In recent times, the issue of magic art being misused in the form of witch-Hunting have been highlighted by the feminists again. The studies[2] of the present century shows that the structural aspects of the 16th & 17th Century witch hunts needs to be re-analyzed in various parts of the world, including India. The present piece of research work is hence an endeavor to recognize the problem in context with present socio-legal perspectives of India.

1. WHY SPEAK OF WITH-HUNTING AGAIN?

An 80 years old Ramkanya Devi of Bhilwara town, State of Rajasthan, lived her whole life in a town, working as a midwife serving various women in times of need along with her husband and sons. One day a neighboring girl fell ill and she was taken to the *bhopa,* sorcerer of the village for treatment. He convinced the family of the girl that Devi is a witch; and the girl is sick because she is the victim of witchcraft. The neighbor branded Devi, as a witch and accused her of being responsible for the girl's illness. This was followed by death threats and vowed

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1 Gorden Napier, 'Maleficium: Witchcraft & Witch-Hunting in the West', Amberley, UR, 2017, P-1..

2 Ross E. Cheit, *The Witch-Hunt Narrative: Politics, Psychology and Sexual Abuse of Children*, Oxford University Press, USA; Govind Kelkar & Dev Nathan, *Witch Hunts Cultural, Patriarchy and Structural Transformation*, Cambridge University Press, 2020; Alam Shamsher and Raj Aditya, "The Academic Journey of Witchcraft Studies In India"*, Serial Publications*, pp. 123-138; Sohaila Kapur, Witchcraft in Western India. Orient Longman Ltd.; Silvia Fedirici, Witches, Witch-Hunting and Women. *PM Press, 2018*; Gregg Jarrett, Witch Hunt: The Story of Greatest Mass Delusion in American Political History. *Harper Collins Publishers,* 2019; William E. Burn. *Witch Hunts in Europe and America: An Encyclopedia*, Greenwood Press, London 2003; L' Estrange Ewen, Witch Hunting and Witch Trials. *Routledge Taylor & Francis Group, 2011;* Syd Moore, Witch Hunt. *Avon Publications, 2012*; Layla Nash, Witch Hunt. *Vellum Publications, 2018.*

to burn her house. She was kept locked in dark for 18 days by her family to save her and their house from being burnt. She kept crying and shouting that she is not a witch and should not be killed. Later a local human rights activist rescued her. So, Devi cried and said 'I don't trust anyone anymore. They might kill me if they catch me alone'; it's been months since the incident happened but Devi still lives in fear. The police blame the bhopas as the root cause of the problem of spreading the superstition of witches the local lawyer says 13 victims of witch-hunts have been compensated, however no one has been convicted since 86 cases files the passing of the Rajasthan Prevention of Witch-Hunting Act, 2015. Mostly, the witches are killed and those who survives the physical abuse are ostracized by society in such a way that physically they are alive but killed in so many other ways.[3]

Human being are the most evolved species on Earth. They have distinguished themselves from other creatures by virtues of their radical development. However, this journey has been full of various hindrances. Many phenomena that man could not find an answer to or explain, paved way for his belief in super natural powers or practices which were otherwise unimaginable. Such phenomena gave rise to belief in presence or practice of magical powers for benevolent or malevolent gains. The people often prayed for preventing the negative occurrences. These practices lead to socially acceptable good motives which were referred to as white magic, whereas the negative ones were labeled as black. One such black magic practice is 'witch craft'. Witch craft is the practice and belief in magical and supernatural abilities/skills and the one who possess such abilities/skills is called a witch or wizard. The people associated with the practice of witchcraft are looked at with doubt. Since the word witch is a gender inclined terminology, it is the kind of practice in which women who are alleged of possess supernatural powers are branded as witches and are subjected to all kinds of physical, verbal, mental and emotional tortures.

In India, the practice of witch hunting is customary and is largely prevalent in non-urban areas where the Tribal population is dominant. The evil practice of witch hunting is majorly practiced in various states of India like middle Indian states of Uttar Pradesh, Madhya Pradesh, Chhattisgarh, Bihar, Jharkhand; in northern state of Haryana; in southern states of Maharashtra, Orissa; in eastern states of Gujarat and Rajasthan and in western states of West Bengal and Assam. In most of the instances, the innocent victims of practice of witch hunting are the women who are labeled as witches because of their physical appearance like skin color, some ailments etc. In a very few cases even men have been accused of possessing supernatural powers and are subjected to sufferings. It is not only the person who is accused of being witch or wizard is punished but also their family

[3] Jason Over dorf, 'Going on a witch hunt', in India is real-and deadly, *USA Today*, 13 December, 2017.

members who have to suffer because of social boycott or in worse cases death.[4] In most rural areas of India, the practice of witch hunting is still riding high due to various superstitious beliefs wherein it is believed that witches possess magical powers with the help of which they can attack humans, cause destruction of property and cattle, influence body and mind of others. Sometimes, lack of resources such as high medical costs involved to treat any kind of physical or mental ailment also contributes to the ridiculous beliefs. The gullibility conservative and patriarchal nature of the society, inter-personal disputes over monetary or physical assets, jealousy, social conflicts are some other reasons behind witch-hunting.[5]

Though our nation has become independent in the year 1947 but the ages old malpractice of witch-hunting is widely practiced throughout the nation, irrespective of the one of the most developing states of the nation i.e., Gujrat[6] or the heritage state of the nation i.e., Rajasthan.[7] As per National Crime Records Bureau (NCRB), between 2001 to 2014 more than 2,000 witchcraft-motivated murders were reported across seventeen states and most of the victims were women.[8] This data does not reveal the true state of affairs as most heinous cases are unreported and thus are unrecorded. Jharkhand and Chhattisgarh have the highest number of reported cases of witch hunting as per 2019 National Crime Record Bureau data, in India largest practice of Witch Hunting is in the state of Chhattisgarh with 22 murders and Jharkhand was ranked third in the list.[9] Hence, this makes us con-

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4 Juhi Pushpa Pathak, National Seminar on Phenomenon of Witch-Hunting in the North-East: A Major Challenge to Women. For more information visit<https://www.researchgate.net/ publication/304301648_Witch_hunting_and_the_role_of_media>.3 September 2021.

5 Mohd. Aqib Aslam. A Doctrinal Study on Witchcraft and Role of Anti-Superstition Laws in Modern India. International Journal of Applied Research 2021. Vol. 7 Issue 1. For more information visit <https://www.allresearchjournal.com/archives/2021/vol7issue1/PartC/7-1-37-174.pdf > 3 September 2021.

6 In the Western Indian State of Gujarat, three women lived with the men, who used to beat them and call them witches. The women found male relatives defecating in their crops, and these men did not like women speaking up about it. This was seen as a woman challenging a man, which is not acceptable in their culture. They were often beaten for this. A year later two men in their home died of different causes. Those women were forced to sign over their piece of land to save their lives.

7 In another true incident a 40-year-old woman named Kesi Chadana lives in the State of Rajasthan. She came home from the hospital, where her daughter just gave birth and found that villagers were present in her house. They branded her a witch. They locked family of Kesi in their house and started tormenting her. They gave her beatings, insulted her by stripping and making her wear shoes garland. Then she was paraded in the villages nearby on a donkey. They planned on burning her but the police got there before they did. Thirty people were arrested and sentenced for participating in this attack.

8 In one of the incident the three members of a family, namely Birsa Munda, Sukru Purti and Somwari Purti, in Khunti district were abducted and killed on grounds of practicing witchcraft. The Police made arrests of three accused and conducted raids to nab the others. For more information visit<https://timesofindia.indiatimes.com/city/ranchi/witch-hunting-on-rise-in-jkhand-ncrb-data/articleshow/78974831.cms >15 October 2021.

9 Sahay Sanjay, 2020, "Witch-Hunting on Rise in J'khand: NCRB Data", *The Times of India*, 1-11-2020.

cludes that witch hunt is not a dead crime. It is a growing concern and we need to speak and address the issue again.

2. DO WE HAVE LEGAL UNDERSTANDING OF TERMS: WITCHES, WITCH-HUNTING & WITCHCRAFT?

Etymologically the term 'witchcraft' is comprises of two words 'wicce' and 'craft' wherein the word 'wicce' refers to '*witch*' and 'craft' denotes 'skill or ability'.

Witchcraft is considered to be possessing supernatural powers which is instrumental in enabling diseases, cause physical dysfunctions, cause natural hazards like floods, famine etc and even unnatural deaths apart from other non-favourable stances. Owing to its feminine affiliation, the practice has been widely known as witch- craft and its male counterpart, wizard-craft.[10] As per Section 2 (c) of the proposed bill to curb the practice of witch craft namely The Ban on Witch-Craft Bill, 2010, the 'witchcraft' means any act of magic, casting spells or sorcery or voodoo or black magic which is practiced with a view to help or harm other persons.[11] Thus, as per this definition the purpose of witch craft can be positive i.e. for the purpose of helping any persons from recovering any illness, fertility problem, for good harvest, prosperity etc or for a negative purpose of harming someone physically, financially, psychologically etc. the definition itself proves that we don't have much understanding about the problem.

It was in 2016 another central legislation was proposed in form of The Prevention of Witch Hunting Bill, 2016 in which the definitions of witch,[12] witchcraft[13] and witch hunting[14] were provided. Under this bill the definitions have only negative connotations suggesting that the witch is one who uses supernatural powers in order to harm any other person or property. Also, another aspect which

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[10] Alam Shamsher and Raj Aditya. The Academic Journey of Witchcraft Studies In India. Serial Publications. pp-123-138.

[11] The Ban on Witch-Craft Bill, 2010. For more information visit </billstexts/ lsbilltexts/ asintroduced/903ls.pdf> 22 November, 2021.

[12] The Prevention of Witch Hunting Bill, 2016:- Section 2(h) "witch" means any woman who has been branded as witch by person or persons in belief that such women has the power to harm anyone or that she allegedly have such intention or having the belief that she has bad eyes or evil eyes or could do black magic or that she, by Mantras can harm people or society at large, in any manner;

[13] The Prevention of Witch Hunting Bill, 2016:- Section 2(i) "witchcraft" means the supposed power of a person to harm the other by— (a) occult or supernatural means secret use of Tabij or any water or water mixture pretending it to be sacred; or (b) any other substance or things like spell, spirits or magic power with the purpose of causing harm, damage or sickness to other person or harm or damage to the properties;

[14] The Prevention of Witch Hunting Bill, 2016:- Section 2(j) "witch-hunting" includes branding of a woman as witch, mostly after an 'ojha' confirms that a woman is a witch the process of prosecution and execution of that woman, often involving mass hysteria and lynching.

can be revealed from these definitions is that a witch is declared a witch only when an Ojha[15] confirms such branding due to which the process of persecutions follows. Thus, from legal provisions one can conclude that legally no straight jacket definition has been given to these terms till today and due to which many aspects of this practise are largely out of the purview of law, hence there is not much legal understanding of these to us.

3. DEVIS & BHOPAS: DO INDIA HAVE A HISTORY OF WITCH-HUNTING?

In India, with regard to the belief in the system of witchcraft and witches, largely there are three types of communities:

- Firstly, is among the Hindus, amongst whom there is very dominant faith in witchcraft activities mainly in Hindu caste groups of central forest areas of Rajasthan and Chhattisgarh due to patriarchy system.
- Secondly, are the indigenous peoples, mainly in the areas of Central India, including many states from Rajasthan to Odisha. In these communities largely tribal, are engaged into the practice of witch craft and witch hunting.
- Thirdly, the group of communities are those who are settled gatherer-hunters, like the Birhor and Chenchu in Central India and in South India respectively, who do not seem to have any notion of witchcraft or practice of witch hunts.

In Europe and America, witchcraft was considered as a crime so the accused were judicially tried through a legal system and therefore, judicial records became useful resources of information about the practice of witch craft and witch hunting,[16] however, in India, most of the witch trials are largely done in public domain and details are not easy to find because the acts were done secretly by the communities. However, religious literatures and some colonial journals/ books revealed that the practice of witch-hunting in India has always remained a tool to oppress women and hamper her empowerment. The term dayan was used as synonym of witch in folk literature.[17] During the colonial period, till 1857, numerous witch-hunting activities were recorded in the region of Chotanagpur

[15] Ojha is a Sanskrit word which means a nomadic person who is indulged in practice of meditation and exorcism. He is believed to possess the power of healing people. For more information visit<https://www.collinsdictionary.com/dictionary/hindienglish/%E0%A4%93%E0%A4%9D%E0%A 4%BE15 March 2021.

[16] Sinha S.S. (2015), Culture of Violence or Violence of Cultures? Adivasis and Witch-Hunting in Chotanagpur, Anglistica, 19(1), pp. 105–120.

[17] Mohapatra, D. S. (2014). Witch Hunting : A tool of terrorization across the World and its Legal Ramifications. International Journal of Academic Research, 1(4). pp-81–90.

region of eastern India.[18] The National Archive Records[19] show that in the early 19th century around hundreds of women had been killed in central part of India due to this evil practice. It is believed that the number of women on accusation of being witches had even exceeded those who died as sati[20] but the murders were largely unrecorded. Most witch-hunting victims were from schedule castes communities who were accused for suffering of society.[21] P. G. Ambedkar, a Dalit activist believed that the act of witch hunting is so closely associated with caste system that not even a single incident of was recorded against upper caste or brahmin women. Thus, Varna System played an important element in the practice of witch hunting in ancient India.[22]

4. ARE DEVIS & BHOPAS INTERNATIONAL CONCERNS AS WELL?

Witches, Witchcraft and Witch-Hunting has also been an international phenomenon. Various countries have with the passage of time come up with different legislations to curb this problem**.** In Europe, witch hunting practice is approximately 200 years old starting from era of 16th century and continuing. Many people who were accused of practicing *maleficarum* i.e. harmful magic have to suffer banishnment and even persecutions but there is no certain of number of Europeans persecuted on account of practice of witchcraft. On the basis of public records, few historians claims the numbers ranging from 40,000 to 100,000, which amounts to three times more than the number of people actually accused of practicing witchcraft.[23] Also as per the historians most of the persecutions occurred in areas which are present day the developed nations of the Netherlands, Switzerland, Germany and France. Though the practice of witchcraft was condemned across Europe, but the culture of "black magic" spread at different times in various regions, during the years 1580–1650, these were the times when even the witch trials were conducted and many books and laws were laid down to conduct those trials.[24] It was only in late 17th century that the practice of witch trials was abolished.

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[18] Sinha, S. (2007). 1857. Witch-hunts, Adivasis, and the Uprising in Chhotanagpur. Economic and Political Weekly, 42(19), 1672–1676.

[19] National Archives of India, New Delhi. Foreign Department (hereafter FD), Political, 16 February 1853, pp 121-31.

[20] Practice of widow-immolation on husbands' funeral pyres.

[21] Mathur, K. 2004. Countering Gender Violence: Initiatives Towards Collective Action in Rajasthan. *Sage Publication*.

[22] Ambedkar, P. G. (2017). Dalit Women and the witches. For more information visit <website: https://www.newsclick.in/dalit-women-and-witches> 21 March 2021.

[23] Jone Johnson Lewis. 2020. A Timeline of Witch-Hunting in Europe. For more information visit< https://www.thoughtco.com/european-witch-hunts-timeline- -3530786 >. 20 February, 2020.

[24] William E. Burns, *Witch Hunts in Europe and America: An Encyclopedia*, Greenwood Press, London 2003, pp. 354-360.

Although in Europe men were also accused of witchcraft, but about largely (75% to 80%) of those executed in name of witch hunts were women. Women across Europe were subject to various economical, spiritual and cultural prejudices. They were considered as weaker sex and thus, more susceptible to victimization. The reason of women's being weaker sex is being linked to the story of Eve's temptation by the Devil in the Bible, but practically the story itself cannot be reason for making accusations on women being evil. In other nations too, the victims of witchcraft accusations were largely women. Just like in India, there are evidences on the basis of which in Europe, also many authors and thinkers have argued that many of those accused of witchcraft were single women or widows whose existence delayed the complete and unhindered inheritance of property by male heirs/descendants. Dower rights which are intended to protect widows, gave women power over property which their male counterpart could not accept. Witchcraft accusations were one of the easy means to remove the obstacle. It was also true in Europe that most of those accused and executed were among the poorest, most marginal sections of society. The African Continent have a deep-rooted history of practice of witch-hunting.

In Tanzania, the people suffering from albinism[25] become victims of witchcraft. Similar practices have known to have taken place in Zambia and also other parts of the continent, like in Ghana, where 90-year-old Akua Denteh[26] was bludgeoned to death in July 2020. In the Democratic Republic of the Congo (DRC), surprisingly, usually the younger generations are associated with the evil practice of witch-hunting and witchcraft. They are usually rejected by their families and left to feed themselves. Therese Mema Mapenzi, a social worker in DRC, reported that there are many cases of children suffering from offences like rape due to which they are rejected by their own families.[27] Therefore, the entire social infrastructure is fueling this hatred against these innocent young children. The social reformers in these African nations feel handicapped because of absence of any legal protection because the practice of witch hunting is not considered as violation of law and due to absence of law, the people have enveloped their own practices to punish those who are accused of being witches. Therefore, they resort to the practice of engaging into a dialogue with the communities in order to stop the accusations and victimization of innocent people.

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[25] Albinism is a rare group of genetic disorders that cause the skin, hair or eyes to have little or no color. For more information visit <https://www.healthline.com/health/albinism#:~: text=Albinism%20is%20a%20rare%20group,have%20a%20form%20of%20albinism.> 28-9-2021.

[26] In Ghana an old lady namely Akua Denteh was accused of being a witch and thus was given beatings until she died. For more information visit < https://www.bbc.com/pidgin/tori-53554465> 22 March 2021.

[27] Charlotte Muller, Sertan Sanderson. 2020. Witch-Hunts a Global Problem in the 21st Century. For more information visit <https://www.dw.com/en/witch-hunts-a-global-problem-in-the-21st-century/a- 54495289>.10 August 2020.

In Colonial America and Early Modern Europe, witches were accused for even natural disasters which have resulted in numerous deaths due to which they were subjected to sufferings and torments by the state machinery so that they confess Apart from Europe and African nations, the witch hunting is practiced in other parts of the worlds too. In the Western World, after eighteenth centaury, the incidents of witch- hunting gradually disappeared as a consequence of religious reforms and economic development.[28] Hence, Devis and Bhopas are international concerns and legal impediments has resulted in much of victimization.

5. WHY MOSTLY DEVI? GENDER ISSUES IN WITCH-HUNTING?

The reasons behind women being popular targets during witch hunting occurrences needs to be considered as well. Based on in-depth interviews of victims of witch hunt and their relatives; accusers and their relatives and local tribal and non-tribal activists, broadly two categories of witch hunting have been stated, firstly is calculated witch-hunting attacks and secondly is surprise witch-hunting attacks.[29] In cases of calculated attacks, the relationship between the accuser and the accused, becomes important because this provides motive to select a particular person. Men, use such attacks and conflicts to meet their ulterior motives of grabbing the tangible properties, satisfy urge of violence, sexual harassment etc. The women thus become mere scapegoats in this hatched conspiracy of men. On the other hand, in cases of surprise attacks, the women or her family members, are completely unaware of the accusations prior to the attack. In this case, neither there is any prior witchcraft accusation nor any instigation of any kind.

Not only physical characteristics but also dominating nature of the woman is used as an excuse to targets them for hunts. In few cases, extra marital relations of a women are also used as a legitimate excuse for witch accusation by branding them unchaste.[30] Thus, it can be summarized that there are many reasons of women being targeted,[31] like idea of punishing women for their assertion of voice and for their initiative, women's prohibition from political and ritual spheres, patrilocality[32] and control over women's income, patrilocality and control

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[28] Purkiss, D. (1996). *The Witch in History*. Routledge, London. pp 182-189.

[29] Alam Shamsher and Raj Aditya. "The Academic Journey of Witchcraft Studies In India". Serial Publications. pp-123-138.

[30] Bridget Marshall.Most witches are Women because witches' hunts were all about persecuting the powerless. For more information visit<https://theconversation.com/most-witches-are-women-because- witch-hunts-were-all-about-persecuting-the-powerless-125427. 23 October 2019.

[31] Kelkar Govind. Nathan Dev. 2020. *Witch Hunts: Culture, Patriarchy and Structural Transformation*. Cambridge University Press.

[32] Patrilocality: is a social system in which the married couple stays after marriage with or near the relatives of husband. For more information visit< https://courses.lumenlearning.com/ culturalanthropology/ chapter/residence-patterns/> 13 March, 2021.

over women's income, land, inheritance, and patrilineality.[33] Therefore, it can be concluded that the belief of treating the women as a weaker sex has made men to dominate their will over the women under the veil of patriarchy system and due to this the women, who raise their voices in any area which is dominated by men, they are accused of being a witch.

6. WHAT TYPE OF PERSECUTIONS DOES VICTIMS SUFFER?

From the review of literature on this critical issue, it is apparent that the victims of the practice of witch-hunting have to undergo many atrocities and sufferings at the hands of the society. They are subjected to various persecutions and torments. The main types of persecution[34] which are widely practiced with the victims are torture to extract confession, murder, physical and sexual violence,[35] being expelled from the village, verbal abuse, public humiliation, social boycott or other ostracism,[36] forcing out of the village,[37] being made to pay a fine and

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[33] Patrilineality is also known as the male line or agnatic kinship, is a common kinship system in which an individual's family membership derives from and is recorded through their father's lineage. For more information visit< https://www.encyclopedia.com/social-sciences/encyclopedias-almanacs-transcripts- and-maps/patrilineality> 13 March, 2021.

[34] Sundar, Nandini. 2001. 'Divining Evil: The State and Witchcraft in Bastar'. Gender, Technology and Development 5(3). pp 425–448.

[35] Amreen was married to Saleem and lived in her in-laws' home. She worked as a labourer during the construction of her in-laws' house. On 23 March 2015, at midnight, her sister in-law, her mother in-law, her brother-in-law and her husband gave her beatings believing that a witch's spirit had possessed her body and she would eat her child. They took the child away from her custody and tortured her with hot iron rods. She appealed for help but nobody came to help her. Next morning, her brother came and he was shocked to see Amareen's condition. He took her to the nearest Hospital, where she was admitted for treatment. Before Police, her in-laws stated that Witch spirit entered her body and they are not responsible for the condition. Later an FIR u/s 498/A and 326 IPC were registered) against her husband and in-laws.

[36] Sarna Devi, a woman of Champa district of Chhattisgarh, lived with her family having three acres of land. Sarna Devi had a reputation of being authoritative and assertive, due to which she was not liked by few people. One day, her the neighbour's son fell ill. As a prudent person, Sarna Devi advised the family to take the child to the hospital but the family didn't. While Sarna Devi was forcefully taking the child to Hospital, unfortunately the child passed way in the way. She was blamed for the death of the child. She mentally tortured and verbally abused. She has apprehensions that she will suffer from physical violence someday. Presently, she is socially ostracized, she and her family members have to go to other villages to find work, even the *panchayat* also did not came for her support.

[37] In Mayurbhanj district of Odisha, a 48-year-old married woman named Churki and her husband, Amana, have about six acres of land. Even though Amana and his siblings distributed the inherited land among themselves. Amana's brother wanted to take the share of land belonging to Amana and spread rumours that his wife Churki was a witch. One day a sick boy of the village was taken to a *ojha* who said Churki was responsible for the illness of the child. She was stripped and insulted. Later the entire village in a meeting decided the fate of Churki and bounded her family to pay a heavy amount as compensation to village panchayat. They even tried to kill her, but she escaped. Later the police arrested nine people who are presently lodged behind the bars. Churki and her family remain ostracized in the village. Churki currently lives in the house of her brother in a different village, which is far away from her own village.

in the worst case they are even murdered after suffering from humiliations. The charge of using supernatural and magical powers is something which cannot, be established in a normal course so as to show the proof of such practice. The only manner in which witch craft can be established is through confessions which is mostly extracted through torture. The factors like jealousy, possession of valuable property with widowed/divorced/single women, refusal to sexual submissions, casteism, patriarchy, assertion of authoritativeness etc. makes women subject to this practice. Therefore, these factors lead a woman being subjected to the accusations of witch-hunting which is then followed by the aforementioned persecutions.

7. ARE INDIAN LAWS EFFICIENT TO COMPENSATE DEVI & CONVICT BHOPAS?

Across India, hundreds of unreported incidents of witch-hunting take place every year in almost every state. Once a woman is accused of being a witch, she is subjected to harassment, physical and mental torture, banishments from her village and sometimes to the extent of consumption of human excreta.[38] As per United Nations (UN) Report between 1987 and 2003 approximately 25000 witch-hunting cases are recorded in India.[39] As per National Crime Records Bureau (NCRB) between 2001 to 2019, approximately 2937 women were killed in India on accusations of practicing witchcraft.[40] Even though there are alarming statistics on the incidence of witch hunting in India still there is no national level law, however, few states have enacted legislations to curb this gruesome practice[41] like Jharkhand, Odisha, Assam, Chhattisgarh, Bihar, Rajasthan, Maharashtra and Rajasthan. Despite there being so many legislations through-out India still these laws are not able to eradicate the evil practice of witch hunting because of weak implementation which does not act as deterrent. The punishment granted in the law in few States like Chhattisgarh and Odisha are nominal. In Maharashtra where the punishment is up to 10 years imprisonment still there are large number of cases of witch hunting, because of no witnesses. Moreover, there is no witness protection provisions in the law as such due to which there is least conviction.

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38 Das, Prafulla. 2005. Witch-hunts in Orissa. *Frontline*. *22*(11). 21May 2005. pp.41-43.

39 Federici, S. (2008). Witch-hunting, globalization, and feminist solidarity in Africa today. Journal of International Women's Studies, *10*(1), 21–35.

40 NCRB. 2019. National Crime Records Bureau. For more information visit<https://www.google.com/search?q=ncrb&rlz=1C1RLNS_enIN811IN811&oq=ncrb&aqs= chrome..69i59j69i57j0l4j69i60l2.4084 j0j7&sourceid=chrome&ie=UTF-8> 16.16 November 2021.

41 The Prevention of Witch (Daain) Practices Act, 1999 in Bihar; The Prevention of Witch (Daain) Practices Act, 2001 in Jharkhand; Chhattisgarh Tonahi Pratadna Nivaran Act, 2005 in Chattisgarh; The Odisha Prevention of Witch Hunting Act, 2013 in Odisha; The Maharashtra Prevention and Eradication of Human Sacrifice and Other Inhuman, Evil and Aghori Practices and Black Magic Act, 2013 in Maharashtra; The Karnataka Prevention and Eradication of Inhuman Evil Practices and Black Magic Act, 2017 in Karnataka; The Rajasthan Prevention of Witch Hunting Act, 2015 in Rajasthan; The Assam Witch Hunting (Prohibition, Prevention and Protection) Act, 2015 in Assam.

As there is no specific national level law that could bring witch hunting within the ambit of crime or criminal offence, therefore, the prosecution agency have to resort to the provisions under Indian Penal Code, 1860 like on the charge of murder Section 302 IPC[42] or attempt to murder Section 307[43] IPC is invoked similarly when a victim is hurt or grievous hurt then sections of 323[44] and 325[45] of IPC are invoked. On rape, acid attack, outraging the modesty of the victim the charges of sections 376,[46] 326A[47] and Section 354[48] are levelled against the accused person. Apart from this at the national level, apart from the Constitution of India, Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989 and The Protection of Human Rights Act, 1993 can two legislations which curbs offence of witch- hunting indiretcly. Thus, from the above discussion we can conclude that in India the laws are neither sufficient to compensate the victims nor efficient to convict the accused persons, this is because of absence of central legislation and also lack of understanding and acknowledging the gravity of the problem.

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[42] Indian Penal Code Section-302. Punishment for Murder. —Whoever commits murder shall be punished with death, or 1[imprisonment for life], and shall also be liable to fine.

[43] Indian Penal Code Section-307. Attempt to Murder- Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to [1][imprisonment for life], or to such punishment as is herein before mentioned.

[44] Indian Penal Code Section-323. Punishment for voluntarily causing hurt. —Whoever, except in the case provided for by section 334, voluntarily causes hurt, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

[45] Indian Penal Code Section-325. Punishment for voluntarily causing Grievous Hurt. —Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

[46] Indian Penal Code Section-376. Punishment for Sexual Assault – 1 (a) whoever, except in the cases provided for by sub-section (2) commits sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to 10 years and shall also be liable to fine.

[47] Indian Penal Code Section-326A. Whoever causes permanent or partial damage or deformity to, or bums or maims or disfigures or disables, any part or parts of the body of a person or causes grievous hurt by throwing acid on or by administering acid to that person, or by using any other means with the intention of causing or with the knowledge that he is likely to cause such injury or hurt, shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and with fine: Provided that such fine shall be just and reasonable to meet the medical expenses of the treatment of the victim: Provided further that any fine imposed under this section shall be paid to the victim. Voluntarily causing grievous hurt by use of acid, etc.

[48] Indian Penal Code Section-354. Assault or criminal force to woman with intent to outrage her modesty.—Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

8. IS PREVENTION OF VICTIMIZATION OF DEVI POSSIBLE?

Acknowledging Indian Judiciary: In Himachal Pradesh a group of people attacked an 84 year old lady, molested her and paraded her after lynching through the village[49] and in Odisha, a woman along with her four minor children were brutally murdered while in sleep earlier in 2019 take place. It is hard to believe that such incidents took place however, it has been observed that it is not only the superstition that led to such accusations there are many other motives behind them. Not only research scholars, academicians and social reformers but Judiciary has also strongly believed that this practice of Witch hunting breeds fundamentalism and superstition which is a threat to entire humanity and humanistic principles. *In Hulikal Nataraju v State of Karnataka,*[50] the High Court of Karnataka after citing few examples of witch hunting and other forms of human sacrifices discusses that most astonishing factor about these practices are that they are so deep rooted into the society ridden with superstition, gender inequality, untouchability, discrimination on caste, color, creed and varna system that there has developed an attitude of acceptance about it. Similarly in *Gaurav Jain v The State of Bihar,*[51] the Hon'ble Supreme Court termed the practice of witch-hunting as gross violation of human rights. In this case various guidelines were laid down in the form of directives to state governments to curb this social evil. Thus, the practice of Witch Hunting and accusations are violative of fundamental rights as well as the principles of Justice, Equality and Equality enshrined in the Preamble of our Constitution. Such incidents are shame to the largest democratic nation of the world. It shows that despite independence and establishment of a welfare state, India has failed to achieve basic and fundamental directives of literacy, humanity and gender sensitivity.

Empowering Devi: Since the root cause to victimize women is to outrage her wealth, status and femineity so to most crucial suggestion is to empower women by educating them and to make them economically self-sufficient. In that field various efforts are made by the government like Beti Bacchao Beti Padhao, launching of female cholarships, grant of free bicycles and books in some states, free traveling for female students, sanitization of schools etc. thus, these are the steps in the area of empowering women. New approaches need to be adopted like the victim women must be not only rehabilitated in the village where she was accused of being a witch but also given position in the politics or panchayat. So that, she earns back the respect of which she was devoid.

Central Legislation: Another way to prevent the victimization of the women is to enact a central legislation which have nationwide implementation so

[49] Archana Datta, Witch-Hunting: Victims of Superstition? *The Tribune*, 8 March 2020.

[50] *Hulikal Nataraju* v. *the State of Karnataka*, Karnataka High Court, Writ Petition. no.1750/2008, 1 September, 2020.

[51] *Gaurav Jain* v. *State of Bihar*, 1991 Supp (2) SCC 133.

that the accused does not take the benefit of inter sate variations in law and escape their liabilities. The legislation should have elaborate provisions on areas of witness protection. There should be stringent punishment and strict liability of the accused persons along with adequate compensation to the victim and her family. The law should be holistic in manner of identifying the definition of the terms like Witch, Witch craft and witch hunting so as to incorporate each and every aspect of cruelty in its domain.

Compensation to Devi: There is need not only to punish the abusers but also to compensate the victims and her family the physical persecutions are suffered victims but the financial and psychological victimization takes place of the entire family. We have read the story of *Sarna Devi* and *Churki* where the entire family was compelled to leave the village or they were socially boycotted by their own villagers not only that they were even heavily fined. Therefore, there is need to make elaborate provision for compensating the victims and their families either out of the property or earnings of the accused persons or if the accused escapes lability in any manner, then the state should compensate the victims. Presently, a bill has been proposed namely Prevention of Witch-Hunting Bill, 2016 in which focus is shifted to victim then from crime. It has very promising provisions of compensation to victims along with medical assistance but the same has not been enacted by the parliament till today.

Investigation and Prosecution: Further there is urgent need to sensitize the police administration and train them to differentiate between the act of murder or rape with the act of murder or rape motivated by the practice of witch hunting. So that the accused is charged and punished differently so as to set as an example for the rest of the community indulged in the such heinous act. Also, most of the times it is observed that the investigating officers themselves belong to the community of accused therefore they manipulate law and investigation process in order to save their kins. Due to this there is need to form a Special Investigation Team for investigation into such heinous acts so that they work independently and bring accused to justice.

Reformation of Bhopas: Apart from the changes in legal system and prosecution process, there is need to generate awareness and enter into dialogue with the communities which are indulged into this evil practice of Witch Hunting with the help and expertise of social activists and reformers like Therese Mema Mapenzi of Congo. In such cases, education plays a very prominent role. With time the caste system has been substituted by class system so caste-oriented witch hunting practices have reduced but tribal people are still having primitive though process and away from modern virtues of equality, liberty and justice. Therefore, they resort to such practices and also become its victims. The only manner to remove this evil from tribal population is to make them aware about law so that they deter from making any such accusations. Thus, above are few suggestions through which the victimization of the *Devi* can be prevented. Despite so many incidents

throughout the length and breadth of the nation, still we are waiting for any central stringent law against this practice.

Honestly speaking, the present world which claims itself to be scientific is actually and equally superstitious. There are many superstitions now as in the past, this could be concluded from one religious beliefs and rites. The problem, hence, persists and needs social as well as legal introspection. The suggestive measures mentioned above could be helpful in addressing the issue but introspection at the social level is much necessitated only then we could dream of a society without Devis and Bhopas.

Let's be optimistic about India, no more Devis as Bhopas would be behind the bars.

ANALYSING THE IDEA OF FRATERNITY INTRODUCED BY DR. B.R. AMBEDKAR UNDER THE CONSTITUTION OF INDIA

Prem Chandra[*] *& Ashutosh Garg*[**]

1. INTRODUCTION

The idea of equality, liberty, and fraternity was originated from French Revolution from where it is travelled across the world. The principles of liberty, equality and fraternity are essential part of social democracy and cannot be treated separately. In a democratic system these principles becomes way of life. They form a union of trinity. If we will try to make a concrete separation of one from other then we will not be able to fulfill the dream of Constitution framers. A complete and unconditional liberty may develop a kind of dominance by the few members or group of society upon others. In same manner, if we have equality in all sphere of life but do not have liberty then it may totally destroy the development of cognitive faculty of human mind, innovation and creativity. Without fraternity, liberty and equality cannot become a reality or a natural course of life[1]. It is argued that fraternity is third neglected child of French Revolution[2]. The idea of fraternity enumerates some duties on State so that social unity and solidarity can be enhanced. It requires the State to ensure a certain degree of well being for the socially excluded people.[3] In Karachi Session of Congress which was held in 1931, under the Presidential ship of Sardar Vallabhbhai Patel a resolution on Fundamental Rights was accepted by the members of Congress. In this session, it was resolved that any future Constitution should include the fundamental rights of the people as now mentioned in Article 19 (1) (a) of the Constitution of India. It was also resolved that such Constitution should prohibit any discrimination on the basis of any religion, caste, creed in public employment and should be ruled out any

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1 "Why B.R. Ambedkar's three Warnings in his Last Speech to the Constituent Assembly Resonate even Today", <https://scroll.in/article/802495/why-br-ambedkars-three-warnings-in-his-last-speech-to-the-constituent-assembly-resonate-even-today>. (visited on 16-05-2021). Also available on: <https://www.drishtiias.com/to-the-points/Paper2/preamble-to-the-indian-constitution> (visited on 16-5-2021).

2 Tarunabh Khaitan, Fraternity, available on: <https://www.outlookindia.com/website/story/ fraternity/240443> (visited on 10-5-2021).

3 Spicker, Paul, 'Fraternity and solidarity', Liberty, equality, fraternity (Bristol, 2006; online edn, Policy Press Scholarship Online, 22 Mar. 2012), <https://doi.org/10.1332/policypress/9781861348418.003.0006> (visited on 10-05-2021).

civic bar on account of sex. Equal rights must be assured for all citizens of India. Like right to use & access of public roads, wells and all other places of public resort must be given to all without any discrimination. It was also required that State should not make any discrimination on the basis of religion. In 1936, a powerful idea was given by Dr. Babasaheb Bhimrao Ambedkar in his book "Annihilation of Caste". In the book Dr. Ambedkar writes that "what is your ideal society if you do not want caste, is a question that is bound to be asked of you."[4] If you asked me, my ideal would be a society based on liberty, equality and fraternity and why not[5]? Dr. Ambedkar argued that caste has no scientific basis. In order to unite to the India, it is necessary to annihilate caste system completely from India. In this respect only inter-caste marriage and inter-castes dinning is not sufficient. It is necessary to destroy the very notion of religion upon which the caste system is based.[6] In constitutional history, the inclusion of fraternity in preamble may be connected with the assassination of Mahatma Gandhi which occurred on January 31, 1948. Dr. Ambedkar, in his letter to Dr Rjendra Prasad on February 21, 1948 said that "the Drafting Committee has added a clause about fraternity in the preamble although it does not occur in the objective resolution". On this the committee felt that the need for fraternal concord and goodwill in India was never greater than now and that this particular aim of the new Constitution should be emphasized by special mention in the preamble.[7] After two years later on November 25, 1949 in his speech before Constituent Assembly, Dr Ambedkar said that without fraternity, equality and liberty will be no deeper than coats of paint.[8] Thus, it is clear that the idea of fraternity was not included in the objective resolution but on latter stage it was deliberately projected by Ambedkar in our Constitutional scheme. It is argued that word "fraternity" means brotherhood and it is male centered or male inclined concept and sisterhood is not included in it. On other hand, some scholars argued that the Hindi word "bandhuta" is more appropriate and inclusive for the correct sense of fraternity.[9] Fraternity means a strong feeling and sense of bonding among all. It is the principle which gives unity and solidarity in the social, political and religious life of human beings and it is not easy for human civilization to create such ideal conditions in actual life of all. A very sincere concern was made by Dr. Babasaheb Bhimrao Ambedkar in Constituent Assembly Debate about the

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4 Dr. B.R. Ambedkar's Vision of Society based on the Liberty, Equality and Fraternity, available on: <https://www.readersdigest.in/conversations/story-society-based-on-liberty-equality-and-fraternity-b-r-ambedkar-124787> (last visited on 29-7-2021).

5 *Ibid*.

6 Available at: <https://ruralindiaonline.org/en/library/resource/dr-babasaheb-ambedkar-writings-and-speeches-vol-1/>. visited on 10-5-2021.

7 B. Shiva Rao, "The Framing of the India's Constitution" Vol. III p. 510. Available on <https://archive.org/details/in.ernet.dli.2015.278539/page/n515/mode/2up> (visited on 11-5-2021).

8 Why B.R. Ambedkar's "Three Warnings in his Last Speech to the Constituent Assembly Resonate Even Today". Available on: <https://scroll.in/article/802495/why-br-ambedkars-three-warnings-in-his-last-speech-to-the-constituent-assembly-resonate-even-today> (last visited on 29-7-2021).

9 Harsh Mander, Fraternity: The Missing Link of India's Democracy, *The India Forum*, available on: <https://www.theindiaforum.in/article/fraternity-missing-link-india-s-democracy> (visited on 15-5-2021).

value, importance, recognition and acceptance of the principle of fraternity.[10] He said that to believe that we are a nation; we are under a delusion. He raised a big question that how can people divided into several thousands of castes in our country be a nation? In such type of environment he had a doubt in his mind about the future of Independence of India. In Constituent Assembly he said that in real sense we are not a nation. I India we are divided into thousands of caste and castes are also divided into sub-castes. The caste system of India is very anti to the notion of one nation. The caste system is not only anti- national, it destroys the foundation of our social life. But if we really want to become one nation we would have to overcome upon these problems.[11] Irrational, illogical and arbitrary dominance or supremacy of one group upon another in society leads clash and mistrust among people. The solution of this problem is that we must have common and universal rules of morality for all otherwise the interest of individual will not be protected. Divided society leads to the denial of justice. Common and universal rule of morality is the tool to safeguard the growth of individuals. Conflict among different classes, groups, castes will prevent to the individuals from having a consistency and creativity in mind. If society is divided in castes, classes and groups how it can be united? The only remedy lies in making fraternity universally effective.[12] Fraternity is nothing but another name for universal rules of morality.[13] If we look at idea of fraternity, it may be a fraternal bond and obligation between two individuals, between two groups, classes or communities, religious groups or among family members. According to Dr. Ambedkar, the word "religion" is very ambiguous as it has gone through several stages. Each stage has own religious though and that is religious thought of that time. There may be a sense of strong brotherhood among Muslims within one community but it does not extend to other community at all. Hinduism does not have such fraternal feelings at all because it is divided into castes, sub-castes and various classes. In Hinduism, fraternal feelings are limited only within same castes or sub-caste. But Buddhism extends the idea of fraternity across the every human being at all. In October 1956, on the day of his conversion in Buddhism, Dr. Ambedkar said that Hindu religion gives no scope or opportunity for a particular class of society who is categorize by them as untouchable and to improve their destiny which itself is based on inequality. He contended that Buddhism is based on equality and justice and therefore would like to see all Indians follow Buddhist.[14]

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[10] Constituent Assembly Debates on Friday, 25 November 1949, Vol. XI. Available on: <https://indiankanoon.org/doc/792941/>.

[11] *Ibid*.

[12] Dr. B.R. Ambedkar, Budha and His Dhamma, 1957 at 184. Available on <https://drambedkarbooks.files.wordpress.com/2015/01/english-buddhaandhisdhamma.pdf> (visited on 16-5-2021).

[13] Dr. B.R. Ambedkar, "Budha and His Dhamma, 1957" at 184. Available on <https://drambedkarbooks.files.wordpress.com/2015/01/english-buddhaandhisdhamma.pdf> (visited on 16-5-2021).

[14] Dr. B.R. Ambedkar, "Budha and His Dhamma, 1957" available on: <http://ycis.ac.in/CEGC%20Library/English/Buddha%20and%20His%20Dhamma.pdf> (visited on 16-5-2021).

2. ANALYSING THE IDEA OF FRATERNITY AS A CONSTITUTIONAL VALUE

Fraternity is a indication of common bond of feeling united; between people or communities that are acting either within a private or public sphere.[15] A fraternal bond is one that does not relate to the shared use of goods. It is necessarily related to sharing the feelings of human beings which is essential for the existence and survival as well as proper functioning of social system.[16] In western concept, the idea of fraternity was related with the fraternization to each for common cause.[17] However, it seems that in Indian context it has taken place in a very wide and different sense.[18] Preamble is considered as an introductory statement and very important part of a document. It presents the philosophy and objectives of the document. It is considered the key to know the vision, philosophy and intention of framers, history of creation, and core value of document and core principles of a nation. After independence, India was declared a sovereign socialist secular democratic republic on 26th November, 1949. Preamble of the Constitution of India is one of the most important parts of this document.[19] The aims and objectives of the Preamble can be understood by analyzing the text of the Preamble itself.[20] First part of the preamble of Constitution of India is declaratory in nature. It declares that the people of India are the source of the Constitution. It means that the authority of the people is supreme and they have vested the authority in the Constituent Assembly for the purpose of making of the Constitution of India. Second part of the preamble is obligatory which mandatorily seeks that India will be a Sovereign, Democratic

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15 Katherine A. Chandler, "A New Idea in Social Fraternity", 8(4) American Journal of Sociology 442-455 (1903). Available on: <https://www.jstor.org/stable/pdf/2762050.pdf?refreqid=excelsior%3Aa584693715fe8e3bf2eee806a214a528> (visited on 17-5-2021). See also: <https://docs. manupatra.in/newsline/articles/Upload/1A226E6F-4443-472F-9E7E-CB70EA7C3744.pdf>.

16 Andreas Esheté, "Fraternity", 35 Journal of Metaphysics 27-44 (1981). Available on: <https://www.jstor.org/stable/20127605?refreqid=excelsior%3A4305faaf391989304c7759241836d031&seq=1> (visited on 17-5-2021). See Also: <https://docs.manupatra.in/newsline/articles/Upload/1A226E6F-4443-472F-9E7E-CB70EA7C3744.pdf>.

17 Aymen Mohammed, Dialoguing on the Constitutional Value of Fraternity, Refresher Course for Law Teacher NALSAR University of Law, Hyderabad. Available on: https://onlinecourses.swayam2.ac.in/arp20_ap08/unit?unit=37&lesson=39 (visited on 16.05.2021).

18 Aymen Mohammed, Dialoguing on the Constitutional Value of Fraternity, Refresher Course for Law Teacher NALSAR University of Law, Hyderabad. Available on: <https://onlinecourses.swayam2.ac.in/arp20_ap08/unit?unit=37&lesson=39> (visited on 16-5-2021).

19 "We, the people of India, having solemnly resolved to constitute India into a sovereign, socialist, secular democratic republic and to secure to all its citizens: Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity; and to promote among them all; Fraternity assuring the dignity of the individual and the unity and integrity of the nation; In our constituent assembly this twenty sixth day of November 1949, do hereby adopt, enact and give to ourselves this constitution"

20 Smaran Shetty and Tanaya Sanyal, "Fraternity and the Constitution: A Promising Beginning in Nandini Sundar V. State of Chattisgarh", 4 NUJS Law Review 439 (2011). Available on: <https://docs.manupatra.in/newsline/articles/Upload/1A226E6F-4443-472F-9E7E-CB70EA7C3744.pdf> (visited on 17-5-2021).

and Republic country. The third part of the preamble is Descriptive which is comprised of promises which the framers of the Constitution intended to ensure to the citizens of India. The ideals enshrined in the Preamble of Constitution have to be harmoniously interpreted to achieve the aims and objectives of the Preamble. The Preamble puts the dignity of a person before the unity of the nation, and thereby emphasize that for the unity of nation State is required to guaranteed the dignity of individual. Now, it is clear from the vision of preamble of the Constitution of India that we the people of India have a pious obligation to secure the dignity for all of its citizens. We are also duty bound to ensure justice either social or economic or political and the liberty of thought, belief etc. along with equality of status and opportunity to all of its citizens. All the constitutional value as mentioned above can be protected and promoted if we all have a sense of fraternity in our mind. Constitution framers were well aware about the things which can make a nation socially, economically and politically prosperous. To prevent the tendencies of regionalism, linguisticisim, communalism and secessionist and separatist activities promotion of fraternity is necessary. In the words of KM Munshi, "dignity of the individual is an instrument not only of ensuring material betterment and maintaining a democratic setup, but that recognises that personality of every individual is sacred[21]." Fraternity or spirit of brotherhood is required absolutely, especially in India where diversities are the most essential feature of the society.

Preamble of the constitution itself spells out the duties of the people and contains the ideals and aspirations of the people of India and their dedication for same.[22] Preamble of the Constitution states people of India have resolved to secure to all the citizen of India justice, liberty, equality and fraternity. Whatever is needed to achieve these goals is our obvious duty to perform it. The idea of fraternity is also reflected under some other provisions of our Constitution. Fraternity is needed because it supplement to equality. Inequality is enemy to fraternity. All forms of inequality are prohibited under the Constitution. Equality before law and equal protection of laws is one of the basic tenets of our constitution. It is rightly argued that equality can easily be maintained by the sense of fraternity. Under Article 17 of the Constitution any form of untouchability has been abolished. Practice of untouchably has been made punishable offence.[23] Civil liberties can be enjoyed properly in a well organized society only. Human beings may have so many desires uncontrolled desires create problem. Therefore those are required to

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[21] Role of the Preamble in the Interpretation of the Constitution, Available on: <http://law-projects.blogspot.com/search?q=%E2%80%9Cdignity+of+the+individual+is+an+instrument+not+only+of+ensuring+material+betterment+and+maintaining+a+democratic+setup, +but+that+recognises+that+personality+of+every+individual+is+sacred.%E2%80%9D> (last visited on 29-7-2021).

[22] B.R. Atre, Supreme Court on Fundamental Duties, Universal Law Publishing, New Delhi, 2016 at 3.

[23] The Protection of Civil Rights Act, 1955. Preamble of the Act read as under: An Act to prescribe punishment for the preaching and practice of "Untouchability" for the enforcement of any disability arising there from and for matters connected therewith.

be controlled, reconciled and regulated with similar desires by other individuals.[24] If the people have deep sense of fraternity in their mind their desires would operate in a self controlled and self regulated manner which is precondition for a just and fair society. Right to freedom of speech includes liberty to propagate one's own views as well as to publish the views of others but it does not include using of derogatory language against others.[25] Using derogatory language would lead to intolerance and inimical environment among the people. All citizen of India have been given the right to move freely throughout the territory of India[26] and to reside and settle in any part of the territory of India.[27] All persons are equally entitled to freedom of conscience and the right to freely profess, practice and propagate religion.[28] The complete neutrality of State from religion cannot help to eliminate the mutual misunderstanding and intolerance between different group of religion, faith and belief.[29] Cultural rights of any citizen of India are also protected by the Constitution.[30] Article 51A, which, constitute Part 4A of the Constitution talks about the various duties which are equally important for the promotion of the fraternity in the society. Article 51A clause (c) imposes duty on every citizen to uphold and protect the sovereignty, unity and integrity of Country. Article 51A clause (e) enumerates the duty of citizen to promote harmony and the spirit of the common brotherhood among all the people of the India. It also expect from the citizen to renounce the practices derogatory to the dignity of the women. Further Article 51A clause (e) provides further says that every citizen shall have duty to value and preserve the rich heritage of composite culture of the nation.

3. PROMOTION OF THE IDEA OF FRATERNITY UNDER THE OTHER LEGISLATIVE PROVISIONS

Constitution is the supreme law of land and brotherhood, mutual harmony among different groups of society has been recognized as an important constitutional value in this holy document. The idea of fraternity and brotherhood has also been reflected under the other diverse legislative provisions. Section 295 A of the Indian Penal Code deals with the deliberate and malicious acts intended

[24] *A.K. Gopalan* v. *State of Madras*, 1950 SCC 228 : AIR 1950 SC 21. See also Dr. J.N. Pandey, Constitutional Law of India, Central Law Agency, Allahabad, 2015.

[25] Constitution of India, Art. 19(2) imposes certain restrictions on right to Freedom of Speech and Expression such as decency and morality, defamation, incitement of an offences.

[26] Constitution of India, Art. 19(1)(*d*).

[27] Constitution of India, Art. 19(1)(*e*).

[28] Constitution of India, Art. 25(1).

[29] *Id*., para 81.

[30] Constitution of India, Art. 29(1) reads as under: Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

to outrage religious feelings of any class by insulting its religion or religious beliefs.[31] A person who deliberately and maliciously outrages the religious feelings of others shall be punished. Any person who voluntarily causes disturbance to any assembly which is being held for religious worship or for performance of religious ceremonies shall also be punished.[32] If someone wounds the religious of any other person by uttering words, is a punishable offence. No person can be justified in wounding the religious feelings of his neighbors by words, gestures or exhibitions.[33] Right to dignity has been recognized as fundamental right under the Article 21 of the Constitution of India. For welfare and betterment of weaker section of society and to protect their constitutional and legal rights the Parliament has enacted various laws. National Human Rights Commission and State Human Rights Commission are required to be established for the proper protection of human of human rights of all. For the welfare and well being of aged persons the Maintenance and Welfare of Parents and Senior Citizens Act, 2017, is enacted by Parliament. In our country, women even are not safe in their own house. They are beaten by her relative for trivial causes. To protect the rights of women various laws has been enacted. Protection of Women from Domestic Violence Act, 2005, is enacted by the Parliament to control or eliminate violence against female in family. Disable persons are needed special attention of the community and State. To protect and promote their interest the Rights of the Persons with Disability Act, 2016 has been passed by Parliament. Juvenile Justice Care and Protection of Children) Act, 2015 makes the provision for the proper rehabilitation and reformation of juveniles who are found in conflict with the law. The main object of these protective laws is to give the protection of the rights of underprivileged class of society which would have been protected and promoted by the society itself if we would have a deep sense of fraternity and brotherhood in our mind.

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[31] Penal Code, 1860, S. 295-A read as under:

Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs- Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizen of India, by words either spoken or written, or by the signs or by the visible representations or otherwise, insults or attempt to insult the religion or the religious beliefs of that class shall be punished with imprisonment of either description for a term which may extend to three years or with fine or with both.

[32] Penal Code, 1860, reads as under:

Disturbing religious assembly- Whoever, voluntarily causes disturbance to any assembly lawfully engaged in the performance of religious worship or religious ceremonies shall be punished with imprisonment of either description for a term which may extend to one year or with fine or with both.

[33] Penal Code, 1860 S. 298 reads as under:

Uttering words etc with deliberate intent to wound the religious feelings of any person- Whoever, with the deliberate intention of wounding the religious feelings of any person utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places, any object in the sight of that person shall be punished with imprisonment of either description for a term which may extend to one year or with fine or with both.

4. ROLE OF JUDICIARY IN PROMOTION OF FRATERNITY

There are three organ of State that is Executive, Legislature and Judiciary. It is duty of every citizen to respect these institutions. Judiciary plays an important role for the protection of rights of individuals. Four things are very important for efficient judicial system. Firstly, the Judges have responsibility to hear patiently. Secondly, the Judges should consider diligently. Thirdly, they should answer wisely. Fourthly, they should decide `impartially. If a judge neglects any one of these four duties, it is disrespect to the constitutional institution of judiciary. When lawyers go on strike for redressal of their professional grievances and stall the working of the court it is also results in denial to the constitutional values. All organs of the government are duty bound to follow the constitutional ideals such as brotherhood, concept of non-violence, and build a just society. Judiciary has to play very important role for establishing a just and fair society. In a number of cases the idea of fraternity which is reflected in the preamble of the constitution has been recognized by Judiciary. Recently in the matter of *Indian Young Lawyers Assn.* v. *State of Kerala*[34] the Supreme Court has observed that constitutional goal of Justice, Liberty, Equality and fraternity can only be achieved through the commitment and loyalty of the organs of State to the constitutional value. These four important concepts are not disjunctive. Our commitment, loyalty and understanding to the constitution can complete only if we acknowledge the complex relationship between the pursuit of justice, protection of liberty, realizations of equality and the assurance of fraternity. In the matter of *Ashok Kumar Thakur* v. *Unoin of India*[35] the Supreme Court has observed that the 'Preamble as one of its objects secures the fraternity assuring the dignity of the individual and the unity and integrity of the nation.' Reservation unless protected by the constitution itself, as given to us by the founding fathers and as adopted by the people of India, is sub-version of fraternity, unity and integrity and dignity of the individual.

In the matter of *Aruna Roy* v. *Union of India*[36] the Supreme Court has opined that religion is not the only a source of essential value for human race; it is a major source of value generation too. We have an obligation to educate the young mind or our new generation about the core values and arch of different religions. A comparative study of the philosophy of different religions may create a mutual trust by eliminating the misunderstanding about the philosophy of other religions.

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[34] (2019) 11 SCC 1 available on: <https://www.scconline.com/Members/ NoteView.aspx?enc=KDIwMTkpIDExIFNDQyAxJiYmJiY0MCYmJiYmU2VhcmNoUGFnZQ==> (last visited on 23-7-20221).

[35] (2008) 6 SCC 1 : AIR 2008 SC (Supp) 1 para 58, available on <file:///C:/Users/PREM%20CHANDRA/Desktop/Ashoka_Kumar_Thakur_vs_Union_Of_India_And_Ors_on_10_April_2008.PDF> (last visited on 27-7-2021).

[36] (2002) 7 SCC 368 : AIR 2002 SC 3176. Available on: <file:///C:/Users/PREM%20CHANDRA/Desktop/Ms_Aruna_Roy_And_Others_vs_Union_Of_India_And_Others_on_12_September_2002.PDF> (last visited on 27-7-2021).

The people should be made aware that the essence of every religion is common, only the practices are different. The people should be made convinced that we all have an obligation to respect the differences of opinion in certain areas[37].

Despite many efforts for peace at national as well as international level inter and intra religious conflict has seems to become the part of human life. The UNESCO Department for Intercultural Dialogue has pleaded for religious union or "Spiritual Convergence". It will help for promoting a healthy dialogue among the different religious and spiritual traditions in whole world. It is the need of time that children from early childhood must be introduced and made aware about the adoptive approach of "otherness" and about to the values of tolerance, respect, and confidence in the "other". It may bring a drastic change in behaviour and attitude of others. Specific teaching about the traditions and values of various cultures and religions with the help of proper instructive mechanism may develop a better understanding among diverse religious and cultural groups of society. Such type of shared knowledge may be considered as a common spiritual and cultural heritage. In the matter of *Indra Sawhney* v. *Union of India*[38] Supreme Court has utilized the idea of fraternity in two ways. One was to defend the reservation policy and second to warn the executive about the adverse impact of reservation if it will be used in unguided and arbitrary manner. Thus, against the conventional idea of equality, it was used as justification for affirmative action. However, fraternity is recognized to achieve the goal of equality. In the matter of *AIIMS Students' Union* v. *AIIMS*[39] the Supreme Court has adopted the idea of fraternity in same manner and held that reservation for post-graduate students in AIIMS was not supported by the Constitution and therefore not in line with the idea of fraternity in Constitution. The Court stated through fraternity every citizen is assured of equality, which altogether is having objective of achieving the national unity and dignity. In the present case, the assurance as mentioned in the Preamble about the fraternity would substantially be undermined by reservation. It is also not supported by Constitutional values and morality. In *Raghunathrao Ganpatrao* v. *Union of India*[40] case, the Court said that the Princes do not form a separate class under Article 14 of the Constitution and therefore not entitled for any special privilege. The privileges of Princely class were taken as threat to the common brotherhood and fraternity. In *S.R. Bommai* v. *Union of India,* case it was held by the Court that secularism is part of basic structure of the Constitution of India. However, the Hon'ble Court accepted the principle of fraternity is pre-cursor to achieve the concept of secularism. The Court said that "secularism is the bastion

[37] The Chavan Committee (1999) strongly urges education about religions as an instrument of social cohesion and social and religious harmony.

[38] 1992 Supp (3) SCC 217 : AIR 1993 SC 477.

[39] (2002) 1 SCC 428 : AIR 2001 SC 3262.

[40] 1994 Supp (1) SCC 191 : AIR 1993 SC 1267.

to build fraternity"[41]. In the matter of *Nandini Sundar* v. *State of Chhattisgarh*[42]the Supreme Court said the misguided policies of State are contrary to the vision of Constitution makers and Constitutional morality. There is a clear mandate of our Constitutional morality that powers vested in the State must be exercise for the welfare of the people at large. Any arbitrary or misguided State Policy will necessarily damage the idea of fraternity and human dignity. Thus the court has taken into the consideration the idea of fraternity in different cases for the interpretation to the Constitution but not much. There is urgent need of time to utilize the principal of fraternity in interpretation of Constitutional as well as legal issues.

5. ROLE OF EXECUTIVE IN PROMOTION OF FRATERNITY

In the modern democratic system, political theories as well as the Constitution values have acknowledged the obligation of government to provide jobs, medical care, old age pension, and imposes an affirmative obligation to promote equality, liberty and fraternity. The government has affirmative responsibility for elimination of social, economic and political inequalities. Special treatments for the under-privileged class have been permitted[43]. It is argued that the idea of fraternity can be promoted in a better manner by the fair and just executive. The concept of fraternity is moral one and it has no relevance in the interpretation of the Constitution and therefore the interpretation of the Constitution in the light of the idea of fraternity is unnecessary and illogical. Further the question is also raised that whether the Constitution is capable to ensure promise of fraternity? Specifically, when a fair and just executive is seems more appropriate organ of the government for maintaining fraternal relations among people in society. Here, it is necessary to mention that that such conditional executive makes automatically necessary role of the Judiciary to interpret the Constitution in the light of the idea of fraternity. When executive becomes biased, unfair and unjust, the judiciary has responsibility to scrutinize and correct it. It is the judicial duty of the court to scrutinize the policies of the executive which are having the potential to divide society and can adversely affect fraternal relations of citizens. It cannot be assumed that executive is appropriate and competent authority to promote fraternity and it will undertake this responsibility faithfully, without any digression. Another objection regarding fraternity is about its vagueness. In this respect; views of Dr. B.R. Ambedkar gives clarity about the requirements of fraternity. In view of Dr. Ambedkar, "owing to the socially tense situation due to religious, linguistic and caste based differences, the constitution we should ensure through constitutional mandate about the creation of unity amongst citizens of India"[44].

[41] *Id.,* para 186.

[42] (2011) 7 SCC 547. Available on: <file:///C:/Users/PREM%20CHANDRA/Downloads/Sundar%20case%20-%20Decision%20of%205%20July%202011.pdf> (last visited on 27-7-2021).

[43] Constitution of India, Art. 15(3).

[44] B. Shiva Rao, "The Framing of India's Constitution", Vol. III, 510 (2004) as quoted by Smaran Shetty and Tanaya Sanyal, "Fraternity and the Constitution: A Promising Beginning in Nandini

Dr. Ambedkar viewed the idea of fraternity as a tool to improve relations between different groups of heterogeneous society which is consisting of different castes and religious communities[45]. Executive has to play an important role for promotion of fraternity among the citizens of India. Ministers, Constitutional functionaries, civil servants, members of judiciary are expected to infuse the idea of fraternity in the system of governance. It is their pious constitutional duty to work for promoting the fraternity and ensuring the dignity of individuals, integrity of the nation. All public authorities are constitutionally duty bound to run the system in a proper way. They can play a dominant and leading role in promotion of fraternity and brotherhood. It will definitely improve the confidence of the public in the system of governance. Unfortunately it is not happening on our system in true spirit. Executive branch of government must have a sense of fraternity in its functioning.

6. ROLE OF COMMUNITY IN PROMOTION OF FRATERNITY

It is true that without sense of fraternity among the people we cannot enjoy the fruits of our Constitutional values, like equality, liberty, and unity of nation at all. All citizens of India are duty bound to promote the sense of fraternity which is necessary for a prosperous, healthy, peaceful and happiest life. If we promote or observe the idea of fraternity in our behavior and life there will be no discrimination, no fight, no violence, no exploitation or injustice in the society. Our complete faith in the idea of fraternity may prove a good step for establishing a just and fair society. The concept of rule of law may become reality.

7. CHALLENGES TO THE IDEA OF FRATERNITY

Incidents of attacks on minorities and minority's opinion, violence against women even by her own relatives, exploitation of weaker section of the society, child labour and child sexual abuse, gender inequality are big challenges to the Idea of fraternity. The India faces serious threats from casteism, communalism and religious fundamentalism etc. They are weakening the functioning of our fraternal relations[46]. One of the more dangerous things is the mixing of caste and politics. It has resulted in politicization of caste and casteization of politics. Caste consciousness has not yet been eroded in our society. Communalism and religious fundamentalism is required to be eroded from the mind of the individuals. It has disrupted the pattern of co-existence and social harmony in the society. Use of violence for political motives is also very dangerous for the idea of fraternity. India

Sundar V. State of Chhattisgarh", 4 NUJS Law Review 439 (2011). Available on: <https://docs.manupatra.in/newsline/articles/Upload/1A226E6F-4443-472F-9E7E-CB70EA7C3744.pdf>.

[45] *Ibid*.

[46] Challenges to Indian Democracy, "Contemporary India: Issues and Goals" available on: <https://nios.ac.in/media/documents/SecSocSciCour/English/Lesson-23.pdf>. Visited on 23-7-2021 at 10.30 p.m.

is struggling with regionalism, an outcome of regional disparities & imbalances in development. If we ask a question to ourselves that whether we have renounce the violence to safeguard public and public property which is our constitutional duty to do? Whether we are respect women at all. Whether strikes for redressing the grievances have not increased? Answer will be no. In most of the cases, public properties are targeted and damaged. Further, whether truly are we striving to promote harmony, solidarity and fraternity in the spirit of common brotherhood among people which are having faith in different religions? It appears that we have not taken necessary steps towards this. Similarly, instead of protecting and improving the natural environment, we are damaging it.

8. CONCLUSION & SUGGESTIONS

As a political ideology, the idea of fraternity was emerged during the French Revolution from which it has traveled across the world. Fraternity is the common bond or feeling of unity among the people. The concept of fraternity and brotherhood has also been adopted by the framers of our Constitution. Despite of express mention in the preamble of the constitution, impliedly it has been incorporated not only under the various provisions of the Constitution but under the various statutory provisions too. For establishing a peaceful, just and fair society it is necessary that we should promote and flourish the idea of fraternity in all sphere of life. Most of the social, economic and political problems exist in the society because we are not applying or observing the idea of fraternity in the true sense. Political violence, religious violence, domestic violence, communal violence, abuse of children, corruption, inequality, and everything is there. After independence, we have made progress a lot but in the perspective of fraternity we have to do a lot. It is rightly argued that fraternity is the foremost step to achieve the idea equality, liberty and dignity of individuals which to some extent will automatically flourish the unity and integrity of India. Important thing is that we should develop a clear link between the pledge of fraternity which is clearly expressed in the preamble with the part third and fourth of the Constitution and other statutory provisions too. There is very ample scope of fraternity for the interpretation of Constitution. It may be proved an important tool to promote the social solidarity. All the three organs of the government must be made duty bound and responsible for promoting and flourishing the idea of fraternity and the brotherhood. We should educate to all about the idea of fraternity. There are so many protective laws which have been enacted by Parliament for the protection of under privileged class of the society because our fraternal bond has been diluted. If fraternal bond would have been developed properly and not damaged there would have no need of such laws.

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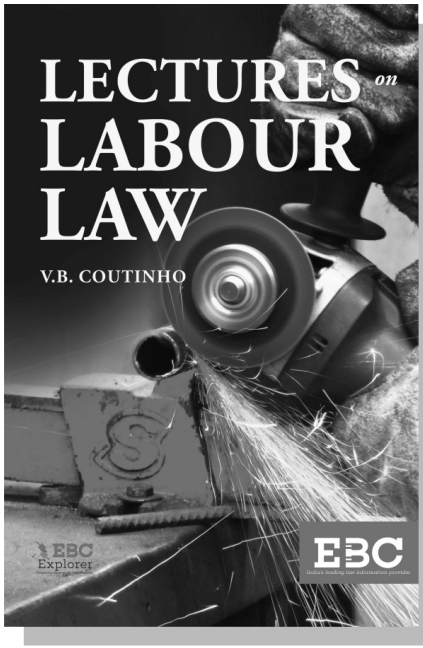

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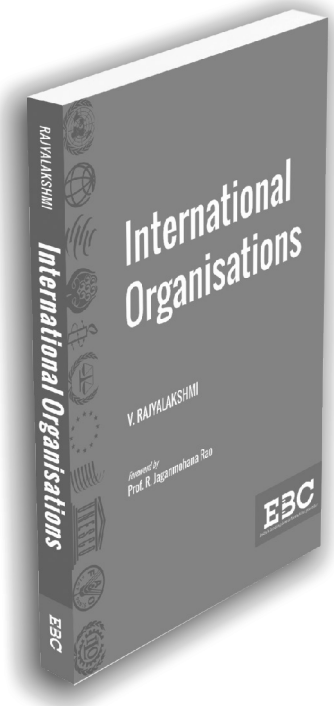

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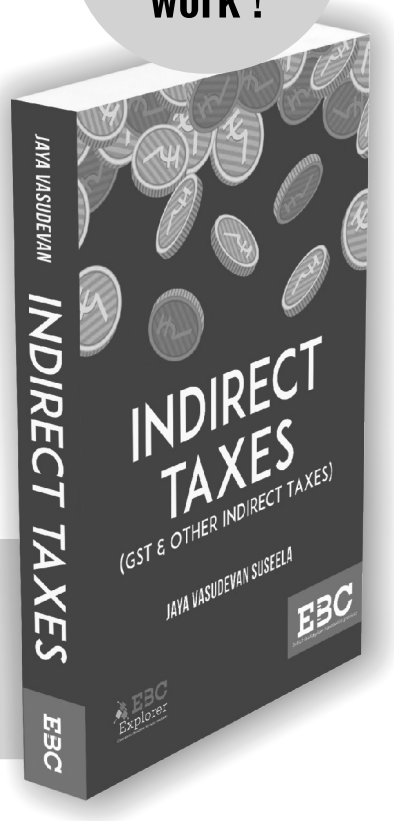

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