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CONTRACT WORKERS' STRUGGLE DURING THE PANDEMIC AND BEYOND: CRISIS BEHIND THE CLOSED DOORS

Shivam Sethi*
Balwinder Kaur**

1. Introduction

As per the definition, “Contract labour are workers who are hired in or in connection with the work of an establishment by or through a contractor with or without the knowledge of the principal employer”.¹ This relation was acknowledged when the CLRA was enacted. Most companies would prefer to have a contractual workforce to retain the flexibility to adjust to their business cycle and to reduce the cost they will spend on their permanent staff. It is reported that a company like Maruti had engaged 1869 contract workers in Manesar constituting 40% of the total workforce in the factory in 2012-13. They used to get salaries according to entry-level permanent employees, but their service depends on the market conditions.² A report published by the “National Commission on Enterprises in the Unorganised Sector” (NCEUS) observes that over 90% of the workforce is included in the ‘unorganized sector’. Contract labour is common in unorganized sectors for jobs such as stone quarrying, beedi rolling, rice shelling, and brick kiln work. According to ILO (2018), the percentage of the workforce across the globe who are engaged in the unorganized (informal) sector is more than 60 percent. Many South Asian Countries' workforce is into informality.³ The informal workforce is seen in countries with lower income per capita as compared to the countries with higher per capita which have more formalisation of the workforce.

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¹ Contract Labour (Regulations and Abolition) Act 1970, s 2.

² Suman Nayak, Indian Industry's attitude toward contract works changing for the better' (Business Today, 17 February 2013) < <https://www.businesstoday.in/magazine/features/story/contract-labour-reduction-india-inc-38852-2013-02-06>> accessed 31 March 2022.

³ International Labour Organization, *India Wage Report: Wage Policies for Decent Work and Inclusive Growth, India* (International Labour Organization 2018).

Hence, the informality of the workforce is highly concentrated in developing countries.⁴ It is a fact that informal or contractual workers are mainly engaged in the unorganized sector, this trend has changed now there has been the rise of ‘informatization’ of employment in the organized sector. “The International Labour Conference of 2002” developed a consensus on the plight or vulnerabilities of the informal workers and agreed there is a need to address the vulnerabilities.⁵ It is a fact that contractual or informal workers are in general not recognized and not registered in the national statistics. They are not granted protection under labour law and do not get social protection or any other protective measures that may be required at the workplace.⁶ Over the last 20 years, the proportion of temporary workers with temporary contracts has increased significantly compared to permanent workers, according to ILO.⁷ Temporary contract workers are those workers who are engaged by the companies through third-party contracts or temporary work agencies and are not entitled to any social security. It constitutes a large number of labour markets in developing countries these workers have a substantial number in developed countries.⁸ Economic Survey of 2015-16 highlights the significance of jobs in the organized and the blockades that prevent the availability of more jobs in the organized sector. It notes, “The slow pace of labour reform has encouraged firms to resort to other strategies to

⁴Rajneesh Narula, ‘Policy Opportunities and Challenges from the COVID-19 Pandemic for Economies with Large Informal Sectors’ (2020) Journal of International Business Policy <<https://link.springer.com/article/10.1057/s42214-020-00059-5>> accessed 31 March 2022.

⁵International Labour Office, *Transitioning from the Informal to the Formal Economy* (International Labour Organization 2014).

⁶ International Labour Office, *Measuring Informality: A Statistical Manual on the Informal Sector and Informal Employment*, (International Labour Organisation 2013).

⁷ International Labour Organisation, *World of work report: better jobs for a better economy* (International Labour Organisation 2012).

⁸ The share of temporary and short-term contractual workers is increasing in many OECD countries over the past few decades. According to OECD Employment Outlook Report 2010 it has increased four times in the Scandinavian countries and has almost doubled in other European countries. This segment however employed 6.8% of the European Union working population in 2006. In the United States and the Japanese labour markets the same segment covers 6.2 and 49% of the total workforce respectively.

negotiate 'regulatory cholesterol'. One popular strategy is to hire contract workers, which has two key benefits: first, the firm essentially subcontracts the work of following regulations and 'managing' inspectors to the contract labour firm. Second, because contract workers are the employees of the contractor and are not considered workmen in the firm, the firm stays small enough to be exempt from some labour law." The Survey also records that "the practice of contract workers grew quicker in states that had comparatively more 'rigid' labour laws."⁹ Work is considered to be part of one's life and is also important to one's well-being, dignity, and development as a human being. Economic development not only creates jobs but also ensures dignified working conditions.

It is the Ministry of Labour & Employment, which is working towards the protection and safeguards of the rights of workers, providing social security protection to all sectors by enacting and implementing various labour laws. In the year 2018, the population of India was speculated to be around 136.6 crores of which, 26% were children (of age 0-14 years) and 74% were adults (of age 15+ years). This essentially amounts to the number of adults in the country 101 crores which includes two-thirds of the total population. According to the recent "Periodic Labour Force Survey (PLFS) Report 2018-19", 92% of the Indian population is working age (15-59 years), while 8% are senior citizens (60+ years). "Around 47 crores (47%) of adults were working in the country. Over half (52%) of the workers were self-employed, followed by casual workers (24%) and the remaining were regular or salaried (24%)."¹⁰ The nature of work and payment system of casual workers is irregular which makes them the most vulnerable.¹¹ The ILO estimations that globally eight out of every 10

⁹ Ankur Bharadwaj, 'India's Industrial Sector: The Rise of the Contract Worker' (Centre for Economic Data & Analysis, 15 July 2021) < <https://ceda.ashoka.edu.in/indias-industrial-sector-the-rise-of-the-contract-worker/> > accessed 31 March 2022.

¹⁰ MoSPI, *Periodic Labour Force Survey. July 2018—June 2019*, (National Statistical Office, Ministry of Statistics and Programme Implementation, New Delhi 2020).

¹¹ MHA, *Population Composition 2018—Chapter 2*, (Census of India, Office of the Registrar General & Census Commissioner, Ministry of Home Affairs, Government of India, New Delhi, 2018).

enterprises function informally. These enterprises employ less than 10 workers and small-scale units. The workers are not entitled to social protection and have poor working conditions.¹²

2. Abolition of Contractual Worker's Concept

The primary objective of the “Contract Labour (Regulations and Abolition) Act”¹³ is to regulate the employment of ‘contract labour’ in certain industries and to provide for its abolition in certain circumstances and matters connected therewith. Section 10 of the Act says “Prohibition of employment of contract labour”¹⁴. Apart from the legislation, several commissions recommended the abolition of contract labours. In 1929-31 the Whitley Commission suggested the abolition of contractual workers.¹⁵ The Bombay Textile Labour Enquiry Committee recommended abolishing contractual labor and hiring workers directly by management for each department in a mill.¹⁶ The Rege Committee recognized the prevalence of the contract labour system and suggested that it should be abolished in certain sectors of work. However, the committee strongly opposed the complete abolition of the contract labour system. To incorporate these workers the definition of ‘worker’ was widened in various legislations like the “Factories Act 1948, the Plantation Labour Act (1951), and the Mines Act 1952” to incorporate contract labour and to give them benefits. It was however, the court’s interpretation of these legislations which eventually led to the rights being granted to the contract labours somewhat on par with the rights of regular workmen. The next turning point for the evolution of the concept in India came after the Second five-year plan (1956 - 1961). It was in this outline that the burning topic was raised to a

¹² ILO, *Brief: COVID-19 Crisis and the Informal Economy Immediate Responses and Policy Challenges* (International Labour Organization 2020).

¹³ Contract Labour (Regulations and Abolition) Act, 1970.

¹⁴ Contract Labour (Regulations and Abolition) Act 1970, s 10.

¹⁵ Report of the Royal Commission on Labour in India available at <<http://14.139.60.153/handle/123456789/8973>> accessed on 31 March 2022.

¹⁶ Report of the Textile labour Inquiry Committee, Bombay, 1940. Vol. II: Final Report available at <<http://hdl.handle.net/10973/24157>> accessed on 31 March 2022

national level and a committee in the Independent India was formed on the issue of contract labour. The Planning Commission's recommendations were majorly based on the research and application principle which was to research the viability of the scope of this problem of contract labour and thereupon act for the modification of the conditions on which the contractual labours served. Various tripartite conferences were called upon to deliberate on the issue of which the consensus was to modify the conditions where they could be modified and if they could not be modified (modification of such condition would lead to the objective of the work being lost), abolish the same. However, the discretion for the same and the procedure were not discussed in this report. "The First National Commission on Labour (1966-69)" recommended the regulation of contract labour and the partial abolition of the same in specific sectors which were as recommended in the Second Five-year Plan. In the case of *Stanvac v. Their Workmen*, the Supreme Court observed that "where the work is of perennial and must go on from day to day and the work is incidental and necessary for the work of the factory and the work is being done in most other concerns through regular workmen and lastly if the work is sufficient to employ a considerable number of whole-time workmen, then in such work contract labour should not be allowed."¹⁷ Section 10 offers the process for the abolition of the process of employment of contract labour. The Act aimed to safeguard the contract labourers from the unfair terms of the contractors.¹⁸ In the *D.S. Nakara* case, the Hon'ble Apex Court observed that "the principal aim of a socialist state is to eliminate inequality in income and status and standards of life. The basic framework of socialism is to provide a decent standard of life to the working people and especially provide security from the cradle to the grave."¹⁹ The procedure to be adopted through section 10 states that "the appropriate Government may, after consultation with the Central Board or, as the case may be, a State Board, prohibit by notification in the

¹⁷ AIR 1960 SC 948.

¹⁸ Contract Labour (Regulations and Abolition) Act 1970, s 10.

¹⁹ *D.S. Nakara v. Union of India*. (1983) 2 SCR 165.

Official Gazette, employment of contract labour in any process, operation or other work in any establishment. Before issuing such notification concerning an establishment, the appropriate Government shall have regard to the conditions of work and benefits provided for the contract labour in that establishment, and other relevant factors.” The relevant factors mentioned in the Section include the necessity of the process or work in which such contract labours are employed for the said industrial establishment and the duration of the work in question. It is important to consider whether the regular workers perform the same work as the contract labour and whether the work is suitable for full-time employment. It is also essential to ensure that the work environment is healthy and safe for the workers. This, however, is at the discretion of the appropriate government in concern. Their compensation often depends on their productivity and task fulfilment, creating a stressful workplace environment that adversely affects their well-being, both physically and mentally. Furthermore, the notably low levels of unionization among these labourers compound their challenges, limiting their ability to collectively advocate for their rights and engage in negotiations.

Contract labourers face an array of serious worries which extend beyond the industrial domain and resonate across society. The biggest challenge for contract workers is an overpowering sense of job uncertainty, which outweighs the stability enjoyed by their regular counterparts. This discrepancy in job security is worsened by the widespread exploitation of contract labourers in the workplace - a troubling issue that has not gone ignored by the government. Most serious obstacles for contract labour include the terrible negotiating strength and lack of social protection making them especially susceptible. These people are frequently employed in hazardous sectors, where safety precautions and facilities are typically inadequate, jeopardizing their well-being and economic stability.

2.1. Decent Work and Contract Labour

“Decent work and economic growth” are goal 8 of the 17 “sustainable development goals” (herein referred to as “SDGs”) of the 2030 agenda for

sustainable development introduced by ILO in 1999.²⁰ The International Labour Conference Resolutions²¹ projected the term “informal economy means ‘all activities’ that are, in law or practice, not covered or insufficiently covered by formal arrangements.” It essentially pertains to the people employed, who are excluded from the dialogue which takes place in the organized sector. They are not taken into consideration by official statistics. Decent work is one of the basic principles of quality of life. Decent work gives a sense of fulfilment and dignity. As per the International Labour Organisation, Decent work is necessary for achieving equitable, inclusive, and sustainable development.²² To offer decent work for contractual labour is a tedious and challenging task, especially in such an economic competition. The advent of the novel coronavirus COVID-19 and the lockdowns which accompanied it in the months after March 2020 severely struck not only the health of the people but the economy of the country as well having an obliterating effect upon the labour industry.²³ Most of the workers of the country found themselves either workless (industrial workers) or having huge workloads (as essential services workers and healthcare workers).²⁴ Since these workers were hired on a contract basis, to cut off the costs which various companies had to bear, the services of these workers were the first ones to be terminated with minimal salary and short notice periods. The two primary challenges which a worker deals with are Wages and Social Security whose most accessible remedy is their right to organize as trade unions.

²⁰ ‘Integrating Decent Work, Sustained Growth And Environmental Integrity’ (International Labour Organisation, 2019) <https://www.ilo.org/wcmsp5/groups/public/---dgreports/inst/documents/publication/wcms_712685.pdf> accessed on 31 March 2022.

²¹ International Labour Conference Resolutions, 2002.

²² ‘Decent Work and the Informal Economy’, (International Labour Organisation, 2001) <https://www.ilo.org/wcmsp5/groups/public/---ed_emp/emp_policy/documents/publication/wcms_210442.pdf> Accessed 31 March 2022.

²³ Shankardass, M.K., *Home, the Vulnerable and the Pandemic. In Sociological Reflections on the Covid-19 Pandemic in India* (Springer, Singapore 2021) (pp. 35-50).

²⁴ Vanshika Singh, ‘COVID-19 and the Women at Work’ (2022) 57(5) Economic & Political Weekly < <https://www.epw.in/author/vanshika-singh>> accessed on 31 March 2022 p.23.

2.2. Wages

The Central government on 29.03.2020 vide its order, instructed the competent authorities at the state level, “to take needed action and to issue the required orders to their District Administration / Police Authorities to guarantee that all the employers, shall make payment of wages to their workers on the due date, without any deductions for the period during the lockdown.”²⁵ In addition, “The Ministry of Labour & Employment, The Government of India” through its letter dated 20/03/2020, “recommended all the employers of Public and Private Establishments not terminate their employees or implement any kind of wage cut. The Order explicitly laid stress on the casual or contractual worker. The Order said that if any worker took any leaves, he should be deemed to be at work without any substantial wage cut during the time of the nationwide lockdown. Further, the Order stated that if any employment space is deemed as non-operational due to the COVID-19 lockdown, the workers of such units shall be deemed to be on duty.”²⁶ One of the main reasons for the increasing growth in the numbers of contract labour is to overthrow the labour legislation. On paper, the contract labours are offered the minimum wages, but the reality is often deceptive. The middleman i.e., the contractor is the one who collects the money from the principal employer and then pays further wages to the labourers. This is the stage where inconsistencies exist. The amount which he receives from the principal employer and pays to such labourers. The wages paid to these workers are so little that they have no value in these difficult times.²⁷ Since the 1991 reforms, the GDP has grown thirteen times, but minimum wages increased only seven times. The COVID relief announced by the government for the marginalised sections seems to be large but if see it per -person the amount

²⁵ Ministry of Home Affairs, Government of India, 'Order' (2020) <https://www.mha.gov.in/sites/default/files/PR_MHAOrderrestrictingmovement_290320.pdf> accessed on 31 March 2022.

²⁶ Ibid.

²⁷ Shankardass, M.K., *Home, the Vulnerable and the Pandemic. In Sociological Reflections on the Covid-19 Pandemic in India* (Springer, Singapore 2021) (pp. 35-50).

is very little. It was observed that proper guidelines were absent and the plans for implementation were not correct and complete making the announcement made by the government not very promising. It needs to be taken into account that in case of a regular worker, a person applies for a specific function and needs to undergo a selection process much stricter in both quality and skill as compared to contract labour. Furthermore, contract labour is a seasonal worker if we take into account the time period of the contract whereas a regular worker is a permanent worker. Thus, there need to be minimum wages for the contract labour for which a mechanism must be put in force that the contract labours are not exploited by the contractors. Such a mechanism however, if implemented by an agency of the government would be less beneficial as compared to the principal employers putting in place such a mechanism in violation of which they may be penalized or such necessary actions may be taken. It is suggested the report by Working Group on "Labour Laws and other legislations" that where provisions for permanent work or regular work is available, the contract labour needs to be abolished in such industries. However, in the aftermath of the pandemic, wherein most of the workforce has been disturbed by the cessation of work as have been the industrialists, such an action seems to be inflicting further the blows of the pandemic. As per the data of the Human Development Report, in 2020 only 20 percent of Indian workers or only one in five Indian workers skilled, the rest being semi-skilled or unskilled risks more loss of jobs where provisions for permanent workers are available. This does more harm than good as a policy of the government.²⁸

2.3. Social Protection

The presence of some fundamental social rights is social security and the same is guaranteed to those who live off their labour and at the moment

²⁸ Ministry of Labour and Employment, *Reports of Working Group On 'Labour Law And Other Legislations For The Twelfth Five-Year Plan* (Ministry of Labour and Employment 2011) <https://niti.gov.in/planningcommission.gov.in/docs/aboutus/committee/wrkgrp12/wg_labour_laws.pdf> accessed 31 March 2022.

are unable to earn employment, temporarily or permanently. The ILO constitution refers to “the need and protection of workers against sickness, disease, and injury arising out of their employment, pension for old age, protection of the interests of the workers who were employed in countries other than their own”. As per the “Social Security Code, 2020”²⁹ the term social security is defined as “the measures of protection afforded to employees, unorganised workers, gig workers, and platform workers to ensure access to health care and to provide income security, particularly in cases of old age, unemployment, sickness, invalidity, work injury, maternity or loss of a breadwinner using rights conferred on them and schemes framed, under this Code.” Even before the pandemic, the economy in India had slowed down and when the pandemic hit, the conditions were even worse. The unemployment rate had skyrocketed to nearly 25% of the workforce. This essentially meant that this very code, social justice legislation should have come to the rescue of those hit by the pandemic, however, in reality, it didn’t. The pandemic forced industries and companies out of business, essentially meaning to sustain them, the governments had to take steps.³⁰ It was this very segment of the Contract Labours apart from the migrant workers who were hit the most when the governments at the state level one after the other started diluting various laws to sustain the capitalists.³¹ This was seen as a matter of unilateralism, as against the tripartite dialogue agreement ratified by India by Convention No. 144, of the International Labour Organisation. The contract workers are worse off than the permanent workers due to fewer rights that the former have compared to the latter. This step meant that the very little social security that they previously had was further diluted into merely

²⁹ The Code on Social Security, 2020.

³⁰ Jeemol Unni, J., ‘Impact of lockdown relief measures on informal enterprises and workers’ (2020) Economic and Political Weekly <<https://www.epw.in/engage/article/impact-lockdown-relief-measures-informal-enterprises-workers>> accessed on 31 March 2022.

³¹ Pandey H, ‘Contract Labour and Social Security Legislation in India’ (1994) 36 Journal of the Indian Law Institute <<https://www.jstor.org/stable/43951531>> accessed 31 March 2022.

being existent on the papers.³² Apart from this, these workers mostly reside in slums like Dharavi and have nearly non-existent healthcare services for them. Apart from this, even the social welfare schemes like Ayushman Bharat are availed only if one reaches the hospital which is a luxury in these areas. As could be seen in the Pandemic, beds were scarce in the hospitals, which makes it even more apprehensive that they might get the facilities because they do not have many funds to support themselves. In the pandemic time, when lockdown is imposed and the circumstances of a curfew in place prevail, the right of the workers to form trade unions is also curtailed in the sense that it exists but merely on the statute books. In reality, the primary task of a trade union is to organize itself in such a manner that it may protect the rights of a worker from being exploited by employers.

The right to form trade unions is a salient feature of the freedoms enshrined in the Part III of the constitution which provides the citizens of the country with the “right to form associations and unions”. During the pandemic time, when lockdown is imposed and the circumstances of a curfew in place prevail, the right to form trade unions was also curtailed in the sense that it exists but merely on the statute books. In reality, the primary task of a trade union is to organize itself in such a manner that it may protect the rights of a worker from being exploited by employers.³³ Even though the contract workers form part of an unorganized community in labour, they are considered workers in furtherance of the judgment of the Hon’ble Apex Court in the case of Standard Vacuum Refining Company, meaning they legally had a right to form a trade union and or join a trade union which could escalate their needs/ demands to the employers. However, during the Pandemic, a gathering of more than five

³² Hatekar, N. and Belhekar, P., ‘*Why it Makes sense to Leave and Stay gone*’ (2020) 55 Economic & Political Weekly <<https://m.epw.in/author/neeraj-hatekar>> accessed 31 March 2022.

³³ Unni J, “*Impact Of COVID-19 On Informal Economy: The Revival*’ (2020) 63 The Indian Journal of Labour Economics < Unni J, “Impact Of COVID-19 On Informal Economy: The Revival> accessed 31 March 2022.

people was banned, meaning the employers would not take much concern about the actions of these unions when the work was already shut. Even worse is the ignorance of the state governments towards this stratum of the workforce. The labour class have since long been one of the favourite constituents of the population whom employers can violate. The decision of taking back or in effect, annulling the effect of numerous labour law legislations by the governments in various states ruled by a score of political parties like Congress in Punjab and Rajasthan to BJP in Uttar Pradesh and Madhya Pradesh. Awareness among the workers is also a chief component of the work of the trade unions. It is this very reason why the workers organise trade unions, it however is the duty of the trade unions, to make the workers aware of their rights and duties. Various schemes detrimental to the rights of the labours by the government could not see the light of day due to the proactive awareness campaigns and the promotion of knowledge by these unions. As mentioned in the social security, nearly 80% of the workers, are part of the informal sector and almost all the contractual workers either do not fall under the category of the people insured or are not listed in the same. This could have been mitigated had the trade unions been more rigorous in campaigning for these rights. Recently, they got a breakthrough wherein the definition of those insured had been amended by the Government of India. This was projected to pace up the number of workers registering for the benefits under ESIC or EPFO or various other schemes in India and substantially increase the claims and benefits arising thereof by mid-2020. However, since the pandemic hit the country early in January 2020 and the subsequent imposition of lockdowns and curfews across the subcontinent, not only reduced the pace but even be stagnated due to the ban on public meetings. Since most of these workers are illiterate or if they are literate, have less to no knowledge of technology, scheduling virtual meetings as those in the corporate world or the administrative world was next to impossible. Apart from the escalation of issues to the employer, trade unions also worked as an intermediary in the consultation process, as they were a stakeholder in such cases. The dilution of various social security

legislation through ordinances, government orders, notifications, etc. was a unilateral step of the government or at maximum, a step wherein the employers were consulted but not the trade unions or the labours.³⁴ This not only as mentioned above is a violation of a convention to which India is a party but is also against natural justice.

3. Conclusion

Even though the pandemic is receding, the effects of the dilution of various labour laws during the pandemic to empower businesses are yet to be seen in the long run. Moreover, the structural and operational inefficiency of labour legislation in the country has led to various labour law legislation being implemented partially in reality. The laxity of the statistical body worsens the issue, by publishing data that is outdated and the inexperience of the data collectors in the field portrays a much bigger challenge which is a mismatch of the statistics the reality. For a long, there has been debate around the elimination of contract labour to minimize the exploitation of workers. However, this exploitation of the workers as argued by many has maintained a huge amount of employment, though not guaranteed for the unskilled workers. “The Contract Labour (Regulation and Abolition) Act, of 1970”³⁵ regulates contract labour and provides the competent authorities with the powers to abolish the same if required. The Minimum Wages and Social Security, two of the most important issues which a worker faces while he/ she is employed are more or less diluted in these times which prevent the contract labour as well as the regular workmen from taking the benefits which are meant for their development. Even before the pandemic hit the country, the economic slowdown had already taken its toll on the labour market in the country. The unavailability of the trade unions to promote the disputes of the workers and their engagement in consultation with regards to the legislation

³⁴ Kingra, K.J. and Ayushi, G., “*Overcoming precarity: how informal women workers coped during COVID-19*” (2021) 56 Economic and Political Weekly <<https://www.epw.in/engage/article/overcoming-precary-how-informal-women-workers>> accessed 31 March 2022.

³⁵ Contract Labour (Regulations and Abolition) Act 1970.

applicable to them also poses a threat to the workers as it was the most accessible and practically the most feasible remedy for a worker out of a dispute arising due to employment.

4. Suggestions

In order to effectively address numerous challenges that are faced by contract labourers it becomes necessary to adopt a comprehensive as well as cooperative approach involving government entities, employers, labour unions, and society. Labor laws must be strengthened and rigorously and effectively enforced to safeguard the rights of contract labourers. These laws should encompass provisions guaranteeing fair compensation, reasonable working hours, and safe, conducive work environments. Stringent oversight mechanisms should be established to ensure contractors adhere to these regulations, preventing any breaches. Providing access to health insurance, retirement plans, and unemployment benefits, will help to reduce the instability of their lives. Contract labourers should not be subjected to bias based on their employment status. Skill development and training programs can enhance the employability of contract labours and will also create pathways for career development. Public awareness campaigns and transparency in the implementation of policies play a pivotal role in garnering support for the rights of contract labourers. Communication channels between employers and contract labourers should be open which will help in creating tailored solutions that will bring to light the challenges within specific industries.

THE RECOGNITION OF THE RIGHT TO A HEALTHY AND SUSTAINABLE ENVIRONMENT AS A KEY COMPONENT OF HUMAN RIGHTS IN NATIONAL AND INTERNATIONAL ENVIRONMENTAL LAW: WITH A PARTICULAR EMPHASIS ON INDIA

Wazida Rahman *

1. Introduction

Humans have a crucial role in the natural ecosystem, and our fundamental human rights are inherently connected to the environment in which we reside. The degradation of the environment obstructs the full realization of human rights, whereas safeguarding human rights safeguards the environment and fosters sustainable development. Maintaining a clean and orderly environment is essential for safeguarding fundamental human rights, such as the rights to life, health, access to uncontaminated water and food, employment, cultural advancement, progress, information accessibility, and participation. For example, when development projects cause environmental degradation by destroying land for agriculture and food production, it directly worsens food insecurity and disease among individuals, thereby violating their basic human rights to access food, healthcare, and a satisfactory standard of living. Furthermore, when a government neglects to include local communities in decision-making processes, such as those of construction plans or infrastructure development in their vicinity, it infringes against the people's entitlement to participate and be informed. Based on international legal theory, all human rights are universally acknowledged entitlements that are essential for ensuring a satisfactory standard of living for every person. These rights are derived from universally acknowledged ethical standards that are

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respected in all communities. The link between human rights and the environment is intrinsically interdependent. An immaculate and untarnished habitat that can be perpetually preserved is essential for safeguarding our intrinsic human rights. Environments that are polluted, hazardous, or present a health risk can violate our fundamental human rights. Environmental rights pertain to the acknowledgment of an individual's entitlement to certain criteria regarding environmental circumstances. These concepts are not only abstract or insignificant; they may be measured, significant, and have a profound influence on society and its surroundings. More than 100 countries have included environmental protection clauses in their constitutional systems. Violations of environmental rights have adverse effects on human health and the general well-being of the planet. The connection between human rights and the environment was first recognized during the Stockholm Conference on the Human Environment in 1972. At the meeting, a Declaration was announced asserting that every person has an innate entitlement to freedom, equity, and adequate living standards, within a nurturing environment that facilitates a dignified and prosperous life. The Declaration underscored the need to preserve and augment the environment for both present and future generations. The United Nations General Assembly (UNGA) adopted a resolution on July 28, 2022, affirming that every individual has an inherent right to a sustainable and unpolluted environment. This momentous decision is the result of extensive engagement from several groups over an extended duration. This resolution is a direct reaction to a previous statement endorsed by the Human Rights Council in October 2021. It calls for States, international organizations, and private enterprises to increase their efforts in ensuring a conducive environment for all citizens.

2. Comparing Environmental Rights to Human Rights: A Distinct Fundamental Human Entitlement

The acknowledgment of the entitlement to a functional environment was first articulated in the Stockholm Declaration in 1972. The underlying

premise of the argument is that individuals possess an innate entitlement to liberty, fairness, and satisfactory living conditions. Having access to a superior environment is crucial for leading a dignified and profitable life. Furthermore, it is incumbent upon individuals to conscientiously safeguard and enhance the environment for the benefit of both current and future generations. The Rio Statement on Environment and Development, issued in 1992, restated this statement. The Rio Declaration acknowledges the right of people to enjoy a state of optimum bodily and mental well-being, as well as productivity, that is fully aligned with the natural environment. Moreover, it emphasizes the need for governments to implement steps within their legal jurisdiction to prevent activities that might harm the environment of other countries or areas outside their own boundaries.¹

The Rio Declaration had a significant impact, leading to the inclusion of environmental conservation as a core objective in all major international accords involving many cooperating countries. The scope of the global agenda has expanded to include not just those pertaining to human rights, but also those concerning environmental challenges. Consequently, several elements of international law, such as free trade agreements, have included environmental limitations to actively encourage collaboration on environmental matters.

In the case of *Delia Saldias de López v. Uruguay*², the UN Human Rights Committee observed that it is ethically unacceptable to interpret Article 2 of the Covenant in a way that allows a state party to engage in violations of the Covenant in the territory of another state if it would not be able to commit such violations within its own territory.

Preserving human rights, supporting environmental conservation, and attaining peace and security are essential principles of contemporary global civilization. The correlation between safeguarding human rights and safeguarding the environment has been widely acknowledged for a

¹ Dr. Aneesh V. Pillai, '*Right to Environment*', e-Adhayan, <<https://ebooks.inflibnet.ac.in/hrdp02/chapter/right-to-environment/>> accessed 20 February 2022.

² *Delia Saldias de López v. Uruguay*, (1981) CCPR/C/13/D/52/1979.

substantial period. Undoubtedly, the quality of the environment in which people reside directly impacts their overall well-being in modern society. The degradation of the environment may impede the realization of fundamental human rights, including the right to life and the right to live in secure and healthy environments.

The right to a healthy environment safeguards the fundamental components of the natural environment necessary for a dignified existence, irrespective of their form or expression. It encompasses the protection of fundamental human rights, such as the right to life and the availability of clean water and food.

The 1972 United Nations Conference on the Human Environment underscored the crucial significance of the environment, including both natural and artificial components, in promoting human well-being and protecting fundamental human rights, such as the right to life. This was the first instance in which a correlation was established between human rights and the environment.

The United Nations General Assembly (GA), the main governing body of the UN, has formally endorsed a resolution recognizing the fundamental right of every person to a clean and sustainable environment. This momentous occasion signifies a widespread international endorsement of this entitlement, recognized in 156 nations at both the domestic and continental levels.³

3. Environmental Rights are Considered Essential Human Rights in India

India, known for its rich biodiversity, diverse landscapes, and population over one billion, exemplifies the interdependence between humanity and the natural environment. The welfare of a considerable population is

³ Joel E. Correia, 'UN just declared a new human right' (*World Economic Forum*, Aug 9, 2022) <<https://www.weforum.org/agenda/2022/08/the-un-just-declared-a-universal-human-right-to-a-healthy-sustainable-environment-here-s-where-resolutions-like-this-can-lead/>> accessed 15 August 2022.

inextricably linked to the condition of the environment, including areas such as agriculture, forestry, and fisheries. The environment is crucial for supplying individuals with the vital resources of air, water, and food.⁴ This highlights the indisputable correlation between the welfare of humans and the ecological condition of the world.

In this specific scenario, ensuring a functional and pollution-free environment has significant legal and ethical importance. While the Constitution of India does not explicitly mention the right to a healthy environment, it implicitly recognizes it as an inherent aspect of the right to life safeguarded by Article 21. The court has affirmed the acknowledgment of the right to a healthy environment as a fundamental human right via its significant judgments, emphasizing its essential role in ensuring a satisfactory quality of life for all individuals.⁵ Public Interest Litigations (PILs) have become a potent tool in the realm of environmental conservation, signifying significant advancements. Judicial activism has played a crucial role in influencing the development of environmental law in India.⁶

India's legal framework for environmental protection is formed by laws such as the Environment (Protection) Act of 1986, the Water (Prevention and Control of Pollution) Act of 1974, and the Air (Prevention and Control of Pollution) Act of 1981. These laws are implemented to regulate and supervise many aspects of environmental pollution and degradation, setting standards and punishments for non-compliance.⁷

⁴ Robert W Kates, *'The Human Environment: The Road Not Taken, The Road Still Beckoning'*, (Wiley Online Library, December 1987) <<https://doi.org/10.1111/j.1467-8306.1987.tb00178.x>>, accessed 24 September 2022.

⁵ Nico Stehr, *'Man, and the Environment: A General Perspective'* *Archives for Philosophy of Law and Social Philosophy*, (JSTOR, Vol. 64, No. 1 (1978), pp. 1-17) <<http://www.jstor.org/stable/23678987>> accessed 21 March, 2022.

⁶ Zachary Holladay, *'Public Interest Litigation in India as a Paradigm for Developing Nations'*, (Indiana Journal of Global Legal Studies, JSTOR) <<https://doi.org/10.2979/indjglolegstu.19.2.555>> accessed 22 April 2022.

⁷ Barbara Rose Johnston, *'Human Rights and the Environment'* *Human Ecology, JSTOR*, <<http://www.jstor.org/stable/4603161>> accessed 22 January 2022.

India's obligation to safeguard the environment is strengthened by international accords such as the Paris Agreement and the Sustainable Development Goals. India, as a signatory to several international treaties, has committed to reducing its carbon emissions, conserving biodiversity, and promoting sustainable development practices. These agreements illustrate the recognition of the interconnectedness of environmental issues and the need for cooperative endeavors on a global scale.⁸

The notion highlights the inherent connection between human well-being and the environment, suggesting that any harm to one would ultimately affect the other. The right to a healthy environment ensures the promotion and protection of this mutual dependency. This is a plea for individuals, communities, and the government to adopt sustainable behaviours, reduce their environmental footprint, and actively participate in the conservation of natural resources.

The right to a healthy environment is not just a legally mandated privilege, but also a moral duty that recognizes the inherent link between human well-being and the state of the environment. India is now grappling with the challenges presented by environmental degradation. To tackle this problem, it is imperative to build robust legislative frameworks, guarantee the effective enforcement of existing rules, and promote a collective commitment to sustainable behaviours.

4. International Treaties and Laws in India to Protect Environmental Rights as Human Rights

India, as a responsible participant in the world community, has officially accepted many significant international agreements on environmental protection. India has harmonized its dedication to worldwide environmental objectives with its own legislative structure. A notable example of a big agreement is the Convention on Biological Diversity

⁸ Redclift, Michael. 'Sustainable Development: Needs, Values, Rights' (Environmental Values, JSTOR) <<http://www.jstor.org/stable/30301305>> accessed 21 February 2022.

(CBD), which India officially approved in 1994. The Convention on Biological Diversity (CBD) prioritizes the preservation of biodiversity, the promotion of sustainable use of biological resources, and the guarantee of fair and equitable distribution of benefits derived from genetic resources. The Biological Diversity Act, passed in 2002, functions as India's national law for carrying out the Convention on Biological Diversity (CBD).⁹ This legislation establishes a legally binding structure to safeguard the wide array of living organisms on Earth, promote the sustainable use of its elements, and preserve the indigenous knowledge linked to biodiversity.

In 1992, India officially approved and accepted the Montreal Protocol on Substances that Deplete the Ozone Layer, so becoming a participant in an additional international accord. In 2000, India implemented the Ozone Depleting Substances (Regulation and Control) Rules in order to meet the requirements outlined in the agreement. The purpose of these regulations is to regulate the manufacture, use, trade, and application of compounds that contribute to the depletion of the ozone layer, under the reduction objectives set by the Montreal Protocol. India's implementation of these limitations not only fulfils its obligations to the international community but also helps in the worldwide endeavour to safeguard the ozone layer and alleviate the negative impacts of ozone depletion on human health and the environment.¹⁰

The United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol play a crucial role in worldwide endeavours to tackle climate change. In 1992, India officially recognized and supported the United Nations Framework Convention on Climate Change (UNFCCC), and in 2002, it also officially accepted and approved

⁹ Lakshman D Guruswamy, 'The Convention on Biological Diversity: Exposing the Flawed Foundations' (Environmental Conservation JSTOR) <<http://www.jstor.org/stable/44519572>> accessed 03 Nov. 2022.

¹⁰ Graham Epstein, 'Governing the Invisible Commons: Ozone Regulation and the Montreal Protocol' (International Journal of the Commons, JSTOR) <<https://www.jstor.org/stable/26523167>> accessed 21 November 2022.

the Kyoto Protocol.¹¹ In 2008, India adopted the National Action Plan on Climate Change (NAPCC) to meet its obligations. The NAPCC included measures for both adapting to and reducing the impacts of climate change. Furthermore, the Energy Conservation Act of 2001 and the National Environment Policy of 2006 provide a legal framework to address climate change issues inside the country. India's efforts in this field exemplify a comprehensive strategy, combining global obligations with local measures to address the complex difficulties presented by climate change.

In 1982, India formally ratified the Ramsar Convention, also known as the Convention on Wetlands. The government implemented the Wetlands (Conservation and Management) Rules in 2010 to fulfil the criteria outlined in the treaty. The purpose of these rules is to govern activities inside and around wetlands to maintain their biological integrity. The Ramsar Convention and its national enforcement efforts help the preservation of crucial ecosystems, acknowledging the significance of wetlands for biodiversity, water resource administration, and sustainable development.

In 1992, India became a signatory to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. The Hazardous and Other Wastes (Management and Transboundary Movement) Rules, which were implemented in 2016, follow the goals of the Basel Convention. These regulations govern the manufacturing, preservation, and global transportation of dangerous waste, guaranteeing that such substances are handled in an ecologically responsible way and do not pose any threats to human health or the natural environment.

India showcases its commitment to global environmental governance by incorporating several international agreements into its domestic legislation. India fulfills its international responsibilities and tackles urgent environmental issues at the local level by implementing and enforcing

¹¹ UN Climate Change Conferences, United Nations Website <<https://www.un.org/en/climatechange/un-climate-conferences>> accessed on 12 March 2022.

domestic laws. Incorporating international principles into national legal systems exemplifies a unified strategy that promotes sustainable development and environmental conservation within the country. Additionally, this effort makes a substantial contribution to the global endeavour of safeguarding the planet for future generations.

The Environment (Protection) Act, 1986, is an all-encompassing law that addresses a broad spectrum of environmental concerns. This act grants the federal government the authority to implement measures aimed at safeguarding and enhancing the state of the environment. The Polluter Pays Principle is included, mandating that polluters bear financial responsibility for the expenses associated with the repair and restoration. The Act also highlights the Precautionary Principle, granting the government the authority to take proactive steps in addressing potential environmental harm, particularly in situations when scientific assurance is lacking.¹² Exercising prudence is essential in instances when postponing action might lead to irreparable damage to the environment.

The National Green Tribunal Act, 2010 creates the National Green Tribunal (NGT) as a specialized organization with the purpose of efficiently and promptly resolving matters concerning environmental preservation and the protection of forests and other natural resources.¹³ The NGT operates based on the Polluter Pays Principle, which mandates that people or businesses that violate environmental standards are responsible for the financial repercussions of their actions. The NGT also supports the use of the Precautionary Principle,¹⁴ granting it the authority

¹² Satish C Shastri, 'THE POLLUTER PAYS PRINCIPLE' AND THE SUPREME COURT OF INDIA' (Journal of the Indian Law Institute, JSTOR) <<http://www.jstor.org/stable/43951740>>, accessed 12 March 2022.

¹³ Vinod Shankar Mishra, 'National Green Tribunal: Alternative Environment Dispute Resolution Mechanism', (Journal of the Indian Law Institute, JSTOR) <<http://www.jstor.org/stable/45148537>> accessed 04 May 2022.

¹⁴ C.P. Singh, 'The Precautionary Principle and Environment Protection', (Journal of the Indian Law Institute, JSTOR) <<http://www.jstor.org/stable/45148535>> accessed 13 March 2022.

to issue directives aimed at averting environmental harm and mitigating possible hazards.

5. The Worldwide Acknowledgment of Environmental Rights As Inherent Human Rights Is Growing

The global recognition of environmental rights as fundamental human rights is increasing. Although there is a growing worldwide discussion on the connection between human rights and environmental concerns, recognizing their mutual dependency, there is still no widely accepted legal stance on the importance of the environment in international human rights law. Several multilateral environmental accords (MEAs) recognize the interdependence between human rights and the environment. Several human rights treaties have pertinent articles that explicitly address the intersection between environmental and human rights. Some notable examples are the Convention on the Rights of the Child, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the Convention on the Elimination of All Forms of Discrimination Against Women. The International Court of Justice, the Human Rights Council, and the World Bank Inspection Panel, renowned international organizations, are now scrutinizing the connection between human rights and the environment. The European Court of Human Rights, the African Commission on Human and Peoples' Rights, the Inter-American Commission and the Court of Human Rights have used their legal judgments to establish and maintain human rights.¹⁵ The latest decision of the Human Rights Council on climate change asserts that incorporating human rights norms, standards, and principles may improve the development of climate change policy at the global, regional, and national levels.

This has the potential to result in enhanced policy coherence, reliability, and long-lasting results. The most recent resolution endorsed by the

¹⁵ Paul Hunt, 'Interpreting the International Right to Health in a Human Rights-Based Approach to Health', (*Health and Human Rights Journal*, December 2016) <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5394996/>> accessed 12 May 2022.

Human Rights Council (HRC) on human rights and the environment calls for States to carefully consider the promotion and protection of human rights within the framework of the United Nations Framework Convention on Climate Change (UNFCCC). When dealing with environmental problems, nations should give priority to the advancement, safeguarding, and realization of human rights.¹⁶ The resolution recognizes that environmental degradation may have negative effects, both directly and indirectly, on the full realization of all human rights.

The 2005 UN World Summit Outcome Document reaffirmed that sustainable development is an essential element of the broader framework of UN operations. This report was published after a meeting that focused on the Millennium Declaration and Millennium Development Goals. Sustainable development encompasses the integration of three interrelated and mutually supportive pillars: economic growth, social advancement, and environmental improvement. The three essential procedural human rights in environmental policy-making include the right to get information, engage in public decision-making (including the freedoms of speech and association), and seek remedy or compensation. The significance of these rights is equivalent, and they must be adhered to, as articulated in Principle 10 of the Rio Declaration.¹⁷

6. Conclusion

The right to clean air, water, and soil is intrinsic to the well-being of every human being. These environmental elements are not mere commodities; they are essential components of a dignified and healthy life. The majority of contemporary legal systems acknowledge the entitlement to a sound environment, and the significance of the correlation between the environment and human rights is unquestionably crucial in the realm of

¹⁶ Megan Donald, 'Human Rights And The Environment Human Rights', (*The Geneva Academy*, December 2022) <https://www.geneva-academy.ch/joomlatools-files/docman-files/Briefing%2021_web.pdf> accessed 30 December 2022.

¹⁷ Dr. Anesh V. Pillai, 'Right to Environment', e-Adhayan, <<https://ebooks.inflibnet.ac.in/hrdp02/chapter/right-to-environment/>> accessed 20 February 2022.

international law. Nevertheless, many factions have voiced their dissent about the incorporation of environmental issues within a framework that mostly emphasizes human rights. Consequently, several strategies have been developed to safeguard the environment and get a thorough understanding of the related concerns. Within the domain of human rights legislation, there has been a change in the understanding of rights that were established prior to the advent of the 'ecological period'. This strategy has been used by several human rights monitoring and supervisory entities. Furthermore, the procedural rights outlined in the two United Nations human rights Covenants, which have been influenced by advancements in international environmental agreements, might potentially be invoked independently under certain conditions. A comprehensive entitlement to the environment enables the assessment of environmental matters independently from other human rights and acknowledges the global scale of these challenges. Moreover, it is imperative to recognize that the conservation and advancement of the environment are not only essential prerequisites for the fulfilment of other human rights but are also directly impacted by them. Therefore, it is crucial to develop comprehensive policies that address both environmental conservation and the safeguarding of human rights, regardless of the lack of an obvious connection between the two. Given the extensive and profound economic consequences linked to acknowledging the right to the environment, it is unsurprising that there is a considerable degree of dispute on this issue.

ROADMAP TO DISABILITY INCLUSIVE DEVELOPMENT IN INDIA

Sital Sharma*
Aman Sharma**

*“The problem is not how to wipe out the differences but how to unite
with the differences intact.”*

Rabindranath Tagore

1. Introduction

Article 14 of Indian Constitution guarantees equality of all.¹ Equality is one of the most significant core values upon which our Constitution is based.² Equal treatment before law is a necessary implication of Rule of Law which permeates the Constitution.³ Article 14 involves two concepts, one is ‘equality before law’ and other is ‘equal protection of laws’. ‘Equality before law’ is a negative concept and is of English origin. This ensures that all will be treated equally irrespective of one’s status, rank or condition. However, it admits few exceptions, for example, “foreign diplomats enjoy immunity from country’s judicial process.”⁴

Due to various social, psychological and cultural reasons, persons with disabilities face discrimination and neglect. The abilities and potential of

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¹ INDIA CONST. art 14. Right to Equality suggests equal protection of laws who are placed equally. This article is one of the significant fundamental rights to prohibit any kind of discrimination.

² M.P. JAIN, INDIAN CONSTITUTIONAL LAW 905 (8th ed.).

³ Ashutosh Gupta v. State of Rajasthan SCC 2002 SC. (INDIA).

⁴ Jain, supra note 2, at 908.

persons with disabilities are not fully channelized due to general public perception and prejudices. This effects the mental growth of these individuals.

The General Assembly adopted the Convention on the ‘Rights of Persons with Disabilities’ on 13th December, 2006, which was ratified by India 1st October, 2007. As per Article 51 of Constitution⁵, the State is directed to provide for laws respecting treaty obligations and maintaining international harmony. Taking in note of such a duty, the Central Government implemented the said Convention by enacting The Rights of Persons with Disabilities Act, 2016, which came into force on 19th April, 2017 (hereinafter referred as ‘RPWD Act of 2016’).⁶ The Convention adopted by General Assembly provided for following principles.⁷

- The first principle directed high regard for inherent dignity and independence inclusive of right to decide on one’s options
- The second principle provides for prohibition of any discrimination
- The third principle provides for inclusive approach to ensure active participation
- The fourth principle provides for high regard to acknowledge the differences of PWD’s to uplift human diversity
- The fifth principle provides for equal access to opportunities
- The sixth principle provides for promoting accessibility
- The seventh principle provides for gender equality
- The eighth principle provides for development of capabilities of children and for preservation of identities of children suffering from various disabilities.

⁵ INDIA CONST. art 51. This Article aims to promote international peace and security by directing the state to make efforts towards peaceful settlement of disputes by arbitration as an alternative redressal mechanism. Further it is the responsibility of state to frame laws to uphold the treaty obligations ratified at international level.

⁶ The RPWD Act of 2016, 2016 (INDIA).

⁷ Principles of Convention on Rights of PWD’s (Aug 3, 2023, 10.05 AM) <https://social.desa.un.org/issues/disability/crpd/guiding-principles-of-the-convention>.

RPWD Act of 2016 aims to provide for inclusive development of such persons keeping in view the values enshrined in the above said convention.

2. Meaning of Disability

As per Merriam Webster Dictionary the word ‘disability’ means⁸

“a physical, mental, cognitive, or developmental condition that impairs, interferes with, or limits a person's ability to engage in certain tasks or actions or participate in typical daily activities and interactions”

As per Section 2 (s) of RPwD Act of 2016, a person with disability means someone who is suffering from long term physical, mental, intellectual or sensory impairment of such a nature that amounts to a restriction or acts as a barrier for his/her involvement in society and to fully participate with others.

The United Nations (UN) Convention on the Rights of PWD’s 2006 provides for inclusive defines disability as *“Persons with disabilities include those who have long-term physical, mental, intellectual, or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”*⁹

Earlier disability was conceived in a narrow perspective. However, with efflux of time ‘disability’ as a concept has undergone significant change. ‘Disability’ as a concept has evolved in order to cover within its fold almost every kind of disability and to provide care and support to as many people possible.

⁸ Meaning of Disability (Aug 3, 2023, 10.30 AM) <https://www.merriam-webster.com/dictionary/disability>.

⁹ Meaning of Disability (Aug 3, 2023, 10.45 AM) “[https://ec.europa.eu/eurostat/statisticsexplained/index.php?title=Glossary:Disability&oldid=421833#:~:text=Disability%20is%20conceived%20as%20an,\(environmental%20and%20personal%20factors\).](https://ec.europa.eu/eurostat/statisticsexplained/index.php?title=Glossary:Disability&oldid=421833#:~:text=Disability%20is%20conceived%20as%20an,(environmental%20and%20personal%20factors).)

¹⁰ PWD Act, 1995 (INDIA) (Aug 3, 2023, 11.00 AM)” “<https://thenationaltrust.gov.in/upload/uploadfiles/files/Persons%20with%20Disability%20Act%201995.pdf>.”

3. The Roadmap

a. Highlights of ‘Persons with Disability (Equal Opportunities, Protection of Rights and *Full Participation*) Act, 1995’ (hereinafter referred as ‘PWD Act of 1995’)- In 1995, the Government of India enacted the above-mentioned act. This Act provided for equal opportunities for people with disabilities and this Act had provisions to ensure equal participation such people in nation building. The Act included protentional and promotional aspects for rehabilitation. The Act covered within its ambit provisions for:

- Prevention and early detection of disabilities
- Provisions taking care of educational requirements of persons with disabilities
- Provisions taking care of employment needs of persons with disabilities
- Provisions ensuring non-discrimination
- Provisions dealing with research and manpower development
- Affirmative action which included aids and appliances to be made available to persons with disabilities
- Provisions providing for social security
- Provisions providing for redressal of grievances.

However, after the adoption of new National Policy for Persons with Disabilities in 2006, the above said Act was replaced by The Rights of Persons with Disabilities Act, 2016.

b. ‘National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental *Retardation and Multiple Disability Act, 1999*’ (hereinafter referred as the ‘National Trust 1999’) This is an act to provide for constitution of the National Trust for welfare of Persons suffering from various physical and mental disabilities. The objectives of the Trust, as provided under section 10 of the Act, are to make provisions for the empowerment of PWD’s to lead an independent life as close with the community as possible. The Act aims to keep the PWD’s

within their families for their nurturing and their overall development. In case of death of the parent of persons with disability, to provide care and protection of persons with disability and to appoint guardian and trustee are significant objects of the trust.”¹⁰

- c. “Rehabilitation Council of India Act, 1992’- Before becoming a statutory body in 1993, Rehabilitation Council of India was set up as registered society in 1986. The council has been delegated with the task of modulating and overseeing the training of rehabilitation of professionals and personnel. Further, the council seeks to provide for rehabilitation and special education as required. The council is also responsible for maintaining Central Rehabilitation Register. With the enactment of The Rights of Persons with Disabilities Act, 2016, an amendment has been proposed by the Department of Empowerment of Persons with Disabilities. Since, the definition of ‘disability’ has undergone a significant change, consequently, this has an impact on the education of Rehabilitation professionals. Moreover, in order to ensure quality rehabilitation education and to make it at par with national and international courses being conducted an amendment in *Rehabilitation Council of India Act, 1992* in tune to the ‘Rights of Persons with Disabilities Act, 2016’ has been proposed.”¹¹
- d. “National Policy for Persons with Disabilities, 2006’- This policy targets inclusive development of persons suffering from disabilities. It seeks to provide facilities to boost the confidence of such persons. It focuses on creating an environment which ensures their equal participation by providing them equal opportunities. The policy seeks

¹⁰ Section 10 of National Trust 1999- The trust focuses on establishing and empowering Pwd’s to be independent and lead a life which is closer to the community. The objectives also extend to provide services during crisis and also provide for mechanism for appointment of guardians and also to provide for family support, in case of death of caregivers. The provision also aims to provide Pwd’s equal access to opportunities. The provisions also take care of involvement of Pwd’s in other ancillary and incidental subjects.

¹¹ Rehabilitation Council of India (Aug 5, 2023, 10.50 AM) <https://disabilityaffairs.gov.in/content/page/rehabilitation-council-of-india.php>.

to safeguard rights of such person. The policy upholds the constitutional mandate of treating everyone equally, with dignity and ensuring justice. The task is to build an inclusive society comprising all and to enhance quality of life of persons with disabilities. The policy takes care of effective rehabilitation measures to bring the persons with disabilities to the forefront along with others.” The basic features of this Policy are as follows:¹²

- i. “Physical Rehabilitation- which aims to provide assistance in detection at early stage, intervention, medical interventions and counselling. It also includes the development of rehabilitation professionals and making available aids and appliances.
- ii. Educational Rehabilitation inclusive of vocational training and Economic Rehabilitation so that persons with disabilities may lead a life with dignity.
- iii. Rehabilitation of Persons with Disabilities includes significant components such as: (a) availability of assistive aids and appliances (b) educational facilities (c) training in vocational courses (d) provision for employment assistance (e) provision for training so that they can lead an independent life.”¹⁴

National Policy recognizes Non-Governmental Organizations (NGO) role in providing institutional mechanism that complements the efforts of the government. The policy acknowledges the significance of involving NGO’s in its task of making a change in societal attitude towards Persons with Disabilities. Grant-in-aid has been provided by the Central Government to NGO’s over successive Five Year Plans through various schemes. These grants have been provided for successful implementation of various schemes like Deendayal Disabled Rehabilitation Scheme for their rehabilitation. NGO’s are

¹² National Policy for Persons with Disabilities, 2006 (Aug 5, 2023, 12.00 PM) https://www.mospi.gov.in/sites/default/files/reports_and_publication/statistical_publication/social_statistics/Chapter%208%20-National%20redressal.pdf. 14

providing help in research activities and overall human resource development. On the other hand, Government is also trying to include NGO's in formulation of policy, planning, implementation, monitoring to include their perspective and their suggestions relating to issues dealing with PWD's.¹³

- e. "National Education Policy 2020" – 86th Amendment Act of 2002 to the Constitution of India, included Article 21A the Constitution of India,¹⁶ to provide for free and compulsory education of all children in the age group of 6 to 14 years. This right is acknowledged as a Fundamental Right and it is for the state to determine it by law. Taking note of this right, the government enacted The Right of Children to Free and Compulsory Education (RTE) Act, 2009, in order to lay out a roadmap for providing full time elementary education of equitable quality in a formal school which is consistent with established norms and standards. Further, The National Education Policy 2020 provides for sufficient and effective resources for students with disabilities including resource centers and educators, schools within a radius of 5-10 km.¹⁴ The policy also addresses the problem of shortage of special educators. The Policy lays down basis upon which a superstructure of providing a 'Barrier-free' access to education for all children with disabilities. The policy has included short-term specialized courses for children with disabilities within the existing framework. The teachers are free to pick various educational tools for imparting education as per the requirements of the students. The policy also provides for establishment of National Assessment Centre, 'Parakh'. 'Parakh' will ensure accessible assessment guidelines for children with learning and this will in turn make education more inclusive. The policy also aligns with the objectives of

¹³ Sonia Yasmin, *Role of NGO's in Empowering the Children with Disabilities*, IJRAR, Mar 2022, at 464-469. ¹⁶ INDIA CONST. art 21A.

¹⁴ Salient Features of National Education Policy (Aug 6, 2023, 9.00 PM) <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1847066>.

the Rights of Persons with Disabilities Act, 2016.¹⁵ It also extensively has laid out the kind of special schools for Children with disabilities from 15-18 years to provide them free education under Integrated Education for Disabled Children (IEDC) Scheme.”

- f. Development of Instructure- Over a period of years, various National Institutes (NIs) have been set up under the Department of Empowerment of Persons with Disabilities (Divyangjan). These are established under the Societies Registration Act, as autonomous bodies, focussing on specific types of disabilities. These Institutions are working for research, development and providing for PWD's. Various institutions working for upliftment and for inclusiveness of persons with disabilities in nation building are as follows:¹⁵
 - i. “National Institute for Empowerment of persons with Visual Disabilities’ (NIEPVD)- situated in Dehradun, the institute provides for a residential school for the visually impaired till 12th standard. Diploma courses in Special Education and Rehabilitation Psychology are being offered by the institute. The institute also undertakes Research and developmental activities.”¹⁶
 - ii. “Ali Yavar Jung National Institute of Speech and Hearing Disabilities’ (AYJNISHD)- situated in Mumbai, the institute offers Ph.D, Post Graduate, Under Graduate and Diploma courses in Audiology, Speech Language Pathology, Special Education, etc. The institute also provides for the infrastructure for Tertiary level care, evaluation and diagnosis of speech -language and audiology impairment.”¹⁷

¹⁵ Development of Infrastructure for Persons with Disabilities (Aug 6, 2023, 9.30 PM) <https://disabilityaffairs.gov.in/content/page/national-institutes.php>.

¹⁶ *Id.*

¹⁷ *Id.*

- iii. “National Institute for Empowerment of Persons with Intellectual Disabilities’ (NIEPID)- situated in Secunderabad, Telangana, this institute offers rehabilitative services for Persons with Intellectual Disabilities. The institute also provides for Special Education, Cognitive Therapy and Vocational/ Skill training.”²²
- iv. “National Institute for Empowerment of Persons with Multiple Disabilities’ (NIEPMD)- situated in Chennai, this institute provides for inclusive Preparatory School and Vocational training and it also takes care of rehabilitation of persons with Multiple Disorders. This also takes in the task of Psychological Assessments.”
- v. “Pt. Deendayal Upadhyaya National Institute for Persons with Physical Disabilities’ (PDUNIPPD)-situated in New Delhi, the institute along with rehabilitation services, offers courses for different levels in Prosthetics & Orthotics, Physiotherapy and occupational Therapy.”
- vi. “Swami Vivekanand National Institute of the Rehabilitation Training and Research (SVNIRTAR)’-situated in Cuttack-situated in Odisha, the institute offers 100 bedded hospital and Cerebral Palsy Clinic. Besides, rehabilitation services it offers counselling services and assessment services.”¹⁸
- vii. “National Institute for Locomotor Disabilities’ (NILD)- situated in Kolkata, this institute offers wide range of facilities like 50 bedded hospital and center for corrective surgery. It provides for OPD and Radiology services as well. The institute also takes up the task of providing comprehensive rehabilitation services to the Persons with Locomotor Disabilities.”¹⁹

¹⁸ *Id.*

¹⁹ *Id.*

- viii. “Indian Sign Language Research and Training Centre’ (ISLRTC)- situated in New Delhi; the institute offers well researched dictionary of Indian sign language (10000 words). The institute also promotes Indian Sign Language in audio visual and social media. The institute is also working for developing trained expertise for using, teaching and conducting research in Indian Sign Language.”²⁵
- ix. “National Institute of Mental Health and Rehabilitation’ (NIMHR)- situated in Sehore, Madhya Pradesh, the establishment of this institute has been recently approved by the cabinet in 2018. The institute provides for comprehensive rehabilitation services for persons suffering mental health issues.”
- g. “*International Commitments*- India is a signatory to the Biwako Millennium Framework (BWF) for action towards an inclusive, barrier free and rights-based society for PWD’s in Asia and Pacific. Enforcement of policies and regulations for equal opportunities and treatment of PWD’s and their rights with respect to information, health, education, communications, training, employment, social services and other allied matters, is the core element of BWF. Further, the aim is to include persons with all kinds of Disabilities in all laws and policies. Another significant objective is to include persons with disabilities in the national policy decision-making.”²⁰

4. Challenges in Implementation

4.1. Allocation of Resources

Allocation of resources is an important criterion to determine the inclination of the government to execute a particular scheme. The percentage of GDP, that has been allotted for the welfare of the Persons with Disabilities, for the last three years, has seen a declining trend, from

²⁰ India’s International Commitments to uplift Persons with Disabilities (Aug 6, 2023, 5.00 PM) <https://punarbhava.in/index.php/legal-instruments/international-instruments/united-nations/bmf>.

0.0097 percent in 2021 to 0.0084 in 2023. The allocation of resources has decreased even if the intention of the government was otherwise. There are three departments, working for welfare of Persons with Disabilities, which receive significant chunk of funding.²¹ There are

- Department for Empowering People with Disabilities (DePwD).
- Department of Health and Family Welfare.
- Department of Rural Development.

4.2. Under Utilisation of Resources

It has been highlighted by the report of Centre for Budget and Governance Accountability's report on Budget, that funds which been allocated for the execution of various schemes has not been utilised for inclusive development of Persons with Disabilities. In 2018-2019 the funds which were not used was placed at 4.90% of the total dedicated amount. In the year 2019-2020, the ratio went up to 15.66% of the dedicated amount with a further rise in the year 2020-2021, for which the amount stood at 34.99% of the total amount and 2021-2022, 2023-2024 has not been any different. It can be seen that the allocated resources have not been fully exhausted to carry out the tasks set up in different welfare schemes. Underutilisation of resources also reflect "lack of awareness about schemes for Persons with Disabilities."²²

4.3. Lack of Coherent Community Level Strategy

The attitudes of the society towards such persons has to be reformed. Sensitisation programmes must be held at different levels in order to educate the society to not to consider Persons with disabilities as liabilities but assets.

²¹ Challenges in implementation of various schemes (Aug 6, 2023, 5.30 PM) <https://cjp.org.in/persons-withdisabilities-held-back-by-inadequate-implementation-of-welfare-measures/#:~:text=As%20we%20have%20seen%20above,the%20discriminative%20effects%20of%20disability.>

²² *Id.*

Sometimes lack of coordination between the government and NGO's results in neglect of Persons with Disabilities. There is a need to involve different stakeholders from various strata of society, so that they offer employment to Persons with Disabilities without any hesitation.

4.4. Lack of 'Barrier-Free' Environment

Participation of Persons with disabilities is only possible if the environment around is conducive and hassle free, so that they can move about safely and freely. Therefore, there is need to create "Barrier-Free infrastructure such as buildings, transport, road and pavements., etc. must cater to the special needs of Persons with Disabilities."

4.5. Lack of Social Security

The families of these Persons incur huge expenses in order to provide basic facilities to such persons. "There is a need to provide social security to such families by providing them assistive devices for such persons free of cost or at low prices. Tax rebate, disability pension or unemployment allowance or other measures could be a way out for such families, so that they can upgrade the lifestyle of such persons."²³

5. Conclusion

There is a need to change the mindset of the society, with respect to its understanding of word 'disability'. The new policy of 2006 also focuses upon prevention of disabilities and spreads awareness regarding measures to be taken for prevention of disabilities. In order to reach out to the grass root level, that is to include Persons with Disabilities in rural areas, new District Disability Rehabilitation Centres (DDRCs) are established with the aid of government. 'The National Rural Health Mission through Accredited Social Health Activist' (ASHA) provides for targeting the requirements of population living in rural areas (special attention to sections at risk) relating to health. The government in order to enhance accessibility of PWD's is supporting them with resistant and advanced aids

²³ *Id.*

and instruments meeting ISI standards which can provide them physical and assistance and also aim to boost their confidence and enhance self-esteem. No doubt, the roadmap for inclusive development of Persons with Disabilities has been laid out in detail but in order to ensure their participation, such persons are to be included in task of policy making itself.

MORAL POLICING AND HUMAN RIGHTS IN INDIA

Rachna Sharma*
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1. Introduction

The term ‘moral policing’ is gaining currency in recent times. It refers to the enforcement of moral values upon individuals by a group of people without any legal authority. In fact, it is a term used to describe the vigilante groups that act to enforce a code of morality in India. Any activity determined to be immoral or against Indian Culture is the target of Moral Policing.¹ So, the basic idea connected with this phenomenon is to impose restrictions against acts which do not align with our Indian culture. The limitation could either be imposed through legal orders which are officially given by the courts or it could be done by the vigilante groups through unjustified acts which include arson, stone pelting, and violent protest marches. Keeping in view the increasing number of cases in which youngsters have been assaulted across India in the past few years, there is an urgent need to reconceptualise Moral Policing, and that too from Human Rights perspective. There are various factors such as social, political, and economic which are responsible for Moral Policing in India. It mainly violates individual’s rights and freedom.

The basic agenda of Moral policing is to establish a society in which religious and cultural practices are not tarnished by any foreign influence. In other words, we can say, it intends to impose restrictions on such acts that are not in consonance with the Indian culture. Specifically, politically

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¹ MK Koulnu Chothe, “*Moral Policing in India: A Study on Human Rights Perspective*” *Pramana Research Journal* <<https://www.pramanaresearch.org/gallery/prj-p826.pdf>>. Accessed on 22 November 2021.

motivated groups such as the vigilante groups are responsible for this type of scenario. They are quite powerful and use bullying to act as Moral Police. Any individual, couple, or group could be a victim of Moral policing. The so-called moral police would attack art exhibitions, pubs, and bars which they consider are against the cultural values of our country. In order to protect cultural and social norms, the so called “Moral Police” would not take a minute to take the law in their hands. They can go to any extent even if it means physically assaulting people and mentally torturing them. It is to be understood that the term ‘Morality’ has different connotations attached to it and it is perceived differently by everyone in contemporary times. In the same way, Moral Policing has divergent repercussions for different people.

Indian Society is basically a patriarchal society. Although with the changing times, the thinking of people has progressed considerably. However, till today several incidents reveal the presence of conservatism amongst the people. In contemporary India, women work in different sectors and have attained new heights. It is highly ironical that for every move they take, they are questioned. They are controlled by others. It is expected that even if they are working, they should not forget about the norms of the society. They are considered to be the preserver of the family’s dignity and hence if they violate any norm of the society or have a premarital sex, then they are shunned by the family and the society. They are often trapped in the whirlpool of questions like ‘What will the people say?’, ‘What will the people think?’, and so on.² The people who consider themselves as the custodian of society can go to any extent to keep morality in the society. However, they fail to understand the fact that morality is subjective and its interpretation may vary from region to region, amongst communities, or religions.

² Neelam Jain, “Patriarchal Moral Policing, Communalization and Politicization of Love and Marriage” Indian Journal of Society & Politics. <<https://ijsp.in/admin/mvc/upload/40206.pdf>>. Accessed on 23 June 2022.

2. Factors

Moral policing involves individuals or groups enforcing societal norms and values, often without legal authority. This phenomenon is influenced by various social, economic, and political factors. These factors are discussed in detail.

2.1. Social Factors

2.1.1. Cultural Norms and Values

Societies with strict cultural norms are more prone to moral policing. These norms often encompass traditional beliefs about gender roles, sexuality, and acceptable public behaviour. In some cultures, there are strong expectations about modesty in dress or conduct, particularly for women. People who deviate from these norms may be subjected to moral policing by community members who feel they must enforce traditional standards. For example, wearing short clothes by girls is considered as immoral in many societies.

2.1.2. Religious Influence

In many societies, religious groups and their ideologies play a central role in moral policing. Religious doctrines often dictate specific moral behaviours and practices, and adherents may feel obliged to enforce these within their communities. This can include actions against behaviours considered sinful or immoral according to religious teachings, such as drinking alcohol, premarital relationships, or homosexuality.

- (i) **Community Pressure:** In close-knit communities, pressure to conform to accepted norms can lead to moral policing, with individuals or groups enforcing these norms. In India, people adhere to many norms or conditions because they are followed by the majority of the population.
- (ii) **Education and Awareness:** Levels of education and awareness impact moral policing. Less educated populations may be more influenced by

conservative ideologies, leading to more instances of moral policing. Conversely, higher levels of education and exposure to diverse viewpoints can lead to more liberal attitude and a reduction in moral policing behaviours.

2.2. Economic Factors

- (i) **Economic Inequality:** High levels of economic disparity can create social tensions, with moral policing becoming a way for marginalized groups to assert control or express frustrations.
- (ii) **Employment and Occupation:** Economic instability and unemployment can increase the likelihood of moral policing, as people may use it as an outlet for their frustrations or to gain social power.
- (iii) **Resource Allocation:** In regions where law enforcement resources are limited or inadequate, community-driven moral policing can become more prevalent. In the absence of formal mechanisms to regulate behaviour, individuals or groups may take it upon themselves to enforce social norms, often through informal and sometimes coercive means.

2.3. Political Factors

- (i) **Government Policies and Laws:** Political environments that promote conservative or authoritarian values often implicitly or explicitly support moral policing. Governments with policies that prioritize traditional social values may encourage or tolerate actions by moral policing groups. Laws that criminalize behaviours deemed immoral, such as same-sex relationships or certain forms of expression, can also legitimize and bolster moral policing efforts.
- (ii) **Law Enforcement Attitudes:** The stance of law enforcement agencies towards moral policing can either curb or encourage such behaviour. Lenient or supportive authorities can allow moral policing to flourish.

- (iii) Political parties and movements that emphasize traditional values, social conformity, and moral order often back or tolerate moral policing. These political entities may view moral policing as a way to maintain social cohesion and order, aligning with their ideological goals.
- (iv) Social Movements and Activism: Political and social movements aimed at social reform or moral revival can drive moral policing, with activists taking direct action to enforce their views.

Understanding these factors is crucial for addressing the root causes of moral policing and fostering a more inclusive and tolerant society.

3. Present Situation

In the last few decades, the incidents of Moral Policing are increasing day by day in India. Even at the societal level, the people who are not related to any vigilante group carry out Moral Policing. It has been observed in many of the cases that the victims are publicly shamed. It sometimes takes the worst form and even led to lynching of people and burning down their houses etc. The victims of moral policing are mostly the women. Women in the Indian society have always been perceived as the weaker sex. The most shameful and prevalent human rights violation existing in India is the violence against women. The people with a patriarchal mindset would attack or abuse women and impose unnecessary restrictions on them in the name of morality. Ultimately, it is this patriarchal mindset that limits women in terms of how they dress, speak, and behave in public, and how they relate to others. Women are required to come up to the expectations of the family and the society even if they are against their will. If a woman does not act as per the set norms of the society, people do not even hesitate to attack or abuse such women in the name of upkeeping morality. They will not even hesitate to kill her if it is found that she has done something

which is not as per the norms of the society.³ These conditions are not only imposed on the adult or the young girls as even the school-going girls are not spared in this context. They are told not to speak to the boys and emphasize brother-sister relations in the very ambit of the classroom. Even for that matter, the boys who are homosexuals are often mocked at and humiliated by the so called perpetrators of Moral Policing. They are taught not to cry and also to remain aggressive enough to be masculine. The homosexuality according to such people is a foreign concept or mental problem and is not considered as dignitary in our conservative society. There have been several incidents and many cases where the people or the family members kill a homosexual person or impose strict restrictions on them in the name of morality. Moral Policing is an act which not only imposes limitations upon the freedom of women but men as well. We need to understand that every human being has a right to sexual as well as artistic expression. It shall not be curtailed to such a degree that it violates the basic human right of an individual. In the context of women, Moral policing is done solely with the intention of limiting their movement as well as sexuality in the society. Women also bear the brunt of harassment in public in the name of culture and tradition.

4. Forms of Moral Policing

Recently, the most serious manifestations of the Moral Policing have been in the form of Honor Killings, Violence in cinema halls for protest on ban of films, Mob Lynching and Cow Vigilantism. Most identifiable agents of Moral Policing are general public, right wing vigilante groups, *Khap panchayats*, media, patriarchal male family members, school authorities and even police. There are many forms of moral policing as mentioned above. Some of these forms are discussed here in detail.

³ Stephen Banks, "*Informal Justice in England and Wales, 1760-1914*," *Boydell and Brewer eBooks* (2014) <<https://doi.org/10.1515/9781782043249>>. Accessed on 9 November 2021.

4.1. Honour Killing

The offences against women particularly Honour killings and Rape come within the ambit of Moral Policing and often led to the lynching of an innocent person. Honour killing is amongst the most horrendous forms of human rights violation. It involves the execution of innocent people who simply intend to get into the wedlock and start their new lives. People with a patriarchal mindset do not consider Honour killing as an offense. Instead, they consider that by killing the person they have preserved the Honour of their family as that person had brought the shame upon the name of the family or disgraced the family's image or reputation. This is the thinking of the majority of the society in India especially in northern states like Punjab, Haryana, Rajasthan, and Uttar Pradesh.⁴

As discussed above, Honour Killings are the most horrifying crime for humanity where the family members kill a person just because that person (mostly a woman) has not adhered to the norms of the society and have tarnished family's reputation or honour.⁵ These killings stem from cultural, social, and sometimes religious beliefs that place family reputation above individual rights and lives. There are multiple cases of Honour killings every year all over the world. There are some recent incidents where the girls have been killed due to their failure to accept the norms of their society. Some of the recent incidents has been mentioned below in the detail. In the landmark Manoj - Babli case, the victims Manoj and Babli were killed by the family on the decision of *Khap Panchayat*. It was decided that whoever had helped them will have to pay 25000 Rupees as fine and the couple was abducted and killed by Babli's grandfather, who was the leader of the *Khap Panchayat*.⁶

⁴ Anand Mishra, "https://Manupatra.Com/Roundup/337/Articles/Honour%20Killing.Pdf"(Manupatra) <https://manupatra.com/roundup/337/Articles/Honour%20Killing.pdf> Accessed on 26 November 2021.

⁵ Widonlule Newme, "Honour Killings in India" (2018) 5, Journal of Emerging Technologies and Innovative Research. <https://www.jetir.org/papers/JETIR1809070.pdf>. Accessed on 25 November 2021.

⁶ Smt. Chandrapati v State of Haryana and Others (2011) (SC).

These cases illustrate the devastating impact of honour-based violence and emphasize the urgent need for global awareness and intervention to protect individuals' rights and lives from such practices. In many of the rape cases, the reasons given by the accused include the dressing or the attitude of the girl which according to them is not appropriate for the society, and being the custodians of moral policing, they do such acts to stop or control the women from violating such norms.

4.2. Mob Lynching

Besides Honour killings which we have already discussed, Lynching is the worst form of violence under which a mob under the pretext of administering Justice without Trial executes the presumed offender often after inflicting torture and corporal mutilation. The social networking platforms like *Instagram*, *WhatsApp*, and *Facebook* often act as stimulants by spreading fake news and aggravating the situation resulting in communal clashes. Lynching is a collective hate crime. It is largely responsible for the violation of human rights as the execution of the presupposed offender takes place without due process of law. Besides social media, the inactive attitude of the politicians and police officers is also responsible for the outbreak of the mob lynching. The heart wrenching lynching incident occurred in Karbi Anglong, Assam in 2018. In this lynching, two persons were killed by the mob based on a fake rumour on WhatsApp that these persons were child abductors or kidnappers.⁷ These kinds of cases show the absence of humanity in people for others and call for the requirement of strict laws in the society. Earlier there was no particular law to deal with these cases.

4.3. Cow vigilantism

Cow vigilantism involves Killing of people just on the suspicion of consumption of beef depicting the intolerance amongst the vigilante. Cows

⁷ Rahul Karmakar, 'Two men beaten to death in Assam' *The Hindu* (Assam, 9 June 2018) <<https://www.thehindu.com/news/national/other-states/two-men-lynched-on-suspicion-of-being-child-lifters-in-assam/article24122413.ece>> Accessed on 1 November 2021.

are worshipped and revered in the Hindu religion. The intensity of moral policing which is perpetrated through cow vigilantism is increasing day by day. The Hindus have made their grounds firm and have recklessly violated the human rights by lynching the minorities i.e., Muslims on the pretext that they regularly consume beef or because they are involved in slaughtering cows. Several cases have been registered where the vigilante groups have been misled by the false information which have consequently led to the loss of the lives of the minorities. Any kind of association which strengthens one religion on the one hand and weakens the other religion on another give rise to the communal tension and is contrary to the communal harmony.

5. Role of Police and Other State Authorities

We all know that the role of the Police is to promote Law and order. However, under the garb of protecting morality and Indian culture, the police have also been harassing and humiliating the people. The police officials also sometimes perpetrate Moral Policing by raiding public parks, pubs, and hotels. As a result of insufficient awareness and proper training, they turn blind eye to the cases related to Honor Killings, Domestic Violence and fail to register cases against the vigilantes. Under the garb of protecting Morality, they interfere with the basic fundamental right that our Indian Constitution has provided to every citizen. That is Article 21 “Right to Life and Personal Liberty”⁸. “It is the fundamental right of every citizen of India. As per this article, every person has a Right to Life and to live with dignity.” However, in a society like India, the morality pertains over Constitutionality. Here, the morality is considered way above the Constitution. In certain cases, the judges decide the cases on the basis of the morality of the society rather than imposing constitutional principles.

Police officials, whose duty is to give protection to people and save the victims from the brutality, in turn, help the accused in committing this heinous crime. Police have also been using the *Prevention of Immoral*

⁸ CONSTITUTION OF INDIA 1950. Art. 21.

Traffic Act (PITA)⁹ to justify raids on hotels and arresting consenting couples as an excuse for raids and arrests. The *Immoral Traffic Prevention Act*¹⁰ was originally passed to prevent Human Trafficking. Mumbai police carried out a hotel raid in which Sixty one people were arrested under section 110 of the *Bombay police Act, 1951*, meaning “behaving indecently in public”.¹¹ In the investigation, the police checked off a few boxes: ‘couples in a bedroom’ means ‘indecent’; ‘touching’ stands for ‘disorderly conduct’; and ‘lodges’ means ‘public resort’. The fact that the ‘couples’ were consenting adults was overlooked. In another humiliating incident which took place in Ghaziabad where under the pretext of safeguarding the so called morality, the couples sitting in parks were harassed by the police and were made to do sit ups in front of the cameras under the pretext of ‘Operation Majnu’. Section 293 of *Indian Penal Code, 1860*¹² deals with the sale of the obscene material to the people below 20 years, whereas Section 294¹³ of this code deals with the “obscene acts and songs”. However, the obscene acts are not properly defined and are open to interpretation. Police use such loopholes to justify moral policing acts undertaken by them. The so called Moral Police should understand that everybody deserves a life with dignity.

Moreover, the idea of merging social responsibility with morality has also led to the perpetration of the moral crimes. It put a question mark on our civil liberties and freedom of expression. We have to understand that social responsibility expects the people to fulfil their civic obligations. It is expected that the activities of the individual must profit the entire society. It is highly ironical that there is hardly a day when we do not get to read about one or the other act of aggression which was taken out on an unsuspecting citizen because they unknowingly ended up hurting someone’s religious or moral sentiments. It could be a piece of art, a write

⁹ Prevention of Immoral Traffic Act 1956.

¹⁰ *ibid.*

¹¹ Bombay Police Act 1951. s. 110.

¹² Indian Penal Code. 1860 s. 293.

¹³ *ibid.* s. 294.

up or an unmarried couple holding hands strolling on the side of the roads, etc. which can become the reason for the people to get aggressive against any person.

There are numerous incidents wherein our basic fundamental rights enshrined in the Constitution such as the right to freedom of speech and expression, right to live with dignity, right to privacy, etc. are curtailed under the garb of Moral Policing. The worst sufferers in this case have been the LGBT community. This community faces violence owing to their sexual orientation which is detrimental to the dignity of the individual. They have to face the brutality of the people just because they do not act as per the standards or norms of the society. Privacy represents the core of the human personality and recognises the ability of each individual to make choices and to make decisions. There are numerous incidents of attack on sexual minorities for their food preferences, freedom of expression, and religious background. People fail to understand the fact that every religion or area has a different set of norms which can make a difference in their choices and opinions. A famous Painter and Padma Vibhushan Awardee, Maqbool Fida Hussain's painting of the Hindu Goddess Saraswati became a matter of controversy in 1996.¹⁴ Thus the artist had to spend the last years of his life in exile because of national outrage and continuous threats.¹⁵

6. Role of Non-State Actors

Besides there are non-state actors like *Anti Romeo Squads* and *Hindu Yuva Vahini* which are more coercive and arbitrary in nature and focus on

¹⁴ M.F. Husain faced protests and legal challenges for depicting nude Hindu deities in his paintings, sparking debate over artistic freedom. Hundreds of lawsuits were filed against M.F. Husain in 2007 over allegedly obscene artwork. When he failed to show up for a hearing, a warrant was issued for his arrest; however, it was eventually suspended. High Court Justice Sanjay Kishan Kaul emphasised the need to safeguard artistic freedom and issued a warning against utilising the legal system to do it.

¹⁵ "MF Husain: *An Artist Who Courted Both Fame & Controversy*" (The Economic Times, June 10, 2011) <<https://economictimes.indiatimes.com/news/politics-and-nation/mf-husain-an-artist-who-courted-both-fame-controversy/articleshow/8787177.cms?from=mdr>>.

changing equations at the cultural level. The members of these groups portray themselves as the Moral Police. They reckon Morality on the basis of Code of Manu. They emphasise on *Varna system* which promotes hierarchy amongst individuals. We can say that these so-called vigilante groups aim to attack the democratic norms on the pretext of 'preserving Indian culture, morality, Indian ethos and religious sentiments.' The norms that are formulated on the basis of the code of Manu promote discrimination on the basis of gender and due to which women are always a target of moral policing. They are always judged for their dressing choices or if they do not adhere to the said norms. Other than this, if a boy and girl are found to be sitting, walking, or talking then such people do not think twice before taking the law into their hands.¹⁶ They disrespect them, talk to them harshly or sometimes they may hit them also. In these cases, even the police take such boys and girls in the custody and inform their families. Thus, they keep morality above the constitutionality.

Moral policing enjoys supports majority of Indians with conservative mindset. A large portion of this percentage belong to middle or senior age groups. Another important reality is that mostly people between the age group of 18-30 are the targets of vigilante groups who do not subscribe to their life style. The younger generation have got the access to the internet and social media due to which they are exposed to the western culture. They try to imitate their culture that is not acceptable to the orthodox section of the society. They are being subjected to violence because they do not accept or follow the norms which are prevailing in the society.

The younger generation has started to act against the moral policing. There have been various incidents of protest against Moral Policing. One such incident was in October 2014 when the right-wing youth coterie attacked the Coffee Shop at Calicut. A group of youngsters decided to observe Kiss Day on 2nd November expressing freedom of love following this incident. The Youngsters started a Facebook Campaign. It was later called Kiss of

¹⁶ Ritwik Jaiswal, "*Moral Policing in India: A Critical Analysis*" (2020) 10 Pen Acclaims <<http://www.penacclaims.com/wp-content/uploads/2020/05/RITWIK-JAISWAL-2.pdf>>.

Love Protest, which was a nonviolent protest against the Moral Policing. Indeed, it started in Kerala and later spread to other parts of India, at least on the Internet. Kissing their friends and loved ones in public places to protest moral policing was the agenda of the campaign, which to an extent was achieved by the group. Even after such protest against moral policing there have been incidents of moral policing in the recent past. Some of them are cited here. In an incident that took place in April 2015, in Kerala, a youth was beaten to death by the mob as he had entered the house of a woman. In 2009, the Ram Sena activists attacked a pub in Mangalore. They had beaten several young boys and girls there because they were not adhering to the traditional norms of the society.¹⁷ As mentioned, many people become the victims of moral policing on every day basis.

The acts of Moral Policing promote conservatism by impeding the development of our society. The so-called vigilante groups issue *diktats*¹⁸ for women against western clothing thus making it difficult for the women to move freely and independently. This is very common in the rural areas; however, the urban areas are not immune from such conservative attitude. Other than this, the women are not allowed to marry the person of her choice. If she runs from her family or asks them to not to marry the person of their choice, then she has to bear harsh consequences.

However, Moral policing is never encouraged by the courts. These activities are against the basic fundamental principles laid down for the country. We do not have any specific law that deals with Moral Policing in India. The perpetrators of moral policing can be punished under different sections of the “*Indian Penal Code*” (IPC). There have been many instances where cases were filed in courts against actions that come under the very ambit of Moral Policing. In those cases, the courts of India have given verdicts that do not encourage Moral Policing either by government

¹⁷ “Five Episodes of Moral Policing That Made National Headlines” *The Indian Express* <<https://indianexpress.com/article/india/five-episodes-of-moral-policing-that-made-national-headlines/>> Accessed on July 12, 2021.

¹⁸ According to Merriam Webster Dictionary *Dictats* are “A decree or an order”.

or Law enforcement agencies or by the vigilante groups. It is important to mention that the *Khap* Panchayats, which often encourage Honor killings or brutal action against the person, were declared illegal in September 2018 by the honourable Supreme Court.¹⁹

There has been a divergence of opinion amongst the people regarding the issue of Moral Policing. There is a group which feels that it is justiciable to the extent that it endeavours to bring out Moral development of the society. How can we forget the role played by “*The Gulabi Gang*” which is not actually a gang but is a vigilante group consisting of women activists constituted by Sampat Pal Devi and focuses on empowering women, combating Domestic Violence and Desertion.²⁰ The women of this group wear Pink Sarees. Besides, kissing in public is another sensitive issue which involves Moral Policing. Although kissing is not a crime however it is expected that some minimum level of decency should be maintained in public places. Even the law does not permit kissing in public places. Despite this, Moral Policing is not the way, and the vigilante instead of taking the matter into their hands should approach the Judiciary or the Police in this concern. So, we can say that the type of policing which does not interfere with the individual’s freedom and which seeks to improve the society without causing any harm to anyone should be encouraged.

However, on the other hand, if the violent means are adopted, it might lead to the infringement of the fundamental rights of the people and also goes against the constitution and laws of the country. In this context then it is totally unacceptable. “As per the honourable courts, the Constitutionality prevails over morality. The person has fundamental right to live provided

¹⁹ In *Shakti Vahini v. Union of India and Ors.* case, the honourable Supreme court declared that the action taken by the *Khap Panchayat* against the consenting adults who has married will be illegal.

²⁰ Jerin Jacob “*The Gulabi Gang’s Feminist Vigilantism: Violence and Articulation within a Social Movement - One Future Collective*” (One Future Collective - One Future Collective, February 1, 2019) <<https://www.onefuturecollective.org/the-gulabi-gangs-feminist-vigilantism-violence-and-articulation-within-a-social-movement/>> Accessed on 12 April 2022.

under Article 21 of the *Constitution of India*²¹, thus the strict action is taken against such persons who infringes such laws. Moreover, the international Human rights are granted to every human and according to these rights every human is equal. They have right to life and should be treated with dignity.” Thus, in the cases where violent actions are taken by so called moral police, it not only violates the fundamental rights granted by the constitution but also infringes the basic human rights which are given to every human.²²

We have already discussed about extreme forms of moral policing in the context of Honor Killings, Mob Lynching and Cow Vigilantism. Not only this, Moral Policing also hinders the education of the children by means of curriculum changes that promotes specific narratives, omitting facts, compulsory languages etc. Such moral policing is meant to promote religious ideologies and curtail pluralism, which will lead to religious fanaticism amongst young people. Other than this, moral policing can be seen in schools or localities where the children especially the girl child have to follow the conduct of the society. For example, if the girl walks in a pair of shorts or if she has a tattoo or dyed hair then she becomes a topic of discussion and is judged on this basis. Moral policing curtails individual rights and freedom. It also hampers artistic activity and innovations through censorship of movies, books, etc. curtailing the artist’s freedom of expression. So, we see moral policing is not the way.

India has a robust legal framework to protect human rights, including provisions in the Constitution and various laws that safeguard individual freedom. However, the implementation and enforcement of these laws remains a challenge. The laws that safeguard the individual freedom should be enforced strictly. Moreover, the acts of harassment should be penalized and strict action must be taken to control such incidents. The judiciary plays a crucial role in upholding human rights and has made

²¹ CONSTITUTION OF INDIA, 1950.

²² Andrew J Goldsmith and Collen Lewis, *Civilian Oversight of Policing, Governance, Democracy and Human Rights* (Oxford Portland Oregon, 2000).

significant interventions in moral policing cases. Nonetheless, more comprehensive legal mechanisms and increased sensitivity amongst law enforcement agencies are necessary to address the issues effectively. Development of robust support system including legal aid, counselling services and safe havens etc. for individuals who are subjected to moral policing is required.²³ Not only this, even the media also plays a significant and critical role in shaping public opinion and perceptions of Moral policing incidents. Some media outlets sensationalize and amplify moral policing incidents, perpetuating intolerance, others contribute to constructive discussions and challenge the practice. Social media platforms such as Twitter, Instagram, Facebook, and so on have provided a space for individuals to voice their dissent and mobilize the support against Moral Policing.

A nation that is well-known throughout the world for its exceptional educational system is also recognized for encouraging and hiring moral vigilante groups on university campuses to monitor students' behaviour or, more importantly, to uphold the standard of the "moral compass." Some universities in India have even gone to the extent of controlling the kind of attire female students are allowed to wear on campus; they have even been known to forbid skirts and denims. India is a democracy, yet it is precisely these kinds of incidents that cause us doubt the society's foundation and its constrained comprehension of the times we live in. The use of violence by these institutions' moral police to make their points—beating up kids, frightening and intimidating them, and occasionally even extorting money—goes beyond all bounds. Even as young as ten years old, children are being socialized to adopt the beliefs of the society. They want them to possess the qualities that the culture deems desirable. However, the saddest part is that this is exclusive to females. It is the need of the hour

²³ Prakash Rathod and Salil Shringarpure, *Ethical and Legal Issue in Moral Policing: Indian Cinematographic Perspective* (LXV Research Gate, 2022) 39 <https://www.researchgate.net/publication/371350879_ETHICAL_AND_LEGAL_ISSUE_IN_MORAL_POLICING_INDIAN_CINEMATOGRAPHIC_PERSPECTIVE>. Accessed on 20 November 2021.

that the public awareness campaign should be initiated that are designed to enhance the feeling of equality amongst people and to challenge the practice of moral policing for respecting personal autonomy of every individual.

7. Conclusion

In the end, we can say there is a need to promote sensitivity and awareness amongst people and administration about the constitutional values and general principles of Fundamental Human Rights. It is important that the laws that are there to protect the person from atrocities should be implemented strictly. Moreover, if it is found that the police official who has supported or helped the person accused of Honor killing or any such crime then strict action must be taken against such official as well.²⁴ Other than this, public discussions and debates should be promoted in schools and colleges to create awareness and sensitization towards different aspects of Moral policing. We must understand that the actual sensitisation begins at home. We must teach the children and younger generation that such type of people does not come from the educated background and are generally ignorant about the laws. It is required that the comprehensive educational programs that emphasize the importance of respecting individual rights and cultural diversity must be implemented. This must include integrating human rights, gender equality, and personal freedom topics into the school curriculum, and community education efforts must be undertaken to create awareness. There is a requirement for a better agenda for tackling fake rumours that are circulated through social media platforms. Media can play a responsible role in promoting a culture of tolerance and freedom for minorities. Protecting people from Moral Policing and Violence does not require the creation of new International Human Rights Standards. All are entitled to enjoy the protection provided by International Human Rights Law. It is the need of the hour to challenge

²⁴ Bhaswat Prakash “*Criminalizing of Moral Policing*” (Legal service India) <<https://www.legalserviceindia.com/legal/article-10382-criminalizing-of-moral-policing.html>> Accessed on 24 November 2021.

and counteract moral policing to build a rights respecting society. This is not possible without the collective efforts from individuals, communities, political groups, civil society organizations, and the government. It is only through such collective efforts that we shall be able to promote awareness and foster a culture that values diversity, tolerance, and respect for Human rights. We must take help from community leaders and influential figures to promote internal reforms. We must engage such people to empower local communities to oppose moral policing practices and uphold individual freedom. Moreover, a technology should be introduced to create a platform where the moral policing incidents can be reported anonymously. This will help in reporting of such incidents without any concern for the security of the person who has provided the information for the same. Last but not the least, it must be ensured that the policies that are formulated should be implemented effectively and efficiently. Regular monitoring must be done to assess the impact and efficacy of such policies. By integrating these strategies, it will be possible to cultivate a society which is more tolerant and respectful and where the personal autonomy and individual choices will be given importance. We can conclude with the words of Richard Dawkins “Most thoughtful people would agree that morality in the absence of policing is somehow more truly moral than the kind of false morality that vanishes as soon as the police goes on strike or the spy camera is switched off”.

COMPARATIVE ANALYSIS OF INTERNATIONAL FRAMEWORK CONCERNING CHILD RIGHT'S PROTECTION: SPECIAL REFERENCE TO CHILDREN OF PRISON INMATES

Abhijit Chanda*
Saurabh Kishor**

1. Introduction

The regulation and uniform protection to the rights of the human being has been indispensable in taking cognizance of the crime been committed to encroach upon rights protection of the individual. The concept of human rights has been evolved since ancient period which has been further categorized in protecting the varied sections of the society prone to vulnerability. The children are been neglected and even been considered as “*small adults*” and been pushed to world of labor for economic contribution along with bearing the familial responsibilities¹. The protection to the rights of the children has been the matter of concern after the outbreak of First World War². The child are not protected from the cruel of the society, rather pushed into violation of their rights through the practice of child labor, child marriage³, and by way of different means of child exploitation. The sections of the children are prone to vulnerability based upon their parental status, opinion, belief, etc. The children often suffer from rights violation in context to involvement of their parents in violating the laws of the land and being detained through State

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¹ Vissing, Y. *History of Children's Human Rights in the USA*. In: *Children's Human Rights in the USA*. Clinical Sociology: Research And Practice. Springer, Cham. 181-212, (2023).

² History of child rights, UNICEF FOR EVERY CHILD (July 30, 2023, 10:05 AM), <https://www.unicef.org/child-rights-convention/history-child-rights>.

³ Van de weijer, S.G.A. Smallbone, H.S. Bouwman, v. Family formation patterns of children who experienced parental imprisonment, *Advance in Life Course Research*, 43 100321 (2020).

intervention. The child of the imprisoned parents has taken into consideration at very limited occasion, as their vulnerability coincides with their dependency factor upon parents. The relation of children in contradiction with law relates the status of juvenile delinquency, but the uncovered story of vulnerability of children of imprisoned parent are subject to “*collateral convicts*⁴” and “*collateral victimization*” which depends upon their residence post-incarceration of their parents. The imprisonment of the parents results in isolation of their children or youths in the society and get into the prey of adopting delinquency attributes. The children or family member of incarcerated parent are often termed as “*Hidden Victims*⁵”, as they get no opportunities or platform to address their problem. The incarceration has different impact in relation to the mother or father prisoner and bears different challenges to their child. In comparison with the maternal and paternal incarceration, mothers are primary caregivers and closely associated with them. Hence, the mother often faces more adverse consequences like stress, depression etc., upon separation from their child during incarceration period⁶. Therefore, the separation during incarceration entails various risk factors inter-linkages the imprisoned parent and their dependent child prior to incarceration, communication level persists in between the jailed parent and caregiver and the availability of the foster and institutional care.

The international documents pertaining to child rights protection has been legislatively codified in various international and regional instruments to encompass wider protection and interests of children. Thus, the children of prisoners constitute a different vulnerable sections has been explicitly

⁴ Robertson O. *Collateral Convicts: Children of Incarcerated parents*, Human Rights & Refugees Publication, Quaker United Nation Office (2012).

⁵ Martin E. *Hidden Consequences: The Impact of Incarceration on Dependent Children*, National Institute of Justice Journal, 278 (2017).

⁶ Bloom B. Steinhart, D. *Why punish the children: A reappraisal of the children of incarcerated mothers in America*, National Council on Crime and Delinquency (1993).

addressed by the CRC⁷. The present paper would touch upon the international instruments covering the rights protection of children specially the children of prisoners.

2. Protection of Child Rights: International Instruments

The concern for protection of the child has been addressed after the outbreak of First World War. The children were found in distressed condition, and *Eglantyne Jebb* came forward to voice the child rights protection and founded “*Save the Children Fund*”. The fund has later organized and structured as “*International Save the Children Union*” with the assistance of ICRC⁸. Thus, a draft has been formulated which have been first adopted by the International Union in 1923, followed by which the same has brought before the League of Nation. In 1924, draft of the Declaration has been adopted and named it as “*Geneva Declaration on the Rights of the Child*”⁹. The major provisions of the Geneva Declaration emphasized upon requisite child protection ensured against exploitation, and basic rights to be looked concerning health rights, basic level of nutrition, right to descent life and shelter, etc. The Geneva Declaration also encompasses the liberty of child to the world of labor and also to employ talents towards providing varied services to earn their daily breads. The establishment of UN laid stress upon human right protection and ensures fundamental freedoms through the adoption of UDHR¹⁰. The provision of UDHR lays emphasis upon special protection to human rights (including children) and ensuring their recognition since their birth. The states must

⁷ E/CN.4/RES/1990/74, *Convention on the Rights of the Child*, UN COMMISSION ON HUMAN RIGHTS (July 21, 2023, 08:50 PM) <https://www.ohchr.org/sites/default/files/crc.pdf>.

⁸ Droux, J. *From Child Rescur to Child Welfare: The Save the Children International Union facing World Warfare (1939-1947)*, *Journal of Modern European History*, 12(3) 277-397, (2014).

⁹ Geneva, 1924: *The Geneva Declaration of the Rights of the Child*, Online Atlas on The History of Humanitarianism and Human Rights (July 28, 2023, 10:50 AM) <https://hhr-atlas.ieg-mainz.de/articles/stornig-geneva>.

¹⁰ Universal Declaration of Human Rights, United Nations Peace, Dignity and Equality on A Healthy Planet (July 21, 2023, 04:30 PM) <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.

respect the liberties of the parents determining the kind of education being imparted to their child. Further the child rights protection has been one of the branch studies of the human rights and simultaneously taken into consideration through the 1959 Declaration.

The 1959 Declaration¹¹ has come into existence been the second documentation concerning child rights and addressing that the family, society and state must provide the best to the child. It set out the preamble which demarcates upon protecting every child without any form of discrimination which has been reproduced under:

“...Whereas the child, by reason of his physical and mental maturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth...” (emphasis Supplied)

The declaration comprises 10 principles surrounding child rights protection ensured and not been subject to any form of discrimination. The children must be cared with special protection and holistic development and considering “best interests of the child”. The Declaration further stress upon protecting the children before and after birth; and child of tender age must live with their mother unless exceptional circumstances arise. The various principles incorporated under the Declaration of 1959, the vulnerable category of children has been covered not to be discriminated based upon the status of their family or parent has been reproduced herein under:

“Principle 1: ...Every child, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of race, color, sex,.....birth or other status, whether of himself or of his family”

¹¹ Declaration of the Rights of the Child 1959, Humanium (July 30, 2023, 01:34 PM) <https://www.humanium.org/en/declaration-rights-child-2/>.

The child protection has been also reiterated in the ICCPR¹², in term of prohibiting all possible form of discrimination like religion, color, sex, etc. and safeguarding their recognition. The ICESCR¹³ encompasses obligation upon the state to provide adequate facility to the family considering growth, development, education, etc. Further special protection has been accorded to protect all child from any discrimination and the member States must laid down age limit to engage the children into employment or any occupation. The Convention also set out provision to reduce the child mortality rate and to set adequate measures ensuring their healthy development. The remarkable step adopted by adopting CRC to ensure holistic protection of the child¹⁴. The 1989 Convention covered all vulnerable sections and develops legislative mechanism to deal with the rights violation and to ensure the children with appropriate remedy. The preamble of the CRC explicitly mentions that children must be nourished in conformity with the objectives of the UN¹⁵. It ensures the extended form of protection been already envisaged by the former international instruments and to deduce the protection by mentioning the category of different section of children prone to vulnerability or rights violation. The instruments covering the child rights has been propagated and recommended to adopt at the national level to configure a uniform form of protection and treatment towards securing the interests of the children and take action against and prohibit discriminatory or arbitrary practice violating rights of children.

¹² G.A. Res. 2200A (XXI) (1966), *International Covenant on Civil and Political Rights*, United Nation, Treaty Series, 999 (171), UN GENERAL ASSEMBLY (June 30, 2023, 10:23 PM) <https://www.ohchr.org/sites/default/files/ccpr.pdf>.

¹³ G.A. Res. 2200A (XXI) (1966), *International Covenant on Economic, Social and Cultural Rights*, United Nations, Treaty Series 993 (3), UN GENERAL ASSEMBLY (July 25, 2023, 11:24 AM) <https://www.ohchr.org/sites/default/files/cescr.pdf>.

¹⁴ *Supra* Note 7.

¹⁵ Charter of the United Nations 1945, 1 UNTS XVI, UNITED NATIONS (July 12, 2023, 02:32 PM) <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>.

3. Protection of Children of Parental Incarceration: International Instruments

The status of child of imprisoned parents has been traced first time in the Standard Rules¹⁶ which encompasses little scope towards facilitating the children of incarcerated prisoners. The children of the prisoners born inside or outside the prison must be accommodated by the prison administration. If any childbirth takes place inside the prison premises, then such fact should not be disclosed in the birth certificate. The female barracks of the prison must be acquainted with antenatal and post-natal medication.

The Body of the Principles of 1988 is to protect the interests and rights of prisoners during trial or after conviction by means of State interference¹⁷. The principle concerning the safety and protection been given to all women, especially the expectant and mothers during breastfeeding period along with the children in need of care and protection (cnep) and child in conflict with law (ccl) must be protected. The protection to such vulnerable group is subject to judicial or authoritative review [Principle 5(2)]. Further the provision of the principle encompasses that any children deprived of any supervision due to imprisonment of their parent through state intervention, needs to be looked after by on or behalf of the State (Principle 31).

The history behind the adoption of the CRC reiterates the contribution of the first *Polish Draft 1978* which has contributed in adding intrinsic value in formulating the provisions of the CRC¹⁸. The draft provisions envisaged

¹⁶ E.S.C. Res. 663 C (XXIV) (1957) *Standard Minimum rules for the Treatment of Prisoners*, United Nations Specialised Conferences, United Nation (July 05, 2023, 12:23 PM) https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf.

¹⁷ G.A. Res. (43/173) (1988), *Body of principles for the Protection of All Persons under Any Form Detention of Imprisonment*, UN general Assembly (July 2, 2023, 09:00 PM) https://www.tjsl.edu/slomansonb/10.3_DetentionImprisonment.pdf.

¹⁸ E/CN.4/1284 (1978), *Original Polish Draft*, 31-32, UN COMMISSION ON HUMAN RIGHTS (July 16, 2023, 12:31 PM) <https://www.ohchr.org/sites/default/files/Documents/>

regarding the children of tender age are not supposed to get de-attached from their mothers, and provide with special protection to the children lacking family or any means of support. It has been discussed that the provisions of the draft convention have been discussed among the representatives of member States and thereby made several recommendation and suggestion related to “*ties of children with their father not to be jeopardized*” and “*child's place of residence*”. In the year 1989, the General Assembly has adopted the Convention of the Rights of Child, emphasizing upon several vulnerable category of child¹⁹. The CRC envisaged a provision under Article 9 stating about the consequences faced by the child upon their parental separation through state intervention must configure towards “*best interests of the child*”. Article 9(4) of CRC clearly stipulates that when any separation is being initiated by means of State interference such as imprisonment, detention, etc. of either or both parents, then the children of such parents to be looked after by the State in terms of right protection and also to convey the necessary information concerning the jailed member of the family in accordance with the state legislation. Further the provision emphasized to maintain frequent contact in between the children and separated/ jailed parents unless the same is detrimental in the interests of the child. In adjacent to the interests of children of incarcerated parents, the opinion of or any information expressed by the children are taken into consideration concerning any matters related to them has been primarily incorporated under Article 7 of the *Revised Polish Draft, 1979*²⁰. The retaliation of the same has been incorporated in the final text under Article 12 to prioritize the opinion of the child in matters including their interests in lieu of the maturity and age of the children. Further any decision been provided by any judicial or quasi-judicial body affecting the position of child of imprisoned parent, then such child may participate in such proceedings by himself or through any person

Publications/LegislativeHistorycrc1en.pdf.

¹⁹ *Supra* Note 8.

²⁰ E/CN.4/1349 (1980), *United Nations Economic and Social Council, Revised Draft Convention on the Rights of the Child*, UN COMMISSION ON HUMAN RIGHTS (July 7, 2023, 03:40 PM) <https://digitallibrary.un.org/record/19171?ln=en>.

represented on or behalf of such affected child. The invisible group of vulnerable child of prisoners has a great chance of deprived from familial environment; and thus addressed through Article 20 of CRC. Primarily the status and protection of children deprived from the family has been reiterated in the first *Polish Draft 1978*²¹, and thereafter incorporated under the final text. Thus, any child been deprived of familial environment needs adequate protection and benefit through state interference, and thereby alternative form of care such as foster care, institutional care, etc. can be availed for their proper well-being and nourishment. The children must be shifted in alternative place to ensure the upbringing of the children by keeping in uniformity of the national laws.

The General assembly adopted and proclaimed the *Riyadh Guidelines* in 1990 which also put a deliberate view that the children must not get separated from their parents unless and until it is derogatory to best interests of child²². The larger initiative has been called upon by the *Bangkok Rules* in order to develop the area of children residing inside prison with their parents and the after-effect experienced by the child witnessing parental incarceration²³. The Bangkok rules laid down emphasis upon protecting interests of prisoner's children especially living inside prison with imprisoned mother reproduced herein under:

“...all States to give attention to the impact of parental detention and imprisonment on children and, in particular, to identify and promote good practices in relation to the needs and physical, emotional, social and psychological development of babies and children affected by parental detention and imprisonment,”

²¹ *Supra* Note 18.

²² A/RES/45/112 (1990), *United Nations Guidelines for the Prevention of Juvenile Delinquency* (The Riyadh guidelines), UN General Assembly (July 01, 2023, 07:42 PM) <https://humanrights.gov.au/sites/default/files/Annexure%20F%20-%20Riyadh%20Guidelines.pdf>.

²³ A/C.3/65/L.5 (2010), *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders* (the Bangkok Rules), UN GENERAL ASSEMBLY (June 19, 2023, 03:55 PM) https://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf.

In accordance with Rule 2, the prison authorities must ensure the adherence for making arrangements before the children along with any female inmates gets admitted in any prison and must be devoted towards "*best interests of the child*". The basic credentials of the children who are left behind due to parental incarceration or being accompanied with mother prisoners inside prison in accordance with the national legislation must be recorded through state intervention. The basic details of the children need to be kept confidential with the competent authority in complying with their best interests (Rule 3). The women prisoner needs to maintain a personal level of hygiene in recourse of their pregnancy which is equally important for the female inmates and during before or after childbirth (Rule 5), along with maintain a proper balanced diet been prescribed by any health expertise to ensure proper health development (Rule 48). The children residing with female prisoners concerning their better well-being and interests (Rule 49), and the women prisoners carrying children inside prison must provide adequate time or opportunity to spend more time with their child and looked after their needs and basic necessities (Rule 50). Further the prison must ensure frequent health checkups of the dependents accompanying female prison inmates inside prison during the period of their eligibility or period of incarceration (Rule 9). The prison administration must lay emphasis to maintain strict professionalism while conducting any search to any children of female inmates or of any children visiting the prison to maintain bonding with imprisoned parent (Rule 21), and the children during prison visits must be ensured in a conducive environment to make face to face open interaction (Rule 28). The Bangkok Rules of 2010 has focus upon to maintain the discipline among the female inmates but not restricted to maintain familial contacts especially the children (Rule 23), and adequate measures to be adopted to ensure healthy connect between the incarcerated mother and their dependent child (Rule 26). The rules laid down regarding the proper counseling, training and program are to be held with the prison official or staffs to order to accustom themselves to deal with the children of prisoners in case of emergency (Rule 33); the women prisoners with

children and expectant female inmates needs to participate in different programs to satisfy the needs the gender and to ensure holistic development (Rule 42). The de-attachment of the child from incarcerated mothers would be solely decided and rely upon “*best interest of the child*” and any child been separated from their mother prisoners needs to be accommodate their alternative place of residence in advance, and afterwards the female inmates would be providing with adequate opportunity to have periodic meet with their children concerning the rights protection and welfare of the children (Rule 52). The rule for the non-custodial measure has also been provisioned in the Bangkok rules for the expectant women prisoners or accompanying with children except the nature of the violation of law is not heinous or shower any suspicion of threat or danger.

The offspring accompanied with mothers has been reiterated in the *Mandela Rules*²⁴. The prison must ensure the women barracks with special arrangements such as medical care and treatment deemed necessary before and after childbirth. If any expectant mother prisoners gave birth to any child inside prison, the same should not be mentioned in the birth certificate (Rule 28). The children are to be kept inside prison with their mother inmates concerning “best interests of the children” and adequate facilities for health and care management must be ensured to take care especially when their mothers prisoners deployed with any task, frequent health monitoring, etc. are deemed necessary. The child accompanying women prisoners inside prison must not be treated as prisoners (Rule 29). The imposition of solitary confinement must not be provided to any women carrying children inside prison (Rule 45); the instrument to restrain must not be applicable to any women prisoners during labor, and especially during delivery of child or after child-birth (Rule 48).

²⁴ A/RES/70/175 (2016), UN Standards Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), UN GENERAL ASSEMBLY (June 29, 2023, 01:43 PM) <https://www.refworld.org/docid/5698a3a44.html> .

4. Other International Actions

There are different actions and initiatives been taken on or behalf of the United Nation to vigilante upon the existing frameworks thus different discussion, meeting, declarations, study has been emphasized in carrying out the objective been framed towards benefiting the vulnerable section of children of incarcerated children. The United Nations has taken an initiative to implement the child rights during the period they attain he age of eighteen years. Such initiative has been taken into consideration in the 40th session of the committees of CRCto oversight the objective been framed in the CRC²⁵. The discussion has taken into forum to provide essential services to all the children especially education, care and development. Further the discussion twisted in providing special services to all the children prone to vulnerability such as children residing with mother inmates inside prison. The discussion has been initiated regarding the developmental rights of the children deprived of family, or being separated from the incarcerated parents. Thereby the dependency factor leaves an adverse effect upon the socio-physical development of the children.

The Salvador Declaration has been initiated by the member stated of UN concerning the protecting human rights²⁶ as being reiterated in the preamble reproduced herein under:

“...Reaffirming the necessity of respecting and protecting human rights and fundamental freedoms in the prevention of crime and the administration, and access to, justice, including criminal justice...”

²⁵ CRC/C/GC/7/Rev.1 (2006), General comment No. 7 (2005): *Implementing Child Rights in Early Childhood*, UN COMMITTEE ON THE RIGHTS OF THE CHILD (CRC) (July 27, 2023, 06:32 PM) <https://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/GeneralComment7Rev1.pdf>.

²⁶ G.A. Res. 46/152, 56/119, 62/173, 63/193, 64/180 (2010, Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime prevention and Criminal Justice systems and Their development in a Changing World, TWELFTH UNITED NATION CONGRESS ON CRIME PREVENTION AND CRIMINAL JUSTICE (July 12, 2023, 07:42 PM) https://www.unodc.org/documents/crime-congress/12th-Crime-Congress/Documents/Salvador_Declaration/Salvador_Declaration_E.pdf.

The declaration put emphasis to save the interests and rights of the youth in conflict in law. The criminal justice system should lay reformative approach to the young offenders, followed by addressing the basic necessity and benefits to be given to the children of prison inmates. The discussion led to propose a special attention under the shadow of CRC in the form of formulating any Optional Protocol or to make any amendments in the existing legislations or norms of juvenile justice (Point 26).

In the year 2011, the committee on the CRC has identified one of the major vulnerable sections of children i.e. “children of incarcerated parent” as a point of discussion²⁷. The topic has been preliminarily bifurcated into two groups i.e. “*babies and children living with or visiting a parent in prison*” and “*children left outside when their parent is incarcerated*”. The discussion before the floors of the Committee has been addressed by some representative of member states and highlighting the aspects of views or opinion of children to be taken into consideration; requirement of enacting a special legislation at the state level concerning rights and interests of the “children of incarcerated parents”, taking into account “*best interests of the children*” at every stage relating to their parental imprisonment; emphasizing upon adverse impact upon health factor of the children followed by the pre and post-natal care and treatment of the expectant women prisoners; children’s access to information relating to their incarcerated parents and stimulate upon proper training of the officials of correctional service to deal sensitively with these invisible group of vulnerable child. Adequate discussions have taken place concerning two groups considering rights protection and social up-bringing. Thereby there were various recommendations been reported concerning the opinion and better practices discussed for their welfare and development likewise, alternative to custodial considering the child’s interests and non-tenacity to

²⁷ 2011 Day of General Discussion: Children of incarcerated parents, UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER (July 09, 2023, 06:41 PM) <https://www.ohchr.org/en/events/days-general-discussion-dgd/2011/2011-day-general-discussion-children-incarcerated-parents>.

represent threat or danger to public; adoption of some best practices for the arrest procedure before the children concerning protection of human rights; child's opinion to be considered in residing with the incarcerated parents inside or outside prison; member states must ponder upon basic rights of the child such as health, education, recreation, etc.; frequent visitation rights of children (living outside prison) with the incarcerated parents and other family members (children living inside prison); right to access the information concerning their imprisoned parents; every member states must maintain the records child of imprisoned parents whose parents has been incarcerated..

The UNODC has developed model strategies to eliminate the violence been prevalent against the integrity and dignity of the children²⁸. Thereby the UNODC has come with lot of outlets which has been committed against the children in the society. The major revolution could be nurtured at to formulate various strategies and policies to eradicate the prohibition and prevention of any violence and to implement the same in the existing frameworks to attain the objective of the CRC. The model strategies have laid down various section of children prone to vulnerability due to prevalence of various abuse or violence been committed against the child. They have been addressed in the developed mechanism and adequate implementation of policy or guidelines to be incorporate by the member states to prohibit the violence and ensure the growth and development of this category of these children.

In context to the Global Study been commenced to reiterate the status of child deprived off from liberty due to different prevalence of traditional

²⁸ United Nations Office on Drugs and Crime (2015) *“Introducing the United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice: A New Tool for Policymakers, Criminal Justice Officials and Practitioners”*, Thailand Institute of Justice (July 04, 2023, 01:55 PM) https://www.unodc.org/documents/justice-and-prison-reform/14-08451_Strategy_eBook.pdf.

and institution practice²⁹. The category of the “children of incarcerated parents” has been covered of deprived status due to involvement of their parent in conflict with law. The findings of the study covering 69 countries stated that there are around nineteen thousand children living in the prison with their incarcerated mothers. The study reveals that the practice of allowing the residence of children with their imprisoned mothers varies from one state to another, as no such rule has been uniformly prescribed. It laid emphasis upon the alternative form of custodial sentence been imposed to the females convicts or under-trial stage accompanying children. Further it enumerates several international and regional frameworks have been taken into consideration and nurture the policy for its implementation through state intervention. It has encompassed several recommendations concerning the rights protection of the children of prisoners emphasizing upon abolition of discrimination; alternative arrangement for adverse impact upon children of parental incarceration; alternative for the custodial solution; children to be allowed to co-reside inside prison with incarcerated mothers based upon “best interests of the children”; adequate protection to be rendered to the children of prisoners against all form of cruel, neglect, torture, etc.; formulation and implementation of comprehensive programs and training to be imparted to all concerned working with the children co-residing inside prison; deployment of social or independent expert to assess the prevalence conditions of the children of mother prisoners living inside prison; economical and material support to be provided in cooperation with the “*government departments and civil society stakeholders*”; members states must put effort to put extensive research and collect adequate information concerning the prevailing status of the children accompanied female prisoners inside the prison; etc.

In the concluding observations of the second to fourth periodic reports of Switzerland which has been adopted by committee of CRC in 1983rd

²⁹ A/74/136 (2019), Global Study on Children deprived of Liberty, UNITED NATION GENERAL ASSEMBLY (July 26, 2023, 08:56 PM) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/213/15/PDF/N1921315.pdf?OpenElement>.

meeting³⁰. One of the aspects has been surrounding to protect the child of incarcerated parents facing traumatic experiences or suffer from anxiety, stigma, and depression. The children living inside the prison needs to be statistically represented by the member states, which is usually lacking and thereby the question has been raised in regard to maintain a conducive relationship in between the children and whose parents is detained behind bar. The discussion initiated by UN in 2011 which advises states to gather adequate information or data regarding the number of children whose parents has been incarcerated or detained by way of state interference. Further the concerned member state must ensure the frequent contact could be maintained among children and incarcerated parent in compliance with Article 9 of CRC.

5. Regional Frameworks

The actions and framework of various region cannot be ignored which has been formulated and stimulates more engagement on the well-being and rights protection of these child prone to vulnerability due to parental involvement in conflict with law. The preamble of the “African Charter on the Rights and Welfare of the Child” has been adopted in safeguarding children which has reflected and reproduced herein under:

“...Recognizing that the child, due to the needs of his physical and mental development requires particular care with regard to heath, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security...”

The Charter inspired from CRC has been adopted in Africa deliberately to facilitate the child of female prisoners. The provisions has been laid down to put special assistance to mother inmates especially accompanying children inside the prison should be adhered to conditions laid down under

³⁰ CRC/C/CHE/CO/2-4 (2015), Concluding observations on the combined second to fourth periodic reports of Switzerland, COMMITTEE ON THE RIGHTS OF THE CHILD (August 01, 2023, 08:54 PM) https://www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/internationale-organisationen/Empfehlungen-Ausschusses-Bericht-Uebereinkommens-Rechte-Kindes-2015_EN.pdf.

Article 30. The provisions enumerates that the nature of the punishment inflicted to the women prisoners specially those are pregnant or carrying any child need to be provide with alternative form of custodial sentence; prison should accommodate special form of treatment holding; no mother prisoners should be detained with any children inside the prison; prohibition of capital punishment upon any expectant female inmates or carrying any child; and assist in reformation and rehabilitation of the female inmates back in the society.

The health department of US has taken cognizance of the antisocial and delinquent nature of the children having incarcerated parents³¹. The study revealed that there are almost 15 lakhs children having an incarcerated parent, where 50% of the children found to be co-residing with the incarcerated parent and 80% of the children are residing outside the prison with any secondary caregiver or the other parent. It has been envisaged that the children having incarcerated parents have the tenacity to adopt delinquent attributes, poor academic results, etc. The empirical data of the study clearly states that the grown-up children often carry the delinquency attributes or involve in detainment by enforcement officials at some point before they attain the majority. Thus, the incarcerated background of the parent has a co-relation with adopting anti-social or delinquency characteristic of the child. Therefore, the study has come up with varied form of treatment process which would reduce the vulnerability factor among the children left behind due to parental incarceration such as “*Parent management Training*”, “*Multisystemic Treatment*”, “*Multidimensional Treatment Foster Care*”, etc.

The Female Offender Manual³² stated that female inmates are to be provided special assistance especially those are pregnant or in regard to

³¹ Eddy J.M., Reid J.B., *The Antisocial Behavior of the Adolescent Children of Incarcerated Parents: A Development Perspective*, U.S. Department of Health and Human Services (2002) NATIONAL POLICY CONFERENCE.

³² Federal Bureau of Prisons (Change Notice- 5200.02 RSD/FOB) (2016), Female Offender Manual, U.S. DEPARTMENT OF JUSTICE (June 30, 2023, 04:23 PM) <https://www.bop.gov/policy/progstat/5200.02.pdf>.

placement of the child. The prison administration must be accommodated towards facilitating the expectant mother prisoners, facilitates delivery of childbirth in any medical institution outside prison and also to prioritize the rights of mother prisoner to abort or to give birth the child. Female inmates to be assisted under the promotion of MINT (Mother and Infants Together) program and especially place the expectant female inmates in the Residential Reentry Center (RRC) facilities. The prison inmates are being endorsed upon to look after the holistic development of their child. There is another program been invoked out of inter-government agreement among the Federal Bureau of Prison with Washington Department of Corrections (WADOC) to initiate some programs allowing the female prisoners to live with their newly born baby up to 30 months post immediate child birth for sufficient and quality of care and nourishment can be ensured which is indispensable for every child. Further the 2016 Manual insist upon additional familial visitation facility been given concerning immediate delivery of the child.

The prison rules of the Europe has been adopted by the Council of Ministers on 2006 which has several provisions along with the recommendation received and implemented towards facilitating and protecting the interests of the children of prisoners³³. The provision enumerates that any human being below eighteen years are not subject to detain in prison (Rule 11.1) and if exceptionally co-reside in the prison with the primary caregiver, then adequate means of special care and treatment to be ensured (Rule 11.2). The prison rules emphasis for maintaining the profile of the detained prisoner including basic whereabouts of minor child if any (Rule 15.1 (h). The prison authority must confirm with the accommodation to provide pre and post-natal care and protection (Rule 34.4). In conformity with “best interests of the child”, the prison administration must provide different developmental and

³³ Rec(2006)2-rev, Recommendation Rec(2006)2-rev of the Committee of Ministers to member States on the European Prison Rules (2020), COUNCIL OF EUROPE, COMMITTEE OF MINISTERS (July 22, 2023, 02:12 AM) <https://www.refworld.org/docid/43f3134810.html>.

recreational programs to ensure the similar kind of nourishment could be provided at par with the children of society (Rule 35.1). The imposition of “*solitary confinement*” is completely prohibited upon any expectant female inmates or any mother prisoner accompanying children inside prison (Rule 60.6a); and the instrument of restraint are also prohibited upon any mother prisoner during or after delivery of the child (Rule 68.7).

On the completion of the 25th year of CRC, the European Parliament has considered various dimension of the rights and interests of the children³⁴ followed by taking action upon several sections to be addressed upon. The action has been set concerning the scope and ambit of application of Article 9, and thereby insist upon to examine the existing the policies or legislation guiding the prison tools and rules. The fact has been expressed concerning the children of imprisoned parent in Europe that their rights are being adversely affected which increasing their level of vulnerability and huge number of children every year is suffering due to their parental involvement in conflict with law.

6. Conclusion

The vulnerable group of children of prisoners has been addressed through various international and regional frameworks to protect the rights of the children, as they are been deprived even without any fault of them. The child of prisoners has been dissected into two basic groups which have already been taken into acknowledgement, but the real struggle possesses upon less contribution of women prisoners in the prison population i.e. around 6.9% of the world prison population³⁵. The children co-residing inside the prison comes under the surveillance of the criminal justice system. Putting emphasis upon the other children of prisoners who resides

³⁴ 25th anniversary of the UN Convention on the Rights of the child (2014), EUROPEAN PARLIAMENT RESOLUTION (July 24, 2023, 01:30 AM) https://www.europarl.europa.eu/doceo/document/TA-8-2014-0070_EN.html.

³⁵ Fair, H. and Walmsley, R. *World Female Imprisonment*, World Prison Brief, Institute For Crime & Justice Policy Research (August 2, 2023, 08:30 PM) https://www.prisonstudies.org/sites/default/files/resources/downloads/world_female_imprisonment_list_5th_edition.pdf.

outside prison facilities due to multiple reasons likewise availability of secondary caregiver, refuses to stay or keep the children, against “*best interests of the child*”, etc. In uniformity with CRC, the “children of incarcerated parents” without endorse upon any classification or categorization, the member states recommended to formulate and implement laws and policies concerning and facilitating children accompanying by mother inmates inside prison. Taking into consideration the status of the children living inside prison are subject to several vulnerabilities addressing their health, psycho-social development, recreational facilities, connectivity with the outer world, education, etc. The provisions enumerated in many of international and regional frameworks reflects almost similar form of provisions mostly concerning special assistance during pre and post-natal period and prohibition of harsh punishment i.e. solitary confinement to any expectant female prisoner or those carrying child.

The challenges often involve concerning the children lists out from the eligible criteria to stay inside prison or in exceptional circumstance stays outside the prison during the incarceration period of their either or both parents. Thereby the gap always remains reiterating the status of the children living outside prison and children of father prisoners which has limited engagement in discussion. The history behind the legislation of CRC expresses the concern been raised by several member countries to cover the aspect of mother and father prisoners while considering the vulnerable status of their children. There are several gaps remaining to work upon to improve the status of the children of parental incarceration at each level of protection and to spread the message of protecting the mostly veiled or uncovered story of children living outside prison during the parental imprisonment leaves a sense of obligation and responsibility upon the shoulder of each state and of individuals.

SAFEGUARDING PERSONAL AUTONOMY VIS-A-VIS RIGHT TO ABORTION: A COMPARATIVE ANALYSIS BETWEEN INDIA AND USA

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Shaurya Jain**

1. Introduction

The issue of Abortion is a matter of debate at global level. The controversy revolves around head on clash between mother's choice to end her pregnancy by exercising her personal or bodily autonomy and an unborn child's right to life. So, the underlying ethical and legal principle related to the issue is the idea of personal autonomy. A person's capacity and right to make decisions about their own life, body, and health without excessive intervention from others, such as the government or medical experts, is known as personal autonomy. Personal autonomy in the context of abortion means that a woman has the freedom to choose whether to continue or to abort pregnancy based on her values, beliefs, circumstances and needs.

Abortion necessitates a procedure to end a pregnancy. There are two different ways. One is Medical abortion (or Abortion with pills) in which medicines are used to end the pregnancy. Another is Surgical Abortion (or Procedural abortion) which follows a procedure to remove the pregnancy from the uterus.¹

The Indian Government recognized the need to prevent unsafe abortions and protect personal autonomy and bodily integrity and enacted the

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¹ Abortion, Medline Plus (August 23, 2023), available at <https://medlineplus.gov/abortion.html>.

Medical Termination of Pregnancy Act, of 1971 “to reduce the death rate of women from unsafe and illegal abortions and to optimize the maternal health of Indian women.”²

Those who condemn the right to abortion, consider it socially and morally wrong whereas others argue that the right to abortion is an extended version of the right to reproduction and is an important facet of the right to life, personal autonomy and bodily integrity which should be uninfluenced by the State or any third party.³

2. International Perspective on Abortion

The issue continues to be a highly controversial within the realm of women's rights. In numerous countries worldwide, including developed Western nations, the practice of abortion remains either prohibited or subject to certain conditions such as “in cases of rape or when the mother's life is at significant risk.”

2.1. International Instruments Relating to Abortion

The issue of reproductive rights which revolves around safe and lawful abortion has been a central point of various international agreements, treaties, and conventions. These instruments demonstrate the increasing recognition of women's reproductive health and autonomy.

2.1.1 Convention on The Elimination of All Forms of Discrimination Against Women (CEDAW), 1979

CEDAW is often considered the international bill of rights for women. Even though it does not explicitly talk about abortion, yet it emphasizes

² Mahawar S., “*Medical Termination of Pregnancy Act, 1971*”, (iPleaders, August 10, 2022) available at [https://blog.ipleaders.in/medical-termination-of-pregnancy-act/#:~:text=According%20to%20the%20Medical%20Termination,maternal%20health%20of%20Indian%20women.\)](https://blog.ipleaders.in/medical-termination-of-pregnancy-act/#:~:text=According%20to%20the%20Medical%20Termination,maternal%20health%20of%20Indian%20women.))

³ Ibid .

the elimination of discrimination against women in all areas, including healthcare and family planning.⁴

2.1.2 International Covenant on Economic, Social and Cultural Rights (ICESCR) And International Covenant on Civil and Political Rights (ICCPR), 1966

These twin covenants recognize “the right to the highest attainable standard of physical and mental health and the right to life.”⁵

2.1.3 Sustainable Development Goals (SDGs)

While not explicitly mentioning abortion, SDG 3 aims to “ensure healthy lives and promote well-being for all at all ages, which includes access to sexual and reproductive healthcare services and rights.”⁶

2.1.4 The International Conference on Population and Development (ICPD)

Even though ICPD Program of Action, adopted in Cairo in 1994 does not specifically endorse or promote abortion, it definitely emphasizes a broader approach to reproductive health care, including family planning, maternal health, and access to comprehensive sexual and reproductive health services.⁷ It also acknowledges importance of reducing maternal mortality and morbidity by providing access to safe and legal abortion services where they are not contrary to law.

⁴ Article 12(1).

⁵ Article 6(1).

⁶ Yinuo, “Fast Facts- What Is Sustainable Development?” (*United Nations Sustainable Development*, September 5, 2023) https://www.un.org/sustainabledevelopment/blog/2023/08/what-is-sustainable-development/?gclid=CjwKCAjwgsqoBhBNEiwAwe5w0-QEso8Ts2VUTGF6o9KZdhi0s3pwqtFC9NA23k_D-fs_Ppo-HtaXTRoC5CsQAvD_BwE.

⁷ United Nations Population Fund, Programme of Action of the International Conference on Population Development, page 85, < https://www.unfpa.org/sites/default/files/pub-pdf/programme_of_action_Web%20ENGLISH.pdf>.

3. Constitutional and Legal Perspectives in India

3.1. Constitutional Protection under Article 21

As stated earlier, the underlying disagreement within the abortion discourse revolves around the conflicting rights of the mother to terminate her pregnancy and the unborn child's entitlement to life. Indian Constitution explicitly guarantees the Right to Life under Article 21 only to individuals recognized as "persons."⁸ The question is whether an unborn child should be considered a person? Moreover, the Indian Constitution recognizes that women's reproductive choice is a fundamental aspect of their right to liberty.⁹

3.2. Criminalization Under Indian Penal Code, 1860

Chapter XVI of the Code, 1860 pertains to legal provisions concerning abortion and related matters. Section 312¹⁰ criminalises individuals who intentionally induce a miscarriage in a woman, unless done in good faith to preserve the woman's life. Also, under Section 316, if an individual engages in an action resulting in the death of a quick unborn child within the maternal womb, they shall be deemed responsible for the offense of culpable homicide.

3.3. Medical Termination of Pregnancy Act, 1971

Abortion can occur either naturally without external intervention or it can be induced i.e. deliberate termination of a pregnancy through medical or clinical procedures. The process of liberalizing legislation in India to facilitate access to safe abortion services was initiated in 1964, under the guidance of the Shanti Lal Shah Committee. There were a number of cases

⁸ Makam G, "Article 21 & Abortion" (*Social Science Research Network*, January 1, 2023) <<https://doi.org/10.2139/ssrn.4338917>>

⁹ Suchita Srivastava v. Chandigarh Administration CIVIL APPEAL NO.5845 OF 2009

¹⁰ Section 312- Causing miscarriage.

where women resorted to alternative methods of abortion due to legal barriers.¹¹

The Act of 1971 was enacted in consonance with Indian Penal Code with the objective of “facilitating the termination of pregnancies by registered medical practitioners” (RMPs) based on specific grounds. The legislation mandates that the termination of pregnancy within the initial 12 weeks necessitates the endorsement of a single medical professional, while the termination of pregnancy between 12 and 20 weeks requires the consent of two medical professionals. Under the Act, the termination of pregnancy is legally permissible within a “gestational period of up to 20 weeks.” The inclusion of this provision was undertaken with the objective of eradicating gender prediction tests and the practice of sex-selective abortions.

3.4. The Medical Termination of Pregnancy (Amendment) Act, 2021

“The primary objective of the (Amendment) Act, 2021 is to enhance women's accessibility to secure and lawful abortion services, particularly in cases necessitated by therapeutic, eugenic, humanitarian, and societal considerations.” It incorporates following provisions:

1. The pregnancies up to 20 weeks could be terminated with the approval of a single qualified medical practitioner, while termination of pregnancies between 20-24 weeks would require the approval of two registered medical practitioners.¹²
2. To increase the maximum duration of gestation from 20 weeks to 24 weeks, with a special focus on the vulnerable, such as survivors of rape, victims of incest, women with disabilities, and minors.¹³

¹¹ Tripathi GNR, “*Legacy and Legality of Abortions in India and USA*” (Social Science Research Network, January 1, 2020) <<https://doi.org/10.2139/ssrn.3636238>>

¹² Sec 3(2)(b).

¹³ Sec 3(2)(b).

3. To remove the maximum gestation period requirement for cases involving substantial prenatal abnormalities as determined by the Medical Board.¹⁴
4. That an individual's name or other details shall not be disclosed or made available to unauthorised parties.¹⁵

4. Role of Judiciary in India

The MTP Act has undergone several amendments in response to petitions filed in the courts seeking permission to extend the gestation period for terminating pregnancies on various grounds such as sexual assault against women or foetus abnormalities.

The Supreme Court has made clear and strong statements in *Suchita Srivastava v. Chandigarh Administration*¹⁶ and *Devika Biswas v. Union of India*¹⁷, affirming that a woman's reproductive autonomy is a fundamental aspect of her right to privacy without any intervention from the government.

Moreover, in *XYZ v. Union of India*¹⁸, the apex Court determined that the term 'life' in Section 5 of the MTP Act should be construed in a comprehensive manner, in line with the principles outlined in Article 21. This interpretation takes into account the physical distress and psychological anguish that accompany an unwanted or coerced pregnancy.

Further, the Supreme Court in “*X v. Principal Secretary, Health and Family Welfare Department, Govt of NCT Of Delhi & Anr.*”¹⁹, dealt with Rule 3B²⁰ of the MTP Rules. These rules do not explicitly address the

¹⁴ Sec 3(2B).

¹⁵ Sec 5A(1).

¹⁶ CIVIL APPEAL NO.5845 OF 2009.

¹⁷ WRIT PETITION (CIVIL) NO. 95 OF 2012.

¹⁸ 2019 SCC OnLine Bom 560.

¹⁹ 2022 SCC OnLine SC 905.

²⁰ Rule 3B pertains to the criteria for women who meet the eligibility requirements for undergoing a termination of pregnancy beyond the twenty-week mark, extending up to the twenty-fourth week.

specific category of unmarried girls. The apex Court held that it is not a justifiable argument to exclude unmarried women, as it would violate Article 14. The court reiterated that according to Article 21, a woman is granted the entitlement to reproductive autonomy, dignity, and privacy.²¹

In *Murugan Nayakkar vs. UOI & Ors*²², “the Supreme Court granted permission for the termination of a pregnancy of a 13-year-old victim of rape, who was at the 32-week gestational stage.” The court's ruling was based on considerations of the victim's age, trauma, and distressing circumstances.²³

The Chhattisgarh High Court recently gave a verdict rejecting a petition submitted by a 29-year-old married woman who sought permission for the medical termination of her pregnancy. The grounds for dismissal were based solely on the contention that the marital relationship between the petitioner and her husband had become strained subsequent to her conception resulting from their relationship.²⁴

5. Comparative Analysis of Abortion Laws Between India and USA

5.1. Gestational Limits

In India, the prevailing policy permits abortion up to 20 weeks of gestation, with the exception of specific circumstances where the threshold extends to 24 weeks. After the 20-week mark, the authorization of two registered medical practitioners is necessary.²⁵

In USA, the gestational limit exhibits significant variation across different states. Certain states have legislation that permits abortions to be performed up to either 24 or 26 weeks, whereas in other states, the

²¹ Justice K.S. Puttaswamy (Retd.) and Ors. v. Union of India & Ors. (2019) 1 SCC 1.

²² Writ Petition(s)(Civil) No(s). 749/2017.

²³ Sri X v. State of West Bengal and ors 2023 Live Law (Cal) 231.

²⁴ XYZ v. State of Chhattisgarh and Ors WPC No. 2768 of 2023.

²⁵ Sec 3(2)(b), Medical Termination of Pregnancy Act, 1971.

permissible timeframe is limited to as early as 20 weeks or potentially even less.²⁶

5.2. Access and Availability

India records a total of 6.5 million abortions, with approximately two-thirds of these procedures taking place in unsafe environments. According to the National Family and Health Survey (2017), there is a higher prevalence of unsafe abortion in rural areas of India compared to urban regions.²⁷

In USA, access to abortion varies significantly State-wise, with some states having In numerous clinics and others having very few, leading to disparities in access.²⁸

5.3. Legal Framework

In India, the MTP Act of 1971 (as amended in in 2021) serves as the regulatory framework for the practice of abortion in the country.

USA depends on a combination of both federal and State laws. “The seminal Supreme Court ruling in *Roe v. Wade* (1973) solidified the Constitutional entitlement of women to access abortion services.” Nevertheless, this decision granted States the authority to regulate abortion by imposing restrictions. However, in a subsequent development in

²⁶ “Gestational Limits on Abortion in the United States Compared to International Norms - Lozier Institute” (Lozier Institute, July 17, 2023) <<https://lozierinstitute.org/internationalabortionnorms/>>

²⁷ Rahaman M and others, “Examining the Rural-Urban Divide in Predisposing, Enabling, and Need Factors of Unsafe Abortion in India Using Andersen’s Behavioral Model” (“BMC Public Health, August 5, 2022) <https://doi.org/10.1186/s12889-022-13912-4>”

²⁸ “100 Days Post-Roe: At Least 66 Clinics Across 15 US States Have Stopped Offering Abortion Care” (Guttmacher Institute, February 8, 2023) “<<https://www.guttmacher.org/2022/10/100-days-post-roe-least-66-clinics-across-15-us-states-have-stopped-offering-abortion>“care#:~:text=This%20means%20there%20are%20no,26%20have%20shut%20d own%20entirely.>

2022²⁹, “the Supreme Court of the United States overturned the above 1973 decision and determined that the Constitution of the United States does not explicitly safeguard the right to abortion for its citizens.”

6. Conclusion and Suggestions

Personal autonomy and self-determination in reproductive decisions often involve intense discussions about morality, religion, and government intervention. Both countries recognise personal autonomy, but their abortion policies vary due to historical, cultural, religious, political and legal differences. The MTP Act of 1971 in India gives women the right to choose their pregnancies, with a focus on maternal health and reproductive liberty. The legal framework in India endorses abortion for health, fetal abnormalities, and socio-economic reasons. There is a need to eliminate social stigma and negative associations with abortion to ensure fair and equal access for all populations and regions. Policymakers, healthcare providers, and advocates both in India and the US must recognize the importance of personal autonomy while navigating their respective legal, cultural and social environments. Access to information, resources, and support is essential to uphold personal autonomy. Promoting open and respectful discourse, understanding across cultural boundaries, and recognizing a variety of viewpoints can help both countries develop a more inclusive and equitable reproductive rights framework.

²⁹ Dobbs, *State Health Officer of The Mississippi Department of Health, Et Al. vs. Jackson Women’s Health Organization Et Al* 2022 U.S. LEXIS 3057

NARCO ANALYSIS TEST IN INDIA: A CONSTITUTIONAL AND HUMAN RIGHTS PERSPECTIVE

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1. Introduction

The study of criminology has quickly advanced in recent years. To increase the effectiveness of the inquiry and detect dishonesty, some new scientific techniques are required. When the accused are not forthcoming with the truth, it is important to continue examine the crime's circumstances and to get further information after the test in order to identify the true offender. The Apex Court had also acknowledged the need for scientific research in various cases.¹ The cutting-edge forensic scientific techniques can be highly helpful in criminal investigations. The word "narcoanalysis" originates in Greek and meaning "anaesthesia" (**narke**)² and a technique that uses chemical compounds to induce stupor suspension (**topor**), where they can be taken advantage of by the therapist (or investigative agency). The narcoanalysis test is also known as lie detector testing and truth serum testing. In this test, the subject takes the serum, enters an unconscious condition, and then verbally expresses whatever is on their mind. Due to this advanced technology, a variety of issues require the collaboration of two professions, law and science.

1. Need for Conducting The Narco Analysis Test

The narco-analysis examination is designed to limit a person's ability to deceive through imagination. This ability is removed once the person enters the subconscious stage, under the effect of the drugs induced during

¹ Som Prakash v State of Delhi (1974) AC 989.

² Sourodip Nandy and Himanshu Garg, '*Constitutionality of Narco Analysis and Polygraph Examination*' (2019) 2 International Journal of Law, Management and Humanities 1, 1.

the Narco-test. The investigative agency gathers information in order to perform a narcotics analysis. The investigating officer has the legal authority under the Criminal Procedure Code of 1872 to look into the crime, ascertain the true story, and apprehend the accused.³ This test is a useful tool, particularly when the investigating agency is without any evidence as to the happening of the crime and despite all efforts and the use of every other possibility, the investigation has not advanced.

This examination is required to improve the effectiveness of the investigation and to identify the accused. When the accused are not forthcoming with the truth, it is important to continue examining the crime's circumstances and to get further information in order to identify the true offender. Besides safeguarding society from third degree tactics, these contemporary scientific methods also aid the investigative agency in gathering evidence and also in proving the innocence of the person wrongly alleged to be the accused.

2. Methodology

The individual is given an injection of sodium pentothal or sodium amytal and is unable to express his thoughts for himself, yet he is able to respond to simple, specific questions.

Since a semi-conscious person cannot influence the answers, it is thought that they are spontaneous. In a narco (narcoanalysis) test, the subject receives an injection of "truth serums" that make them talkative and loose-lipped. Sodium Pentothal, which only sedates for a short time, is utilised for these tests. Also utilised are medications like Sodium Amytal and Scopolamine.

Because the patient is able to easily express the truth or suppressed information from his sub-conscious mind in the dissociative state rather

³ Code of Criminal Procedure 1973, s 54.

than in a conscious state, the patient's inhibitions in this test diminish.⁴ A narco-analysis test's primary goal is to get information from the suspect while he is under the influence of hypnosis. The doctors are solely accountable for this surgery.

First, the procedure is explained to the suspect and his consent is requested. Another name for narcoanalysis is the truth serum test. One such test is the administration of thiopentone via injection.⁵ It is given to the accused after being combined with distilled water and given the chemical name sodium pentathol. It could take anything from one to three hours to complete the test. The accused regains consciousness fifteen minutes after the drug is withdrawn, and two hours later he is able to return home.

3. Narco Analysis' Evidential Value in The India Legal System

The General Acceptance standard⁶, also popularly known as the Fyre Test is used as a standard for accepting scientific evidence. This admissibility under this test depends on its acceptance and used by the scientific community in and around the world. The second test i.e., the Relevance Test was later developed by Federal Court but even after this test the Court continued to follow the general acceptance test of the Fyre Standard.

The currently accepted legal standard along with Fyre test is the Daubert's test.⁷ Courts may accept evidence under Daubert even if the scientific community does not accept it. Daubert essentially gave courts some latitude in how they may accept scientific findings. The Daubert ruling was also notable because it was one of the first instances in which a legal and scientific analysis of the validity of expert testimony was combined.

⁴ Nishant Singh, *Forensic Science: Principles and Applications* (Ancient Publishing House, Delhi, 2011) 163.

⁵ B.R. Sharma, *Forensic Science in Criminal Investigation and Trials* (Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2014)..

⁶ *Frye v United States* (1923) 293 F 1013.

⁷ *Daubert v Merrell Dow Pharmaceuticals, Inc* (1993) 509 US 579.

3.1. Section 27, Indian Evidence Act

It provides that the information provided by the accused can be utilized as evidence as discovery of a fact by the police, but not otherwise.⁸ But as voluntariness is an important criterion under Section 27, the issue of accepting the information gained under Narco-test is still controversial as the information is made to be given by the person under the influence of the drugs and hence the voluntariness is questionable. Another aspect that can be covered is the voluntary undergoing of the Test by the person. But as a result of the subject's lack of conscious control during the test, the highest courts of India has ruled that test results cannot be included as evidence in court even if the accused has given their consent.⁹ Moreover, the Act also prohibits the admission or any confession given in the presence of a police officer¹⁰, or while they are in their custody¹¹.

In *Nisha v. State of Orissa*¹², it was discussed that Article 20(3) simply shields the accused from forcefully testifying against himself but does not provides a leeway to suppress truth. So, assuming information which is provided by accused person under Section 27 (IEA) is coerced testimony is incorrect.

3.2. Section 45 of Indian Evidence Act, 1872

This section discusses about the expert opinions. The opinions of individuals, especially knowledgeable in science, foreign law, or in matters relating to handwriting identification or fingerprint impressions, are relevant when the Court is required to form a judgment/opinion on a topic involving foreign law, science, or art. These people are known as experts.

The presiding judge cannot be an expert in all subjects. There are various instances when the subject matter of the facts before the court require

⁸ The Indian Evidence Act 1872, s 27.

⁹ *Supra* n 13.

¹⁰ Indian Evidence Act 1872, s 25.

¹¹ *Ibid*, s 26.

¹² (2007) 1 SCC 33.

technical expertise. Hence opinion of experts is sought for in these cases. Judge is unable to deduce implications from information which is technical. The most pressing issue that today's judges are debating is how to adapt, modify, or realign the current value-based system of justice in order to make the best use of today's modern scientific technologies.

In *Rameshwar Singh v. State of Rajasthan*¹³, it was ruled that expert testimony can be used in court, subjected to the condition that the person attesting as witness is qualified as an expert in his field regarding which he is called and his statements are based on scientific facts and adequate facts which can be proved, as evidence. The use of the narcotics test was rejected by the Bombay High Court¹⁴ since it is against Article 20. and held that it is acceptable and admissible, proper procedure has been followed in coming to the conclusion and this conclusion is based on established facts and data that can be proved before the Court. Although they are not conclusive in nature, the court has the option to accept them and to determine their evidential value and reliability. Hence, though Section 45 can be used to refer to an opinion of expert but the admissibility and credibility of the same is to be decided by the Court.

4. Validity of The Narco-Analysis Test in The Constitution

4.1 Right against Self- Incrimination

The essential clause controlling criminal prosecution and investigation, which provides the right against self-incrimination one of the cornerstones of democracies is found in Art. 20(3). It is often agreed upon that narco-analysis violating Article 20(3) of the Constitution blatantly constitutes subjecting the accused to torture.

In *Radha Kishan v. State of Punjab*¹⁵, it was determined that Article 20(3) restricts the applicability of Section 27 of IEA. Thereby, the accused when

¹³ (1952) SCR 377.

¹⁴ *State of Maharashtra v Praful Desai* (2003) 4 SCC 601.

¹⁵ (1963) 3 SCR 67.

is required to provide testimony and these findings are obtained by compelling him, they cannot be used against him.

The right to remain silent, sometimes known as the Right to Silence, is acknowledged by both the Constitution and the Code of Criminal Procedure (CrPC).¹⁶ Narco-analysis is alleged to be mental torture that breaches Article 21¹⁷ right to life since it interferes with one's right to privacy. Again, the law against invasion of privacy prevents the use of brain fingerprinting as evidence in court.

4.2 Right to Silence and Free Trial

The administration of the narco-analysis test involves the main concern, which includes legal issues and human rights concerns. Important questions about the legality of employing this method as investigative support include the potential invasion of a person's rights, liberties, and freedom.

In the case of *Nandini Sathpathy v. P.L. Dani*¹⁸, it was ruled that the accused has the right to remain silent during interrogation and cannot be forced to provide statements. This right was declared a fundamental right by the court and was supported by Section 161(2) and administering tests to extract information from the accused goes against this right.¹⁹

The test also adversely affects the right to free trial of individual. Additionally, the right to counsel may also be jeopardised. A fundamental human right, the right to counsel guarantees that everyone has access to legal counsel and aid. However, a suspect's capacity to put up a strong defense may be jeopardised if they undergo the narcoanalysis test absent legal representation.

¹⁶ The Code of Criminal Procedure, 1973, s 161(2).

¹⁷ The Constitution of India, art 21.

¹⁸ (1978) AIR SC 1025.

¹⁹ Law Commission of India, Report No. 180: Article 20(3) Of Constitution of India And The Right To Silence (2002) 3.

4.3 Right to Privacy

The 'Right to Privacy' is implicit to Indian citizens by Article 21 of the Constitution. Without the person's consent, no one can publish anything regarding these matters, whether true or false, and whether it is praising or criticizing.²⁰ The Indian Constitution has always interpreted and protected the rights to life, liberty, and freedom.²¹

With its violence and suspense, the *Aarushi Talwar Murder Case*²² alarmed the entire country. It entailed the murder of a young adolescent within her home, which caused her parents and the housekeeper to come under suspicion. Two days after her murder, the housekeeper was found dead. This made her parents the only people under suspicion. In spite of this, the court had exonerated her parents due to a lack of evidence. Krishna and two additional household helpers were subjected to the narco test. Their tests confirmed that they shared a drink that evening at their house, the scene of the crime, with Hemraj. They admitted that there had been an altercation between them and Aarushi, and when Hemraj stepped in, they killed him.²³ Because narco was not allowed to be used as evidence in court, this similarity was left not considered. Considering the difficulty and obscurity the case faced, this could have been a crucial piece of evidence. On the basis of a simple legal technicality, the court should not have dismissed the test. The legislation established by the earlier rulings may be modified and ought to be modified as necessary.

5. Right to Self-Incrimination: Is it against Public Interest

The argument against the narco test's legality contends that because it is intended to gather information and support investigations, it does not amount to coerced testimony and hence does not violate Article 20(3). The

²⁰ Dinesh Dalmia (2006) CriLJ 2401.

²¹ The Constitution of India, arts 14, 19, 21.

²² (2013) 82 ACC 303.

²³ Ibid.

supporters believe that it is specifically helpful when it is needed to get information for preventing terrorist acts.

To replace the present, conventional form of interrogation, which has caused police to experience shame, ignominy, and dishonor and eroded the legitimacy of the criminal justice system, use of these scientific tactics must first be objectively assessed. The use of narcotics as a therapeutic tool has the potential to replace barbarous third-degree approaches. However, it is important to take precautions to ensure that the investigating officer does not abuse or misuse this method, and it should be associated with some corroborative.

Selvi V. State of Karnataka²⁴

The main issues raised before the Supreme Court in this case were:

- Whether the 'right against self-incrimination' enshrined under Art. 20(3) is violated by administration of the scientific techniques like Narco test?
- Is the forced use of the contested methods a justifiable constraint on "personal liberty" as that term is used in Article 21?

It was held that any of these procedures that are administered involuntarily to people violates their right to mental privacy and bodily integrity and right to a fair trial. Constitutional protections cannot be weakened on the pretext of a protecting public interest.²⁵

Forcing someone to perform any of the contested procedures goes against the legal requirement of "substantive due process," which is needed to restrict human freedom. The fact that the results of this could subject a person to unfavorable repercussions means violation of such a nature will take place regardless the fact that these procedures are conducted with the use of force or coercion during the course of an inquiry.

²⁴ (2010) 7 SCC 263.

²⁵ The Constitution of India, art 21.

The Court said that nobody should be compelled to undergo any of the aforementioned tests, neither as part of a criminal inquiry nor for any other reason. That would be an unjustified violation of his freedom. But assuming appropriate protections are in place, they left opportunity for the voluntary application of these procedures. The court allowed the use of these tests in certain circumstances, such as in cases involving national security or terrorism, provided they are done with the prior permission of the accused. The test results cannot be made admissible in the Court by themselves although the consent of the subject who is undergoing the test has been obtained. It is because when the test is conducted, conscious control of the person over his reactions is not there. Still, any information or data recovered due the results of the test that are administered voluntarily can be used under Section 27.²⁶

Ramachandra and ORS. V. State of Maharashtra²⁷

In this case, the court upheld the order in a case which permitted the Special Investigation Team to carry out these scientific tests on the accused person (Telgi). It was held that these tests when conducted on the person do not involve any statement. The court also stated that very less harm was done in conducting these tests and hence they are safe to that extent.

M.P. Sharma V. Satish Chandra²⁸

This is an important case where the words “to be a witness” were understood broadly and included any testimony, obtained through any forceful or compelling method that may side with the story of the prosecution against the accused. However, this wide interpretation by the Supreme Court was deemed to impede the true sense of justice and efficiency in handling delicate matters of criminal justice.

²⁶ Rojo George v State of Maharashtra (1987) AIR SC 1792.

²⁷ (2019) 9 SCC 362.

²⁸ (1954) AIR SC 300.

6. Guidelines by NHRC

The National Human Rights Commission (NHRC) has issued guidelines for conducting narco analysis test. These are-

- a) The test can only be conducted on a voluntary basis and only after taking the prior permission of the accused.
- b) The person should also be informed of his right to refuse the test.
- c) The test should be conducted by a qualified and experienced examiner in a professional and scientific manner.
- d) The accused should be given adequate notice of the test and a written explanation of the procedure, including the purpose and consequences of the test.
- e) The test should also be conducted in a safe and secure environment to ensure the privacy and confidentiality of the accused.
- f) The alleged accused must be provided with a chance to consult with a lawyer before and after the test.
- g) The results of this test results should only be used for investigative purposes and not as conclusive evidence.
- h) The accused has the right to challenge the admissibility of the test results.

Any violation of these guidelines will be considered a violation of the accused's rights and will be subject to legal action.²⁹

7. Human Rights Perspective of Narco Analysis Test

The test poses various issues in terms of human rights. The question of informed consent is one of the main worries. However, the suspect is

²⁹ National Human Rights Commission India, Guidelines on Administration of Lie Detector Test, <https://nhrc.nic.in/press-release/guidelines-administration-lie-detector-test> (last accessed 26 March 2023).

frequently denied the chance to provide informed permission when undergoing a narcoanalysis test. Instead, individuals are usually threatened or promised leniency in exchange for passing the test. Because it denies people their freedom to make decisions without fear of repercussions, coercion is a violation of human rights. Coercion can be particularly problematic since it can result in the violation of one's rights including privacy, right to bodily integrity, right to silence and right to a fair trial.

The test's propensity to yield false confessions is another issue. The suspect may say whatever the interrogator wants to hear because the medications used in the test can make them feel disoriented and confuse. This may result in erroneous confessions and convictions. Additionally, the test may yield incorrect results since a suspect under the influence of drugs may be more inclined to embellish or fake their responses.

Concerns concerning the right to privacy are also raised by the critics. A vital human right, privacy shields people against unjustified prying into their private affairs. When invasive methods, like the insertion of a catheter to monitor the suspect's bodily functions, are used, privacy is compromised. This can breach the suspect's right to privacy and bodily autonomy and be humiliating and degrading for them. The disclosure of information gathered through the narco analysis test to outside parties also constitutes a violation of right to privacy. A cornerstone of medical ethics is confidentiality, which guards patients' privacy and their personal data. However the Narco Test allows for the possibility of sharing test results with law enforcement or other outside parties and this may violate the suspect's privacy and jeopardize the fairness of justice system.

8. Advantages of Narco-Analysis Test

8.1 To Curb Heinous Crimes

In Narco, the accused is in a condition of unconsciousness and hence answers to every question that is put to him. Such tests are needed when a horrific crime has been committed and the accused is required to be questioned in order to learn more about the incident and ensure the safety

of the community. If security to be attained in the long run, personal freedoms may have to be given up. Threats to the country's security and instances of terrorism would fall under this category. The terrorists must be interrogated in a way that will yield the most information in the shortest amount of time. When these terrorists constitute a threat to the entire world community, this is also necessary.³⁰ The solutions and knowledge discovered can help to prevent similar assaults in the future. The courts should think about permitting something to be included as testimony because it has importance in criminal proceedings.

8.2 Gathering Sufficient Incriminating Evidence

Criminal justice system nowadays is in a lax state, with a high rate of crime victims but a very low conviction rate. This is largely a result of the police being unable to compile adequate evidence. This is because using techniques like narcoanalysis to convict the culprit is prohibited by the authorities. When an accused person should be found guilty but isn't because of legal requirements and technicalities, this is not good for society. If convicts were given these tests and required to respond to the questions within the allotted time, this approach would allow the criminal justice system to function effectively.

8.3 Accused is not Physically Harmed or Subjected to Third-Degree

In many instances, the standard ways of acquiring evidence may not provide the investigating police with the needed information. In many of these situations, the police may even employ physical force to obtain a confession or information. This is undesirable because it harms the accused's body and raises the risk that the suspect may agree to a crime, he did not actually commit out of the fear of being physically hurt.³¹ However, if authorities were allowed access to this technology to gather information, they would be better able to do so without endangering the

³⁰ Kamal Jeet Singh and Vikram Singh, "*Forensic Science: An Effective Tool in Criminal Justice Administration*" (2012) 48 C&MJ 302.

³¹ *Supra* note 9.

suspect. The accused are not physically harmed by this procedure, which is scientific. The folks who have criticized the procedure would feel relieved. To help with the inquiry, the police should be given an alternative. They cannot be expected to be impartial towards any approach. There must be a procedure that makes sure that the suspect offers details that can be utilized as evidence in court. Only when performed without a medical professional and when the medication is injected into the body in high quantities does the procedure become hazardous. If the procedure is carried out under close observation, this can be managed.

8.4 Questions are Framed by Specialized Experts

The inquiries made during the procedure are not typical inquiries made during an investigation. They are constructed so that a person in a relaxed state of mind can respond. According to the assessments of the experts and medical professionals, the results of this process are as accurate as possible, and it is because of this precision that it can be used in the courts.

³² These reports reduce the likelihood that the individual would be falsely accused because they have a medical condition that influences their state of mind. In this situation, the suspect is forced to provide honest responses to the questions rather than having time to consider and formulate them. This lessens the possibility that cops may be charged with coercing confessions from the accused. Although these tests are carried out as part of the investigation process, they do not immediately compel the subject to make a confession to the police. Though the subject is responding to questions under the influence of drugs this enables individuals to answer correctly rather than only arguing from its self-defeating side.

³² A. Raghunadha Reddy, *"From Jurisprudence To Jurimetrics: A Critical Evaluation Of The Emerging Tools In The Judicial Process"* (2009) 51(1) *Journal of the Indian Law Institute* 92. [Available at JSTOR, <http://www.jstor.org/stable/43953427>] (last accessed 9 November 2022).

Corroboration of Evidence

The test report may be used to corroborate the evidence rather than using it as a standalone piece of evidence. The court must be open to all available avenues for gathering evidence and must resist becoming overly preoccupied with the self-incriminating legal provision. When a scientific approach is utilised to acquire data during the course of an investigation, the procedure is less onerous and there is potentially less risk of the evidence being erroneous.

9. Criticism of The Narco-Analysis Test

Scientific investigations show that the test is not perfect and even leads to admissions from innocent people. It is therefore questioned as to if it amounts to testimonial coercion in the legal system and a breach of fundamental rights of the individual. It has been indicated that people who make sincere confessions are the one's who would have been more inclined to do so had interrogators continued to use conventional techniques.; and that liar can persist in lying even while under the presence of a purported truth serum.

- The approach is less successful in gathering evidence if the subject is drug dependent.
- As the person answering the questions is in a semi-conscious state, there is some doubt about the trustworthiness of the information they provide. As a result, this issue is brought up.
- The criminal court system's well-known tenet that a witness must be "well and fit" contradicts the narcoanalysis test, where the witness is in the semiconscious state.
- These statements made during the tests are not completely true. It was observed that some subjects made completely bogus claims.

Additionally, it is feared that during questioning, memories may be "planted" in the subject's brain, leading him or her to mistakenly believe that they have done the crime while they are actually completely innocent.

10. Conclusion

The use of scientific evidence in Indian law has changed over time. In recent years, the Supreme Court has maintained the stance that involuntary Narco Test is violative of fundamental rights. It has also been emphasized it is not a scientifically reliable method of obtaining information, hence the results cannot be directly used as evidence. More sophisticated techniques for administering the narco analysis tests will undoubtedly emerge as scientific technology advances and new discoveries become mainstream. The constitutional rights of citizens must still be upheld by courts, even if the general reliability of such testing improves.

The Selvi case amply demonstrates the steps the Supreme Court would take to extend the reach of a few citizen rights in order to secure their preservation, as provided and intended by the constitution's authors. The Supreme Court has attempted to bring a balance by putting up an effective self-incrimination defense, focusing on consent, and highlighting the provision of proper safeguards for the performance of the Test.

Due to the conditions under which it was obtained, the narco-analysis test has been considered unlawful and inadmissible in court, decreasing the likelihood of swift justice. If the administration of the test is made compulsory in serious offenses, it may improve the evidence system and lead to a qualitative change. Despite concerns about the validity and ethics of the test, it may be conducted with stricter provisions for the benefit of society, as long as the accused's consent is obtained.

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