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Beyond Boundaries

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FOREWORD MESSAGE

Law as a discipline of study has arrived and is subject of choice for last 10 years. Students have been seen preferring 5 years LL.B. course, particularly B.A. LL.B. and BB.A. LL.B. course. The third generation reforms in legal education mostly introduced through National Law Schools are available to only few percentage of the total number of students. Hence, Sharda University – School of Law (SSOL) is providing a great opportunity for the student to join the better opportunity than the other Law Schools in India. Sharda University has made it possible of tremendous savings through both the courses of 5 years B.A. LL.B. and BB.A. LL.B. SUSOL is also offering LL.M. and Ph.D. courses and hence contributing to the nation through better research and learning facilities. We had the zeal that a people's version of National Law Universities could be contributed. We have to know how and convinced the Government to contribute resources which they provide for higher education.

It is duty of all stakeholders in the university or as a Professor or Law teacher that each one should do one's bit, and say so or admit if one remains dissatisfied with the outcome. If you don't, you are conspiring to stall the growth of your institution and, as a result, of the whole society and nation.

How we can Contribute National Law Schools and other advanced Law schools should contribute to transference of legal knowledge to society. Law teachers, advocates and law students are not applying the 'clinically parroted' legal knowledge in their conduct or to situational realities. Mostly, they do not analyze impact of law teaching at all.

We are coming out with this journal done amateur way. We would do it in appropriate way soon. Anything doable or achievable on their part for the society is sorely missing. It is the job of the legal academics or the Bar Council of India regulating law schools in discharge of the responsibility of standards, but treating it as a power. This small mention should be sufficient to discerning. Aim of this journal is to bring home this discussion to the participants and to set a high benchmark for the legal education. We wish best of luck to the publisher and looking forward for their future association.

Prof. Pradeep Kulshrestha
Dean, Sharda School of Law,
Sharda University,
Chief-Editor, Sharda Law Review

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A Double-Blind Biannual Peer Reviewed Online Journal

Sharda Law Review [SLR] is a double-blind biannual online peer-reviewed journal published by the Sharda School of Law - Sharda University, Greater Noida. The Journal consists of editorial advisors of the highest repute legal luminaries and dignitaries. The first edition of the journal was published in the month of August, 2021 and now this is the second edition of publication.

In the contemporary world of the knowledge society, understanding the legal dimensions of an individual's life constitutes the major crux and thrust of social science research. Against this backdrop, the Sharda Law Review (SLR) stands to serve as a mirror to all these conflicting currents of Law & Society. It publishes research writings, book reviews and case-comments in the Socio-Legal field that seek to explain different aspects of individual in relation to their society, polity, economy, culture, and psychological well-being. The journal covers a wide variety of sub-fields in the area of social science research mainly focusing on the conflicting currents of socio-cultural-economic, psychological, and political aspects of human life in a contemporary globalized society.

The aim of Sharda Law Review is to avail platform to intellectuals and academicians for expression of their original ideas and creations whether in the form of Research Paper, Article, Case Comments or Book Reviews, etc. The journal is published twice in a year during the 6th and 12th Month of every Calendar year.

Submission Guidelines

- Submissions are accepted only in the English language.
- All articles/papers must be accompanied by abstract not exceeding 300-500 words. Case Comments and Book Reviews do not need to be accompanied by abstracts.
- The abstract must expressly include the originality and usefulness of the idea that the author wishes to put forth and must categorically mention the specific contribution of the article beyond the existing available literature.

- Co-authorship (with no cap on authors) is permitted for all articles.
- The manuscript should not contain any reference to the identity of the authors. However, authors are allowed to cite their previous published works.
- The body of the manuscript should be in Times New Roman, Font Size 12, and 1.5-line spacing.
- The paper references should be in APA format.
- There must not be footnoting, only endnote/references.
- Content taken from online sources must be referred with the title/caption of the literature along with the name/s of authors following the APA style referencing of online-data base literature.
- The first page should be of Abstract wherein below the title of the paper, author/s name should be mentioned along with their institutional affiliation.
- At the end of the Abstract, there must be Key Words.
- Starting from introduction to conclusion & suggestions, each topic, sub-topics must be properly indexed without underling.
- Only the first letter of each words used for topic and sub-topics should be in Capital.
- Except the case-name, no content should be in italics.

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(For the rolling submissions) Kindly send your manuscript in MS Word (.docx) without any formatting like bordering and page numbering etc. to the email:

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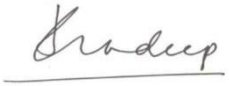
EDITORIAL

The objective of the teaching profession is not only to educate society but also to motivate society for the dissemination of information learned and observed by them. The human mind is the most fertile and the intellect of the human mind has always huge potential to conceive novel and original ideas. If these intellectual ideas would not be paid due attention and not be duly recognised, the purpose of teaching-learning would be futile. Therefore, the intellectual creation of the human mind should always be given a due forum to express their novel and unique ideas in public so that the coming academic generation may easily get aquatinted with the past contemporary issues and challenges discussed and addressed by a particular society. Nothing could be a better forum for this purpose than a periodical journal.

With a view contributing to the area of legal study, the Sharda School of Law, Sharda University is coming with its periodical law journal namely Sharda Law Review. This journal aims at publishing doctrinal as well as non-doctrinal research works along with the original and novel articles, case comments, Book-Review etc.

We are deeply indebted to the contributors for their enthusiasm in sharing their intellectual creations and their warm extended support in our journal. We are deeply thankful to the members of the Advisory Board who has given us unconditional support in publishing this journal as well as we are grateful to the Management and Administration of Sharda University for their constant support and encouragement in bringing out this journal. Lastly, we are thankful to all, who have supported us in bringing out this second edition of the journal.



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Sharda Law Review

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Sharda Law Review is an online double blind biannual peer-reviewed research publication published by the Sharda School of Law, Sharda University, Greater Noida. This publication is an honest effort to serve as a medium for the promotion and circulation of original or/and views, ideas or research on contemporary legal issues among members of the legal profession such as academicians, scholars, researchers or students. The Sharda Law Review aims at legal research centres, policymakers and government organisations. The views expressed in this publication are those of the authors and not necessarily those of the Editorial Board of the Law Review.

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TRIAL OF COMPOUNDABLE & NON-COMPOUNDABLE OFFENCES: REVIEW OF NCRB DATA

Adarsh Pandey[1*]

ABSTRACT

The tool of compounding of offences occupies many vital positions in debates concerning role of victim in criminal trials and overburdening of judiciary. Just one section in the Criminal Procedure Code is dedicated to the issue, and the existing literature fails to provide much empirically supported trends in cases of Trials in Compoundable and Non-Compoundable cases. The analysis of NCRB Data reveals that the compounding is not actually done even in petty cases of theft but in serious cases like murder and rape, with the intervention of court, the same has been possible. The court has evolved principles by which it has made compounding possible even in non-compoundable cases. The research work at hand is an endeavour to bring out a critical evaluation of the current trends in the arena of compounding of offences in light of statistical NCRB data and give suggestions to the issues involved.

Keywords: compromise, victim, data, court intervention, trials, etc.

INTRODUCTION

"The finest hour of justice arrives propitiously when parties, despite falling apart, bury the hatchet and weave a sense of fellowship or reunion.We consider it a success of the finer human spirit over its baser tendency for conflict."[2]

The aforesaid enlightening words of Justice V. R. Krishna Iyer very beautifully, sum up the entire rationale behind the provision of compounding of offences, which forms one of the vital elements of Criminal Justice Jurisprudence in India. It is a flawed understanding of Criminal Law that it operates for the sole purpose of punishing people and making them suffer for their deeds. The progressive Criminal Justice System of India works on the principle of effective and optimum criminalisation, which maintains a fine balance between penology and condonation. The general rule is that a crime is a wrong against society, hence any sort of compromise should not absolve accused of his responsibility. But CrPC, as per S.320, recognizes certain offences which are of private nature and certain offences which though private,

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[2] Shakuntala Sawhney v. Kaushalya Sawhney, (1979) 3 SCR 639.

but are serious, and hence in former case allows compromise at the will of victim and in latter case, allows victim voluntary compromise, but with the permission of court[3] (mostly cognizable in nature). It goes like this: All compoundable offences are majorly non-cognizable but all non-cognizable offences are not compoundable.[4]

Compounding a crime was considered a misdemeanor under English common law. It entailed a prosecutor or a victim of a crime taking something of value in exchange for agreeing not to prosecute or hinder the punishment of a felony. In this usage, "compound" refers to a compromise or arrangement. Accepting an offer to restore stolen goods or make restitution is not compounding as far as there is no commitment not to pursue.

Compounding a felony was once a misdemeanour underneath the common law. Several states have passed legislation making the offence a felony. It is not a felony to compound a misdemeanour. An arrangement not to pursue a misdemeanour, on the other hand, is unenforceable since it is against public policy. In principle, criminal responsibility for compounding is widespread in American law. Compounding a felony is a statutory criminal in 45 states, and it appears to be a common law violation in two more. In England and Wales, Northern Ireland, the Republic of Ireland, and New South Wales, compounding has been abolished.

In the realm of criminal law, compounding refers to the prosecution's forbearance as a consequence of an acceptable compromise among the parties. Compounding an offence, as stated by the Calcutta High Court in a landmark judgement in Murray[5], signifies:

“that the person against whom the offence has been committed has received some gratification, not necessarily of a pecuniary character, to act as an inducement of his desiring to abstain from a prosecution”.

The sufferer may have gotten restitution from the criminal, or the parties' attitudes toward one another may have improved for the better. The victim is willing to overlook the accused's objectionable behaviour once he has been chastened and remorseful. Criminal law must be adjusted to account for such circumstances and to offer a recourse for the termination of criminal procedures in specific kinds of crimes. Compounding of offences is based on this logic. In addition, the compounding mechanism releases the courts of the weight of pending cases. The range of offences that can be compounded is

[3] R. V. Kelkar, *Criminal Procedure* 462 (Eastern Book Company, 6th ed. 2018).

[4] *Ibid.*

[5] (1894) 21 ILR 103, 112.

peculiar to Indian criminal law. The prosecution office for the state is not engaged in the compounding procedure.

It is always a puzzle for legislators to figure out which crimes should and shouldn't be compoundable. The issue must be examined from all angles, the benefits and drawbacks must be evaluated, and a sensible conclusion must be reached. In general, offences that jeopardise the state's safety or have a significant effect on the community as a whole should not be allowed to be compromised. Compounding shall not be used in the case of offences of a serious nature. The law's stance on compoundability of offences is complicated, and there is no one-size-fits-all method for making a determination. When it comes to determining compoundable and non-compoundable offences, a comprehensive approach rather than a piecemeal approach is required. Victims' interests and society interests in the conviction of the perpetrator frequently collide, making the task of lawmakers more difficult. The fact that the courts are overburdened with cases and, as a result, more and more crimes must be designated for compoundability is really a side note. First and foremost, the nature, scope, and repercussions of the offence must be considered.

Research Problem

There has been no consistency in issues of compoundability of offences. Even the heinous offences which one can think of being completely unsuitable for compromise are being settled and the offences which are purely of private nature and where no harm is caused is reversible or has minimum impact on life of the victim, in that cases as well, no ample settlement is being arrived at. Questions are also raised on what grounds can courts allow to compromise an offence which has been made stringent and incapable of being settled by scheme of CRPC as they are against the society at large and are heinous towards victims.

Research Questions

1. What trend does the NCRB Report (2016-2020) suggest with respected to Compoundability of Offences (Compoundable & Non-Compoundable)?

2. What has been the judicial trend towards compromise in arena of trial of Non-Compoundable Cases?

Objectives

1. To enlighten the contemporary legal regime governing the issue of compoundability of offences and its justness on case to case basis

2. To present an analysis of NCRB data with respect to Compoundability under various offences

3. To analyze the stand of Judiciary in case of Compoundability of Non Compoundable Offence

4. To suggest the way forward to increase the effectiveness of legal provisions governing compoundability of offences

Literature Review

Dr. Chintala Lakshmana Rao and Pradeep Kumar Bharadwaj, in their manuscript Alternative Dispute Resolution in Criminal Justice System: Need of the Hour?[6] explores the possibilities of resolving conflicts at the pre-litigation and investigative phases, as well as the referral of specific groups of criminal matters for mediation and conciliation, that can help in disposal of cases that are either settled by the litigants themselves or that would result in acquittal due to fissures or absence of incriminating evidence against the offender, lowering the load on the system and saving money and valuable court hours.

In Compounding a Non-Compoundable Offence : Judicial Pragmatism : Neither Activism Nor Absolutism by P.R. Thakur[7], the author laments that there exist some situations, like in matrimonial offences cases, theft, criminal breach of trust, where parties in majority of cases are willing to compromise, and even court is in favour of the same, but owing to legislative barriers, in S.320(9) CrPC. The paper is an excellent literature as it helps to understand the basic technicalities around the issue of compoundable offences, but the paper could have been better, as being published in such an esteemed journal, it could have covered more procedural technicalities revolving around the topic.

Chirayu Jain's Compoundability of Offences: Tracing the Shift in the Priorities of Criminal Justice[8] commences by outlining the evolution of criminal law in British India, as well as how British law enforcement handled with razeenamahs (settlement instruments). Author does not intend to dispute or criticise the British-introduced core notions of criminal justice. He is more interested in understanding compounding as a criminal process inside the criminal justice administration, that may be classified as a retributive paradigm, and in looking at how the notion of compounding has evolved over time.

Debasmita Panda & Rucha Bhimanwar in their work Quashing of a Criminal Proceedings in Respects of Non-Compoundable Offences on the Basis of Compromise[9] analyse several important issues like

[6] Dr. Chintala Lakshmana Rao and Pradeep Kumar Bharadwaj, "Alternative Dispute Resolution in Criminal Justice System: Need of the Hour?" 12(7) *Turkish Journal of Comparative and Mathematical Education* 1289 (2021).

[7] P.R. Thakur, "Compounding a Non-Compoundable Offence : Judicial Pragmatism : Neither Activism Nor Absolutism" 39(2/4) *Indian Law Institute* 437 (1997).

[8] Chirayu Jain, "Compoundability of Offences: Tracing the Shift in the Priorities of Criminal Justice" 7 *Journal Indian Law & Society* 20 (2016).

[9] Debasmita Panda & Rucha Bhimanwar, "Quashing of a Criminal Proceedings in Respects of Non-Compoundable Offences on the Basis of Compromise" 4 *Supremo Amicus* 146 (2018).

difference between 320 and 482 CrPC, Quashing of Non-Compoundable Offence, etc. The strength of the literature lies in its simple and engaging language, at the same time clarifying several procedural day-to-day aspects in functioning of S.320 CrPC.

Most important piece of literature for instant research work would be, the Crime in India[10] report published by the Ministry of Home Affairs (2017-2020). It is the sole statistical crime analysis of India which analyses the same in intense details. The said report furnishes data for number of cases compromised for Indian/ Foreigners, few major crimes under IPC as well as certain special criminal legislations per year, and also shows the number of compromises stroked in various states of India. The publication by similar agency of Prison Statistics India[11] (2017-2020) also aided in establishing the link between compounding and imprisonment.

Another important literature for the instant research work is 41st[12] and 237th[13] Law Commission of India Report. In the former it suggested that no universal yardstick can be forged for determining the compoundability of offence. While in case of latter, it analysed and explored the possibility of compounding a few offences under IPC, which currently do not fall in that domain, like S.498A, 324, 326, etc.

Methodology

The researcher has analyzed the existing situation through a doctrinal method and has collected data from both primary as well as secondary sources. The primary source of research will consist of the legislations, case laws and statistics from various authentic sources, such as National Crime Record Bureau, etc. Similarly, the secondary source will include the reports of various committees and commissions, legal commentaries and digests, journal articles, and lex lexicon. Existing data would be collected, arranged and then systematically analysed to arrive at some specific conclusions.

The research universe would be India. As per the requirement of research questions, both deductive and inductive reasoning would be employed. Descriptive Research Design relying both upon Qualitative as well as Quantitative Data would be employed for the instant research work. For citations, the ILI Citation method would be used.

[10] National Crime Records Bureau, *"*Crime in India" (Ministry of Home Affairs, 2021).

[11] National Crime Records Bureau, "Prison Statistics India*"* (Ministry of Home Affairs, 2021).

[12] Law Commission of India, "The Code of Criminal Procedure, 1898" (1969).

[13] Law Commission of India, "Compounding of (IPC) Offences" (2011).

COMPROMISE IN TRIALS OF NON-COMPOUNDABLE CASES

It is important to remember that the ability to compound offences granted to the Court the Code differs from the High Court's inherent jurisdiction under Section 482, which allows it to dismiss criminal cases. When it is determined that compounding is allowable when a specific offence is encased by Section 320, and the Court in these kind of cases is steered solely and squarely by the parties' agreement, the Court is directed by the substance on record in determining if the ends of fairness would rationalise such a workout of power, even though the utmost result may be dismiss of charge or acquittal.

Apex Court articulated this difference in the matter of Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur & Ors. v. State of Gujarat & Anr.[14], where it issued guidelines for High Courts to follow while hearing a motion for quelling a FIR or a criminal action per section 482 CrPC on the basis of a negotiation between the litigants. In instant case, the Appellants moved to have the FIR lodged against them quashed on the grounds that they had resolved their disagreement peacefully and quietly. Affidavits to that extent were also filed by the complainant. After considering the appeal, the Supreme Court affirmed the impugned ruling, citing different precedents and outlining broad norms. In which it was expressly stated that: "the invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provision of section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable." [15]

The superior courts have indeed been given these authorities, either under Section 320 or Section 482 CrPC, to allow them to achieve "complete justice" and penalize the culpable. A three-judge Panel of the Apex Court in Gian Singh v. State of Punjab[16] elucidated the fine difference between the authority of compounding of offences bestowed by Section 320 and the curtailing of criminal court hearings by the High Court in usage of its inherent jurisdiction imparted on it by Section 482:

"In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case

[14] 2017 Cr.L.R. (SC) 961.

[15] *Id.* at para 14.

[16] (2012) 10 SCC 303.

and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime"[17].

The three judge bench of the Apex Court, very recently in 2019, in case of The State of Madhya Pradesh v. Laxmi Narayan[18], gave following guidelines in Para 13, regarding S.320 r/w S.482 CrPC:

"i) that the power conferred under Section 482 of the Code to quash the criminal proceedings for the non-compoundable offences under Section 320 of the Code can be exercised having overwhelmingly and predominantly the civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes and when the parties have resolved the entire dispute amongst themselves"

"ii) such power is not to be exercised in those prosecutions which involved heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society"

"iii) similarly, such power is not to be exercised for the offences under the special statutes like Prevention of Corruption Act"

"iv) offences under Section 307 IPC and the Arms Act etc. would fall in the category of heinous and serious offences and therefore are to be treated as crime against the society and not against the individual alone, and therefore, the criminal proceedings for the offence under Section 307 IPC and/or the Arms Act etc. which have a serious impact on the society cannot be quashed in exercise of powers under Section 482 of the Code"

"v) while exercising the power under Section 482 of the Code to quash the criminal proceedings in respect of non-compoundable offences, which are private in nature and do not have a serious impact on society, on the ground that there is a settlement/compromise between the victim and the offender, the High Court is required to consider the antecedents of the accused; the conduct of the accused, namely, whether the accused was absconding and why he was absconding, how he had managed with the complainant to enter into a compromise, etc."

In Manoj Sharma v. State & Ors.[19], the division bench of Apex Court lead by Justice Markandey Katju interpreted the aforesaid dichotomy firstly in negative sense, and then provided a way out for the same:

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[17] *Id.* at para 57.

[18] AIR 2019 SC 1296.

[19] (2008) 16 SCC 1.

"since Section 320 Cr.P.C. has clearly stated which offences are compoundable and which are not, the High Court or even this Court would not ordinarily be justified in doing something indirectly which could not be done directly…However, it has to be pointed out that Section 320 Cr.P.C. cannot be read in isolation. It has to be read along with the other provisions in the Cr.P.C. One such other provision is Section 482 Cr.P.C' [20] which uses non-obstante clause "Notwithstanding".

Yogendra Yadav & Ors v. State Of Jharkhand & Anr[21] was another case relating to offences of S.498A IPC r/w Section 4 of the Dowry Act, one of such cases, in which issues of compoundability comes very often because ethe opposing parties are spouses or their in-laws, but interestingly both offences are non-compoundable, therefore unfit for settlement under S.320CrPC. Court clarified the tussle very briefly:

"The inherent power of the High Court under Section 482 of the Code is not inhibited by Section 320 of the Code"[22].

CRIME IN INDIA – NATIONAL CRIME RECORDS BUREAU REPORT AND COMPOUNDABILITY OF OFFENCES: AN ANALYSIS

- SOME NON COMPOUNDABLE OFFENCES (INCIDENTS FROM 2016-2020)

S.No.	Offence	Cases 2016	Cases 2017	Cases 2018	Cases 2019	Cases 2020
1.	Sedition	35	51	70	93	73
2.	Dowry Deaths	7621	7466	7166	7141	6966
3.	Cruelty by Husband or relatives	110378	104551	103272	124934	111549
4.	Assault on Women with Intent to Outrage her Modesty	84746	86001	89097	88259	85392
5.	Rape	38947	32559	33356	32032	28046

[20] *Id.* at para 17.

[21] (2014) 9 SCC 653.

[22] *Id.* at para 6 (per Ranjana Prakash Desai, N. V. Ramana, concurring).

6.	Acid Attack	223	244	228	249	182
7.	Murder	30450	28653	29017	28915	29193
8.	Causing Death by Negligence	140215	142794	144031	145167	126779
9.	Abetment of Suicide	NA	8129	8324	8312	8816
10.	Unnatural Offences	2187	1271	1378	997	826

- SOME NON COMPOUNDABLE OFFENCES (CASES COMPOUNDED FROM 2016-2020)

S.No.	Offence	Compounded 2016	Compounded 2017	Compounded 2018	Compounded 2019	Compounded 2020
1.	Sedition	0	0	0	0	0
2.	Dowry Deaths	49	32	40	15	15
3.	Cruelty by Husband or relatives	8437	9925	9693	8397	5640
4.	Assault on Women with Intent to Outrage her Modesty	3938	4787	4044	5681	2513
5.	Rape	215	110	209	190	103
6.	Acid Attack	0	0	2	1	1
7.	Murder	24	13	53	21	16
8.	Causing Death by Negligence	2107	1380	1400	1359	826
9.	Abetment of Suicide	NA	26	33	47	19
10.	Unnatural Offences	2	2	6	7	5

Analysis

The offence of Sedition, which has been of immense controversy, both domestically and globally, as per the NCRB data from 2015-2019 has shown a consistent rise and very small conviction rates. As per the NCRB data, there were 30 cases and 31 victims of sedition in 2015, which rose to 35 cases and 35

victims, which rose to 51 cases and 54 victims in 2017, which rose to 70 cases and 80 victims in 2018 and finally in 2019, it all rose to 93 cases and 112 victims. The conviction rate was 33.3% in 2016, which dropped to 16.7% in 2017 and further low to 15.4% in 2018. And in 2019, it was lowest, 3.3%. 51 In 2019, 96 people were arrested, out of 76 were chargesheeted and further out of which only 2 were convicted. This shows that police authority arbitrarily exercises its authority in arresting people, but crossing the judicial safeguards, very less number of people are actually found guilty. And it is even more surprising to note that not a single case of Sedition has been compromised or compounded in the past 5 years, which again shows how determined the authorities are to get accused punished under this section.

The compounding of offences is done mostly in cases of matrimonial offences of Cruelty and Dowry Death, despite them being non-compoundable, with the intervention of High Court under S.482, because the parties involved are related to each other by bond of marriage, which is deemed too sacrosanct to be severed easily in Indian society. So the parties do make attempts to settle the issue. Now perusing the data, out of the total cases registered in respective years, for Dowry Death, only 0.006% cases were compromised in 2016, 0.004% cases were compromised in 2017, 0.005% cases were compromised in 2018, 0.002% cases were compromised in 2019 & 2020. The reason for the same is the death of victim, which is resulted in such cases, which makes offence more severe, hence there are very less chances of parties to settle the dispute, and as per the data, the compromise percentage is falling consistently. For Cruelty, out of the total cases registered in respective years, only 0.08% cases were compromised in 2016, 0.09% cases were compromised in 2017, 0.09% cases were compromised in 2018, 0.06% cases were compromised in 2019 & 0.05% cases were compromised in 2020. In case of Cruelty, since FIR is filed in case of physical assault against wife, which may vary from being small to severe, the chances of settlement are comparatively better in respect to Dowry Death, however the percentage is dropping in this regard as well.

Now three major offences against women have been the subject matter of instant research, In case of Assault on Women with Intent to Outrage her Modesty, out of the total cases registered in respective years, only 0.05% cases were compromised in 2016, 0.06% cases were compromised in 2017, 0.04% cases were compromised in 2018, 0.06% cases were compromised in 2019 & 0.03% cases were compromised in 2020. In case of Acid Attack, out of the total cases registered in respective years, no compromise was entered into 2016 & 2017, 0.009% cases were compromised in 2018, 0.004% cases were compromised in 2019 & 0.005% cases were compromised in 2020. In both these cases, no general inference can be drawn. Just one conclusion can be drawn that in cases of S.354 IPC, which is less severe, the chances of compromise are comparatively better than S.326A IPC, and the reason lies only in severity of offence. The acts fulfilling S.354 have a wide range, but S.326A completely ruins a female's life, hence compromise is bound to be rare in this case. In case of Rape, out of the total cases registered in

respective years, only 0.005% cases were compromised in 2016, 0.003% cases were compromised in 2017, 0.006% cases were compromised in 2018 & 2019 and 0.004% cases were compromised in 2020. Rape is one the most heinous offences against women, but it is surprising to note that compromise has been possible in such cases as well, no matter the numbers being negligible and inconsistent.

It is again surprising to note that compromise has been done in cases of Murder – The Most Heinous Offence under IPC. Out of the total cases registered in respective years, only 0.0008% cases were compromised in 2016, 0.0004% cases were compromised in 2017, 0.002% cases were compromised in 2018, 0.0007% cases were compromised in 2019 and 0.0005% cases were compromised in 2020. Data shows no definite trend, but one thing is clearly evident that in very rare cases, compromise is possible here, because one of the party loses their closed ones and also it is the most serious offence against society and state, therefore Prosecution is determined to not let accused go free easily. In cases of Causing Death by Negligence, out of the total cases registered in respective years, 0.02% cases were compromised in 2016, 0.01% cases were compromised in 2017, 2018, 2019 and 0.006% cases were compromised in 2020. In such cases, death caused may be may be due to Road Accidents, Hit and Run, Medical Negligence, etc., hence the numbers of compromises are comparatively better than Murder. In case of Abetment of Suicide, out of the total cases registered in respective years, 0.003% cases were compromised in 2017, 0.004% cases were compromised in 2018, 0.006% cases were compromised in 2098 and 0.002% cases were compromised in 2020. Here as well, there is no consistency in Data, and compromise is very rare.

In case of Unnatural Offences, out of the total cases registered in respective years, 0.001% cases were compromised in 2016 & 2017, 0.004% cases were compromised in 2018, 0.007% cases were compromised in 2019 and 0.006% cases were compromised in 2020. It is pertinent to note that the said section was decriminalized in 2018 as far as it criminalizes consensual sex[23], and the impact on the number of cases post 2018 is also visible, as they are reducing, and the compromise has also been better as compared to the pre- 2018 position.

In conclusion what can be said is that in cases of Non-Compoundable Cases as well, the compromise has been made possible by intervention of High Court under S.482CrPC, but the number of compromises entered in comparison with number of cases held is abysmally low, and that is quite understandable as well, because such cases are deemed as heinous offences against state and society at large, and compromise might be only permitted by court in such cases, only when the prosecution side has got many loopholes.

[23] Navtej Singh Johar v. Union of India, AIR 2018 SC 4321.

- SOME COMPOUNDABLE OFFENCES (INCIDENTS FROM 2016-2020)

S.No.	Offence	Cases 2016	Cases 2017	Cases 2018	Cases 2019	Cases 2020
1.	Wrongful Restraint & Wrongful Confinement	NA	20176	19303	18732	19061
2.	Theft	494404	589058	625441	674414	493172
3.	Forgery, Cheating & Fraud	123340	127430	134546	143641	127724
4.	Criminal Breach of Trust	18708	20371	20456	20986	17358
5.	Miscarriage, Infanticide, Foeticide and Abandonment	NA	1872	1728	1972	1634
6.	Counterfeiting of Seal or Mark	NA	17	18	3	22
7.	Criminal Trespass	NA	35343	40101	39703	40818

- SOME COMPOUNDABLE OFFENCES (CASES COMPOUNDED FROM 2016-2020)

S.No.	Offence	Compounded 2016	Compounded 2017	Compounded 2018	Compounded 2019	Compounded 2020
1.	Wrongful Restraint & Wrongful Confinement	NA	0	0	0	0
2.	Theft	49	32	40	15	15
3.	Forgery, Cheating & Fraud	8437	9925	9693	8397	5640
4.	Criminal Breach of Trust	404	515	709	524	222

5.	Miscarriage, Infanticide, Foeticide and Abandonment	NA	1	1	3	0
6.	Counterfeiting of Seal or Mark	NA	0	0	0	0
7.	Criminal Trespass	NA	3292	3753	3617	1965

Analysis

In case of Wrongful Restraint & Wrongful Confinement, out of the total cases registered in respective years, no cases were compromised in between 2017 – 2020, despite it being a less serious offence, which is surprising to note. In case of Theft out of the total cases registered in respective years, 10% cases were compromised in 2016, 5% cases were compromised in 2017, 6% cases were compromised in 2018, 2% cases were compromised in 2019 and 3% cases were compromised in 2020. Theft despite being a private nature offence and less serious offence, and where in many cases, stolen property is also recovered, it is quite surprising to note that compromises which should be more and more in such cases are decreasing very steeply with progression of years. In case of Forgery, Cheating & Fraud, out of the total cases registered in respective years, only 0.07% cases were compromised in 2016, 0.08% cases were compromised in 2017, 0.07% cases were compromised in 2018, 0.06% cases were compromised in 2019 and 0.04% cases were compromised in 2020, which shows a gradual drop in compromise in such cases. In case of Criminal Breach of Trust, out of the total cases registered in respective years, only 0.02% cases were compromised in 2016 & 2017, 0.03% cases were compromised in 2018, 0.02% cases were compromised in 2019 and 0.01% cases were compromised in 2020, which again shows a gradual drop in compromise in such cases. In case of Miscarriage, Infanticide, Foeticide and Abandonment, only miscarriage is compoundable rest are non-compoundable, but In NCRB report their Data is mentioned together, as per which, out of the total cases registered in respective years, only 0.0005% cases were compromised in 2017, 0.0006% cases were compromised in 2018, 0.0001% cases were compromised in 2019 and no cases were compromised in 2020, which shows that compromise is too rare in such cases, and the figures of same are decreasing as well. In case of Counterfeiting of Seal or Mark, out of the total cases registered in respective years, no cases were compromised in between 2017 – 2020. This is maybe due to establishing deterrence in such cases, as if such crimes are not controlled, they can hamper economic stability of the entire nation. In case of Criminal Trespass, out of the total cases registered in respective years, only 0.09% cases were compromised in 2017, 2018 & 2019 and 0.05% cases were compromised in 2020.

What can be said in nutshell in regard to aforesaid cases is that since they are compoundable, the percentage of cases compromised is better as compared to non-compoundable cases. However the number of compromises are not much in these cases also and the figures are either constant or going down every year, which is a problematic thing, because they have been deemed to be capable of being settled as per scheme of CrPC, but on ground level, they are not being adequately settled.

- SPECIAL LAWS NON-COMPOUNDABLE OFFENCES (INCIDENTS FROM 2016-2020)

S.No.	Offence	Cases 2016	Cases 2017	Cases 2018	Cases 2019	Cases 2020
1.	Dowry Prohibition Act	9683	10189	12826	13307	10366
2.	The Protection of Women from Domestic Violence Act	437	616	579	553	446
3.	SC/ST Act	5926	6495	4559	4576	4652
4.	Protection of Civil Rights Act against SC/ST	31	234	257	16	28

- SPECIAL LAWS NON-COMPOUNDABLE OFFENCES (CASES COMPOUNDED FROM 2016-2020)

S.No.	Offence	Compounded 2016	Compounded 2017	Compounded 2018	Compounded 2019	Compounded 2020
1.	Dowry Prohibition Act	101	131	342	259	159
2.	The Protection of Women from Domestic Violence Act	2	0	4	5	0
3.	SC/ST Act	49	0	0	0	0
4.	Protection of Civil Rights Act against SC/ST	0	0	0	0	0

Analysis

In case of Dowry Prohibition Act, out of the total cases registered in respective years, only 0.01% cases were compromised in 2016 & 2017, 0.02% cases were compromised in 2018 & 2019 and 0.01% cases were compromised in 2020. In case of The Protection of Women from Domestic Violence Act, out of the total cases registered in respective years, only 0.004% cases were compromised in 2016, zero cases were compromised in 2017, 0.007% cases were compromised in 2018, 0.009% cases were compromised in 2019 and again zero cases were compromised in 2020. Both these legislations relate to matrimonial offences, where both parties involved are related by institution of marriage, although being less in numbers and despite being non-compoundable, compromise is allowed in these cases.

In case of SC/ST Act, out of the total cases registered in respective years, only 0.008% cases were compromised in 2016 and after that zero compromise was entered between 2017-2020. In case of similar law, Protection of Civil Rights Act against SC/ST, zero cases were compromised between 2016-2020. The figures speak much. The legislations in this arena have been a huge impact of controversy in the nation, on the grounds of misuse and them being utilized as a weapon by the depressed class against upper class. Right back in 2018, when apex court, taking into consideration the said rampant misuse, added preliminary investigation requirement in such cases, and allowed anticipatory bail[24]The entire nation awoke to chaos as members of the depressed class called for "Bharat Band" and vandalized public property throughout the nation.[25] The legislature had to hurriedly step in to overturn the judgement by adding S.18A in the SC/ST Act, and larger bench of Apex Court also overruled the same after a year[26] on grounds of Judicial Excessivism. No doubt, when viewed strictly, it was a case of judicial overreach. But they did nothing wrong, when in order to curb the misuse of the Act, they added simply an additional preliminary investigation requirement. If the case would have been genuine, no preliminary investigation could dilute its strength. This should have instead come from the legislature, but it did not happen. But some people could not bear the power of their weapon getting diluted and Politics of this nation can lose anything but majority in house and vote bank. And these inferences are being strengthened by the fact that even in heinous cases like Murder, Rape, etc. compromises are being allowed by court with the support of victims, but so called "victims" are not ready to enter a single compromise, through the nation, in the span of 4-5 years, in cases of such special legislation, which are especially made for their protection.

[24] Dr. Subhash Kashinath Mahajan v. The State of Maharashtra & Anr., (2018) 6 SCC 454.

[25] The Hindu Net Desk, "The Hindu explains: What triggered the 'Bharat bandh'?", *The Hindu*, April 2, 2018, *available at* <https://www.thehindu.com/news/national/the-hindu-explains-what-triggered-the-bharat-bandh/article61870711.ece> (last visited 30 April, 2022).

[26] Union of India v. The State Of Maharashtra, 2019 (13) SCALE 280.

- **NUMBER OF PROCEEDINGS COMPOUNDED (2014-2020)**[27]
  - ⇒ (2014-15): 900
  - ⇒ (2015-16): 1019
  - ⇒ (2016-17): 1208
  - ⇒ (2017-18): 1621
  - ⇒ (2018-19): 2235
  - ⇒ (2019-20): 1119
  - ⇒ (2020-21): NA

Analysis

For the number of proceedings compounded analysis, the data from 2014 has been take into consideration, so that a more clearer picture appears. It is evident from the aforesaid data, the number of cases compounded has increased constantly from 2014 to 2019, which is a positive sign, as it implies that more and more cases were being mutually settled by people in these years, therefore saving court's time and litigants' money and time. However the figures witnessed a dip in 2019 and in 2020, the data for the same was not available.

CONCLUSION AND RECOMMENDATIONS

Over the last two centuries, there appears to have been a shift in how law enforcement officers view the criminal justice apparatus. In 1876, the Bombay High Court viewed criminal punishments as fulfilling a function:

"to enforce duties regarded as of such importance to the community that the option of insisting on them, or of bringing the provided penalty to bear in cases of their infringement, cannot safely be left in the hands of private persons".[28]

Now the perception has amended to:

[27] National Crime Records Bureau, Ministry of Home Affairs, Government of India, "Crime in India" (2014-2020), *available at:* https://ncrb.gov.in/en/crime-india (last visited on May 2, 2022).

[28] Reg. v. Rahimat, ILR (1877) I Bom 147, para 7.

"Any such step would not only relieve the courts of the burden of deciding cases in which the aggrieved parties have themselves arrived at a settlement, but may also encourage the process of reconciliation between them."[29]

Every law's final goal is to ensure that parties are treated fairly. The present penological pattern and thinking is to encourage parties to resolve their disputes amicably, with the underpinning goal of not only reducing case backlog but also instilling emotions of fraternity and kindness in order to re-establish social harmony. Of course, there are several offences that jeopardise society's essential interests, and conciliation in such circumstances is not a viable option. Many crimes, nevertheless, can be compounded with the consent of the court in a safe and non-endangering manner, although such wrongs are not included in the pre-compounding lists in Section 320 CrPC. The impact of compounding on impressions of efficacy and dependability in criminal justice is yet unknown. For better or worse, the refusal to handle all criminals brought before the courts similarly is a bizarre anomaly in a system that claims to treat everyone similarly. In India, only a few studies have looked at the impact of compounding on the government apparatus, as well as public views of the government apparatus (police) and the criminal justice administration. While detailed research on the consequences of compounding are needed, there is also a need for the court and other agencies, such as the Law Commission, to seriously study the topic, free of the "efficiency" and "reducing backlog in courts" justifications.

In light of issues highlighted in instant research work, following recommendations emerge:

- As per Data furnished by National Judicial Data Grid, 41062592 cases are pending before District and Taluka Courts of India[30], 5890705 cases are pending before High Courts[31] and 70154 cases are pending before Supreme Court of India[32]. Also vacancy in Subordinate Judiciary is approx 21%, and in High Courts, it is approx 35%.[33] 3 out of every 4 prisoners in India is an undertrial and since long back prisons are suffering from

[29] Ramgopal v. State of M.P., (2010) 13 SCC 540 (per JJ. M. Katju and T.S. Thakur).

[30] "Pending Dashboard", *National Judicial Data Grid (District and Taluka Courts of India)*, *available at* <https://njdg.ecourts.gov.in/njdgnew/?p=main/pend_dashboard> (last visited 30 April, 2022).

[31] "Pending Dashboard", *National Judicial Data Grid (High Courts of India)*, *available at* <https://njdg.ecourts.gov.in/hcnjdgnew/> (last visited 30 April, 2022).

[32] "Statistics", *Supreme Court of India*, *available at* <https://main.sci.gov.in/statistics> (last visited 30 April, 2022).

[33] Omir Kumar & Shabnam Dutt, "Understanding vacancies in the Indian judiciary", *PRS India,* Nov. 18, 2021, *available at* <https://prsindia.org/theprsblog/understanding-vacancies-in-the-indian-judiciary> (last visited 30 April, 2022).

the issue of overstuffing.[34] Bringing more and more offences under the category of compoundability under S.320 CrPC can help solve these issues, as courts are functioning with heavy case load and understaffing and prisons are suffering from overpopulation. Compoundability is a panacea for all these ills.

- If it deems fit to court in interest of Justice, and victim agrees for the same, then however serious the nature of offence is, court should lean towards animating parties to settle the matter and if they agree, then courts can quash the charges.
- In cases of matrimonial offences, if compounding can ultimately lead to resumption of normal marriage life, the court should promote compounding in such cases so as to maintain the sacred institution of marriage in society. But equally the courts should remain stringent in favour of interests of victims.
- In cases of SC/ST Act, or Protection of Civil Rights Act, if it appears to court that it is in interest of Justice and the prosecution case is not much strong, or it is a sham, it should promote settlement in such cases, so that sanctity of those legislations is maintained in society.

[34] "India, World Prison Brief Data", *Prison Studies*, *available at* <https://www.prisonstudies.org/country/india> (last visited 30 April, 2022).

CHANGING SOCIAL FABRIC IN FRANCE AND INDIA

Amardeep Singh Sandhu[35]

ABSTRACT

Liberté, égalité, fraternité translates to Liberty, Equality and Fraternity. These golden principles were the theme of the French Revolution and have been held in high regard ever since. Countries like India have adopted them as a fundamental feature of their democracies. The political debate in France has revolved around liberty for quite some time. However, the focus is being shifted to fraternity now. The Charlie Hebdo attacks in 2015 and the recent killing of Samuel Paty in 2020 were acts of terrorism carried out by radical Islamic Extremists. The combined effect of these incidents have changed the social fabric of French society. These attacks were caused by the same cartoon depictions of the Prophet Mohammad which were published by Charlie Hebdo and later shown by Samuel Paty in his class on 'freedom of speech'. These incidents have flamed Islamophobia further. Incidentally, in India the Muslims and Hindus were engaged in communal riots twice and one of these was again caused due to an objectionable Facebook post on the Prophet Mohammad (SAW).

The COVID – 19 gave birth to an anti – China emotion in both the countries. These two events have left some degree of adverse social impact in both the countries. It becomes imperative to examine and analyse whether the two governments have adopted some policy changes. This paper aims to ascertain the impact of these events on the social fabric of the respective countries in the last year.

Keywords: Social fabric, riots, democracy, coronavirus.

INTRODUCTION

The life as we knew it took a drastic turn in the initial months last year and the entire human race was thrown in a hostile and adverse situation where everything became obscure. The flow of information without any credibility and infused with speculations made life very unpredictable, strange and fearful. There was a sense of suspicion prevailing in the human community

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worldwide. The entire human civilisation was virtually under a lockdown while being clueless about the danger it faced. There was no confirmed or known formula to tackle such a situation. The entire world was pointing fingers and nobody knew what could be done to tackle the situation. The severity, duration, extent and solution were unknown. Never before had humans faced such a perilous situation as a whole. The saying 'tough times bring people together' was not true this time as people were asked to stay away from each other and practice social distancing. Although, some instances of people trying to get together were witnessed but still there was a growing insecurity about going near other people as people saw other people as a threat. The economic and business activities came to a standstill and many people were thrown out of their jobs. The governments of the world threw all their resources in finding the solution – a vaccine for coronavirus. All this while mindboggling number of people were getting infected and dying of the virus and cremated by the officials without handing over the dead bodies to the family members of the deceased. This situation was the biggest factor that impacted the lives of people and put an amazing strain on personal, financial, cultural and societal spheres of human life. In other words, the social fabric of the human race was altered and it all started from China from where it first spread into Europe.

Europe was among the first places that was hit by the COVID-19 outside China. The entire debate around the topic whether COVID-19 is a man-made virus by Chinese scientists in Wuhan has made humans vary about the evil capabilities of the human race which further makes the air of suspicion thicker.

This paper attempts to examine whether the recent events have torn the social fabric in Europe and India or has it brought the people together in the times of peril.

Now, on a mere perusal of the events of past year reflects that social fabric has weakened not only in the European nations, rather all over the globe instances of division and non-tolerance was witnessed. A few of such major events from Europe has been picked for the purposes of this paper. The most important being the social impact of coronavirus in Europe, then in no particular order of importance, the events like killing of the French teacher Samuel Paty and Coronavirus pandemic. Meanwhile, the counterpart events in India discussed in this paper are the Hindu-Muslim riots and the long-stretched Farmers' protest and their effect on the social fabric of the country.

THE COVID – 19 PANDEMIC

The coronavirus entered Europe on 24 January 2020 when first case was confirmed in Bordeaux, France and 2 other cases were confirmed in Paris, France by the end of the day. The rest of the continent soon started reporting COVID-19 cases and Europe became one of the worst hit places on earth. With 6 European nations being in the list of top 10 worst hit nations by coronavirus, it was only natural that the European continent had a cultural and social reaction to it. On social front, the incidents of racism and xenophobia were witnessed in United Kingdom against the people of Chinese and East Asian descent. Other than United Kingdom, these incidents were witnessed and reported across the continent in various countries like Belgium, Croatia, Finland, France, Germany, Hungary, Ireland, Italy, Netherlands, Russia and Sweden.

Some of the notable incidents which reflect social discrimination against Asian people have been mentioned hereinafter. In Belgium, a man of Asian origin was attacked without any provocation by an attacker who accused him of being the reason of 'coronavirus'[36] In another incident in Belgium, a woman was assaulted by five men with coronavirus related racial slurs and then spat on her.[37] In France, there has been a surge in anti-Asian sentiments and incidents of abuse of Asian people after the outbreak of coronavirus. Even the press in France printed racially charged articles and insulted Asians by calling them 'the yellow peril'.[38] The twitter hashtag #JeNeSuisPasUnVirus, i.e., I am not a virus was posted by many Asians living in France as a retaliation to the insult.[39]

[36] "Man attacked, accused of causing coronavirus in Belgium" *The Brussels Times,* Mar. 11 2020. Available at: https://www.brusselstimes.com/belgium/99790/man-attacked-accused-of-causing-coronavirus-in-belgium/. (last visited on February 10, 2022).

[37] "'They spat on me': Chinese-Belgian targeted by coronavirus harassment in Brussels" *The Brussels Times*, Mar. 04, 2020. available at: https://www.brusselstimes.com/brussels/98367/they-spat-on-me-chinese-belgian-targeted-by-coronavirus-harassment-in-brussels/. (last visited on February 10, 2022).

[38] "Coronavirus: Asians victims of discrimination in France" *France Televisions*, Feb. 2, 2020. available at: https://www.francetvinfo.fr/sante/maladie/coronavirus/coronavirus-les-asiatiques-victimes-de-discrimination-en-france_3808777.html. (last visited on February 10, 2022).

[39] "France In Grips of Racism Epidemic, As Coronavirus Fans Anti-Asian Hysteria" *Forbes*, Feb. 11, 2020. available at: https://www.forbes.com/sites/tamarathiessen/2020/02/11/france-in-grips-of-racism-epidemic-as-coronavirus-fans-anti-asian-hysteria/?sh=7ecfa80452d7. (last visited on February 10, 2022).

In Germany, a lot of incidents of social ostracism were reported where people were asked to leave their rented homes, denied entry to hospitals, hotels and restaurants, stadiums.[40] Moreover, in a survey by Ipsos MORI poll in early February, 28% of German respondents would consider avoiding people of Chinese origin in the future to protect themselves from the coronavirus.[41] In Ireland, two Chinese men were attacked in a physical and verbal racist assault whilst shopping in a supermarket on 8 August 2020. Later, on 14 August 2020, an Asian woman was physically assaulted and thrown into a canal by a group of boys who called her 'coronavirus'.[42]

In a similar fashion, the reports of ostracism, racism, verbal abuse, insults and physical assault were flowing de die in diem. The European continent has been one of the most migrated places. A lot of people have migrated to Europe and there is a considerable population of Asians living in Europe who are now at the receiving end of the discrimination due to the coronavirus pandemic. It is not difficult to understand the cause of this discrimination even though it is a lot more difficult to approve. The social fabric in Europe has undoubtedly been tarnished in the past year and continue to degrade further because coronavirus has immensely and adversely influenced the lives of people for which China is being blamed as of now by a large part of the population.

It will not be correct to say that such incidents have only hampered the social order in Europe only as such episodes were witnessed across the globe. But it will not be wrong to state that the xenophobia against Chinese and Asians have increased manifold with much frequent cases of Sinophobia. The COVID-19 pandemic, which started in the city of Wuhan, Hubei, China, in December 2019, has led to an increase in acts and displays of Sinophobia as well as prejudice, xenophobia, discrimination, violence, and racism against people of East Asian, North Asian and Southeast Asian descent and appearance around the world. With the spread of the pandemic and

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[40] Ella Torres, "Backlash against Asians could hinder efforts to contain coronavirus, expert says" *abc news*, Mar. 13, 2020.
available at: https://abcnews.go.com/US/backlash-asians-hinder-efforts-coronavirus-expert/story?id=69556008. (last visited on February 10, 2022).

[41] CORONAVIRUS: OPINION AND REACTION RESULTS FROM A MULTI-COUNTRY POLL, Feb. 14, 2020.
available at: ipsos.com/sites/default/files/ct/news/documents/2020-02/ipsos-mori-coronavirus-opinion-reaction-2020.pdf. (last visited on February 10, 2022).

[42] Laura Lyne, "Asian woman pushed into Dublin canal by teens in allegedly racist attack says she is afraid to leave her home" *Irish Mirror* , Aug. 17, 2020.
available at: https://www.irishmirror.ie/news/irish-news/asian-women-pushed-dublin-canal-22531169. (last visited on February 10, 2022).

formation of hotspots, such as those in Asia, Europe, and the Americas, discrimination against people from these hotspots has been reported. The complete affect of this phenomenon is yet to be ascertained but it has definitely harmed the perception of Chinese people across the European continent and the globe.

"We need to talk about racism. And we need to act. It is always possible to change direction if there is a will to do so. I am glad to live in a society that condemns racism. But we should not stop there. The motto of our European Union is: 'United in diversity'. Our task it to live up to these words, and to fulfil their meaning" - President von der Leyen, European Parliament, 17 June 2020.

THE KILLING OF SAMUEL PATY

Samuel Paty was a middle school history teacher in Paris, France. He was targeted and attacked by an Islamic extremist for showing cartoons of the Prophet Mohammad in his class room. The attacker killed Paty and beheaded him with a cleaver. Paty was showing the cartoons published by Charlie Hebdo in his class on 'freedom of expression' to his students which did not go well with Muslim community. A social media campaign against Paty ultimately led to the murder of Paty by an eighteen-year-old Muslim boy. The murder sparked anger against the Muslims and blamed Islamic extremism for the brutal death of a teacher who was teaching 'freedom of expression'.[43]

The French government took a strict stance against the killing. The perpetrator was shot dead by the police on the same day. The French president Emmanuel Macron hailed Samuel Paty as a "quiet hero" and "the face of the republic". As the French president paid homage to Paty at a national memorial in Paris, he awarded Paty posthumously with *Légion d'honneur* (the Legion of Honour), the French highest honour.[44] The murder has shocked France and prompted a crackdown on Islamic extremism. Police have raided dozens of suspected extremists and Islamist groups, with several likely to be dissolved. A mosque near Paris is to close for six months.

[43] France teacher attack: Seven charged over Samuel Paty's killing, *BBC News*, Oct. 22, 2020.
available at: https://www.bbc.com/news/world-europe-54632353. (last visited on February 10, 2022).
[44] Jon Henley, "Samuel Paty posthumously awarded French Légion d'honneur" *The Guardian*, Oct. 21, 2020.
available at: https://www.theguardian.com/world/2020/oct/21/samuel-paty-attack-two-pupils-among-seven-facing-terror-charges. (last visited on February 10, 2022).

The result of such incidents, regardless of the causes or fault of the parties, is a differentiation of people between 'us' and 'them'. Whoever is not 'us' is a threat to us and therefore a divide is formed between people. The Islamophobia in people is very evident and probably it is not without its reason but whatsoever be the cause, the effect is that social coherency is getting harmed. The leaders of Muslim majority countries criticised the depiction of the Prophet Mohammad as a cartoon saying that it is highly offensive in Islam to make cartoons of the Prophet. Many groups in Pakistan and other Muslim majority countries called for boycott of French products and asked the government to throw out the French ambassadors in their country.[45]

In response to the threats of boycott to French products, the French president escribed Islam as a religion "in crisis" and announced new measures to tackle what he called "Islamist separatism" in France.[46] These issues had not even settled when another Muslim man killed three people in a church in France by stabbing them. These events reveal the unsafe and volatile situation of society in France.[47] The matter gains more gravity if the number of Muslim population in France is considered, which is now at the receiving end of the anger and disgust of the people. France has Western Europe's largest Muslim population with around 4 million Muslim people living in France.[48] A socially coherent coexistence between people of various religion is a must for a democracy and religious tolerance and freedom of speech must be given their due importance which was absent in this dreadful incident.

The social fabric of France was also tarnished by this incident while simultaneously causing disturbance in the entire world which is already not pleased with the Muslim community. This incident reminded French people of the Charlie Hebdo killings where 12 people were killed by Islamic extremists for the same reason of depiction of the Prophet Mohammad as a cartoon in a magazine.

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[45] Pakistan 'to boycott French products' over cartoons, *BBC News*, Nov. 17, 2020.
available at: https://www.bbc.com/news/world-asia-54971409. (last visited on February 10, 2022).
[46] *Ibid.*
[47] Islam is being hyper-politicised in France, but Muslims are not a part of the debate, *France 24*, Oct. 30, 2020.
available at: https://www.france24.com/en/france/20201030-islam-is-being-hyper-politicised-in-france-but-muslims-are-not-in-the-debate. (last visited on February 11, 2022).
[48] World Population Review, France Population 2021 (Live).
available at: https://worldpopulationreview.com/countries/france-population. (last visited on February 10, 2022).

THE INDIAN SOCIAL FABRIC

India witnessed its share of unfortunate incidents in 2020 which weakened the social fabric of the country. In a democratic country, protests are regarded as a feature of freedom of expression of the people and a reflection of the strength of the democratic values of the country. However, the frequent protests even under the threat of coronavirus and some of the protests turning violent is alarming and suggests that some serious restoration work is required in order to bring coherence in the society.

Two of such incidents are the Hindu – Muslim riots firstly in the national capital, Delhi in February and then again in Bengaluru in August and secondly, the Farmers' protests. The impact of COVID – 19 is worldwide phenomenon and India felt its impact as well. However, there is more anti-China sentiment due to COVID – 19 in India rather than any internal social issues other than unemployment but that cannot be said to be ruining the social fabric in India.[49] Apart from these incidents, the past year saw Indian population coming to the streets for various reasons throughout the year, starting with the long anti – CAA protests, the migrant crisis amid coronavirus lockdown, the Hathras rape case and political violence in West Bengal. The combined effect of all these incidents in the past year has exposed the differences in the Indian public and between the public and the government.

THE HINDU – MUSLIM RIOTS

The riots in Delhi were marked by bloodshed, property destruction, arson and theft which continued for 4 days and ended with 53 dead people and lot more injured.[50] Within 6 months, another Hindu – Muslim riot took place in Bengaluru which saw arson, stone pelting and

[49] The Indian economy tanked during the coronavirus crisis and shrunk for the first time in more than forty years. The economy contracted by a massive 23.9% in 2020. The miserable condition of Indian economy has been attributed to the country wide lockdowns due to COVID – 19. As such, the anger and frustration towards Chinese products and businesses was noticed. The Indian government as well as the private companies in India and Indian public boycotted everything related to China. A major part of this anger can be blamed on the India – China skirmishes on the border near Ladakh region and Pangong Tso lake. 267 Chinese mobile applications faced ban and Indian companies withdrew tenders from Chinese companies and prohibited Chinese companies from conducting business with them in future. Indian public also boycotted 'Made in China' products.

[50] WHAT ARE DELHI RIOTS 2020, *Business Standard.*
available at: https://www.business-standard.com/about/what-is-delhi-riots-2020. (last visited on February 13, 2022).

property destruction and a loss of 3 lives.[51] The Delhi riots were flamed by hate speech, provocation and confrontation on CAA protests, mass mobilization and religious nationalism. Whereas the Bengaluru riots were caused by alleged blasphemous Facebook post on the Prophet Muhammad. The point here is not to examine who was right and wrong, but to reflect that the communal harmony is being disturbed again and again which is not just damaging the social fabric of the country but also resulting in avoidable loss of lives.

Following the Bengaluru riots, a panel, headed by retired judge Srikanth D. Babaladi was formed and the findings of the panel were astonishing as the panel informed in its report that the riots were pre-meditated and pre-planned rather than being spontaneous as was initially thought.[52] The judicial determination of guilt is yet to be done but the report suggests towards a deeper problem related to communalism and the wrecked social fabric between the two largest communities in India.

THE FARMERS' PROTEST

The Indian Parliament passed a set of three bills on agriculture law hastily last year amid protests against the bills. These bills, considered as draconian laws by the farmers faced immediate backlash from the farmers who are regarded as 'Ann Daata', i.e., the provider of food. The protests saw mobilisation of lakhs of farmers from various parts of the country to the national capital. These farmers have jammed the main entry points to the capital since November last year. The government and the farmers are at loggerheads with each other and each side is sticking to its point. The result is that the public and farmers have been suffering and meanwhile, the government is canvassing for the laws passed by it in every part of the country. This has divided the people into two blocs, one of which is pro-farmers and the other is pro-government. As a result of any division, both sides are blaming the other for multiple reasons. The farmers have been tagged as terrorists, separatists, politically motivated and the government has been labelled as capitalists and a proxy for a few companies and anti-farmer. The protests, which were

[51] Aditi Phadnis, "Offensive Facebook post leads to riots in Bengaluru, three dead" *Business Standard*, Aug. 12, 2021.
available at: https://www.business-standard.com/article/politics/offensive-facebook-post-leads-to-riots-in-bengaluru-three-dead-120081201775_1.html. (last visited on February 13, 2022).
[52] Neelam Pandey, "Bengaluru riots communal & an attempt to turn area into Muslim majority — fact-finding panel" *The Print*, Sept. 4, 2020.
available at: https://theprint.in/india/bengaluru-riots-communal-an-attempt-to-turn-area-into-muslim-majority-fact-finding-panel/495696/. (last visited on February 13, 2022).

peaceful for two months, took a violent turn on the Republic day. The violence again led to a further division and differences between both sides. Each side is blaming the other for the violence and the resolution of the issue is not in sight as of now.

The urban – rural divide has been felt due to this protest with people living in urban areas feeling that the farmers, who are primarily from rural areas are unnecessarily troubling them. A sense of distrust and frustration has crept in the people. The longer these protests will go on, the stronger the division will get. It is in the interest of social cohesion that these protests come to an end in a peaceful manner to protect the fraternity, harmony and unity in the society.

CONCLUSION

The events of the past year have disrupted life across the globe. Similar tensions related to the matters like religion, employment, politics, discrimination are making the human race divided. The issue at hand is easy to understand but difficult to approve. The human race is becoming more knowledgeable every day and yet we are finding it increasingly difficult to co-exist with each other peacefully. The change in the social fabric in the European continent, India or anywhere else in the world is not for the better. The dividing forces the pulling people apart harder than ever and social cohesion is absent in the society. A conscious effort for restoring secularism, unity and fraternity is required.

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EQUALITY IN MARRIAGE AND THE LIVED REALITIES OF WOMEN IN POLYGAMOUS MARRIAGES IN AFRICA: UGANDA AS A CASE STUDY

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ABSTRACT

Polygamy, a practice of a man marrying more than one wife has been noted to be an age old customary practice in many societies across the globe, especially in Africa. Although polygamy brings about many disadvantages especially for women in the marriage, many countries recognise polygamy in their domestic laws. International, regional and domestic law provides for the right to equality of men and women, including the equality in marriage. This article therefore seeks to critically analyse the practice of polygamy as a key violator of women's right to equality in marriage. It examines the practice of polygamy in society and analyses the law on equality in marriage and the extent to which it protects women in polygamous marriages. Finally, the paper critically examines the extent to which polygamy violates the various rights of women in marriage. In realizing these objectives, the article employs the doctrinal method of research and concludes that polygamy violates the principle of gender equality and although it is also recognised that curbing the practice may not be a very practical solution for the protection of women, the article recommends other modes of realising women's rights' protection. Uganda is used as a case study because it legalises polygamy and polygamy is prevalent in the country.

Key words: Equality, Marriage, Polygamy, Women, Law, Africa, Uganda

1. INTRODUCTION

Polygamy, which for purposes of this article will be referred to as the practice of a man marrying more than one wife is a wide spread customary and religious practice that has existed for

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centuries.[55] This article will focus on polygamy as a customary practice and will specifically focus on the African region. Although polygamy is practiced across the globe, it has been noted that it is more widely practiced in Africa and that 20 to 30 men out every 100 men in Africa are polygamists.[56] During the colonial period in Africa, polygamy was one of the reasons as to why customary marriages were not recognized because Christianity prevailed. A case in point is the case of *Rex v Amkeyo*[57] in which Justice Hamilton stated that *"In my opinion, the use of the word 'marriage' to describe the relationship entered in to by an African native with a woman of his tribe according to tribal custom is a misnomer which has led in the past to a considerable confusion of ideas … the elements of a so-called marriage by native custom differ so materially from the ordinary accepted idea of what constitutes a civilized form of marriage that is difficult to compare the two."* For a very long time, this was the position that was contained on what constituted a marriage under colonial rule. Additionally, monogamy was promoted to the extent that polygamous men's families were prohibited from attending church.[58] This, however, did not and has not deterred the practice of polygamy. Its propounders and practitioners instead started their own churches. Today many countries across the globe and most especially in Africa have legalised polygamy in customary marriages although it is acknowledged that the practice has significantly decreased in this modern era.[59] The decrease has partly been attributed to the fact that society is more enlightened, and that women are more empowered.[60] In addition, polygamy comes with negative effects especially on women and children and these include, violence arising from conflict in the family over competition of the wives for their husbands attention and favour.[61] Several cases have been reported of wives murdering their husbands as result of the insult and humiliation brought upon, which has in some cases result into mental torture and harm

[55] Genderlinks for Equality and Justice, 'Women's Rights and Polygamy' Policy Brief, 2013 https/www.genderlinks.org/family%20law%20and%20customary%20law/16129_polygamy_policy_briefrev.pdf accessed March 10, 2021.

[56] Obonye J (2012) 'The practice of polygamy under the scheme of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a critical appraisal' 4 (5) *Journal of African Studies and Development* 142-149 at 143.

[57] Rex v Amkeyo [1917] 7 EALR 14.

[58] Mwambene L (2017) 'What is the Future of Polygyny (Polygamy) in Africa?' 20 *PER/PELJ* 1-33 at 5-6.

[59] Mwambene (note 4) at 6. .

[60] Mwambene (note 4) at 6.

[61] Struensee V (2005) 'The Contribution of Polygamy to Women's Oppression and Impoverishment: An Argument for its Prohibition' available at http://www.austlii.edu.au/au/journals/MurUEJL/2005/2.html [accessed 10 March 10, 2020].

upon first wives.[62] Moreover, polygamy has been advanced as one of the leading causes of domestic violence in Africa with co-wife fights and the animosity between them, with the first wife usually blaming the second and/or the subsequent wives for having taking her husband away from her. The husband, in turn, is usually caught up between his wives' fights usually responding with physical battering of the wives. In addition, the failure of husbands to sufficiently provide the necessary resources for their polygamous families has been recognized.[63] Similarly, men in polygamous marriages especially have many children from the different wives and hence the rights of children are compromised because of meager resources to cater for all of them.[64] Moreover, polygamy has been argued to accelerate women's poverty because they have to share meager resources amongst themselves. This in the long run worsens the already low economic status of women.[65] All this put together has been described as a form of economic violence perpetrated against women.[66]

The negative impact of polygamy notwithstanding, some justifications have been advanced in favour of the practice of polygamy. Women's financial dependence on men as result of poverty and very low education levels or lack thereof pressures them into marrying already married men in order for the women's financial needs to be met.[67] Bareness in marriage is another factor which makes it necessary for men to marry other women for purposes of child bearing. In addition, pregnant or nursing mothers are culturally barred from having sexual intercourse so their husbands have to marry other women during these stages of a woman's life in order for their husband's sexual needs to be met.[68] In many African societies, big families are treasured because it is viewed as a sign of family strength. Polygamy is therefore a way of ensuring that big families are attained sooner. Large families too are key for providing free labour for farming and even family businesses where they exist.[69] Furthermore, it has been argued that polygamy is

[62] Tibatemwa-Ekirikubinza L (1998), 'Multiple partnering, gender relations and violence by women in Uganda' 4 (15) *East African Journal of Peace and Human Rights* 40.
[63] Cook RJ and Kelly LM (2006) 'Polygyny and Canada's Obligations under International Human Rights Law' 31-32 (Research report presented to the Family, Children and Youth Section Department of Justice Canada, 2006) available at https://www.justice.gc.ca/eng/rp-pr/other-autre/poly/chap3.html [accessed 10 March 2021].
[64] Struesee (note 6).
[65] Ibid.
[66] Cook and Kelly (note 9) at 31-32.
[67] Oyugi P (2017) 'Article 6 of the African Women's Rights Protocol: towards the protection of the rights of women in polygamous marriages' 1 *African Human Rights Yearbook* 290-310 at 299-300.
[68] Oyugi (note 13) at 299-300.
[69] Oyugi (note 13) at 299-300.

practiced to promote and preserve culture..[70] Today, for example among the Baganda of Uganda, in a bit to preserve culture, all people are subjects of the king and he has the cultural power and authority to choose any woman he wants to marry, even if that woman is already married. It is considered an honor for the king to choose a woman to be considered as his wife from among his subjects. Hence in exercise of this cultural authority, the king keeps choosing women to become his wives.[71] The Baganda do not have a problem with this practice but rather prefer to see their culture prosper. Polygamy has also been advanced as a saving grace for widows who can no longer take care of themselves economically. Levirate marriages are therefore practiced in order for brothers to be able to take care of their deceased brothers' wives. Similarly, polygamy affords women the privilege to experience the honour of marriage and take away the shame of singlehood upon women.[72] The advantages as advanced notwithstanding, the disadvantages of polygamy outweigh the advantages especially in as far as women in polygamous marriages continue to be oppressed. Additionally, women in polygamous marriages do not enjoy the same right as the men in respect to more than one marital partner and they are therefore not placed on the same footing as their male counterparts in that respect and cannot therefore be said to be equal partners in the marriage. Against this background, this article seeks to critically analyse the extent to which human rights law protects women's right to equality in marriage with specific reference to polygamous marriages. Part one contains the introduction to the article, part two discusses the link between polygamy and the violation of women's rights in marriage, part three discusses the extent to which women's right to equality in marriage is protected under human rights law. Part four contains the case study on the law and practice of polygamy in Uganda and finally, part five contains the conclusion and recommendations. Uganda is selected as a case study because polygamy is legally recognised and hence the practice of polygamy is prevalent, with very many women facing violence in polygamous marriages. The paper is a typically desk study and employs the doctrinal research method to achieve its objectives.

2. POLYGAMY AND THE VIOLATION OF WOMEN'S RIGHTS IN MARRIAGE

[70] Oyugi (note 13) at 299-300.

[71] Daily Monitor News Paper, 'Looking back at Polygamy among Buganda Royals' available at https://www.monitor.co.ug/uganda/magazines/life/looking-back-at-polygamy-among-buganda-royals-1507624 [accessed 15 May 2021].

[72] Oyugi (note 13) at 299-300.

As already highlighted in the previous section, some arguments have been advanced in favour of polygamous marriages, including the continuity of family lineages and clans, the security of women economically and socially in societies where levirate marriages are practiced, positive economic competition amongst women for purposes of obtaining favour before their husband, economic security in terms of labour arising from many wives and children as well ensuring the accumulation of children in a short while, among many others.[73] It is, however, important to note that none of these arguments as advanced, are in favour of women. They all favour the polygamous men. With the advancement of human rights at the international globe, the practice of polygamy is continually losing credence in favour of the promotion of women's rights and

gender equality.[74] The practice of polygamy in itself is an expression of inequality in the sense that it can only be practiced by men, and not women. This alludes to the fact that the practice treats women as lesser human beings than men as well as lesser members of their families hence a violation of women's right to dignity and expression of in human and degrading treatment against women. Although it is recognised that not all difference in treatment and opportunity amounts to inequality and/or discrimination, from a human rights perspective and more specifically, from a women's rights perspective, as long as men are afforded the right to multiple marriage partners which their female counter parts cannot enjoy, this amounts to inequality and non-discrimination against women. This is even more so, in the context of equality in marriage. The principle of equality and non-discrimination under human rights seeks to afford equal rights and opportunities for all persons especially men and women except where difference in treatment/discrimination is considered positive.

Furthermore, the practice of polygamy compromises women's right to property as guaranteed under human rights law.[75] Matrimonial property is difficult to determine in favour of women especially because the commonest practice is that the property is communal to the family.[76] Circumstances are even worse at divorce or in the event of a husband's death especially since the property is rarely tagged to a specific owner. Although women may own personal in property in

[73] Obonye (note 3) at 144 -145.

[74] Obonye (note 2) at 144 -145.

[75] Art 17 of the Universal Declaration of Human Rights; Article 14 of the African Charter on Human and Peoples' Rights; Art 6 (j), 7 (d), 19 (C), 21 (1) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

[76] Archampong EA (2010) 'Reconciliation of women's rights and cultural practices: polygamy in Ghana' 36 (2) *Commonwealth Law Bulletin* 325-332 at 329.

polygamous marriages (*Moonlight Sengoba Ssalongo v Administrator General* (HCCS No. 894 of 1973); *Uganda v Jenina Kyanda* [1977 HCB 111]), research has indicated that in polygamous marriages, women's ownership, access and control of property especially land is largely limited since women access land through their husbands. In addition, land is usually not enough to be shared among all the wives in a subsisting marriage further complicating women's right to property.[77] In Kenya, *Section 8 (1) (a) of the Marital Property Act (2013)* provides that property acquired by a man and his first wife entirely belong to him and his first wife and the subsequent wives have no claim. In South Africa, *Section 7 of the Recognition of Customary Marriages Act (1998)* vests property in a polygamous marriage to a husband, leaving the wives disadvantaged in terms of property ownership.

In addition, the right to health of women is compromised.[78] This is majorly due to the fact that the husband is exposed to multiple sexual partners who might be sick and women have also been noted to have no power to negotiate condom use or even refusal to have sex with their husbands. As a result, the women are usually forced into sexual intercourse by their husbands and hence easy transmission of disease. High Incidences of HIV/AIDS have therefore been recorded in polygamous marriages.[79]Moreover, research has revealed that Female Genital Mutilation (FGM) is widely practiced in some communities where polygamy is prevalent. This is intended to ensure that women's sex drive is controlled especially because their husband might not be able to satisfy all his wives. This continues to place women's health at risk.[80] In addition, women's mental health has been noted to be highly threatened by polygamy. Women have confessed to being unable to sleep thinking about the fact that their husband is with another woman. That thought just makes them go crazy. This has oftentimes led to women committing crimes of violence against their co wives or husbands, including murder.[81] Court in *Itwari v Asghari*[82]took note of the fact that the mind and health of a wife is affected by the insult of bringing another wife into

[77] Kabaseke C (2020) 'Climate Change Adaptation and Women's Land Rights in Uganda and Kenya: Creating Legal Pathways for Building the Resilience of Women' 18 (2) Journal *of Gender and Behaviour 15458-15475* at 15466.

[78] Preamble and art 55(2) of the United Nations Charter (1947), art 12 of the International Covenant on Economic, Social and Cultural Rights (IESCR) (1966), art 12 of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) (1979), art 16 African Charter on Human and Peoples' Rights (ACHPR), art 14, Maputo Protocol (2003), art 25 (1) of the Universal Declaration on Human Rights (1948).

[79] Archampong (note 23) at 329.

[80] Struensee (note 7).

[81] Cook and Kelly (note 9) at 26-27.

[82] *Itwari v Asghari* [1960] A.I.R. 684 (Allahabad) ["Itwari"] (India).

her home and that this is buttressed by fact that society too will automatically degrade the first wife.

Women's right to privacy and family life as guaranteed under article 17 of the ICCPR is also compromised under in polygamous marriages. The Human Rights Committee (HRC) in its general comment number 16 on the right to privacy under article 17 pointed out that States are under obligation to adopt special and legislative measures to prohibit interference with this right. Polygamy has been argued to violate the right to privacy and family life because a woman has to share her husband hence undermining her security and relational interests. This is even worse, where the wives live in the same house, compound or vicinity.[83]In addition to this, women' honor, reputation and dignity are violated. The HRC buttresses the position that whether the wives live in the same compound / vicinity or not, their privacy is violate. This was the position of the Allahabad High Court of India in the case of *Itwari v Asghari.*[84] States should therefore employ measures to do away the practice of polygamy which violates women's right to privacy.

Moreover, polygamy violates women's right to freedom from inhuman and degrading treatment as guaranteed under *article 7* of the *ICCPR*. In *Atwari v Asghari*, court further noted that in addition to the insult brought upon the first wife at the instance of marrying another wife automatically causes society to degrade her but also is an insult to her honour. The HRC, while interpreting article 17 on the right to privacy, mandated states to ensure that the honour and reputation of individuals is protected by law.[85] Further in its concluding observations on Yemen in 2002, the HRC observed that polygamy is an "affront to the dignity of the human person and is discriminatory under the Covenant."[86]Moreover, polygamy, having been noted to have physical, sexual and psychological harms on women, has been characterized to constitute violence against women and hence a traditional harmful practice against women in violation of article 2(a) of the *Declaration on the Elimination of Violence Against Women*[87] which defines violence to include harmful traditional practices against women. In addition, Polygamy was

[83] Cook and Kelly (note 8) at 26-27.

[84] *Itwari v Asghari* [1960] A.I.R. 684 (Allahabad) ["Itwari"] (India).

[85] General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17), UN HRCOR, 23rd Sess., U.N. Doc. Equality of rights between men and women (article 3), UN HRCOR, 68th Sess., U.N. Doc. HRI\GEN\1\Rev.1 at 21 (1994) at para 11.

[86] Human Rights Committee: Concluding Observations on Yemen UN HRCOR, UN Doc. CCPR/CO/75/YEM (2002) para 9.

[87] Declaration on the Elimination of Violence Against Women, United Nations General Assembly Resolution 48/104 December 1993.

characterized as one of the violent cultural practices against women within the family especially because it is used as a threat against women by their husbands within the family. Women are usually threatened with taking on another wife when they try to demand their rights and so this threat keeps them under fear.[88] In this context and many other contexts therefore, polygamy has been noted to be a form of violence which keeps women subjected to cruel, in human and degrading treatment.[89] The effect of polygamy on the various rights of women including the violation of the right to health as result of exposure to disease, effect on mental health as well as through harmful practices like FGM to prevent sexually starved women in polygamous marriages from committing adultery against their husbands has been pointed out. This has continued to buttress the fact that polygamy subjects women to inhuman and degrading treatment.[90]

The women's rights violations in polygamous marriages notwithstanding, some women still regard marriage as enhancing their dignity and therefore do not mind the type of marriage they enter into because they find it more shameful to remain single than to be in a polygamous marriage.[91] Furthermore, some women culturally believe that a real man cannot marry just one wife and would even go ahead to encourage their husbands to take on other wives.[92] The other factor that pushes women to encourage their husbands to take on more wives is bareness. Women who are barren usually encourage their husbands to take on other wives for purposes of child birth. The arguments in favour of polygamy notwithstanding do not compare to the violation of women's rights it occasions as already highlighted in the preceding paragraphs. It is, however, highly unlikely that the practice will be abolished soon especially in African countries. This is because in addition to the value attached to culture, the heads of state who are meant to steer the abolition of the practice are themselves practitioners of the same.[93]

3. LEGAL PROTECTION OF WOMEN'S RIGHT TO EQUALITY IN MARRIAGE IN THE CONTEXT OF POLYGAMY

[88] RCoomaraswamy R, U.N. Special Rapporteur on Violence Against Women, Cultural practices in the family that are violent towards women, UN ESCOR, 2002, 48th Sess., UN Doc. E/CN.4/2002/83 (2002) at para. 63.
[89] Cook and Kelly (note 8) at 31.
[90] Struensee (note 6).
[91] Obonye (note 2) at 14-145.
[92] Obonye (note 2) at 14-145.
[93] See note 61 below on examples of African leaders who are married to more than one wife.

It is recognised that no law at the international or regional levels expressly outlaws polygamy. The United Nations has, however, been committed to the rights of women since its founding as reflected in the *United Nations Charter* which provides non discrimination and equal rights of men and women.[94] Similarly, the International Bill of Rights for example provides for gender equality and prohibits discrimination on grounds of sex.[95] States are therefore mandated to do away with practices that advance discrimination of any kind, including discrimination on grounds of sex.[96] Article 1 of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) of 1979 defines discrimination as 'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.' From this definition, women are restricted from getting married to more than one husband, whereas men can marry more than one wife. This restriction impairs women's exercise of a social and cultural right to multiple marital multiple partners as enjoyed by their male counterparts. To this extent therefore, polygamy falls into discriminatory practices to the extent that only men can practice it and women cannot, at least in the context of marital relations and family life especially because men and women are entitled to equal rights in marriage. Further, it is acknowledged that polygamy exacerbates the violation of women's rights, specifically the right to equality and freedom from discrimination. Although no direct reference is made to polygamy by the Bill of Rights, the UN Commission at its first meeting in 1947 committed itself to among other other rights of women in the family, monogamy. This could have augmented the inclusion of article 16 of the Universal Declaration of Human Rights (UDHR) (1948) which provides that men and women of full age have a right to marry and are entitled to equal rights at marriage and during the marriage. A similar provision is contained in article 23 (4) of the *ICCPR* which provides for equality in marriage. This means that both parties to a marriage are entitled to equal rights in marriage including the right to or not to practice polygamy/polygyny that is applicable to both parties.

[94] Art 13 (2) of the United Nations Charter (1945) UNTS XVI.

[95] Art 1 and 2 of the Universal Declaration of Human Rights (UDHR) and article 2 of the International Covenant of on Civil and Political Rights (ICCPR) (1966) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966).

[96] Mwambene (note 4) at 8.

Similarly, although the *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*(1979)[97] does not expressly outlaw polygamy, Article 16 provides for equality in marriage and family relations and mandates states parties to put in place all appropriate measures to eliminate discrimination against women in matters relating to family and marriage relations (article 16). The CEDAW did not have to expressly mention or spell out one by one, all matters that discriminate against women. As explained above, polygamy discriminates against women as it definitely does not promote gender equality especially because it is a preserve for the men. [98] The *CEDAW committee* in its general recommendation 21 on 'Equality in Marriage and Family Relations'[99] pointed out that polygamy violates women's right to equality and should be discouraged and violated. In addition, the committee noted with concern that some states parties, in their Constitutions, provide for gender equality including equality in marriage yet they still legalise polygamy hence a violation of women's constitutional rights as well as a violation of article 5 (a) of the *CEDAW* which requires states parties to take appropriate measures to 'to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.' Polygamy has been noted to advance stereotypical ideas, for example, it is a solution for childlessness in marriage. Men usually marry second wives when their first wife is unable to have children. This portrays the key role of women in marriages to be reproduction and polygamy is used to advance this hence being a cultural avenue through which women a portrayed as inferior to men.[100] States are therefore under obligation to address persistent stereotypes based on gender (polygamy inclusive), through law, legal and societal structures and institutions and where necessary by employing special and temporary measures.[101]

As rightly stated by the CEDAW committee, many African countries guarantee equality between men and women as well as equality in marriage in their Constitutions yet they still legalise

[97] CEDAW 1979 UNTS, vol. 1249, p.13.

[98] This article recognizes the fact that some very small portion of societies practice polyandry (the practice of women marrying more than one husband). A case in point is the Masai community of East Africa (Genderlinks for Equality and Justice) (note 1).

[99] CEDAW committee general recommendation 21, adopted at the Thirteenth session of the Committee on the Discrimination against women, in 1994 (A/49/38).

[100] Uchem RN, 'Polygamy as a Solution to the Problem of Childlessness' 2016 DOI: 10.13140/RG.2.1.2803.8646.

[101] CEDAW Committee General Recommendation 25, Article 4, paragraph 1, of the Convention (temporary special measures), UN CEDAWOR, 30th Sess., UN Doc. HRI/GEN/1/Rev. 7, (2004) at 282, at para 7.

polygamy. This is typical of pluralist jurisdictions which apply written law alongside customary law. Some of these countries include Kenya[102], Uganda[103], Ghana[104], South Africa,[105] Tanzania[106], Malawi[107], Mozambique[108], among many others. More interesting to note is also the fact that some countries legalise polygamy yet they criminalise bigamy.[109] Although the CEDAW committee recommendations are non-binding, they offer a persuasive element towards states parties. In addition, whereas it acknowledged that customary law respects age old customs of the people, customs and culture that violate human rights and specifically those that violate human dignity and promote discrimination cannot continue to be upheld.[110]

Although the *Hague Convention on the Celebration and Recognition of Marriages,*[111] in article 11 requires States parties not to recognise the validity of polygamous marriages, it does not expressly abolish the practice. Similar to the CEDAW committee recommendation, the *Human Rights Committee*, in its General comment no. 28, while interpreting article 3 of the ICCPR on equality between men and women, pointed out that polygamy violates the right of women to equality in marriage and has severe financial consequences on the woman and her children.

Most important on the women's rights discussion is the Protocol to the *African Charter on Human and Peoples' Rights on the Rights of women in Africa* (Maputo protocol)[112] which was adopted as a supplement to the *African Charter on Human and Peoples*' Rights (ACHPR)[113] to

[102] S 45 (3) of the Kenya Constitution (2010) guarantees equality in marriage yet polygamy is also legalized (S 2, 3 (1), 4, 6 (3), 44, 55, Marriage Act no. 4 of 2014; S 8 (1) (a), (2), Matrimonial Property Act 49 0f 2013.

[103] The Constitution of Uganda (1995) recognizes equality before the law and recognizes equality in marriage (art 31) yet the Customary Marriages (Registration) Act (Cap. 248) in Section 4 recognises polygamous marriages.

[104] The Constitution of the Republic of Ghana (1992) guarantees Equality and non-discrimination in art 17 yet polygamy is legal under customary law.

[105] The Constitution of South Africa (1996) provides for equal rights of women and men (art 9) yet the Recognition of Customary Marriages Act no. 120 of 1998 recognises polygamous marriages in Sections 2, 6 and 7.

[106] S 12 and 13 of the Tanzania Constitution (1977) recognises equality between men and women and yet polygamous marriages are legal under s 10 (2) and 15 of Tanzania's Law of Marriage Act (1971) Cap. 29 R.E 2019.

[107] S 20 of the Malawi Constitution (1994) provides for equality between men and women yet polygamous marriages are legal under customary law.

[108] S 36 of the Mozambique Constitution (2004) provides for equality between men and women but polygamy is not criminalized under the Family Law Statute, no 10 of 2004.

[109] For example bigamy is an offence in Uganda under section 41 of the Marriage Act (Cap 241) and section 153 of the Penal Code Act, Cap. 120.

[110] Tibatemwa-Ekirikubinza (note 8) at 23.

[111] Convention on the Celebration and Recognition of Marriages, developed during the Hague Conference on Private International Law in 1911 and signed in 1978.

[112] Maputo Protocol, African Union, 2003.

[113] African Charter on Human and Peoples' Rights (ACHPR), CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

specifically provide for the protection of women's rights in Africa. It was seen as a saving grace for women in Africa especially because it was aimed to deal with the specific challenges encountered by African women. Although the ACHPR provided for the equality of both sexes, it did not specifically provide for the rights of women. It only provided for the protection of women in an omnibus provision on the protection of family rights.[114] The Maputo protocol was therefore aimed to address the specific unique needs and challenges of African women. Although the Maputo protocol has been considered a breakthrough for African women, some provisions have been critiqued as confusing as though the framers of the Protocol intended to play safe with some provisions. A case in point is Article 6 (c) which provides that, *'States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that … monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected.'* Although this article on the face of it seems to recognise the plight of African women in relation to polygamy and hence promotes equality in marriage, it does not out rightly outlaw the practice. This is rather strange especially seeing as the same Protocol seeks to curb discriminatory practices against women and advance the promotion of women's rights.[115] This is an indicator that even the framers of the Protocol were divided on whether to outlaw the practice of polygamy or not. This is however not surprising especially seeing as majority of African Union countries are marred with the practice of polygamy with some of the AU heads of states themselves practicing polygamy.[116] This is therefore a rather critical situation for African women to be in because if a Protocol that is entirely aimed to eradicate inequalities against women failed to eradicated one of the biggest challenges faced by African women, one wonders whether there is indeed hope for women's rescue.

As already pointed out, some national Constitutions, even on the African continent promote gender equality and equality in marriage yet at the same time legalise polygamous marriages. Although not yet the ideal practice especially in Africa, it is encouraging to note that some

[114] ACHPR (note 58), art 18.

[115] Art 8 (f) Maputo Protocol (note 58).

[116] For example King Muswati of Swaziland, Jacob Zuma, formerly the president of South Africa, Yaya Boni of Benin, Mwai Kibaki, formerly of Kenya, Muammar Gaddafi, formerly of Libya, Yahya Jammeh of the Gambia, among others (Genderlinks for Equality and Justice (note 1) and Obonye (note 2).

jurisdictions across the globe have clearly pronounced themselves on the practice of polygamy. A case in point is the British Columbia Supreme Court which in landmark ruling pronounced itself on the practice of polygamy and held that polygamy should remain a crime in Canada. This, among others was in a bid to protect the rights of women and children which the court recognized to be more important than religious freedom, in that context.[117] Similarly, the Allahabad High Court of India[118] observed that "*the importing of a second wife into the household ordinarily means a stinging insult to the first…[who is]…automatically degraded by society. All this is likely to prey upon her mind and health if she is compelled to live with her husband under the altered circumstances."*These precedents bring a ray of hope in the developing jurisprudence on court pronouncements on the practice of polygamy and the rights women. It is worth noting that some countries have outlawed polygamy and these include, the Unites States of America, Bangladesh, Turkey, Democratic Republic of Congo, Tunisia, Burundi, Mauritius.[119] This is a step towards the right direction and it hoped that the practice of outlawing polygamy will spread across the globe and specifically, the African continent.

Hopefully, these precedents will offer a guiding light for African governments. The law as analyzed is not very efficiently framed to protect women's right to equality in polygamous marriages as it does not expressly prohibit it. The framers of the law seemed to play safe when it case to outlawing polygamy. It is clearly impossible to have the practice of polygamy in favour of men and then have equality at the same time. The practice of polygamy is in itself a practice of inequality against women. Legal reform, although the most viable means of abolishing polygamy might not be the best approach especially because the law alone will not change peoples' attitudes and cultural practices. In addition, we have to warn ourselves of the dangers of radical reform which might backfire on the same marginalized persons it seeks to protect.

4 . THE LAW AND PRACTICE ON POLYGAMY IN UGANDA

Although Uganda is a predominantly Christian country, polygamous unions/marriages are legal and are wide spread. Polygamous unions are celebrated customarily based the culture or societal

[117] Supreme Court of British Columbia, In the Matter of: The Constitutional Question Act, R.S.B.C. 1986, c 68 And In the Matter of: The Canadian Charter of Rights and Freedoms And in the Matter of: A Reference by The Lieutenant Governor In Council Set Out in Order In Council No. 533 dated October 22, 2009 concerning the Constitutionality of s. 293 of the Criminal Code of Canada, R.S.C. 1985, c. C-46 (Reference re: S 293 of the Criminal Code of Canada, 2011 BCSC 1588) November 23, 2011.

[118] *Itwari v Asghari* (1960: para15)

[119] Struensee (note 7).

norms or customary practices of the parties involved. Polygamous marriages are therefore majorly customary in nature and are only legal or practiced under the customary type of marriages. Customary marriages in Uganda are governed by the *Customary Marriage (Registration) Act*,[120] the law which governs the registration of customary marriages. This law, in section 4 provides that customary marriages are potentially polygamous. This means that although not mandatory, polygamous marriages can be polygamous in nature. It is important to note that women's consent is not relevant before their husbands can marry subsequent wives. This is not only discriminatory against women, it is a practice that is inhuman and degrading in nature. As earlier allude to, the act of bringing a stranger into one's home without their consent or knowledge cannot be anything less than inhuman and degrading.

This reality notwithstanding, and with a law in favour of polygamy and with some legislators who are responsible for making the law being polygamists, some strong points in favour of polygamy have been advanced. Polygamy in Uganda has been associated with respect for men especially those are able to bear many male children through the marriages. The pride of a man in Africa and specifically in Uganda has been associated with the number of male children one has.[121] In addition, men were originally entitled to a larger share of all communally owned land if they had many wives and hence many male children. This was majorly because it was expected that he would leave inheritance to all his sons. Polygamy was therefore considered an avenue for wealth acquisition.[122] Furthermore, polygamy ensured continuity of family lineages through bearing many children. This is because in addition, children were seen as social security during the old age of the parents as they were required to take care of their aged parents social and economic needs. If a woman was barren, she was looked at with scorn in society and she therefore would encourage the husband to marry another wife so that she can bear children for the couple and spare them the shame they were going through.[123] Young men were trained and encouraged to marry many wives right from a young age. In addition, women were encouraged to live harmoniously with each other and to a large extent, they did.[124] They regarded each other

[120] Customary Marriage (Registration) Act, Chapter 248, Laws of Uganda, 2000.

[121] Amone C (2019) 'Polygamy as a Dominant Pattern of Sexual Pairing Among the Acholi of Uganda' *Sexuality and Culture* 5; Amone C and Arao M (2014) 'The Values of Polygamy among the Langi People of Northern Uganda' 3 (4) *Global Journal of Interdisciplinary Social Sciences* 48-52.

[122] Amone (note 67) at 4-6

[123] Amone (note 67) at 4-6.

[124] Amone (note 67) at 4-6.

as each other's support system. They combined labour to ensure more agricultural produce and where one was barren or aged, the new wife came in to bear children and to fulfill their husband's sexual needs. Polygamy has also been hailed for curbing the problem of single motherhood, prostitution and street children especially because everywoman would at least have a husband through polygamy and have her children in marriage.[125] Important to note also is the fact that in colonial Uganda, colonial masters preferred to appoint polygamous men to leadership positions especially as chief because they were economically stable and easily met their tax obligations.[126]All the outlined advantages in favour of polygamy notwithstanding, it is import to re-emphasize that none of the advantages outlined above were in any way a favour of the women. They were either in fulfillment of filling the child gap, a labour gap or a sexual desire that a man needed so badly so as to remain relevant and respected in society.

Although the proponents of polygamy have advanced some advantages in favour of polygamy, its negative impact on women, on the parties to the marriage and the family generally outweigh its positive impact. Polygamy accounts for the biggest percentage of domestic violence cases in Uganda.[127] Parties to polygamous marriages, both men and women have pointed out that jealousy and competition in polygamous marriages catalyse violence. In addition, there is usually scramble for all the resources especially the land hence violence which at time results into death.[128] It is important to note that Uganda has no law which defines what amounts to matrimonial property. Courts have, however, attempted to pronounce themselves on the same and have held that what amounts to matrimonial property varies on case by case basis and includes property which both parties have contributed to either in monetary terms or otherwise (*Rwabinumi v Bahimbisomwe* (Civil Appeal 10 of 2009) [2013] UGSC 5). As already highlighted in part two of this paper, parties to a marriage may own individual property during the subsistence of a marriage. Although this position applies to polygamous marriages, it acknowledged that customarily and traditionally, where there a many wives in one family, it is still difficult to categorise the level of contribution by each individual wife hence property wrangles especially after the death of the polygamous husband. Men have also confessed to the difficulty of adequately maintaining polygamous marriage financially and economically. It is

[125] Amone (note 67) at 4-7.
[126] Amone (note 67) at 8.
[127] Amone and Arao (note 67) at 50.
[128] Amone and Arao (note 67) at 50.

difficult for one man to provide for the basic needs of the family including clothing, school fees for all his many children and medical care for his very large family. In addition, adultery was pointed out as one of the leading causes of adultery among women in polygamous marriages especially due to women's sexual starvation.[129]

In addition to polygamy being legal in Uganda, some of the other reasons it continues to persist is as a result of deep rooted cultural, religious and customary beliefs and values which still have a strong grounding in Uganda. This is buttressed by the legal recognition of the applicability of customary law in Uganda. It is important to recognize that that Uganda is a legally pluralist country which applies customary law alongside written law. *Article 2* of the *Constitution of Uganda* makes it clear that the Constitution is the Supreme of Uganda and that any other law or custom that is inconsistent with the Constitution is null and void to the point of its inconsistency. This is a clear indicator that customary law and customs are valid and applicable in Uganda as long as they do not contravene the Constitution.

In addition, the *Judicature Act*[130] in section 14 and 25 recognizes customary law as one of the types of law that can be applied by the courts of law especially in the absence of any written law. This has to an extent frustrated the efforts of some activists in trying to have some customary practices in respect of marriages outlawed. This was reflected in the case of *Mifumi (U) Ltd and Others v. Attorney Generaland Kenneth Kakuru*[131] in which the Supreme Court in Uganda, which is the highest court in the land, has clearly stated that customary marriages (under which polygamy is practiced) are legal. Earlier, the Constitutional Court[132] had pointed out that many have many types of marriages at their disposal and that if one type of marriage (in this case customary marriage) does not favour them, they can choose to celebrate another one. The problem with this judgment in respect of the issue at hand is the fact that when a woman is already in a customary marriage, she does not have an opportunity to leave and celebrate another type of marriage of her own. Even if she would, her chances of getting married to someone else are slimmed as a result of many social factors for examples having children that her new partner may not accept. Society also views previously married women as 'second hand' and would therefore amount to no good. Additionally, although a woman might refuse to marry a man that

[129] Amone and Arao (note 67) at 50.
[130] Judicature Act, Chapter 13, Laws of Uganda, 2000.
[131] *Mifumi (U) Ltd and Others v Attorney Generaland KennethKakuru*, Constitutional Appeal no. 02 of 2014.
[132] *Mifumi (U) Ltd & 12 Ors v Attorney General and Kenneth Kakuru* (Constitutional Petition no. 12 of 2007).

will not want to go through a monogamous marriage, chances are that the men usually have the upper hand on the type of marriage that can be celebrated. Moreover, whereas men have the liberty to choose any partner, women are not usually exposed to the opportunity to choose 'whoever' they would like to marry. They are rarely 'choosers' but they wait to approached for marriage.

Other efforts that have been made to have polygamy outlawed have also been frustrated by its proponents have opposed the efforts. In 2005 the *Domestic Relations Bill (DRB)*[133] which attempted to make consent of an existing spouse mandatory before her husband can marry another wife[134] was tabled before Parliament but over 1000 Moslem women demonstrated against the bill since it violated the provisions of the Koran and Islamic law generally which permits men to marry up to four wives.[135] They argued that In addition, some parliamentarians, who are the law makers are polygamists. It is not surprising therefore that the passing of the Bill into law has dragged on.

Similarly, in 2010, MIFUMI (U) Ltd, a non-governmental organization dedicated to fighting all forms of domestic violence against women petitioned the Constitutional court to outlaw polygamy on many grounds including the fact that it is discriminatory against women.[136] Although the petition was dismissed based on technicalities and abuse of court process, it is a step towards the right direction and an indicator that polygamy and its effects is being appreciated. It is also interesting to note that although the petition was filed in 2010, the hearing commenced in 2018 and then it was dismissed on technicalities. This could imply that either such deeply rooted cultural issues that affect women, however crucial, are not priority for the courts of law, or they are just avoided.

In addition, this position on polygamous marriages in Uganda is augmented by Uganda's position as a party to the International legal instruments which recognize the right to culture, among them, the *UDHR* (*article 27*)(1948), The *Covenant on Economic, Social and Cultural Rights (article 15 (a)(1966), ACHPR (article 17)(1981)* to which Uganda is a State party. In

[133] *Domestic Relations Bill* (2003) (Uganda).

[134] Art 79 (3) of the *Domestic Relations Bill* (2003) provided that a wife to an existing marriage could petition court for divorce on ground that without her consent, her husband was in the process of marrying another wife.

[135] Ross W 'Ugandan 'Polygamy' Bill Protest' BBC News, Kampala available at http://news.bbc.co.uk/2/hi/africa/4391067.stm [accessed 13 May 2021].

[136] Court dismisses anti-polygamy case available at https://www.moniotr.co.ug/uganda/news/national/court-dismisses-anti-polygamy-case-1780220 [accessed 15 May 2021].

response to her international obligations, Uganda provides for the right to culture its Constitution. Article 37 provides for the right to culture and similar rights, every person has a right as applicable to belong to, enjoy, practice, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others.' These provisions however have to be read together with article 33 (6) which provides that, 'Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this Constitution and the already cited article 2 of the Constitution and section 14 and 15 of the Judicature Act. The provisions should also be read together with the report of the special rapporteur on polygamy being a harmful cultural practice against women.[137] Uganda should therefore outlaw polygamy especially seeing as it violates the international, regional and domestic obligations in relation to gender equality, non discrimination and women's rights.

The above position on polygamy and culture in Uganda not withstanding Article 31 of the Constitution provides that married persons are entitled to equal rights in marriage, during marriage and at its dissolution. Moreover, article 33 provides that Women shall be accorded full and equal dignity of the person with men. Drawing from the preceding paragraphs on polygamy and from the law on customary marriages in Uganda, it is uncontested that polygamy in no way favours equality at marriage and during the marriage. This is so, given the fact that a husband can take on a second spouse yet the wife cannot. This therefore means that women do not enjoy equal dignity of the person with the men. As already highlighted in the preceding paragraphs, discrimination is defined to include any distinction made on the basis of sex. Going by the definition, women cannot legally get married to more than one husband especially because it is considered a taboo for women to do so, which is not the case for their male counterparts.[138]

Article 21 Constitution also provides that 'all persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.' The continued legalization and practice of polygamy does not present any equality between men and women in marriage in as far as only the men can marry more than one spouse. Likewise, article 24 of the Constitution provides that 'no person shall be

[137] Refer to footnote 34.
[138] Otter R C D (2015) 'Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage' 64 (6) *Emory Law School* 1977-2040 at 1987-1988.

subjected to any form of torture or cruel, inhuman or degrading treatment or punishment.' As already alluded to in this chapter, polygamy with all it negative effects on women is a true indicator of in human and degrading treatment against the women. In addition, there is nothing more degrading than a spouse bringing a permanent stranger (who doubles as competitor) to his wife's house, especially without her consent. Although seeking the consent of a wife before taking on another wife might not remedy the negative aspects of polygamy, it is also acknowledged that in some circumstances, families in which wives have consented to their husband marrying another wife for one reason or another have lived more peacefully than families where consent was not obtained. The wife in this case is expected to receive her co wife and behave like nothing happened. Should she object, then she loses her marriage. There is no worse form of inhumane and degrading treatment. In the case of *Catherine Alak Leku v. Jackson Lek,*[139]court stated that the tradition where*' man brings various women in a matrimonial home … is against the dignity and welfare of a woman.* Court added that this amounts to cruelty and torture. Whereas the case does not directly touch on polygamy, it is relevant in the sense that bringing other women would be cruel, inhuman and degrading for the woman in the home. Uganda therefore needs to urgently delegalise polygamy in order to meet its constitutional mandate as well as it international obligations.

5. CONCLUSION AND RECOMMENDATIONS

This article set out to analyse the extent to which the practice of polygamy vitiates women's right to equality in marriage and the extent to which the law protects the rights of women in polygamous marriages. It is concluded that the practice of polygamy is practiced across the globe and especially deeply engrained in the African customary practices. The practice itself is a violation of right to equality of spouses especially seeing as only men are entitled to marry more than one wife. The practice also violates international, regional and domestic law in respect to equal rights during marriage. This is made worse by the fact that no law out rightly prohibits polygamy and the status quo seems intentional as some heads of state are practitioners of the same. It is further concluded that deep entrenchment of the practice is not one that can be easily abolished but criminalisation of the practice would be a good starting point especially in order to put the law on equality in marriage into practice. The cited examples of the countries which have taken this direction offers a ray of hope. Although this seems radical and would take a long time,

[139] *Catherine Alak Leku v Jackson Lek*, Divorce Cause no. 8 of 2009 [2010] UGHC 23.

some gender equality activists advance a more radical approach of making polygamy applicable to both men and women in order to realise equality. Otherwise continued education of masses on the dangers of polygamy as well as economically and socially empowering women would go a long way in reducing numbers that practice polygamy. Continued education of women on their rights including the right to legally dissolve polygamous marriages need to be strengthened. The challenge with this is that women fear to leave their marriages even if their lives are in danger because they usually lack the economic standing to sustain themselves. Some women still fear the shame that comes with failed marriages, hence the need for education to be strengthened. Uganda and other countries which share the same position on polygamy need to urgently delegalise polygamy to not only meet up with their international obligations but also with their own laws.

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The Principle of Sustainable Development Vis-À-Vis Intergenerational and Intragenerational Equity: An Analysis of Environmental Perspective

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Abstract

Environment is held as a most complex phenomenon however a clean and pollution free environment is very much essential for life. Environmental deterioration and pollution have their serious impact on the human life, health and well- being due to which the issue of environmental protection has become a global issue. There is a concern to save the quality of life of the present generation and efforts are being made to ensure that the future generation does not encounter environmental disaster.

The scientific and technological advancements and population explosion worldwide have brought out numerous changes in the human environment. These changes have affected the balance of ecosystem, caused disturbance in human life and environment and given birth to several environmental problems. The balance in the ecosystem needs not be maintained and that can be done only by resorting to the principle of sustainable development. Regulating human behaviour and social transactions are the need of the hour in order to cope up with the changing conditions and values. The concept of intergenerational equity is based on cherished human values the focus of which is on the "rights of future generations". It is based on the idea that there exists a partnership between and amongst the various generations of human community. Also, the present generation is held as a trustee of the planet earth for the benefit of future generations.

In the light of this backdrop this paper is an attempt to analyse the principle of intergenerational equity and intragenerational equity in the context of achieving sustainable development particularly from environmental perspective.

Key Words: Environment, Development, Sustainable Development, Natural Resources, Intergenerational Equity, Intragenerational Equity.

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1. Introduction

Environment is equated with nature which is most complex phenomenon. Environmental deterioration and pollution have their serious impact on the human life, health and well- being. Therefore, the issue of environmental protection has become a global issue. There is a concern to save the quality of life of the present generation and efforts are being made to ensure that the future generation does not encounter environmental disaster. The natures' gift to human beings in the form of rich biodiversity has to be preserved and maintained in their natural form. The balance in the ecosystem needs not be maintained and that can be done only by resorting to the principle of sustainable development.

The scientific and technological advancements and population explosion worldwide have brought out numerous changes in the human environment. These changes have affected the balance of ecosystem, caused disturbance in human life and environment and given birth to several environmental problems. Regulating human behaviour and social transactions are the need of the hour in order to cope up with the changing conditions and values. The concept of intergenerational equity is based on cherished human values the focus of which is on the "rights of future generations". It is based on the idea that there exists a partnership between and amongst the various generations of human community. Every generation of human beings has the right to use and derive benefit from the diverse natural and cultural resources in the same degree which was enjoyed by earlier generations. Also, the present generation is held as a trustee of the planet earth for the benefit of future generations, and therefore it is under obligation to protect and conserve the biodiversity of earth so that the legacy may be continued.

In the light of this backdrop this paper is an attempt to analyse the principle of intergenerational equity and intragenerational equity in the context of achieving sustainable development particularly from environmental perspective.

2. Principle of Sustainable Development

The impacts of development on natural environment are manyfold and very intricate as any change in natural habitat gives rise to lot of changes in the biotic and abiotic components of biospheric ecosystem. There are many non-renewable matters in the nature eg., petroleum, minerals etc. exploitation of which is done for development purpose and thereby the natural

equilibrium gets affected. Man is still in search of suitable alternative so that the natural equilibrium could be maintained. While carrying out developmental activities much damage has already been caused to the forest, wildlife, land, surface, water resources and atmosphere. Developmental goals have been achieved undoubtedly but, in this process, enormous damage to the environment has been caused and its' dangerous effect is looming large.

Every developmental activity has some adverse effect on the environment as environment and development are the two sides of the same coin. The important point is developmental activities cannot be totally banned and thus environmental damage is bound to occur in somewhat proportion. However, damage to the environment can be abated. It has rightly been observed that "Development can take place at the cost of environment only until a point. Development without the concern for environment can only be short term development. In the long term, it can only be anti- development and can go on only at the cost of enormous human suffering, increased poverty and oppression."[140] Development must not take place at the cost of environment. There should be harmonious adjustment between environment and development.

The principle of sustainable development is of comparatively recent origin and is now central to the environmental law and policy. Sustainable development requires consideration of environmental values involving environmental perspectives, economic perspectives, social and cultural perspectives and scientific perspectives. Sustainable development implies "integration of developmental and environmental imperatives". The dominant factor responsible for environmental degradation and pollution is haphazard industrial developmental and other developmental activities without taking into consideration environmental aspects. However, this doesn't mean that industrial development and economic growth must be stopped. If it so happens, this may be disastrous for the whole mankind especially for the developing countries. The World Conservation Strategy clarifies that the "development and the conservation of environment are equally necessary for our survival".[141]

Sustainable development requires global economic development to be carried on so that requirements of the present generation could be met and at the same time care must be taken so that the future generations may not get deprived to fulfill their needs. The present activities

[140] Centre for Science and Environment, "The State of India's Environment 1984-85: The Second Citizens' Report" 302 (January 1985).
[141] David Hughes, *Environmental Law* 14 (Butterworths, London 1992).

should not be such as to prevent future generations from pursuing their legitimate options. Therefore, when the current generation is using natural resources for certain developmental activities it should create such natural resources on compensatory basis so that future generations could also use such natural resources in the same manner as done by the current generation. Where an irreplaceable asset could be used up by an activity, sustainable development requires that activity's cessation.

The term "sustainable development" became more popular when the "World Commission on Environment and Development", popularly known as "Brundtland Commission", submitted its Report in 1987 that was named "Our Common Future". The Bruntland Report defined "sustainable development" as "Sustainable development is development that meets the needs of the present without compromising the ability of the future generations to meet their own needs."[142] The scope and ambit of this definition is very comprehensive.

As per Mr. Justice Kuldeep Singh, "sustainable development is a balancing concept between ecology and development".[143] Clarifying the concept further he says that "some of the salient features of sustainable development as culled out from Brundtland Report and other international documents are intergenerational equity, use and conservation of natural resources, environmental protection, precautionary principle, polluter pays principle, obligation to assist and corporate, eradication of poverty and financial assistance to the developing countries".[144] However, he held that "the precautionary principle and the polluter pays principle are essential features of sustainable development".[145]

The idea that "present generation should be modest in their exploitation of natural resources for the benefit of future generations" is also found to be inherent in the Maltese Proposal at the UN General Assembly of 1967, which asserted that "the time has come to declare the sea-bed and ocean floor a common heritage of mankind". The proposal emphasized that the common heritage of mankind should also be afforded legal protection by the international community at large. In this way this theory rests on the postulate that "natural resources such as seabed are not the fruits

[142] World Commission on Environment and Development, *Our Common Future* 43 (Oxford University Press, New York, 1987).
[143] *Vellore Citizens Welfare Forum* v. *Union of India*, AIR 1996 SC 2715 at 2720.
[144] *Id*. at 2720-21.
[145] *Ibid.*

of labour of present generations and thus such resources can only be exploited with adequate consideration of the rights of the future generations".[146]

Sustainable development indicates the way in which developmental planning should be designed. The principle of sustainable development implies a policy perspective rather than a substantive prescription of norms. It seeks to modify the prevailing unqualified development concept on the basis of environmental values. Global environmental problem is the result of crisis of values and "in order to achieve sustainable development environment protection constitutes an integral part of development process and it cannot be considered in isolation. Peace, development and environment are interdependent and indivisible".[147]

3. Principle of Intergenerational Equity

It is general acceptance globally that equity is an essential ingredient of the concept of sustainable development. The principle of sustainable development is based on the principle of equity. It is structured on two forms of equity, namely, "intergenerational equity" and "intragenerational equity".[148] The Sustainable Development Goals have been formulated based on the principles of intergenerational and intragenerational equity. According to the principle of intergenerational equity, the present generation must show concerns to the needs of the future generations. The reason is that environmental bounty is common for all generations to come and therefore the same must not be exhausted by one generation.

For development to be truly sustainable it must take into account inter and intragenerational needs and be concerned with the well-being of the environment.[149] While deciding the developmental issues we must keep in mind that approximately every branch of human development has its exclusive impact on environment in a specific manner. As such it is to be taken care of that our natural resources should not be destroyed in attempt to have massive growth and development. Moreover, the effort should be made that development in present must

[146] Mainhard Schroder, "Sustainable Development- A Principal for Action and Instrument to Secure the Condition for Survival of Future Generations?" 101-113 at 101, 51 *Law and State* (1995).
[147] The Rio Declaration on Environment and Development, 1992, Principles 4 and 25.
[148] Gurdeep Singh, *Environmental Law* 29 (Eastern Book Company, Lucknow, 2016).
[149] S. Sivakumar, "Bringing New Dimensions to Environmental Justice in India" in Manoj Kumar Sinha, S. Sivakumar *et. al.* (eds.), *Environment Law and Enforcement: The Contemporary Challenges* 15-37 at 27 (Indian Law Institute, New Delhi, 2016).

not endanger the future common life. This could be ensured only when every developmental activity is carried out only after anticipating and identifying the future dangers and its remedies.

The principle of inter-generational equity is the basic principle recognized by the concept of sustainable development. According to this principle we should live today with tomorrow in mind. We should not snatch away all the prosperity of the nature ourselves at the cost of the very survival of the future generations. It is the fundamental right of every human being of each generation to enjoy the nature's gifts given by God. Men have right to be benefitted from cultural and natural inheritance of the past generations. Equity being important component applies not only to the present generation but also to the future generations. The consequences of the environmental degradation have their worst effects on future generations. It is assumed that the development yields progressive, richer and positive consequences to the future generations. But this overconfident view may result in rapid environmental disasters transcending geographical and generational boundaries. Therefore, Brundtland report,[150] Rio declaration,[151] Stockholm conference,[152] Earth summit[153] and Johannesburg summit[154] have all referred to the rights of the future generations and recognized inter and intragenerational rights in one or the other way.

The concept of sustainable development in the Brundtland Report of 1987 is based on intergenerational equity. The reference to the term "ability of the future generations" implies intergenerational equity.[155] The report clearly enjoins a strong commitment to equity on the part of the present generation towards future generations. So, intergenerational equity involves an obligation of providing an opportunity to enjoy an equal measure of environmental resources to future generations. Thus, this principle is the basic principle discussed from the time environment and concept of sustainable development identified. The principle enunciates that the present generation is bound to preserve and protect natural environment and not to exhaust all the natural resources for the benefit of succeeding generations. Poverty with pressing needs and richness with compulsive habits are the causes for unsustainable use of resources. Welfare of all

[150] It defined "sustainable development as development which meets the needs of the present generation without compromising the ability of future generations to meet their own needs."
[151] It said that "the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations".
[152] It stressed upon the need to protect the nature's gifts for future generations.
[153] It asserted that "intergenerational equity is one of the pillars of sustainable development".
[154] It confirmed the principle of conservation of resources for future generations.
[155] Brundtland Report of 1987 defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."

generations is necessary for eco- civilization. The discrepancy within the generation is also the cause of environmental damage.

The concept of sustainable development is based on the understanding that the future generations must not suffer from the scourge of environmental degradation created by their ancestors; equity demands the accommodation of social relationship that transcends time. The social relationship between two generations is very important because the activities of one generation can have long lasting impacts on the other, thus, involving the issues of equity, justice and fairness and raising future oriented, socio-centric, strategic perspective of sustainable development.

Intergenerational equity implies "intergenerational fairness and mandates that the present generation should not look at the earth and its resources as mere investment opportunity but as a trust passed on to them by the ancestors, to be enjoyed and passed on to the future generations for their use. Each generation holds the earth and its resources as a steward or in trust for future generations. Earth and the resources constitute a planetary trust. The theory of intergenerational equity stipulates that we, the human species, hold the natural environment of our planet in common with all members of our species, past generations, the present generation and future generations. As members of the present generation, we hold the earth in trust for future generations. Thus, the present generation being trustee, has the right to be benefited from the use of the natural resources which constitute trust property".[156]

The theory of intergenerational equity and obligations derive strong support from John Rawls, when he asserts "fairness as the basic premise for justice". Delineating the intergenerational duties and obligations he observed that "persons in different generations have duties and obligations to one another just as contemporaries do. The present generation cannot do as it pleases but is bound by the principles that would be chosen in the original position to define justice between persons at different moments of time"[157] and "the conception of justice as fairness covers these matters without any change in the basic idea."[158] To ensure justice to the future generations he argues that social and economic resources are to be arranged with a bias in favor of the least advantaged segment of the society and opines that "no generation has a stronger claim than any other." Thus, according to Rawls' theory of justice, future generations

[156] *Supra* note 8 at 30.
[157] John Rawls, *A Theory of Justice* 293 (Harvard University Press, USA, 2009).
[158] *Ibid.*

are at a disadvantageous position in comparison to the present one. Therefore, the advantageous position of the present generation does not permit them to exploit the planetary resources indiscriminately rather it is under obligation to preserve the environment and natural resources to be handed down to the potential beneficiaries. Non-existence of the unborn generations does not give a stronger claim to the present one to exhaust the planetary resources at the cost of the future generations.

The principle of intergenerational equity, which essentially prescribes the duty of the present generation to future generations, is comparatively of recent origin. The core concept of intergenerational equity was developed by Edith Brown Weiss which consists of three principles[159] such as: (1) "Conservation of options",[160] (2) "Conservation of quality",[161] and (3) "Conservation of access".[162] The first principle "conservation of options" implies that "each generation is required to conserve the diversity of the natural and cultural resource base so that it does not unduly restrict the options available to future generations in solving their problems and satisfying their own values, and it should also be entitled to diversity comparable to that enjoyed by previous generations".[163] It can be achieved partly by scientific and technological innovations that creates substitutes for existing natural resources or provides alternative methods for extracting and using them more efficiently.[164] The second principle "conservation of quality" entails that "each generation is required to maintain the quality of the planet so that it is passed on to the next generation in no worse condition than that in which it was received, and it should

[159] Phillippe Sands, Principle of International Environmental Law 11 (Cambridge University Press, Cambridge 1994).
[160] For example, conserving bio- diversity contributes to the robustness of ecosystems. See, Stuart Bell and Donald McGillivray, *Environmental Law* 46 (Universal Law Publishing Co. Pvt. Ltd, New Delhi, 5th edn. 2000).
[161] *Ibid*. It means "handing over environmental quality at local and global level without worsening its state".
[162] *Ibid*. It means "equitable rights of access to what past generations have handed over to us while keeping open equitable access for future generations".
[163] Limited and careful use of natural resources is necessary for environmental sustainability. According to Rio declaration "to achieve sustainable development and a high quality of life for all people, states should reduce and eliminate unsustainable pattern of production and consumption". The implementation plan of Johannesburg Summit 2002 also consists of conservation of natural resources and reduction of unsustainable pattern of production and consumption levels. In 1941, special tribunal in the case of trial smelter observed that "state has no right to use its territory in a manner which causes or likely to cause injury to others territory or life or property thereon." The earth is one though human being has geographically demarcated it and so the damage to environment is common to entire world. Thus, preservation, conservation and replacement of non- renewable resources and protection of the renewable natural resources is the key principle of sustainable development.
[164] Edith Brown Weiss, "In Fairness to Future Generations and Sustainable Development" 8(1) *American University International Law Review* 19-26 (1992).

also be entitled to planetary quality comparable to that enjoyed by previous generations."[165] It does not mean that the environment either could or should remain in its pure or original form. The trade- offs are inevitable. What is emphasizes is that a framework should be developed so that a balance between environment and development can be maintained. This requires the development of predictive indices of environmental quality, the establishment of baseline measurements, and an integrated monitoring network.[166] The third principle "conservation of access" implies that "each generation is to provide its members with equitable right of access to the legacy of past generations and should conserve this access for future generations". It means that "the members of the present generation have a non- discriminatory right to use the resources of the planet to improve their own economic and social well- being provided they do not unreasonably interfere with the access of other members of their generation to do so as well".[167]

These three principles i.e. "principle of options", "principle of quality" and "principle of access" are the foundation of the intergenerational rights and obligations of each generation of persons. Further, there are at least four criterions which help the principles of intergenerational equity to grow and develop. Firstly, "the principles should encourage quality among generations, neither authorizing the present generation to exploit resources to the exclusion of future generations nor imposing unreasonable burdens on the present generation to meet indeterminate future needs".[168] Secondly, "they should not require one generation to predict the values of future generations and must give to future generations flexibility to achieve their goals according to their own values".[169] Thirdly, "they should be reasonably clear in their application to foreseeable situations".[170] Fourthly, "they should be generally shared by different cultural traditions and be generally acceptable to different economic and political systems".[171]

4. The Principle of Intragenerational Equity

[165] To maintain sustainability environment is to be protected. Protection of bio- diversity is important to achieve sustainable development. By protecting bio- diversity, ecosystem or ecological processes may be balanced which is essential for human survival and sustainable development. Environment problems can undermine or shunt the goals of development, the productivity will be affected. The unscrupulous exploitation, hazardous effluents from industries is detrimental to environment. To protect environment certain quality standards, planned use of resources, timely intervention, evaluation and assessment are required.
[166] *Supra* note 25.
[167] *Ibid.*
[168] *Ibid.*
[169] *Ibid.*
[170] *Ibid.*
[171] *Ibid.*

The concept of equity is applicable to equity between present and future generations and it extends to equity within generation too. In the Brundtland Commission's definition of sustainable development the use of the expression "needs of the present" confirms the inclusion of commitment for intra-generational equity. Since the present is the foundation of the future, sustainability loses its relevance if the present generation is not taken care of. The developing countries endorse the concept of sustainable development only because it includes intra-generational equity within its ambit. The imperative of intra-generational equity extends moral obligation on the part of the rich nations to assist the less fortunate ones. Intra-generational equity is not just equity between nations alone, it is equity irrespective of nations and amongst people. Thus, concept of sustainable development stresses the interdependence between economic growth and environmental quality. Unequal distribution of resources and uneven development is incompatible with sustainable development. So, sustainable development could not be secured unless due consideration is given to equity in developmental policies. Sustainability refers to the maintenance of environmental qualities throughout the world. Ecological unity could be attained only when intra-generational equity is a mandate and not merely an option.

To achieve inter-generational equity, principle of intra-generational equity is required to be observed. The Brundtland Commission's Report in many places provided the essential linkages between intra-generational equity and sustainable development. Sustainable development has no meaning unless it is understood as a commitment to socially equitable development of the present generation. Intragenerational equity signifies equity within and between the nations. The Brundtland Report has also recognized the inequalities between nations and stated that several problems arise from inequalities and lack of access to resources. The report maintains that inequitable land ownership can lead to overexploitation of resources which may result in harmful effects on both environment and development hampering sustainable development.

Intragenerational equity requires that the developed countries should provide environment friendly technologies and funds to the developing countries so that they can build their capacities to protect the environment. Accordingly, international treaties and conventions concerning protection of environment lay emphasis on intragenerational equity and make provisions for transfer of technology and funds by developed countries to the developing countries. International funding mechanisms for building the capacities of the developing countries to

protect the environment aim at the fulfillment of the entitlements of the developing countries based on intragenerational equity.

Intragenerational equity mandates recourse to capacity building measures. The developed and the developing countries have common but differentiated responsibilities to protect the environment. The responsibilities are differentiated due to the difference in the economies. The responsibilities of the state to protect the environment are proportionate to their respective economies.

5. The Principle of Intergenerational Equity in International Law

The principle of intergenerational equity has firmly been recognized in international law. The UN Charter; the Universal Declaration of Human Rights, 1948;[172] the International Covenant on Civil and Political Rights, 1966; and other such international documents vociferously recognize the dignity and equality of rights of all human beings globally. The unmindful exploitation of the natural and cultural resources by the present generations of persons would undoubtedly undermine the rights and well- beings of persons of future generations and is contradictory to the very spirit of the object of the UN Charter and other international human rights documents.

The UN Charter which is held as one of the outcomes of the aftermath of the World War Second has affirmed the global concern about the welfare of persons of future generations in the opening words of its Preamble which states that "We the people of the United Nations determined to save succeeding generations from the scourge of War..."[173] The Universal Declaration of Human Rights also states in its Preamble that "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world..."[174] The term "human family" has temporal element and includes dead, living and unborn persons. In the same vein, the International Covenant on Civil and Political Rights, 1966 and also the International Covenant on Social, Political and Cultural Rights, 1966 recognises that "The inherent dignity and the equal and inalienable rights of all members of human family constitute foundation of freedom, justice and peace in the world..." [175]

[172] Universal Declaration of Human Rights, 1948, Preamble.
[173] UN Charter, 26-06-1945, Preamble.
[174] *Supra* note 33.
[175] International Covenant on Civil and Political Rights, 1966, Preamble; International Covenant on Social, Political and Cultural Rights, 1966, Preamble.

Concern for intergenerational justice regarding the natural environment can also be gauged from the initial meetings of the UN Conference on Human Environment, 1972. The Preamble to the Stockholm Declaration unequivocally talks about the objective of intergenerational rights in the words such as "To defend and improve the environment for present and future generations has become an imperative bowl for mankind."[176] The World Charter for Nature, 1982, though a non-binding document, explicitly talks about the requirement to protect species and ecosystems for future generations.

The Stockholm declaration also very categorically states that the present generation "… bears a solemn responsibility to protect and improve the environment for the present and future generations."[177] For this, it obligates the present generation by stating that the "natural resources … must be safeguarded for the benefit of present and future generations through careful planning or management".[178] Principle 3 of the Rio Declaration is based on intergenerational equity.[179] It provides that the "right to development must be fulfilled so as to equitably meet development and environmental needs of the present and the future generations."[180] The sole thrust of these provisions is that the present generation "must undertake to pass on to the future generations an environment as intact as the one it inherited from the past generation".[181]

The United Nations Framework Convention on Climate Change, 1992 says that "Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities" Further, the Preamble to the the Aarhus Convention, 1998 while recognizing intergenerational equity principle states that "… every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations".[182] Also, the Copenhagen Declaration, 2009 states about "equitable social development and social

[176] Stockholm Declaration, 1972, Preamble.
[177] *Ibid*. Principle 1.
[178] *Ibid*. Principle 2. See also, Rio Declaration on Environment and Development, 1992, Principle 3.
[179] Rio Declaration on Environment and Development, 1992, Principle 3.
[180] *Ibid*.
[181] Shyam Diwan and Armin Rosencranz, *Environmental Law and Policy in India* 585 (Oxford University Press, New Delhi, 2015).
[182] United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 1998, Preamble.

justice" which is manifest recognition of the principle of intergenerational equity.[183] The component of intergenerational equity is, therefore, very much inherent in the concept of sustainable development.

6. Judicial Approach to Intergenerational/ Intragenerational Equity

The Apex Court and High Courts in India have taken into account article 14 and 21 of the constitution of India for the purpose of deliberating on the principle of intergenerational equity. In *Ganesh Wood Products v. State of Himachal Pradesh*,[184] the Supreme Court recognized the "obligation of the present generation to preserve natural resources for the next and future generations". The Court held that the acts of the state government are "violative of the National Forest Policy and the State Forest Policy evolved by the Government of India and the Himachal Pradesh Government respectively - besides the fact that it is contrary to public interest involved in preserving forest wealth, maintenance of environment and ecology and considerations of sustainable growth and inter-generational equity." The court also held that "the present generation has no right to deplete all existing forest and leave nothing for future generations."

Similarly, in the *CRZ Notification* case,[185] the Supreme Court while recognizing the right to intergenerational equity observed that "A law is usually enacted because the legislature feels that it is necessary. It is with a view to protect and preserve the environment and save it for the future generations and to ensure good quality of life that the parliament enacted the anti-pollution laws, namely, the Water Act, the Air Act and the Environment (Protection) Act, 1986." The Court further observed that "Violation of anti-pollution laws not only adversely affects the existing quality of life but the non-enforcement of the legal provisions often results in ecological imbalance and degradation of environment, the adverse effect of which will have to be borne by the future generations."

The Supreme Court discussed the application of this principle in the *Consumer Education and Research Society* case,[186] and observed that "if an attempt is made by the state legislature and the state government to balance the need of the environment and the need of the economic development it would not be proper to apply the principle of prohibition in such a case. It would,

[183] United Nations Climate Change Conference, 2009, para 6.
[184] *Ganesh Wood Products* v. *State of Himachal Pradesh*, (1996) 5 SCC 647.
[185] *Indian Council for Enviro-Legal Action* v. *Union of India*, (1996) 5 SCC 281 at 293.
[186] *Consumer Education and Research Society* v. *Union of India*, (2002) 2 SCC 599.

therefore, be proper and safer to apply the principle of protection and the principle of polluter pays keeping in mind principle of sustainable development and the principle of intergenerational equity."[187]

The Apex Court in *K. M. Chinnappa* v. *Union of India*,[188] observed that "sustainable development is essentially a policy and strategy for continued economic and social development without detriment to the environment and natural resources on the quality of which continued activity and further development depend. Therefore, while thinking of the environmental measures the need of the present and the ability of the future to meet its own needs and requirements have to be kept in view. While thinking of the present, the future should not be forgotten. We owe a duty to the future generations and for a bright today, bleak tomorrow cannot be countenanced. We must learn from our experiences of past to make both the present and the future brighter. We learn from our experiences, mistakes from the past so that they can be rectified for a better present and the future. It cannot be lost sight of that while today is yesterday's tomorrow, it is tomorrow's yesterday."

The Supreme Court got another opportunity to explain the meaning of sustainable development and the concept of inter-generational equity in *Glanrock Estates* v. *State of Tamil Nadu*,[189] and observed that "inter-generational equity is part of Article 21 of the Constitution". Explaining the meaning of inter-generational equity in the context of forest management in India, the court observed that "The present generation is answerable to the next generation by giving to the next generation a good environment. We are answerable to the next generation and if deforestation takes place rampantly then inter-generational equity would stand violated. The doctrine of sustainable development also forms part of Article 21 of the Constitution. The precautionary principle and polluter pays principle flow from the core values in Article 21. The important point to be noted is that in this case we are concerned with vesting of forests in the States. When we talk about inter-generational equity and sustainable development, we are elevating an ordinary principle of equality to the level of over-arching principle."

[187] *Id.* at 605.
[188] AIR 2003 SC 724 at 727.
[189] Writ Petition (Civil) nos. 242 of 1988 and 408 of 2003.

The Apex Court reproduced the above observation with approval in *Maharashtra Land Development Corporation* v. *State of Maharashtra*,[190] and went further to underscore the need for preservation of eco- system while observing that "Preservation of the eco- system is an immutable duty under the Constitution- a fine balance must be struck between environmental protection and development. Many regions in India are biodiversity hotspots, known to host a staggering variety of flora and fauna. However, they are under the constant threat of environmental degradation and rapid depletion of natural resources, due to various factors, including the desire to earn quick money. Consequently, a major challenge in this backdrop is to arrive at a successful model of sustainable development- one that aims to preserve the rich ecosystem, while addressing the economic needs of the people in the region."

The Supreme Court invoked article 14 of the Constitution of India in the context of intergenerational equity in *K. Guruprasad Rao* v. *State of Karnataka*,[191] where the balance between "development of mineral wealth" on the one hand and reservation for "protection of historical/ archaeological/ monumental wealth for future generations" on the other was again a matter of issue. The court while stressing on the need simply stated "... Mining within the principle of sustainable development comes within the concept of 'balancing' whereas mining beyond the principle of sustainable development comes within the concept of 'banning'. It is a matter of degree. Balancing the mining activity with environment protection and banning such activity are two sides of the same principle of sustainable development. They are parts of the precautionary principle."

Courts have time and again gone beyond the restraints of procedures to which they are otherwise struck with incommodious walls. One such instance is found in *Samaj Parivartan Samudaya* v. *State of Karnataka*,[192] wherein the Supreme Court delt with the issue of overexploitation and indiscriminate mining of natural resources by the state and vehemently stated that "... Intergenerational equity and sustainable development have come to be formally embedded in our constitutional jurisprudence as an integral part of the fundamental rights conferred by article 21 of the constitution. In enforcing such rights of a large number of citizens who are bound to be

[190] JT 2010 (12) SC 305.
[191] (2013) 8 SCC 418.
[192] (2013) 8 SCC 219.

adversely affected by environmental degradation, this court cannot be constrained by the restraints of procedure...".

In *Kinkri Devi* v. *State*,[193] it was alleged that "the unscientific and uncontrolled quarrying of the lime stone has caused damage to the Shivalik Hills and was posing danger to the ecology, environment and inhabitants of the area". The Court while recognizing the "right to intergenerational equity" observed that "if a just balance is not struck between development and environment by proper tapping of the natural resources, there will be violation of Articles 14, 21, 48-A and 51A (g)." The Court also observed that "natural resources have got to be tapped for the purpose of social development. But the tapping has to be done with care so that ecology and environment may not be affected in any serious way. The natural resources are permanent assets of mankind and are not intended to be exhausted in one generation."

In *Court on Its Own Motion* v. *Union of India*,[194] the Supreme Court held that "the law also casts a duty upon the State to ensure due protection to the forests and environment of the country. Forests in India are an important part of the environment. They constitute a national asset". The Court also held "that the concept of intergenerational equity is a part of article 21 of the Constitution of India". In *M.C. Mehta* v. *Union of India*,[195] the Court found that "indiscriminate mining had resulted in large scale environmental degradation of the Aravalli Range" and therefore suspended mining operation in the Aravalli Hills on the basis of the principle of sustainable development. The Court took into account Article 32 and Article 142 of the constitution for this purpose. The Court held that "Environment and ecology are national assets. They are subject to intergenerational equity". The Court observed that "Mining within principle of sustainable development comes within the concept of 'balancing' whereas mining beyond the principle of sustainable development comes within the concept of 'banning'. It is matter of degree. Balancing the mining activity within environmental protection and banning such activity are two sides of the same principle of sustainable development. They are parts of Precautionary Principle."

[193] A.I.R. 1988 H.P.4.
[194] *Suo Motu* Writ Petition (Civil) No. 284 of 2012, (2013) 1 MLJ 639 (SC).
[195] Manu/SC/0768/2009.

In *N.D. Jayal* v. *Union of India*,[196] the Court dealt with the issue of safety and environmental protection in view of construction of Tehri Dam and observed that "... the balance between environmental protection and developmental activity could only be maintained by strictly following the principle of sustainable development. This is a development strategy that caters to the needs of the present without negotiating the ability of the upcoming generations to satisfy their needs... it is a guarantee to the present and bequeath to the future…"

In *Goa Foundation* v. *Union of India*,[197] the Supreme Court held that "four principles—intergenerational equity, sustainable development, the precautionary principle and polluter pays principle—are part of the right to life enshrined in article 21 of the Constitution." The Court also held that "the public trust doctrine extends to all-natural resources, and that the state is a trustee for the people, and especially for the future generations." The Court found that "the mining of iron ore has caused significant ecological and environmental damage" and recognized the principle of intergenerational equity and the principle of sustainable development in the context of conservation of scarce resources like minerals.

7. Conclusion

In todays' world order "environmental issues range from the street corner to the stratosphere." The need of environment protection has become a matter of international politics now. The reason is that environment protection is a very vital issue and ranks high among priorities of people. Intergenerational equity is a notion that is implicit in ecological sustainability. It has emerged as a principle that forms the very basis of the concept of environmental sustainability. It gives emphasis on the inter-dependence of human beings of each generation including the present one and equitable distribution of resources to meet the ultimate objective of achieving sustainable development. The principle of intergenerational equity and intragenerational equity are two sides of the principle of sustainable development. Sustainable development aims to find a proper balance between intergenerational equity i.e. between the present and future generation; and intragenerational equity i.e. between the rich and the poor of the present generation.

Sustainable development makes it obligatory for the present generation to be cautious while exploiting natural resources for developmental processes as there are future generations also who have to meet their requirements out of these natural resources only. Therefore, this generation is

[196] 2004 (9) SCC 362.
[197] 2014 (6) SCC 590.

under moral obligation to conserve the planetary resources and handover Mother Earth to them in better form. Unmindful overexploitation of resources would result into fast depletion of their reserve which would adversely affect the sustainability of future generations. The object of the concept of sustainable development is to maximise the sustainability of the present as well as future generations.

The goal of sustainable development can only be achieved by following *inter alia* intragenerational and intergenerational equity principles. Moreover, observance of intra-generational & inter-generational equity principles are more important in India which is a developing economy where more resources are required for sustained economic growth. The adherence to the principle of sustainable development is held a constitutional requirement. The judiciary in India has played a very important role in ensuring environment protection and always tried to make a balance between environment protection and development. While doing so the courts have applied the principle of sustainable development vis-a vis the principle of intergenerational equity and intragenerational equity. The Apex Court and various High Courts have in many cases held that "environment and ecology are national assets and are subject to 'intergenerational equity' and that the State is a trustee for the people." The Courts while dealing with the issues of ownership and control of natural resources, protection of environment etc. have often invoked Articles 14, 21, 39(b), 48-A, 51-A(g) of the constitution.

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CURRENT SCENARIO OF CHILD SEXUAL ABUSE IN INDIA

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ABSTRACT

All over the world, children are subjected to sexual abuse. It's a growing issue that needs to be addressed right away. As a result, children who are subjected to this type of abuse suffer long-term psychological damage. The law treats children differently from adults because of their age-related characteristics. Mental immaturity, impressionableness, recklessness, and impulsivity are just some of the characteristics associated with adolescence. That most cases of child sexual abuse go unreported in the country only heightens their shock factor. Since the pandemic shut down the country, COVID-19 cases have risen. The author has attempted to describe the current state of child sex abuse in India, and to highlight the legislative changes that have been implemented in the past few decades. The country's major difficulties in dealing with this issue are laid out, and recent High Court rulings are also discussed. Research by the author suggests ways to put together an effective framework to combat Child Sexual Abuse.

Keywords: Sexual Abuse**,** Victimization, Adolescence, Pandemic, Maltreatment.

Introduction: Sex abuse occurs when a minor is subjected to sexual activity that he or she does not fully understand; he or she is not yet ready to consent to; or it is contrary to the law or social taboos. When it comes to rape, theft and assault, children are more likely to be victims of these crimes than the general adult population. Child maltreatment, neglect, and emotional abuse are just a few examples of victimizations that children face that are unique to their age group. Crimes against minors, on the other hand, are much less likely to be reported to the police than crimes against adults. Even so, the police are more likely to see children as victims of crime than perpetrators. Because of this, it is ironic that juvenile delinquency receives far more attention from the government than crimes against children.

Any act or conduct that puts a child at risk of harming or impairing their physical or emotional health or development is considered child abuse. "Any injury or series of injuries to a child that

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appears to be intentional or deliberate in nature constitutes child abuse," says the American Academy of Paediatrics. Physical, sexual, emotional, and mental abuse are all forms of child abuse. Neglect is also considered child abuse. Even if a child abuse incident does not result in a serious injury, one should assume that all child abuse experiences are serious and harmful.

Research Methodology: The doctrinal methodology has been used for this study, which focuses on analysing existing statutes, books, landmark case laws, and papers published by reputable journals and dependable websites. This paper utilises a wide array of scholarly works. Theoretical approach has also been used to assess the effectiveness of existing legislation and decide whether or not changes are necessary. Using this strategy, an attempt has been made to simplify the research and bring to the reader a comprehensive study.

Position of Child Sexual Abuse in India: For decades in India, CSA has been a scourge that has ravaged the country. There is a high rate of child abuse, and it often gets worse. It crosses all economic, racial, religious, and ethnic boundaries. A child abuser is almost always a family member, such as a parent or stepparent. Child abusers are rarely strangers. Abuse of children occurs all over the country, in both rural and urban areas. In a 2007 Ministry of Women and Child Development report, it's estimated that more than half of Indian children have been victims of CSA. There are a lot of victims who choose to keep their stories to themselves. CSA incidences rose from 8,904 to 14,913 in the first year of the Protection of Children from Sexual Offences Act of 2012, which went into effect in 2014.More than eight out of ten of these crimes were related to sexual offences and kidnappings. In 2017, 32,608 incidents were reported under POCSO, and 39,827 incidents were reported in 2018, according to data from the National Crime Records Bureau. Between 2018 and 2020, a total of 418,385 cases of child maltreatment were documented.[200] In just 21 days of the first COVID-19 wave in India, the national Child Line Helpline Number 1098 had answered around 22,000 calls in a single day, according to CSA.[201] More than 3 million calls were made to CHILDLINE during the first 11 days of lockdown;

[200]Maansi Verma, to tackle rising cases of child sex abuse, the NCRB must address gaps in POCSO data, The Wire (2021), https://thewire.in/government/tackle-rising-cases-child-sex-abuse-ncrb-gaps-pocso-data (last visited Oct 29, 2021).

[201]Shreya Khaitan, How Covid has put children at risk of abuse, labour, marriage, Indiaspend (2021), https://www.indiaspend.com/child-rights/how-covid-has-put-children-at-risk-of-abuse-labour-marriage-755065 (last visited Oct 29, 2021).

92,105 were made to report child abuse.[202] It has long been recommended in the country that victims stay at home when their own blood turns into a predator. They, on the other hand, fear for their own safety at home. The majority of rapes involving children took place when the perpetrator was someone the children knew or had previously interacted with.[203] There has been a 106 percent increase in the number of reports of child sexual exploitation worldwide, according to the Cyber Tip line of the National Center for Missing and Exploited Children.[204] During the COVID-19 lockdown, searches for CSA content in India have risen by 95 percent, according to reports.[205] For these figures, the internet's lack of censorship and filtering may also play a role in their rise90 percent of cases of child sex abuse are perpetrated by trusted family members, according to a recent report from a non-governmental organisation (NGO). In the past week (September 2021) alone, Tamil Nadu was alerted to allegations of sexual abuse and physical abuse perpetrated on children by their own parents or others working with them. This reveals the lack of security measures that could have prevented this type of crime. For example, in the case of two women from Chennai, the shameful incident was revealed when police officers tasked with cutting down on gutka sales raided the perpetrator's shop and discovered the alleged sexual assault on their children. According to police, he had been abusing the children for a long time.[206]

Laws Related to Children: Cases involving CSA are tried in India under the POCSO and the "Indian Penal Code, 1860."[207] Prior to the implementation of the POCSO Act, the Goa Children's Act of 2003 dealt with CSA cases in the state. Aside from this statute, CSA cases were tried under the IPC. This, however, was inefficient because it had considerable downsides. Because

[202] Reethu Ravi, 90% of abusers are known to victim: How this NGO is prepping families to fight CSA, The Logical Indian (2020), https://thelogicalindian.com/exclusive/lockdown-child-sexual-abuse-cases-20852 (last visited Oct 29, 2021).
[203]Recent statistics of child abuse, Save the Children (2020), https://www.savethechildren.in/childprotection/recent-statistics-of-child-abuse/ (last visited Oct 30, 2021).
[204]Ramya Kannan, Covid-19 pandemic fuelled rise in CSA online: Report, The Hindu (2021), https://www.thehindu.com/news/national/covid-19-pandemic-fuelled-rise-in-child-sexual-abuse-onlinereport/article37098788.
[205]Ramya Kannan, Covid-19 pandemic fuelled rise in CSA online: Report, The Hindu (2021), https://www.thehindu.com/news/national/covid-19-pandemic-fuelled-rise-in-child-sexual-abuse-onlinereport/article37098788.
[206]https://www.newindianexpress.com/states/tamil-nadu/2021/sep/04/four-cases-of-child-abuse-reported-last-week-in-tamil-nadu-2354058.html
[207] Hereinafter referred to as IPC

the legislation was broad, it did not put a strong emphasis on child victims. There was a lot of misunderstanding because there was no specific age provided for a child.

In 2012, after portions of the Indian Penal Code 1860 and the Criminal Procedure Code 1908 were judged to be insufficient to deal with the rising problem, a law was established to protect children from sexual abuse. Child protection legislation, including POCSO and the Juvenile Justice Care and Protection of Children Act 2015, is critical. These laws differ in some respects, but the overall goal of protecting child victims from abuse is the same. When it comes to protecting children under the age of 18, POCSO lays out comprehensive obligations on the protection of children, while also focusing on one of the most important concerns of children being exposed to sexual harassment for pornographic purposes, which is defined by the POCSO. With child victims, the age of the minor becomes a critical step in moving forward with the case. There are documents that can be used in court to determine a minor's age under the Juvenile Justice Act, which deals with rehabilitation for young criminals under the age of 18 through its system of care for two classified groups of children: "*Children in Conflict with Law and Children in Need of Care and Protection*."

This is a gender-neutral law that recognises that boys can be victims of sexual violence as well. The POCSO Act was enacted in 2012. Children are those who are under the age of eighteen, according to the law. It is illegal in India under the Indian Penal Code to commit sexual assault on boys. This law made it easier for anyone to come forward with information on crimes against children. Sexual assault now includes non-penetrative and aggravated penetrative assault (sections 3–10), as well as assaults on persons in positions of trust, such as teachers and law enforcement officers. If a person is under the age of 18 and cannot differentiate right from wrong, they are considered children by the law. It has become commonplace for countries dealing with juvenile crimes to follow the "Doli Incapax" principle, which states that the perpetrator of a crime must not be able to comprehend what they have done.

Judicial Trends in Child Rights Protection: The court has a crucial role in protecting the rights of individuals, particularly children. The court has the primary responsibility for safeguarding children's rights in order to ensure their well-being and development.

Children's welfare and safety have been the Supreme Court's top priority. Among the highlights of the judiciary's position on children's welfare and development are, J.M.B Lokur and Deepak

Gupta of, **Bachao Andolan v. Union of India, Bachpan**[208], in an order issued by the Supreme Court in the case, said that calamities should be given special attention. Supreme Court ordered the National Disaster Management Authority to take urgent action to protect children in the event of calamities. " ' It was ruled by the Supreme Court in **Tamil Nadu v. Union of India**[209] that "the legislation on child care and protection shall be beneficial to all kinds of children. "Child in need of care and protection" should be interpreted as broadly as possible, according to the Supreme Court of Canada's ruling on the Juvenile Justice Act, 2015. The courts also defend children's rights by establishing rules. The Supreme Court ruled that there was no physical contact between the victim and the man who was acquitted of sexually assaulting her. A female High Court judge in Mumbai issued an order in January that aroused significant outrage. It is up to the courts to focus on sexual intent, not on the fact that defendants and victims touched each other's bodies, the Supreme Court ruled. This is a tedious and narrow construction, but one that could lead to absurd readings of the provision," he says.

In **Anil Surendra singh Yadav v. State of Gujarat,** [210] The accused had been convicted by the trial court under Section 363, 376AB, 377, 302 and 201 of IPC and Section 3(a), 4, 5(r), and 6 of the POCSO Act. He had kidnapped a three-and-a-half-year-old girl, raped her inhumanely, and then strangled her to death. He eventually placed her body in a gunny bag and left it to rot and disintegrate at his home while fleeing to Bihar. There were no signs of remorse or repentance, and because of this heinous conduct, the court deemed the case a "rarest of the rare and sentenced the accused to death. The mitigating and aggravating elements were all stacked against the accused, resulting in a death sentence under Sections 302 and 376D of the IPC.

In **Narayan v. State of Kerala**[211], the accused sexually molested the victim who is his own daughter. In this case, the High Court partially reversed the trial court's ruling, which resulted in the accused's conviction under Sections 377 and 376 of the IPC. The conviction under Sec 377 was overturned, while the conviction under Sec 376 was upheld by the H.C. The same was done in the case on the basis of "Residual Doubt." The court indicated that it is totally convinced that the alleged crime occurred, but it is not satisfied that it occurred with the same intensity and frequency as stated by the prosecution.

[208] Writ Petition (civil number) 75/2012, date of order September, 2017"
[209] 2017) 2 SCC 629.
[210] 2019 SCC OnLine Guj 2692
[211] 2021 SCC OnLine Ker 3406

In **Pama v. State of Odisha**,[212] the petitioner has been charged with offences under Sections 342 and 376(AB) of the IPC, as well as Section 10 of the POCSO, and sought bail for the same. The petitioner enticed the juvenile victim into his home and raped her as she tried to keep her mouth shut. The victim's sisters and mother tracked her down as a result of her screams. When the mother knocked down the accused's door, she caught him attempting to commit sexual acts on the victim. What was alarming to the court in this instant petition was that the police filed a report three days before this occurrence alleging the same accused of attempting to commit sexual assault on the complainant's elder daughter. The H.C. denied the bail as there are many specific allegations and stated the accused seems to a repeated sexual offender and no bail should be granted until competition of investigation.[213]

Conclusion: Child sexual abuse in India is far more common than most people realise. There can be no dispute about it. Families or primary caregivers have the primary responsibility to protect children from abuse and neglect. Children's welfare is also the responsibility of communities, civic society, and all other stakeholders. It is the role of the state to ensure that vulnerable and exploitative children have a safe and secure environment in which to grow up. Legislators and judges are to be commended for their efforts. If the loopholes and limitations aren't addressed, CSA in India will remain a serious issue until justice is served and such horrific actions are prevented. Using the statute in favour of the victim, courts have shown how far they will go to ensure that the victim receives the justice they deserve. Even though laws have been strengthened and actions have been taken to ensure that victims receive justice, the country still has a long way to go. In the meantime, hundreds of youngsters around the country are being sexually molested.

Recommendations

i. Awareness programmes should be launched around the country to help victims of CSA disclose such crimes in a secure and confidential environment. Instead of focusing on a few institutions, these initiatives should be broad enough to include those who have been left out of society.

[212] Pama v. State of Odisha (2021) SCC Online Ori 140
[213] (2021) SCC Online Ori 140

ii. Education for youth should include lectures on sexual education, consent, and the lives of CSA survivors. Even though this may be considered as an extremely delicate approach, it is absolutely necessary.
iii. As a result, the POCSO must be rewritten such that it is gender neutral for the defendant.
iv. There must be an all-out assault on the CSA in order to defeat it. It is imperative that the legislative, judicial, and executive branches of government all work together and leave a small margin for mistake. There must be no omissions from the legislation passed.
v. In assessing the victim's interim restitution, the courts must give a flexible framework. An adequate compensation package should cover all of the victim's immediate requirements.
vi. NGOs and social professionals that work tirelessly on behalf of CSA victims can also benefit from incentives provided by the state government.

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Section 377 of IPC after Navtej Singh Johar Judgement and Challenges Still Open to LGBTQ Community

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Abstract

Section 377 of the Indian Penal Code 1860 criminalises unnatural sex and has remained in IPC since the beginning. There is no mention of what is unnatural sex in section 377, and neither there can be. What is unnatural for one may seem completely unnatural to others. Through this research paper, the researcher has tried to prove that there is evidence to support the existence of homosexuality in ancient India. Further researcher discusses section 377 as it stood before the judgement in Navtej Singh Johar Versus Union of India. In the next part journey towards part decriminalisation of section 377 is discussed with the help of cases. The researcher goes on to discuss the Navtej Singh Johar case, which is next in line and which finally decriminalised consensual unnatural sex between two adults. Since judgement has not solved all problems of the LGBTQ community, the researcher discusses the challenges that are still open. In the end, the researcher concludes the paper with suggestions for the improvement of the conditions of LGBTQ people.

Keywords-

Section 377, Homosexual, Navtej Singh Johar, LGBTQ, Unnatural Sex, etc.

1. INTRODUCTION-

On September 6, 2018, a two-year legal battle concluded with the historic decision to decriminalize Section 377 of the Indian Penal code Code. The very portion that dealt with the country's lengthy rituals and social structure was never thought to have been quashed by the Top Court, yet the decision rattled the Indian culture's foundations. While the LGBTQ community, their families, and supporters applauded the decision, a sizable portion of the population opposed it and continues to oppose it. Homosexuality was referred to as an "imported sickness" by the Vishwa Hindu Parishad, which shook the foundations of Indian culture. Fighting for LGBTQ+ rights, according to Subramanian Swami, is an American sport.

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The most enormous opposition to homosexuality being decriminalized in India was based on the belief that it was against Indian culture. Is this, however, the case?

In the 4th century, A.D. Kamasutra explained in vibrant details the physical pleasure in homosexual partnerships. The Kama Sutra is an old Sanskrit Indian classic that gives details on sexuality, fun and the experiences of the same sex. The storey of a sex connection between 2 widows is related to the 14th century Bengal mythology. In mediaeval India, Bhakti Saints would effeminize to worship Krishna and Shiva. Nawabs would settle as females on several holy days at the Royal court of Awadh in the 18th century. Scholars note that although these Homosexual practices were not generally practised standards, they had never been ridiculed or rejected.

Indeed, Urdu poets like Insha and Saadat Yaar Khan Rangin were freely writing about the ties between the same gender in similar colours as the interactions between heterosexuals until the early 1800s. In 1860 only after Thomas Macaulay enacted section 377 in IPC 1860, which was structured according to the 1533 English Buggery Law and declared oral sex and anal sex a penal offence, was homosexuality seen as a sin against nature. Texts like the Kamasutra enraged Victorian sensibilities, and India's exposure to sexuality paradoxically turned to be among the causes the British categorized it as a primitive civilization. In the 1920s, when Hindi writer 'Ugr' wrote a 'chocolate' stock, it generated a tumult. Even though it decried homosexuality, Writers, journalists, and reformers chastised the author for discussing homosexual desire, which they felt should not be discussed. By 1967, Britain issued a law recognizing same-gender relationships, but the Victorian notion of homosexuality had become an intrinsic integral part of the Indian beliefs. When Deepa Mehta's lesbian love storey "Fire" was shown in Indian theatres in 1998, it sparked widespread complaints from Indian political groups. But the activists of LGBTQ pushed back and fought against these stereotypes. Their social and legal work has emphasized our rich heritage of queer traditions and uniquely Indian perceptions of queerness over the years. Coupled with the boldness of famous LGBTQ people (such as Navtej Singh Johar, Jafar Ali), this action prepared the stage for a lengthy legal battle that eventually led the Supreme Court in 2018 to decriminalize homosexuality.

2. NON-HETEROSEXUAL PRACTICES IN ANCIENT INDIA-

In the work, "Tritiya-Prakriti: People of the Third Sex," Amara Das collects pieces of evidence thorough Sanskrit research writings of ancient and mediaeval India, proving that homosexuality and the "third genders" not just existed in Indian society at the time but were largely accepted.[214] Citing the chapter 'Purushayita' in Kama Sutra, the ancient Indian Hindu scripture of the 2nd century, the book references lesbians being called 'Swarini.' These women frequently married and had children with other women. They were also well-liked by the 'third gender' group as well as the general public. The book also mentioned gay males, or "klibas," who, while they may relate to impotent males, usually represented males who could not have sexual relations with a female because of their "homosexual tendencies." These gay males were extensively mentioned in the Kama Sutra's chapter "Auparishtaka," which deals with oral sex. 'Mukhebhaga' or 'asekya' were terms for homosexuals who played the 'passive' part in oral sex. The book also states there had been eight various types of weddings under the Vedic system. Of them, the "Gandharva" or the "celestial varied," "one union between love and life without parental sanction" is a marriage between two homosexuals.

In Khajuraho's temples, there are representations of ladies erotically encompassing women and men who show each other their genitals. This has been characterized by scholars as a recognition of the involvement of persons in gay behaviours.[215] God Rama's follower and friend Hanuman is reported to see Rakshasa woman kiss and embrace another rakshasa woman in Valmiki Ramayana. The Ramayana also narrates the storey of Dilip, a king with two wives. He died without a surviving successor. On account of Krittivasi Ramayan, written by Bengali poet Krittibas Ojha, Lord Shiva instructed widowed queens in their dreams that they will have children if they loved one another. The queens performed what Shiva instructed, and one of the two queens became pregnant. A baby was born to her who afterwards became known as King Bhagirath, remembered for "bringing the Ganga river to earth from the sky."

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[214] Sanjana Ray, *Indian Culture Does Recognise Homosexuality, Let Us Count the Ways*, THE QUINT (June 15, 2021, 09:28 PM), https://www.thequint.com/voices/opinion/homosexuality-rss-ancient-indian-culture-section-377#read-more.

[215] India Today Web Desk, *Homosexuality in ancient India: 10 instances*, INDIA TODAY (June 16, 2021, 06:02 PM), https://www.indiatoday.in/india/story/10-instances-of-homosexuality-among-lgbts-in-ancient-india-1281446-2018-07-10.

The Mahabharata offers an exciting account of Shikhandini, the woman or transgender fighter of that period culpable for Bhishma's defeat and murder. She was the daughter of King Drupada and was brought up as a son by him in order to take revenge on Hastinapur's rulers, the Kurus. Her father got her married to a woman.[216] Her wife became enraged when she learned the truth. The day was rescued by supernatural interference, which bestowed manhood to Shikhandini throughout the night. Shikhandini lived as a hermaphrodite from then on.

God Vishnu adopted the shape of a lovely lady, Mohini, to make fool of demons so that all gods can drink amrut during the considerable churning of the ocean of milk, according to Mastya Purana (the immortal juice found from the churning of the sea). Lord Shiva, meanwhile, recognized Vishnu as Mohini, and he fell to him immediately. Lord Ayyappa was born as a result of their union. Another piece of literature, the Narada Purana, contains references to "unnatural offences" as defined in Section 377. According to the Narada Purana, anyone who discharges sperm in non-vaginal areas, in people without vulva, and in animal uteruses is a grave sinner who will perish in hell. The Purana forbids "unnatural sins," although references show that they were practised.

3. SECTION 377 BEFORE NAVTEJ SINGH JOHAR JUDGEMENT-

Section 377 of the Indian Penal Code reads-

"Unnatural offences: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

It is critical to decide which is natural and unnatural to apply to Section 377. Furthermore, homosexuality must be determined whether or not it is contrary to nature. The functional principle is given to identify what is natural, which signifies that every limb of the human body has a specific function to execute. So, employing such a body part for any other cause is

[216] Ibid

unnatural.[217] According to this argument, any other sex besides penile-vaginal is abnormal. It is in this logic that anything but procreative sex is denounced as unnatural. In other cases, the courts supported this rationale, although primarily irrational. In India, the term "carnal intercourse against the order of nature" has been defined so broadly that it now encompasses anything from oral and anal sex to penetration into artificial orifices like folded palms or between thighs. As a result of the broad interpretation of article 377, which is based on vague language, the law has been applied arbitrarily, raising issues about its constitutional legality. Aside from that, section 377 renders homosexuality unlawful because it is against nature's order. As a result of acknowledging the right to freedom as a fundamental human right, it is widely believed that criminalizing gay behaviour is a blatant infringement of the right to privacy around the world.

4. A JOURNEY BEFORE DECRIMINALIZATION OF SECTION 377 AS TO CONSENSUAL UNNATURAL INTERCOURSE-

The legal fight for LGBTI rights began in 2001. A petition was filed in the High Court of Delhi by the Lawyers Group on behalf of the Naz Foundation, questioning Section 377.[218] The High Court of Delhi denied hearing the PIL in 2004, finding that the petitioners lacked capacity. The petitioners subsequently filed an appeal with the Supreme Court, which granted the petitioner's request and remanded the case to the High Court of Delhi to be decided. In the LGBTQ community, this case sparked a lot of curiosity. Many organizations, including a coalition named "Voices against 377," women's organizations, human rights organizations, and others, later joined the case and backed the petitioners. This case has not involved either the transgender community as a single petitioner or as an organization; however, the transgender individuals who had been detained and subjected to police abuse filed affidavits pursuant to section 377.

It was alleged in this case that § 377 infringes the basic rights provided in Articles 21, 19, 15 and 14 of the Indian Constitution by covering voluntary sexual relations between two consenting adults. It was further argued that Article 21 could only be diminished if the state is overwhelmingly interested. They further maintained that the term "sex" in Article 15

[217] BURTON M. LESIER, HOMOSEXUALITY AND THE UNNATURALNESS ARGUMENTS IN SEX MORALITY AND LAW 44 (Gruen & Panichas, 1996).
[218] Naz Foundation Versus Govt. of NCT of Delhi & Ors. ((2009) 111 DRJ 1).

encompasses "sexual orientation," and hence there could be no discrimination based on sexual orientation under Article 15. In general, they asked the court to declare section 377 of the IPC as unconstitutional inasmuch as it criminalizes adults' consenting sexual conduct. In this case, complete opposite affidavits were filed by two central Ministries of the Govt. of India. The Home Ministry attempted to explain the act's continued existence by citing population health, public displeasure, and social distaste. The Ministry of Health and Family Welfare, on the other hand, backed the petitioners' claim, claiming that the retention of section 377 in the criminal code has hampered HIV/AIDS prevention programs and that its removal would aid in the treatment of gays with HIV/AIDS.

Arguments put forward by the ministry of home affairs were rejected by the High Court on the basis that to curtail the rights provided under Articles 14 and 21, public disapproval or popular morality cannot be considered. The court concluded that only constitutional morality, not popular morality, may pass the test of compelling state interest. In "Naz Foundation v, Govt. of NCT of New Delhi and Others", the Delhi High Court delivered a significant decision in 2009. Section 377 of the IPC was finally found unconstitutional by the court forming the bench of Chief Justice Ajit Prakash Shah and Justice S Muralidharan. The part was also found to be in violation of the Constitution's guarantees of equality, liberty, and life to all citizens.

This well-known Delhi High Court decision, was short-lived, as it was questioned in the Supreme Court by Suresh Kumar Koushal, a Delhi-based astrologer. It was contended that the objective of the legislature behind enacting section 377 is to safeguard social culture and values. According to the court, every law passed by Parliament or state legislatures is presumed to be lawful. This principle also applies to laws enacted prior to the Constitution. If no changes are made to a law, it may imply that the legislature believes it is appropriate to leave the legislation alone. Post-independence, the IPC has been amended over 30 times, including amendments to the chapter on sexual offences, which includes unnatural offences. "However, the legislature elected not to change or reconsider the law. This demonstrates that Parliament, which is unquestionably the representative body of the Indian people, did not deem it necessary to eliminate the provision".[219] Finally, the court upheld the constitutional validity of section 377 in the case of "Suresh Kumar Kaushal Versus Naz Foundation". The court did, however, leave the legislature with the option of repealing or amending the statute.

[219] Suresh Kumar Kaushal Versus Naz Foundation AIR 2014 SC 563.

5. THE JOURNEY TOWARDS DECRIMINALIZATION OF SECTION 377-

"Five persons from the LGBT community, dancer Navtej Singh Johar, businesswoman Ayesha Kapur, journalist Sunil Mehra, and chef Ritu Dalmia, hoteliers Aman Nath and Keshav Suri filed a writ petition before the Apex Court, challenging the constitutionality of Section 377 of the IPC and the decision of the two-judge bench in the Suresh Koushal case. They challenged the section punishing consenting adults having sexual intercourse and rendering it as an act against the order of nature".[220]

5.1 Arguments from Petitioner- The petitioner's lawyer placed reliance on the ratio in "K. S. Puttaswamy v. Union of India"[221], which said that "sexual orientation is also an essential attribute of privacy. Therefore, protection of both sexual orientation and the right to privacy of an individual is extremely important, for, without the enjoyment of these basic and fundamental rights, individual identity may lose significance, a sense of trepidation may take over, and their existence would be reduced to mere survival". Nobody has the right to tell how a person decides to go to bed.

In reaffirming the Delhi H.C. ruling in the case of Naz Foundation, the counsel also relied on the decision in the case of Manoj Narula v. Union of India wherein the theory of constitutional morality was avoided. The highest Court is the custodian of the Constitution. The Apex Court is the "ultimate arbiter of constitutional rights", and the Supreme Court is responsible for protecting constitutional morality and eliminating social contempt. To back up their claims, the petitioner's lawyers cited the cases of "Francis Coralie Mullin v. Administrator, Union Territory of Delhi and others"[222] and "Common Cause (A Registered Society) v. Union of India and others"[223], in which the court decided that the right to life and liberty enshrined under Art. 21 of Indian Constitution is pointless unless it ensures the dignity of every individual irrespective of theie gender or class.

The court's attention was drawn to the report of Justice J.S. Verma Committee on Criminal Law Amendments wherein it was noted that the term 'sex' in Article 15 covers sexual orientation and

[220] Garima Khare, *Case Analysis: Navtej Singh Johar v Union of India*, LEGALDESIRE.COM (June 16, 2021, 02:45 PM) https://legaldesire.com/case-analysis-navtej-singh-johar-v-union-of-india/.
[221] Justice K. S. Puttaswamy (Retd.) & Anr. Versus Union of India (2017) 10 SCC 1.
[222] Francis Coralie Mullin Versus Administrator, Union Territory of Delhi and others 1981 AIR 746, 1981 SCR (2) 516.
[223] Common Cause (A Registered Society) Versus Union of India and others

therefore, in petitioners' belief Section 377 violates Article 15 of the Constitution on this issue as well.

It was also argued that after disclosing their identity, the LGBT community feared punishment and persecution, and hence never approached the court. They are looking for assistance from teachers, parents, and NGOs to voice on their behalf.

5.2 Arguments from the Respondent- The lawyer argued that there is no breach of Art. 15 because it merely forbids discrimination on grounds of race, religion, sex, caste, place of birth, or combination of these factors, but does not prohibit discrimination on the ground of sexual orientation. The reliance was placed on the case of "Fazal Rab Choudhary v. State of Bihar", in which it was determined that the provision indicated sexual absurdity or bestiality against the natural course and that the state has all the powers for putting "reasonable restrictions" on sexual acts between a woman and a man which are perversive, offensive, or against the natural order.

The lawyer contended, citing the decision in "State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat and others", that national, societal or community interests as a whole are superior to the individual interest, regardless of how vital the individual interests are. To begin with, the court lacks the competency to change the provision of an enactment or eliminate or add words to it. Second, the decriminalization of this section shall make the sex between two homosexual persons legal, which is typically expected to happen between two heterosexual persons and shall impact the system of family and the institution of marriage. it can lead to the rise of a great many social issues that the legislature is not prepared to address at the present time. and these issues shall pose a threat to the family system.

5.3 Judgement- The bench of five judges comprising Chief Justice Dipak Misra, Justice Indu Malhotra, Justice R.F. Nariman, Justice D.Y. Chandrachud, Justice A. N. Khanwilkar, unanimously found that Section 377 was unconstitutional in the sense that it criminalized sexual intercourse between two adults of the same sex who consented to indulge in sex and that it was a private matter. It reversed the bench's decision in "Suresh Koushal v Naz Foundation". The court cited its own judgement in "National Legal Services Authority v. Union of India"[224], in which it stated that "gender identity is essential to one's personality and denying the same would be a violation of one's dignity." We would be violating their fundamental right to privacy if we

[224] National Legal Services Authority (NALSA) Versus Union of India AIR 2014 SC 1863.

discriminated against LGBT people solely because they are a minority of the population. The bench also cited "Shafin Jahan v. Asokan K.M".[225] and 'Shakti Vahini v. Union of India"[226] to reaffirm that an adult's freedom to "select a life partner of his/her choice" is a component of individual liberty. Anything that two LGBT individuals decide to do in private does not undermine public decency or morals. 'Intimacy among consenting homosexual adults is beyond the State's legitimate interests' The Chief Justice relied on 'the principles of transformational constitutionalism and progressive rights implementation and found that the constitution must lead the transformation of society from an archaic to a pragmatic society, where fundamental rights are ferociously protected.' The Chief Justice said. In addition, he said, "constitutional morality would dominate social morality." They also stated that homosexuality is "not an aberration but a change in an individual's sexual preference."

6. CHALLENGES STILL OPEN TO LGBTQ COMMUNITY-

The Judgement in Navtej Singh Johar's case has given recognition to the consensual same-sex and trans sex relationships. But the battle has not ended yet. The LGBTQ community has a long way to go. The long-awaited judgement has decriminalized consensual unnatural relationships only, but there are plenty of things that need to be changed on the societal level. People need to change their mindset and govt. also has to keep in mind that it doesn't concern itself with someone's bedroom affairs. Following are some of the challenges that are still lying open to the LGBTQ community-

6.1 Marriage Between LGBTQ People- By the effect of the verdict in Navtej Singh Johar's case, same-sex couples can make a physical relationship with each other but cannot get married. Marriage under all the family laws and the Special Marriage Act 1954, is permissible only between a male and female. So homosexual and transsexual couples can indulge in consensual intercourse with each other by the effect of this judgement but cannot stay together as a married couple unless the law of marriage undergoes changes. People still look at homosexuals staying together as if they have committed some crime and consider the relationship illicit. Several legal cases involving same-sex marriages are now pending. The Uttarakhand High Court recognized on June 12 2020, that though same-sex marriage may not be lawful, the law provides protection

[225] Shafin Jahan Versus Ashokan K.M. AIR 2018 SC 357.
[226] Shakti Vahini Versus Union of India AIR 2018 SC 1601.

for coexistence and "live-in partnerships." To answer the question of whether India is ready for same-gender marriage, the answer is perhaps yes, but it will be a long road.

In India, various people have expressed their views publicly on the issue. As per a poll in 2016 conducted by the 'International Lesbian, Gay, Bisexual, Trans, and Intersex Association', 35% of Indian people have supported the idea of the homosexual marital union while other 35% have rejected the idea.[227] 9 A Varkey Foundation survey showed that the level of support for equal marriage among 18–21-year-olds was 53% higher. Acceptance of LGBT persons in elite government institutions such as IITs is reported to be much higher. According to a 2015 study at IIT Delhi, 72% believed that "homosexuality is normal as heterosexuality." Many IITs have LGBT clubs, including IIT Bombay's "Saathi" (meaning "Friend"), IIT Delhi's "Indradhanu," IIT Kharagpur's "Ambar," IIT Kanpur's "Unmukt," BITS Pilani's "Anchor," and others.

6.2 Marginalisation of LGBTQ People- Marginalization is central to excluding people, interpersons and society from full and complete social life. Marginalized people have a comparatively lesser influence on the lives that they lead and the accessibility of the resources to them; they are likely to be stigmatized and often acquire bad public perceptions. The possibilities for them to contribute socially are limited, and they may have little self-esteem and self-confidence. They grow lonely.

LGBT people may have several types of marginalization, e.g. sexism, poverty, racism or other circumstances, and transphobia or homophobia that have a negative influence on mental health. A lot of LGBT people are marginalized by the stigma associated with sexuality and the identification or expression that falls beyond the anticipated heterosexual, untransgender norm. This denies LGBT people, frequently including their own families, from several support facilities, which leaves many other individuals with little access to services, such as healthcare, judicial and legal services and education. LGBT individuals are often prevented from obtaining basic public services such as health care and homes and contribute to severe health disparity by marginalizing and biasing gender identity and sexual orientation. Marginalization of LGBT persons typically begins with their birth in the family. Research tells, that roughly 30% of young people who were from the LGBT community were physically abused by family members due to their sexual expression or identity or orientation, and up to forty per cent of the homeless

[227] ILGA, *The Personal And The Political: Attitudes To Lgbti People Around The World*, ILGA (June 16, 2021, 08:01 AM) https://ilga.org/downloads/Ilga_Riwi_Attitudes_LGBTI_survey_Logo_personal_political.pdf.

adolescents in the United States were LGBT young people.[228] In addition, without further resources, many LGBT young people are compelled to engage in criminal acts such as sex work, leading them farther to the outskirts of the city and exposing them to great risks of HIV.

6.3 Family Reaction and Acceptability- Another big challenge for the LGBTQ community is to reveal their sexual identity to their families, who are more likely to reject the idea. A country like India has a different set-up of minds altogether. In many parts, love marriages are unacceptable to the families, and the couple has to face dire consequences, despite the fact of being a heterosexual marriage. If such is the case with heterosexual marriages, and the families feel offended just because of the different caste or religion, then one may imagine how the homosexuals in the family will be tolerated. Of this fear, many homosexuals are not able to gather sufficient courage to share their sexual orientation with their families. They are afraid of the family's reaction. In the past, relatively few teenagers came to their parents or told people about their homosexuality. Most lesbians, gays and bisexuals (LGBs) waited until adulthood to speak to others about their LGB identification. Many LGB adults were prevented from publicly expressing their life under fear of being rejected and major negative repercussions. Limited resources existed for LGBT young people before the 1990s. Gay and transgender teens did not have much info to discover or find support about their identities. In recent years, the Internet, schools, and LGBT groups have helped homosexual and transgender young people to discover accurate information, counsel and support. More LGBT young people come out throughout adolescence with increased access to services (telling their transgender or homosexual orientation with family, friends or others). Until recently, it was little known how the family responds to a young LGBT during adolescence. And it was not yet recognized how family attitudes affect the health and emotional health of an LGBT teenager. The LGBT children's danger and well-being are greatly affected by families and carers.[229]

6.4 Homophobia- The risk for injury, harassment, discrimination and the threat of force because of their sexuality is greater for lesbians, gays, bisexuals and transgender people than for those who define themselves as heterosexual. Homophobia is the cause. Morals, religions and the political ideas of a majority population are some of the things which can strengthen homophobia

[228] Majd K, Marksamer J, and Reyes C, *Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts*, NJDC (June 16, 2021, 09:21 AM) http://www.njdc.info/pdf/hidden_injustice.pdf.
[229] Ryan, C. (2009). Supportive families, healthy children: Helping families with lesbian, gay, bisexual and transgender children. San Francisco, CA: Marian Wright Edelman Institute, San Francisco State University

in a wider way. Being in a homophobic atmosphere drives many LGBT individuals, for fear of unfavourable reactions and effects, to hide their sexuality. The term 'homophobia' does not actually include a single definition as it covers a vast range of various ideas and attitudes. Homophobia is often defined as animosity or fear of homosexuals, but also as the stigma that comes from social views around homosexuality. Negative sentiments or attitudes about non-heterosexual conduct, orientation, relations and community can lead to homophobia, and this is at the foundation of discrimination against many lesbians, homosexuals, bisexuals, and transgender (LGBTs). Homophobia can be manifested in various ways, such as homophobic jokes, physical assault, occupational discrimination and unfavourable media portrayals. For persons who have been educated to think that homosexuality is immoral, the understanding that they may be gay can create disgust and self-representation and result in low self-esteem. Silencing homosexuality means negating a vital part of an individual's identity and can have significant effects on their lives and relationships. In addition, the question of whether or not to quit can create a lot of personal hardship. The LGBT who make the choice to reveal their sexual orientation may be discriminated against by their families, friends and society as well. Homophobia may harm people's lives really badly. As a result, for example, of the rejection by their family after their sexual orientation, many LGBT persons have become homeless. In the lives of LGBT folks, homophobic people play an effective role. Their hate and the reality that they are unable to tolerate LGBT people cannot be suppressed. They are therefore verbal or physical, harassing LGBT people and exposing them to violence. Such sentiments lead LGBT people to worry, unhappiness about their location, physical perturbation, soleness and ostracism.

6.5 LGBTQ Students and Their Harassment- LGBT children in schools undergo trauma. Lesbian, Homosexual, bisexual, and transgender (LGBT) kids are harassed in schools across the country on a daily basis. Students who are just seen as LGBT are mistreated as well. A report by 'The Gay, Lesbian, and Straight Education Network (GLSEN)' states that nine out of ten LGBT kids endure torture. 'The 2007 National Climate Survey' indicated that 31.7% of LGBT students had skipped a class, and 32.7% had missed a school day for the last month as a result of their unsafety. They are not able to focus on their studies, and their scores start reflecting that if they don't go to class. The average grade of students who are harassed more often due to sexual or gender expression is approximately half a grade less than for students who are harassed less often (2.8 versus 2.4). Teens should only worry about the material they deliver at school. Most

adolescents obviously think much more than that, but harassment should not be one of them. GLSEN registers almost 4000 Gay-Straight Alliances. These clubs give LGBT students a safe area at their schools and provide the rest of the school with an educational instrument to enhance climate and reduce harassment. It is difficult for too many LGBT students to discuss the harassment that they face because it is so ingrained in our culture. LGBT harassment is the more recent form of harassment in popular culture still permitted.

7. CONCLUSION AND SUGGESTIONS-

The landmark judgement in Navtej Singh Johar's case has proved to be a milestone for the LGBTQ community. This is something that should have been done decades ago. In fact, it should never have been made a crime because what may seem unnatural to some may completely seem natural to others. So there is no straight jacket pattern to decide what can be called natural and what has to be called unnatural. However, the judgement happened finally. Problems and challenges to LGBTQ people shall not be over in a day. It is a constant process that needs time. The researcher has the following suggestions to better address the problems of LGBTQ people-

1. Since the LGBTQ class is vulnerable, Govt. is required to frame a full-fledged law with regard to the rights of the LGBTQ community so that gender equality can be realized in a true sense. Such law must also make provisions for the marriage among the LGBTQ community, be it a marriage between two men or two women or between two transgender or a marriage of transgender to male or female. By incorporating the provisions of marriage, they can stay together as a legally wedded couple and spend their life peacefully.
2. To remove the stigma attached to homosexuals, people have to be sensitized first on the issue. That is why it is the responsibility of central and state governments to conduct sensitization programmes to sensitize public servants, especially those who are connected with the maintenance of law and order and the administration of justice.
3. There are myths and misinformation on the issues of homosexuals and transgenders. A great many people believe that it is a disease and needs to be treated. Many even try to get their homosexual child treated with electric shocks. We need to spread awareness on the issue and tell them that homosexuality is not a disease but a sexual orientation and need not be treated. People need to know that liking a person of the same sex is as natural and spontaneous for a homosexual as liking a person of the opposite gender is for a heterosexual. And all this confusion and misinformation can be cleared only when there is communication on the issue. There have to be thorough discussions and debates on the

issue through media, schools, colleges, and workplaces. Only then this phenomenon can be natural.

4. Govt. needs to make stringent possible laws to punish those who harass and discriminate against LGBTQ.
5. Schools and colleges should have homosexual clubs and committees so that members of the LGBTQ do not feel sidelined.

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WOMEN IN ATHLETICS – THE NEED FOR REFORMS IN LEGISLATION

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ABSTRACT

An important part of a country's socioeconomic development is athletics nowadays. In addition to enhancing individual well-being and reducing medical expenses, sports involvement fosters positive social interactions and strengthens community bonds. The organisation of a large athletic event improves a country's economy by improving infrastructure, creating jobs, attracting foreign investment, and attracting athletes and players. There are several ways in which athletics affects the economy and society.

The world of athletics is enormous, and males have long held sway over it for some reason. Women, on the other hand, have steadily gained prominence and demonstrated the same level of charisma and endurance as men over time. The contributions of males to sports are well-known, but the achievements of women are rarely discussed. Until about 1900, men dominated Indian sports, but today, a growing number of women are pursuing and succeeding in sports as a career. As part of this piece, we'll be looking at some of India's most notable female sports leaders.

On the legal side of things, we'll look at legislation pertaining to and safeguarding women from things like sexual harassment, gender-based sexism, and significant laws that have dealt with them and the need for reforms in legislation related to women in athletics.

Keywords: Women, Athletics, Gender Discrimination, Sexism, Laws protecting women.

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1. INTRODUCTION

Participation in sports by women has been around for a long time. Conflict and discrimination abound, but so do the remarkable accomplishments of female athletes and the significant strides made toward achieving gender parity and women's empowerment throughout history. Women have made incredible progress in sports despite a variety of obstacles erected as a result of gender inequality. According to clinical trials and observational studies, women's engagement in physical activity and sport has long been known to provide health benefits. As a result, more women get involved in sports and go on to achieve success in their chosen sport. In the last 50 years, the gender gap in involvement has narrowed dramatically. Every day, we see the names of women who have triumphed in competitions in the headlines.

2. WOMEN IN ATHLETICS IN ANCIENT INDIA

In ancient India, Hinduism was the most widely practised religion. Throughout the Vedic and Epic eras, Indians have engaged in a variety of sports. Hinduism emphasised the importance of physical activity by emphasising the connection between the mind and the body. In contrast, the majority of Indian women's sports were played for fun. There are three types of traditional Indian sports: polo, sikhar (hunting), and jhula, jal krida (water sports)[230], were among the outdoor sports they played.

2.1 WOMEN IN ATHLETICS IN MODERN INDIA

Modern India was a lot more welcoming to women participating in sports than ancient India was. It has been established that the performance of women in sports in India since independence has been more than equal to the performance of males in the field. There are valid grounds for this: women have shown themselves to be decent players in some games and much superior in others when given the option to engage in sports and games. As a result, women faced considerable obstacles in terms of social structure prior to their freedom. Women were not allowed to participate in sports or games, and men were the only ones allowed to participate in these

[230]Rosa Lopez De D'Amico, Maria Luisa M.Guinto,Maryam Koushkie Jahromi, "Women And Sport In Asia" (Taylor & Francis 2021).

activities. A social and cultural backlash followed because it was viewed as unethical. Only a few Anglo Indians or those who resisted religious prejudice were allowed to participate in sports.

3. PROMINENT WOMEN IN ATHLETICS IN INDIA

In 1924, Indian women made their Olympic debut in Paris. The "Iron Lady," Karnam Malleshwari, won a bronze medal in weightlifting at the 2000 Summer Olympics in Sydney, becoming the first Indian woman to do so. Saina Nehwal, the 2012 Olympic bronze medalist, broke even more records after that. This was India's first Olympic medal in badminton. Saina Nehwal has won numerous medals outside of the Olympics, including those from the Commonwealth Games and the Asian Games.

A trailblazer in many ways, MC Mary Kom paved the way for others. For the first time ever, an Indian boxer had achieved Olympic success. First female boxer to win medals at all six World Amateur Boxing Championships was Mary Kom, who won five times. At the 2014 Asian Games in South Korea, she became the first Indian woman boxer to win a gold medal in the women's division.

With P.V. Sindhu and Sakshi Malik securing historic podiums on their Olympic debuts, India's medal collection was bolstered for the first time in Olympic history by female athletes. Only a handful of Indians can boast standing on the Olympic podium with a silver medal around their necks, but P.V. Sindhu fits that description. Aside from boosting the sport's popularity, her victories at the 2016 Olympics and the 2017 BWF championships established India as a serious force to be reckoned with.[231]

For the first time, an Indian female athlete won a medal in Olympic competition in Rio in 2016. A bronze medal for Sakshi Malik, 58 kg, in the 2016 Olympic wrestling competition made her the first Indian woman to win an Olympic wrestling medal.

Adding Sania Mirza to the list is a good move. Sania Mirza was the world's best women's doubles player for 91 weeks in a row, making her one of the most successful Indian tennis players of all time. One of just two women's doubles players in the history of the sport to win six

[231] Olympic Channel Writer, 'Indian women who broke the glass ceiling in Olympic sports' (Get inspired by these Indian Women Athletes, 3 September 2021) accessed 12 May 2022.

Grand Slam titles in a row. Sania has been awarded the Arjuna, Padma Shri, Khel Ratna, and Padma Bhushan honours for her outstanding contributions to Indian sports.

Among them is Dutee Chand, a professional sprinter who has won a silver medal at the Asian Games in Jakarta, where she represented India. During the IAAF World U20 Championships, Hima Das became the first Indian athlete to win a gold medal. Dipa Karmakar, the first Indian woman to win a medal in gymnastics at the 2014 Commonwealth Games in Glasgow, stole the show. Only Mithali Raj has scored more runs in one-day internationals than 6000 runs, and she is India's captain and the team's all-time leading run scorer.

It wasn't easy for these women to reach these milestones. They encountered numerous flaws during their journey to success, which we will go over in detail.

4. CHALLENGES FACED BY WOMEN IN ATHLETICS AND LAWS PROTECTING THEM

The 2011 National Sports Development Code governs sports in India. However, in the case of Indian Olympic Association v. Union of India, the validity of such a code was upheld. Although it is administered by a number of independent bodies, including the Board Control for Cricket in India, the Indian Olympic Association, and Hockey India, it is still governed by the IOC. Gender Discrimination is a broad term that encompasses a wide range of issues faced by female athletes today. Sexist language and behaviour toward female athletes are just a few examples of the many ways in which sports are riddled with gender discrimination.

4.1 SEXUAL HARASSMENT

In the sporting world, sexual harassment and assault have been dubbed a "microcosm." Sexual harassment and assault are common in sports because of their emphasis on masculinity and violence in the culture. The Second World Conference on Women and Sports in 1998 stated that "it is the responsibility of all parties to ensure a safe and supportive environment for girls and women to participate in sports at all levels." However, things are quite different in this case.

As early as the '80s, allegations of sexual harassment and assault by athletic trainers were making headlines. Coaches in high positions of authority have abused their authority numerous times by having unrestricted access to female athletes. Sexual acts with children have been committed by some of the most heinous criminals, leaving their victims with life-altering scars.

Krishan Kaushik, the coach of the Indian women's hockey team, and captain Ranjitha Devi filed a complaint with Hockey India in 2010. The team's videographer, Basavaraj, was also alleged to have been filmed with prostitutes while on a trip abroad. Krishan Kaushik was fired from the Central Zone hockey team, but he was unexpectedly rehired as a high-performance manager.[232]

An international-level gymnast and her coach allegedly made vulgar and obscene remarks about a young female gymnast during a practise at the Indira Gandhi Indoor Stadium. These charges were brought against the defendants under IPC sections 509 and 506, which state that "whoever commits the offence of criminal intimidation with the intent of insulting the modesty of any woman" shall be punished, and "whoever commits the offence of criminal intimidation with the intention of intruding upon the privacy of such a woman" shall be punished under IPC sections 509 and 506."[233]

There were allegations of molestation and sexual harassment against a SAI-run sports centre and school in north Bengaluru, Bangalore, in December 2017.[234] Section 354 of the IPC defines "molestation" as "Whoever assaults or uses criminal force to any woman intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years and shall also be liable to fine."[235] In his defence, the coach claimed that he only made physical contact with her while they were working on their discuss throw technique.

An Indian Paralympic team coach has been suspended for three years for misconduct, misbehaviour, and manhandling of female athletes in the case Prasanta Karmakar v. Paralympic Committee of India. Additionally, he was accused of filming athletes at the 2017 National Para

[232] Siva Gautam, 'Hunting Grounds -Are Indian Sports Persons at The Mercy of Predators?' (Nation of sport, 26 November 2018) <https://www.nationofsport.com/stories/sports-sexual-harrassment> accessed 10 May 2022.
[233] Press Trust of India, 'Gymnast, Coach Booked For 'Harassing' Woman Player' Business Standard (New Delhi, September 17, 2014) <https://wap.business-standard.com/article-amp/pti-stories/gymnast-coach-booked-for-harassing-woman-player-114091701130
-1.html> accessed 13 May 2022.
[234] Outlook Web Bureau, 'Three ITBP Constables Arrested For Allegedly Molesting Minor National Level Table Tennis Players In Chhattisgarh' Outlook(24 May 2018) <Three ITBP Constables Arrested For Molesting Minor Girls In Chhattisgarh (outlookindia.com)> accessed 10 May 2022.
[235] Indian Penal Code 1860, s 354.

Swimming Championships in Jaipur, India, without their permission.[236] However, Karmakar denied the charges against saying it was just a way of tarnishing his image.

Vijayawada police received a complaint in 2018 from five female Kabaddi players and the secretary of the Krishna district Kabaddi Association, V Veera Lankaiah, who accused him of sexual harassment and selling Form-2 certificates. Applicants for government jobs with a sports quota must submit Form-2, a certificate issued by the relevant sports association, as proof of their accomplishments in the sport in question.[237] In order to obtain a certificate, the athletes claimed that the secretary demanded sexual favours from them. Later, Veera Lankaiah appeared in court and was taken into custody by judicial authorities.

Some of the instances are not even reported. The stories repeat itself but in the midst of all, how do athletes protect themselves? The National Development Code of India, 2011, contains specific principles and restrictions aimed at preventing female sexual harassment. One of this includes The Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013.[238]

Section 2(o)(i) of this act defines workplace as "Any sports institute, stadium, sports complex or competition or games venue, whether residential or not used for training, sports or other activities relating thereto." To this list should be added: "Any department or organisation that is established or controlled by the appropriate government in whole or in part, whether through ownership, control, or funding provided directly or indirectly." In this regard, the aforementioned national sports federations are funded by the government. As a result, this rule can be fully implemented to ensure the safety of female athletes on the field of play.

Another law which gives protection to minors is Protection of Children from Sexual Offences (POCSO) Act, 2012. The POCSO Act, passed in 2012, is a comprehensive law that protects children against sexual assault, pornography, and harassment. The Act identifies different types of sexual abuse, including both penetrative and non-penetrative assault.[239]The Act protects the

[236] Prasanta Karmakar v. Paralympic Committee of India, (2020) Delhi High Court 1.

[237] Express News Service, 'Sexual harassment: Andhra Pradesh Kabaddi Association' The Indian Express (Vijayawada, 17 May 2018) <http://www.newindianexpress.com/cities/vijayawada/2018/may/17/sexual-harrassment-andhra-pradesh-kabaddi-association-secretary-surrenders-in-court-sent-to-judicia-1815685.html> accessed 17 May 2022.

[238] Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act 2013, s 2.

[239] The Protection of Children from Sexual Offences Act 2012, s 2.

interests of children under the age of 18 by providing child-friendly reporting and evidence recording methods.

4.2 GENDER DISCRIMINATION

Sports have always been a male-dominated domain, helped by systemic gender discrimination. Women have been denied full and equal participation due to institutional limits and social prejudices. Where exactly have these restrictions come from?

Some myths have grown up around female participation in sports. Many people believe that sports are bad for a woman's reproductive system, endanger her ability to bear children, and make her appear more masculine. Male masculinity will be compromised if girls outperform boys in sports; human and economic resources will be wasted because female performance levels are significantly lower than male performance levels; sport is irrelevant to the social development of girls because achievement, aggressiveness, and competition don't matter in a woman's life. Despite the fact that research has dispelled all of these myths, they continue to affect some athletes, leading to negative connotations and a sense of identity crisis. Even though this can happen, studies show that it is generally a good experience. When comparing female athletes and non-athletes in countries like India, the United States, and Australia, data shows that female athletes have a better sense of self-worth, a more positive body image, and a more positive outlook on life than non-athletes.[240]

As a result of hypoandrogenism regulations, sprinter Dutee Chand was disqualified and dropped from the national team by the Athletics Federation of India (AFI) and the International Association of Athletics Federations (IAAF) in 2014.[241] Ms Chand made history as the first athlete to challenge these rules at CAS. The aftermath of this, Ms Chand was allowed to compete again after being banned for 1 year. The CAS temporarily halted the IAAF's hypoandrogenism policy for a period of two years. In May 2019, she came out and said she was in a same-sex relationship in public. She made history as the first female athlete to make such a confession. In India, same sex partnerships are still frowned upon. This has set a precedent for other female athletes who are faced with controversial suspensions.

[240] Betzer-Tayar M, "The Role of Women in Decision-making Positions: The Case of Israeli Sport Organisations" <https://hdl.handle.net/2134/12089> accessed 17 May 2022.
[241] CAS2014/A/3759, Chand v. AFI and IAAF

During the National Open Athletics Championships, India's sprint queen, P.T. Usha, broke down in front of the media after being denied proper accommodations due to discrimination.[242]

There is still a significant amount of adversity faced by women in the pursuit of authority within sports administration and coaching ranks. The percentage of women who hold positions of authority within Indian sports associations ranges somewhere between 2% and 8%. The lone exception to this is the sport of hockey in India, which has a female participation rate of 34 percent. Federations have only awarded recognition to a small number of female coaches. The SAI has a total of 1013 coaches, but only 183 of them are female.

4.3 GENDER PAY GAP

Gender-pay gap has been a recurrent problem over the decades. It is a well-known fact that women receive less in the way of incentives, remuneration, and benefits than men. Furthermore, men are clearly at the forefront of society. There are fewer and lower-quality sponsorships available for women as well. The wage disparity is one of the most visible examples of bias.

An example of this is the pay gap between men's and women's cricket players in India: According to BCCI annual player contracts, men with grades A+, 50 million, 30 million, and ten million of rupees can expect to receive; women can expect to receive INR five million in A+ payments along with INR three million in B+ payments and one rupee in C+ payments during the same time period. It's clear that there's a huge difference. The BCCI pays Smriti Mandhana 50 lakh per year, which is only 7% of Virat Kohli's annual income[243] of 7 crore per annum. The female wage gap in sports is greater than that in politics, business, and even academia, according to the 2017 Global Sports Survey's overall inequality issue.

What accounts for the widening wage gap? Sports' androcentric nature affects the number of viewers and fans, so this is based on that. Women's sport has a lower 'entertainment value' than men's sport because they entered the sports arena considerably later than men. Men's sport, on the other hand, has always been encouraged, allowing it to expand into a global phenomenon and drawing greater financing.

[242] Dr.Sushil Kumar Sharma, Dr. Ekta Sharma and Saurabh Kumar, Yatendra Sharma, "Gender Discrimination in Indian Sports" (2018) 32 IJASRM 59.
[243] Liesl Goecker, 'All the Arguments You Need: To Advocate for Equal Pay in Sports' (The Swaddle, July 5 2019).

Male and female tennis players are paid equally at Grand Slam events since 2007, but female tennis players are paid significantly less than male tennis players at men's-only events in the world of professional tennis.

The tenacity and determination of women in their fight for equal rights has yielded fruitful results. Dipika Pallikal, an Indian squash player, questioned the disparity in pay between men and women and boycotted the 2015 squash nationals. Some of the innovative attempts date back to 1973, when Billie Jean Kind led the push for equal pay for male and female tennis players in tournaments.

4.4 OTHER CHALLENGES

Women also confront discrimination when it comes to media coverage and representation. The media's portrayal of female sports and athletes has the potential to fuel damaging stereotypes. Media portrayals of female athletes frequently place their focus on their femininity before their abilities as athletes. A study conducted on two English newspapers in India's coverage of the 2014 Incheon Games revealed that female medalists received far less attention than their male counterparts did. Despite the fact that Sania Mirza won the double mixed doubles match in tennis, neither magazine showed her competing on the court. Nevertheless, the Midday edition featured two photographs of her: one of her posing with the trophy, and the other of her attending a fashion event.

Mary Kom, the three-time world boxing champion, won gold, but it was only until a Bollywood film was made in her honour that the news became widely known. Geeta Phogat's performance in Dangal, a biographical film, received more attention than her performance in Ground. Many of the terms used to describe female sports stars perpetuate gender stereotypes about the athletic abilities of women and the social acceptability of their involvement in sports.

Women and girls are also discouraged from participating in sports due to cultural and religious issues. That's what Mary Kom's father was worried about when she decided to take up boxing, according to the Olympic gold medalist. Residents and extended family members of Haryana's wrestlers Geeta and Babita Kumari hurled insults at them, claiming that no one would marry a girl with muscles and that wrestling like a man was a disgrace to women's dignity.

5. THE NEED FOR A COMPREHENSIVE SPORTS LAW IN INDIA

In contrast to other areas of life in India, there is no specific legislation governing sports at this time. Many statutes' provisions have been applied to sports-related concerns and litigation because there is no formal legislation. Judicial judgements of the Supreme Court and various High Courts serve as guiding principles for Indian sports.

Unlike other countries, India's legislators have made no effort to contribute to sports law, despite other countries making significant efforts in this area. Unlike the United States, France, China, or Canada, India's sports jurisprudence is still developing, despite the presence of various sports authorities.

The protection of female athletes in sports is hampered by this. Many of the above- mentioned cases would not have made news if rigorous laws and regulations had been in place. Women in sports are still without a clear legal framework in India, despite the fact that anti-discrimination legislation has been implemented.

We urgently require a structure specifically devoted to ensuring the safety of female athletes, one that takes into account their unique strengths and weaknesses. A sports law should be enacted that gives special protection to women by taking these concerns into account.

6. CONCLUSION & SUGGESTIONS

Sport in India has undergone a dramatic shift over the past decade. As a result, it has helped to empower women, increase diversity, and create new employment opportunities. Discrimination based on gender is being reconsidered and challenged. As a result of the strong female leadership, more women and girls will participate in sports. Despite the numerous hurdles that India's sports women endure, the future appears promising.

Female athletes in India are most in need of encouragement. Federal civil rights legislation in the United States prohibits sex-based discrimination in any school or educational programme receiving federal funding. To ensure that all federally funded educational institutions, from elementary schools to colleges and universities, give female athletes equal opportunity in sports, Title IX was implemented.

Similar legislation could be enacted in India based on similar legislation in other countries, which could encourage more participation in sports. Reforms must be implemented from the ground up in today's changing times. I believe that if our country had strong and stringent laws in place to protect the rights of women in sport, we could achieve a lot more in the future.

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Decoding Sections 354 to 354D, IPC in a new dimension

*Krishna Murari Yadav

Abstract

Outrages of modesty, sexual harassment, disrobing etc., are direct attacks on the fundamental rights of women enshrined in Articles 19 & Article 21, the Constitution of India. These are also contrary to the right to life, including the right to privacy & right to personal liberty. Right to life includes the right to a dignified life.[244] There are many gender-based laws for protecting women. According to Article 15 (3), the States are authorised to enact special laws for the protection of women and children. Sexual offences have physical as well as psychological effects. It has a long effect on the thought process and social behaviour of the victim. These offences denote patriarchal thought. It must be stopped at any cost. In this article, the researcher will try to interpret Sections 354 to 354D in the context of changing society and for better protection of women. Way of laws' interpretation will be beneficial for increasing the conviction rate.

Keywords

Outrage of Modesty, Sexual Harassment, Disrobing, Voyeurism, Stalking

(1.) Introduction

Hon'ble Justice Arijit Pasayat observed[245], "Denial of a fair trial is as much injustice to the accused as is to the victim and the society. The concept of a fair trial is triangulation". Section 354, the Indian Penal Code, 1860 (the Code), is from the very beginning. Sections 354A to 354D were inserted in 2013. These sections deal with different types of outrage of modesty. These offences are part of offences against the body, i.e. part of Chapter XVI, IPC. IPC provides general laws for conviction of sexual offences culprits. Section 509 also deals with insulting the modesty of women.

The Protection of Children from Sexual Offences Act, 2012[246] is special law which has been enacted for the protection of the interest of children. In *Attorney General for India and Ors.* v.

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[244] *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597. The case was decided on January 25, 1978.
[245] *Zahira Habibulla H. Shiekh & Anr.* v. *State of Gujarat and Ors.* was decided on April 12, 2004, which is known as the 'Best Bakery Case'. *Available at:* https://indiankanoon.org/doc/105430/ (Visited on April 30, 2022).
[246] *Available at*:

Satish and Another[247] Supreme Court observed that since the sexual offences against women were not adequately addressed by the existing laws. So, the Parliament enacted the POCSO Act, 2012 protecting children from pornography, sexual harassment, and sexual assault.

The IPC is a general law. Section 5 of the IPC says that IPC will not affect special law. It further provides that a special law will prevail over general law in case of inconsistency between general law (IPC) and the special law (POCSO). Section 41 of the Code defines 'special law'. There are many differences between IPC and POCSO. Major differences are in the point of a subject, burden of proof, the standard of proof and punishment. Sections 454 to 354D deal with women and apply to women, while POCSO applies to Children. In *State of Punjab* v. *Major Singh*[248] Justice Bachawat interpreted women in the light of Section 7 IPC, read with Section 10 IPC in the context of Section 354. It can be concluded that every female comes under the definition of a woman irrespective of her age. For the purpose of the POCSO Act, children are below the age of 18 years, irrespective of their sex.[249] Prosecutor is bound to prove the commission of an offence by the accused under IPC beyond a reasonable doubt. In contrast, in the case of the POCSO Act, the accused is bound to prove his innocence beyond a reasonable doubt.[250]

Women are not to be treated as flowers. They are fire. The State has recognised the rights of the private defence since the inception of its origin. They have the right of private defence not only to protect their body but also the body of others. If they do anything in the exercise of the right of private defence as enshrined in Sections 96 to 102 except Section 100 and 106, they will not be liable for any offence. In case of outrage of modesty, she can't cause death. Her matter will be covered only under Section 101.

(2.) Section 354, IPC

Section 354 deals assault or criminal force to woman with intent to outrage her modesty. The Section requires intention or knowledge. Section 354 is based on 'Actus non facit reum, nisi mens sit rea'. There is no question of the application of 'Strict Liability'. A person could not be liable without a guilty mind. The Criminal Law (Amendment) Act, 2013 amended Section 354

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https://www.indiacode.nic.in/bitstream/123456789/2079/1/AAA2012___32.pdf#search=POCSO (Visited on March 1, 2022).

[247] *Attorney General for India and Ors.* v. *Satish and Another*. Date of Judgment: November 18, 2021. *Available at:* https://main.sci.gov.in/supremecourt/2021/2286/2286_2021_32_1501_31537_Judgement_18-Nov-2021.pdf (Visited on February 2, 2022).

[248] *Infra* n. 10

[249] The Protection of Children from Sexual Offences Act, 2012 (Act 32 of 2012): Section 2 (d).

[250] *Supra* n. 4 and The Protection of Children from Sexual Offences Act, 2012 (Act 32 of 2012): Section 30,

and enhanced punishment for outrage of modesty. In *Pandurang Mahale* v. *State of Maharashtra and Anr*.[251] and *Ramkripal S/o Shyamlal Charmakar* v. *State of Madhya Pradesh*[252] the Supreme Court observed that there are the following essential ingredients of Section 354 IPC -

(i) Existence of criminal force or assault on a woman.

(ii) The intention of such criminal force or assault should be to outrage the modesty of women.

In these cases, ratios of *State of Punjab* v. *Major Singh*[253] and *Rupan Deol Bajaj* v. *KPS Gill*[254] were discussed.

(2.1.) Ingredients

There are the following ingredients of Section 354 –

(2.1.1.) Method

There must be the use of assault or criminal force. The meaning of 'Assault' and 'Criminal Force' in the context of Section 354 must be read with Section 7 and 351 & 350, respectively.

(2.1.2.) Mens Rea

An offence under Section 354 can be caused either with intention or knowledge. The intention is desire and foresight of consequences. Knowledge is the awareness of consequences. In *Basdev* v. *The State of Pepsu,* Supreme Court said, "knowledge is an awareness of the consequences of the act."[255] In *Emperor* v. *Mt. Dhirajia,*[256] Allahabad High Court observed, "Some degree of knowledge must be attributed to every sane person". An insane person can't form awareness.

(2.1.3.) Only Women Victim

Outrage of modesty of women is possible under Section 354. Outrage of modesty of men is not possible under Section 354. In *State of Punjab* v. *Major Singh*[257] Hon'ble Justice Bachawat interpreted 'Women' in the light of Section 7 read with Section 10 in the context of Section 354.

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[251] *Infra* n. 19.
[252] Date of Judgment: March 19, 2007. *Available at:* https://indiankanoon.org/doc/1308370/ (Visited on March 1, 2022).
[253] AIR 1967 SC 63. Date of Judgment: April 28, 1966.
Available at: https://main.sci.gov.in/jonew/judis/2651.pdf (Visited on March 1, 2022).
[254] *Infra* n. 16.
[255] *Basdev* v. *The State of Pepsu* (Date of Judgment: April 17, 1956 S. C.).
Available at: https://indiankanoon.org/doc/504992/ (Visited on January 15, 2022).
[256] AIR 1940 All 486 (Date of Judgment: June 04, 1940, Allahabad High Court).
[257] *Supra* n.10.

It was concluded that every female comes under the definition of a woman irrespective of her age. In this case, a female baby whose age was only near about seven months and fifteen days was treated women for the purpose of Section 354.

(2.1.4.) Outrage of modesty

If there is no outrage of modesty of women, no question arises regarding the application of Section 354. The essence of a woman's modesty is her sex.[258] The meaning of modesty was discussed in *Rupan Deol Bajaj* v. *KPS Gill.*[259] In this case, Supreme Court observed that the modesty word had not been defined under IPC while this word has been used under Section 354 and Section 509, IPC. The Supreme Court took the help of dictionaries to define 'Modesty'.

The Supreme Court observed that if the act of the accused is of such kind, which is shocking the sense of women's decency, he will be told that he had outraged the modesty of a woman.

In this case, Supreme Court observed that slapping the posterior part (Butt) of a woman publicly would amount to outrage of modesty of a woman. The Court convicted the accused under Section 354, IPC. In *State of Punjab* v. *Major Singh*[260] Hon'ble Justice Bachawat held that woman's modesty exist in her sex. She possesses modesty by birth. Modesty is attributed to her sex. It was held that seven and half months baby had modesty. Inserting fingers in her vagina was outrage of modesty. Accused was convicted under Section 354, IPC.

In *Baldeo Prasad Singh* v. *State*[261] victim was cooking food. Baldeo Prasad Singh entered the house and squeezed her breasts. After this, he ran away. Orissa High Court convicted the accused of outraging the modesty of the victim under Section 354.

In *Pandurang Mahale* v. *State of Maharashtra and Anr*.[262] (2004) Supreme Court observed, "The act of pulling a woman, removing her saree, coupled with a request for sexual intercourse, is such as would be an outrage to the modesty of a woman; and knowledge that modesty is likely to be outraged is sufficient to constitute the offence without any deliberate intention having such

[258] *Pandurang Mahale* v. *State of Maharashtra and Anr*. 2004 (4) SCC 371 and *Ramkripal S/o Shyamlal Charmakar* v. *State of Madhya Pradesh* Date of Judgment: March 19, 2007.
[259] *Infra* n. 32.
[260] *Supra* n. 10.
[261] 1984 Cri. L.J. (NOC) 122 (Orissa).
[262] 2004 (4) SCC 371.

outrage alone for its object". It was followed in *Ramkripal S/o Shyamlal Charmakar* v. *State of Madhya Pradesh.*[263]

(2.1.5.) Offender

There is neither dispute nor doubt that men can commit an offence under Section 354, IPC. There are some doubts about whether a woman can outrage the modesty of another woman. 'Whoever…' word denotes any person irrespective of age or sex. This word includes he, she and transgender. '… he will thereby outrage her modesty…' words have been used. According to Section 8, the pronoun 'he' and its derivatives are used of any person, whether male or female. He includes 'she'. 'Whoever' may be interpreted in the light of Sections 354A, 354B, 354C, 354D and 375. Section 375 says, 'a man is said to commit rape…' Section 375 clearly says that only a man can commit rape. In contrast to Section 375, Section 354 uses 'Whoever'.

The victim's brother had already been arrested for raping a four-year girl. All the women accused assembled together and pulled out a victim from home in public. They naked her, age 22 years, by tearing her clothes. They compelled her naked, parading her in public on June 17, 2010. Session Court rejected the argument that only a man can be convicted under Section 354. Session Court interpreted Section 354 read with sections 7 and 8. The Session Court convicted 11 women under Section 354 for outraging the modesty of a woman in December, 2015.[264]

(2.2.) Attorney General for India and Ors. v. Satish and Another

The Supreme Court decided *Attorney General for India and Ors.* v. *Satish and Another* on November 18, 2021. This case is known as the 'Touch to touch' skin case. In this case, many appeals were filed before the Supreme Court. There were two accused in different cases, one of them was Satish, and another was Libnus. Satish had pressed the breast of the victim, aged about 12 years, without removing her top. He did not touch her breast directly. He also tried to remove her salwar. He pressed her mouth and did not allow her to shout for help.

The Extra Joint Additional Sessions Judge, Nagpur, convicted Satish under Sections 342, 354 and 363, IPC and Section 8, the POCSO Act, 2012.

[263] *Supra* n. 9.

[264] Rebecca Samerve, '11 women, jailed for 'outraging modesty' *Times of India*, December 30, 1015. *Available at:* https://timesofindia.indiatimes.com/city/mumbai/11-women-jailed-for-outraging-modesty/articleshow/50374229.cms (Visited on March 4, 2022).

Bombay High Court (Nagpur Bench) acquitted the accused for a charge under Section 8 of the POCSO Act. The High Court said that there was a need for direct touch for 'sexual assault', which is defined and punished under Section 7 and Section 8, respectively. But the Court convicted the accused under Sections 342 and 354 of the IPC.

Supreme Court convicted the accused of 'sexual assault' under section 8, the POCSO Act and Sections 342, 354 and 363 of the IPC.

(2.3.) Problem & Solution

There was fighting between Salama and Riya in the Faculty of Law, University of Delhi. Riya intentionally or knowingly squeezes the boobs of Salama during a fight. Salama reached Mauris Nagar Police Station, and she was putting pressure on SHO to register cases under Sections 323 and 354, IPC. SHO is ready to register the case under Section 323, but he denied registering FIR under Section 354, IPC. Salama reached the Court and requested to pass an order for registration of FIR under Section 354 by using the power under Section 154 (3), CrPC.

Is Riya can commit an offence under Section 354, IPC?

Riya can commit an offence under Section 354. Knowledge means awareness of consequences. 'Squeezing' word has been used rather than touching or holding. The answer to this question is based on the meaning of 'Whoever' and 'he', which have been used under Section 354. 'He' must be interpreted in the light of Sections 8 r/w Section 7. 'Whoever' may be interpreted in the light of Sections 354A, 354B, 354C, 354D and 375, IPC. These Sections clearly use 'Man' rather than whoever. It means the legislative body was not ready to allow one woman to outrage the modesty of other women. The meaning of modesty is not gender-based.

Women are also losing morality day by day. During the fight, they may do anything to humiliate other women publicly. The purpose of Section 354 is to protect the modesty of women rather than protect and convict offenders only on the basis of sex. FIR must be registered against Riya.

(3.) SECTION 354A

Article 15(3) states that the State can make any special law for the protection of women. According to Article 51A (e), it is a fundamental duty of every citizen of India to renounce practices derogatory to the dignity of women. Gender justice is a pillar of Article 14. The right to privacy and dignified life is a sine qua non-part of Article 21. These rights are also available to

foreigners, including women of enemy countries. Sexual harassment can be discussed through the following points –

Before the insertion of Section 354A in 2013, sexual harassment was covered under Section 354. Now Sexual harassment is covered under Section 354A. If any action is not covered under Section 354A, but that is outrage of modesty, it will be punished according to Section 354, IPC. Section 354A is specific, while Section 354 is general.

A writ petition was filed for violation of Articles 14, 19 and 21. *Vishaka & Ors* v. *State of Rajasthan & Ors*[265] was decided by Supreme Court in which sexual harassment at the workplace was discussed. Supreme Court observed that gender equality is a fundamental right under Article 14 of the Constitution. Sexual harassment and sexual assault is against norm of gender equality.

Guidelines were issued for the protection of Sexual harassment of women in the workplace, and it was directed that these guidelines should be treated as law under Article 141 of the Constitution of India. Sexual harassment was defined in this case. The Court observed, "…sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:

(a) physical contact and advances;

(b) a demand or request for sexual favours;

(c) sexually coloured remarks;

(d) showing pornography;

(e) any other unwelcome physical verbal or non-verbal conduct of sexual nature".

For criminal law, sexual harassment was covered under Section 354 before the 2013 amendment. Now specific section has been provided for this. So it will be covered under Section 354A. Section 354A is gender-based. Only man can commit an offence, and only a woman can be a victim.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 was enacted in 2013. Section 2 (n) of the Act also defines sexual harassment.

Sexual Harassment has been provided under section 354A, which was inserted by Criminal Law (Amendment) Act, 2013. Section 354A (1), IPC also defines sexual harassment.

There are four categories of the definition of sexual harassment. These are –

[265] Date of Judgment: August 13, 2022. *Available at*: https://main.sci.gov.in/judgment/judis/13856.pdf (Visited on March 03, 2022).

(1) Physical contact & sexual overtures– If a man makes physical contact with a woman and involves in an unwelcome and explicit sexual overture, he will be told that he has committed sexual harassment. Mere physical contact is not sufficient. There are two ingredients to this. One of them is physical contact and another is the involvement of unwelcome and explicit sexual overture.

(2) Demand for sexual favours – In this category, there is no need of physical touch. Here demand or request for sexual favour is sufficient. Demand and request both words have been used. 'Demand' has flavour of supremacy, while request denotes courtesy. 'Request' gives more options to the victim. If the boss says for sexual favours, this is demand. If a friend says for sexual flavour, this is a request. It depends upon the facts and circumstances of each case. There is no straight-jacket formula.

(3) Showing pornography – If a man shows pornography with consent, that is not sexual harassment. But showing pornography against her will would amount to sexual harassment. If Ram knowingly sends a porn video on WhatsApp of Reema. He knew that Reema was against such videos. Reema thought that he had sent Holi messages and some relevant videos. She opened it. She was surprised. She went to a Police station, and made FIR lodged. Ram had committed an offence of sexual harassment. In another example, he sent porn videos. But he deleted it before she was seeing. He will not be liable for sexual harassment.

(4) Sexually coloured remarks – If a man makes sexual coloured remarks to a woman, he will be liable for sexual harassment. For example, Abdul folded two fingers of his left hand and tried to make the shape of a vagina. After this, he started to insert the finger of the right hand into the folded finger of the left hand. In this way, he was showing penetration of a penis into a vagina. He was doing this work in front of Sania. He will be liable for sexual harassment, and it will be said that he was making sexual coloured remarks.

In *Attorney General for India and Ors.* v. *Satish and Another*[266], the Supreme Court convicted Libnus for having sexual harassment of the victim, aged five years, under Section 354-A(1)(i) and the POCSO, Act. The mother of the victim saw in her house that her daughter was raising

[266] Supra.

her pant upwards. The accused was holding her hand. When she scolded, he released her hand and started to close the zip of his pant.

(3.3.1.) Sexual Harassment Allegation against former CJI

Massive controversy erupted in 2019 after a Supreme Court staffer [Junior Court Assistant] alleged sexual harassment by then Chief Justice of India Ranjan Gogo. She was arrested and kept in police custody. Her husband was beaten in police custody.[267] The victim was under surveillance through the 'Pegasus' after submission of the Affidavit.[268]

Supreme Court had closed suo motu proceeding against sexual harassment charge against Mr Ranjan Gogoi who delivered Ayodhya Judgment and now Member of Rajya Sabha.[269] He had played a vital role in the preparation of NRC. Supreme Court observed that there was a possibility of a conspiracy behind the case.[270]

(4.) SECTION 354B

Section 354B deals with assault or use of criminal force to woman with intent to disrobe. There are the following ingredients of Section 354B –

(1). Only a man can commit a crime. This is not neutral law.

(2). Only women can be victims.

(3). It can be caused either by assault or criminal force.

(4). Disrobing must be with intention.

There are two parts to this section, namely; (a) actus reus, and (b) mens rea. Even the threat of disrobing is sufficient. Even abetment is also punishable. Attempt to disrobe will cover under

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[267] Sruthisagar Yamunan & Supriya Sharma, "Chief Justice of India sexually harassed me, says former SC staffer in an affidavit to 22 judges" *Scroll.in*, April 20, 2019. Available at: https://scroll.in/article/920678/chief-justice-of-india-sexually-harassed-me-says-former-sc-staffer-in-affidavit-to-22-judges (Visited on March 03, 2022).

[268] Scroll Staff, *Pegasus: Woman who accused former CJI Ranjan Gogoi of sexual harassment among potential targets' Scroll.in' March 03, 2022. Available at: https://scroll.in/latest/1000586/pegasus-woman-who-accused-former-cji-ranjan-gogoi-of-sexual-harassment-among-potential-targets* (Visited on March 4, 2022).

[269] Reporter, 'SC closes sexual harassment proceedings against former CJI Ranjan Gogoi, hints at a conspiracy behind charges' *India Today*, February 18, 2021. https://www.indiatoday.in/india/story/sc-closes-sexual-harassment-case-against-ranjan-gogoi-1770437-2021-02-18 (Visited on March 03, 2022).

[270] G. Ananthakrishnan, Supreme Court closes cases against ex-CJI Ranjan Gogoi, says plot against him not ruled out' '*Indian Express',* February 19, 2021. Available at: https://indianexpress.com/article/india/ranjan-gogoi-sexual-harassment-case-supreme-court-conspiracy-7193712/ (Visited on March 3, 2022).

Section 511, IPC. This gender-based law. Only a man can commit an offence. Only disrobing of women is punishable.

Pulling the veil without the consent of women is criminal force. Section 350, illustration (f) supports this point. An essential ingredient of Section 354 B is criminal force.

A Group of men recorded their act of forcefully disrobing a woman, and more than 20 people were looking in Uttarakhand in 2016. No one had saved her. There was viral video.[271]

(4.1.) Disrobing of men by men or women

What would offence be constituted in case of disrobing of man by man or women?

In case of minor matter will be covered under POCSO, Act 2012 especially under Section 11 (ii). In the case of others, the matter will be covered under Section 355. Disrobing a man is the dishonour of that person. Under section 355, a person has been used. It means the culprit may be of any sex.

(4.2.) Pulling of Hijab, Veil or Bikini

Hindu and Muslim are two eyes of mother India. Both have fundamental rights to enjoy their life as per their wish. It is other thing that any fundamental right is not absolute. They can be compelled to show their face only for security purposes. But these women cannot be compelled to wear any particular type of dress. Dress is part of the right to life. Pulling hijab, veil, and bikini is a violation of dignified life. 'Disrobing' means take off one' clothing. There are two types of disrobing – (1) Partial disrobing and (2) complete disrobing. Pulling of hijab, veil or bikini only is partial disrobing.

Pulling the veil without the consent of women is criminal force. Section 350, illustration (f) says that intentionally pulling of a veil of a woman without her consent by using force will amount to criminal force. His intention must be to injure, frighten or annoy her. One of the essential ingredients of Section 354 and Section 354B is criminal force.

In *Pandurang Mahale* v. *State of Maharashtra and Anr*.[272] Supreme Court observed, "The act of pulling a women, removing her saree, coupled with a request for sexual intercourse, is such as would be an outrage to the modesty of a woman; and knowledge that modesty is likely to be

[271] Vineet Upadhyay, Group of men recorded their act of forcefully disrobing a womanwhile more than 20 stood watching the act, *The Times of India*, September 25, 2016.
Available at: https://timesofindia.indiatimes.com/city/dehradun/group-of-men-record-their-act-of-forcefully-disrobing-a-woman-while-more-than-20-stood-watching-the-act/articleshow/54508105.cms (Visited on March 03, 2022).

[272] *Supra* n. 19.

outraged is sufficient to constitute the offence without any deliberate intention having such ourtrage alone for its object". It was followed in *Ramkripal S/o Shyamlal Charmakar* v. *State of Madhya Pradesh.*[273]

Meaning of modesty with the help of *Punjab* v. *Major Singh*[274] and *Mrs. Rupan Deol Bajaj & Anr*. v. *Kanwar Pal Singh Gill & Anr.*[275] had already been discussed above.

We should respect the dress of each and every woman. If anyone pulls a hijab[276], veil or bikini against the consent of a woman, a question arises what offence had been committed by him/her? There are the following answers –

(1) Disrobing by a woman – If one woman disrobes another woman, she will be liable under Section 354, IPC.

(2) Disrobing by man - If one man disrobes another woman, he will be liable under Section 354 and Section 354 B, IPC.

(5.) SECTION 354C

Voyeurism has been provided under Section 354C, which was inserted by Criminal Law (Amendment) Act, 2013.

There are the following ingredients of voyeurism –

I. **Only men accused** – Only men can commit an offence of voyeurism. Women cannot be liable for voyeurism.
II. ***The expectation of woman-*** There must be an expectation of a woman that no one must see her. If she is taking a kiss with her boyfriend in a public auto-rickshaw and another passenger is seeing rather than gazing, it will not amount to voyeurism.
III. ***"Private Act"*** - The woman must engage in 'a private act'. According to explanation 1, "Private act" for Section 354C covers the act of watching the victim in such circumstances which would reasonably provide privacy, and the victim is involved in the following cases –(i) She is in such a position that her posterior, genitals or breast are exposed or covered only in underwear. (ii) She is involved in a lavatory, or (iii)

[273] *Supra* n. 9.
[274] *Supra* n. 10.
[275] AIR 1996 SC 309. This case was decided by Hon'ble Justice M.K. Mukherjee on October 12, 1995. *Available at*: https://indiankanoon.org/doc/579822/ (Visited on March 1, 2022).
[276] *Smt. Resham and Another* v. *State of Karnatak and Othjer*, Karnataka High Court, Date of Judgment: March 15, 2022. Hijab is not an essential part of religion. It can be prohibited in educational institutions.

She is involved in sexual intercourse of such kind, which is not performed in a public place.

IV. ***Watching, capturing or disseminating*** **–** Watching is not in the permanent form. But capturing and disseminating become in permanent form. When she is engaging in a private act, someone is either watching, capturing the images of a woman, or he disseminates such images. According to explanation 2, where the victim consented only to capturing images, but she prohibited dissemination to third persons. Case of dissemination of such images will be an offence under Section 354C.

V. ***Perpetrator or on behalf of the perpetrator*** **–** Such Watching, capturing or dissemination may be done either by the perpetrator or on behalf of the perpetrator.

(6.) SECTION 354D

Stalking is unwanted contact by someone, and you feel harassed or afraid. The stalker may also use different types of technology, including email and other social media. Research says that out of six, one woman has experienced stalking in her lifetime.[277]

Two news portals released tapes in public alleging that Mr Amit Shah was directing police to put a young woman and senior IAS officer under illegal surveillance in 2009. At that time, Mr Amit Shah was Minister of State for Home in Gujarat.[278]

Stalking has been provided under section 354D, which was inserted by Criminal Law (Amendment) Act, 2013. It deals with physical and electronic stalking. Only man can be liable under Section 354D. It is gender-based law.

(6.1.) Kinds of Stalking

There are two types of stalking, namely; *(1) Physical stalking and (2) Electronic stalking.*

i. ***Physical Stalking*** - In physical stalking, a man follows a woman. He contacts or attempts to contact to foster personal interaction. He follows repeatedly. He does this despite a clear indication of disinterest of the woman. Single follow up will not cover under physical stalking. The word 'repeatedly' has been used under Section 354D.

[277] *Available at*: https://www.womenshealth.gov/relationships-and-safety/other-types/stalking (Visited March, March 4, 2022).
[278] HT Correspondent, 'Amit Shah accused of snooping on a woman in 2009' *Hindustan Times*, November 19, 2013. *Available at*: https://www.hindustantimes.com/india/amit-shah-accused-of-snooping-on-woman-in-2009/story-Md1i9PLxPbv9BDNllXpXpL.html (Visited on March 4, 2022).

ii. ***Electronic Stalking-*** Any man who monitors the use by a woman of the internet, email or any other form of electronic communication commits the offence of stalking.

In electronic stalking, a man monitors the internet and other electronic communication used by a woman. In modern times, everyone, including women use internet and other social media to express their view. Everyone is equal. Women should not be harassed in any manner, including electronic stalking. Using 'Pegasus Spyware' against any women will come under this category. Illegal call intercepting will also come under this category. Repeated sending of facebook requests or comments, WhatsApp messages, sending messages through other electronic methods and calling, etc., will come under this category.

Exceptions -

Certain kinds of physical and electronic stalking are not an offence under section 354D. There are certain justifications for this. Three categories of conduct will not amount to stalking, which is the following –

1. ***Prevention of Crime –***

If State has imposed responsibilities to prevent and detection of crime and a man was stalking in pursuance of those responsibilities, he will not be liable for stalking under Section 354D. This exception is sine qua non to protect the life, liberty and property of persons along with the sovereignty and integrity of the nation. In the absence of this exception, no one will be ready to work in IB, CBI and other intelligence agencies.

2. ***Compliance with Law*** –If a man stalks a woman in compliance with the law, he will not be liable for stalking.
3. ***Reasonable conduct-*** If the conduct of a man was justified and reasonable in the particular circumstances, he would not be liable for stalking. Salma and Abdul are students of LL.B., Faculty of Law, University of Delhi. Salma is in CLC, and Abdul is Law Centre-II. The class timing of both is the same. But both never talked to each other. Abdul and Salma both were using Metro and Bus. After some time, Salma thought that Abdul was stalking her. She thought that Abdul followed every day. At the same time, Abdul was using the metro and bus to take classes. The timing of both centres is the same. Salma did not know that Abdul was a student of LC-II. That's why he uses the

metro and bus. Abdul will not be liable for stalking. The reason for this is that his conduct was reasonable and justified.

The burden of these three types of conduct will lie on that person who wants to take benefit.

Punishment for Stalking **-** Punishment for stalking may be divided into two categories, namely (i) First Conviction and (ii) Subsequent Conviction

First Conviction –

In the case of first conviction for stalking, the maximum punishment is imprisonment of either description of three years. He shall also be liable for a fine.

Subsequent Conviction – In the case of second or subsequent conviction, punishment has been enhanced. He comes under the category of habitual offender. In such cases, there is provision for imprisonment of either description for a term which may extend to five years. There is a provision for a fine also.

(7.) Conclusion

Offences against women are increasing day by day. There is a need for sensitisation among families, societies, police and Courts. It was often observed that due to family pressure, the victim did not approach the police station to make an FIR lodged. Several times the police did not lodge an FIR either suo moto or under pressure. Judges interpreted the law ignoring the victim's aspect. If a statute is silent about the mens rea of an accused and the offence is against a woman, the 'Principle of Strict Liability' should be applied. Increasing the participation of women in the commission of offences is another concern. The time has come to implement laws without considering caste, race, religion, political pressure, etc. The victims should also not be categorised on any basis.

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FEMALE GENITAL MUTILATION: VIOLATION OF WOMEN'S RIGHTS

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ABSTRACT

The research article starts with an introduction to the practice of FGM/C, or Female Genital Mutilation/Circumcision, as a form of violence against females that has been practised for around a thousand years now. Further, the article talks about the history of the practice of FMG/C and how it developed. The next portion of this article talks about the different types of FGM, the reasons, prevalence, and effects of this grievous practice, and the approaches by WHO and UNFPA. It also deals with the legislation that explains violations of human rights, laws, and opposition. In continuation, it talks about the current situation, which includes attitudes that prevail in different countries, a revolution in practice, the rate of FGM, and the evolution of the practice. Further, it covers the statistics and key milestones, which include the different steps taken by UN bodies to curb this practice of FGM. Lastly, the research article concludes with the responses of UNICEF and WHO and recommendations from the authors' side.

Keywords: Female Genital Mutilation/Circumcision, Violation of human rights, Gender Inequality, Legislations, UN Approach.

"To cut off the sensitive sexual organ of a girl is directly against the honesty of nature, a distortion to her womanhood, and an abuse of her fundamental human right"- Joseph Osuigwe Chidiebere

1. INTRODUCTION

History is a witness to the fact that women have been struggling for equal rights and positions in society. This includes not only the cultural factors, but also biological, regional, political, and, physiological aspects. Violence toward women is a global crisis and one out of three women has faced some or the other type of violence at least once in her life. The practice of FGM/C or Female Genital Mutilation/ Circumcision is nothing but another such violence that has been practiced for around a thousand years now. Female Circumcision is "the practice of partial or complete removal of the external female genitalia for no medical reasons." It includes practicing

a procedure on females in order to injure or alter their genitalia. 200 million girls (which includes 30 nations of Africa, the Middle East, and Asia) have sustained female genital mutilation where a majority of them were under the age of five![279] This practice has been recognized as "a violation of the human rights of females as well as the violation of child rights" by UNICEF. This kind of treatment is inhuman and cruel which often leads to death and thus, is also a violation of the right to life. Gender inequality is the root of this entrenched social norm that has been prevalent for so long and has affected females from childhood through old age.

This article aims at unfolding FGM by discussing its history, types, and the reasons behind the practice. It also discusses the different aspects and legislations made to deal with this entrenched practice in order to protect the human rights of women.

1.1 HISTORY OF THE PRACTICE

According to the United Nations Population Fund (UNFPA), the history of "one of the most widespread violations of human rights" is uncharted but the practice dates back to around 2000 years. This practice is not limited to any particular culture or religion. It is prevalent in patriarchy-driven societies where women are not considered equal to men. Research shows that FGM predates Islam and Christianity. According to some beliefs, it started when the black women were captured as slaves in Arab societies while others point out the advent of Islam religion in parts of sub-Saharan Africa. [280] Throughout history, it has been considered a tradition to protect the "purity" of a female. The word purity here refers to the social concept of keeping a female's hymen intact to reduce female desires.

Talking about our Country-India in particular, this practice has been found in the Bohra community of Western India. They are believed to have migrated from North Africa for the purpose of trading. The defenders of this practice compare this to the practice of khatna (male circumcision where the foreskin is removed), claiming that only a nip of clitoral skin is removed,

[279] Oxfam International, Violence against women and girls: enough is enough, available at https://www.oxfam.org/en/take-action/campaigns/say-enough-violence-against-women-and-girls/violence-against-women-and-girls-enough-enough. Last visited 10 May 2022.

[280] FGM National Group, Historical and Cultural, available at http://www.fgmnationalgroup.org/historical_and_cultural.htm#:~:text=Some%20believe%20it%20started%20during,as%20part%20of%20puberty%20rites Last visited 10 May 2022.

bereft of its baleful effects. They also mentioned to maintain hygiene and to gain greater legitimacy, local circumcisers have been replaced by medical professionals.[281] FGM, or khatna, the terminology used by the Bohras, has long been a well-guarded secret, a taboo matter never to be spoken. However, some women who have been victims of the Bohra practise are now opting to speak up and raise awareness. An article in Hindustan Times featured Masooma Ranalvi, a Delhi-based publisher who, along with 17 other women, has signed an online petition opposing the practise, and has decided it's time to speak up and share their personal stories. The anguish has turned into a catalyst, and her desire to protect other girls from being sliced has made her and the others bold.[282]

The next portion of this article talks about the different types of FGM and the reasons behind this grievous practice.

1.2 TYPES OF FEMALE GENITAL MUTILATION [283]

Female Genital Cutting is briefly categorized into 4 major types:

- "Type I or clitoridectomy means the removal of a part or the whole clitoris.
- Type II or excision means the removal of part or all of the inner labia and clitoris, with/without the elimination of labia majora.
- Type III or Infibulation means the narrowing of the vaginal opening by sealing it through cutting or repositioning the labia.
- Type IV or other harmful practices, include pricking, piercing, cutting or burning the area of the female genitals."

The most prevalent types are I and II (around 80%), but there are differences between countries. Type III - infibulation affects approximately 10% of all affected women and is commonly done

[281] Sahiyo, Tracing the Origins of Female Genital Cutting: How It All started, available at https://sahiyo.com/2018/07/21/tracing-the-origins-of-female-genital-cutting-how-it-all-started/. Last visited 10 May 2022.

[282] Hindustan Times, India's Dark Secret, available at https://www.hindustantimes.com/static/fgm-indias-dark-secret/. Last visited 10 May 2022.

[283] WHO, Female Genital Mutilation, available at https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation. Last visited 10 May 2022.

in Somalia, northern Sudan, and Djibouti.[284] Generally, these processes are not done under the supervision of any medical expert and do not even include the use of anaesthesia or antiseptics. These are often done with equipment like a knife, scissors, scalpels, pieces of glass, or a razor. Girls' legs are frequently chained together to immobilize them for 10-14 days in cultures where infibulations are practiced, allowing scar tissue to grow.

1.3 REASONS BEHIND THE PRACTICE OF FGM

Reasons behind the practice of Female Genital Mutilation consist of a variety of social, cultural, and, religious factors. The reasons listed by WHO and UNFPA are mentioned below.

1.3.1 World Health Organization (WHO) [285]

As per WHO, the reasons include:

- Where FGM is a societal convention, the social pressure to affirm the practice is a powerful motivator to keep it going.
- FGM is often viewed as a crucial component of properly "growing a girl and preparing her for marriage/adulthood."
- FGM is frequently motivated by "ideas about what constitutes acceptable sexual behaviour."
- FGM is linked to "cultural values of modesty and femininity." Although the benefits or necessity of this practice has not been mentioned in any "religious texts, many practitioners believe they have religious backing." Religious leaders take "a variety of perspectives on FGM: some support it, some dismiss it, and yet others advocate for its abolition."
- Local power and authority structures can continue to sustain the practice.

[284] UNFPA, FAQs-FGM, available at https://www.unfpa.org/resources/female-genital-mutilation-fgm-frequently-asked-questions#common_types. Last Visited 11 May 2022.

[285] WHO, Female Genital Mutilation, available at https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation. Last visited 10 May 2022.

- FGM is frequently regarded as "a cultural tradition, which is frequently used as justification for its continued practice."
- In other countries, recent FGM acceptance is tied to replicating neighbouring tribes' practices or is "part of a larger religious or traditional revival movement."
- FGM is practiced by new groups in various societies when they "relocate into areas where the local population practices FGM."

1.3.2 UNITED NATIONS POPULATION FUND (UNFPA) [286]

As per UNFPA, the reasons include:

- FGM is performed "to control a woman's sexuality, which is sometimes described as insatiable if certain sections of the genitalia, particularly the clitoris, are not removed." It is claimed to "boost male sexual pleasure and ensure virginity before marriage and loyalty afterward."
- FGM is viewed as "an integral component of a girl's initiation into womanhood and a community's cultural legacy." FGM is sometimes perpetuated by "beliefs about female genitalia" (for example, that an uncut clitoris will grow to the size of a penis, or that FGM will improve fertility or infant survival).
- To increase hygiene and aesthetic appeal, external female genitalia is reportedly removed in some communities considering it unclean and unattractive.
- Religious teaching is frequently cited to defend the practice although neither Islam nor Christianity supports female genital mutilation.
- Several communities consider FMG as a requirement for marriage. Economic necessity and heavy reliance of women on men can be a primary driver of the procedure. It is also sometimes a requirement for inheriting rights in the narrow minded society. It could greatly be a significant source of income for practitioners

1.4 IMPACT OF FGM ON FEMALES

[286] UNFPA, FAQs-FGM, available at https://www.unfpa.org/resources/female-genital-mutilation-fgm-frequently-asked-questions#common_types. Last visited 11 May 2022.

Young girls are most typically cut from the time they are born until they reach the age of 15, yet the procedure can have long-term consequences that affect women for the rest of their life. It is also known to be practised at various times of a woman's life, such as during her marriage or after she has given birth to her child. The reports cited by WHO state that "around 200 million girls and women alive today have been cut till date and over 3 million girls are still at risk every year." Female genital mutilation has no health benefits but numerous effects on a female that includes a physical, psychological, and social impact on the girl's health and safety. [287]

- It entails "removing and damaging healthy and normal female vaginal tissue, as well as interfering with girls' and women's bodies' natural functioning."
- Immediate complications of FGM can include "severe pain, genital tissue swelling, fever, infections e.g., tetanus, urinary problems, wound healing problems, injury to surrounding genital tissue, shock, trauma, and, death."
- Long-term complications can include "vaginal and urinary problems, scar tissue, keloid, sexual problems, childbirth complications, need for later surgeries, etc."[288]
- A female might go through various stages of difficulties throughout different phases of her life.[289]
    a. Childhood: There have been cases where the lives of girls ended during the process of mutilation or as a direct result of it. The range of complications causing these deaths include haemorrhage, contracting septicaemia, tetanus, or HIV, due to unsterilized tools. Fear, shock, pain, and trauma are some indirect effects of this practice.

[287] Giving Compass, What is Female Genital Mutilation?, available at https://givingcompass.org/article/what-is-female-genital-mutilation/?gclid=CjwKCAjw47eFBhA9EiwAy8kzNIzjkIu3_W3uwBZXCJLJj9wl095oSpdEhrST63GOehBUoJhsiNABRRoCy2YQAvD_BwE Last visited 11 May 2022.

[288] Desert Flower Foundation, What is FGM? available at https://www.desertflowerfoundation.org/en/what-is-fgm.html Last visited 10 May 2022.

[289] Orchid Project, Impacts of FGC, available at: https://www.orchidproject.org/about-fgc/impacts-of-fgc/?gclid=CjwKCAiAgvKQBhBbEiwAaPQw3N_IhMm3W2d61hb3RrBe6aaWyH2BbR2VSpRJ0VbBYetvmEfa7XzExRoCwdEQAvD_BwE Last visited 10 May 2022.

b. Girlhood: During the teenage period, a girl might experience pain and difficulties during urinating or menstruating because of her urethra/ vaginal opening might be blocked after receiving FGM. Infections, chronic pelvic inflammation, cysts, abscesses, and ulcers might also get developed. FGC-related health issues may force kids to "skip school, resulting in greater dropout rates and economic disadvantages later in life." FGC is frequently used as a gateway to child marriage.

c. Marriage and Intercourse: After one or every type of FGM, sexual intercourse can be painful and traumatic. Many a time, the women have to be re-cut or experience forced penetration. In some cases, the pain doesn't stop here. The scar tissue might not recover and cause pain and trauma for a lifetime. After being cut, women might also result in becoming infertile. This, in some communities, leads to her being abandoned by her husband and family thus causing depression.

d. Pregnancy and Childbirth: Maternal and new-born mortality are the direct results of FGM. FGC Type III patients are "70% more likely to experience haemorrhage during childbirth, are twice as likely to die in childbirth, and have a higher risk of stillbirth due to obstructed labour." Other problems, including obstetric fistula, foetal asphyxia, and perineal tears, are more common in women who have had FGC Type III. Low birth weight (less than five and a half pounds at delivery), respiratory issues at birth, and stillbirth or early death are all risks for the new-born.

- FGM has the potential to inflict both short- and long-term psychological harm. It can cause behaviour problems in children in the short term, which are linked to a lack of trust in their families or caregivers. Women may develop anxiety and depression in the long run.

- Individuals and families may experience social consequences as a result of the custom. In countries where cutting is considered an important rite of passage, refusing to get cut can lead to social marginalization for their family, and such females are frequently stigmatized and discriminated against.

- A fistula is a passageway between the urethra and the vaginal canal that allows urine to flow into the vaginal canal. When the urethra is injured as a result of FGM, this can happen. Fistula produces incontinence and other issues, such as odours, and can lead to social exclusion in girls and women.

- It can be very traumatic experiences and emotional difficulties throughout life, which includes anxiety, depression, feeling of loneliness, etc.

- Sitting or even walking can bruise and re-open scar tissue owing to repeated rubbing of garments which adds to the psychological stress and loss of sexual feeling.

- These economic and societal consequences may have many further consequences for the individual girl. According to the United Nations, 22 of the 30 nations where FGC is practiced are classified as "least developed", meaning they have the lowest socioeconomic indicators. As a result, the negative effects of FGC are felt in the personal, household, community, and state economies.

The next section discusses the prevalence of Female Genital Mutilation.

2. PREVALENCE OF FEMALE GENITAL MUTILATION

FGM is reported to be prevalent in 27 African nations, Yemen, and Iraqi Kurdistan, according to a 2013 UNICEF report which is based on surveys performed by selected countries. The exact count of females who have undergone genital mutilation is unknown, but according to the data of UNICEF, a minimum of 200 million females, between the age bracket of 15-49 years have been mutilated in over 31 countries all around the globe.[290] In the past 30 years, there has been a noteworthy progression in eradicating this practice. Younger girls have a lesser risk of being mutilated as compared to their mothers and grandmothers. “Progress, on the other hand, is neither universal nor rapid enough.” In certain countries, the practice is still prevalent as it was three decades ago. The practice has been banned in almost 44 countries, but still, the laws haven’t been implemented in a proper way yet.

[290] UNICEF Report, available at https://web.archive.org/web/20140111204919/http://www.unicef.org/media/files/FGCM_Lo_res.pdf Last visited 9 May 2022.

As a question of fact, many people think of this as a religious practice. UNFPA clearly quotes that "no religion promotes or condones FGM". Even if it is looked upon as a connection of Islam, "not all Islamic groups practice it but many other Non-Islamic do". Further it is true that culture and tradition serve as a foundation for human happiness but these cannot be used as a means to condone violence acts on the people. Every female has the right to stand up against such religious practices, cultures, and traditions. [291]

Moving further, when we talk about the evolution of this practice, a question arises- Whether "medicalized" FGM is safe or not? FGM is increasingly being performed by educated health care professionals in numerous nations, in violation of the Hippocratic Oath to "do no harm." "About one in every three adolescent girls (15-19 years) who have experienced FGM, were cut by a health worker. FGM can never be safe or harmless." Even when the treatment is carried out in a sterile condition by a health-care expert, major health repercussions might occur both immediately and later in life. FGM that has been medicalized provides a false sense of security. All forms of FGM, including medicalized FGM, are associated with substantial hazards.[292]

3. VIOLATIONS OF HUMAN RIGHTS[293]

According to a UN interagency statement 2008, FGM/C is a human rights violation, a form of racial discrimination, and a form of violence against females. "This practise infringes on a number of human rights enshrined in the Universal Declaration of Human Rights (UDHR), the Convention the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). According to Article 3 of UDHR, all of us have the right to life, liberty, and personal security. Unfortunately, in many nations, girls and women lack complete control over their lives, freedoms, and bodies."

"Gender equality and non-discrimination, the right to life (where the practice results in death), the right to be free from torture and harsh, barbaric, or degrading treatment or punishment, and

[291] UNFPA, FAQs-FGM, available at https://www.unfpa.org/resources/female-genital-mutilation-fgm-frequently-asked-questions#common_types. Last visited 11 May 2022.

[292] UNICEF, FGM, available at https://www.unicef.org/stories/what-you-need-know-about-female-genital-mutilation Last visited 9 May 2022

[293] NCBI, Eradicating Female Genital Mutilation/Cutting, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6293358/ Last visited 9 May 2022

the rights of children are all violated by FGM/C. It is also a violation of right to the best possible health of a person as it interferes with healthy genital tissue without medical necessity and can have major physical and mental health consequences for women." Even though it is recognised as a form of violence against girls and women and a human rights violation in many nations throughout the world, the issue remains polarising due to the practice's deep roots in customs and culture, rendering laws difficult to establish and execute.

3.1 LAW AND OPPOSITION[294]

Since 1965, "twenty-four of the twenty-nine countries with the highest rates of FGM/C have used a human rights-based strategy to their regulations." The sentences might last anywhere from 3 months to a lifetime. Number of countries also levy monetary penalties. FGM/C has also been made illegal in twelve countries with considerable populations of FGM/C practitioners. Several laws make it illegal to perform it in government health institutions and by medical practitioners. Some countries only punish it when it is performed on minors, while others do so in all scenarios. Fines may be imposed solely on practitioners or on anybody who is aware of the situation but does not report it. The crime could be as simple as cutting a female in the country or as complex as bringing her to another country to perform it.

Both the "right to religious freedom and the right to participate in cultural life" is protected under international law. On the other hand, international law states that the freedom to express one's religion or views may be subject to restrictions to protect others' basic rights and freedoms. As a result, societal and cultural reasons protected by "article 4 of the International Covenant on Civil and Political Rights" could no longer be invoked to justify FGM. Legislation is a critical tool in stopping FGM/C because it can disturb the status quo by granting legality to new behaviours—but it is ineffective unless it is accompanied by cultural change initiatives.

Support for a culture of FGM manifests itself in a refusal to comply with anti-FGM/C rules and submit evidence against family members, neighbours, or friends, as well as criticism or derision directed towards law enforcement. "If the legislation is enacted, local law enforcement and anti-FGM/C crusaders (such as pastors, chiefs, assistant chiefs, and other leaders) may encounter a

[294] NCBI, Eradicating Female Genital Mutilation/Cutting, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6293358/. Last visited 9 May 2022.

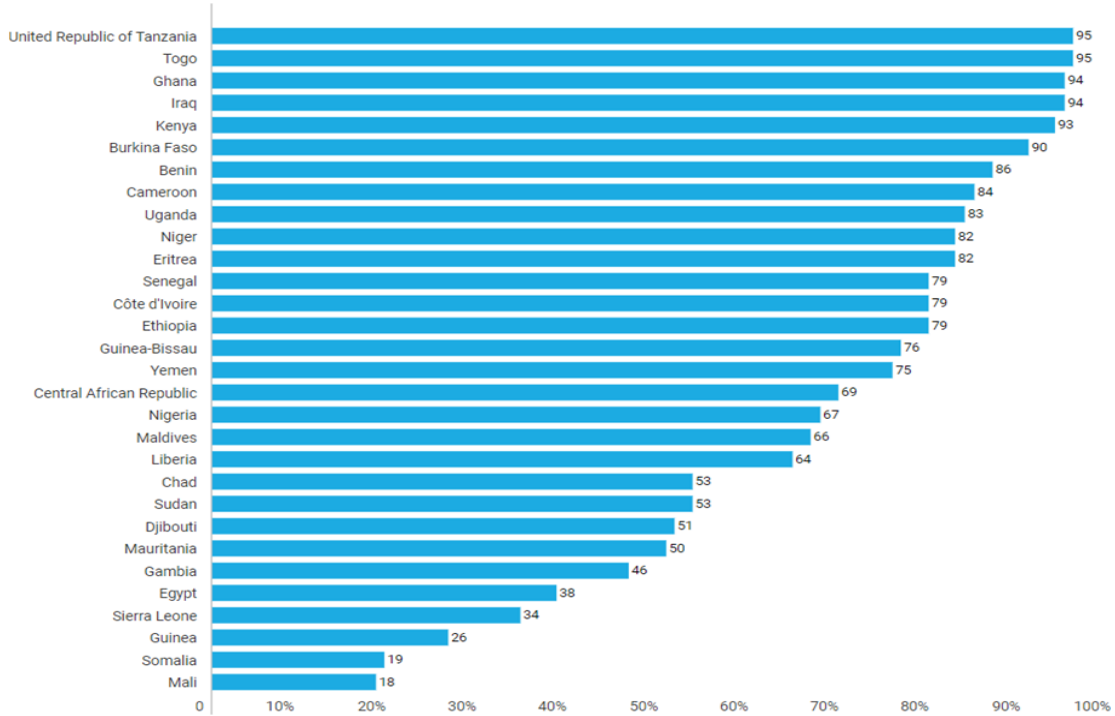
conflict of loyalty because it pits them against local culture, a process known as social nullification. While criminalising damaging cultural practices such as FGM/C is critical, it can also lead to rebellion directed at evading or opposing the law."

4.1 ATTITUDES THAT PREVAIL[295]

The opinions of women and girls against FGM differ greatly among countries. "The countries with the highest levels of approval were Sierra Leone, Mali, Gambia, Guinea, Egypt and Somalia, with more than half of the female population feeling the practice should remain." Nevertheless, the majority of women and girls in Middle Eastern countries and most African with representative data on opinions feel it should be abolished (23 out of 30).

In nations where statistics are available, the majority of women and girls believe the practice must be stopped.

The percentage of women and girls aged fifteen to forty-nine who have heard and believe that it should be abolished.



[295] UNICEF, Child Protection-Female Genital Mutilation, available at https://data.unicef.org/topic/child-protection/female-genital-mutilation/ Last visited 11 May 2022.

Source: UNICEF global databases, 2021, based on Multiple Indicator Cluster Surveys (MICS), Demographic and Health Surveys (DHS) and other national surveys, 2004-2020. [296]

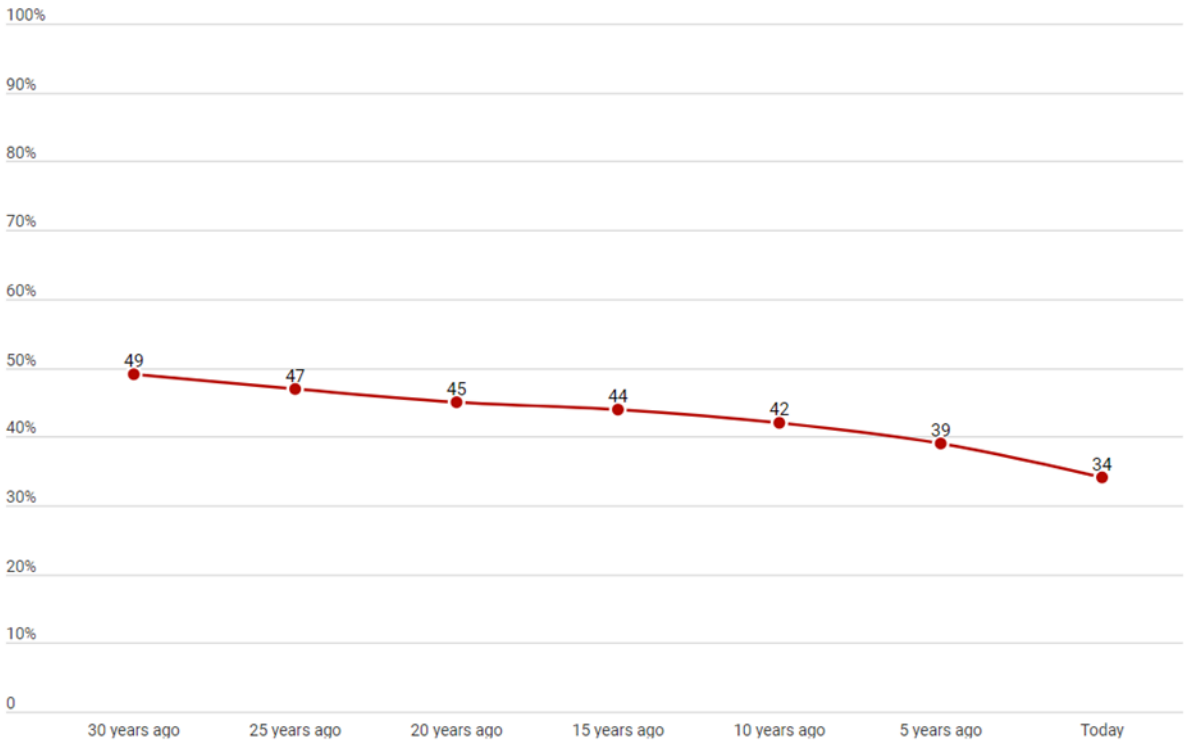
4.2 IS THERE A REVOLUTION IN THE PRACTICE?[297]

Over the last three decades, the practice of FGM has been on the decline. "One in every three girls aged fifteen to nineteen has been involved in the practice presently, compared to one in every 2 in the late 1980s, across the 30 countries having nationally representative prevalence statistics". However, not all countries have made improvements, and the rate of decline has been uneven. In nations with various levels of FGM prevalence, such as Burkina Faso, Egypt, Kenya, Liberia, and Togo, there has been a rapid drop among girls aged 15 to 19.

Although not all countries have improved, and the rate of decline has been uneven, there has been a general drop in the prevalence of FGM during the previous three decades. FGM has been performed on a per cent of girls aged fifteen to nineteen years old.

[296] **Notes**: "Because women and girls from practising communities are more likely to support the practice, the amount of opposition in Liberia, as measured by the 2019-20 DHS, is lower than what would be expected if all girls and women were polled. For Indonesia, there are no data on opinions against FGM."

[297] UNICEF, Child Protection-Female Genital Mutilation, available at https://data.unicef.org/topic/child-protection/female-genital-mutilation/ Last visited 11 May 2022.



Source: UNICEF global databases, 2020, based on DHS, MICS and other national surveys, 2004-2018." [298]

4.3 WHAT IS THE RATE OF FGM?[299]

While the exact number of women and girls worldwide who have been subjected to it is unknown, at least two-hundred million women and girls between the ages of fifteen and forty-nine have been subjected to the practice in thirty-one countries.

Efforts have been made in the last 30 years to put an end to the practice. In many countries now, young girls are far less likely than their mothers and grandmothers to be subjected to it than they were in the past.

[298] "**Notes**: This is a weighted average based on comparable data."

[299]UNICEF, Female Genital Mutilation, available at https://www.unicef.org/stories/what-you-need-know-about-female-genital-mutilation#:~:text=How%20prevalent%20is,stop%20has%20doubled Last visited 11 May 2022.

However, progress is neither widespread nor swift enough. In some nations, the practice continues to be practised as it was thirty years ago. Over ninety percent of girls and women in Somalia and Guinea are subjected to some form of FGM/C.

If the prevalence of FGM is to be ended by 2030, improvement must be done ten times faster.

5. KEY MILESTONES[300]

"In 1997, the World Health Organization (WHO) released a joint declaration against the practice of FGM) with the United Nations Children's Fund (UNICEF) and the United Nations Population Fund (UNFPA)."

Since 1997, major research, community work, and policy measures have been implemented to fight FGM.

To speed the abolition of female genital mutilation/cutting, UNFPA and UNICEF created the Joint Programme on Female Genital Mutilation/Cutting in 2007.

"In 2008, WHO, along with nine other United Nations partners, released a declaration titled "Eliminating female genital mutilation: an interagency statement" to promote increasing advocacy for its abolition. This declaration presented data on the practice of FGM gathered over the past decade."

In partnership with other relevant UN agencies and international organisations, WHO developed the "Global strategy to prevent health care providers from performing female genital mutilation" in 2010. Is the WHO assisting countries in implementing this strategy?

"In December 2012, the United Nations General Assembly endorsed a resolution calling for the eradication of FGM."

"In May 2016, WHO, in collaboration with the UNFPA-UNICEF joint project on FGM, produced the first evidence-based guidelines on the management of health complications related

[300] WHO, Female Genital Mutilation, available at https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation. Last visited 10 May 2022.

to FGM. The guidelines were developed after a thorough review of the most up-to-date evidence on health interventions for women who had undergone FGM."

"In 2018, the World Health Organization (WHO) produced a clinical guide on female genital mutilation (FGM) to improve health care personnel' knowledge, attitudes, and abilities in preventing and managing FGM's repercussions."

"UNICEF announced a study agenda for FGM in 2021, with the collaboration of WHO, UNFPA, and the Population Council. WHO published ethical guidelines for undertaking FGM-related research to complement this objective?"

"WHO plans to release a training manual on person-centred communication (PCC) in 2022, a counselling technique that encourages health care practitioners to question their FGM-related attitudes and improve their communication skills to give effective FGM prevention counselling?"

5.1 HOW MANY PEOPLE DOES IT AFFECT?[301]

FGM is estimated to have affected 200 million women and girls alive today, as per World Health Organization, and over 3 million females are in danger of receiving the procedure each year. In parallel with the worldwide population increase, the rate of FGM is likewise rising.

"An estimated hundred to one hundred forty million females alive today have undergone FGM. 3 million girls and women may be at risk of FGM/C each year." The percentage of women who have been undergone is very different for each country. Like in Indonesia, eighty-six percent to hundred percent of women and girls have undergone. In Somalia and Guinea, more than ninety-five percent of women and girls have. In Egypt, Djibouti, Sierra Leone and Eritrea, it is near ninety percent. However, in Cameroon and Uganda, less than two percent.

"More than 513,000 women and girls in the US had, have or are at risk of FGM, as per available figures."

[301] Giving Compass, What is Female Genital Mutilation?, available at https://givingcompass.org/article/what-is-female-genital-mutilation/?gclid=CjwKCAjw47eFBhA9EiwAy8kzNIzjkIu3_W3uwBZXCJLJj9wl095oSpdEhrST63GOehBUoJhsiNABRRoCy2YQAvD_BwE Last visited 11 May 2022.

6. WHO IS IMPACTED BY THIS?

Young girls are most typically cut from the time they are born until they reach the age of 15, yet the procedure can have long-term consequences that affect women for the rest of their life. It is also known to be practised at various times of a woman's life, such as during her marriage or after she has given child.

6.1 WHAT EFFECT DOES IT HAVE ON THE LIVES OF PEOPLE?[302]

FGM has a negative influence on people's physical, psychological, and social well-being.

It has a direct physical impact on the health and safety of girls who are subjected to FGM.

FGM has the potential to inflict both short- and long-term psychological harm. It has the potential to produce immediate behaviour problems in children, which are connected to a trust issue in their families or caregivers. Women may develop anxiety and depression in the long run.

Finally, individuals and families may experience social consequences as a result of the practice. In countries where cutting is considered an important rite of passage, refusing to get your hair cut can lead to social marginalisation for your family, and females are frequently stigmatised and discriminated against.

6.2 THERE ARE NO HEALTH BENEFITS AND ONLY HARM[303]

It is "damaging to girls and women in a variety of ways, and it offers no health benefits." It involves "removing and damaging normal and healthy female vaginal tissue, and also tampering with the natural functioning of women's and girls' bodies". Although all kinds of FGM are associated with an increased risk of health problems, the risk is greater with more severe forms of FGM. Type 3 is associated with more health issues than types 1 and 2.

FGM can cause immediate difficulties such as:

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[302] Giving Compass, What is Female Genital Mutilation?, available at https://givingcompass.org/article/what-is-female-genital-mutilation/?gclid=CjwKCAjw47eFBhA9EiwAy8kzNIzjkIu3_W3uwBZXCJLJj9wl095oSpdEhrST63GOehBUoJhsiNABRRoCy2YQAvD_BwE Last visited 11 May 2022.

[303] WHO, Female Genital Mutilation, available at https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation. Last visited 10 May 2022.

- excessive bleeding (haemorrhage)
- severe pain
- fever
- genital tissue swelling
- urinary problems
- infections e.g., tetanus
- injury to surrounding genital tissue
- wound healing problems
- trauma
- shock
- death

"Complications that may develop over time include:

- vaginal problems (discharge, itching, bacterial vaginosis and other infections);
- urinary problems (painful urination, urinary tract infections);
- scar tissue and keloid;
- menstrual problems (painful menstruations, difficulty in passing menstrual blood, etc.);
- increased risk of childbirth complications (difficult delivery, excessive bleeding, caesarean section, need to resuscitate the baby, etc.) and new-born deaths;
- sexual problems (pain during intercourse, decreased satisfaction, etc.);
- need for later surgeries: for example, the sealing or narrowing of the vaginal opening (Type 3) may lead to the practice of cutting open the sealed vagina later to allow for sexual intercourse and childbirth (deinfibulation2). Sometimes genital tissue is stitched again several times, including after childbirth, hence the woman goes through repeated opening and closing procedures, further increasing both immediate and long-term risks;
- psychological problems (depression, anxiety, post-traumatic stress disorder, low self-esteem, etc.)
- A fistula is a connection between the urethra and the vaginal canal that allows urine to flow into the vaginal canal. This can happen when the urethra is damaged during FGM/C. Fistula causes incontinence and other problems, including odours, and can cause girls and women to become social outcasts."

6.3 WHAT ARE THE EFFECTS ON PREGNANCY?[304]

FGM/C normally does not create complications during pregnancy, but women may face special health concerns during childbirth. These are some of them:

- Long hours of labour. Women who have had type 3 FGM/C are more likely to have a prolonged 2nd stage of labour.
- Extreme bleeding after the birth of the child
- Episiotomy is at higher risk during childbirth. A doctor cuts the perineum, the flesh between the anus and vagina. It is also at higher risk that this flesh will tear on its own during birth. These risks are especially high who have had type 3 FGM/C.
- Higher risk for caesarean section (C-section). Doctors may suggest a C-section when they are not familiar with scarring from FGM/C. However, C-section may not be necessary. With type 3 FGM/C women may have their vagina safely re-opened during pregnancy or in labour and delivery. But health care providers may not have the experience or training to provide adequate health care.
- Low birth weight (less than 5½ pounds at delivery), respiratory issues at birth, and stillbirth or early death are all risks for the new-born.

6.4 UNICEF'S RESPONSE[305]

Global efforts have expedited progress toward the abolition of FGM. Nowadays, a girl is around one-third less likely to be subjected to FGM than she was thirty years ago.

Nonetheless, maintaining these accomplishments in the context of population expansion is a significant problem. More than 1 in every 3 girls will be born in the 31 countries where FGM is most frequent by 2030, putting sixty-eight million girls, some as young as new-borns, at danger.

If worldwide efforts are not greatly increased, the number of women and girls who will undergo FGM in 2030 will be higher than today.

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[304] Office on Women's Health, Female genital mutilation or cutting, available at https://www.womenshealth.gov/a-z-topics/female-genital-cutting Last visited 9 May 2022.

[305] UNICEF, Female Genital Mutilation, available at https://www.unicef.org/protection/female-genital-mutilation Last visited 9 May 2022.

UNICEF strives to ensure that policies and regulations aimed at halting and banning FGM are developed, implemented, and enforced. We also assist in providing appropriate care to girls at risk of FGM, as well as FGM survivors, while rallying communities to change the societal norms that support the practice.

UNICEF and UNFPA have collaborated on the Joint Programme on Eliminating FGM: Accelerating Change since 2008.

The Joint Programme builds on UN General Assembly and Human Rights Council decisions to catalyse global momentum to end FGM by 2030, drawing on history and best practices.

WHAT HAS BEEN THE INFLUENCE OF UNICEF?

"13 countries have implemented national laws against FGM since the UNICEF/UNFPA programme began in 2008. The programme also provided access to resources for prevention, protection, and treatment. In just one year, approximately 7 million people from 19 countries took part in education, dialogues, and social mobilisation aimed at ending FGM."

6.5 WHO APPROACH[306]

In 2008, the World Health Assembly passed Resolution WHA61.16 on the abolition of FGM, emphasising the significance of a concerted effort from all sectors, including justice, health, finance, education, and women's affairs.

WHO's efforts to end FGM and medicalization are centred on:

- Boosting the healthcare sector's response: establishing and implementing standards, tools, training, and policy to ensure that health care providers can give medical care and counselling to girls and women who have undergone female genital mutilation (FGM) and speak about the practice's prevention;
- Obtaining evidence: creating knowledge about the practice's causes, repercussions, and costs, including why health care practitioners perform the procedure, how to stop performing it, and how to care for persons who have been subjected to FGM;

[306] WHO, Female Genital Mutilation, available at https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation. Last visited 10 May 2022.

- Strengthening advocacy: Creating publications and advocacy tools for worldwide, regional, and local efforts to stop FGM, including tools for policymakers and activists to evaluate the health burden of FGM as well as the potential public health benefits and cost savings of eliminating FGM.

7. Conclusion & Suggestions

1. "Challenge The Discriminatory Reasons FGM Is Practised"

   A perceived desire to suppress female sexuality is one of the discriminating grounds for FGM.

   Alima, 70 said that "The purpose of female genital cutting is to ensure that a girl behaves properly, saves her virginity until she gets married and then stays faithful to her husband."

   Fatoumata daughter-in-law, 25, explains "Sometimes, when my husband isn't home, I'll sit with my neighbours and we'll discuss all kinds of things. They think the same way as me about cutting."

   "I too think it should be stopped." says Alima. "Even if nobody listens to you and just carries on, you have to stand firm and maintain the dialogue. Such an ingrained custom can only be changed through perseverance."

2. With the help of older generations, we can change traditions

   "In the past, grandmothers used to tell fairy tales and fables containing concealed life lessons. But nowadays children just don't want to know. Similarly, grandmothers were the ones who provided sexual education. We've lost that role too, but I think it should be reinstated." says Ma, 65 (pictured below).

   "We grandmothers have the time to keep an eye on things. If a granddaughter goes out and comes home late, her grandmother would be able to tell by the twinkle in her eye if she's fallen in love. Children are often more inclined to tell something to their grandmother rather than their mother."

3. Educate young women about their right to control what happens to her bodies

Sanaba, 24, was the last of her family's girls to be chopped. She consults with acquaintances in her neighbourhood who will assist her in making decisions about her girls' futures.

“Some of them want to cling to this tradition, even though they are aware of the consequences."

Her mother, Fatoumata adds: "I don’t think it’s normal for a woman not to enjoy sex."

“More and more children are going to school and learning to think for themselves," says Sanaba. "No child who is well informed and able to stand up for himself or herself wants the practice of genital cutting to continue. I think women of my age should support teenage girls.”

4. Speak Out Against FGM's Risks and Consequences

FGM has long-term physical and mental implications that must be addressed so that girls and women do not have to suffer in silence any longer.

“M’Pène is 4 now, but we decided when she was born that we didn’t want her to be cut. That’s because I’d seen photos and a video of a girl’s cutting. My husband agrees with me. He’s a member of the village council, as a medical advisor, so he knows what’s involved. He watches a lot on TV about it and listens to the radio,” says Korotoumou, 30.

“This is the first time that my mother-in-law and I have discussed cutting. The opinion of a girl’s grandmother is crucial. I’m sure that if grandmothers were to see these images, they too would want to stop cutting. We’ll find a solution to the issue of cutting. And daring to talk about it is the first step.”

5. Raise awareness that FGM is not required by religion

“People think that Islam advocates cutting to ensure that a girl stays virtuous and pure. I tell them that I lost my own daughter to female genital cutting and that it’s a practice that must be stopped because of all the problems it causes,” says Nega, 48, an Imam in his village.

"My assistant said to me recently, "If I didn't know your story, I'd still preach that in the name of our religion, the tradition of cutting should be continued.'

"People don't seem to be able to distinguish between religion and traditional practices. They tend to see them as one and the same thing."

6. Deal with the secrecy which enables the cutting to go on

"In the old days, genital cutting was an initiation rite for girls, to prepare them for their future. The whole community would participate. But nowadays it's become more controversial and it usually takes place discreetly at home. And the girls who are cut are getting younger and younger. This is because the younger a girl is, the less likely she'll be to discuss it with her friends," says Fatoumata.

Rokia, a grandmother of 92, says the practice is in steady decline: "Here in the village, there are no more cutting ceremonies. People do occasionally have their daughters cut, but they take them to neighbouring villages. Or they'll have the cutter come in secrecy, because they know that people will gossip."

7. Continue to advocate for the prohibition of FGM

Djaminatou, a Plan International-trained village educator, believes that grassroots support for ending FGM will lead to an official ban.

"Cutting, is a violation of children's rights: the right to physical integrity, the right to good health and the freedom to make your own choices. It even violates a child's right to be educated. If the wound becomes infected because the cutter uses an unsterilized knife, for example, the girl will fall ill and be unable to attend school.

"My biggest challenge in the struggle against female genital cutting is the passing of legislation that will outlaw it. Then, and only then, will we be able to put an end to FGM. But it will take a lot of lobbying and advocating, at all levels: in government, in parliament, and in villages and communities."

8. Community involvement

The following are characteristics of successful initiatives to end or diminish the practise of FGM/C:

a. Individuals from the community are trained as educators and trainers. Many organisations employ well-respected local women to teach other women and girls about the dangers of FGM/C in their communities.

b. Efforts are centred on community needs and strengths, as well as member recommendations.

c. The programmes and leaders of organisations respect the community's customs and social structure. Participants in the programme develop the trust of the community, allowing difficult topics like FGM/C to be discussed openly.

d. To teach families about FGM/C, culturally sensitive programmes use theatre, singing, and activities.

9. Laws against FGM/C

In the majority of countries FGM/C is prohibited, including many of the countries where it is commonly practised.

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Constitutional Morality vis-à-vis Living Constitution

Mansanwalpreet Singh*

ABSTRACT

The immediate brief would explicate constitutionalism with regards to morality and dynamism. The present writing would slowly but surely focus on varied facets of constitutionalism. For instance, in the incipient part; the ideas of the constitutional morality and dynamic/living constitution would be elucidated. Further, the interdependence and intertwining of the aforementioned conceptions would be clarified. Furthermore, a critical analysis of a few verdicts by the honourable Supreme Court (like; the *Puttuswamy* judgement of 2018, *Navtej Singh Johar* judgement of 2018, *Triple Talaq* judgement, *Sabarimala Temple* judgement, etc.) explaining the concepts of constitutional morality and Dynamism would be done. Last but not the least, dynamism of the Indian constitution would be compared to the vitality of the constitutions of other democracies, such as; constitution of the United States and Australia. To conclude, today's Indian Constitution would be scrutinised and paralleled to the aspirations of the father of our constitution i.e. Dr. Bhimrao Ambedkar.

Keywords – Constitutionalism, Constitutional Morality, Living/Dynamic Constitution

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1. MEANING OF CONSTITUTIONAL MORALITY AND DYNAMISM

Though not explicitly mentioned in the constitution, constitutional morality is the core of the every facet of the constitutionalism in India. As mentioned by the father of the Indian constitution, Dr. Bhim Rao Ambedkar; constitutional morality is a predominant requisite for sustaining the essences of equality, fraternity and liberty in the society. He also quoted the Greek historian, George Grote, who coined the term 'constitutional morality' and considered *self-restraint* and *liberty* as the basics of that morality, wherein *self-restraint* meant people and the government authorities restraining from breaching any rule of law and *liberty* apparently meant freedom of all the kinds. In a layman's language, when a state or any regime abides by the rudimentary principles of the constitution then only, the constitutional morality can be considered as complete. Therefore, as mentioned in the preamble of the Indian constitution the basic elements of the Indian constitutional morality are; social, economic and political justice, liberty, equality, fraternity and last but not the least rule of law in the whole country.

Now, deliberating on the concept of a living constitution, when a constitution is not frozen and has an ability to evolve with the evolution of the society it is termed as a dynamic or a living constitution. Indian constitution is classified amongst the dynamic constitutions of the world as it is rigid as well as flexible i.e. in some cases, amendments can be made by a simple majority of the elected house however in some cases, for instance as mentioned under Article 368, majority of the elected house and ratification by half of the states lead to the passage of the bill, making it quite rigid and difficult.[307] Though, a blend of rigidity and flexibility, the draftsmen of the Indian constitution wanted it to evolve with the regular progression of the society.

INTERTWINED CONCEPTS

The foremost relation between the constitutional morality and a living constitution is, these both concepts are intertwined and move together that is whenever a constitution changes with the requirement of the society the amendments have to be made according to the basic principles of the constitution thus perpetuating its constitutional morality. Ancillary to these concepts, there is another similar conception, majoritarian morality; which is the morality which has been passed from generation to generation and can also be considered as customary or generational morality, which in fact may be contradictory to the basic principles of the constitution. There have been number of verdicts where tussle between constitutional and majoritarian morality arose and had been dealt by the courts in a thorough manner. Constitutional morality had not been talked much

[307] The Constitution of India, art. 368.

since the constitution came into force, however what initiated in 2009 from *Naz Foundation*[308] judgement ignited the concept in Indian legal system and later in 2014, 2017 and 2018 especially this idea was used many times in different rulings which are deliberated in the furtherance of the immediate brief.

JUDICIARY AND CONSTITUTIONAL MORALITY

The *Shayara Bano case*[309] or *Triple Talaq judgement* was adjudicated by the Supreme Court in 2017 banning the customary practice of instant divorce (by saying talaq for three times) or talaq-e-biddat amongst the Muslims on the basis of constitutional morality and as a consequence the cases involving constitutional morality surged in following years especially in the year 2018 which may be entitled as the year of constitutional morality.

In 2017, right to privacy was declared as fundamental right under Article 21 of the Indian constitution by the Supreme Court of India in *K.S. Puttuswamy v. Union of India*[310] wherein, it was declared that right to privacy is the basic right of every individual and state cannot prescribe how a person ought to live his or her life thus perpetuating the basic principle of freedom and liberty to all the individuals. This immediate verdict laid down the fait accompli for the *Navtej Singh Johar*[311] Judgement of 2018.

The hon'ble Supreme Court in *Navtej Singh Johar* judgement overruled the *Suresh Kumar Koushal*[312] verdict, wherein the major argument of the Ministry of Home Affairs (MHA) was, "*the public at large disapproves the homosexuality thus the provisions of the section 377*[313] *should be kept unbroken*" and the court also adjudicated on the same idea of public morality. Nevertheless in *Navtej Singh Johar* judgement, the total emphasis was given to the fundamentals of the constitution and it was held that the *Suresh Kumar Koushal case* must have been decided on footings of constitutional morality instead of majoritarian or societal morality.

Further in the *Sabrimala Temple* case, wherein judges again referred to the principles of public morality and constitutional morality but arrived at different conclusions, 2 judges had the opinion that the public morality and the customary practices have to cede to the constitutional morality and females aged 10-50 must be allowed to enter the *Sabrimala temple* as it is their fundamental right under Indian constitution, however 3rd Judge had a different opinion that was the religious

[308] *Naz foundation v. Govt. of NCT of Delhi*, 160 DLT 277 (2009)
[309] Shayara bano v. Union of India, AIR 2017 9 SCC 1 (SC).
[310] K.*S. Puttuswamy v. Union of India,* AIR 2017 SC 4161.
[311] *Navtej Singh Johar v. Union of India,* 2018 AIR SC 4321.
[312] *Suresh Kumar Koushal v. Naz Foundation,* (2014) 1 SCC 1.
[313] Indian Penal Code, 1860, s. 377.

rights should not be considered in an isolation and public morality and customary practices need to be considered as well. Later, the concept of the constitutional morality was heavily criticized by the public at large.

Though judiciary has done a great job in interpreting and utilising constitutional morality in a way that it should have been used however there are still a number of issues that require similar kind of manoeuvres, for instance, the marital rape issue, "*Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape*."[314] Thus the law itself shields husbands from being prosecuted by their wives for rape. Though there are sufficient debates going on in the courts and many other legal institutions about the gravity and urgency of the issue and it is really a complicated issue because there is a fear of thousands of innocents being framed and prosecuted for rape if marital rape is directly penalised. Nonetheless, this cannot be an excuse in making all the married female victims suffer for this inhumane crime and to keep the constitutional morality unharmed, an immediate action is required by the judiciary or the legislature so that all the victims can be provided with the justice and women can feel safer in the country.

LEGISLATURE AND CONSTITUTIONAL MORALITY

Draftsmen of the Indian constitution tried to make the constitution partially flexible and partially rigid thus as per the procedures laid down in the constitution, some provisions can be amended by the simple majority and some provisions like articles 57, 73, 162, etc. require special majority of each house i.e. not less than 2/3rd of the quorum and ratification by not less than half of the states.

No doubt, the legislature has majorly brought on the laws or amended the constitutional provisions to make the constitution more compatible and effective according to the evolution of the society. Nevertheless, there have been number of instances wherein the basic constitutional ideologies were dented while passing the constitutional amendment bills by some ruling parties to promote their agenda or ideology. Elucidating the case of CAA-NRC, (Citizenship Amendment Act and National Register of Citizens) though according to the central government the law was being brought to provide refuge and easy naturalisation to the Non-Muslims who are or who may suffer persecution in the Afghanistan, Pakistan and Bangladesh. However, this action attracted a lot of criticism for avoiding Muslims, Jews and Atheists from the instant law despite the fact there are a category of Muslims as well (for example, Ahmadis in Pakistan), who also suffer persecution as a minority in these nations.[315] Resultantly, the immediate law would make two

[314] Indian Penal Code, 1860, s. 375 (exception 2).
[315] Gautam Bhatia, *a bill that undercuts key constitutional values*, The Hindu, March 27, 2022, 11.30.

categories of migrants legal (non-Muslims) and illegal (Muslims) under the upcoming records of National Register of Citizens.

Another criticism is, Myanmar was exempted from the list of these countries when thousands of Rohingyas had been shunted out of the country and thousands of them attained refuge in India but they are being shown no empathy and government is trying to propel them out of India under the garb of security issues. Thus, the situation explicitly contradicts the rudimentary ethics of our constitution and the principle of equality[316] seems violated in the present scenario. Though the government responded to the writ petitions and even satisfied the Supreme Court but prima facie, constitutional morality appears to have been hurt.

COMPARATIVE ANALYSIS OF DIFFERENT CONSTITUTIONS

Looking at the other constitutions of the world, the constitution of the United States is not an inert one but it is quite rigid constitution, as for amendment massive majorities are required at all the stages of an amendment bill. First, 2/3rd majority is required in both the houses of the congress and second, 3/4th majorities at the state level are required for the ratification of the same.[317] This is the reason; there have been only 27 amendments to the American constitution till date, while ten of these amendments (bill of rights) happened only after few years of coming into force. In the same way, the constitution of Australia is also considered as a rigid one, as a matter of fact, there has not been any modification in their constitution since 1977 and Australians have even adopted an uncommon method of amendments which is amendment by referendum. Till date, there have been only 8 out of 44 attempted major amendments in the Australian constitution. The reason behind the rigidity of the constitutions of these countries is, they have federal structures in entirety and flexible constitutions would make the federal structures insecure and weak.

On the other hand, one of the biggest examples of the flexible constitution is British constitution as it is an unwritten constitution and with the judicial interpretations and introduction of different acts in the legal system, it runs the government machinery.

Thus, Indian constitution can be considered as a perfect blend of both rigid and the flexible constitutions as mentioned above, procedures for amendment differ from provisions to provisions, sometimes supermajority and ratification by the states is required and sometimes simple majority of the house can pass the amendment bill.

[316]The Constitution of India, art. 14.
[317] Matthew F. Shugart, Constitutional Law, *Britannica*, (2022)

Conclusion & Suggestions:

Dr. Bhim Rao Ambedkar while giving his views on the constitutional morality quoted Greek Historian George Grote, "*a paramount reverence for the forms of the Constitution, enforcing obedience to authority acting under and within these forms yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts combined too with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of the Constitution will not be less sacred in the eyes of his opponents than in his own."* Then Dr. B.R. Ambedkar himself said, "*Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it."*[318] Thus, it can be clearly inferred from the words of the father of the Indian constitution that constitutional morality needs to grow in Indians, the fundamental principles of the constitution need to be embedded in the administration, in the legislature hence in the statutes and in the judicial interpretations.

Accordingly, it can be said that the draftsmen of the constitution and especially Dr. B.R. Ambedkar wanted forthcoming Indian regimes to follow the path of constitutional morality but he also understood that Indians need time to adapt to the basic fundamentals of the constitution in all the aspects. For instance, in *Sabrimala Temple case*, there was a colossal hullabaloo from the people who believed in the customary practice of not allowing women aged 10-50 to enter the temple. So, the appropriate authorities need to be futuristic and foresee such kind of reactions from the people. Therefore, all the three pillars of the democracy have this gigantic burden of implementing the constitutional morality and concurrently helping people adapt to the change.

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[318] J. Sai Deepak, "Dr. Ambedkar on Constitutional Morality" , *The daily Guardian*, March 27, 2022, available at https://thedailyguardian.com/dr-ambedkar-on-constitutional-morality/ (last visited on May 17, 2022)

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Forced Displacement Due to Armed Conflicts: Issues & Challenges

With Regard to Definition of Refugee

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Abstract:

The 1951 Refugee Convention together with 1967 Protocol provides the fundamental International legal framework for humanitarian help to those displaced people who qualify the definition of 'refugee'. A displaced person may or may not be a refugee, especially so, if the displacement has happened due to armed conflict. People who are forced to leave their country of origin due to international or national armed conflicts face a specific kind of disadvantage, i.e. they are not normally considered as 'refugees' within the definition of the term under the 1951 Refugee Convention. The said Convention covers displacement which is caused by the "well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion". Thus, the definition is narrow in that sense and does not include people who are displaced due to armed conflict situation. Thus, they are denied institutional assistance in like manner as that of people with refugee status.

The present paper attempts to bring out the challenges posed due to the definition of 'refugee' under the 1951 Refugee Convention in providing support to forcibly displaced people due to armed conflicts. Also, a humble effort has been made to suggest possible solution to the stated problem.

Key Words: Refugee, Displaced People, Forced Displacement, 1951 Refugee Convention, UNHCR.

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1. Introduction:

As per United Nations High Commissioner for Refugees (UNHCR) 'Global Trends- Forced Displacement In 2020 Report'[319], the number of forcibly displaced people globally has doubled in last one decade (41 million in 2010, 82.4 million in 2020). The said number includes forcible displacement due to persecution, conflicts, and human right violations among others. Every year the world witnesses new types of crises or the resurfacing of some old crises that makes further addition to already existing pool of forcibly displaced people world over. The ongoing Russian invasion of Ukraine is a case in point where armed conflict situation is responsible for vast scale forcible displacement of people into the neighboring countries. They are fleeing due to general degradation of socio-economic and political situation of their country leading to violation of basic human rights. However, not all of them will get the status of refugees under the existing framework of International Humanitarian Law (IHL) especially due to definitional constraints. The definition of 'refugee' under the 1951 Refugee Convention lays its main emphasis on well-founded fear of persecution due to race, religion, nationality, membership of a particular social group or political opinion. Thus it excludes certain categories of displaced people who are forced to flee from their home country in search of safety and security. It is very difficult for an applicant seeking refugee-status who is displaced due to armed conflict to show that she has 'well-founded fear of being persecuted' for any of the reasons stated above. Also, it will be challenging to show that whether or not her own national government is able to provide effective humanitarian assistance in case the territory is occupied by invading armed forces.

The definition of 'refugee' needs broader interpretation or else requires certain additions to it so as to allow protection of IHL mandated measures to forcibly displaced people due to armed conflicts as well.

2. Understanding Armed Conflict:

Generally speaking any difference arising between two States that leads to the use and intervention of armed forces is an armed conflict. However, armed conflicts are not always

[319]. *Global Trends Forced Displacement in 2020* available @ https://www.unhcr.org/flagship-reports/globaltrends/ (visited on 28 May 2022).

'international' in nature, for example, there may be a situation where armed conflict can be between governmental and non-governmental forces.

Therefore, under International humanitarian law armed conflicts are divided in two broad categories, namely,

i) International armed conflicts (IAC), between or amongst two or more States.

ii) Non-international armed conflicts (NIAC), between governmental forces and non-governmental groups.

The above stated non-international armed conflicts are not uncommon and the world has seen several such conflicts in recent history as well such as in Africa having devastating effects on civilian population leading sometimes to large scale displacement.[320] However, this article confines itself to international armed conflicts and the resultant issue of forced displacement.

According to the International Criminal Tribunal for the former Yugoslavia (ICTY) "an armed conflict exists whenever there is a resort to armed forces between States".[321] Thus, an international armed conflict happens when two States indulge in a conflict through the use of armed forces. In recent times, world has seen armed invasion by one country into another such as in Iraq and in Ukraine.

As per the Geneva Conventions of 1949 states: "In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance"[322]. As per this definition when one or more States have recourse to armed forces against another State, regardless of the reasons or the intensity of this confrontation, it will be considered as an international armed conflict.

Generally an armed conflict situation creates multifarious dangers for human beings caught in that situation. Apart from the measured and sometimes controlled quest of military operations

[320]. Some Reflections on the Protection of Refugees from Armed Conflict Situations Author(s): G.J.L. Coles, International Migration Review (available on www.jstor.org)
[321]. https://www.icty.org/ (visited on 25 May 2022)
[322] . Article 2 of the Geneva Convention, 1949.

resulting in extreme dangers and sufferings for the civilian population, there is also the risk of uncontrolled or indiscriminate acts of violence which may ultimately result in serious general corrosion of the social, economic and physical wellbeing of a country. The collapse of social order or destruction of economy would make it extremely difficult to protect human rights of the civilians.

Forced displacement broadly may be of two types, viz., Externally Displaced and Internally Displaced. Trans-boundary or trans-frontier fleeing of people in search of safety is forced external displacement, whereas, internally displaced people (IDPs)[323] are those who have not crossed a border to in search of safety. Mainly, forcible external displacement of people occur due to persecutions, conflicts or internal disturbances leading to gross human right violations. Armed conflicts, be it the IAC or the NIAC, are also the major causes of forced external displacements. At the end of 2020, there were more than 80 million all kinds of forcibly displaced people world over.

Refugee law, under the 1951 Refugee Convention and the Protocol of 1967, does not adequately provide protection to all types of forcibly displaced people, even though such displacement might had happened due to fear of persecution induced by armed conflicts.

3. International Humanitarian Law and Forced Displacement due to Armed Conflicts:

Armed conflicts have led to forced displacement not only in so-called Third World countries such as in Asia, Africa or Central America but also in developed world such as in Europe, most recently in Ukraine.[324] The International Humanitarian Law (IHL) which is also known as 'law of armed conflicts', contains certain treaties for the protection of civilian population during international armed conflicts and also during non-international armed conflicts. These are as follows[325]:

i. **Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949:** It generally provides the rules governing protection

[323]. This article confines itself to the issue of forced external displacement of people, therefore, the issues of IDPs will not be part of the analysis.
[324]. The UN says that as on 1 June 2022, 6.9 million people of Ukraine have crossed the borders of Ukraine and entered into neighboring countries like Poland, Romania, Hungary and Moldova.
[325]. The Handbook of International Humanitarian Law (available on https://www.corteidh.or.cr/tablas/31461.pdf , visited on 26 May 2022).

of civilian population particularly the treatment of civilians in occupied territory and those deprived of their liberty. Also, it regulates the question of occupation in general.

ii. **Protocol Additional to the Fourth Geneva Conventions, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 8 June 1977:** It contains fundamental safeguards for people not taking part in hostilities during an international armed conflict. It also establishes rules for the protection of civilians, civilian objects and the installations essential for the survival of civilians.

iii. **Protocol Additional to the Fourth Geneva Conventions, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), 8 June 1977:** It contains fundamental safeguards for people who are not taking part in hostilities during a non-international armed conflict. It also establishes rules for protection of civilians, civilian objects and the installations essential for the survival of civilians.

The above listed are the basic instruments for ensuring safety and rights of people caught in the hostilities during IAC or NIAC. But these are civilians within the country facing armed conflict situation and not 'refugees' as yet. Also, even if civilians caught in armed conflicts are forced to cross the international borders of their country into some other country, these above stated instruments will not be available to them; their plight shall be uncertain because they may not even be qualified to get the status of refugees under the relevant international law instruments.

It is quite common that armed conflicts also create fear of persecution in the minds of people caught in such situation, especially in regions where invading power has laid a siege.

4. Forced Displacement due to Armed Conflicts and Refugee Status:

Usually an armed conflict results in general degradation of socio-economic and political order of an affected country. It is more so when the theatre of war or conflict is a civilian area.[326] Not only civilian population but also the civilian installations or institutions bear the brunt of such conflicts. The IHL through its instruments (Fourth Geneva Convention and its Additional Protocols) attempts to provide certain protections and reliefs to civilians caught in such kind of armed conflicts. However, the general deterioration of human rights situation, in addition to degradation in law and order condition as also the worsening socio-economic wellbeing of a

[326]. Ongoing Russian invasion of Ukraine has delivered a massive blow to Ukraine's economy and infrastructure (See: https://www.worldbank.org/en/news/press-release/2022/04/10/russian-invasion-to-shrink-ukraine-economy-by-45-percent-this-year)

country caught in armed conflicts, always has the potential to trigger exodus of people in search of security and safety. Such exodus may be internal i.e. within the country of their origin or external i.e. outside the country of their origin. The people fleeing are generally referred as Forcibly Displaced people.

Forcibly displaced people may or may not be accorded the status of 'refugee' under the International Humanitarian Law depending on whether they fulfil the criteria given under the definition of the term. This is one of the long standing contentious issues amongst the experts and scholars of international law.

5. The Term 'Refugee' under International Humanitarian Law:

As per the UNHCR, "Refugees are people who have fled war, violence, conflict or persecution and have crossed an international border to find safety in another country"[327]. Thus 'refugee' is someone who is compelled to migrate from his own country and home to some other country. The safety and protection of refugees became an international concern for the first time during and aftermath of World War-I. But the determination of refugee status always remained a contentious issue for the international humanitarian law. After the World War-II when large scale changes were being discussed and deliberated in the general international law, issues with regard to problem of refugees also came to the fore. The issues of refugee status and the definition of refugee were the most prominent for the humanitarian purposes. On 28th of July 1951, the Convention relating to the Status of Refugees (the 1951 Refugee Convention) was adopted by the United Nations, and it entered into force on 21st April 1954. The said Convention included a general definition of the term 'refugee'. Article 1 A (2) of the 1951 Refugee Convention states that the term "refugee" shall apply to any person who:

"As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

[327]. Available on https://www.unhcr.org/what-is-a-refugee.html (visited on 22 May 2022).

The main emphasis of the definition is on two important phrases: i) owing to well-founded fear of being persecuted, and ii) for reasons of race, religion, nationality, membership of a particular social group or political opinion. These are in fact qualifying criteria for someone to be recognized as a 'refugee'. The first one requires subjective inquiry whereas the second one is a factual condition.

'Well-founded fear of being persecuted' is a claim made by the person seeking refugee status where she anticipates or actually suffers oppression or human rights violations that compels her to cross international borders for safety. However, said 'well-founded fear of persecution' must be 'for reasons of race, religion, nationality, membership of a particular social group or political opinion'. In general, the applicant's fear should be considered well-founded if he/she can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.[328]

A refugee is basically a 'forcibly displaced person' from his home and country in search of safety. However, every displaced person may not be a 'refugee', because a person may be forced to cross international borders for several other reasons different from the ones mentioned under the 1951 Refugee Convention and the Protocol of 1967. Forcible displacement may happen due to civil war or armed conflicts as well. But these are not the grounds that would directly satisfy the definition of 'refugee' under the 1951 Refugee Convention. Thus, people who are forced to leave their country of origin due to international or national armed conflicts face a specific kind of disadvantage, i.e. they are not normally considered as 'refugees' within the definition of the term under the 1951 Refugee Convention. It becomes very difficult for an applicant who is displaced due to armed conflict to show that she has 'well-founded fear of being persecuted' for any of the reasons stated above. Also, it will be challenging to show that whether or not her own national government is able to provide effective humanitarian assistance in case the territory is occupied by invading armed forces.

6. Conclusion and Way Forward:

[328]. The Handbook of International Humanitarian Law (available on https://www.corteidh.or.cr/tablas/31461.pdf , visited on 26 May 2022).

The above described narrow conception of 'refugee' under the 1951 Refugee Convention and its 1967 Protocol has the potential to deny international humanitarian protection to millions of people who have fled their home countries due to dire circumstances induced by armed conflicts. The UNHCR would not accord it's assistance to them in the same manner and as per the same protocol as it would to those having 'refugee status'. Though such forcibly displaced people have not fled due to 'well-founded fear of being persecuted' but they would have well-founded fear of imminent starvation, fear of safety due to deteriorating law and order situation, fear of other forms of human right violations including sexual offences by invading forces etc. Unlike designated 'refugees', they will not be provided with material relief or permanent settlement and will most likely be at the mercy of the country that has allowed them temporary asylum on humanitarian grounds.

The problem with existing narrow definition is that of overemphasis on 'persecution' for according refugee status. Basically the term 'persecution' accounts for the lack of state protection under repressive conditions where a government is either party to such oppression or unwilling to provide protection to its own people. However, the term fails to include a condition where the government ceases to exist or is not in position to help its own people especially during armed conflicts when superior power is the invading force. In that context persecution is but one manifestation of a broader phenomenon: the absence of state protection of the citizen's basic needs.[329] In both types of situations: where government itself is oppressor and where the government is unable to protect, it is people's basic human rights which are violated. Thus, claim of refugee status is justified in case of those as well who are forced to flee and are deprived of basic needs due to armed conflict situation.

An interesting and well-meaning solution to the problem of definition came from the Organization of African Union (OAU). The OAU adopted a Convention Governing the Specific Aspects of Refugee Problems in Africa on 10 September 1969 (OAU Convention). The OAU Convention includes a definition of 'refugee' which is more inclusive than the definition under 1951 Refugee Convention. The definition incorporates the essence of earlier definition and in addition includes further:

[329]. Who is a Refugee? By Andrew E. Shaknove, Chicago Journals (available on http://www.mcrg.ac.in/RLS_Migration_2020/Reading_List_2020/Module_E/Shacknove_Who%20is%20a%20Refugee.pdf, visited on 6 June 2022).

"The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of nationality."[330]

This definition widens the scope of the term 'refugee' by including causes such as external aggression, occupation, foreign domination and disturbance in public order. Any of which may lead to forced displacement due to deprivation of basic needs and violation of human rights.

Thus, it would be proper if the United Nations and its instruments for international humanitarian law make appropriate changes in the present understanding of the term 'refugee' in order to provide much needed institutional support to the claim of forcibly displaced people due to armed conflicts. The OAU definition should have been accorded wider acceptance amongst the international humanitarian law proponents especially when the present definition leaves out lakhs of displaced people from the institutional assistance that are available to statutory refugees.

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[330]. Article 1 (2) of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted September 10, 1969 (UNTS no. 14691), Available on https://www.unhcr.org/about-us/background/45dc1a682/oau-convention-governing-specific-aspects-refugee-problems-africa-adopted.html, visited on 6 June 2022).

The Substantive and Procedural Aspect of Section 498A IPC: Analysis of Purpose and Trend

Rinita Das*

Abstract

Section 498A intends to prevent the infliction of cruelty by the husband and his relatives on the wife. This paper explores the law relating to section 498A with its societal and familial impact, the role of the court to prevent the misuse of the section and the trend of the institution of the cases. It concludes with the suggestion for the effective application of the section in true spirit.

The paper identifies that in the power relationship of 'men to women' in family, infliction of cruelty increases the 'bargaining power' of men for the satisfaction of their wants, creating non-cooperative environment that manifests imbalance of power in the family. Therefore the deeper object of the section is to amend the power relationship of men to women in family and empower the latter in the power struggle, thereby removing discrimination. The paper also infers that Section 498A increases the cost to be imposed on the perpetrator by fine and imprisonment making him weak in the power struggle and dilute his inherent bargaining power.

The procedural and the substantive aspect of the law is discussed at length with the opinion of the Apex Court, High Courts and various committee reports. From the various documents it is inferred that certain problems that triggered a need for change or reconsideration includes a) Police arresting the husband and relatives on the complaint b) tendency of the complainant to implicate the person without any justification c) lack of sensitive approach of the police towards women actually in distress.

The trend of the institution of cases has been explored and forecasting has been made with SPSS version 20. A significant reduction of the number of cases instituted is noticed due to the influence of the said ruling of the Supreme Court in Arnesh Kumar Case.

Keywords: Law, Cruelty, Judgments, Misuse, Trend.

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The Substantive and Procedural Aspect of Section 498A IPC: Analysis of Purpose and Trend

1. Introduction

Tradition bound Indian society visualizes women as goddess but the reality is a far distant dream. Marital discord and the demand of dowry due to the greed and malafide intention of the husband and the relatives to extort money from the bride's family give rise to the social evils like bride burning and abetment of suicide that pervaded the cultural conditions of India. Indian society discriminated women against men and women have faced such discrimination in silence making the constitutional protection of equality and righteousness equivocal. Consequently women lose their lives, homes as well as the sense of identity.

Section 498A was introduced into the Indian Penal Code 1860 by the Amendment Act of 1983 to protect women from cruelty in the hands of husbands and relatives of husband by making infliction of cruelty a punishable offence. This is in concern of the life, liberty and equality of the women.

The matrimonial offences that take place within closed doors could not be effectively controlled especially because the acts are incited privately and have diverse impact on the parties. By the Criminal Law Amendment Act in 1983 the legislators have introduced some significant changes in favour of the women. However over the years, history has witnessed that section 498A has been used as well as misused; false and exaggerated complaints have been filed in the Courts implicating the husband and relatives. Therefore there is a mixed opinion on the importance of the section as well as its applicability.

This paper explores the law relating to cruelty of husband and relatives along with the procedural aspect and the object. It further discusses the various proposal of change and the role of the Courts to prevent abuse of section 498A. The trend of the institution of the cases and the influence of the laws for the same has been analyzed. It concludes with the suggestion for the effective application of the section.

2. Object of section 498A Indian Penal Code and the familial structure

Violence inflicted on women is the reflection of superiority of men over women in gender relation approved by society that places women in subordination to men. Hence the infliction of cruelty finds place in men to women relationship in family that manifests in divergent forms, ranging from physical aggression to emotional abuse. In a patriarchal society when the wife goes to her matrimonial family after marriage, it makes her even more vulnerable in this 'man to woman' relationship. In spite of the husband being morally bound to protect the wife and look after her interest, very frequently it is found that the sacrosanct institution of marriage is diluted by infliction of cruelly on the wife. The immediate objective of the implementation of the section is a response to the escalation in dowry deaths in India. The failure of the moral and ethical responsibility of the groom and his family generated circumstances for section 498A to step in for the protection of married women in times of distress. In the power relationship of men to women the latter always falls at the hands of the former as the violence tends to increase the bargaining power of men. Bloch and Rao[331] opines that "domestic violence is the vehicle employed by males to enhance their bargaining power". Violence acts as a means to ensure that the victim performs in satisfaction to the abuser being dominated by him. She fails to implement her preferences in the household. Implementation of her preferences is positively correlated to the violence that she has to confront. Therefore, in a non-cooperative environment, the satisfaction of preferences of woman leads her to confront violence that actually causes her greater dissatisfaction. This equilibrium of satisfaction and dissatisfaction causes stress and further makes the family environment more non-cooperative. The Declaration On The Elimination Of All Forms Of Violence Against Women which was adopted by the United Nations on 20th December 1993 also recognized that "violence against women is the manifestation of historically unequal power relations between men and women" causing domination, discrimination and hindrances to their development. Menon and Johnson[332] has shown that the personal and

[331] Bloch, F. and V. Rao " Terror as a Bargaining Instrument: A Case Study of Dowry Violence in Rural India", Vol 92, American Economic Review, pp.1029-1043, (2002),

[332] Menon, N. and M. P. Johnson."Patriarchy and Paternalism in Intimate Partner Violence: A study of Domestic Violence in Rural India., in K. K. Misra and J.H. Lowry (eds.), Recent Studies on Indian Women: Empirical Work of Social Scientists, Rawat Publications, Jaipur, India, pp. 171-195. (2007),

the family characteristics affects the infliction of the cruelty. Therefore there is a close connection of family physiognomy to the act of cruelty. Section 498A empowers women in this non-cooperative environment increasing her bargaining power in the power struggle against her husband and relatives. It further increases the cost to be imposed on the perpetrator by fine and imprisonment as well as the sufferance of anxiety making him weak in the power struggle and dilute the bargaining power that inherently exist in the society as against the women.

The attitude of women for the gender roles and privilege is believed to be the best overall predictor of domestic violence. Therefore the section touched upon the mindset of both men and women, creating a change in the belief on the performance of gender role and the privilege that they are entitled to in the society. As cruelty is the manifestation of men's superiority over women in the power struggle and relationship imposing the superior bargaining power of men over women creating imbalances of the satisfaction of wants of men and women in the family, the section has a deeper objective to amend the power struggle and the power relationship of men to women in family and enabling her to satisfy her wants and protecting her from the cruelty of husband and her in-laws removing the innate discrimination.

3. The procedural and substantive aspect of section 498A: An Overview

Section 498A states "whoever being the husband or relative of the husband of the woman subjects such woman to cruelty shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine." Explanation of 'cruelty' is "1) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of woman or 2) Harassment of the woman where such harassment is with a view to coercing her or any other person related to her to meet any unlawful demand of any property or valuable security of is on account of failure by her or any person related to her to meet such demand".

The explanation defines 'cruelty' is defined in express words. It includes "any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or mental or physical health or any harassment

of the woman for dowry". Although the definition has specified the extent of the term 'cruelty' but the term 'cruelty' is very relative to each woman depending upon the facts, circumstances and level of toleration. There is no stringent benchmark but a virtual comparative realization of disadvantage to the individual. Infliction of cruelty may not be deliberate or willful. In Inder Raj Malik V Sunita Malik[333] it was held that "cruelty includes filing of false and vexatious litigations, deprivation and wasteful habits persistent demand and extra marital relationship, harassment and dowry demands false allegations of non- chastity and the non-acceptance of the baby girl". The Supreme Court in Sobha Rani V Madhukar Reddi[334] held that the "definition of cruelty in the explanation adds a new dimension to the concept of cruelty". It includes both "physical and mental cruelty" (Deviknanadan V State of MP[335]). The mental cruelty leads to the severance of the bond between the parties Hanumanta Rao V Raman[336]. The infliction of physical cruelty by way of beating or any kind of assault is equivalent to the emotional exploitation. The standards for both cannot be quantified distinctly. It includes all those conduct that is distressing and painful for the women (Surender Reddy and Ors. V State of A.P.[337]). The Apex Court defined mental cruelty as "when a person cannot reasonable live together" and "the woman cannot be asked to put up with such behavior and continue to live with the other". It is not necessary to prove grievance to health (V. Bhagat V B. Bhagat[338]). Therefore cruelty is the conduct of one that affects the other adversely.

Cruelty has also been distinguished as: latent cruelty and patent cruelty and each one is equally dangerous so as to include within the definition – one can be seen and the other one can be felt (Girdhar Shankar Tawade V State of Maharashtra[339]). If there is a physical

[333] Inder Raj Maik V Sunita Malik 1986 CRLJ 1510

[334] Sobha Rani V Madhukar Reddi AIR 1998 SC 121

[335] Deviknanadan V State Of MP 2003 CRLJ 1502(MP)

[336] Hanumanta Rao V Raman AIR1999 SC 1318

[337] Surrender Reddy And Ors V State Of AP 2002 CRLJ 2611(AP)

[338] V Bhagat V B Bhagat AIR 1994 SC 710

[339] Girdhar Shankar Tawade V State of Maharashtra 2002 CRLJ 2814 (SC)

and mental ill-treatment, cruelty is inferred for the wife (Savitri Devi V Ramesh Chandra and ors.[340]).

For invoking the section against the husband or relatives it is necessary to prove that the victim is a married woman and "husband or relative of the husband of the woman subjects such woman to cruelty" causing harm, harassment or hurt. The intention of infliction of such willful cruel conduct is not necessary to be proved. It is the responsibility of the legal professional to prove cruelty before the Court but it is purely a question of fact and depends on many extraneous factors like individual mindset, understanding of the parties, education and the economic status, the endurance and the courage to vindicate. There are some conducts that are considered with indignity, harassment and humiliation disclosing a gross violation of the basic rights of the individual and therefore always termed to be an act of 'cruelty'.

4. The procedural aspect of the law

Section 498A is non-bailable, and cognizable in nature. The accused cannot claim bail as a matter of his right but can be enlarged on bail on the discretion of the Court. The Court may allow bail with or without conditions as it thinks fit on the existing facts and circumstances. Provisions related to arrest of a person during investigation has been an important procedural aspect. Section 41A was introduced in the Code of Criminal Procedure (CrPC) by the Amendment Act of 2008. Under section 41 "police is having the power to arrest any person without a warrant who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or against whom a credible information has been received or a reasonable suspicion exists" to the same interalia. Under section 41A, "the police officer (where section 41(1) is not applicable) shall issue a notice directing a person against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exist that he has committed a cognizable offence, to appear before him at such time and places as may be mentioned in the notice". Section 41A (2) states that "It shall be the duty of the person to comply with such notice" and then according to subsection 3 "he shall not be arrested". If he fails to comply with the terms of the notice, then the police officer shall get

[340] Savitri Devi V Ramesh Chandra And Ors 2003 CRLJ 2759 Delhi

appropriate orders of the court to get him arrested according to section 41A (3). In Arnesh Kumar V State of Bihar[341], the Court differentiated offence punishable with 7 years and more. The Hon'ble Court held that 498A is punishable with imprisonment of less than or for 3 years therefore compliance to section 41A is compulsory. Disciplinary proceedings shall be started against the police who do not comply to section 41A CrPC. Therefore the power of the police officer to conduct arrest is restricted to a greater extent.

Section 498A is cognizable in nature as the police officer can arrest any person without warrant on the FIR being lodged and start with the process of investigation without prior permission of the magistrate and thereby the criminal justice system is set at motion. Uncertainty prevails as it is not decided by the law whether when a written complaint has been made, the police officer is bound to register the FIR or exercise discretion to conduct a preliminary inquiry before registration of the FIR or whether the lodging of the FIR be stopped until the parties sit for reconciliation.

The exercise of the power to arrest the husband and in-laws is a weapon in the hands of the wife that immediately functions against them. In case of trivial matrimonial discontent when a complaint is being made, the wife considers the instantaneous arrest of the husband and his relatives as consolation to the anxiety caused by disagreement without considering the fate of the complaint. Therefore the instantaneous arrest merely on the FIR lodged by the wife on the spur of moment gets stimulated as the reason for the complaint. The restrictions of the police on the power of arrest in such cases have a social perspective. It prevents them from the sufferance of the arrest which is made without considering the veracity of the complaint that may help in the prevention of the breakdown of the marriage and reconciliation between the parties at the later stage. Hence this legal restriction is of great help to the society at large.

5. An outline on the proposal for modification

The section was implemented to rescue women from cruelty inflicted by husband and relatives of husband but the misuse of the section is discerned from various judgments of the court and the reports. In assessment to section 498A, the Malimath Committee Report

[341] Arnesh Kumar V State of Bihar (2014) 8 SCC 273

2003[342] states that the law is very harsh and instead of helping the victims have become the source of blackmail and harassment of husbands and relatives. The police get a chance to arrest the person named in the complaint without considering the truthfulness of the complaint. Therefore, the chance of saving the marriage is lost once and for all as it

affects their relationship and consequently becomes difficult for the woman to go back to the matrimonial house and lead a family life. Hence it is found that the committee has expressed doubt regarding the ability of the law to save the institution of marriage. The Committee further stated that "a less tolerant and impulsive women can lodge a FIR even on a trivial case" and "as the offence is non-bailable, the accused languish in jail". However the Report does not articulate the rights of the woman under the law and the need of section 498A for a woman in trouble and distress. The need to reconsider the law relating to section 498A is reflected in the judgments of the courts from time to time. In Preeti Gupta V State of Jharkhand[343] the Supreme Court expressed doubts on the efficacy of the section and stated that the legislature needs to relook into the law. The copy of the judgment is referred to the Law Commission for reconsideration. In G.V. Rao V L.H.V. Prasad[344] the Supreme Court held that when FIR states all the persons in the matrimonial family to be accused irrespective of the role played by each one of them, then the FIR is liable to be quashed. The allegations become non serious and should not be sustained in the eyes of laws. If the provision is misused, it has to be amended, repealed modified by the legislature and cannot be done by the Courts. The Courts can only interpret it (Padma Sundara Rao V State of Tamil Nadu[345])

Systematic, persistent and willful act that causes the life of the women burdensome so as to make her commit suicide (Savitri V Ramesh Chand and Ors[346]) is made punishable under the law to shield the women but there are clear manipulation and misapplication of the section striking at the foundation of the marriage itself, which is detrimental to the

[342] Dr. Malirnath Committee on Reforms of Criminal Justice System; Government of India, Ministry of Home Affairs. Report Vol. 1. India, March 2003, para 16.4.3
[343] Preeti Gupta V State of Jharkhand AIR 2010 SC 3363

[344] G.V. Rao v L.H.V Prasad AIR 2000 SC 2474

[345] Padmasundara Rao V State Of Tamil Nadu (2003) SCC 533

[346] Savitri V Ramesh Chand and Ors 2003 CRLJ 2759 (Delhi)

wellbeing of the society. Justice Kapoor stated that the section is "responsible for bringing about a social catastrophe and wreaking havoc on the idea of the family." Similarly the court in Sushil Kumar Sharme V Union of India[347] held that the objective of the section is to prevent the dowry menace but in many instances it is found that FIR is filed with an "oblique motive". The acquittal of the accused does not wipe out the humiliation faced by him. Moreover in the civil society the problem is augmented by media coverage. The importance of the section has been diluted in various instances. It was held that "complaints under Section 498A may be filed with an oblique motive to wreck personal vendetta". The Court used the term 'legal terrorism' for Section 498A. The Court further held that the power of arrest needs to be very carefully used as it reduces the chance of reconciliation in matrimonial disputes. It has cautioned the legislatures to find out ways to deal with false and frivolous applications. In Siddaram Sadlingppa v State of Maharashtra[348] the court held "the arrest should be the last weapon and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of the case". The Supreme Court in the case of Ram Gopal Chaturvedi V State of M.P[349] opined that the offence under this section should be made compoundable in nature. The same recommendation was given by the Law Commission on its 243rd report on 12th August 2012[350]. Additionally the process of compounding the offence is also recommended which includes that after the application of compounding is filed then complainant must be interviewed by a lady judicial officer or a member of the District Legal Service Authority. If the Court is of opinion that there is a voluntary withdrawal of complaint and candid settlement between the parties, the magistrate shall hear the application and fix a date after the next three months and on the said date, interview the victim and finally pass appropriate orders. The Report stated that they had conducted a survey amongst 244 judicial officers out of which 100 stated that it must be made bailable and 114 stated that the offence should remain non- bailable in nature but expressed concern on the false cases being filed. They expressed concern on the duty of the police to act sensibly.

[347] Sushil Kumar Sharma v Union of India (2005) 6 SCC 281

[348] Siddaram Sadlingppa V State Of Maharashtra AIR 2011 SC 312

[349] Ram Gopal Chaturvedi V State of M.P. (1969) 2 SCC 240

In Arnesh Kumar V State of Bihar[351] Justice Pinaki Chandra Ghosh and Justice Chndramauli Kumar Prasad began where Justice Kapoor ended in Savitri V Ramesh Chand and Ors[352]. The court stated that the sections are used as a weapon and not as a shield as the section has made the offence non bailable and cognizable in nature and there is a routine arrest of the accused by the police. In Chander Bhan V State[353] the Delhi High Court observed that the complaints are filed due to ego clash between the parties out of which the children of such wedlock are the worst affected. The court issued the following guidelines that are needed to be followed by the police:

a) FIR should not be registered in a routine manner without checking prima facie the veracity of the complaint,
b) Police should scrutinize the complaint carefully before registering the FIR,
c) Cases under Section 498A and Section 406 should be registered after taking approval of the DCP or additional DCP and arrest of the accused to be done only with the approval of the DCP or the additional DCP.
d) All possible steps to be made for reconciliation and if it fails then only the recourse of law to be taken for return of 'stridhan' property,

These directives were followed in Delhi only by the standing order issued by the Commissioner of Delhi coupling the orders as "Guidelines for Arrest".

In Rajesh Kumar Sharma and Ors. V State Of UP and Anr.[354] the Court appointed A.S. Nadkani Additional Solicitor General and V.V. Giri a Senior Advocate as amicus curiae to give recommendations to prevent the misuse and the recommendations which are as follows:

1) If there are allegations against all the relatives of husband for cruelty then it cannot be taken at the face value. It needs to be proved by clear supporting evidence.

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[350] Law Commission in its 243rd report available in lawcommissionofindia.nic.in
[351] Ibid at 11
[352] Ibid at 16
[353] Chander Bhan V State 2008 SCC Online Del 833

[354] Rajesh Kumar Sharma and ors V State Of UP and anr 2018 10 SCC 472

2) If the FIR has vague and exaggerated evidence without verifiable evidence of physical and mental harm resulting harassment and even arrest of the family members, then the complaint cannot be considered,
3) If the relatives of the husband are residing outside India then the matter shall be considered only if the Investigating Officer thinks it necessary to proceed against the person by impounding the passport.
4) The counseling under section 14 of Protection of Women from Domestic Violence Act 2005 ought to be necessary before the institution of the case.
5) Establishment of the Family Welfare Committee with the paralegal service producers and volunteers to communicate with the complainant and the respondent, and after the said authority files a report to be considered by the magistrate, the law can take its course.

The directives of the court have been very effective to prevent the abuse of section. But the directives need to be incorporated in the procedural law that governs the implementation of the section. Therefore it can be inferred that the substantive aspect of section 498A itself is not unscrupulous but the procedural formalities to be maintained have made the law a weapon for intimidation. Certain problems that triggered a need for change or reconsideration includes a) Police arresting the husband and relatives on the complaint b) tendency of the complainant to implicate persons without any justification c) lack of sensitive approach of the police towards women actually in distress. Although the power of arrest becomes a significant weapon

in the hands of the police it should be sparingly used not as a weapon but as a shield especially considering the veracity of the complaint and the possible impact on the life of the women. Mechanical exercise of the power of arrest violates the right to life and therefore the investigating officer should sparingly use such powers to balance individual rights and liberties to the duties and obligations of the each other.

6. Analysis of the trend of the cases instituted under section 498A

year	cases instituted under sec 498A
1991-1992	15949
1992-1993	19750
1993-1994	22064
1994-1995	25946
1995-1996	31127
1996-1997	35246
1997-1998	36592
1998-1999	41376
1999-2000	43823
2000-2001	45778
2001-2002	49170
2002-2003	49237
2003-2004	50703
2004-2005	58121
2005-2006	58319
2006-2007	63128
2007-2008	75930
2008-2009	81344
2009-2010	89546
2010-2011	94041
2011-2012	99135
2012-2013	106527
2013-2014	118866
2014-2015	122877
2015-2016	113548
2016-2017	110378
2017-2018	104551
2018-2019	103272

Table 1: Gathered from the NCRB Data

Data is consolidated from the reports that are published by the National Crime Reports Bureau to analyze the trend of the institution of the cases under section 498A using the software SPSS Version 20 and discuss the effect of the judicial pronouncements and the

changes of the law on the trend. Table 1 shows the number of cases instituted from 1991 to 2019.

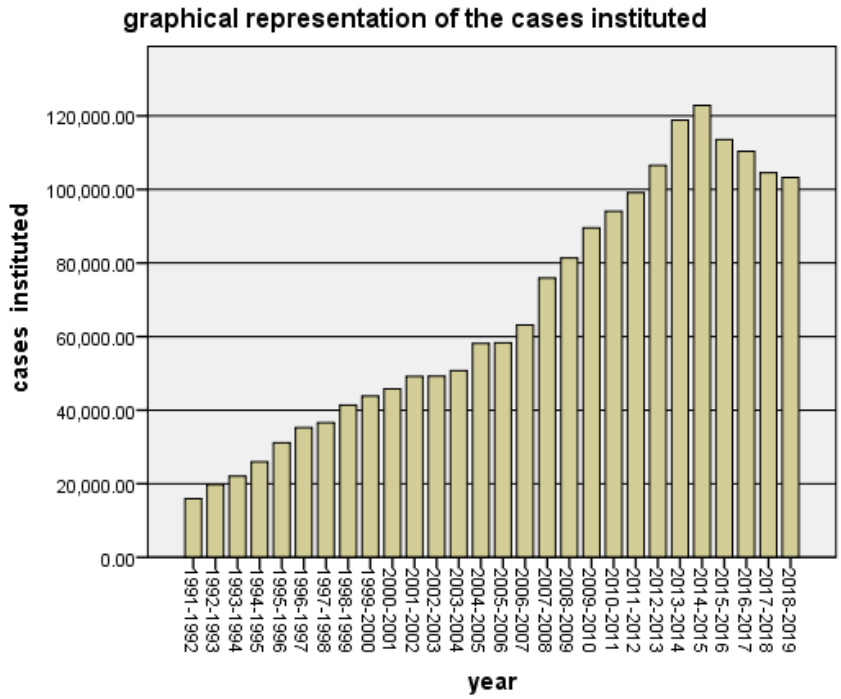

Figure 1 : histogram showing the number of cases instituted per year

From figure 1 it is found that since 1991-92 there has been a gradual and steady increase in the institution of the cases by roughly 4000-4500 cases annually and in the year 2003-2004 and 2005-06 there is a lesser number of cases that has been instituted as reflected in the chart. Thereafter the chart shows a steady increase till 2014. But from the year 2014-15 there is a sharp decline in the institution of the cases and the trend goes down. Overall until the year 2014 there is no significant changes in the trend of the institution of the cases.

For further understanding of the trend of the number of cases the difference of each year in reference to the mean on the Y-Axis is plotted in the graph as shown below. A steep fall in the number of cases since 2014 is conspicuously reflected in Figure 2.

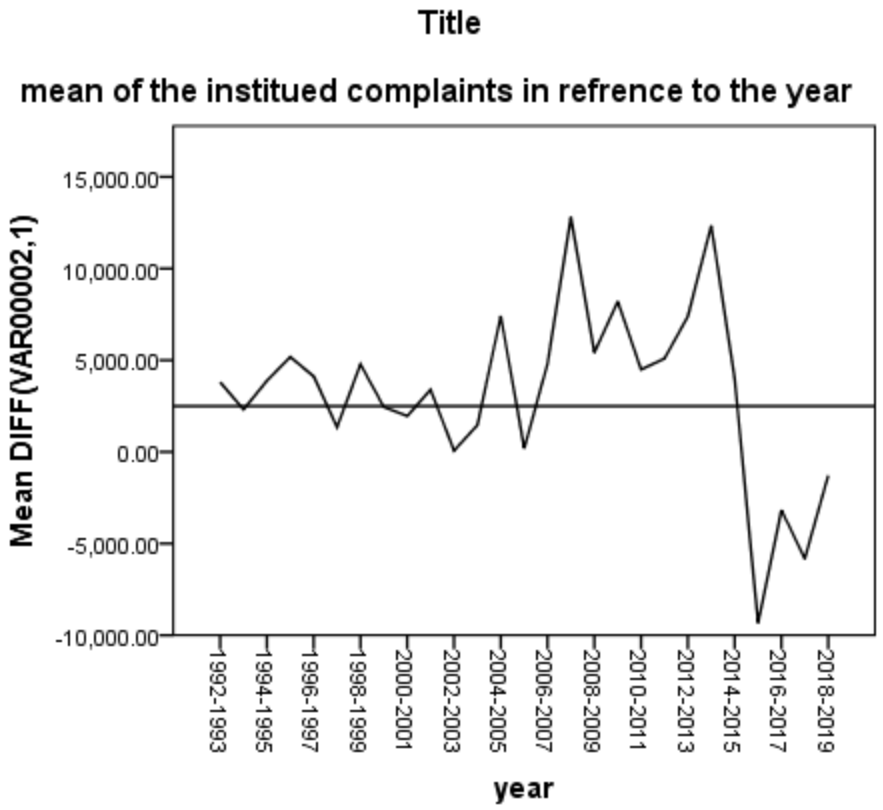

Figure 2

It is worthy to mention that the trend of the institution of cases is influenced by Ruling in "Arnesh Kumar v State of Bihar", which laid down a very prominent rule restricting immediate arrest of person on filing of FIR stating that compliance of section 41A of the CrPC is mandatory. Thereafter routine arrest of a person on the basis of the FIR is not to be done and the power to arrest the accused is to be exercised only when he fails to conform to the notice issued. Thus, it is inferred that the significant reduction of the number of cases instituted is due to the influence of the said ruling of the Supreme Court.

There is a close connection of section 498A and the cases to be instituted under the 'Protection of Woman from Domestic Violence Act 2005[355]' as the domain of its operation is similar; the former imposes criminal liability while the latter imposes civil liability for infliction of violence or cruelty. Section 498A concentrates on the accused and imposes punishment by way of fine and imprisonment on the husband and his relatives for the infliction of cruelty on the wife; whereas the remedy the Domestic

[355] Hereinafter referred to as the Domestic Violence Act

Violence Act concentrates on the victim to redress her grievances within the domestic household when she has been subjected to violence by any male member of her family which includes her in-laws as well as the parental family. It is remarkable to note that the promulgation of the Act has not influenced the trend of the institution of the cases under section 498A except a very trivial fall in the cases instituted in the year 2005-06. Therefore, it can be inferred that both the civil as well as the criminal remedy as been opted for by the victim.

A forecast of the trend has been made and the chart generated by SPSS in figure 3 shows that there will be a significant reduction of cases in the next five years. Therefore the influence of the ruling, restraining arbitrary arrest has a huge impact on the cases instituted. The line left to the vertical line indicates the present value of the trend and the line to the left forecasts the trend in future. The model forecasts that by 2025 the number of complaints will be significantly reduced to 80,000 approximately.

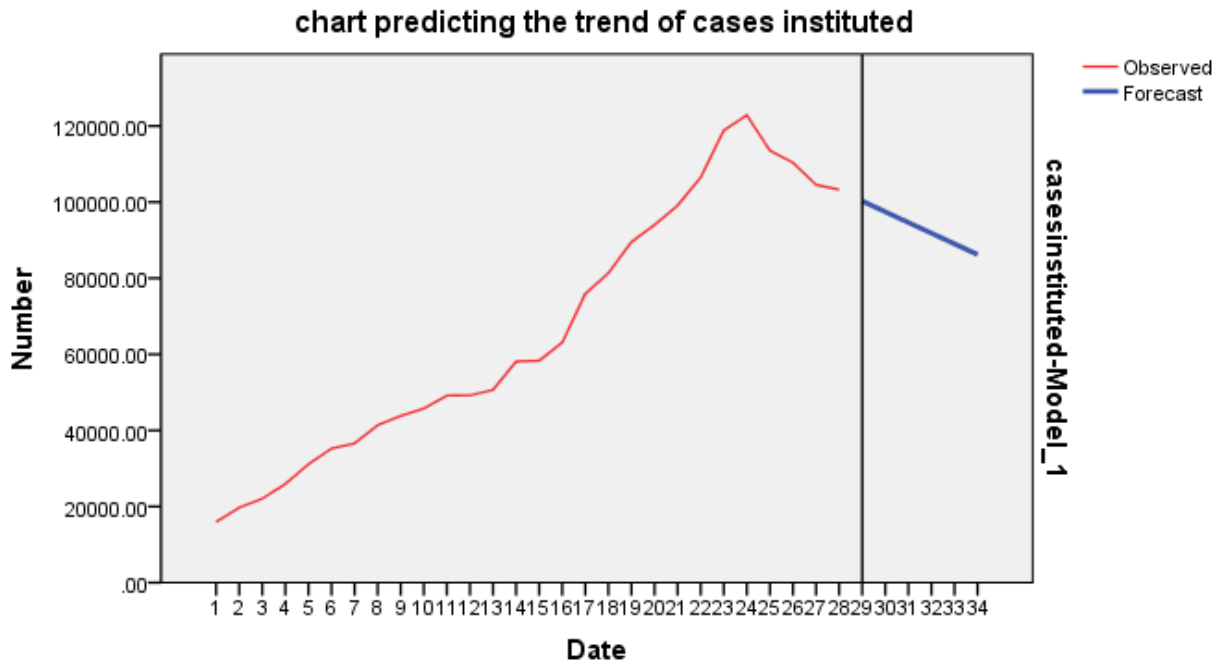

Figure 3

7. Conclusion & Suggestions

Section 498A that intends to protect wives from cruelty inflicted by the husband and the relatives goes deep into the fabric of the family life. Therefore it influences and is influenced by the individual deeds and conduct in family. For the protection of women from cruelty, the familial and legal perspective is considered hereinafter. From the familial perspective, infliction of violence compels her to subdue to the interest of the perpetrators and she no longer continues as a freethinking individual and consequently lacks a progressive outlook. Within the framework of relationship, violence is used as a means to achieve the maximum benefits of the said relation. Infliction of cruelty will stop when within the framework of the

Relationship, the perpetrator of violence has to bear the maximum cost and enjoys no benefits or satisfaction from his acts. Therefore it ought to be the duty of the legislators and the court to make the cost of violence exceedingly large, by imposing greater penalty so that the accused does not consider it as a worthy end in that situation. The gap between the implementation of his preferences and the violence needs to be narrowed down considerably and that will enable the violence to get dissolved. On the other hand, when the procedural provisions are exceedingly inclined in favor of the women enabling them to use them as a weapon and not as the shield, the legislature ought to devise ways to protect the husband and the relatives from false and frivolous complaints that can be filed against them. It is necessary to revamp the procedural aspect of the law relating to section 498A for the benefit of the family in particular as the institution of marriage builds up the family. The harshness of the law that breaks the sacrosanct institution needs to be reduced so that the women do not take the undue advantage of the law and at the same time the women in need get the protection of the law.

Leveraging the 'Assignment'& 'Licensing' provisions of Copyright Act 1957 for Value Chain of Business

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Abstract

Anything that is constant in the business is 'Change'. Change is the only constant variable which requires its management in the realm of business and its sustainability in market environment. The plethora of opportunities in the sphere of 'Intellectual Property Rights' including that of Copyright has opened vistas of opportunities for business stakeholders. The value chain of growth and development of business and the country requires a robust, nimble and supple infrastructure and framework, which has to be time-tested and based on sound legal principles and doctrines. The buzz on leveraging the provisos for the absolute and competitive advantage in the business landscape with respect to 'Assignment' and 'Licensing' is becoming a game changer in the domain of 'Copyright'. The statutory provisions as enacted in the Copyright Act 1957 has to be seen in tandem with the judicial precedents and judicial rulings from the Hon'ble Courts of Law in the ethos of the vibrant democracy of India. The instant paper is an attempt to review and analyse the multi-faceted dimensions pertinent to the know-how and the knowledge domain of 'Intellectual Property Rights' from the prism of multiple stakeholders, *inter alia* 'lyricists', 'music composers', 'sound recording companies', 'cinematograph/film industry stakeholders', 'costume designers'.

Keywords: *Copyright; Comparative Law; Assignment; Licensing; Moral Rights; Commissioned works; Authorship; Ownership; Exclusive Licensing; Open Source Licensing; Comprehensive Intellectual Property Rights Policy; General Public Licensing system; Privity of Contract; Copyleft Doctrine of Copyright Law.*

Introduction

It is a *fact accompli* that the dynamic changes in the domain of 'Copyright' warrants a close analysis of the multiple facets and based on 'facts and circumstances' of the cases surfacing before the Hon'ble Court of Law, the interpretation of statutory provisions is also playing a vital part in rendering finality of judgment. As could be averred in catena of cases, which has surfaced in Hon'ble Court of Law, that the 'mode of licensing' has a quintessential and seminal impact on

the rights of the assignor and assignee in the domain of Copyright. The growing upward trend in the 'Infringement of Copyright' has substantiated the vital need to reanalyse and relook at the basis principle and doctrine in the touchstone of statutory provisions and the essence and ethos of law in its entirety. Section 14 of the Copyright Act 1957 specifies the meaning of Copyright. Thus, it can be averred that Copyright is bestowing a 'private property alike structure', whereby there is an incentive to invest, create and disclose. It is vital to understand that **Section 14** confers upon the '**Owner**' a set or rather a bundle of rights enumerated in the said section; whereas the '**Author'** is entitled to '***Moral Rights'*** (specified in **Section 57** of the Copyright Act, 1957).

Moral Rights of performers

Moral rights pertains to the author's specific rights and has two component, *firstly*, authorship claim of the work of the author and *secondly*, the claim related to distortion, mutilation, modification or anything prejudicial to author's honour or reputation. Thus, a distinction is been made with respect to 'Moral Rights' which are non-economical rights available to author vis-a-vis the economic rights which are there with owner.

There are **two aspects** to the work in question, **either *it can be emanating from the employee and employer relationship existing in the course of employment*** where the employee does something for the employer **or** it pertains to '***Commissioned Work'***.

The employment contract provides that right of the author to the owner by the virtue of that contract of service to be the owner where the contract overrides the default provision as enunciated in Section 17(a) [which is the default provision], whereby the ***'contract' would be provided that prominence overriding the Section 17(a) of the Copyright Act***.

Section 17(a) pertains to the newspaper and journalists work. For example, a person going to a photo studio and asking with a '***valuable consideration'*** certain rights whereby as per **Section 17(b)** the **right would be assigned to the owner.** It is vital to note that **Section 17(b) pertains to only specific Categories** of work including that of

1. Photograph
2. Painting
3. Portrait or Engraving or Cinematographic Films

And this Section 17(b) does not apply to literary, musical, dramatic or sound recording work.

The distinction is vital when considering the '***Contract of Service'*** of the nature of employer and employee relationship with applicability of ***Section 17(a) and Section 17(c)*** of the Copyright Act; Whereas, '***Contract for Service'*** pertains to ***Section 17(b)*** of the aforesaid Act.

US Supreme Court case ***Community for Creative Non-Violence v. Reid***[356]***,*** laid down the eight point guidelines for ***Contract of Service*** and is a guiding light for determining 'ownership' in Copyright works.

For Joint authorship, the copyright subsists from the lifetime of the last surviving author plus 60 years post his demise. If it is anonymous, then the copyright subsists from the date of publication and then 60 years and if the identity of the author is known during that subsistence, then it would calculate for that lifetime of the author plus the 60 years.

The case ***Eastern India Motion Pictures vs Performing Right Society Ltd.***[357], a judgment of the Hon'ble Supreme Court while interpretation the Section 17(b) of the Copyright Act 1957, the observation was that the whole of right pertaining to the 'underlying individual copyrights which subsists with lyricists and music composer' along with the cinematograph film went to the Film Producer. It had far reaching consequences where the disincentive to the 'underlying individual copyrights owners of literary, music composers' was their copyright went to the Producers and it was total and complete plenary control to the 'Film producers' and this was corrected in amendment to the Copyright Act 1957 in the year 2012, that was inserted as "Provided that in case of any work incorporated in a cinematograph work, nothing contained in clauses (b) and (c) shall affect the right of the author in the work referred to in clause (a) of sub-section (1) of section 13..." Section 17(b) and Section 17(c) did not talk about copyright of literary and musical work, so the question is about the applicability in that sense to another distinct area or category of 'Cinematograph work'.

[356] Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989)
[357] Eastern India Motion Pictures vs. Performing Right Society Ltd. AIR 1977 SC 1443

In ***Neetu Singh vs. Rajiv Saumitra and Ors.***[358] surfacing before the Hon'ble High Court of Delhi, the Court observed that the 'Director' is not an employee of the company, but rather agent of the company.

Sec 2(d) of Copyright defines the 'Author', with respect to sound recording and Cinematograph works, the author can be the producer. Author with respect to literary, dramatic, musical or artistic work which is computer generated, it the person who has created the work.

In the case ***Neetu Singh v. Rajeev Saumitra***[359] case, the issue other than matrimonial strain between husband and wife it was about authorship of the books. The case is pertaining to determining the 'first owner of Copyright' as per Section 17 of Copyright Act 1957, in which the Hon'ble Court observed that Director is not employee in the course of employment. The Director is 'only an agent' of the company and the authorship cannot be construed to be in the course of employment.

Comprehensive Intellectual Property Policy

It is vital to note that that a '***Comprehensive Intellectual Property Policy'*** defines the relationship of the student and the faculty when it comes to Copyright and its issues related to consent where the consent to the policy and would be of binding character to the parties entering into that contract. The publication houses asks for the assignment of the copyright via a contract with the author generally. The difficult part is to distinguish between what form part of 'course of employment' and 'not in course of employment'.

So, while purchasing of the CD and playing it in public gathering say, in a stadium involves the following stakeholders rights:

1. 'Royalty' for the Singer with the applicability of Section 38A with respect to 'Right of the performer'
2. 'Royalty' for the Literary work of the Lyricist
3. 'Royalty' for the music work of the music composer or the music director
4. 'Royalty' for the 'Sound Recording'

[358] Neetu Singh vs. Rajiv Saumitra and Ors. CS(Comm.) 935/2016
[359] Ibid

It is pertinent to mention that the Copyright in India subsists for lifetime of the author and 60 years from the death of the author. This is valid for literary, dramatic, music and artistic work which is published. The 60 year period is calculated from the 1st of January of 'next calendar year' which follows the year when the author has died. The 'Copyright' is in basis purpose provides that statutory backing as enunciated in Section 13(1) of the Copyright Act 1957 and helps in providing the clarity from statutory perspective.

A conjoint reading of Section 15, 16 and 52(1)(u) of Copyright Act 1957 becomes imperative to analyse. **Section 52(1)(u) of Copyright Act 1957** is coming in the domain of 'Fair dealing doctrine' for any sculpture in public place or premises for which 'royalty' need not be paid and provides for that scope of exemption if the same is shown in cinematograph films.

Another provision which warrants a relook is **Section 15 of Copyright Act 1957**, which embodies the special provision related to the Copyright in design and which is capable of application of Industrial process for reproduction. For example, a sculpture which is artistic in nature has both the functional and artistic work as such Copyright would subsist for limited copies. As such if the number of copies exceeds fifty in number, then the Copyright ceases. This can be further exemplifies with special sarees, for example, for special occasions for royal family of Bhutan, which if the exclusive nature has to be protected, then Copyright is best method. However, it is put to utility for common public or for mass production, then neither Copyright nor Industrial design can protect it.

Authorship and Ownership in Copyright Act 1957

Authorship in Copyright is embodied in Section 17 of the Copyright Act, 1957, where the ***Section 17 talks about the exceptions to the general rule that 'Author is the first owner of the Copyright'.***

A look at **Section 20** which embodies the principle of '***Transmission of copyright in manuscript by testamentary disposition***' via. the 'unpublished work' by which Copyright subsists for 60 years for posthumous work. As per the Copyright Act 1957, the person who gets the work, say a '***manuscript'***, can be entitled to the 'physical script' and to publish it. At the same time, being the sole owner of the underlying Copyright.

Section 21 embodies the concept of '***Relinquishment of copyright by the author'***. Giving up of the 'Copyright' implies that the rights can be 'relinquished' but not the intrinsic value, which can never be destroyed.

Significant feature of Copyright Act in this aspect in line with **Section 21** involves:

1. By specifying the intent of relinquishing by writing.
2. By addressing to Registrar of Copyright or by way of public notice in national dailies
3. By not affecting any pre-existing license if it exists or subsists in favour of any person on the date of the notice.

Varied Facets of 'Assignment of Copyright'

At a basic level, it is important to note that Section 18 of the Copyright Act 1957 specifies 'Assignment of Copyright'.

From IPR Management perspective, distinction between License and Assignment becomes pertinent in this context:

1. License is the permission to do something, as such without license it would be non-permissible or even illegal; where the 'Assignment' pertains to transfer of ownership.
2. License is mere right to exercise those rights which when done would not be infringement.

The idea and the object of **Sec. 18(1)** are to undo the new mode of exploitation which may be unjust and inequitable for the underlying Copyright stakeholders such as music composers and lyricists when making a Cinematograph work.

The interpretation of the provision – ***first provision*** pertains to '**Saving the underprivileged'** for example music composer as such assignment would not include:

1. **New technology** which take the character of exploitation via new modes (excluding which is via ***apriori mention*** or mention with specific technology)
2. ***Unforeseeable future technology or technology which is not in general use***: Any interpretation which should be specific nature of the new technology.

It is vital to note that the ***first proviso of Sec. 18*** has to be in written and explicit format and after the death then there is provision to consider it by 'Legal representative'.

Second provision in Sec. 18 pertains to "**Right to equitable remuneration**" pertaining to '***Non-cinema exploitation***' which cannot be waived considering that there are many stakeholders or underlying copyright work

Third provision in Sec. 18 pertains to "***Beyond normal pertaining to Sound recording***" Example is that of 'mobile ring tone' which after the advent of internet and mobile technology and has seen huge progress.

There are criticisms of the aforesaid provisos explicated:

1. How about the 'Rights of the Script writer'? Why there rights are not considered? The script writer comes in the realm of dramatic work.
2. There are times when the producers of the cinematograph work are not rich and producers functions as both producer and director and they represent as 'middle class' with underprivileged as they also seek help of bank for payment and financing of their projects.
3. From the perspective of Constitution of India, the logic of 'intelligible differentia'- Is such a distinction does not create classes and sub-classes within classes?

A reading of **Section 19** of aforesaid Act, makes it interesting that the 'oral or verbal assignment of Copyright' would not be valid, it has to be 'registered'. 'Assignment' is 'transfer of ownership'.

From the perspective of Section 30 of the Copyright Act, 1957 which talks about **'License'**- Same modalities as that of Section 19 of Copyright Act 1957 would apply. Mere right of use is transferred, ownership remains with owner in licensing. This is 'not' transfer of ownership.

Section 19 does not talk about the fallout of the technology after-effects or the effect of technology in future when it comes to 'new technology' which has an impact over the Copyright of underlying sound recording or cinematograph film or movie. The only way to surmount or to avoid the contravention of Section 18 (2^{nd} proviso) is to go for 'license'; whereby just to surmount the applicability of Section 18, it is important to take 'license' instead of 'assignment'.

Exclusive licensing

Section 19 of the Copyright Act 1957 has another vital aspect with respect to '**Exclusive licensing'**

It is vital to look into the definition of 'exclusive licensing' as per **Section 2(j)** of Copyright Act 1957 which tells that, when there is 'exclusive licensing happening', even the owner after licensing can be brought in the ambit of infringer of Copyright.

The three vital **characteristics** of ***'exclusive licensing'*** involve:

1. When there is licensing happening based on 'exclusive licensing' between the licensor and the licensee. The 'ownership right' remains with the owner (that is the licensor)
2. All other rights, except the ownership right, goes to the licensee. In this licensor provides all the permission that is exclusive, non-alienable, non-revocable right to the licensee.
3. The 'de jure' right remains with the licensor, while the 'de facto' right or control is transferred where the 'licensee' having the full plenary control as embodied in **Section 19 of the Copyright Act 1957.** It is vital to note that reading this together with **Section 54** of the Copyright Act 1957, provides seemingly 'exclusive right' where the licensee could be considered as the 'owner' with the restriction that the **'licensee' has to be made a party to the litigation** to put him in the bracket of 'owner'.

Open Source Licensing

The concept of 'Open source licensing' could be understood from the basic tenet of '**privity of contract**' between the owner of the contract (licensor) and the users of the software in internet while downloading the same and then providing the same "Share Alike" concept as they would have received it. The open source licensing in that context follows the principle of 'horizontal passing of privity of contract'.

This can be understood as a chain where the owner 'allows' for use by the 'users' of the software by open source licensing, including that of 'user 1' , 'user 2', 'user 3'..., 'user n', whereby these users can provide the permission to 'sub-users' including 'sub-user1', 'sub-user2', 'sub-user3' and likewise to 'sub-user' (number 'n'), leading to a 'Community of Open Source licensing ' called as 'Open source community'.

The terms of the usage is such that it remains the same and the user has to put the same while further licensing as if it was just like the 'original' copyright provided it follows the broader governing rules which govern Copyright with respect to 'Copyleft Doctrine of Copyright Law', which implies that the practice where a piece of work is freely distributed amongst the public with the right to modify or amend it, provided that once amended or modified it is put back in the same form as it existed prior to such licensing.

The positives of the entire process or by resorting to 'Open Source licensing' leads to more robust, supple and nimble and much better software development with more programmers working on it compared to the efficacy by say a 'proprietary software licensing'.

Two stalwarts include that of computer scientist, Mr Richard Matthews Stallman who pioneered the concept of 'Open source licensing' of software and the other name includes that of Law Professor of Harvard School, Mr Lawrence Lessig as founder of 'Creative Comments', who helped the concept to get the traction leading to host of licensing including that of:

1. Copyleft license, which was based on the restriction of put it to use as if it was the same format as one gets it
2. GNU - General Public Licensing system
3. Creative Common Formats Licence
4. Berkley School Development License (BSD License)

The 'Open Source Licensing' was strengthened by OSI (Open Source Initiative) and IoT (Internet of Things).

There is a US based private open source initiative which tags the 'open source templates' on a 10 point criteria, as such that 'private ordering' which labels the private companies standing templates by a 'OSI market contract' and which is used for commercial purpose. The 'Open source contract' is based on the relation between the user and who made it.

Conclusion & Suggestions

The final decision on varied aspects of licensing and assignment in the realm of Copyright is based on multiple criteria. The fruits of future benefits warrants licensing from all the underlying Copyright holders including 'Lyricists and Music Composer', but the contract between the parties with 'Notwithstanding clause' has the 'overriding effect' applicable to the parties in 'the

course of employment' which has to be provided 'due cognizance' in the instant case for its sustainability in the eyes of law. So, Negotiation between the parties and stakeholders becomes pertinent that which provide the opportunity to negotiate on the best practices of the industry also, leading to a 'WIN-WIN situation for all the underlying Copyright holders along with Sound recording and the Cinematograph entities/organisations. It is also important to understand that the mode of licensing including the cases of Open source licensing has a bearing on the impact of Copyright on the underlying copyright holders including the lyricists, music composer and the sound recording companies.

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Personal Law issues in India, Human Rights Approach and Role of the judiciary

***Sarfraz Alam**[360]
****Mohd Faheem Khan**[361]

ABSTRACT

Personal laws are very important branch of civil law to regulate family affairs within society. It is a set of laws that govern and regulate relations between persons due to certain factors like marriage, blood, and affinity. The Constitution of India guarantees to its citizens right to equality and the prohibition of discrimination on grounds of faith, caste, sex, etc, as well as right to freedom of conscience and other rights of religion like free profession, practice, and propagation of religion. So, Part III is a crucial part as well as considered as Magna Carta of the Indian Constitution. Women constitute half of the population. Whenever, there is gender discrimination or women's rights are violated, the Supreme Court of India come forward with great decision and interest of public at large are protected. Recently the Supreme Court of India held in Vineeta Sharma versus Rakesh Sharma that daughters would have equivalent coparcenary rights in Hindu Undivided Family property by virtue of their birth and they could not be disqualified from inheritance, irrespective of whether they were born before the 2005 amendment to the Hindu Succession Act, 1956. This paper will also analyze the judgements about divorce and maintenance of Muslim women like Shah Bano, Shamim Aara, Bai Tahira and Shayra Bano case. In 2017 SC has declared that the practice of instantaneous Triple Talaq is unconstitutional by a 3:2 majority.

Key Words: Constitution, Personal laws, Supreme Court, gender discrimination, Human rights

1. Introduction

The history of personal laws in India is embedded in pre independent India. Both Hindu and Muslim Personal Laws were brought in the early 20th century to safeguard the private sphere of the domestic from the colonial state.[362]Non-discrimination and equality between women and men are central theme of human rights law. Both the International and domestic laws focus on equality, justice, and harmony among all, including gender differences. Gender equality is a fundamental right. Every woman and girl have the right to live in dignity and freedom, free of

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[362] EPW Engage, Personal Laws versus Gender Justice: Will a Uniform Civil Code Solve the Problem? available at https://www.epw.in/engage/article/personal-laws-versus-gender-justice-uniform-civil-code-solution accessed on 15 October 2021.

fear. Gender justice is essential for development and poverty reduction, as well as for human advancement. Realizing it entails men and women sharing authority and responsibility at home, at work, and in larger national and international communities.[363] Although there is no constitutional constraint on the state's legislative power concerning personal laws, successive governments at the federal level have maintained to exempt them from direct involvement. But in recent past years, there have been many controversies related to issues in some personal laws like triple divorce in Muslim Personal laws. However, the honorable Supreme Court of India declares the instantaneous *Triple Talaq* as unconstitutional and invalid. There are many critiques of personal laws regarding gender discriminatory laws like marriage, divorce, maintenance, custody of child or succession.

However, many activists consider that in recent years, personal laws have been regressive and have deprived women. For these reasons, a demand for the creation of a Uniform Civil Code was made. However, it is incorrect to suggest that only Muslim Personal Laws are backward. The Hindu Succession Act has been criticized for discriminating against married Hindu women. The Hindu Succession Act, 1956 governs Hindu succession. This legislation is unique in that it distinguishes between males and women when it comes to intestate succession. The source from which the dead female obtained the property has an effect on the female intestate succession. In Geeta Hariharan case[364], the Supreme Court observed that, "We the people of this country gave ourselves a written Constitution, the basic structure of which permeates equality of status and thus negates gender bias and it is on this score, the validity of Section 6 of the Hindu Minority and Guardianship Act of 1956 has been challenged in the matters under consideration, on the ground that dignity of women is a right inherent under the Constitution which stands negatived by Section 6 of the Act of 1956."

2. Gender discrimination in marriage and divorce in various personal laws

2.1. Discrimination in marriage law

Under classical Hindu law bride is not real party to the marriage which is a transaction between the bridegroom and her guardian in which she is the subject of the gift. In the contract of marriage in old Hindu law consent or non-consent of is not taken into consideration at all.[365] But this approach has been changed after passing of the Hindu Marriage Act, 1955 and the consent

[363] Gender Justice, available at https://www.oxfamamerica.org/explore/issues/women-and-gender-justice/gender-justice/ accessed on 15 October 2021.
[364] Githa Hariharan and another v. Reserve Bank of India and another (AIR 1999, 2 SCC 228).
[365] R.K. Agarwala, Hindu law,22nd Edition, p-35, (Central Law Agency, Allahabad).

means consent of both bride and bridegroom. The Hindu Marriage Act of 1955 is comprehensive, and it has brought significant and dynamic changes to Hindu marital concepts such as monogamy, divorce, judicial separation, and restitution of conjugal rights.

Women are segregated in all forms in ancient Hindu law. Different marriage laws applied to men and women in different ways. When we look at the nature of Hindu marriage, we can find that it is well detailed in the Vedas. It was an indissoluble connection for all eternity in a Hindu wedding. It's described as a combination of "The husband and wife merge into one person, bones with bones, flesh with flesh, and skin with skin." Even after the Hindu laws were legislated in 1955, Hindu women did not have the equal privileges as Hindu males. Polygamy was common among Hindus prior to 1955, and Hindu women could not acquire property as sole owners save in the instance of "*Stridhan*".[366] Famous jurist Abdur Rahim define institution of marriage in Islam as par taking both the nature of Ibadat or devotional arts and Muamlat or dealings among men. Marriage not only satisfies men and women's sexual need but also ensures the survival of future generations, as it is a biological instinct to have sexual intercourse. Marriage, according to Muslim law, is not a sacrament but a civil contract, as Justice Mahmood correctly stated in Abdul kadir versus Salima case.[367] Therefore, a valid marriage creates mutual rights and obligation for both wife and husband and wife become entitle to her dower and maintenance. However, marriage does not give power to the husband over the wife's person beyond the limit of law and right upon her goods and property.[368]

However, one question is always raised regarding Muslim Marriage "why four wives to a Muslim husband?". The Holy Quran says in Verse 3 of Surah 4 An-Nisa (Women) *"If you fear that you shall not be able to deal justly with the orphans, Marry women of your choice, Two or three or four; but if you fear that you shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess, that will be more suitable, to prevent you from doing injustice."*[369]

[366]Neeraj Singh Manhas, Human Rights and Women Discrimination in Personal Law, available at https://www.researchgate.net/publication/344072838_Human_Rights_and_Women_Discrimination_in_Personal_Law, accessed on 16 October 2021.
[367] (1886) ILR 8 All 149
[368] Manjur Hossain Patoari, The Rights of Women in Islam and Some Misconceptions: An Analysis from Bangladesh Perspective, available at https://www.scirp.org/journal/paperinformation.aspx?paperid=96850 accessed on 17 October 2021.
[369] Polygamy in islam, available at https://en.wikipedia.org/wiki/Polygyny_in_Islam, accessed on 17 October 2021.

One can say that this concept of 'four wives' is discriminatory against Muslim wives. But the above verse of Quran says if you cannot do justice with them marry only one. So, Islam only permits polygamy in certain required situation and never promoted it as general phenomenon. While due to lack of knowledge of Islamic law, few people misunderstood this provision of four wives. It is not a tool to exploit women in marriage. It is true some Muslim men abused this provision four wives and exploited women, but their number are very few.

2.2. Divorce in personal law and women rights

Divorce is one of the most sensitive and debatable topics in recent time in personal law especially in Muslim personal law. However, this issue of divorce (triple divorce at one instant) has been put to rest after Shayra Bano[370] judgment by the Honorable Supreme Court in 2017 declaring *Talaqul biddat* as unconstitutional. Before this judgment, from every corner people were criticizing Muslim personal law as discriminatory against Muslim wives in relation to triple divorce. Muslim world is largely divided into two sects i.e. Shia and Sunni. Shia sect does not approve triple talaq at once even before this judgment. Ahl al-hadith group consider triple talaq in one session as single talaq which is revocable. But all four schools of jurisprudence argue that the intended triple divorce at once has the effect of third and final repudiation. Islamic law categorizes divorce as talaq-al-sunnah (talaq in accordance with the Quran and sunnah) and *Talaq-al-biddah* which is not in consonance of the Quran and Hadith. So, after passing of the Muslim Women (Protection of Rights on Marriage) Act, 20 19 only *Talaq-al-biddah* (triple divorce at once) has been made void and illegal. We hope after criminalizing triple divorce the condition of Muslim women may improve and their rights are protected.

Section 10 of the Indian Divorce Act of 1869, which deals with grounds for divorce for Christian men and women, is significantly biased against women since when wives apply for divorce, aggravated kinds of behavior combined with adultery must be proven against the husband. In 1984, the Delhi-based Joint Women's Programmed prepared the Christian Marriage and Matrimonial Causes Bill, which suggested major changes to Christian law, including mutual consent divorce, alimony for women, legalized adoption, and equal rights to matrimonial property. Despite its objections, the Catholic Church has officially agreed to the amendments, but the bill has not passed. But now amendment has done in Indian Divorce Act, 1869 in 2001 and such discriminatory provisions against women have been removed.

[370] Shayara Bano V. Union of India, A.I.R. 2017 S.C. 4609

Section 10 of the Indian Divorce Act, 1869, applies to Indian Christians, contains the most obvious discrimination against Christian women. Men may divorce their spouses based on adultery, but women had to establish cruelty or desertion as well, according to the Act. Cruelty or abandonment were not grounds for divorce on their own. Christian women faced double discrimination: they were pitted against males in their own society who could get a divorce for simple adultery, and they were pitted against women under other personal laws who could get a divorce for adultery, cruelty, or desertion on separate and independent grounds.[371]

3. Property and economic rights of women in personal laws

3.1. Property rights of women in Hindu law

Only coparceners are the owners of joint family property in traditional hindu law. Women were unable to be coparceners and hence lacked property rights. The Hindu Women's Right to Property Act was passed in 1937. It granted women property rights. However, it did not grant her complete control over the land. The Hindu Succession Act was passed in 1956. It granted women property rights. Class-I heirs were given to the mother, wife, and daughter. The notion of coparcenary, which states that only a son can be a coparcener and that a daughter cannot, has not changed. Even after passing of the Hindu succession Act, 1956, women were not kept on par with their male counterparts. But the Hindu Succession (Amendment) Act, 2005 has made a drastic change. Now the daughter has the same rights in the coparcenary property as that of a son.[372]

On 11-8-2020, the Supreme Court of India passed a landmark judgment in *Vineeta Sharma* v. *Rakesh Sharma*[373] stating that the Hindu Succession (Amendment) Act, 2005 will have a retrospective effect. The 2005 Amendment amended Section 6 of the Act in order to align with the constitutional belief of gender equality. Section 6 of the Act was revised in 2005 to conform with the constitutional conviction in gender equality. According to the amendment, the coparcener's daughter, like the boy, becomes a coparcener in her own right at birth. The Vineeta Sharma case answered the question of whether the 2005 Amendment gave a daughter the same rights as a son in coparcenary property regardless of whether the father was alive before the Amendment. While this decision is a positive move, it also raises

[371] Flavia Agnes, Manushi, Issue 119, Reforms As If Women Mattered, A Critique of the Proposed Christian Marriage Bill, available at https://indiatogether.org/manushi/issue119/reforms.htm accessed on 17 October 2021.
[372] P Lakshmi, Personal Laws and the Rights of Women, Christ University Law Journal, 1, 1(2012), 91-99.
[373] Vineeta Sharma v. Rakesh Sharma, (2020) 9 SCC 1.

a slew of new questions that have yet to be answered. It will be fascinating to see how things play out in terms of determining dependent women's shares under the new law.

3.2. Property rights of women in Muslim law

Prior to the 1937 Shariat Act, Muslims in India were governed by harsh customary laws that discriminated against women. Following the 1937 Shariat Act, Muslims in India were subjected to Muslim personal law in all areas, including property laws. However, this had no significant impact on women's property rights. Men and women have equal inheritance rights under Muslim governance. If a Muslim male dies with both male and female heirs, both will inherit the property at the same time. However, in the same degree of relationship to the deceased, a man's part of the inheritance is double that of a woman. In Surah Nisa (women) verse 11 the Holy Quran declared *"God thus directs you, as regards your children's (inheritance) to male, a portion equal to that of females; if only daughters their share is two thirds of the inheritance; if only one daughter, her share is half."*[374]

Some people say it is gender discrimination and against women's rights. But other group of people justify and says Muslim women received dower which belongs to her solely. Muslim women have no other family economic burden. But in practice it is true that many Muslims men deny property to their counter part from inheritance. However, Islam evolved a system in which a relation between man and women are premised on a notion of equality but because of biological and psychological differences male is to undertake difficult tasks of the 'protector' of the family.

4. Gender discrimination in Christian and Parsi Laws

Christians are regulated by Christian law, while Parsis are ruled by Parsi law. Christian women could not get a divorce just on their husband's infidelity; instead, it had to be paired with cruelty, bestiality, and sodomy. Christian husbands, on the other hand, may declare their wives to be adulteresses and divorce them. These ancient regulations were enacted during the colonial period to protect the interests of British bureaucrats who had lawfully married wives in England and were living with a local. The government approved the proposal to alter the ancient Christian Divorce Act 1869 in 2016 after pressure from Christian women. A Parsi woman who married a non-Parsi man lost her property rights under Parsi personal law, and

[374] The Holy Quran, chapter IV Women, verse 11.

non-Parsi wives of Parsi husbands were only entitled to half of the husband's property under Parsi personal law.[375]

5. Conclusion and Suggestion

After analyzing the personal laws of the country one can easily observe that Indian women of all communities continue to be discriminated in one way or another. Most customary laws that deal with marriage, divorce, adoption, and succession still treat women as second-class citizens. Yes, it is true many efforts have been done by the Supreme Court through various judgments to protect women's human rights and to minimize gender discrimination. Our parliament also came up with various social legislation to protect women interest. For this purpose, various amendments have also been made in many personal laws like in 2001 Indian Divorce Act, 1869 amended. The Hindu Succession (Amendment) Act, 2005 (39 of 2005) was passed to repeal the Hindu Succession Act, 1956's gender discriminating clauses. The daughter of a coparcener, like the son, has become a coparcener in her own right by birth. Similarly, following the passage of the Muslim Women (Protection of Rights on Marriage) Act, 2019, the tradition of instantaneous triple talaq is now null and void.

Only legislations and judicial pronouncements are not enough to protect human rights of women but what we need to do now is educate people about using it. Educating and empowering children about the need of gender equality from young age could be a great place to start. We can start a campaign as awareness within family and society regarding gender equality and justice.

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[375] Vibhuti Patel, All Personal laws in India are discriminatory, available at https://www.livemint.com/Opinion/Cn69qE9pQClmtQzzvw1oVP/All-personal-laws-in-India-are-discriminatory.html, accessed on September 15, 2021.

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ANALYSIS OF NATIONAL ANTI-CORRUPTION OMBUDSMAN

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ABSTRACT

People should be conscious that they can change a corrupt system" said by Peter Eigen, founder of Transparency International. In the year 2011, people of India got conscious and a socio political movement was also launched in the leadership of Anna Hazare to curb burning issue that is corruption and demanded the National Anti Corruption Ombudsman to inquire the corruption charges of government officials and public officials. After two years, Lokpal and Lokayukta Act 2013 finally enacted and received the assent of president on 1st January 2014. But the first Anti-Corruption Ombudsman Pinaki Chandra Ghose was appointed in the year 2019. The gap of 5 years is enough to check the efficiency of any event but that five year was subject to vacant of seat due to absence of leader of opposition in the composition of appointing committee. Although this post has been created, but it is not effective in nature. No chief change has been reported yet. According to Corruption Index of Transparency International, Rank of India has been negative in 2021 that is the rank of 85 from 80 of Corruption Index 2019. Hence it shows that post of anti-corruption ombudsman is somehow inefficacious.

KEYWORDS

Anti-Corruption Ombudsman, Administrative Machinery, Lokpal, Lokayukt, Bureaucratic Abuses, Autonomous Body.

INTRODUCTION

The term ombudsman is first originated in Sweden in 1809 which attracted attention of various other countries across the world. So India is also the reflection of that attraction. Basically the ombudsman and democracy is inseparable from each other because in the country like India where the rights and the privileges are to be protected by the

government, there is a need of check over the public functionaries to whom the people of India are subject to.

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Ombudsman plays significant role in the public administration. The National Anti-Corruption Ombudsman of India is an authority who is empowered to investigate the corruption allegations and charges against public functionaries suggest Prime Minister, other ministers, member of parliaments, Group A, B, C and D officers of Central Government. Ombudsman is an agent of parliament who is established for the purpose of safeguarding the citizens from any abuse and misuse of administrative power by the executive. The India which is the 7th largest democracy in the world, it is not possible for the government to keep check on the all administrative function where public are in direct contact with the administrative officials and executive so it is an attempt, like other countries across the world, to handle the grievance against misconduct, inefficiency, delay, negligence, injustice, abuse and misuse against official. Under section 3 of the Lokpal and Lokayukt Act 2013[376], there shall be Lokpal consisting of Chairperson, Judicial members and other Members. The selection committee under Section 4 of the Act of 2013 shall appoint the chairperson and the members of the Lokpal.

NEED AND ESTABLISHMENT OF AN OMBUDSMAN

India is largest democracy and administration is also large, meaning there by administration plays significant role in holding the power of administrative nature. Sometimes, the laws made by the Parliament are not enough to regulate emerging and unexpected situation as per the existing law that's why administrative machinery has been given discretionary power to make rules and regulation to handle that particular situation. And this vast and discretionary power is abused and misused by the administrative officials which results to maladministration and corruption in the society. In India this

[376] The Lokpal and Lokayukta Act, 2013 (Act 1 of 2014)

problem becomes so common that there is a perception among the people that administrative functionaries can't discharge their duty without Maladministration and corruption. In the case of *Chandra Bansi Singh vs State of Bihar*[377] Supreme Court held that it is not eccentric to conclude that if there is more administration, there will be more maladministration. The greatest the power given to the executive the greater the need to save guard the citizen against its arbitrary or unfair exercise. Therefore and urgent problem of the day is to evolve an adequate and effective mechanism to contain this dangers by controlling the administration in exercising its power safeguarding individual rights and creating procedures for redressal of individual grievances against the administration.

So as per need of the country, there have been many attempts to establish body of ombudsman in the country to protect the people right and prevent the maladministration as well as corruption. The term Lokpal has been coined by Dr. L M Singhvi in 1963 which is a Sanskrit word means defender of people or people's friend. In 1960s tha Law Minister Ashok Kumar Sen brought the concept of constitutional ombudsman. The first attempt of Jan Lokpal Bill was initiated by Adv Shanti Bhushan in 1968 which was passed by Lok Sabha in 1969 but Raj Sabha did not pass. Further Lokpal bill was introduced in the year 1969, 1971, 1977, 1985, 1989, 1996, 1998, 2001, 2005 and 2008[378] it was never passed by the parliament due to where is reasons. The first Administrative Reforms Commission (ARC) also recommended the office of Lokpal, that they must be an institution to eradicate the sense of injustice from the minds of the citizens and also built the public confidence about efficiency of Administrative machinery among people. The National Commission to review the working of constitution 2002 and second administrative reform Commission 2007 also sought the body of ombudsman in the country. Finally in 2013 the Lokpal and Lokayukt act 2013 was enacted after 45 years of 10 attempts made earlier. In the year 2011 the Jan Lokpal will movement was started by Anna Hazare with retired IPS Kiran Bedi, Swami Agnivesh, Shri Shri Ravi Shankar, Mallika Sarabhai, Arvind Kejriwal and so on calling that movement India against corruption. The jan lokpal bill was a drafted by prominent civil society activists seeking

[377] *Chandra Bansi Singh vs. State of Bihar* AIR 1984 SC 1767

[378] Amitabh Bhargava, Harsh Purohit, Deepshikha Bhargava, "Lokpal Bill- A Powerful too to control the Corruption: Opinion of Indian Voters" 8 *International Journal of Recent Technology and Engineering* 98 (2019)

the appointment of Jan Lokpal an independent body to investigate the corruption charges and cases against public officials. The movement was on its peak which exerted pressure upon the government to take an action regarding Lokpal Bill. The great agitation from this revolutionary event and zeal of the people participating in that protest finally lady to the enactment of Lokpal and Lokayukta Act 2013 which received an assent of President on 1st January 2014. As per the Section 3 of the Lokpal and Lokayukt Act 2013 there shall be a body that is Lokpal consisting of Chairperson, Judicial Members and other Members. Section 4 of the Act 2013 provides the selection committee to appoint the ombudsman. But for the next 5 years from the date of receiving ascent, no Lokpal was appointed because of non-availability of leader of opposition in the house of parliament. In the year 2019 the retired Supreme Court judge Pinaki Chandra Ghose was appointed as the first Lokpal or National Anti-Corruption Ombudsman of India.

JURISDICTION OF OMBUDSMAN

The national anti-corruption number has given wide power to investigate and inspect the corruption charges against public officials. Ombudsman can take direct actions against the public officials discovered with maladministration doing in discharge of duty and report to the legislature to take the remedial steps against the bureaucratic abuses. Chapter VI of the Act 2013 from Section 14 to 19 provides the jurisdiction of Lokpal in respect of inquiry. As per section 14 Lokpal shall conduct an inquiry the allegations of corruption made against Prime Minister, person who has been Prime Minister, the member of either House of Parliament, officer or equivalent or above the post of officer of Group A, B, C, D, chairperson or member or officer or employee of anybody or board or corporation or authority or company or society or trust established by act of parliament, director manager, secretary of society or associations of person or trust. Under section 14 (3) Lokpal may enquire into any act or conduct of any person other than referred above if such person is involved in the act of abetting, bribe giving, bribe taking or conspiracy relating to any allegation of corruption under the Prevention Of Corruption Act 1988[379]. Section 17 empowers the chairperson to make provisions to distribute the business of Lokpal among the benches and also provide the matters which may be dealt

[379] The Prevention Of Corruption Act, 1988 (Act 49 of 1988)

with by each bench from time to time. Under Section 18 chairperson has jurisdiction to transfer the cases of complaints against the public officials after being heard from one beans to any another bench.

POWER AND FUNCTION OF OMBUDSMAN

Chapter VIII of Lokpal and Lokayukt Act 2013 provides the power of the Lokpal. It consists from section 25 to 34. Section 25 provides the supervisory power to the Lokpal. The local has power of superintendence over and to give direction to Delhi special police establishment for preliminary enquiry or investigation. Under section 26 of the Act 2013, Lokpal if believes that any kind of secret place needs to be investigated for getting any document which is useful, then he may authorise any agency to conduct the search and seizure of such documents under investigation. Lokpal has all power as Civil Court under Civil Procedure Code 1908. Under which it may summon and enforce attendance of any person, require any document, receive evidence on affidavit, requisition any public record or copy, issue Commission for examination of witness or documents. Under section 32 of the Act,

Lokpal may recommend transfer suspension of public servant connected with an allegation of corruption. Lokpal has also directory and delegation power under section 33 and 34 respectively. Ombudsman main supervise the general administration and keep the general surveillance on the functioning of government. Lokpal has also power of confiscation of assets, proceeds, receipts and benefits arisen procured by means of Corruption in special circumstances. Lokpal has power to superintendence over and to give direction to CBI too.

CONTEMPORARY SITUATION OF OMBUDSMAN

Contemporary situation of ombudsman is very distressing why because it has been 3 years of appointment of National Anti-Corruption Ombudsman of India but there is no radical change reported in field of corruption. The first drawback is the late appointment of ombudsman which engulfed 5 years of precious time where the various change could have been brought. According to recent study of Transparency International India is the most corrupt country in the Asia Pacific region where 7 out of 10 people in the India give bribe to access the public service. It shows that that Administrative functions are subject to maladministration and corruption. If we examine the Corruption Index of India in last

2 years even after existence of National Anti-corruption Ombudsman, an autonomous body, the rank of India has been very depressive in the world. According to Corruption Perception Index 2019[380] the rank of India is 80th position among 180 countries and CPI 2020 India stands at 86th rank. As we can see that the status of corruption is increased from 2019 in India which directly or indirectly shows the inefficiency in the function of ombudsman. But as per corruption perception index of transparency International in the year 2021 in the stands at the 85th position out of 180 countries its shows slightest of the slightest positive indication but it is not that much effective because this kind of shift in position has been reported earlier times also. For the functioning of the Lokpal there is a separate platform has been provided to the people to report their complaint against the maladministration and corruption. Since 2019, we have number of complaints lodged but random decrease is not acceptable the country like India where the corruption is one of the burning issues. In 2019 to 2020 the numbers of complaints lodged are 1427, in year 2022 – 2021 the number of complaints launched are 110 and in 2021 to 2022 the numbers of the complaints lodged is 30 only. This random decrease is not digestible in any way and even since 2019 there has been no prosecution made which may prove support the positive change of in the number of complaints. It somewhere shows the manipulation of Data and failure of post of Lokpal.

CRITICISM IN TERMS OF ITS FUNCTION

"One of the basic rules of the universe is that nothing is perfect" Stephen Hawking, yes in the universe nothing can be perfect so how this National anti-corruption ombudsman can be perfect. It too has a lot of criticism.

- Section 10 of the Lokpal and Lokayukt Act, 2013 provides that there shall be a director of enquiry and director of prosecution appointed by the chairperson from the panel of names sent by the central government, but it has been more than 3 years and no director of enquiry and director of prosecution has been appointed it shows the lack of political will to strengthen the Lokpal. It is a clear cut latches at the level of Central Government. It creates the hurdles in the

[380] Corruption Perception Index released by Transparency International *available at:* https://www.transparency.org/cpi/2019

process of enquiry and investigation of the corruption charges and it leads to failure of Justice.

- Due to non-appointment of director of enquiry, under section 11 of the Lokpal is not in position to constitute and enquiry wing which is headed by director of enquiry for the purpose of conducting preliminary enquiry into any of his aged to have been committed by the public servant punishable under Prevention of Corruption Act 1988. Without director of Inquiry, Inquiry wing cannot performance function and preliminary enquiry cannot be initiated.
- Similarly due to non appointment of director of prosecution under section 10, Lokpal is not in position to constitute prosecution being headed by director of prosecution for the purpose of prosecution of public servants in relation to any complaint by the Lokpal under the act 2013.
- Implementation of section 10, 11 and 12 can bring the speed in investigation of corruption cases and delivered the justice. Because these wings are very important to initiate the preliminary investigation without which further actions are not easily to be proceeded.
- There is no transparency in the number of complaints lodged and disposal of the same. Random decrease in the number of complaints as shown to be manipulated.
- It is not free from the political influence because appointing committee itself consists of member of political parties through which government easily and directly interferes into the functioning of the Lokpal.
- The biggest limitation of the Lokpal is that judiciary is completely kept at abeyance from the ambit of Lokpal and it is not backed with the constitutional provision of appeal against Lokpal.

CONCLUSION AND SUGGESTIONS

Since the intention of legislature to make the autonomous body for curbing the corruption and protect the rights of the citizen is very appreciable. But its appreciation must be continued in the form of positive functioning and its implementation. Lokpal must discharge its duty with due diligence and accordance with the provision of the act. Central government has been given sole authority in some function without

which Lokpal cannot function. Like appointment of director of enquiry and prosecution where recommendation of Central government is mandatory. Central Government fails to do that. There is a strong need of strengthening of the Lokpal and needs to be kept separated from the influence of government and interference too. Then somewhere it would be possible to eradicate the problem of corruption from the society. Lokpal needs to be free from the political influence as appointing committed self consists of member from the political party which is direct interference of the government in the constitution of Lokpal.

Lokpal must be financially, administratively and legally must be independent. For the purpose of eradicating corruption from the society, not only government is responsible but we people are also pay attention. We people must complain against the public officials who in malpractice and Corruption activities. We can approach the court for protection of our rights too.

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SHARDA UNIVERSITY - SCHOOL OF LAW

Sharda University School of Law (SUSOL) is a dynamic and progressive Law School situated in the clean and green environment of Greater Noida (National Capital Region). SUSOL is considered to be one of the most prestigious Law schools in the National Capital Region, offering BCI approved Five Year BA. LL.B. (Hons.), BBA. LL.B. (Hons.), LL.M. (Corporate Law, Criminal Law, International Law, Human Rights, Energy Law) and Ph.D. Programme.

VISION & MISSION

Vision

To emerge as a leading school of law in pursuit of academic excellence, innovation and nurturing entrepreneurship.

Mission

1. To prepare students as legal professionals through a transformative educational experience.
2. To encourage the global outlook of the students by providing enriched educational initiatives.
3. To promote research, innovations and entrepreneurship.
4. To inculcate ethical and moral values among the budding lawyers, judges and legal professionals and motivate them to serve society.

The vision is to emerge as one of the top Law Schools in India and one of the best in NCR. The mission of the School is to impart the best legal education to its students and help them to shape themselves as outstanding legal professionals and to inculcate moral values in their overall personalities.

Law serves as an instrument of change to establish an egalitarian society wherein the Preambular declarations of Justice, Liberty, Equality and Fraternity enshrined in the Constitution of India are guaranteed rights. As all aware that the Indian economy is the fastest-growing economy and is poised to become a 5 trillion dollar economy by 2025. This would necessarily entail the enactment of new legislation and setting up of courts and tribunals for speedy disposal of disputes *inter alia* to improve ease of doing the business ranking. This makes legal education a cutting-edge field with a plethora of opportunities for future legal professionals.

It is the sincere effort of the School of Law that these opportunities are made the most of, and it is in pursuance of this goal that the Faculty at School of Law, Sharda University ensures high-quality classroom teaching learning and also places focus on experiential learning, Free Legal Aid and Community Connect. At present we have 906 students. We have an excellent multi-cultural environment with best in class infrastructure.

CORE VALUES

1. Excellence: Commitment to innovation and continuous learning and to ensure we keep striving for the best outcomes in all facets of life.
2. Ethical Conduct: Integrity, fairness, honesty and transparency in all actions.
3. Global Outlook: Welcoming and encouraging diverse ideas, beliefs, and cultures.
4. Promote Leadership: Believing that leaders create leadership skills in others, thus igniting a virtuous cycle of growth.
5. Collaboration and Inclusiveness: Developing a symbiotic community of faculty, students, alumni, industry, government bodies and other Universities/Centers of learning.

SALIENT FEATURES

1. The School of Law has been established in the year 2012 as a constituent of Sharda University, a State Private University, established through an Act passed by the U.P. Legislature (14 of 2009) and permitted by the University Grants Commission to award degrees under section 22 of the UGC Act, 1956. The SOL has been recognized by the Bar Council of India.

2. Qualified and Experienced Faculty Focus on experiential learning - Guest Lectures, Visits, Internship, Workshop, Seminars etc. Regular Guest Lectures by legal luminaries like Supreme Court Judges, High Court Judges, Leading Academicians, Public Prosecutors and Senior Advocates on current topics related to law to enhance the ability and skills of students and to connect with latest happenings of legal world. In the last academic sessions, faculty and students were privileged to interact with eminent legal luminaries namely, Hon'ble Mr. Sanjay KishanKaul, Judge, Supreme Court of India, Hon'ble Ms. Justice Indira Banerjee, Hon'ble Mr. Justice DipakMisra, Hon'ble Mr. Justice R.K. Agrawal, Hon'ble Mr. Justice A.K. Sikri, Hon'ble Mr. Justice Swata'nter Kumar, Hon'ble Mr. Justice R.C. Lahoti, Hon'ble Mr. Justice P.C. Pant, Hon'ble Mrs. Justice Gyan Sudha Misra, Hon'ble

Mr. Justice Anil R Dave, Hon'ble Mr. Justice B.S. Chauhan, Hon'ble Prof.UpendraBaxi, Prof. B S Chimni, Prof. S.C. Raina, Prof. B.T. Kaul, Prof. Balraj Chauhan,Prof. Viney Kapoor, His Excellency ShriArif Mohomad Khan, Governor of Kerala, Hon'ble General (Dr.) V.K. Singh and Hon'ble Mr. Salman Khurshid notables among others.

3. School of Law adopts a multidisciplinary approach.
4. Cultural Diversity- Students from many countries.
5. World-Class Infrastructure.
6. Regular Interaction with top global law professionals and distinguished legal luminaries.
7. Focus on 3A's – Academic excellence accelerated thinking and All-inclusive development.
8. School of Law provides Moot Court Facility, Debates, Quizzes, Guest lectures, Seminars, Conferences, Case Study, Mentoring, Summer internship etc. for the students.
9. Community Connect, Free Legal Aid
10. Family Dispute Redressal Clinic, Mediation Centre at Police Station, Knowledge Park-1, Greater Noida.

2020-21 (Awards & Achievements)

1. School of Law has been ranked 4th Top Eminent Law School 2020 by the CompetitionSuccess Review (CSR)
2. School of Law has been ranked 28th in the India Today Law School Ranking 2020
3. School of Law has been awarded 'KNOWLEDGE STEEZ LEGAL AID AWARD 2019'for rendering excellent services in Legal Aid and Justice to the society in 2019.The award is presented on 19th January, 2020 at Malviya Smriti Bhawan, New Delhi at 4th National Conference on Human Rights and Gender Justice.
4. School of Law has been awarded as the 'BEST LAW SCHOOL IN NORTHERN INDIA AWARD 2019'.The award was given by the National Institute of Educational & Research (NIER), India on Saturday, 27th July, 2019.
5. District Legal Services Authority, Gautam Budh Nagar has commended School of Law for EXCELLENT COMMUNITY CONNECT PROGRAMMES 2019.

District Jail Superintendent Office has commended School of Law for organizing EXCELLENT FREE LEGAL CUM MEDICAL AID CAMP 2019 and providing books for the prison inmates.

ACADEMIC PROGRAMME OFFERED

- B.A. LL.B. (Hons.) Integrated
- BB.A. LL.B. (Hons.) Integrated
- LL.M.
- Ph.D.