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Editorial

Law & Lawyers

Legal Research is a significant tool for every individual in a Law Fraternity. Understanding, analyzing, criticizing, interpreting and applying the law is the core function of law students/advocates/ Judges/ law academicians and so on. Lawyers can achieve this by realizing that research is a process. To become a good lawyer, one has to embark the journey into the interwoven process of research, analysis and writing.

At Bharati Vidyapeeth New Law College, students and faculties are encouraged and promoted to undertake research and its publications into Bharati Law Review Journal. BLR provides opportunities to the students and teachers to develop themselves as good researchers. BLR is a theme based journal promoting and publishing plagiarized checked research papers / articles.

Special issues of BLR themed around Family Law, Human rights, Labour Laws, Cyber laws, Juvenile Justice Law, ADR have been published till date wherein students and teachers from various law colleges have participated and got their articles published. BLR is an initiative to encourage students and faculties to measure the depth of their capabilities as researchers. As well it promotes the students and teachers to be innovative and interpretative.

Dr. Ujwala Bendale
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Editorial

Law & Lawyers

"Words are treasure and ideas are gems". Lawyer is the bursar of intellectual investment. Ideas and words are the weapons for him sometimes but sometimes it will work as a protection shield. Law is not to be the same as it was in yesterday, lawyer shall update himself as like process of 'ecdysiast' work to regenerate to himself and to his litigants benefits.

There are several obligations attached with the lawyer profession, and among all, one of the foremost obligations reside upon his shoulder to provide justice to his litigants case. It is not necessary he will win each and every case in the court of law but because of his uneasy action or effort litigants shall not face injustice. So a lawyer shall be as accurate as mathematicians, he should be very provident about his case and procedure.

Lawyers shall treat every litigant as money lender and the same respect shall be given to litigants. Lawyer is always indebted towards litigants, because every litigant teaches him some lesson of advocacy and life. Law plays an important role in the social, economic and political life of the nation, so a good lawyer who is alive towards the law makes a virtuous contribution in the future of Nation. While doing practice which kind of values shall be imbibed, how to defend the matter, what kind of precaution and hard work lawyer has taken? Will decide the future of the case.

Law is the living organ and its heart shall beat for the benefit of the Society. Researchers are the pioneers of revolution, one idea can change the life of millions of people. So therefore, Bhararti law Review has always taken every effort to inspire the young researcher and students to lay down their thoughts and ideas to promote content of law.

Prof. Jay Kumar Bhongale
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CONTENTS

HUMAN WILDLIFE CONFLICT – NEED FOR AN ECOCENTRIC REGULATORY FRAMEWORK

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Abstract

Human–wildlife conflict refers to the interaction between wild animals and people and the consequent negative impact on people or their resources, or wild animals or to their habitat. The reasons for human –wildlife conflict include the growing population of humans and the encroachment of forest and consequent hazards created to wildlife. The inevitable consequence is the loss of life and resources of humans, and destruction of both wild and domesticated animals. Though there are numerous enactments, rules, regulations, policies and projects intending to prevent these conflicts and protect both sides, they have seldom proved to be effective. What is required is an eco-centric approach by keeping away the anthropocentric mentality so as to bring all the species to centre stage and ensure co-existence side by side without unevenly interfering into life, habitat, resources and surroundings of each other. The future is locked by the behaviour and actions in the present; this has to be acknowledged and has to be considered while taking action. Human-Wildlife Conflict is a threat to the future of all species and the only way to stop it is by preventing and reducing it in the present.

Key words: *Human – Wildlife, Eco centric, Sustainable development*

Introduction

As the name suggests human wildlife conflict refers to the direct conflict between wildlife species and human beings. This conflict is not new, as both have coexisted for millions of years. However, it has become more frequent in recent years resulting in casualties on both sides. The conflict is kick started once the urge for

demands and need for survival conflict with each other. Both of this can be connected with either of sides. To be precise the human wildlife conflict starts either when human demands and conquests rise and wildlife fights to survive or when the wildlife erroneously attacks the human beings and human fights to survive. Either way the result is always what ecology does not want.

There is immense challenge against addressing the Human Wildlife Conflict as the approach which has to be taken in each incident is unique. Efforts to address this problem without fully considering the underlying socio-political conflicts often lead to temporary relief. The factors of culture and practice also need to be considered. Therefore, an interdisciplinary approach based on eco-centrism, coordination and collaborative conservation is needed to achieve meaningful results.

Human Wild Conflict: Evolution and Causative Factors

The origin of human wildlife conflict in India can be traced back to the ancient period. Yet initially the animals were treated close to God and in certain cases worshipped. The wildlife was considered as something which was to be preserved. But with the progress of time, the worship and respect were converted into hatred and hunting.[1] With gradual passage of time and increasing suppression of humans, slowly the animals started to respond for their survival.

The medieval period marked an attenuation of this conflict as in addition to expanding encroachment, circus and animal exhibitions started. This led to more wildlife captivation. The process of catching animals was very dangerous and after captivating they were treated mercilessly. This at times took very dangerous turns, as these were more of the conflicts with dominance vs survival. Hunting and poaching was normalised and Kings of various kingdoms highlighted it as a matter of pride. Alongside religious influence also opened up and wildlife was infiltrated to catch various animals for using them for religious sacrifices and other religious practices.

The modern period offers no much difference compared to the past. The only difference is that new avenues of human wildlife conflict have opened up. As modernization opened various sectors and industries, innovations started to dominate the world. The innovations hugely affected mankind but emerged as the biggest disadvantage for wildlife. Another point of origin of the conflict is climate change over the years. Climate change has affected the natural habitat of both human and wildlife species. As a result, both humans and animals have started to infiltrate into each other's habitat in order to find shelter and support for surviving the sever destructions, this towards an extend has contributed to human wildlife conflicts. The climate change not only affected the shelter/habitat but most importantly affected the food chain which is also an important triggering point towards the conflict. We cannot just victim card the wildlife as the loss amongst the humans is also increasing, particularly if we take the case of India, we could see that the loss of crops and damage of land and human casualties were on steady rise during the past two decades.

Major Causes of the Conflict:

Anthropocentric Approach- Anthropocentric means regarding the mankind/human beings as the centre and most important element of existence as against God or animals. This approach has been the prime reason for human wildlife conflict. Human dominance is not a new thing, but on the other hand has existed for ages. Animals were considered inferior and an element for domination by humans. The wellbeing of animals was a matter of least importance. Wildlife species were often relegated as mere hunting stuffs

The anthropocentric approach is evident even in the legal framework and guidelines involving animals. From the very habitat of wildlife, i.e., forests, it is human interest that always prevailed as apparent from the provisions of Indian Forest Act 1865[2] and followed by Indian Forest Act of 1878[3] and Indian Forest Act of 1927.[4] The Act of 1865 and 1878 were more focussed on establishing British control over the forest and thus

hinting for ultimate control of humans in the habitat for wildlife. The Act of 1927 was more focussed on the protection of the forest but if we move on to details there were large gaps in the Act which was meant for facilitating different illegal activities in the forest. The powers provided by the act ultimately hinted to exploit the forest which was habitat to different species. Just to facilitate human greed. Later Initiatives such as Indian Forest Policy 1952[5], Forest Conservation Act 1980[6] and National Forest Policy 1988[7] were more focused on eradicating the exploitation of forest but was not completely successful in removing the dominating factor and in the end gave a slight edge to human needs.

Even the law directly involving wildlife, i.e., the Wildlife Protection Act 1972[8] does not give a different picture. The act aims to increase the scope for protection and preservation of wildlife but as other frameworks this act also contains loopholes and gaps when it comes for implementation. It consists of various provisions which could be interpreted for human betterment and facilitating exploitation. Section 11(2) exempts killing or wounding the wildlife species/animals in good faith. This is contended as a defence by offenders. Ironically what is good faith is to be determined unilaterally by 'man' let that be 'reasonable man. While the lack of clarity in the provisions has only added to misinterpretation. Moreover, the punishment provided under the act cannot be considered proportionate to the offence committed.

Human "Development Policies"- Development is the change of a particular thing from original state to a different state and it is part of evolution which mankind undergoes, so far, this what development is all about when it comes to development to human kind. Development always demands from its seekers as it never can be implemented without incurring any cost. When the cost is wildlife, the humans take anthropocentric approaches and readily sacrifice the wildlife.
The infrastructure development projects often involve habitat and surroundings of wildlife, which eventually triggers human wildlife conflict. For instance, the Kerala Silver Line Project [9] is promising faster connectivity throughout the state and considerable decrease in

pollution, but yet the project needs 1383 hectares of land which also include eco-sensitive areas, wetlands, farm land and most importantly forest, which could alone destroy the habitat of wildlife species and could lead to a new set of human wildlife conflict.[10]

Yet another issue was involving Kerala, Karnataka and the Union Government which was relating to highway[11] connecting both the States through Bandipur National Park which is home to various wildlife species. The night travel was banned as the night traffic through the highway at times caused accidents involving wild animals. The development of the same highway is sorted for better road connection but the fact regarding risk towards wildlife species and human wildlife conflict is forgotten.

Commercial and economic development has also contributed towards human wildlife conflict. For enlarging the economy and commercializing various activities the wild spread initiatives were kept up front. The proposal of relaxation of Environment Impact Assessment in the recent Draft of EIA 2020[12] can be termed as the best example. An important thing like Environment Impact Assessment with so much relevance in protecting the environment where both humans and animals coexist was proposed to be relaxed to set up more industries and targeting enlarging the economy is being criticized for the approach it has taken in destruction of the ecology for sake of commercial and economic development. Yet the union government is not fully withdrawn from the base idea and is pressing more for this relaxation.

Tourism development has also significantly contributed towards human wildlife conflict. In olden days the travel was confined only for trade and in certain cases for survival but with passage of time the travel tourism grew into a leisure activity that generated immense revenue in the economy. This led to expansion of the tourism portfolio by including eco-tourism, forest tourism and the like. The forest clearing, altering and deforestation were done for making it human friendly but the facts about wildlife animals were just ignored/neglected. The forest

tourism reshaped and depleted the resources for wildlife species and frequent human visit to the territory also caused various problems and hindered free use of the habitat for the wildlife species. The recent announcement of Telangana Government regarding the "Tiger Tourism" focusing on generating revenue from jungle safari boosting travellers through the tiger park [13] indicates revenue generating mentality from the forest habitat, this could however disturb the habitat of the tiger and also other species inhabiting which is being ignored.

Every development mantra comes with a demand and often it is mostly connected with losing the biodiversity and ecological balance. When the eco sensitive areas are affected flora and fauna or the wildlife species are immediately affected. But the ultimate casualty will be the ecological balance of the planet. For instance, the Western Ghats region were termed as the Ecologically Sensitive Area and the adjoining villages were classified into Ecologically Sensitive Zones in Ghats Ecology Panel Report 2011(Gadgil Report) under the Chairmanship of MadhavGadgil.[14] The report suggested that the areas classified under the area and zone should not be altered or messed up with. The warning contained in the report strongly suggested adverse environment and ecologically impact including threat of human wildlife conflict. The major reason for classification of the Ghats into different areas and zones on the basis of ecological sensitivity is that it is home to hundreds of globally threatened flora, fauna, birds, amphibians, reptiles and fish species. It is also in consideration of the fact that the region is covering a long distance by connecting various states and providing it with ecological balance. At present but most States involved in the area are neglecting the fact and thus facing the wrath of negligence. The Western Ghats now are described as 'Restless Mountains, shattered live' [15] as it is clear that Government policies and ruthless exploitation by private entities have disturbed the lives of wildlife species located there.

Extreme weather and environmental Issues - The weather and environment conditions play a crucial role to determine the ecological balance in which both human and wildlife could cohabit. The adverse effects of

environment destruction are slowly reflecting in the form of mass disasters like earthquakes, flood, drought and landslides. The Intergovernmental Panel on Climate Change in its Sixth Assessment Report submitted in 2021[16], estimates that the world will reach or exceed 1.5 degrees C of warming within 2 decades that could make faster heating of sea and glaciers hinting at about more and more calamities affecting all the inhabitants including humans and wildlife. This could also mean that as the disturbance is caused by calamities could lead to direct encounters and conflicts between humans and wildlife for survival.

Population Increase- The population increase is yet another reason triggering the human wildlife conflict. The population increase in both sides i.e., human and wildlife species are factors which influences the conflict. The population increase in humans comes with various requirements, the most important being resources to survive, but this often is unable to be met and results in penetration towards the resources meant for the wildlife species, this results in depletion of resources in which wildlife species can rely. The ultimate outcome is conflict for capturing and retaining the resources.

Due to the surge in population the options of inhabitancy have declined, this also kick-started the migration and resulting encroachments into inhabitants of wildlife species. The result was the depletion of inhabiting space for wildlife species. The encroachments into habitat of wildlife species put humans and wildlife species close to each other which has also resulted in frequent violent interaction between both. The close inhabitants caused frequent visit of both groups into each other habitats, which resulted in violent encounters, also frequent encroachments resulted in alteration of habitat for wildlife but it did not make the wild animals conscious about their boundaries and the same could not be expected from the wild animals. Thus, wild animals continued their routine visit to places and locality even if it was captured by humans, this at times caused hurdles and facilitated frequent human and wildlife encounters.

Frequent incidents of wild animals attacking humans in

close border habitats has also indicated the need for regulating interaction between both sides and need to regulate their living conditions which are closely lying against each other. Now, in certain exceptional situations the wildlife/wild animal's population increase also triggers the human wildlife conflict. In most of the cases the situation is different but as mentioned this exceptional situation also has to be analyzed properly. The population increase in wildlife animals, surges their needs of resources as resources limits and the needs have to be met. The quest to survive and to find out new resources forces them to encroach into human habitat to satisfy their needs. This at times causes human wildlife conflicts.

Wild Animals venturing into human habitat has caused widespread destruction not only to life but also to livelihood which starts the conflict. We could clearly get the situation when we analyse the incidence of wild animals attacking the habitat including fields, houses and other assets of the Humans. The shocking revelation of a reported figure of about 10 years, where reported 124 major and other minor incidents of livestock and human life attack by wildlife animals [17] also indicate the same.

We could safely mention that population increase irrespective of side has its own effect on human wildlife conflict and is more or less an important triggering point of the same. The population fluctuation related issues can be least controlled as so it is uncontrollable and need another conscious approach for the same.

Human population increase and related contributory causes is more alarming as this is often causing major issues related to conflicts between human and wildlife but as mentioned it is in a certain way out of hand and uncontrollable, something which can ensure the division of resources and handling the issues with more intelligent approach.

Impacts of human wildlife conflict

Disturbance to Ecological Balance - Every element in

ecology should be balanced otherwise it could end up in various outcomes which might even extend to adverse outcomes. The species existing in the ecology are also an important element which should be evenly balanced. The ecological balance even includes the relationship between living things with its non-living environment. There is also a food circle existing in ecology and following this food chain a balance is maintained. If one element of the food cycle becomes extinct or not available, imbalance to the food circle and to the ecological system as a whole.

The human-wildlife conflict certainly causes ecological imbalance as disturbing the same with interfering in the circle. Both human and wildlife are part of the bigger part of the ecological circle and are essentially the vital elements to keep the balance. The human wildlife conflict essentially affects one side which ultimately affects the ecological balance.

The ecological balance has a chain reaction and if one species is affected the whole circle goes down. The impact of the same is negative. This could be understood with example from 1920's where in Yellowstone National Park the grey wolf was eliminated considering it as a harm but subsequently elk which was predated by grey wolf grew in population as their primary predators were not affecting them, this caused severe setback as there was full malfunctioning of ecology in the National park, the impact was also visible in other species. Later on, in 1995 the ecologist re-introduced the grey wolf to restore everything. This particular example of Yellow Stone National Park we could identify the human wildlife conflict as ultimately the humans decided that grey wolf was harmful and eliminated it completely, which damaged the whole balance. Thus, it is clear how human wildlife conflict could affect the circle and ecological balance and how severe it could end up.

Moreover, ecology is a basic type/part of biodiversity, which is a much bigger picture. The biodiversity is described or explained at three important levels namely, genetics, ecosystem and species all these work together to run Earth. The genetic diversity consists of variation of genetics and species diversity consists of species

variation with combination of various species and ecosystem diversity consists of variation of habitat and living conditions of species.[18]
Biodiversity is important because it gives clues on how variation takes place for each species. This on the brighter side is also crucial when it comes to managing every species. The human-wildlife conflicts cause disturbances to equilibrium of biodiversity and it damages the basic balance of existence. When the equilibrium is shattered the variation of species cannot be analysed and this ultimately leads to imbalances.

Further, ecological balance is a dynamic objective which has to be achieved and if it is achieved it ensures survival and existence of all organisms side by side with sufficient balance which is required. On the other hand, the diversity as for biodiversity is also maintained. In short, ecological balance maintains the entire biota for the establishment of a healthy environment which is as much required for survival and on the other hand ecological imbalances bring widespread destruction. Thus, the relevance to maintain the ecological balance is very high and it is much required for proper functioning. Human beings have a very crucial role to play in the process, since amongst the species humans are endowed with rationality to understand the need for harmonious relationship between organism and environment.

Destruction of Habitat- The destruction of habitat is an obvious impact of human wildlife conflict. The habitat is the natural home or surroundings of a particular species. Be it human or wildlife species the habitat is necessary and crucial for survival. Without the habitat to live no species can particularly continue its existence because it is the basic root which connects every species to its reality and lifestyles.

Wildlife species require four basic components for an ideal habitat, namely- food, water, cover and space. If these components are present then the habitat is complete for the wildlife species. When human-wildlife conflict occurs, there is a direct effect on either of these four components altering the very nature of habitat. The impact can be assessed through the elements of

Successional Stage, Structure, Size of Area, Arrangement, Surrounding Landscapes, and Time of the Year.

Starting with the Successional Stage, it signifies the predictable change in the plant community. Every plant community species undergoes changes during a different course or quarter of time or due to fixed reason, these changes are as said predictable and is necessary for the evolution of the particular community and also for the species relying on it. Different species might consume it so it is important that everything happens as predictable. Now, human-wildlife conflict is unpredictable which affects the successional stage directly, this may be because of the previously cited ecological imbalances or due to widespread encroachment which influence the successional stage. Next element is Structure, this signifies the structure of habitat where the species exist. Now every habitat has its own structure which is important to be maintained as it is very important to manage the habitat and its process, but human activities particularly human wildlife conflict alters this structure resulting in very severe impacts. Taking an example of forest with thick trees covering it, this is also important for the forest to retain the humidity level but if as part of the conflict any alteration is made to the thick trees which is an important structure then this alteration damages all other species relying on humidity. Taking the next elements Size of Area and Arrangements in the habitat are almost similar, as the size of area and arrangements are important and as crucial as other elements. Firstly, the size of area if depleted could alter the movement and growth of wildlife species and secondly, arrangements refer to arrangements of resources in the habitat and which species could exist without any resources. Thus, human-wildlife conflicts particularly leading to depletion of the same would cost the damage of the habitat and lead to causing harm to species relying on it.

Surrounding Landscapes as an element is important as is as much important as the habitat because it forms the environment and physical ambiance which is very important for the species existence. More dynamic the

surrounding landscapes, the more dynamic the species can grow and co-exist but as the development needs of the humans are growing the result is depletion of surrounding landscapes, this element leads to more chances of human-wildlife conflict.

Finally, regarding Time of the Year as an element, this refers to the time of the year when each occurrence occurs periodically and annually which is much important for the maintenance of ecological balance and preserving the habitat but when human-wildlife conflict it will also affect the cycle which is much important preserving the habitat.

Thus, these elements and alteration caused to it by human-wildlife conflict affects the habitat thereby causing the destruction to it. The destruction occurs either way of direct destruction or fragmentation or degradation. The wildlife habitat is not the only habitat which is affected by the human wildlife conflict. Human habitats are equally affected. The wildlife species infiltrates human habitats depleting human resources and damaging the livelihood of the humans leaving a long-lasting impact. There are many instances where the wildlife attack is faced not only in the village areas but also in city limits causing destruction.

Fight for Survival- The fight for survival is yet another obvious impact of human-wildlife conflict. As and when any conflict occurs the nearest outcomes would be to somehow survive it, sometimes even at any cost the survival is given greater importance. The survival as a concept is wider and is often kick-started by the weaker points in a conflict, this is because the weaker links would not be able to fight back and withstand the aggression from the opposite side, thus, the most obvious choice would be to gather all the resources and somehow survive the aggression from opposite side.
In a human-wildlife conflict the fight for survival may be from either end, depending on the situation. The fight for survival from the part of wildlife is either in the form of an attack of humans to regain the resources for their existence or migration from the habitat or place of aggression to a different habitat. The second instance is

seldom resorted as wildlife species prefer to stay where they belong and fight back from there.

The aggressive fight for survival takes extreme turns leading to extinction of wildlife species. Lethal management is most often the methodology to fight back the wildlife species. Lethal management generally involves killing or sufficiently destructive mechanisms used against the wildlife animals/species.[19] Culling is a narrower concept involved in the same, while the culling is done as a precaution against the spread of diseases or virus and its instance can be mostly seen in Zoo as in to protect the visitors or the remaining species from catching the virus.

The lethal management is State sponsored in most of the cases, but this is done with an intent to protect the humans and their livelihood. The instance of Gray Wolf in North America[20] can be considered here where it faced government sponsored lethal management initiative, i.e., it was killed or brought to complete extinction on account of the threat it posed to citizens of the country. The same fate was met by Zanzibar Leopard and White Shark as they were attacked with the government sponsored lethal management initiatives.

In certain cases, the need is so high that without any such initiatives the humans are not able to withstand it. There are many instances where wild animals, particularly elephants attack the fields and farm sector and as a prohibitory measure the government resort to electric fencing to prohibit the movement. This could even lead to death of elephants but the necessity and fight for survival demands the same. The recent Kerala High Court Judgment[21] of allowing shooting permission and licence to farmers on account to shoot down the wild boars attaching their field also indicates the necessity and fight for survival.

The problem with the fight for survival is that it can lead to aggravation and recurrence of conflict and may lead to the wipe out of species involved either way. The fight for survival continues to greater limits and it never stops on achieving a specific goal but it continues till extinction of

either end of the conflict.

How to balance and mitigate human wildlife conflicts?

Wildlife Conservation- This is the best cure when it comes to human-wildlife conflict. It is very important to preserve the wildlife species, and if it is taken up seriously, inevitably the human-wildlife conflict would go down. Wildlife conservation indicates the protection of species be it plants or animals in their natural habitat which helps to complete the cycle and it ensures that the balance would not be spoiled.

The importance of conservation is underlined by the fact that the human population is increasing every day while the wildlife population is on the decline. Wildlife conservation approaches inject the balance of life cycle into the ecology. This could be illustrated with a simple example where in a food cycle which is part of life cycle an insect is eaten by frog and frog is eaten by snake and what will happen if frog is extinct the cycle is broke as in snakes cannot eat insects and thus a conflict would arise, slowly snake population would be low as there is no food and insects' population would grow as there is no predator. This situation could be only avoided with preserving the frogs which would complete the cycle and maintain the balance.

Currently, international organizations such as World-Wide Fund, Conservation International, The Wildlife Conservation Society and United Nations have taken positive steps and active interest in conservation of wildlife species and to maintain public funds and other resources to achieve the same. International policies and initiatives are formulated with a view of preserving the species and preventing them from nor getting extinct. The goals of these bodies have always been the preservation of the ecology and its species and also to promote awareness and education on the issue so as to get a better response.

Nevertheless, the global initiatives have not reached its full extent and are lacking in the implementation part.

Most of the projects are for preserving the endangering species while all other species who are fast running into this category are neglected and as and when they enter the endangering category, the project for preserving them is kick started. A reversal of approach i. e. Preserving all species and not only the endangering species is required. A uniform implementation scheme is also required so as to ensure that global efforts are replicated at national levels

.

Role of Individual, State and NGOs

Role of Individual- Every Individual has a big role to play in preventing human-wildlife conflict. The best action a person can take is to remain within the limit of ecological boundaries and not to interfere with the habitat of wildlife species. All the encroachments and destruction of the wildlife habitat have to be stopped and the unwanted quest for more resources than one's own need has to be limited.

Moreover, individuals should not interfere in the activities which wrongly interfere with the wildlife species. Further, entertaining activities such as circuses or zoos and sports activities such as leisure hunting should all be stopped as these wrongly use the wildlife species and treat them merely as entertaining activities or commodities.

Role of State- State is committed to every citizen and subject of its, thus, they should protect them. Apart from this, the State should also take active interest in prohibiting its subjects/citizens from infiltrating into wildlife. The State should focus on development but not on account of destruction of the environment, surrounding and habitat which supports wildlife. The projects costing such destruction should be dropped. More inclusive approach has to be taken in case of wildlife as until now wildlife is not considered as something which needs protection or on the other hand, they are considered to be things which ought to be dominated. The approach should be treating wildlife species as similar to humans which should be given importance. If each state takes initiative to cover all the

species under its territorial jurisdiction, then it can be a great change.

Role of NGOs- the NGOs have an important role to play in preventing or reducing human-wildlife conflicts. The NGOs have actively protested against the government. They could also educate a large population for the need of preventing the conflicts.

Adoption of Eco Centric Approach - The Eco-Centric approach targets to keep the environment or nature at the centre for all decision making. It completely focusses on the environment and not particularly on what humans require. It also indicates that anthropocentric approach which keeps humans at its centre of focus has to be replaced with a philosophy of inclusive habitat and environment.[22] This approach highlights the need of preserving all the layers of Earth and it consequently presses for preserving and maintaining ecological balance which would ensure the cycle goes on and no disturbance is caused which break the cycle.

Further, Eco-centrism helps the humans to realize their duties towards nature and it gets centered to solve all the related crises, eco-centrism reminds us that all the humans and non-humans including all species are essentially interdependent and are related to each other.[23] Naturally, a common empathy is developed towards fellow cohabitants irrespective of the species difference which would thus limit the anthropocentrism present in the humans. Gradually, unwarranted actions from the human side would decline as mutual respect developed. Every species would be able to remain in its boundaries and lead a resource full life.

Eco-centrism is not anti-humanism but inclusive of every species. It is in consonance with anthropocentrism yet different from it in terms of its objectives. Objectives of anthropocentrism are- maintaining essential ecological processes for human survival, preserving genetic diversity for protection of human resources and ensuring sustainable utilization of species for the human community. On contrary the major objective of eco-centrism is inter-species justice alongside inter-human

justice which highlights the bigger picture of including all the species into the ecology and it also interpret the reality that humans were not alone during all the ages and should not be alone as on for existence of whole ecology.

Eco-centrism is not only for the present or not only for correcting the past mistakes but for a brighter side it has a great impact on the future. It lays down a path for the future generation and links various factors and fills the gap. It ensures that the preservation mechanism and environment or nature centre approach is taken so that the balance even though is disturbed in present it would not be so in future and at least the future generation would be able to lead a greater resource life cohabiting alongside with all other species.

Implementing Sustainable Wildlife Management- The sustainable wildlife management is the sound management of wildlife species to manage or sustain their surroundings or habitat. This involves recognizing, maintaining and controllably applying the existing resources.[24] This may sound a lot similar to wildlife conservation but the concept is different regarding the approach. In simple words this could be explained by pointing out that wildlife conservation is mostly related to conserving wildlife from endangering so as part of that plans and policy are formulated to achieving the same, while sustainable management is focused on managing all the resources sufficient for the species to survive and planning for properly using it without wasting it and thus maintains balance form getting interfered with. We could however say that sustainable management includes wildlife conservation as part of managing and planning for the process. Thus, wildlife conservation is narrow when compared to sustainable management and is included in the concept.

Sustainable management is the best cure when it comes to human-wildlife conflict as the sustainable management is directly addressing a lot of factors which initially leads to human-wildlife conflict.[25] Sustainable management not only helps to manage resources for the wildlife but ensures proper resources are available to the

humans which thus avoid needs for encroachment or any involvement in the wildlife. This towards a greater extent cut out the probability of human-wildlife conflict.

The key concerns leading to human-wildlife conflict i.e. Safety-security, food security and disease transmission can be solved with sustainable management as the sustainable management ensures optimum utilization of resources which in turn ensures food security. Sustainable management takes direct and firm action on the root causes of human-wildlife conflicts. It addresses the lack of resources in the rising population among humans and checks unwarranted encroachments in one another's habitat. The human made causes such war, unrest, and climate change are also kept in check so as to ensure that it might not cause any conflict. [26]

Sustainable management mechanisms help in reducing or avoiding the human wildlife conflict by-

- Shared governance, education and awareness raising- The shared governance and education ensure all-round reach and helps in equitable use of resources.
- Recognition of local communities with expertise and skills- The local communities can solve human wildlife conflicts by in situ biodiversity conservation and eco-friendly co-existence methods.
- Financial resources- The pooling of financial resources allows to utilize it for meeting the requirement and distributing at exact time.
- Relocation of communities- Relocation of communities from vulnerable areas in order to avoid possible friction from happening and to ensure that relocated communities receive better resources so as to keep them surviving.
- Good land use and panning it correctly- Using the land properly to generate various other sources of resources and planning it correctly would ensure proper distribution and balance.
- Growing alternate crops and protecting it- Growing of alternate crops keeps up that balance in food and continues the circle and protects it from possible attacks in order to keep up the momentum.
- Controllable lethal management and construction of barrier- Controlled lethal management and construction

of barriers would ensure the balance in the ecology,
Thus, sustainable management mechanisms are a useful cure when it comes to human-wildlife conflict and adoption of it globally would ensure the reduction or prevention of such conflict and to keep both the sides protected in the ecology.

Conclusion

The fact goes without saying that wildlife conservation is an imperative which sustains life on this planet. But the sheer expanse in the population as well as lopsided perceptions on development remains as prominent threats to augmentation of forest cover and wildlife conservation. It is a trite fact that forest cover is fast dwindling and wildlife is pitted against multi - pronged threats. In the jurisprudential scenario, the evolution of animal rights and human rights and the ensuing conflicts and desirable convergence are now seriously deliberated around the world. A shift from anthropo-centrism to eco-centrism in developing sustainable mechanisms and models of forest governance would add the much-needed vigour in the quest for symbiotic existence.

It becomes incumbent for the state to formulate ways to manage such conflicts through governance models on a sustainable basis. Nowadays every single incident of causality to the life and property of human beings generates chaos. The intensity of the chaos has spiked to a level where the affected people dare to take law into their hands and have many a times taken law into their hands and involved in destruction of wildlife which they justify as acts for self-preservation. The governments find hard pressed between the hue and cry raised by the victims for compensation and the bounden duty fastened on it by various statutes to conserve wildlife. Hence it goes without saying that there is a social cost involved in such instances both visible as well as invisible.

The States have to design proactive programmes by involving the take holders including the non-state actors to redeem the mainstream society from the prevailing information and knowledge asymmetry levels about the

intricacies involved and design models of co-existence to harmonize the relations for enduring solutions. It is imperative that what the state has to strive for is to explore the frontiers of inclusiveness having an appreciable effect on sustainable models of biodiversity conservation by integrating participatory approaches.

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COURTS AND THEIR INTERPRETATION OF 'CRUELTY' UNDER SECTION 498-A OF THE INDIAN PENAL CODE: A CRITIQUE

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Abstract
In recent years, section 498-A has been severely criticised for being a redundant provision of the Indian Penal Code, frequently abused by women to harass their husbands. The Law Commission of India, in its 243rd Report questioned the relevance of this section on the ground that the number of acquittals in cases of matrimonial cruelty is extremely high while convictions are abysmally low. At the same time, research suggests that violence against women in their matrimonial homes is not just common but has fairly increased in current times, on account of Covid-19. As Courts contribute significantly to the flawed perception of section 498-A, it is necessary to understand the manner in which the provision has been interpreted by them. This paper attempts to study selected decisions of the Supreme Court and various High Courts of India in order to trace the contours of matrimonial 'cruelty' in the Indian Penal Code. The author argues that the high rate of acquittals is the fallout of interpretational errors in decision-making and does not necessarily point towards the dishonesty of the victim, no matter how incredulous the courts and judges may find her to be.

The Context:

In April, 2020, the United Nations [hereinafter, "UN"] drew global attention to the growing violence against women in the midst of the Covid-19 pandemic.[1] Research revealed that with rising number of infections across States and the unavoidable imposition of containment and lockdown measures to protect people, several women were trapped with their abusive partners inside homes.[2] A rise in the number of calls to helplines and shelter homes for protection from violence against

such partners became a matter of concern in countries all over the world. In fact, UN Women called this phenomenon a 'shadow pandemic' of violence against women, festering amidst Covid-19. [3]

In India, like in the rest of the world, the problem of marriage-based violence was found to have increased during the pandemic. Such incidents led a number of Indian Courts to take *suomotu* cognizance of such cases and issue measures and directions to prevent their occurrence.[4] However, the problem continues to rise, making it essential to revisit and re-examine section 498-A of the Indian Penal Code [hereinafter, "IPC"].

Section 498-A was originally codified to protect women from violence inside their matrimonial homes. However, in recent years, it has been cornered by lawyers, judges, police and the public on grounds of abuse and redundancy. The provision lost a major chunk of its appeal and efficacy in 2017, when the Supreme Court [hereinafter, "SC"] passed an important judgment in an inexplicably hurried manner, with a misplaced need to silence women trapped in violent marriages.[5] This decision of the SC was based on an understanding from its pre-existing jurisprudence that section 498-A of the IPC is grossly abused by Indian women to "unleash legal terrorism" on innocent husbands.[6]

This judgment was perhaps the most insensitive in a series of unsympathetic decisions of the SC in such cases, since it reduced the nuanced concept of family-based violence captured in section 498-A to an ordinary civil dispute. Instead, it called for the constitution of 'Family Welfare Committees' to look into the veracity of a complaint of domestic violence before criminal proceedings could be initiated.[7] In September 2018, the SC modified its erroneous ruling in Rajesh Sharma's case and did away with the constitution of Family Welfare Committees. However, it continued to echo sentiments that were captured in its earlier decisions, highlighting the abuse of section 498-A.[8]

Rajesh Sharma's case was preceded by Arnesh Kumar's case,[9] in which the SC laid down a set of guidelines to

contain the rigour of section 498-A. Here, the Court's primary focus was to prevent the police from arresting the husband and his relatives in case his wife has filed an FIR under section 498-A. While doing so, the SC pointed out that the provision has been grossly abused by women to harass their husbands when they did not meet their demands.
Even prior to Arnesh Kumar's case, the SC had noted in two other cases that the fact of women abusing section 498-A is well-known.[10] Apart from the Apex Court, the 243rdLaw Commission Report, which studied the challenges to section 498-A, reiterated the needlessness of this provision. Quoting judgments of the SC that labelled battered women as "disgruntled wives" and presuming that women abused the section to settle domestic scores with their husbands, the Report stated that a miniscule portion of these cases resulted in convictions while the rest of them ended in acquittals.[11] It also stated that the dismal number of acquittals in section 498-A cases suggests the irrelevance of this section.[12] Recommendations of the Law Commission ranged from revisiting the need to retain section 498-A in the IPC to making the offence compoundable.[13]

Ever since the provision has been portrayed as monstrous, especially by the SC, there has been a significant impact on how other actors in the criminal justice mechanism, such as the police, respond to victims of matrimonial cruelty.

A Maze of Evidence and Interpretation:

While it is well established that the number of acquittals under a certain provision cannot by itself point towards its irrelevance, it is also necessary to examine how courts have interpreted matrimonial cruelty under section 498-A and why many of these acquittals may be unjustified.

It is argued that courts have erred in their understanding of the principle of 'beyond reasonable doubt' while appreciating evidence, circumstances and the conduct of victims in section 498-A cases. It is also argued that the web of confusion around section 498-A leads to the creation of insurmountable barriers for victims when

they are attempting to access justice while experiencing violent marriages. The incredulity associated with victims approaching the police or courts with criminal complaints of matrimonial cruelty is hazardous as it attempts to further endanger the oppressed, thereby perpetuating an endless cycle of revictimization and injustice by the very institutions that stand to promote the cause of justice.

The SC's approach, formed on the basis of presumptions and unsubstantiated by data or even an indication of the need thereof, deactivates an existing legal provision by misinterpretation. Hence, before further steps are taken by the SC to pin down section 498-A of the IPC, it is important to dissect decision-making in this area.

To this end, the paper approaches the problem of acquittals under section 498-A from two perspectives: *firstly*, it examines how courts err in their application of the principle of 'beyond reasonable doubt' in cases under section 498-A and *secondly*, it studies the inconsistent interpretation of matrimonial cruelty by courts while reeling under the weight of evidentiary standards in matters of violence within the family. In this regard, it is argued that context cannot be ignored when judges decide whether or not acts of violence qualify as matrimonial cruelty within the meaning of this provision. In doing so, selected judgments of the Apex Court as well as High Courts have been examined to locate inconsistencies in the interpretation of section 498-A.

It is argued that many acquittals are the consequence of Courts' erroneous approach in understanding the nuances of violence or their inability to appreciate existing evidence in such serious offences that happen in the privacy of homes. These flaws in method and reasoning compromise the rights of victims and put them in a tight spot by amplifying existing patriarchal biases and prejudices against them. The combined effect of these cases is that judges end up ideating the contours of cruelty even when the law clearly lays down its contents. Errors in judicial approach cannot be reasons to either treat victims of matrimonial cruelty with suspicion or nullify the impact of a protective legal provision by

judicial action or the lack thereof.
From the perspective of the victim, in cognizable offences such as section 498-A, errors of judicial approach leading to wrongful acquittals may mean the difference between her life and death (if the victim is alive). Not only that, undeserved acquittals create a culture of impunity and encourage a state policy of tolerance towards violence.[14] These ensure, in turn, that batterers feel encouraged to perpetuate acts of violence against women.[15]

Matrimonial Cruelty as a Penal Offence

While the IPC does not *define* matrimonial cruelty under section 498-A, it does provide an explanation which sets out when wilful conduct may be considered cruel. For cruelty to have occurred, it is sufficient that willful conduct exists which drives a woman to commit suicide or causes grave injury to her life, limb or health.[16] Health refers to both physical as well as mental health under the provision. Apart from this, the second limb of the explanation states that if a woman is harassed by her husband or his relatives, or is coerced by them to meet unlawful demands for property or valuable security, such harassment will also qualify as matrimonial cruelty.[17]

In toto, section 498-A provides for two categories of matrimonial cruelty: while the first one encompasses any and every form of violence of a certain *degree* that can qualify as matrimonial cruelty, the second limb identifies harassment of a very purposive and *specific* nature that can be brought within the meaning of section 498-A.

Further, the law makes it abundantly clear that whether or not cruelty was meted out to victims is a question of fact. Thus, how courts appreciate facts in such cases is crucial to the determination of acquittal or conviction.

Courts and their interpretation of 'Cruelty' under section 498-A

Ignoring Omissions

While the criminal act contemplated in section 498-A

may be by way of commission as well as omission, Courts have often passed decisions that obfuscate the meaning of matrimonial cruelty. In order to determine whether an act is grave enough to constitute cruelty in a matrimonial relationship, testing the impact of such an act in terms of it causing grave injury to the victim's life, limb or health is sufficient. Moreover, while determining such impact, it is also necessary to keep in mind that the act in question occurs in intimate relationships. Therefore, whether an omission or a commission would be sufficiently grave to constitute cruelty cannot be construed by isolating incidents from the context of the family and family-based relationships. For example, an omission on the part of the husband to take his half-dead wife to the hospital for several hours after she has sustained injuries under suspicious conditions inside their house should clearly constitute cruelty within the meaning of section 498-A, since it is willful conduct that gravely endangers the victim's life and health. However, Courts have held otherwise and in doing so, have acquitted the accused while gravely endangering the rights of women injured or killed by their violent spouses and their families.

In *Arvind Singh v State of Bihar*,[18] the SC overturned the appellant's conviction despite the fact that he had been convicted by the Trial Court and the High Court, stating *inter alia* that the lack of "outside witnesses" made the Prosecution's case less reliable. Interestingly, the two-judge Bench of the SC in this case pointed out that there were several lacunae in the investigation of the police, as a consequence of which precious evidence that may have helped the Prosecution's case had probably been lost. Facts on record revealed that Minta Devi, the victim in this case, was burnt to death in the presence of Arvind Singh and his family members, who made no effort whatsoever to save her. Not only that, they did not even make an effort to assuage her pain by taking her to a hospital or calling a doctor, as she lay on the cot with 85 percent burn injuries. The victim's family was also not informed about the incident and they arrived several hours later, only when a neighbor informed the family about Minta's "accident."

In cases such as Arvind Singh's, where violence is veiled by privacy and the victim is generally on her own, such omissions raise significant questions around the innocence of the accused and clearly point towards an element of guilt. However instead of contextualizing facts and comprehending them in the light of family-based violence, the SC, in an effort to add layers to the meaning of cruelty, stated that it is a "state of conduct which is distressing and painful to another."[19] Ironically, it went on to state that in light of the above exposition, Arvind Singh did not do anything that could be said to be 'cruel'. The Bench also stated that in the absence of any linkage established with dowry and any *other* evidence of torture, a case under section 498-A could not be made out against the accused.

Frequency of Cruelty- a necessary factor

In several cases of matrimonial cruelty, Courts have applied unreasonable standards in assessing the gravity of acts that may qualify as cruelty within the meaning of section 498-A. While emphasizing that the frequency of cruelty is a necessary factor in determining its sufficiency under section 498-A, they have ended up going to the extent of normalizing violence. In many of these decisions, gravity is equated with frequency of abuse and in the absence of exponentials that judges find acceptable, singular episodes are discarded as non-serious events. Courts have consistently treated family-based violence against women as part of the "ordinary wear and tear of life".[20] The cases of *Girdhar Shankar Tawade v State of Maharashtra*,[21] and *Gopal v State of Rajasthan*,[22] are worthy of exploration from this perspective.

Gopal's case, which also involved an unnatural death of a young woman, the SC upheld the Trial Court's verdict that a 'single act of cruelty' is not sufficient to attract the penalty under section 498-A. This judgment of the SC resonated with the judges subsequently giving the verdict Girdhar Shankar Tawade's case,[23] where it was held that unless the Prosecution is able to prove beyond reasonable doubt that a *series of acts* amounting to cruelty were inflicted on the victim, a case under section

498-A cannot be made out. Despite the testimony of witnesses to the effect that on a number of occasions they had visited the deceased's house and had requested the husband to refrain from harassing her, the Court held that in the absence of a demand for dowry, the facts were not sufficient to constitute matrimonial cruelty within the definition of section 498-A.

In fact, this problematic sentiment of the Court was echoed as far as two decades back, in *Richhpal Kaur v State of Haryana*,[24] where the SC had stated that frequency of violence is a necessary factor in judging its relevance under section 498-A of the IPC.

Misconstruing Dowry

While harassment for dowry can be brought within the statutory meaning of matrimonial cruelty, section 498-A is often wrongly presumed as a provision which mandates the presence of dowry harassment for conviction. Consequently, while in few cases like the ones discussed earlier, Courts have tried to find direct or oblique references to dowry, in other cases, they have refused to accept the presence of cruelty by altering the meaning of 'dowry'. For example, in 2007, the SC delivered an evasive judgment in the case of *Appasaheb and Anr. v State of Maharashtra*,[25] in which the victim, two and a half years into her marriage, was found dead due to insecticide poisoning. The judgment stated that "a demand for money on account of some financial stringency or for meeting some urgent domestic expenses or for purchasing manure cannot be termed as a demand for dowry as the said word is normally understood."[26]

In the same year, in a similar case of dowry death, the only evidence available in the form of a dying declaration and letters exchanged between the victim and her mother. The dying declaration had been made by the victim to her father in the presence of other relatives, where she stated that her mother-in-law, who was the accused, had set her on fire while she was cooking in the kitchen. However, the SC dismissed the existence of matrimonial cruelty, *inter alia*, on the ground that the letters were written by the victim three years prior to her

death.[27] The letters stated that the accused was embarrassed that the victim's family had not incurred a certain amount of expenditure despite promising to do so, and that victim's husband was planning to contract a second marriage.[28] Although the Trial Court and the High Court had considered the content of these letters as relevant facts and convicted the accused based on the available evidence, the SC adopted the principle of literal interpretation while analyzing the language of the letters,[29] and stated that the mother-in-law's displeasure at the amount of expenditure incurred by the victim's family cannot be equated to a demand for dowry by her.[30] On this ground, the accused was acquitted from her liability under section 498-A. In its legal reasoning, the SC also went on to say that section 498-A does not specifically speak of dowry and that the victim's letters were not sufficient "material evidence" to infer that she was harassed by her mother-in-law to meet any "unlawful demand for property", as was the requirement in the second limb of the explanation to this section.[31]

Subsequently, in *Ran Singh v. State of Haryana and Anr*,[32] while reversing the order of conviction of the accused, a two-judge bench consisting of Justice P. Sathasivam and Justice DrArijitPasayat noted that "customary payments" cannot be considered as dowry.[33]

Marital Rape: Grievous Hurt but not Matrimonial Cruelty

Matrimonial Cruelty has several manifestations and marital rape is a common variation. In India, rape of a wife by her husband is not recognized as an offence. In this regard, a legitimate question which arises is whether the present definition of matrimonial cruelty in section 498-A may include marital rape in its ambit. Under section 498-A, an act amounts to matrimonial cruelty if it causes grave injury to a woman's life or limb or to her physical or mental health. Hence, the fact of marital rape, when proved, is sufficient to qualify as matrimonial cruelty. However, certain judgments by Indian courts reveal otherwise. The case of BommaIlaiah,[34] is one in point. The case of the Prosecution was that the accused forced his wife to have sexual intercourse with her, and

in the process, inserted sticks into her vagina causing severe injuries. As a consequence of this, she bled profusely and even fell unconscious. Although the Trial Court had convicted the accused under section 498-A as well as section 325 of the IPC, the High Court interestingly acquitted the perpetrator. Ironically, the Court concluded that the evidence was sufficient to convict the accused of Grievous Hurt but did not constitute matrimonial cruelty under section 498-A. The fact that marital rape of the victim and serious injuries to her private parts are, by themselves, sufficient to show matrimonial cruelty under section 498-A was not accepted by the court.

Continuing Confusion: Exceptional deviations

Although the Supreme Court and High Courts have shown difficulty in their appreciation of the meaning of cruelty under section 498-A, and have sometimes discarded available evidence on the grounds that they were insufficient, the concept of cruelty has undergone mutations favourable to the victim. However, while being of use to individual victims, these cases have added to the confusion arising from the inconsistent interpretation of matrimonial cruelty.

For instance, in MohdHoshan's case, the SC agreed with the Andhra Pradesh High Court's contextual interpretation of the term "cruelty" in the case of Mohd. Hoshan.[35] In this case, the Trial Court had held that taunting and scolding the victim for the way she cooked or commenting on her looks could not be sufficient to drive a woman to commit suicide. However, the High Court set aside the order of the Trial Court by stating that cruelty cannot be guided by any standard objective parameters.[36] It is a subjective factor and can vary from one person to another. Apart from that, the High Court also took note of the fact that while the victim was getting burned, the accused and his family did not make any effort to save her, despite the fact that they were present near her. The SC upheld the verdict of the High Court but modified the sentence of imprisonment to the period already undergone.

Along the same lines, in an earlier case,[37] the SC had

stated that taunting a married woman for not bringing sufficient dowry and calling her ugly constitutes harassment and torture and that such acts constitute cruelty within the meaning of section 498-A.[38]

A comparison of Hoshan's case with the preceding case discussed above reflects the inconsistencies in interpreting cruelty under section 498A. As rightly pointed out by the Andhra Pradesh High Court and the SC, whether or not a given set of facts qualifies as sufficient cruelty within the meaning of section 498-A cannot be verified by an objective assessment. The Trial Court's outright rejection of the possibility that verbal abuse has the potential to drive a woman to commit suicide, as was done in Hoshan's case, is a concrete example of the approach of courts towards violence in marriages. Likewise, the emphasis of the SC in Tawade's case on the requirement of a "series of acts" for cruelty to have occurred deviates from the basic objective and requirement of section 498A.

On the issue of what matters may constitute matrimonial cruelty, the case of Bhaskarlal,[39] is significant. In 2009, the SC had adjudicated that charges under section 498-A cannot be filed against the parents-in-law by the daughter-in-law merely because the Prosecution was able to prove that they had "kicked" the victim. Four years later, in 2013, the SC recalled its verdict and held that it is not necessary to connect every case of cruelty with dowry harassment for penal sanctions under section 498-A to be attracted. Hence, a case of physically harassing the daughter-in-law by kicking and threatening her with a divorce cannot be *prima facie* rejected at the threshold. On the basis of this judgment, the stay order on section 498-A proceedings against Bhaskarlal and his wife was lifted and the SC asked for expeditious disposal of the case considering the loss of time.

Unreasonable Doubts, 'Insufficient' Evidence and Consequent Acquittals

In many cases, the reason for an acquittal under section 498-A is that courts do not find sufficient evidence to

establish the guilt of the accused. Since the nature of matrimonial cruelty is such that it happens within the privacy of family, most of the evidence is circumstantial. Circumstantial evidence is indirect in nature and therefore, it does not prove the fact in question directly but establishes other facts from which the point in question may be inferred conclusively and satisfactorily.[40] In terms of the weight or quality of evidence, there is hardly any difference between direct and circumstantial evidence.[41] But circumstantial evidence is ignored by courts and is often discounted as insufficient. When combined with other requirements of an accusatorial mechanism, it creates insurmountable barriers for the victim as the question of what constitutes sufficient evidence continues to elude the prosecution.

For example, in M Srinivasulu's case,[42] the Trial Court had convicted the accused under section 304-B read with section 498-A. The victim was a young girl who had died of 100 percent burn injuries after being immolated. Although the conviction was initially made by the Sessions Court after examining 11 witnesses and 16 documents, on appeal, the High Court acquitted the mother-in-law, who was the co-accused in this case. The conviction of the husband was upheld by the High Court, although his sentence was reduced. However, the SC ultimately acquitted the accused. His acquittal was based primarily on three letters in which the victim had stated that she was not happy in the marriage but had not mentioned anything against her husband. A reading of the case does not indicate why the SC felt the need to re-appreciate facts and evidence even though the Sessions Court and the High Court had already established the guilt of the accused.

Adding to the list of cases resulting in acquittals under section 498-A is the case of Sukhram.[43] The trial court had convicted both the accused under section 498-A and section 304-B. It was proved beyond reasonable doubt by the prosecution that: (i) the deceased was constantly harassed by her in-laws after marriage, (ii) that her dead body was recovered from a well within a year of her marriage, (iii) that the cause of the death was not drowning but ante-mortem by throttling and

asphyxiation, indicating that she had been murdered, and (iv) although the accused had taken the plea of alibi, upon cross-examination of the mother-in-law of the deceased, it was clearly established that they were present at home during the said occurrence. Despite all these facts being proven, the High Court held that the facts were not sufficient to establish a case of section 498-A or section 304-B, while simultaneously convicting them for murder under section 302. The High Court constantly emphasized on the absence of an eye-witness but eventually, found the chain of circumstantial evidence to be complete. Ultimately, in the SC, the father-in-law, who was the co-accused, was found to be not guilty under any of the sections and his order of conviction was set aside. It was held that he could have at best been present during the commission of the crime but there was nothing to suggest that he even had the knowledge of the crime being committed. Further, the fact that the charge of murder was not framed against him and he was still convicted by the High Court was another reason for his acquittal. A complete reading of the case suggests that both the accused were acquitted of charges under section 498-A, although one of the accused, (i.e.) the husband, was also convicted for murder, which was not set aside by the SC. It is difficult to comprehend how the husband could be convicted for murder but still be acquitted of matrimonial cruelty.

Sometimes courts have expected unreasonably high standard of precision and exactness to determine whether the victim was subjected to cruelty under section 498-A. In the case of Amar Singh,[44] the High Court of Rajasthan as well as the SC acquitted two of the accused (parents-in-law) of charges under section 304-B as well as section 498-A. The acquittal, *inter-alia*, was based on the fact that the Prosecution Witness was not able to state the exact nature of harassment and torture that was meted out to the deceased by the parents-in-law. Contrary to its decisions in cases such as Pawan Kumar,[45] and MohdHoshan,[46] the SC stated that it is not sufficient to state in court that the deceased was taunted, criticized and harassed by the parents-in-law for not being able to bring a scooter or cash. In the Court's opinion, the fact that the Prosecution was not

able to clearly establish the content of the harassment or nature of the torture left space for a benefit of doubt in favour of the accused.

As if to add insult to injury, the two-judge bench of the SC, in this case, even cited KansRaj's case,[47] to indicate that in such cases, there exists a tendency to rope in parents and other relatives of the husband as co-accused, which should be actively discouraged.[48]

Cruelty, Standard of Proof and the Relevance of Context

In India, there exists an undue emphasis on the fundamental principle of establishing a case beyond reasonable doubt. The necessity to arrest this trend has been echoed by the judiciary on several occasions. In the case of Shivaji Sahabrao Bobade,[49] Justice V.R. Krishna Iyer declared unequivocally that a misplaced emphasis on this principle is antithetical to the idea of justice.[50] In *Sucha Singh and Anr. v State of Punjab*,[51] the SC held that exaggerated devotion to the plea of benefit of doubt and blind adherence to the principle of letting a hundred guilty persons free frustrates the objective of justice.[52]

Likewise, in 2011, in the case of *Iqbal Moosa Patel v State of Gujarat*,[53] while deciding a case of contraband, the SC held that the degree of proof required under the phrase 'beyond reasonable doubt' is not one where the prosecution has to establish the case beyond a "shadow of doubt."[54] Incidentally, 2011 was also the year in which the decision of Arnesh Kumar,[55] was passed by the SC. While on one hand, courts were emphasizing upon a liberal approach towards the standard of proof in criminal cases, on the other hand, battered women were facing the consequence of misapplication of the principle of beyond reasonable doubt in cases of matrimonial cruelty.

Despite the liberal interpretation of the concept of 'beyond reasonable doubt', criminal cases filed under section 498-A of the IPC lean in favour of the accused on most occasions. In the absence of strong evidence, which is common in such cases due to the nature of offences, it

becomes even more difficult for the victim to secure the ends of justice. An analysis of leading judgments of the SC in this area reveals that judges expect the victim to prove her case beyond any 'shadow of doubt' and not just beyond reasonable doubt. This approach has led courts to arrive at bizarre conclusions using flawed methods, such as questioning the sufficiency of cruelty against victims even when the accused's conduct results in homicide, rejecting available circumstantial evidence and lamenting on the unavailability of primary evidence, interpreting terms without appreciating the context and legislative intent of the legislation, and finally, as a cumulative impact of the above factors, demonizing a well-crafted legislation designed to protect vulnerable women.

Courts have failed to note that in an accusatorial mechanism where the Prosecution must prove its case beyond reasonable doubt, this burden is a heavy one to discharge as violence against women in marriages takes place in the privacy of homes. In most Indian families, the victim's position may be further weakened by the fact that marriages are generally virilocal. The factor of privacy combined with incompetence, indolence and corruption of investigating agencies makes the entire process even more complicated for the victim. The SC has noted and reiterated this in several cases including the case of Arvind Singh.[56]

Under such circumstances, misunderstanding the concept of 'beyond reasonable doubt' as beyond any doubt whatsoever leads to miscarriage of justice and impairs the faith of victims in the criminal justice system, who then choose to suffer in silence or revoke their rights by not approaching courts. These acquittals ultimately create numerical data which counts against the victim and forms a basis for adverse propaganda against important legal provisions such as section 498-A. Therefore, for the victims to escape this endless cycle of systemic re-victimization, it is high time that courts reassessed their understanding and interpretation of violence in intimate relationships such as marriage.

Conclusion

To conclude, while it may be true that the number of acquittals in cases of section 498A may be high, it is important to assess the reasons underlying these acquittals. While many of these acquittals may be the result of a bad investigation by the police, many more could be a consequence of interpretational and evidentiary errors in decision-making. In none of these circumstances would it be fair for victims to pay the price by being labelled as insincere, incredulous or dishonest. What needs to be reassessed is not whether Indian women still need the strength of section 498-A to protect them in their matrimonial homes, but whether courts can do better by avoiding pitfalls of the legal process arising from a glaring gap between the crime and its context.

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FALSE RAPE ACCUSATION – REQUIREMENT FOR A MEANINGFUL LEGISLATION

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ABSTRACT

'Rape', it's a frightening issue in India and according to Webster's law dictionary the word rape means "In common law, the felony of a man having illegal sexual intercourse with a female other than his wife, by force or with threat of violence and against her will; unlawful sexual act with an unwilling other, and usually involving threat of violence, or to commit the act of forcible sexual intercourse".[3] False accusations are prevalent mainly in the offence of rape because it is a misconception that, the society thinks in each and every felony that the man is a real culprit and he should be hanged till death; this misconception is taken as a base for increasing number of false allegation cases day by day. The false claiming is horrible and disgraceful against the innocent person who becomes an accused of the bogus case. The present article revolves around the offence of rape and the false accusations in the aforesaid crime.

The article is divided into five phases, the first phase deals with general meaning and idea of the false accusation in the offence of rape and statistics of the respective problem, the second phase deals with the question why women falsely accuse a man for rape, the third phase deals with the judicial cases, fourth phase deals with a question that how the false accusation effect someone's life and the last stage deals with the summation, conclusion and suggestions.

The false accusation is a kind of catastrophic disaster in someone's life who is innocent and it is very important to curb this practice.

INTRODUCTION

In our country, some people use the straight jacket formula of false accusations in grief-stricken situations. Every day in the newspapers there is a new mind boggling headline concerning bogus claims for an offence which is prescribed in the Indian Penal Code. History, sacred and profane the common experience of mankind teach us that women of the character prone for a selfish reason to make false accusation both of rape and insult upon the slightest provocation or even without provocation for ulterior purposes.[4]

The expression false accusation consists of two words – false and accusation; where the accusation means 'a formal charge of criminal wrongdoing'. The accusation is usually presented to a court or a Magistrate having jurisdiction to inquire into the alleged crime.[5] The aforesaid expression can also be stated as wrong claiming, this means an assertion or statement which is untrue to mislead. Herein the false accusation also contains a Latin maxim called 'falsuscrimen' which means a false charge for claiming someone under any of the offence. For supporting this, the common law provides a doctrine of 'crimenfalsi'[6] which means the crime of falsifying or any offence which involves some elements of false statement and dishonesty.[7] Moreover, Justice Shemp interpreted the same expression in a case in the Honorable High Court of Lahore wherein 'an offence of false accusation of rape' was taken as a vexatious act to the accused person.[8]

Surprisingly the honorable Allahabad High Court in 2015 has stipulated the definition of false accusation of rape in the case of Gopal Gupta Vs. State of U.P[9], provides that a false accusation is an intentional false reporting of a case that has been filled by the alleged victim whereas in the actual instances the rape has not occurred.

Feminists, fought to have the criminal justice system and society to respect the veracity of women.[10] Perhaps, they never looked outside the box which referred to the dark side of the women who used the legal system and played a victim card for getting perquisites from it. There is a myth that rape is a symbol of a patriarchal society[11] which is dominated by vigorously masculine power of

males, considered as the invasion upon a woman's physical or bodily privacy and outrageous to the dignity of a woman.

The philosophers/jurists/researchers provided the theories by relying on anecdotal evidences and hyperbolized the problem of false rape accusations for justifying the question that why a female would falsely accuse a man for rape? Similarly, there are several situations where men get raped by a female, she could be his boss, friend or someone else; they often do not report the case of being raped because of the problem that they too find themselves in a situation of hostility and skepticism.[12] Such kind of females who do these accusations are taking advantages of procedural and penal code, where they try to report the false cases to get fruit out of it.

According to ***Delhi Commission for Women in 2014,*** they published a report wherein the previous year i.e. 2013-14 53% of rape cases were false and it opened a platform for the most heated debate upon the men's rights against the false rape cases.[13] According to ***NCRB Report 2018,*** there are aspects where the statistical data has been provided; which profanes that out of 23,801 false cases 5,878 cases were reported under the offence of rape (section 376, Indian Penal Code, 1860); although it's difficult to evaluate an accurate percentage of the false accusation perhaps in India NCRB report, 2018 incorporates approximately 25% out of the total cases were reported under section 376 of Indian Penal Code, 1860 were false cases.[14]

By considering the aforesaid mentioned official data it isn't erroneous and fallacious to say that some Indian women are shabby in nature, who involve themselves in a false case of rape which hasn't happened in real, for extraction of some extra benefits and advantages from the accused of such cases.

In ***Dr. Subhash Kashinath Mahajan*** case the learned Attorney General pointed out the statistics considered by the Court in the judgment under review indicate that 9 to 10 percent of cases under the Act were found to be

false.[15]

RESEARCH METHODOLOGY

The research methodology endorsed and taken in this study is 'Doctrinaire'[16] and contain the scrutiny of legal literature which are accessible from case law references, law journals, library researches, books, periodicals and internet.

RESEARCH QUESTIONS

- Are not the women involved in the case of false accusation an "accused", not a victim?
- Why a female would falsely accuse a man for rape?
- What are the aftermaths of false accusation of rape on the accused of a case with special reference and analysis based on judicial decision?
- In our country, it is assumed that when the topic is 'rape', women are the victims. I ask why?

WHY A FEMALE WOULD FALSELY ACCUSE A MAN FOR RAPE?

It is absolutely right to argue in accordance with the precedents given by the Supreme Court and the various High Courts that before registering any false case of rape every such female has a motive in her mindset; although consequently, many assault complainants endured unjust because of these probable contentions grounded in amateur psychology.[17] In the light of the aforesaid question, it was observed by the high court of Odisha that in the submissions on the behalf of accused that the prosecutrix had initiated the proceedings of rape i.e. false allegations of rape to take revenge from the accused.[18] Further, the Supreme Court also observed this and provided that the victim's false rape has commenced the proceeding of her rape is to defame the reputation of the accused and his family in the society.[19]

In the **University of Pennsylvania Law Review, 1970,** John Henry Wigmore with the shreds of evidences provides the reason behind the false accusation in the offence of rape and in other sexual offences. Under his study, it was mentioned that in society there are women

who suffered a sense of shame when their pregnancy results are positive before marriage or after having consensual illicit sexual intercourse; he further provides that women often use this way of false accusation to extract money[20] or to satisfy their notoriety desires or to get married under coercion or to grasp personal grudges.[21]

In ***Khalid Vs. State of Uttar Pradesh***,[22] it was stated that it is the bonafide duty of the courts, simultaneously, to remember that the false accusations of rape are not seldom. There have additionally been uncommon examples where a parent has convinced an artless or loyal girl to make a fraudulent allegation of rape either to extort money or to get rid of financial liability or to take revenge. The determination of rape only depends upon the facts, circumstances of each case, which should be closely scrutinized.

Sometimes women falsely implicate the accused under political pressure because of harbingered enemity. The honorable Allahabad High Court has witnessed the case of political pressure for false accusation. It was observed by the court that the whole story of prosecution was false and bogus; no rape was committed upon the victim. The submitted medical report has also forbidden the charges of rape; further it was observed that the victim has done this for the lust of economic gains and the accused was roped in the false charges of rape and in present the crime was never committed.[23]

LEGAL APPRAISAL

In most of the cases, the Indian judiciary provided precedents apropos to false accusation wherein ***State of Sikkim Vs. DawaTsheringBhutia,[24]*** the question came into the picture that whether the defending party succeed in probabilising the heated argument in relation to the bogus case of rape, which would lead to the unavoidable end that the victim made the false allegations of outraging her modesty and attempt to rape. In the judicial cases, it was also found by the honorable courts that the cases of false accusation can be instituted against the accused out of criminal conspiracy[25] as per

Section 120A of the Indian Penal Code 1860 [26]; apart from this it was also observed that a father of the prosecutrix not ordinarily subscribed the false allegations of rape on his own daughter, he also narrated the whole case to the IO and police officer for drafting the criminal charge sheet on the accused, thereby the father of the prosecutrix has himself invited the ignominy.[27]

It was observed by the honorable Apex court that such a course of conduct in the false cases of rape is entirely uncertain; according to the Principles and Practice of Medical Jurisprudence, Vol. II provides while dealing with the cases of an adult and a well sexually experienced lady, it is required to observe that "a fully grown girl or adult woman should be able to resist a sexual assault. We should expect to find evidence of a struggle to avoid sexual contact or penetration, and may well feel uncertainty about the real nature of an alleged assault in its absence…A false accusation of rape may sometimes be exposed by marks of violence, It is to be recorded that the evidences should be interpreted properly by the medical examiner, whether these bruises on the victim's body are of violence during rape or being initiated by the prosecutrix for the false rape case."[28]

In the ***State of U.P. v. Choteylal,***[29] the Supreme Court, while pointing out that the courts should always be alive about the impact of sexual assault on a victim, made the following observation: ".....A forcible sexual assault brings in humiliation, feeling of disgust, tremendous embarrassment, sense of shame, trauma and lifelong emotional scar to a victim and it is, therefore, most unlikely of a woman, and more so by a young woman, roping in somebody falsely in the crime of rape. The stigma that attaches to the victim of false rape (i.e. male or accused) in Indian society ordinarily rules out the levelling of false accusations."[30]

The honorable Allahabad High Court in 2015 has stipulated the definition of false accusation of rape in the case of ***Gopal Gupta Vs. State of U.P,*** [31] wherein it was provided that an intentionally false report has been filed by the alleged victim whereas in the actual instances the rape has not occurred. Further, it was also observed that

the injuries on the victim's body are self-inflected and the court also laid down that even she refused her nail clippings to forensic expert for investigation because of the same reason.

The observation of an aggressive or critical manner the honorable Apex Court provided that ordinarily in our society, the cases of false accusation of rape are registered by an unmarried woman, who is not a trollop, but for the sake of some additional advantages from the accused the so called prosecutrix risk her most esteemed honour and self-prestige.[32]In the ***State of Maharashtra V. RameshwarShridharJaware&Anr.***,[33] it was observed that the girl was a rustic girl of the village and for procuring some advantages and perquisites lodged the false case of rape on the accused and because of the criminal proceedings, he suffered financially, mentally for 14 years of trial and judicial custody for a period of time.

In the case of Bombay High Court, ***Bhagat alias RikhmanMahabalMaurya V. The State of Maharashtra,***[34] it was observed that accusing an innocent person under the case of rape for taking revenge of some past events is one of the major reason for increasing false accusation cases, wherein the present case provides that for not giving compensation for the damaged hut mentioned in the respective case leads to the conviction of an innocent person under the bogus rape case and faced a trial for five years to prove himself as an innocent.

The acquittal of the rape accused was done by the court after observing, interpreting the facts and evidences; the High court of Chennai has awarded Rs. 15 Lakh as compensation to the accused who was arrested as a college student on the charges of rape and made to confront the criminal trial of more than seven years. The accused was acquitted based on a DNA report that demonstrated he was not the father of the child claimed in the case by the prosecutrix. The court also stated that the trial of false charges of rape had ruined the career and life of the accused.[35]

The High Court of Rajasthan has laid down that the

offence of rape has been incorporated as one of the most brutal and evil crimes against women, the courts observed that it doesn't only insult the womanhood, but also disrobe the prestige of women and erodes her dignity. On the other hand, the women also making the false accusation of rape by misusing the laws and criminal code. The cases of false accusation broke all the judicial norms or embodied the bad name on judicial fraternity and this aspect attains more significance herein it also exposes to launch a proceeding against women under section 182,195 and 211 of Indian Penal Code, 1860 which criminalises any person for filing a false charge.[36]

A noted legal scholar Prof. Alan Dershowitz has given following quote in the said context "Rape is such a serious crime that deliberately bringing a false accusation of rape should be an equally serious crime and women are not being punished for those crimes. I believe that being falsely accused of rape is as traumatic as being raped". Meaning thereby that the impact of said calculated act and misuse of law, is that the incumbent, who has been charged for the offence of rape, the offence that he has never committed, his public image is completely ruined and tarnished, and not only he but his entire family has to go through a great pain, and for rest of the life he and his family has to struggle to regain the reputation.[37]

In the above context of false accusation of rape, in India, no law is present for the exact same offence which expressly talks about the false accusation of rape done by any person and further provide sanctions. If we go through with chapter XI of Indian Penal Code, 1860 Section 211 talks about false charges of offence made in intent to injury. The Allahabad High Court in Jugal Kishore case,[38] held that where a specific false charges is made, the proper section for the proceeding is to be adopted under section 211. The essential for invoking section 211 are that the complaint must have falsely charge such person with having committed an offence, there is to say, the person must be innocent; the person should know that there was no just or lawfull ground for such proceeding or charge and lastly there must have an intention to cause injury to the innocent.[39]

Section 211 is divided into 2 parts first is talking about general false institution of criminal proceeding and second part is specifically dealing with some specific cases where false charges of offence is made in criminal proceeding which intends to injury. Wherein the first part laid down the punishment of two years or liable for fine or both; perhaps second part states that if any false charges are made where the section is involved is having punishment of death penalty or life imprisonment than the punishment in such case will be of seven years or liable for fine or both. Further section states that falsely charging any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge, in such situations Section 211 will comes into picture and the proceedings of contempt of court[40] and section 211 he will be punished.[41]

The expression "institutes a criminal proceeding" postulates an intention to set criminal law in motion; wherein there is a person who is giving information about the false charges to the police against an innocent person that he committed a cognizable offence, further the police has is bound under criminal code to investigate the accusation against that person.[42] In the cases of section 211, the prosecution (person against whom false charges where incorporated) has to prove that the charge was wilfully false to the knowledge of the maker and the prosecution is irreproachable.**[43]**

With the viewpoint of litigants, here courts have also observed that a case of false accusation causes a direct injury to honest litigants who don't have any idea about the false case of their client. Any such litigant may affect their career or can give a lifetime scar on his reputation for pleading a false case in the court. In the Indian penal code section 211 and Section 209 was not deliberated to intervene as a trap for legal experts or lawyers or litigants who may inadequately or erroneously plead their case.[44]

HOW IT AFFECT THE LIFE OF THE ACCUSED

Sadly, some women do lie about being raped or in other words false rape accusations do occur, devastating the lives and reputations of those accused. Consequently,

the reality of underreporting is a separate problem and is of no consolation to those falsely accused of rape. The Indian ancient and modern society both have witnessed that after the filling of the case of every sexual offence the so called accused (who is innocent until proven guilty in accordance of law by the court)[45] of the case is being boycotted by the society;[46] even in some cases the boycott is also done by his relatives and family members. There could be a hypothetical perception of the natural human behavior after the context of boycott that he could be aloof, as he is having people in his neighborhood perhaps they will maintain certain distance from him as being an accused of rape case. This boycott discriminates him from the society which makes him feel alone and even the chances of violent behavior of the accused towards women and society will be increased because of false accusation on him.

Justice Vinod Prakash in 2010 laid down that the offence of rape leaves cicatrix on the prosecutrix's soul but on the other hand, in the case false accusation of rape also leaves a scar on the accused over his whole reputation and personality for decades.[47] In Rajoo and Others v. State of Madhya Pesh,[48] the honorable Supreme Court has also observed the dark side of the false allegations of rape, the court stipulates that " It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication…there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration."[49]

The life span of the society has witnessed examples where the cases can be registered by the known person also. For the aforesaid statement, in the UK a case came where an IT consultant has lost his job because of mere allegations of false rape on him, which was incorporated by his former girlfriend and has to suffer the imprisonment of three years during the trial. Further, it was provided by the Guildford Crown Court that the accused has lost his job and reputation in the society which will be reclaimed by him after explaining his

innocence for decades.[50] The malicious prosecution is the commonest form of abuse of legal proceedings in order to harm another where it combined with a claim for false imprisonment, in these cases the accused has to prove that he was innocent and his innocence was to be pronounced by the tribunal in its judgement.[51]

As per some studies it was provided by the jurist that where a false case on an accused is being incorporated, the phase of the financial crisis could be faced by the said accused of the case because the false case is registered by the females is to extract money and perquisites, for settlement of the case the arrangement of the perquisites will lead him to the phase of financial crises, the connecting point of losing his job as per the above case of UK makes it more difficult.

In Rizwan Shah V. Shweta Joshi &Ors.[52] It was laid down by the Delhi High Court that "The criminal proceedings were initiated based upon false facts and sustained and contested by repeatedly asserting false and baseless allegations lowering image and reputation of appellants in the eyes of his neighbours, friend and relations." The custody of eight months and criminal judicial trial made him suffer from mental agony, the accused of the case lost his job and even due to this his future employment's prospects has also tampered. The honorable court has also provided damages of Rs. 2, 50,000 for the malicious prosecution and faced eight months of judicial custody.

SUMMATION & SUGGESTIONS

As per the examination expressed above by the Hon'ble Courts, Juris, researchers and the other legislators we go to a summation that the offence of false accusation of rape done by some shabby women is an abominable and villainous crime; to punish these females there is a requirement of a meaning full separate legislation or an amendment could be done in penal code with rigorous punishment. As explained above, ultimately section 211 of the Indian penal code attracts the false accusation of rape indirectly in its second part but the implementation of that said section is not providing any rigorous or

deterrence in females that the false accusation will leads to their seven years of imprisonment or fine or both. The theory of deterrent punishment should be followed by the legislators while drafting the laws regarding such a context of accusation. As per the author of the prevention hypothesis of deterrence theory, J. Bentham gave a thought of prevention of deterrence is to both offenders and others from submitting a comparable offence. The goal which should be achieved is maximization of pleasure, joy and minimization of pain. The dread of resulting discipline on account of law should go about as a check from carrying out or committing crimes by people. This hypothesis has faith in giving a model of exemplary discipline through adequate and sufficient punishment.

The words of Judge James E. Horton of the Alabama Circuit Court has written in an opinion that would ultimately curtail his judicial career reflect an age-old fear that men are often falsely accused of rape and other offences. It should be noted that in the present case the victims are men; this fact is frequently ignored by the judges and society, a male could also be a victim of sexual offences. Since biblical times, society has witnessed the inimical aftermath of untrue accusation and induced to prejudice administered towards rape complainants.

The honorable courts have laid down many precedents as per the cases which provide the guidelines for dealing the cases of false accusation, which have to be followed wisely. To abstain from bogus allegations on an innocent, the Honerable Supreme Court provided that a preliminary enquiry might be directed and conducted by the DSP, to detect whether the claims and allegations of the victim is attracting a case under the Atrocities Act and that the charges are not paltry or persuaded.[53]

A per the International Customary, Human Right, Conventional laws the accused is innocent until he/she is not proven guilty accordance to law; but on the mere allegations national media and the society consider him as a culprit and make him feel guilty even for those acts also which are bogus in the actual instances because of

which the said accused hides his identity sometimes or desert their family and abscond from the respective area to find peace. In this context the legislative authorities should amend the laws and provide a punishment to the newspapers, national media and other people who consider an accused for guilty on an offence.

Notwithstanding, a litigant having authentic knowledge about the false claim of his client (or after he / she subsequently acquires that knowledge), the advocate is not supposed to make false claims in front of courts and thereby, it's his / her implied duty to provide the legit information that he is not legally entitled to support any false claims in front of the court. A litigant must decline the client's claims and instructions for the case if there is no evidence or the claim is without proper foundation. The potential of bringing a case of false accusation in front of the court, therefore it is to be considered as an intimidating engine in the hands of unscrupulous men. Society and people still have trust in legislative authority and in the lawmaker, which gives power in the Code of Criminal Procedure and Penal Code to lay down rules which may prevent such abuse.[54]Making a bogus averment in the pleading pollutes the stream of justice. The framework and justice delivery system has to be pure and should be such that the persons who are approaching the Courts must be afraid of making false claims. [55] False accusation should be punishable with the same amount of 'punishment' as applicable to the 'crime' if it has actually occurred.

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[14] Citation of NCRB report vol. 3 page 261.

[15] Dr. SubhashKashinath Mahajan v. The State of Maharashtra and Anr., MANU/SC/0275/2018 : (2018) 6 SCC 454, (para 40) also see Prathvi Raj Chauhan Vs. Union of India (UOI) and Ors. AIR2020SC 1036, 2020(1)KLT810 (Para 2)

[16] "Doctrinal (or "black letter") methodology refers to a way of conducting research which is usually thought of as "typical legal research". A doctrinal approach to research will focus on case-law, statutes and other legal sources." https://uweascllmsupport.wordpress.com/2017/01/18/research-methods-doctrinal-methodology/#:~:text=Doctrinal%20(or%20%E2%80%9Cblack%20letter%E2%80%9D,statutes%20and%20other%20legal%20sources.&text=Doctrinal%20analysis%20will%20focus%20on,sources%2C%20such%20as%20case%20law.

[17]Bopst, Christopher (1998) "Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform;Legislative Reform," Journal of Legislation: Vol. 24: Iss. 1, Article 7. http://scholarship.law.nd.edu/jleg/vol24/iss1/7

[18]Dola and Ors. Vs. The State of Odisha, 2018(4)RCR(Criminal)137. (para 11)

[19] XYZ Vs State of Gujarat and Ors. AIR2019SC 5395, (para 12)

[20]Radhu Vs. State of Madhya Pradesh 2007C riLJ4704, 2007(4)RCR(Criminal)158 (para 15).

[21] 3A JOHN **HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW** § 924a, at **736** (Chadboum rev. **1970). Also see** Radhu Vs. State of Madhya Pradesh 2007C riLJ4704, 2007(4)RCR(Criminal)158 (para 15).

[22] Khalid and Ors. Vs. State of U.P. 2016(2)ACR1542. (para 24) also see Mahendra and Ors. Vs. State of U.P. 2016(5)ADJ573, 2016 (94) ACC 421 (para 30) also see Radhu Vs. State of Madhya Pradesh 2007CLJ4704, 2007(4)RC R(Criminal)158 (para 5)

[23]ShamiUllah Vs. State of U.P. 2010(2)AC R1974 (para 16 and 18).

[24] State of Sikkim Vs. DawaTsheringBhutia SLR (2018) Sikkim 533 (para 56)

[25]ShibSankar Vs. The State of Tripura, (2017)1TLR293 (para 6)

[26] Section 120A of the Indian Penal Code 1860 - When two or more persons agree to do, or cause to be done,—

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy: Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

[27]Inder Singh Vs. State of Rajasthan, 2002C riLJ721, 2002(2)RC R(Criminal)428. (para 30)

[28]PratapMisra and Ors. Vs. State of Orissa AIR1977SC 1307, 1977C riLJ817, (para 8)

[29] State of U.P. v. Choteylal, MANU/SC/0053/2011 : AIR 2011 SC 697 : 2011 (2) ACR 1885 (SC) (para 22).

[30] State of U.P. v. Choteylal, MANU/SC/0053/2011 : AIR 2011 SC 697 : 2011 (2) ACR 1885 (SC) (para 22), also see Sanjay Vs. State of U.P. MANU/UP/4306/2019; Crl. Appeal No. 2027 of 2015 (para 37).

[31]Gopal Gupta Vs. State of U.P., 2015(1) AC R762. (Para 26)

[32]ShamiUllah Vs. State of U.P. 2010(2)AC R1974 (para 16 and 18).

[33] State of Maharashtra VersusRameshwarShridharJaware&Anr. 2007 SCC OnLineBom1166 : 2008 Cri LJ 675 : (2007) 6 AIR Bom R 809 (Para 9,19, 22 and 23).

[34]Bhagat alias RikhmanMahabalMaurya V. The State of Maharashtra, 1985 SCC OnLineBom 204, (1986) 2 Bom CR 175 (Para 3, 8 and 10).

[35] The times of india, page 3, 21 november 2020

[36]Inder Singh Vs. State of Rajasthan, 2002C riLJ721, 2002(2) RCR(Criminal)428. (Para 37)

[37]Inder Singh Vs. State of Rajasthan, 2002C riLJ721, 2002(2) RCR(Criminal)428. (Para 37)

[38]Jugal Kishore, (1886) 8 All 382.

[39] Sew Ratan Vs. Emperor, AIR 1939 Cal 288.

[40] It is provided that for punishment of contempt of court is by simple imprisonment upto six months, with certain conditions which are mentioned in section 3 and section 4A of the Contempt of Courts Act, 1971. Where a charge is having contempt of court is, therefore a charge of an offence which invokes section 211 directly or indirectly.

[41]Hari Das Vs. State of West Bengal, AIR 1964 SC 1173.

[42] Albert Vs. State of Kerala, AIR 1966 Ker 11.

[43]HasanMirzaVs. Emperor, AIR 1914 Cal 349.

[44]https://www.mondaq.com/india/trials-appeals-compensation/840672/perjury-false-claim-false-prosecution-in-a-case-section-209-of-ipc-section-340-of-the-crpc

[45] According to Universal Declaration of Human Rights, 1948. Art. 11.1 states that “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.” The presumption of innocent until proved guilty according to law is also incorporated under Article 6 of European Convention for the Protection of Human Rights and Fundamental Freedoms. Also read Article 14(2) of The International Covenant on Civil and Political Rights, 1996 which talks about the same context. According the common law rules it is the basic principle that an accused of the case is innocent until he is proven guilty whereas the said concept is applicable in India also because India is the signatory of the aforesaid conventions on Human Rights. In the support of common law the British case of House of Lords, 1935 Woolmington v. Director of public prosecutions [1935] UKHL 1 where barrister Sir William Garrow, coined the presumption of innocence is often expressed in the phrase innocent until proven guilty'.

[46]Khappanchayat declared to boycott the rape accused from Rohtak district on the mere allegations, whereas the khappanchayat means the union of few villages which deals with cases and problems of the villagers it emerged as a quasi-judicial body. DeependerDeswal (reporter) Dec 21, 2012, 07.02 AM IST https://timesofindia.indiatimes.com/india/Now-khap-declare-social-boycott-of-rape-accused/articleshow/17701941.cms

[47]ShamiUllah Vs. State of U.P. 2010(2)AC R1974 (para 20)

[48]Rajoo and Others v. State of Madhya Pesh, MANU/SC/8353/2008 : 2009 (64) ACC 672 (SC) : 2009 (75) AIC 65 (para 9).

[49]Rajoo and Others v. State of Madhya Pesh, MANU/SC/8353/2008 : 2009 (64) ACC 672 (SC) : 2009 (75) AIC 65 (para 9) , Also see Mahendra and Ors. Vs. State of U.P. 2016(5)ADJ573, 2016 (94) AC C 421 (para 32)

[50]https://www.bbc.com/news/uk-england-surrey-11676804

[51]Gobardhan Singh Vs. Ram Badam, AIR 1922 All 209 (1); 20 All LJ 284.

[52]Rizwan Shah V. Shweta Joshi &Ors, 2011 SCC OnLine Del 5493 (para 46 and 49).

[53] Dr. SubhashKashinath Mahajan v. The State of Maharashtra and Anr, MANU/SC/0275/2018: (2018) 6 SCC 454, (para 83) also see Prathvi Raj Chauhan vs. Union of India (UOI) and Ors. AIR2020SC 1036, 2020(1) KLT810 (Para 2).

[54]Jacob George vs. State of Kerala, 1995(19) AC R156 (SC). (para 8)

[55]https://www.mondaq.com/india/trials-appeals-compensation/840672/perjury-false-claim-false-prosecution-in-a-case-section-209-of-ipc-section-340-of-the-crpc

GENETIC DOPING: A LEGAL AND PHILOSOPHICAL PERSPECTIVE

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"We used to think that our fate was in our stars, but now we know that, in large measure, our fate is in our genes."
James Watson

Abstract:
Sports signify the pursuit of excellence, in the attainment of highest achievable limits; the human body is capable of, through determination and rigorous training. Depending on the sport, it celebrates efforts designed towards attaining perfection in coordination, balance, agility of the mind and body, strength, concentration, etc. It instils values of honesty, fair play, builds character, courage and a sense of community. This is at stake when athletes indulge in doping. The anti-doping rules forbid the use of certain substances pumped into the body. The World anti-doping agency has recently added gene doping as one of the prohibited methods. Though gene doping has been added, it remains to be seen as to how such a norm can be implemented. CRISPR-Cas9 technology may be used for medical and non-medical purposes in the form of enhancements. Parents would claim a liberty to use available technology to create a child with sharper eyesight, better hearing capacities, enhanced height and other features that would give the child a competitive edge over others. Laws regulating genetic technology are still at a very nascent stage. Since laws do not prohibit use of genetic technology for creating enhancements, it would be interpreted in favour of liberty of the parents. This raises some questions - If gene editing were permissible in the first place, can it serve as a disqualification for entering competitive sports? If instead of gene editing, all the above traits were consciously selected for the future child through eugenics, should it still be a disqualification? Most importantly should the future child/athlete face disqualification for a decision made by his parents, to which he had no say? This research paper seeks to

analyse these questions and examine the competing and the conflicting claims of all the stakeholders, namely parents, children, society and the regulatory authorities. It examines the validity of the arguments from a just, moral and ethical standpoint. It suggests a comprehensive law on the use of genetic engineering for designing super beings and in this case super athletes.

Keywords: *Gene-doping, Genetic engineering, Regulation of gene editing technology, Anti-doping laws*

Introduction

Sports is an official means to show ones strength and capabilities where everyone strives hard to gain an advantage over the other. In the early days, during ancient Greek Olympics and Roman gladiator games, man relied on diet and "secret herbs" to beat the opponent. The concept of doping started early on. Spectator sports with paying audience and non-spectator participatory sports, involve huge investments. Wherever there was fierce competition or a matter of life or death, introduction of performance enhancements into the body was inevitable. As the years progressed we moved towards more sophisticated ways of doping through blood by injecting synthetic performance enhancing proteins [1]. Instances of doping are on the rise making headlines at the Olympics and other major sporting events. Athletes seeking to improve their personal performance and better their past records look beyond nutrition and training. Most performance enhancing drugs were banned, but the problem of some is that they cannot be detected or are yet to be categorized as a banned drug remains. Meanwhile there is no clear consensus over what actions should be punished or what chemicals should be included in the list of prohibited substances. While the debate continues, new problems with respect to gene doping stand in the side-lines.

Genetic technologies hold immense therapeutic promise, there is potential for their misuse, including attempts at the enhancement of athletic performance [2]. Concerns with respect to genetic interventions arise mainly in the domains – muscle function, increasing red blood cells,

production and utilization of muscle energy, sharper vision, and enhanced heights or in the building of core strength [3]. Most competitive sports require an exhibit of muscle coordination that involves controlled contraction, release, optimal energy utilization and removal of metabolic wastes. Endurance sports such as bicycling require erythropoietin (EPO) in red blood cells result in markedly improved performance. Good utilization of metabolic energy benefits muscle and tissue functions and thereby athletic performance. As this is similar to the genetic model for treatment of obesity, which is of burning accumulated fat from muscles, athletes find this of immense use.

With advance developments in science and biotechnology at a fast pace, in the 21st century we have "genetic doping" as a way of natural enhancement. We call it natural because it is undetectable by regular testing methods. Through genetic engineering, the cells in the body are made to naturally produce more of a substance that helps in gaining an advantage during a competition. International sports authorities saw it as a toughest challenge ever faced and thought it important to restrict and monitor such an abuse during competitions and thus, imposed a ban on gene doping in 2003 under a list of banned substances. International Olympic Committee and the World Anti-Doping Agency in WADA Code 2003, Article 4.3.2, have included genetic technology to enhance performance in their list of prohibited items[4]. Till 2021, we only see a brief mention and no concrete rules or regulations developed in furtherance of such technology [5].

Philosophical debate

The debate ranges from appeals for moral values [6], clean sports and a halt of employment of unfair practices to liberal viewpoints [7]. In cases of doping one does not physically harm themselves or another. Hence, law should not interfere in a person choosing to adopt artificial means of performance enhancement. While the debate over the moral uprightness continues, sports authorities are having a tough time deciding on the list of prohibited substances and the quantities of their

presence in the bloodstream of the athlete in an attempt to have 'clean sports'.

Further challenges posed by the advancements in medical science especially genetic engineering made it possible to have taller, sharper and healthier kids, especially designed for a career in sports. The 'ethos of sport' is at stake. Michael Sandel has further objections that he clearly lays out in his book [8]. As Posner summarizes [9] –

"Sandel opposes the use of drugs to enhance athletic performance. He thinks such use detracts from the athlete's achievement; what seems the athlete's achievement is actually the achievement of the drug's inventor. Even worse, in Sandel's view, the use of drugs to enhance athletic performance represents a Promethean aspiration to remake nature, including human nature, to serve our purposes and satisfy our desires. It is not, however, the "drive to mastery" per se that troubles him but the effect of that drive in obliterating what he calls "the gifted character of human powers and achievements"—the recognition that "not everything in the world is open to any use we may desire or devise."

Sports signify the pursuit of excellence in the attainment of highest achievable limits. Depending on the sport, it celebrates efforts designed towards attaining perfection in coordination, balance, agility of the mind and body, strength, concentration, etc. With respect to societal values, the WADA definition hints at the requirement and expectation "from competitive sport, a 'naturalness' meaning 'authenticity' both of performance and of the athlete."[10]

Posner has an objection, which he meticulously puts out in his work. He points out that human beings take an innate delight in the natural hierarchies that they portray, in terms of height, strength, whether consciously or unconsciously built and in agility, beauty, and coordination in movement in them as well as in animals. Hence, sports are designed to highlight these hierarchies in an isolated or a combined manner. In other words, it is a test of 'biological potential'. If doping were employed

sport would become a mere spectacle (a spectacle of how chemical induced humans would outperform themselves raising awe) rather than a matter of appreciation of the athletes' grit and determination leading to an achievement. Arguing teleologically, Posner points out that as long as all activities are designed towards the promotion and display of the highest levels of coordination and display of the hierarchies, it cannot be wrong. Posner adds that if the sport is a showcase of muscle coordination doping that in not directed towards the end of muscle coordination should not be doping at all[11].

The moral and ethical deliberations[12] on these issues seem to point at two competing views. One view is of future parents, whose claim to the use of genetic technology arises from an assertion of free choice. The same view is also resonated in the views of persons assert an innate choice vested within themselves to the use or rejection of any technological development. For if genetic technology use is available for the repair of injured muscle or tissues, i.e. medical issue, then it will be used for enhancement reasons as well. Enhancements for non-disease human traits, like say enhanced eyesight, intelligence are acceptable advances of science; the problem stems from the morality of such efforts. Even if the safety of the use of such procedures to the person is mitigated, or to the future generations the problem remains. The problem is about the articulation of the extent to which we allow uninhibited biotechnology to rule our lives and define striving for individual achievement.

Can it be a reality?

Many feel that genetic enhancement is a waste of resources and this would be a main reason for lack of funding. Implications of this issue is however attracting a lot of debate. In 2008, there was a report of a Chinese scientist He Jiankui alleged to having attempted to make genetically edited babies. They were edited with an ability to resist HIV infection in future[13]. Even in the absence of a definitive evidence of his success, it has sparked a lot of controversy. By acting in contravention to the Chinese

laws which prevent genetic modifications in humans, He was fired from his position and criminal trial was initiated. This leads us to the conclusion that by having a proper legislation in place, gene doping is not a fiction, it can very well be possible. This was a germline modification where the sperm or egg cells are used and the genetic modification is irreversible and passed on for generations. There is also somatic cell modification which can be done in minors or adults and is not passed on to other generations. Here a problem of consent arises on the types of health decisions that minors should be allowed to make and those that their guardians should be allowed to make on their behalf. For example, there is no medical consensus on the use of hormone treatment intervention for children who have been diagnosed as transgender. They would not develop secondary sexual traits if such treatment was given to them at a young age[14].

There are various arguments raised. One argument is that it violates autonomy. But where genetic engineering is employed to design a child who would be tall and having sporting genes, the child is at that point not exercising autonomy. In fact, the argument that it violates autonomy will not apply in case of unborn children as they are incapable of exercising autonomy. Another argument that has been raised is that it violates the child's right to an open future. But open future is nothing but a natural lottery that everyone gets which may or may not be in favour. By interfering with the natural processes and shaping it in a direction that the commissioning parents want, they design the child for a sporting career and thereby interfere with the right of the child to an open future.

It would be interesting to note a few instances here[15]. On one occasion the parents "shopped" for a gene that would result in above average height for the child and also demanded that the gene should come from a family of sportspersons. Instances like this not only depreciate the persons of short stature, but also interferes with the child's right to an open future. In another instance the sperm bank claimed that they did not spread such views, but it was found that the bank collected its samples from

students of Ivy League institutes. They later claimed that they were merely catering to the demands of their customers. The problem is that if technology is available, can law prohibit people from the use of it? If so, on what grounds? Choice of characteristics of an unborn is an exercise of free choice for the parent, and unless it interferes with the liberty/right of another it cannot be restricted. But the exercise of choice in favour of certain characteristics like height, fair skin, intelligence, etc. denigrates the other. More than that the problem is also about attempting to obtain a mastery over the process of birth.

As William May pointed out that there is some learning in the 'openness to the unbidden.' It teaches humans humility, empathy and sympathy. Appreciating children as gifts, in whatever characteristics they bring teaches acceptance. It nurtures a value that is crucial for humans. Sandel states that the problem lies in the hubris of the designing parents in their drive to attain mastery over birth, leading to desecrate nature. The same when used to rectify a medical problem does not, because in such cases it is to support life, and in so doing actually honouring life. Nurturing a child and ensuring a flourishing life does not encompass within itself a duty to employ genetic engineering for choosing characteristics for a desirable career for the child. He states - "Parents give children two kinds of love. Accepting love affirms the being of a child, whereas transforming love seeks the wellbeing of the child. Each of these corrects the excesses of the other. Accepting love without transforming love, slides into indulgence and finally neglect. Transforming love, without accepting love, badgers and finally rejects."

Laws on genetic enhancement

The World Anti-Doping Agency has added gene doping in the list of prohibited methods. But it remains to be seen how such would be implemented. If enhancements were permitted for medical use it would also be open for non-medical use. While the former is used for curing and prevention of ailments the latter would be used to reach beyond and facilitate better outcomes. Further if muscle

enhancements by way of genetic engineering are safer than doing so by the use of steroids, would it be justified to use genetic technology instead?

In India, ICMR has published guidelines in 2019 that explicitly prohibit germ line modifications viz. designer babies. Gene therapy for rare genetic disorders like thalassemia, cancer, sickle cell disease and haemophilia is allowed in clinical trial phase. Only somatic cell therapy using various vectors for a targeted delivery is allowed. All kinds of genetic modifications are allowed in somatic cell therapy. In Schedule V there is a list for which any gene drug developed cannot claim to cure it[16]. This list is a part of Schedule J of the Drugs and Cosmetics Rules, 1945 of India. Nowhere in the list is there anything mentioned about enhancement of growth of bones, muscles, proteins, etc. that is needed for better performance in sports. Law is silent in this matter. The possibility of the fact that there may be genetic modifications carried out by bio hackers, out of the surveillance of government, cannot be ruled out. We already have examples of using EPO gene doping to enhance competition in sports. Studies have shown that gene doping in humans is a possible reality[17]. Although WADA and IOC have banned gene doping, there is absolutely no way of detecting it in a non-invasive manner. Till date has only been a muscle biopsy technique to detect genetic doping which cannot be used during competitions.

The fairness objection has been raised time and again. The problem that the fairness argument does not answer is this – if all players doped would it be fair? Would we then be able to ensure a level playing field? But since natural talents are different for every person and since the rigorous training and grit is different for different persons ensuring a level play field is neither possible nor warranted. Since men and women are considered separate they occupy different playfields. If it is conclusively found the Jamaican players have specific genes different from all others, would we have a separate competition for Jamaican players? Similarly for all players who involved in doping a separate play field for them or all those who gene doped a separate play field for

them would be preferable? If gene doping was permissible and readily available and accessible would the argument of fairness still be used? If players from a certain genetic background were found to have sharper hearing and eyesight, to ensure fairness, would it not be necessary to put them on a separate playfield?
But the argument of fairness does not hold ground. For the assumption is that all human beings of different genetic makeup compete together. We want to believe that success in sports comes not from the genetic makeup but from the training and focused hard work and that is why winners are much appreciated. Enhancements are against this in enlisting the help of artificial genetic technology to make a shortcut to the top. That is where the unfairness argument is placed. The anti-doping regulations thus create a strict liability making the athlete accountable for all substances in his body.

Issues and challenges

The introduction of foreign genes into the genome can result in a slew of previously unknown interactions between genes and their internal and external regulators. Gene doping, unlike gene therapy, does not require the employment of security or protection measures. Gene transfer vectors created in unregulated laboratory circumstances can be polluted with chemical and/or biological substances, putting athletes' health and lives in jeopardy. Some athletes, however, disregard safety concerns despite the well-documented and unforeseen risks involved with gene doping. We humans, always fear the unknown and are resistant to change. Nature is keeps us humble and it is not something to be tampered with. Due the ban on genetic modification, we do not have enough data and funding to characterize this as safe. Genetic interventions should only be utilised to alleviate extreme suffering, that is, they should be limited to diseases that wreak havoc on humans. These treatments should only be used on genes that are definitely linked to diseases, not on genes with a questionable or hypothetical link to illness, and particularly not on genes that profess to influence height or intelligence, about which little is known. The

interventions should not be carried out without the permission or supervision of the government.

Genetic doping although a new scientific concept, is not actually new. We have long been practicing eugenics to eliminate an undesirable genetic character from line of hereditary. Genetic enhancement would be introduction of a desirable character in the line of inheritance. Scientific methods that are now allowed are only to cure a disease. Does this mean that we are open and acceptable to things that only make other people at a level playing field to us? Once they get an opportunity of being better, we draw a line invoking ethics and morality. Right to choose and live is an inherent human right. State can intervene only in matters when there is harm to others' welfare and life. Is a right to be better at something being denied to us?

Another questions of level playing field is invoked. Only the rich and elitist having an advantage. CRISPR technology is now available at a relatively cheaper rate. If the technology is made available to all, the question of unfairness can be eliminated. If CRISPRCas9 technology were readily accessible for all to use, in the absence of any regulating law an on date, parents would be free to use the benefits of technology for designing their children in the desired manner, except may be to the extent laws prohibit. So a parent cannot use genetic technology to make sex selection. Or it may be outrageous to imagine using technology to create impairments. But it will certainly be within parents' rights and free choice to use available technology to have a child of the desired makeup. Therefore, if gene editing were permissible in the first place, it cannot serve as a disqualification for entering competitive sports at a later point. There is no law as yet that prohibits use of genetic technology for designing babies and no law as yet that disqualifies children born out of genetic engineering to play competitive sports.

Consider a situation wherein instead of opting for gene editing, all the above traits are consciously chosen. This procedure also employs technological interventions, but not gene editing techniques. This would not qualify to be

interpreted as gene doping. Furthermore, for the exercise of free choice that the parent makes should the child be disqualified form competitive sports. Most importantly should the future child/ athlete face disqualification for a decision made by his parents, to which he had no say? Our reason points to the negative.

In cases of genetic doping, the challenge is the establishing of guilt. If used as therapy and not for doping the athlete should not be accountable. The burden of proof lies in the person who asserts the existence of a fact. In cases of sports doping, the anti-doping organization ensures that the athlete submits to the test procedures. Not submitting to the tests is a violation of the regulations. If the test results show traces of prohibited chemicals in the samples of the athlete, doping is proved. The regulations thus provide a complete procedure for the evidentiary procedure of doping [18]. But since cases of genetic doping engineers the cells of the person's body, it is not so much of a question of presence of chemicals that is provable by tests.

Conclusion

A lot of jurisprudence remains to be developed to keep up with the fast pacing technology. Genetic enhancement is inevitable. It might have already been put into practice. Necessary regulations and laws need to be in place before it turns chaotic and out of control. Such issues and challenges can only be answered after serious informed deliberations on genetic engineering and the implications arising out of it. The only contingent is that, can a law on doping be comprehensively made.

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UPHOLDING THE DIGNITY AND PROTECTION OF THE RIGHTS OF THE DEAD AMIDST COVID 19 PANDEMIC

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Abstract
When it comes to the rights of people, Indian laws make no exceptions for the dead, thus encompassing the dignity of the dead in Art.21-Right to life and liberty. Judicial courts have reiterated in different judgments that the right to dignity is not solely to be provided to the living human beings but also the dead.

During the initial phase of the pandemic, the lives of the people have been affected largely, primarily in handling the dead bodies in their burial or cremation. For this purpose, organizations such as WHO and NHRC have issued guidelines relating to how the dead bodies need to be disposed of in a dignified manner.

Today, against the background of COVID-19, the role of the stakeholders such as the government, hospital administration, etc. form a core element in safeguarding the rights of the deceased and upholding their dignity and this has become essential due to instances of human rights violations that have occurred in handling the pandemic situation.

Keywords: Covid 19, Stakeholders, WHO, Human Rights, Right to life.

I. Introduction

In the past year, the world has been gripped by the horrors of the COVID-19 pandemic. With a dearth of hospital beds, medicines, and oxygen in countries like India, the official daily death toll averaged up to 3000 in the country.[1] As of 11th August 2021, cumulative deaths in India stood at 429179 (MoHFW). But experts and eyewitnesses say that there is a 'massive' discrepancy in the death toll as compared to the reports.

There has been an ancient practice prevalent in India to burn dead bodies. This was commonly noticed among the Hindus, Buddhists, and Jains quite before the onset of the Common Era, and later accepted by Sikhs too, while the Muslims and Christians foremostly practiced burying of the dead. Even though these rituals related to cremation varied among different communities, they all shared a belief that it should take place immediately after death and usually within twenty-four hours, in an open place and on a funeral-pyre created out of wood.[2] The primary reason is to release the soul from the dead body that serves no purpose and does not be preserved. Historically, some communities also followed the practice of floating the dead bodies in the river who die from infectious diseases[3].

As the second wave of COVID-19 hit India, the cases went sky-rocketing to up and above 25 million cases, with more than 275,000 deaths.[4] Many people could not make it to the hospital and died at home. On one hand, many people could not find enough space to cremate the dead bodies at crematoriums, while on the other, many impoverished families who did not have the money for cremation resorted to wrapping the dead bodies with cloth and dumping them into the rivers, leading to hundreds of corpses hovering in the river Ganges. Similarly, dozens of stiffly decomposed bodies were found tossed on the riverbank in Gahmar village of Ghazipur, Uttar Pradesh, with dogs, insects, and crows eating off the bodies.[5]

The data on the death toll and those found in the crematoriums shows extreme disparity. The following data[6] suggests how the data varied from that of the crematory and cemetery sites. The official number of

deaths due to COVID-19 between 11th to 16th April stood at 145 in Lucknow, the capital of Uttar Pradesh, which is also the most populous state of India. Notwithstanding, according to some eyewitnesses and people working there as workers, just two of the main places reserved for cremations reported more than 430 or about thrice as many in that period, following the COVID-19 protocols or guidelines. This does not take into consideration the funerals and/or burials at other cremation sites within the city. Data gathered from various sites and logs in Surat show that in April 2021, the locations of burial or cremation reported more than 6,520 bodies, up by a count of 1,980 bodies in the same month of the previous year. However, the city's official data show only 585 deaths were taken into account by the city as well as the district in April 2021.

Communities started facing several problems following the undercount of deaths and unreported cremations taking place all around the country. With rising deaths, there was hardly any space left for the people to cremate their dear ones. Many were not allowed to avail themselves of the electric furnace kept aside for COVID-19 deaths due to the unavailability of a virus-positive reports. None of the relatives of the deceased person could attend the cremation either due to unavailability of space or because they tested positive themselves. Crematorium workers also complained of how the local authorities did not furnish sufficient protective gear.[7] Additionally, the market could also see a shortage of workers to extract firewood from trees for the crematoria. India's majority of the population comprises Hindus, but also sizeable communities of Muslim and Christian population. It is vital to remark that much statistical data reports foremostly on Hindu deaths, while Muslim and Christian numbers might show an undercount or be underreported even without considering those burials.[8] Overall, it emerges that India seems to lack an authentic estimate of the number of deaths caused by the coronavirus pandemic.

A study [9] has reported estimates for excess mortality after drawing data from three separate sources since the pandemic's commencement. The report highlights three

estimates for the undercounts beginning with the extrapolation of civil registration at the state level from seven states that suggested up and above 3.4 million deaths. A toll of about 4 million was hinted at by putting the age-specific infection fatality rates (IFR) estimates on the Indian seroprevalence data. And lastly, the Consumer Pyramid Household Survey's analysis provides an estimate of deaths over 4.9 million. The conclusion that followed is that between 3.4 and 4.7 million more people died in this pandemic period than would have been predicted, which is up to 10 times higher than the official death toll of 414,482 given by the Indian government.

II. Guidelines Issued by WHO for the Cremation of Dead Bodies

According to the World Health Organization (WHO), as of August 2021, there have been more than 200 million confirmed cases of COVID-19 globally, and more than 4 million COVID-19 related deaths[10]. The United States of America and India have been the worst hit by the COVID-19 pandemic, with more than 30 million cases reported in each state.[11]

Infection prevention in different settings, including the mortuary management of COVID-19 dead bodies, has become a key issue since the COVID-19 health crisis started. Indeed, bodies of people who have died from COVID-19 might present a potential risk of transmission, such in the case of direct contact with human remains or bodily fluids where the virus is present, or with contaminated fomites, i.e., objects or passive vectors that may carry and spread the virus. There is consequently the need for proper dead bodies management and guidance for individuals handling them, to stave off the infection from spreading.

As the epidemiological understanding about the symptoms and consequences of COVID-19 increased in March 2020, many national governments adopted guidelines on dead body management, as for example the Ministry of Health and Family Welfare of the Government of India in mid-March 2020[12]. Similarly, to other documents published at the onset of the COVID-19

crisis, the Indian Government guidelines express limited knowledge, undeniably attributable to the knowledge gap of the new disease at that moment. Nonetheless, they identify some key issues areas that must be considered in dead bodies management, e.g. the training of staff identified to handle the dead bodies in various settings[13], the removal of the bodies from isolation rooms[14], how to carry out proper environmental cleaning and disinfection of surfaces[15], the handling of the bodies in the mortuary[16], at the crematorium or in the burial ground, the transportation[17], finally also covering some key recommendations on autopsies[18].

The WHO issued on 24 March 2020[19] interim guidance on *Infection Prevention and Control for the Safe Management of a Dead Body in the Context of COVID-19*, which was further updated on 4 September 2020[20] with new content. This document is complementary to a previous document of the Inter-Agency Standing Committee (IASC) entitled *COVID-19 Interim Guidance for the Management of the Dead in Humanitarian Settings*[21], published in July 2020, jointly drafted by the WHO, the International Committee of the Red Cross (ICRC), and International Federation of Red Cross and Red Crescent Societies (IFRC). Being these two documents the most recent ones, they will constitute the basis of the following analysis, to provide a detailed overview on the disposal of COVID-19 dead bodies.

Highlighted in both the WHO and IASC interim guidelines, two elements are critical in the mortuary management of COVID-19 bodies.

Firstly, the safety and the well-being of the staff responsible for handling the bodies must be safeguarded, and all the necessary personal protective equipment (PPE), hand hygiene supplies, cleaning and disinfection supplies, and waste management must be ensured[22]. In Annex I to the WHO interim Guidance, for hand hygiene WHO enlists "alcohol-based hand rub, running water, soap, disposable towel for hand drying"[23], while depending on the level of interaction with the dead body, the personal protective equipment shall include "gloves (single-use, heavy-duty gloves), boots, waterproof plastic

apron, isolation gown, anti-fog goggles, face shield, medical mask, N95 or similar level respirator in the event of aerosol-generating procedures"[24]. Appropriate waste management and environmental cleaning must be secured via disposal bags for biohazardous waste, soap, water, or detergent. WHO has reported that the presence and persistence of human coronaviruses can amount up to 9 days on inanimate surfaces such as metal, glass, or plastic, and "the SARS-CoV-2 virus has been detected up to 72 hours in experimental conditions on surfaces such as plastic and stainless steel"[25]. Thus, it is crucial environmental surfaces shall be cleaned with disinfectant for surfaces containing a minimum concentration of 0.1% sodium hypochlorite or 70% ethanol[26].

The second critical aspect in the management of the dead is that all measures must respect the dignity of the dead, their cultural and religious traditions at all times, including avoiding hasty disposal of their bodies and "stigmatization as a result of the COVID-19 statues"[27]. Timely identification, documentation, and traceability of the dead shall be guaranteed, "including the process for relatives to obtain all related documents, such as death certificates, death registration, and burial permits"[28]. Furthermore, the interests and rights of families and communities should be honored and safeguarded throughout, assuring that the families are treated with utmost respect to mourn their deceased loved ones as per their cultural and religious needs, while also ensuring their safety and that of the community.[29]

What explicitly emerges is the implication of properly balancing the safety of body handlers, the rights of the dead, the rights of the family, and the further need to investigate the cause of death, against the risks of exposure to COVID-19 infection.

Delving deeper into WHO September 2020 guidance[30], detailed step-by-step guidelines are provided for different facets of the mortuary management of COVID-19 bodies.

For what concerns the preparation and packing of the body for transfer, key elements worth mentioning are the removal of all catheters and other indwelling devices,

ensuring that any leakage of body fluids from orifices are contained, keeping the movement of the body to a minimum[31]. Compared to the March 2020 guidance, additional clarification of body bag requirements was specified, in particular, it is clearly stated not to use body bags unless either there is excessive fluid leakage, for post-autopsy procedures, to facilitate the transport and storage of dead bodies outside the mortuary area, or for the management of large numbers of dead bodies. The body bags must be solid, leakproof, and non-biodegradable. In the case of a thin body bag and potential leak, WHO recommends double bagging the body.[32] Further requirements are delineated for autopsies, specifically for the risk of aerosol-generating procedures or splashing of fluids. It is recommended to conduct autopsies in a sufficiently ventilated room, also restricting the number of staff involved in the procedure. Adequate PPE must be accessible, complemented by the usage of particulate respirators (such as N95 or FFP2).[33] While there is a common assumption that COVID-19 dead bodies shall be cremated as a means to prevent the spread of the virus, there is no scientific evidence supporting this. Cremation shall be performed only as a matter of cultural choice and available resources[34]. As all existing guidelines recommend, embalming should not be allowed unless carried out by experienced staff[35]. In the case of families wishing to view the body, they are allowed but they must be instructed not to touch or kiss the body[36]. For funeral rites involving bringing the body home, the usage of gloves for any physical contact with the body and particulate respirators are recommended, further complemented with frequent hand hygiene for all those attending, whose number must nonetheless be limited[37].

In the Inter-Agency Standing Committee guidance document, some further special recommendations for temporary holding areas, namely places where bodies with COVID-19 can be safely stored before disposal, are further outlined. Additional measures might be critical, such as the disinfection of body bags upon their arrival or double bagging the bodies. The body bags shall be properly labeled with unique identifies, and all movements of bodies should be recorded.[38] The

environment temperature shall be maintained around 2-4°C.[39] Lastly, the IASC guidance provides a brief recommendation for the repatriation of human remains, which in the instances of COVID-19 cases could represent an additional challenge[40]. The IASC recommends cremation as the least complex option, as cremated remains contained in a funeral urn can be transported in checked baggage, in some cases even without in-advance agreements. The guidance further points out that some aircraft operators might accept only embalmed human remains, but as already highlighted, embalming should be avoided as an excessive movement of the dead body must be avoided. In case of divergent requirements, the IASC recommends seeking further bilateral discussions [41].

III. International Context & Human Rights Violation

The 2020 Inter-Agency Standing Committee interim guidance does not represent the sole document that IASC released on the subject at hand. Earlier in 2006, following the tsunamis, earthquakes, and hurricanes that had hit Asia and the Americas in 2004-2005, IASC published the "Operational Guidelines on Human Rights and Natural Disasters"[42], targeting governmental and non-governmental organizations, with an eye on what these actors should do "to implement a rights-based approach to humanitarian action in the context of natural disasters"[43]. In emergencies, the population affected by such disasters is confronted with multiple problems, ranging from unequal access to assistance to being discriminated against in relief provision, gender-based violence, child exploitation, and above all being forced to relocate. According to IASC, the population affected is more at risk of human rights violations, when the displacement situation lasts longer. In section D, entitled "Protection of Other Civil and Political Rights", the respect of the dignity and privacy of the dead, and their living family members are stressed, in particular concerning the collection and identification of the human remains of those deceased, the prevention of despoliation and mutilation and their burials, which shall consider local religious and cultural practices.[44] Further measures shall ensure the remains of the deceased are returned to the next of kin, and "if remains cannot be

returned . . . they must be disposed of respectfully and in a manner which will help their future recovery and identification"[45].

It is important to remark that, while WHO and IASC guidelines have become key international frameworks during emergencies such as natural disasters or the COVID-19 crisis, they do not represent the only instruments addressing the dignity of the dead, especially in the international law landscape. Rather, core components of legislation on the issue are to be found in the law of war, international humanitarian law, and the protection of war victims.

Already in the 1929 International Committee of the Red Cross (ICRC) *Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armies in the Field*[46], article 4 paragraph 5, clearly defined that dead people shall be honorably interred.

In the Fourth Geneva Convention 1949 *Protection of Civilian Persons in Time of War,* article 16[47]focuses on the general safety of the wounded, the sick, the infirms as well as pregnant women, who shall be under particular protection and respect. This obligation is general and absolute, and it admits no derogation.[48] The special focus on these societies categories does not in any way exclude or free "the belligerents from their obligation to give the civilian population as a whole the respect and protection to which they are entitled"[49]. Paragraph II reads as follows: "As far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded, to assist the shipwrecked and other fiersolzs exposed to grave danger, and to protect them against pillage and ill-treatment"[50].

Article 130 paragraph 1 of the same convention highlights how detaining authorities, in the case of people who died while interned, shall assure that they are honorable buried in individual graves unless unavoidable circumstances requiring collective graves, and "if possible, according to the rites of the region to which they belonged and that their graves are respected, properly maintained, and marked in such as way that they can always be recognized"[51]. Cremation is to be performed only on the ground of hygiene or religious factors, or in line with the expressed will of the

individual. The ashes must be preserved for safekeeping by the authorities and shall be returned as soon as possible to the next of kin on their request"[52]. The lists of deceased internees, all information needed for their identification, and their graves' exact locations shall be forwarded from the detaining power or nation to the power or nation to whom the deceased internees were liable. Article 8 of the 1977 Protocol II Additional to the Geneva Conventions[53] reaffirms that all possible measures shall be taken to search and collect the wounded, the sick, and the shipwrecked, to guarantee them appropriate care and to decently dispose of them[54].
One key question might arise. The Geneva Conventions represent one branch of International Humanitarian Law usually defined as the "law of Geneva"[55], aimed at both military personnel no longer taking part in the conflict and people not actively having a part in the conflict, such as civilians. But does the law of Geneva also apply during peacetime?
Common to all the Geneva Conventions is Article 2, which states that "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". The 2016 ICRC Commentary [56] clarifies that notwithstanding the full applicability of the Conventions actualizes in situations of armed conflict, "State Parties have obligations already in peacetime".
In particular,
"States must adopt and implement legislation to institute penal sanctions for grave breaches and take measures to suppress other violations of the Conventions; they must adopt and implement legislation to prevent misuse and abuse of the emblems, and they must train their armed forces to know and be able to comply with the Conventions and spread knowledge of them as widely as possible among the civilian population.[57]"
In addition, key provisions on e.g., missing and dead persons or reunion of dispersed families, that is to say, provisions which regulate and remedy "phenomena which originate in or result from an armed conflict or occupation, but whose effects extend beyond the end of those situations"[58] must be applicable "beyond the end of the armed conflict or occupation"[59], thus ensuring

that the dignity of the dead is respected.
In August 1990, also the Organization of Islamic Cooperation (OIC) adopted a core piece of legislation in the Islamic world, namely the *Cairo Declaration on Human Rights in Islam*[60]. This declaration represents an important contribution to human rights law by Islamic Shari'ah and fundamental rights and freedoms in Islam.
About the subject in question, article 3(a) reads:
*"In the event of the use of force and case of armed conflict, it is not possible to kill non-belligerents such as old men, women, and children. The wounded and the sick shall have the right to medical treatment; and prisoners of war shall have the right to be fed, sheltered, and clothed. It is prohibited to mutilate dead bodies. It is a duty to exchange prisoners of war and to arrange visits or reunions of the families separated by the circumstances of war.**[61]"***
It is evident that regardless of religion, the respect of the dignity of the dead is regarded as being a crucial fundamental right.

IV. Indian Scenario & Recent Judgements

Presently in India, the delinquency of the healthcare sector throughout both the public and private spheres across the nation shed light on two important things - the lack of legal awareness even after 3 decades of an established rule of law and; the utter failure of the pertinent authorities in applying the rule at the grassroots level, or any level for that matter. Since the discovery of the very first case of the Coronavirus in January 2020,[62] up until the end of the 2nd wave in May 2021, India grew from having relatively few cases when compared to Europe, the US, and Brazil to become the 2nd largest contributor to the total cases worldwide.[63] The situation in India during the second wave saw both governments and private health systems fail miserably in upholding the right to life as well as the inherent right to die with dignity[64].

The right to life under article 21 of the Constitution of India is accompanied by a duty of care vis-a-vis the legal obligation that not only the State but also all doctors owe to individuals needing care in preserving and protecting their life. In *ParmanandKatara v. Union of India*,[65] it was

held that this legal and professional obligation of doctors and other medical professionals is "total, absolute and paramount" and no law of the state is allowed to infringe upon this fundamental right of individuals. According to *Jacob Mathew vs. State of Punjab*, negligence is defined as the breach of duty caused by the omission or commission of an act that a reasonable and prudent person would have done or not done in a similar situation. It is failure to exercise a duty of care that a person owes to another person resulting in injury or damages.[66] When it involves medical professionals, the duty to care is higher, the failure of which causes civil or criminal liability.For instance, when a doctor performs a surgical operation, a high degree of care and attention is required. In such a case, the doctor makes even a slight error like delaying the procedure for a few minutes could result in a lot of damage to the patient. And because *ParmanandKatara* established a legal standard for medical professionals, any deviation from the set standard would not only amount to the violation of the right to life specified in the case but also the offense of *negligence*. During the second wave, alongside the rise of black fungus infections across India, gross cases of medical negligence were witnessed. Shortage of beds and medical staff saw up to 3 individuals sharing a single bed. Tens of patients losing their lives due to shortage of oxygen, and most importantly- patients being denied even the most basic of care after being admitted, as they are left on their own.

This failure was concomitant with a subsequent rising death toll leading to an overburdening of cremation grounds[67] and the inability of the government to account for horrible violations of this fundamental right to life even as hundreds of dead bodies washed up on the banks of the Ganges [68] The obligation of the State in guaranteeing the right to life of all individuals is absolute and not subject to any legal justifications which may be extended to other legal jurisprudence such as contracts. Any defense of unforeseen circumstance, the act of god, and so on cannot lie against the fundamental right to life

The brief facts in *ParmanandKatara* went as such. The petitioner, a human right activist filed an application

under Article 32 of the Constitution of India pleading to direct the Union of India to provide instantaneous medical assistance to every injured citizen who is brought to a hospital for treatment to preserve the life of the injured, only then any procedure required by the criminal law should be allowed to operate so to prevent any death caused due to negligence. In the event of a breach, appropriate actions for negligence along with compensation should be awarded. He attached to the writ petition a report named "Law helps the injured to die". In this report, it was asserted that a motorist was injured by a fast car. A bystander on the road picked up the profusely injured man and carried him to the closest hospital. The doctors, however, refused any medical assistance to the patient and the Samaritan was told to take the patient to a different hospital located around 20 kilometers away which dealt in *medico-legal* cases. The Samaritan tried to reach the other hospital in time but before he could arrive, the victim succumbed to his injuries.[69]

The disrespectful treatment of the dead, in blatant contravention of the law established in *Common Cause (A Regd. Society) v. Union of India,*[70] in addition to the condition of living in crowded hospitals, the deficit in the availability of beds inter alia, during the second wave of the COVID-19 pandemic in India displayed grim socio-legal prospects despite relevant authority on the subject matter existing much before the pandemic itself. During the short respite that the nation has between waves, efforts must be made to vaccinate extensively.

However, vaccination alone will not be sufficient in battling subsequent waves. United efforts must be taken by all stakeholders- the executive, legislation, judiciary as well as the press. Legal awareness must exist regarding the silent but crucial constituents of the Right to life and related institutions must be strengthened to guarantee their ability in upholding this right. Right without remedy is inconsequential but on the question of rights such as the Right to life, it is far more important to safeguard it than have it violated and receive judicial relief.

Bodies of the COVID-19 patients piling up in hospitals and mortuaries, non-availability of adequate cremation and burial grounds, bodies being cremated in car parks and dumped alongside riverbeds, scenes of mass burials and bodies floating on the Ganga river, all painting a picture of India's horrendous and pathetic mismanagement of the COVID-19 crisis that even the dead couldn't get their due of dignity. Instances like a body being tossed in a ditch for burial and a COVID-19 positive patient being tied to a hospital bed shook the nation. It took courts to reiterate how important it is to ensure the dignity of the dead. In a judgment on 27th July 2020 Karnataka High Court directed that the state government must guarantee that a dead person receives his right to dignity.

This was not the only time; Courts have reiterated the right to dignity after the death of the person. Oftentimes, Courts have affirmed that Article 21, Right to life and liberty encompasses the right to death with dignity.

The landmark case of *ParmanandKatara v. Union of India* recognized a dead person's right to life, fair treatment, and dignity. It provided the right to receive proper health care to an individual whether a criminal or not.[71]

AshrayAdhikarAbhiyan v. Union of India questioned the right of a homeless deceased person for a decent cremation as per the rites and customs of the person's religion. It encompassed that the right to dignity of the dead must be safeguarded and maintained. Furthermore, it also established the state's duty to provide a proper burial or cremation to the deceased person.[72]

In *P. Rathinam v. Union of India,* the domain of article 21 was broadened to include the dignity of a person. It was further extended to a dead person. It added an individual's right to life constitutes living a meaningful life.[73]

A special division bench comprising Chief Justice AbhayShreeniwas Oka and Justice Aravind Kumar of the Karnataka High Court issued an order while hearing PIL petitions on issues related to mismanagement in the

handling of bodies after the death of the COVID-19 positive patients in the state on July 27, 2020.

The court instructed the state to re-examine the guidelines and protocol about how the corpses of the COVID-19 positive person should be disposed of that upholds the rights and dignity of the dead and their family members. The court instructed the state and the civic body to come up with guidelines and directions ensuring the dignity of the deceased persons. Furthermore, the Karnataka state government has to assure that the body of a deceased person receives proper last ceremonies/rites as per their religious and traditional background. The court pointed out certain anomalies in the guidelines relating to the inability of women belonging to a certain community or religious background to go to the crematorium or burial ground to see their loved ones for the last time. Also, the bench commented that there was no mention of keeping the corpses of COVID-19 positive patients for specific periods in the guidelines. The bench called attention to the fact that the exact reason for natural death could not be mentioned due to the pandemic, even if the report comes out to be COVID-19 negative post-death of the patient. It further added that not mentioning the exact cause of the death gets in the way of securing the dignity of a dead person. The bench ordered the state government to take notice of how private hospitals are ensuring to admit patients and not denying their services to needy patients.

Immediately after this judgment, the Karnataka State Government released the guidelines on July 29, 2020, for the management of dead bodies during COVID-19. Several directions regarding insurance and salaries for cleaning staff in the state were also recommended by the division bench.
The order of the court included:

- The State government to issue adequate guidelines emphasizing ensuring the dignity of the dead.

- Assure that the centralized ambulance system is in place shortly.

● State to establish machinery to monitor the activities of private hospitals to ensure patients are not refused admission to the hospitals.

● Re-examination of BBMP guidelines regarding the mentioning of COVID-19 status on the death certificate, even if the reason for death is a natural one. There is no such requirement to do so.

● The beneficiaries of the GaribKalyan Package Insurance Scheme must be notified about the scheme for them to receive the benefits.

● The state needs to clarify who are beneficiaries (pourakarmikas and cleaning personnel present in government institutions including hospitals) under the insurance scheme.

● further, the state is to elucidate whether the relatives of the deceased beneficiaries under the insurance scheme can get the benefit at this phase.

● State to guarantee wage payment of all sanitation workers (pourakarmikas) to be paid on time, particularly in non-BBMP areas. Benefits should further be extended up to compulsory testing and provision of PPEs, temperature testing equipment, etc, which are provided to workers within BBMP areas.[74]

V. Recommendations by the National Human Rights Commission of India

When COVID-19 hit, no one was ready to face the worst medical emergencies of the world. Governments across States dealt with the catastrophe with their limited resources. Lakhs of people lost their lives, some suffered and recovered. In the devastating times of such crises, it became a challenge to treat the dead with dignity when hundreds and thousands of people were dying daily. On May 14, 2021, the National Human Rights Commission of India (NHRC) issued an *Advisory to the Centre and States for Upholding the Dignity and Protecting the Rights of the Dead*[75], which has become a key issue during the

COVID-19 crisis. As of May 2021, no specific law on the protection of the rights of the dead existed in India, although the courts have been playing a key role in ensuring that these rights are granted, e.g. in the 1989 landmark case of *ParmanandKatara v. Union of India,* which extended to dead persons the Right to Life and Right to Dignity enshrined in article 21 of the India Constitution. NHRC reaffirms that in both natural or unnatural deaths, "it is the duty of the State to protect the rights of the deceased person and prevent the dead body from being a victim of a crime"[76], further foreseeing that States are obliged to consult all the stakeholders that might be involved in the process.

In section II of the Advisory[77], the NHRC presents the basic principles for upholding dignity and protecting the rights of the dead. The most fundamental principle for upholding dignity and protecting the rights of the deadis *Ensuring the fair treatment of the body.* When bodies are to be disposed of on an extremely large scale, the bodies might likely be handled in a discriminatory way. A proper system of management that assures that the body of a deceased person does not come across any discrimination in treatment irrespective of religion, caste, region, gender, etc., and proper training of the individuals who are involved in the administration is advantageous. Likewise, safeguarding any kind of physical violation is necessary. The bodies of the deceased are susceptible to be physically violated when there is a certainty that the relatives and friends of the deceased person will not have a chance to touch or look after the body. It becomes only apparent that the bodies might be manipulated for the illegal removal of organs. Any such exploitation means curtailing the basic right of the deceased person to be treated with dignity. A proper monitoring system to notice any such violation is required. Even in instances of donations, the opinion of the deceased person should be of primary significance, no matter the standpoint of the legal heir. Similarly, unclaimed bodies should be placed in safe conditions, and the use of their bodies for any purpose whether academic or research, should not be done without acquiring a proper license. The bodies, to be treated in a dignified manner, require decent cremation

or burial. The last rites of the dead bodies need to be done as per their customs and religious background. Family members possess a right to have a last look at the bodies of their dear ones. In cases of unclaimed bodies, the state should assure the proper disposal of the body following the standard procedure. A person whose death has occurred due to a crime deserves to be treated with compassion and respect. They are entitled to get justice as they are a victim to a crime and the state must ensure they receive justice. Taking measures to make the existing system more efficient. Avoiding any unnecessary delay in post-mortem or autopsy procedures, proper handling of the dead bodies, and treating the bodies in a dignified manner are some of the ways to safeguard the dignity of the dead victim. Close members of the deceased should be provided with a strengthened system to make it easier for them to file their cases and seek redresses. When a person dies, leaving a will, it must be honored and obeyed. It must go in favor of the person the will has been written for. The deceased has a right to not be defamed by any words, written or spoken, by visual representation, made to harm the reputation of the person. No derogatory remarks shall be made to malign the reputation of the dead persons. It is believed to harm the deceased person the same way it would harm if he were alive. A deceased person has a right to privacy and dignity relating to the dissemination of any personal information after death. The onus falls on the media houses including social media sites to avoid any exhibition of the dead bodies' explicit pictures or videos to the common public in a way that compromises the privacy and dignity of the deceased.[78]

As previously mentioned, In India, the law does not embody any particular legislation for safeguarding the dignity of the dead. Nonetheless, the judiciary has asserted that the States shall engage with all the stakeholders involved towards upholding the dignity and protecting the rights of the dead. In Section III[79], the NHRC assigns roles and responsibilities to the key stakeholders i.e., the citizens, hospital administration, medical practitioners, government, etc.

Every citizen is entrusted with a responsibility to report

the respected legal or administrative authority or the emergency ambulance services, whenever there is an instance of any death. Further, Citizens should not be using the bodies of the deceased persons for personal gains or to manipulate the authorities to fulfill their demands. About the duties of hospital administration, it is the duty of the doctor conducting the autopsy to collect, examine, preserve and seal the clothing of the deceased in special body bags for proper transportation and send it for further examination to the forensics. Also, the unclaimed bodies must be stored in a deep freezer to stave off any decomposing. In the case of any pending bills, the bodies should not be withheld by the Hospital Administration. The family members should be allowed to take the dead body. In cases of unclaimed bodies, the civic authority to dispose of the dead bodies in a dignified manner. Proper licenses should be acquired by the Hospitals before using any unclaimed bodies for academic, research, and training purposes. The medical practitioners should be following the guidelines of the Indian Council of Medical Research (ICMR) while dealing with dead bodies of claimed and unclaimed persons. Moreover, when a person dies, the doctor must make an official announcement of the death. Forensic Departments play a key role as a stakeholder. The stage at which forensic departments deal with the bodies is very crucial. Effective steps must be taken to prevent any mismanagement. When the autopsy procedures are to be conducted, only qualified professionals must perform them.

Video graphing of the post-mortem examination must be done according to the guidelines issued by the NHRC. Any mark or incision on the body of the deceased must be hidden by clothes before delivering it to the family members. There must be proper confidentiality while obtaining the genetic data through DNA profiling. The data and biological samples collected should be stored properly, following the proper law. Mortuaries should be kept in a hygienic condition so that the dead bodies are given a clean environment maintaining the dignity of the dead. The data about the deceased person should be kept confidential and secure so that any information that might harm the dignity of the deceased person is

safeguarded, especially in cases of sexually transmitted diseases that are stigmatized. The bodies must be handled in a dignified manner at all times and for this purpose, the staff dealing with the bodies should be provided with adequate training.

The state must maintain and protect the dignity of the dead as has been iterated by courts. From providing proper services regarding the disposal of bodies to digital confirmation of the deaths is all the duty of the government. A district-wise digital dataset of death cases should be maintained on web portals by the state government. The data must also be protected. There must be proper updating of the death of the person in all documents such as Aadhar, Bank accounts, etc., to prevent the misuse of such documents by impersonation. A 24×7 helpline should be run to provide immediate help to the families and friends of the deceased in cases of assault, mishandling, or misconduct of any kind. The state should ensure the proper availability of necessary equipment for post-mortem procedures. Also, there should be state-prepared SOPs to register the particular customs and rituals of the deceased person to assure the dignity of the dead. The dead bodies of the deceased must be properly cremated or buried according to the customs and religious background of the deceased by the civic bodies, in cases of unclaimed bodies or where the body has been disowned by the legal heirs. The last rites must be performed in a dignified manner. The state government should ensure the availability of cremation and burial grounds and encouragement should be provided to environmentally friendly practices such as electric cremation. The Police administration as a stakeholder must ensure that no unnecessary delay occurs while calling the forensic team to the scene of the crime and transferring the body for the post-mortem procedures within the stipulated time. In cases where the death of the person occurred due to sensitive reasons such as suicides, accidents, murders, death due to sexual offenses, etc. the police authorities need to handle the dead body with utmost dignified manner. It should be properly covered and sent for immediate autopsy procedure. For proper identification and transfer of the dead body to the family members, the police personnel

should collect and store unique body codes, technical photographs from the dead bodies under the police record in a dignified manner.

The deceased person has a right to privacy and dignity. It is the duty of the media agencies and social media outlets to ensure that no explicit photographs or videos of the dead bodies are being exhibited in the public. Any kind of remark that is degrading or derogatory to the deceased which might interfere with the dignity of the person should be deterred from being published. As an important stakeholder, the CSOs/NGOs must show the enthusiasm to share the responsibility of performing the last rites of the dead bodies in a dignified manner.

The stakeholders are the bedrock elements of the society to secure that the deceased person receives his share of rights. Today in the COVID-19 times, various violations have been registered such as gross negligence on part of the Hospital Staff, mishandling of the dead bodies of COVID-19 affected persons by the state, dead bodies being thrown in ditches without giving a proper cremation or burial, family members of the deceased being scrapped with the chances to bid their last goodbyes to the loved ones, and many more other incidents. These instances are proof of how major and crucial a role stakeholder's play in safeguarding the rights of the deceased and even the slightest error in discharging their functions leads to gross mismanagement.

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THE PARADIGM SHIFT: ODR IN LIEU OF ADR, VIS AVIS GLOBAL PANDEMIC

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ABSTRACT:
A maximum of transitions happens in the mode of online in recent years, and a known fact is that it is only going to increase in the upcoming years, just as that even the legal fraternity kept up with the trend along with modernizing and reequipping all the traditional legal methods. The uninformed pandemic burst upon us leaving the world baffled, families in discord, relationships that are primary in nature distorted but that did not stop us from using the technology to resolve the issues of the people in need. The ADR matters turned into ODR i.e., Online Dispute Resolution. This paper mainly focuses on E-mediation or Online mediation and how the parties have grown towards it and how mediators have accustomed themselves to the virtual nature of mediating and adapted themselves for the virtual process of mediation. Both domestic and international ADR mechanisms have started taking place through the virtual method, which is convenient in nature for the clients with the pandemic in the picture. This paper deals with how E-mediation is conducted and how the mediator is creative in the stages of the mediation.

The epigram *"justice delayed, justice denied"* is a concept widely heard of and spoken of in reality right for a very long time which dates back to the mid-1800sby William E Gladstone, Former British Statesman and Prime Minister in an issue of the Louisiana Law Journal debate in the House of Lords. This is however a statement also stated in the record by the civil activist Martin Luther King Jr in his letter from Birmingham Jail as *"Justice too long delayed is justice denied"* in the 1960s. It was those times during which the concept of justice was noticing a transformation perhaps a reformation from the judicial system as accorded by the church towards the formal legal judiciary we are entrenched with today. Although

this epigram is however a legal maxim meaning if a legal redress or resolution to an aggrieved party is available yet not in proximity of the timely fashion, it is effectively the same as having no such resolution or remedy at all.
As for speaking of the epigram, it leads to the transposition in the adversarial system of the judiciary, from being justice delayed, justice denied to justice addressed, justice rendered. This non-adversarial system of judiciary is not a very novel structure rather it has been a very traditional custom in India. The study of legal literature accredits that the mode of alternative dispute resolution mechanism has been in implementation in India from time immemorial in resolving disputes like trade, family, or a social stratum. The further unraveling of the legal literature unveils the active role participation of a private person otherwise called the head of a panchayat, punga, sreni and kula. However, if perceived from a notion that is followed today there exists a slightly closer system of adjudication but just not involving the adversarial system.

The dispute resolution system during British India was unlike the traditional form of adjudication nor was it of any conventional methods. It was only in the nineteenth century that the legal field was introduced in India. Initially, arbitration being the first mostly introduced and practiced mechanism of alternative dispute resolution, as the judicial system could not effectuate and bring about any kind of resolution to the then disputes. Also, the spike in the numerous litigation cases in the matters of civil discharges/ disputes were quite cumbersome to be dealt with or resolved quickly. It was why the arbitration was introduced from the then Act VIII of 1859 later codified into civil procedures. It was in the year 1899 that the Arbitration Act was passed by the British Government. However, with time, laws and practices along with their interpretations evolved as well, which was in 1935 on the suggestions and recommendations from the Civil Justice Committee there was a bill passed and named it the Arbitration Act, 1940 by the Indian legislature. It was this Act that mostly governed and empowered the arbitration and arbitral disputes in India and became the exhaustive code concerned with the arbitration procedures and the mechanism in its entirety.

Although the main purpose of pioneering and introducing the act was to ensure the reduction in the court's intervention.

It is familiar that the Indian Courts do not provide speedy trails, which is a huge inconvenience to society. The ADR mechanism provides not only speedy recovery for the disputes and gives cadence in the society, the essentiality of making parties walk into the halls of the court for their dispute resolution. The unanticipated pandemic of Covid-19 left the world to come up with creative methods to keep their work going so the basic economy of their respective countries have their stand. Just as that, even the legal community had to take the necessary steps to keep the thought of egalitarianism alive amidst the declining human contact.
A new way of the resolution was required amidst the pandemic, so the courts updated to online means of communication to keep the litigation going on, just as that, the ADR society also decided to go online, which came to existence as Online Dispute Resolution.
Speaking of online dispute resolutions, they are nothing but alternate dispute resolution taking advantage of the recent and rising technology of the internet, which allows resolving disputes with the comfort of the internet users who choose to resolve their issues. The online mediation framework is divided into disputes of commercial, family, and between a consumer and a certain business. These issues are brought in in a sophisticated manner wherein the parties are able to be vulnerable in the virtual platform in front of the mediator, their concerns will be assessed and the nature of their disputes will be resolved on the outcome which favors both the parties and no undue remain just as the physical resolution of disputes.

As for speaking regarding the family disputes and family violence, Pagelow[1] defined family violence as, *"any act of commission or commission by family members and any condition resulting from such acts and inaction which deprive other family members of equal rights and opportunities and/or interfere with their optimal development and freedom of choice."* Hence, initially, the conflicts are merely a small misunderstanding that gradually with very little or no communication evolved into a big dispute that might require an intervention by the adversarial methods. Not

only do these disputes are a minute misunderstanding but also are a stimulus to a massive mental disturbance and a disruption of the meticulously happening and smooth running of the family activities especially its members.

On the other hand, the unresolved conflicts within the family between the members that are most likely to be unaddressed are the major reason marital conflict leads to familiar disintegration and has negative ramifications towards the upbringing of children. Subsequently, the quality of interaction and communication between a husband and a wife has aftermath negatively on the whole family. In consequence to that, there are many more relationships that have taken a toll in this pandemic psychologically, like a chain reaction from that of a husband and wife conflicts to parent and children relationship where there might arise conflicts regarding the individual freedom, privacy, and showcasing double standards among the sons and daughters of the house by establishing reserved freedom on part of the daughter and how she's expected to learn all the necessities as she does not belong to the natal home and will be going to her in-laws' house; siblings' relationship in which they share a common unique genetic relationship who by the actions of parents' behavior, disregarded authority, neglected attention and constant discrimination tend to develop a subconscious discord towards one another and not to forget that the joint family systems in India is one that requires the ability to maintain the cordial and consider the conflicting relations between all the secondary relatives and cousins; relationship between the in-laws (daughter in law and mother in law) this is one of the hot topics of the family disputes and not to forget to mention that this is the most likely to be the stimulus to cause a family dispute in India as it is very much common here to see the dominance of the mother in law exerted onto the daughter in law's social relations thinking that the daughter in law is going to only disrupt the relations of the brothers and that of the mother and son whereas the daughter finds them intolerable as the sister in laws also plot disruption between the nups only due to miscommunication and misunderstanding leading to a family dispute between mostly the newlyweds, in case

otherwise, it would not lead to any mental distress nor any sort of chaos within the family between any of the persons involved. Regardless of this, one other commonality is that the background of patterns of marital interactions, roles, and power in India is essential before we review research on marital problems. However, studies on families in India have generally concentrated on the joint family, with a patriarchal structure. It has been largely recognized that conjugal relations have little significance in the joint family. Continuing the same, marital interactions, roles, and power have received limited attention in the recent period.

Hence, instead of going to the courts and following up with the extensive procedures, fees, time, and energy the better option is the alternative dispute mechanism, specifically the mediation. However, due to the effect of a pandemic, the mediation has superseded with another solution to the ongoing strict adherence to the safety protocols of the pandemic situation i.e., to the maintenance of social distancing and not to form or entertain a social gathering. E-meditation is a very state of the art method of alternate dispute resolution derived from the formal mediation process except to facilitate the current situation of the virtual processing involving even that of the judicial system. This does not require the parties to travel, get nervous or conscious, and can instead stay relaxed in their atmosphere at their homes and can sign up for the process of E- mediation which now is a very time conservative and not a cumbersome process to register to the online mediation. The technology used nowadays are very common based algorithms as they are very similar to that are experienced in any other online platform and considering the tech-savvy generation, they will be very familiar with the usage of the mediation platform online and will be of better help to the ones required in the family.

The commercial issues in online mediation have become common especially in this pandemic situation, and many unequal bargains happen in the virtual table when the mediation process happens, the mediator ensures that both parties will get justice in a fair and equal manner, the experience of the mediator comes out and the parties receive a noteworthy outcome

for their disputes, the same happens in other types of mediation, even the sensitive issues are dealt with great care by the mediators on the virtual platforms, which the parties will receive content with the outcome they get out of online mediation.

It is a known fact that mediation is one of the mechanisms under ADR, most mediators use the STABEN approach while conducting the process, in online mediation, the same process is involved, wherein the source of conflict is found while both the parties present their issues to the mediator, the mediator comforts both the parties virtually and finds an amicable approach to resolve the issue and put the dispute to the rest, he starts with the joist session at their time convenience and since everything will be conducted online, it will be made at the benefit of the parties and mediator will ensure they are comfortable in the virtual platform and mediates with all the roles he ought to keep up with, and since it will be a voluntary process, both parties will be efficiently given ample time with joint and private session and their needs and wants will be segregated by the mediator and informed to the other party in way which is as neutral as possible, and even though it is all online, the core of mediation which is confidentiality, will be upheld no matter what, no information will be given out unless the parties want it to be given to their respective parties. And until there is a mutual agreement virtually by the parties, there will be no official agreement that will be drafted, the mediator will be assisting them online, so they will be able to reach a mutual understanding and put the dispute down and receive a resolution in the process.

Reflecting and reframing the issues is one of the main features of mediation, and performing it virtually creates a lot of gaps and disturbances between parties and the mediator himself. Identifying the underlying issue by the mediator will be burdensome if the parties don't cooperate and reframing becomes more difficult as it is not easy to make someone see alternatives of the resolution to their disputes on the virtual tables. The goal is to tackle the actual issue and give the satisfaction of coming to the process of mediation to the parties. ODR makes it slightly impenetrable for the mediator to reflect on the issues and reframe them at the same time, but

with the cooperation of the parties, it is not impossible to resolve the underlying disputes.

Times more than necessary and due to technicalities there will be an atmosphere of untrustworthiness amongst the parties and the mediator will need to filter and clarify the issues which may have been caused due to non-technical and technical issues, this can happen because the parties blame each other or confess an unpleasant situation that happened in the past, the mediator will have to handle the parties and make sure they do not stop their session or leave in the middle of an important stage of the process, which is very inconvenient as it is unusual of this happening in the physical process of mediation, but virtually the mediator is in less control of the process as there is lack of essence of physicality between him and the parties.

The pandemic has taken a toll on all of us in the legal community but it has also been a boon for many justice seekers. They are able to reach a resolution for their disputes without having to step out of the comfort of the house. The ODR [2] has given the parties to connect with the mediators easily and the access has been given for the easy performance of mediation to both parties and the mediator which also happens to be a very budget-friendly and easy finance situation for the justice seekers along with receiving high volume transactions in as little time as possible. Although there are consequences for online mediation, an amount of confidentiality is brought upon and the online platform is kept secure to make the parties comfortable with each other and the mediator himself. The other pro of online mediation is that you can mediate from any corner of the world, the parties will have their convenience and the mediator does not have to go to a prescribed location for the process of mediation, they can also do the process at their convenience. Both joint discussions and private discussions are easy to go forward with as the online mediation provides the mediator with communicating with parties jointly and privately with help of one button, the parties do not have to worry about leaking of information from the mediator, even though it is online in nature, the basic roles of the mediator will stay the same if anything changes it means their responsibility of acting as a mediator has heightened their responsibility of being one. Sensitive

disputes such as family issues, matrimonial disputes are done online with great care and is an advantage as the parties are not facing each other like the regular physical mediation, instead, they are in the technical platform, which they might find easier to open up to the mediator with proper communication rapo built between each other.

As an online mediator, it is very much possible that impasses are very frequent issues they stumble upon. It could be an emotional impasse wherein the parties are reluctant to overcome any kind of their emotional deadlocks amongst the other party, this usually occurs in family disputes. The other impasse can be a substantive impasse, which is when parties are not meeting the monetary interests and have different willingness to settle the matter. The next impasse which a mediator can come across is the procedural impasse which means if the mediation is not being done fairly or promptly, as it is online in nature, the parties may feel the confidentiality concept is not being followed upon or third parties are listening to their conversation, this impasse can cause a lot of ruckuses in the procedure, which the mediator has to come up with creative ideas to break the impasses among the parties.[3]

Although it is virtual in nature, the mediator cannot expect the parties will have fully-fledged knowledge about the ongoing case, they will be devoid of legal knowledge, and their resources will be limited to understand the benefits of mediation which creates these various impasses. One of the main roles in virtual mediation of the mediator is to break these impasses and make sure the settlement is reached within the purview of the requirements of both parties.

In order to break the virtual impasse, traditional ways of physical impasses breakage which are *as* will be used virtually as well, but without the breach of their confidentiality. The mediator will brainstorm with the parties to bring in various options for an agreement, those options will be brainstormed and evaluated by keeping in mind what the parties' need, the underlying importance while breaking an impasse is for the mediator to remember the interests of the parties. Also, acknowledging the efforts of the parties for coming so far in the process will also help them break the barrier of

impasse and break it for the greater good.

To *conclude*, virtual mediation or E-mediation is a platform that has helped many Indians across the country, helped them reach a settlement even during this worldwide pandemic, the legal community did not budge only because they were not allowed to roam through the halls of the court or the mediation rooms, in this case, they made sure the justice which people deserve was reached to them with the help of technology and made sure no one was deprived of it to an extent. ODR was grace in disguise for the justice seekers and us lawyers and advocate did not show them the exit instead made use of the alternatives we had in our hands and gave them what they wanted with the laws being followed.

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AN ANALYSIS OF THE ROLE OF FINTECH IN THE INDIAN BANKING SECTOR

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ABSTRACT

With the advent of Innovation and Technology, there has been a radical change in how financial services are delivered. Technology has been an essential factor for the growth of the financial and digital economy of India. Fintech, which combines finance and technology, has allowed companies to enhance the old business models. This industry has not emerged out suddenly but has evolved over the years and now has boomed. Over the years, the banking services provided by the traditional players were not that satisfactory to the users but, the fintech services and companies took benefit of this gap and brought banking services that disrupted the whole banking sector. 80% of the users preferred the services provided by the fintech, such as online banking, online payments, and the use of AI's or chatbots, over the services provided by the traditional players. Many companies like Paytm, razor pay, cred have left their long-lasting impression on the users. Implementation of AI's and intelligent chips, sensors in ATM or machine learning would completely revolutionize the banking sector, which will be the future of the Indian Banking Sector soon. This study is essential to analyze the growth of fintech companies in India's banking sector and to understand how deep it can penetrate the Banking Industry.

KEYWORDS- *Technology, economy, finance, banking, services, digital.*

INTRODUCTION

Fintech is a blend of 2 words, i.e., Financial Technology.[1] It is a catchy term for any disruptive technology that modernizes old-age financial services and includes software, applications based for mobiles and computers, algorithms, and virtual reality platforms in a few cases.[2] These platforms make doing tasks more leisurely, for which a person had to travel a lot, like paying bills, moving money, check deposits.[3] These innovations are now making sure that consumers are the in-charge of their lives and can become financially advanced by taking advantage of these techs. Before Fintech, investing was a challenging task, and most people avoided doing that because of many complex processes. However, with the onset of Fintech, not only investing become easier but, all the banking services are now available at the doorstep. These services do not cater to short-term goals but, with time, more and more companies are making their way into the market.[4] As per the report of Accenture, investment in Fintech Services has seen a growth of $11.7 billion in just seven years, and Europe saw a growth of 215% in 2014.[5]

However, what is leading to the growth of such services? One of the primary reasons for the growing importance of these services is their 'Universality.'[6] The internet and its impressive power have increased the scope of these services and made them accessible to a great no. of people. Another factor leading to its growing importance is that it is 'economical' than the services provided by the retail banks and is much 'secure' than the old banking problems. Furthermore, Fintech services have many growth opportunities, and it helps to empower the Small-medium size Enterprises and helps them access rich funding.

The complex yet straightforward procedure of depositing money, taking loans, and availing of other banking services are an easy target for disruption, and with the development in Fintech Services, consumer banking will soon get disrupted.[7] This paper will focus on understanding the role of Fintech Services in the Banking Sector and how these services have reinvented the whole banking model. Further, the researcher,

limiting the scope of this paper, will try to explain the impact and role of FinTech in India's Banking Sector.

Literature Review

A study of Impact of Financial Technology on Banking Sector in India, by NehaKhurana (2018)[8]
The author of this paper has made the readers understand the importance of Fintech and its impact on India's banking sector. She has explained the evolution of fintech, along with the developments it had brought with it. The researcher from this paper got a deep insight into the evolution of fintech and its long-lasting effect on the banking sector.

Emergence and growth of Fintech start-ups in India, **By L Badri and Gaurav Dayal (2021)[9]**
The authors of this article has explained in detail about the fintech. Further, they explained about the factors leading to the establishment of fintechstartups in India and the disruption they have created in the Indian Market. They have ended their paper on by discussing the future of such services offered by Fintech. The researcher from this paper got the idea to talk about the famous companies providing the fintech services.

Fintech and Consumer Needs by Kay Robinson (2021)[10]
Kay Robinson, through her paper has elaborated upon the services provided by the Fintech Companies and how it has helped to fulfil the needs of the consumer. She has been thorough with her research and gives a clear idea about the need for such services. The researcher through this paper got an idea to understand the reason behind introduction of such services in India.

Digital Disruption in Banking and its impact on competition by OECD(2020)[11]
OECD, in this paper has explained how fintech has led to the digital disruption of the banking sector. The services that were provided to the users physically are now being provided on their doorstep with mobile phones and internet services. The researcher got a clear cut idea about the functioning of these services and how it has

revolutionised the banking sector from this paper.

Statement of Problem

FinTech Services is disrupting and continues to disrupt the Banking Sector and create a revolution in this Sector. Even though these services and investment in these services is growing and is continuously in the news in recent times and is affecting many consumers, surprisingly, the amount of research done on this topic is comparatively very low. Through this paper, the researcher attempts to provide a basic yet informative idea on how FinTech Services are affecting the banking sector. Proper research on this topic is vital, as these services will take over the traditional banking services, and understanding such a revolution in detail is significant. Further, this FinTech will bring a whole new set of problems with them, and the traditional banks have not been able to keep up with these changes. The research will help find solutions to keep up with these changes.

RESEARCH OBJECTIVE

The researcher, through this paper, attempts to achieve the following objective-

1. To understand the evolution of FinTech in India.
2. To find out more about companies and the services that are part of FinTech.
3. To find out the problems the banking sector was facing that led the Fintech Revolution.
4. To analyze the changes brought by FinTech in the Indian Banking Sector.

RESEARCH QUESTIONS

1. What is FinTech, and what is leading to its growing importance?
2. What are some essential services offered through FinTech?
3. What were the issues in the banking sector that led to the Fintech revolution?
4. How is FinTech affecting the Indian Banking Sector?

THE PROGRESSION OF FINTECH IN INDIA

FinTech, as defined by the Financial Stability Board as,

"Technologically enabled financial innovation that could result in new business models, applications, processes, or products with an associated material effect on Financial Markets and Institutions and the provision of Financial Services."[12] It involves much new technology that makes traditional financial services more accessible and includes various services. However, when did these tech services boom?

Earlier, financial communications used to take place with the help of Morse code and Telegraph. However, in 1950, one of the first Fintech services that disrupted the market was credit cards[13] and are still being used by many users today. After few years, Fintech laid down its foundation again in the post-'90s along with the liberalization of the Indian Banking Sector.[14] During this time, the government took the initiative to develop the banking sector and introduce new techs like MICR and online payment gateways, which proved to be a revolution in the banking sector.[15] During this time, the whole traditional banking system got disrupted. After credit cards, the ATMs got introduced, which changed the process of withdrawing money, and with the incoming of the internet, the fintech business boomed, and new models of banking and shopping got introduced, allowing the user to avail all the banking services with one touch from their home.[16]

According to the report of NASSCOM, the advertising of administration in India was approximately around 8Billion dollars in 2016, and as per the expectation, by 2020, it will multiply and grow by 1.7times. Further, this report predicted that the 33 Billion dollar incentive of the Fintech division in India would increase to 73 billion dollars in 2021 at a rate of 22% in 5 years compounded annually.[17]

The government has continuously supported Fintech services by implementing various schemes such as the Jan DhanYojna, Aadhar, UPI emergence all over India. All of these schemes have led to the continuous growth of Fintech Services.[18] The usage of Fintech services, demographically, is 88% in Males and 84% in females, while the age group of 25-44 is the active users.[19]

Famous Fintech Start-up

Today, with the help of smartphones and internet

services, we can avail of all the banking facilities from home. Some websites and applications can calculate the EMI's and quote users the premium for the insurance. The whole banking experience is changed, and this has also led to India's economic growth. There is still scope for many improvements, and many startups are coming down the line to take care of such problems.

1. Lendingkart[20]- it is an e-finance company co-founded by HarshvardhanLunia and MukulSachan in 2014. The company offers loans, working capital, and company loans to MSE' 's all over India. To obtain a loan from this website is comparatively easier than obtaining a loan from the banks. Only minimal documentation is required. The primary objective of this company is to provide capital to the entrepreneurs so that they focus on their business and not on capital funding.

2. MoneyTap[21]- This is the first credit line offered to the users with the help of an app. This company was formed by BalaParthasarathy and two other co- founders in 2015 to offer cash loans, mobile credits, and EMI's at a flexible rate. This app works under the control of RBI and also has its License- NBFC.

3. Cred[22]- It was founded in 2018. It is a reward-enabled platform that allows its users to pay their credit card bills, and with each time they pay their bills, they get rewarded with cred coins which can be used to claim something from cred's brand partners. The app also helps its user to calculate interest on loans, PPF's or EMI's.

4. Razorpay[23]- founded in 2014, Razorpay allows its user to pay money using payment gateways and through links. This app helps to accelerate the payment process and makes banking much more straightforward for users.

Many more such startups are currently working in this sector and are making their way in. These tech-based startups have been very profitable. However, does Fintech positively impact India's banking Sector and the problems faced by the users now? All these things will be dealt with in the upcoming chapter.

IMPACT OF FINTECH ON THE INDIAN BANKING INDUSTRY

Fintech is not a new industry. Instead, it is an old one that has boomed quickly and one of the industries affected by its booming is the banking industry. Traditionally, to avail any banking services, the users had to go to the bank, stand in queues, fill up the forms and wait for couple of days. However, with these financial technology coming up, availing banking services has become so easy that, any person of any age can now avail these facilities any time for any place from their phone. Many of the old age banking system has been replaced with the new technologies. This chapter will deal with the impact of Fintech on the Banking Industry of India and the new problems that users face.

Fintech Services revolutionizing the Banking Industry

1. Cards with Smart Chip- Nowadays, a new type of card have come out with special smart chip embedded on them. These chips helps to minimize the mishaps that were taking place while availing banking facilities. With the help of this card, whenever the user will use this card for any transaction, an OTP- one time password will be sent on the registered phone and a message will be sent after the transaction as well.[24] This helps to increase the security and reduce the thefts that were taking place.

2. Sensors- other than the smart chip system, the Fintech services are now providing ATMs with biometric as well as iris scanners. These scanners will now help the Machine to identify the owner of the Bank Account with the help of fingerprint, iris scanner or mobile apps.[25] It will not only secure the usage of ATM but also would eliminate any chance of human error.

3. Customer Service and AI- The customer service provided by the old players are still in the early bird stage than what is provided by the Fintech. 80% of the Fintech user believes that the services offered by the Fintech companies are consumer driven.[26] These companies tend to provide 24/7 access to customer service than the traditional players' 5 days and 8 hours service. These

services can be accessed through channels like social media and the customer reach has also been maximized.[27] This customer service has also been popular because of the usage of chatbots or AI's. These are 24/7 accessible bots that answer queries of its users and, if they cannot, connect the user with the personnel.[28]

4. Online transactions- the fintech services and companies, now allow all its users to access the apps that allow them to transact online. They can now transfer the money to any person, organization, order cards, pay their bills, pay dividend or any transaction with the help of these apps, from their home[29]. Now, the users don't need to wait for the working days to go to bank and complete their transaction. All they need is a smart phone and internet services.

These are some of the many services that the Fintech companies are offering. Other than these services, many more have yet to come to disrupt more of the banking industry.

Issues that led to Fintech Revolution

There needs to exist some problem for any industry to disrupt other industry. This section would try and analyse what led to the Revolution through Fintech. Many issues were underlying in the traditional banking sector such as[30]-

Rules and Regulations- Since, this sector needed protection and caution, it was closely monitored and had to follow many rules and regulations. This was a good thing but led to so many complex procedures that made banking difficult for the users.

High Costs- Old banking facilities, required the users to go to the bank's branches in which they have their account. Now, to create more of this branches, the banks required high operating costs. This issue was resolved by allowing the users to access banking facilities through their phone.[31]

Flexibility and Power- The fintech companies have allowed the users to have a greater flexibility and power. They can now access any service, from anywhere at any time. Further, this helps the banks too, as the amount of investment has reduced drastically and there has been

an increase in the cash flow, leading to increase in Profits.[32]

Experience of the Customers- [33]The overall customer experience, using the traditional services was terrible. The users weren't satisfied and the employees used to mistreat the lower income section of the society. The banking hours were irregular and the banks used to be off on Public Holidays. Nevertheless, with the coming of the Fintech Services, the users now don't have to interact with the banking employees and can access any service from their home, even if it is a public holiday.

After completing the paper, the researcher can accept the H_0 Hypothesis and reject the H_1 Hypothesis and prove that the fintech services positively impact the Indian Banking Sector.

CONCLUSION

After completing the following research, the researcher can reasonably conclude that the Fintech services have wholly revolutionized India's Banking Sector. The latest techs helped these companies achieve their goals, but the problems created by the banking sector also led to its downfall. Fintech may or may not be beneficial to the banking sector. However, it indeed is beneficial to the users of such services. Not having to stand in queues or wait for days, getting the money transferred, and accessing all services from home is undoubtedly impressive. The users are happy with the services they are receiving through these super technologies and the customer service provided by the companies are also easily accessible, that too 24/7. Not only the users, the economy has also boosted after Fintech services came in India. In India, the two of the major services that fintech focused on were payment service and lending services. It is presumed that with coming time, the fintech will take over all other services as well.

Fintech, is growing day by day, and even today, it tends to provide more services than what the traditional players are providing. With the advent of more techs in the future, the coming days of Fintech is very bright and might be able to disrupt the whole banking sector. Through this paper, the researcher achieved all the objectives and found answers to all the research questions.

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IMPACT OF BLOCK CHAIN TECHNOLOGY AND SMART CONTRACTS ON THE ARBITRATION REGIME

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Abstract
The debate over the block chain technology and its managerial importance has increased multi-fold. As with any technological advancement, it is necessary to access the impact that it will have on different areas. One such legal area is that of arbitration. The concept of arbitration has grown and is seen as a favourable dispute resolution mechanism which out of court and solves the difficulties with litigation in particular. To make it more comforting and effortless in its procedural account, it is necessary to look at the technology which is block chain. But with it comes certain issues in regard to the enforceability, security and reliability on the block chain technology. With the culmination of smart contracts and block chain the transaction do become easier but the accountability and different challenges that it poses should be adequately examined before its full adoption. For that purpose, this article presents with the impact that the block chain technology and the smart contracts will have on the arbitration regime in particular and at the end, expresses certain suggestions as well.

1. INTRODUCTION

Arbitration has emerged as one of the most used alternative dispute settlement (ADR) mechanism. Its impact and significance has diversified in a short couple of years in India with fast track arbitration [1], institutional arbitration, ad hoc arbitration, etc. becoming a reality. This accelerated growth shows the importance of arbitration with major contractual transactions having arbitration agreement embedded or attached to it as the first form of resolution. Thus, it is clearly seen that the parties to a dispute now prefer to

settle the dispute through such ADR mechanism over the time-consuming litigation process.

What has received increasing importance is the emergence of new technologies like block chain, crypto currency, etc. that would make the transactions and day-to-day life much easier. The usage of block chain technology particularly for the managerial governance is seen as a critical instrument.[2] Even in the legal arena, the technological enrichment could not be kept at bay that will help in documentation, formulation of essential steps, and efficiency in the arbitration procedures. The need is, thus, to examine it with reference to the ever-growing arbitration domestically as well as internationally as an out of the court method of resolution. Arbitration regime has put their best foot forward with ease in their procedure and effective resolution. To maintain its stability as a preferred dispute resolution mechanism, it has to consider the changing contours of block chain technology and along with it, another significant concept of smart contracts in commercial transaction. The interdependence and convergence of all will ensure better and efficient access to resolution of disputes.

2. ARBITRATION AND TECHNOLOGY

In India, arbitration is controlled through Arbitration and Conciliation Act, 1996. Consequently, when more disputes are preferred to be resolved through arbitration, the process should definitely be smooth and quick. With that, the need also arises to accumulate the present technological advancements to make arbitration much more attractive to the parties not only for domestic settlements but for foreign settlements as well. With its many significance, the arbitration is by the will of the parties. Party autonomy is a crucial factor involved in arbitration. It gives power to the parties to formulate the procedures for resolving the dispute, unlike the adversarial nature of the litigation procedure. Thus, the growth of arbitration is apparent.

Arbitration proceedings involve various steps. These are the ones which occur before the actual proceeding, at the very stage of drafting the arbitration clause or arbitration agreement itself, at the point of proceedings and lastly,

after proceeding or enforcement period. Thus, by smoothening the process with the use of technology can definitely aid in arbitration so that fast-track awards are actually more frequent when disputes are innumerable.

a) Amendment of 2015

The amendment of 2015[3] is crucial in talk of technology as it introduced the concept of communications through electronic means [4]. This was included as a part of arbitration agreement. Though, the amendment has refrained from defining the word "electronic means"; the help can be taken from the Information Technology Act, 2000 for that purpose under Section 2 (1) (r) which defines "electronic form" where the "information is generated, sent, received or stored in media, … computer memory, … or similar device"[5]. Even going at IT Act, the restrictions and loopholes have now become more prominent in it but its (electronic means) advantages cannot be brushed away. But the major issue is in regard to arbitration and technology is that the framers have still kept technology at a far end as yet in terms of the functioning of arbitration proceedings itself and its regulation. That is where the dilemma, conflict and hindrance arise in regard to implementation of arbitration procedures through technology.

When one goes back to the report of the Law Commission [6] in 2014 chaired by Hon'ble Justice A. P. Shah; it had highlighted the significance of bringing technology in the Act, 1996 to conform it to the UNCITRAL Principles [7]. This report proposed the meaning of the word electronic communications to be added to Section 7 which included plethora of things so as to simplify the mechanism. The significance of this was to ensure that the arbitration agreement can be concluded through electronic means [8] like electronic mails or e-mails, by the use electronic signatures, and such other techniques. This will ensure the documentation part of the arbitration where the physical presence won't be required and time will be saved with focus on solving the conflict at a faster and quicker pace. Moreover, the safety and security of the arbitration agreement in cyberspace is necessary to maintain confidentiality; for that purpose assistance from block chain technology can be undertaken to ensure that the transactions, and arbitration remains secure.

3. ARBITRATION AND BLOCK CHAIN TECHNOLOGY

a) Meaning of Block Chain Technology

What block chain does is that it allows for a network of chain where transfer is recorded. It keeps a form of record where every transaction is recorded and chained together by way of integrated blocks in a database[9]. This ensures that the data that is shared or transferred remains intact and is not hacked into that easily for the high chances of detection. With digital age come several cyber issues for which it is necessary to maintain a balanced regulatory system and employment of counter-attack from technology itself by third or inferior parties. This is where block chain comes into picture. When even a single block is altered or a new block is formed, it changes the complete orders because all the blocks are connected through a chain, thus, the detection becomes more instant.

With the talks of electronic means and technology, comes the newer age and rapidly increasing sub-set which is the block chain technology. Block chain technology with its accelerated and fast transaction and recording system will help in arbitration. Even in real world, transactions will become smoother by the application of block chain technology.

b) Usage and Importance of Block Chain Technology in Arbitration

At this digital age and by the coming of the global pandemic like COVID-19, the moving from one place to another had become restricted. This allowed and opened new ventures in the form of ODR (Online Dispute Resolution) system. ODR has its connectivity to ADR and specifically to arbitration in guiding towards a solution based on participants in different geographical locations saving the travelling cost, paper-work procedures, etc. Similarly, COVID-19 can also be seen as a pathway to move towards more technology like block chain as well.

As one look at different steps that are involved in the culmination of an arbitral award, the stages are numerous from initiation of the arbitration clause at the first instance and then moving all the way through the

summoning of the parties, examination of parties, looking at the evidences and other procedural requirements. The digital space gives the account for these different procedures of arbitration by the use of block-chain technology through the creation of different blocks of procedure. But the real problem arises as to till what point the mechanism will be functional [10] as the arbitration clause functions as soon as a breach occurs. For that purpose, at the instance of the breach or at a greater stage when the notification reaches the party or even further than that the block chain is possible? Similarly, the regulation at different stages might be similar or different with each defined chain of block. This means that at the first instance, block chain helps in securing the documentation by creating an air tight locking system where it remains confidential and secondly, it moves to other procedures in arbitration. In understanding the other procedures, there are certain other parameters in the block chain which arises like the smart contracts.

4. BLOCK CHAIN AND SMART CONTRACT

a) Meaning of Smart Contract

Smart contracts are those that become functional as soon as certain pre-defined conditions are fulfilled. These are used in commercial transactions in the form, for example where a seller as soon as he delivers the goods at the port, the transaction (payment) takes place from buyer to seller through a chain that already exists. These are generally called as “self-executing contracts”.

b) Convergence of Smart Contract and Block Chain Technology

The prominent feature of the smart contract is that it culminates its procedure with that of the block chain technology for a pre-set terms and conditions and thus, when these are triggered, it works within the chains and blocks that are already created. This ensures the functioning of the smart contracts is essentially carried out even when one party is reluctant at a later stage concerning payment. This will make the transaction complete on the end of the parties through the use digital technology.

The process of smart contract involves different steps in

execution of the transaction. These steps become cumbersome and complexities at a stage involving different intermediaries. Thus, to add as a factor of clearly requested pathways which when are authenticated or completed, the verification[11] of the process is done and it validates the transaction as a whole. It, thus, decentralizes the complete process by the usage of a verification and validation steps of the block chain technology which ultimately ensures that the commercial transaction between two or more entities are complete and absolute. The culmination of the smart contracts and that of the block chain technology was seen with an insurance group, Met Office[12] which through the automated algorithm made sure that the insurance claim is paid[13] to the parties when certain pre-determined conditions were fulfilled.

5. IMPACT OF CONVERGENCE OF ARBITRATION: SMART CONTRACTS AND BLOCK CHAIN TECHNOLOGY

a) The Linkage and Operation

The convergence of smart contracts, block chain technology and arbitration has opened new venues and ventures for benefits as well as difficulties. As we know, the block chain technology acts as an infrastructure for the smart contracts allowing for the software transcript to function by the application of the technology.[14] This is how another connection is established in the arbitration where the usage of smart contracts happen at the implication of block chain technology. The limits itself in the smart contracts are all the way highlighted in the block chain technology whereby the other party may fulfil its promise but there might exist a defect in it, what smart contract does is it makes the transaction as complete as soon the essential conditions are fulfilled. As a next step, the parties have to operate the arbitration clause in the agreement or the separate agreement itself for underlining the difficulty that arose through arbitration. At this point, the block chain further operates through the elementary stages of summoning or giving notice to the other party by such algorithms, moving with evidences, and the filing of the statements, etc. This point to a poignant stage while at the same time

maintaining the decision which will be human interaction by the arbitrator or arbitrators. Yet the block chain through the conveyance of the finalized award and its enforcement becomes an issue at later stage.

b) Jurisdictional Issues

As one goes to the international commercial transactions, India has with reservations taken the enforcement of Foreign Awards through its Part II of the Act, 1996. It has adopted the principles of New York Convention[15] and Geneva Convention[16] in the Act 1996. When the involvement of block chain technology takes place in arbitration, the confusion and dilemma arises as to the jurisdiction of the award because specifically in case of India, it has recognised by adoption of these conventions only certain specified States in its schedule while not others.

This causes complexities as to the final arbitral award that will be enforced[17] or not in India because of firstly, the electronic means of conduct as well as the interpretation as to the particular State involved, the seat of arbitration and the arbitrator. Going with the interconnectivity of the smart contracts and block chain technology where the arbitral clause will become automatically effective at the breach of the pre-defined conditions and terms of the contractual obligation undertaken by the parties, it will move forward along the lines of make block chain ledger of each stages of procedure that will be required during the process of the arbitration.

As a result, the method will be encrypted and secure, but at the stage of evidential importance and audit, the unjust can arise with incorrect information in the system[18] which might lead to wrong results causing further delay in justice. Since these are through already encrypted algorithms, the maximum accuracy needs to be ensured.

c) Streamlining Communication of Parties

When looking at it from a holistic point, Section 7 of the Act, 1996 presents itself with the opportunity to employ the use of block chain technology. By this method, the

agreement itself is to be constructed by the way of streamlining the parties' communications to reach an agreement or the clause. Yet the Act does not specifically employ the usage of the term block chain which acts as a hindrance to the extent and limit of the provisions of the Act itself.

One of the major impacts exists in the form of application of the parties' rights and obligations when a dispute arises. This helps in resolving the matter faster. When smart contracts are entered into, it leads to automated conclusion of the transaction. If a dispute arises, it becomes easier at two points. If the transaction is not complete at all, one can identify the chain through the block chain technology to identify where the issue arose as all the blocks are ultimately connected with each other and ledger is created of each such step. If there is any deviation, this can be easily detected.

Secondly, after the completion of the transaction itself, the block chain technology again comes into picture in particular with arbitration when the application of the award takes place[19] with its help. When one goes beyond with block chain, the digital currency issues will arise as well, though that is different issue in particular to arbitration and digital currency; yet it is closely linked to block chain technology as well with its reliability and security.

d) Right to Privacy in Digital Age

The apex court has highlighted the importance of right to privacy[20]. This has been recognized as an important human right internationally as well. But privacy becomes all the more important in the business transaction when it involves the leaking of the private sensitive information which might harm the competitive advantage of the business and will ultimately affect the competition. Thus, a higher degree of privacy is required while dealing with block chain technology so that the encrypted transaction does not get compromised or hacked into but if that happens because 100 % of accuracy is impossible; a faster rate of catching the culprit or redressed with quick removal of the information is to be there. This will ensure double reliability.

6. CONCLUSION AND SUGGESTIONS

Thus, there is no denial in the fact that the block chain technology is the present and future in the coming years. It will help in revolutionizing the business transactions, domestically as well as cross-border and trans-national transactions. So much so that it becomes necessary to understand the usage of it in different needed fields and areas. Because with its employment, there comes the risks and implications associated with its functioning. The risks need to be completely analysed and understood in reference to their impact in arbitration because arbitration has grown over the years at a faster rate. Thus, to ensure maximum capacity that is definitely a needed criterion to keep the reliability on technology as well as faster rate of enforcement. These, along with smart contracts will help in making the arbitration process much easier and will impact it in a positive way.

First and foremost need is to define the electronic record, electronic means of communication as well as the block chain technology and smart contracts within the sphere of arbitration through amendments in the required provisions. This will allow for a change as to what is inculcated and included in these particular meaning of words. Furthermore, defining the terms and conditions which will form as an essential part of the smart contract with specific regard to arbitration proceedings is necessary. This will ensure that the contours and boundaries of these are specifically defined to what is included in them and what is not. As a result, the commercial transactions through these mechanisms becomes easier which what is the real purpose of introducing block chain technology and smart contracts within the sphere of arbitration. Moving forward, there is need to understand the public and private block chain technology[21] and which is to be used for what kind of transactions. To understand the demerits and merits of both of these networks is necessary because the security of the transaction needs to be maintained. As the widely used Ethereum (open-source block chain or public)will become all the more prominent in India and around the world with wide effect, the regulation of the functioning should also be maintained. The next complication arises in regard to private networks and their algorithms to be defined clearly so as to stop the breach within by a third-

party. The private-sources and their regulations should be clearly set along with a defined standard of regulations to be maintained. Because privacy becomes a very important issue and when a large transaction by big or small organizations, companies or even governments takes place, this privacy needs to be maintained as it might lead to huge losses and distrust in the block chain technology itself.

Since arbitration is growing at a faster pace and use of block chain technology along with smart contracts will ensure maximum efficiency and effectiveness in dispute resolution; it becomes all the more pertinent to look at the wider range of difficulties and issues that might arise by such convergence. This will ensure lesser errors and scrutinize that the commercial transactions are carried out by maintaining the privacy as well the secured digital communications with greater enforceability.

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INTRODUCTION TO EIA DRAFT 2020 AND PUBLIC INVOLVEMENT

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ABSTRACT
In the present set where industries are carrying out hard projects which are leading to various environmental disasters that puts a long-lasting negative impact on nature and the people, a new draft has been put forward by the lawmakers, which looks into assessing the environmental projects through the perspective of violator. This paper analyses the key changes introduced in the Environmental Impact Assessment Draft 2020 from 2006 and its major drawback in excluding an integral part of nature and the environment, that is, the public. A democratic country can only rest when the public is the base. In the recent timeline, people who have been facing the wrath of explosions from various industrial projects have been robbed off from getting involved or voicing their concerns which might harm them. The objective would be discussing the erosion of various instituted environmental legal principles regarding public involvement by the draft whose agenda is to assess the impacts of activitiess on the environment.

KEYWORDS: *Environment Impact Assessment, Public Consultation, Environment, Post-facto Clearance, Public Participation.*

1. INTRODUCTION

The Environment Impact Assessment (EIA) Notification, 2020 is a draft brought out in the public domain by the Ministry of Environment, Forests and Climate Change (MoEFCC) in the month of March 2020.

This was a move made by the Environment Ministry, keeping in mind to bring certain changes in the Environment Impact Assessment Notification, 2006, the pre-existing legal regime for environmental management in the country for the past 14 years.[1] It invited changes during this uncontrollable pandemic, to be made by the public and comments by stakeholders within 60 days

from the date the notification is made available to the public.[2] Consultations were entertained till 11th August.[3]

Under the EIA, Central Government takes measures to protect and safeguard the environment from external harmful factors that tend to deplete the natural resources and deteriorate the quality of the environment. This protection is in the form of imposing restrictions or prohibitions on projects being undertaken by the public as well as the private sector.[4]

l **History**

Before the issuance of any of the notifications under the **Environment (Protection) Act, 1986, the evaluation** of various huge developmental projects and scrutinizing their effects on the environment was a matter of administrative concern, to be decided by the concerned environmental authorities on an administrative level and did not fall under the legislative head. The very first EIA Notification was published in the year 1994. It was from this year onwards, that the executive environment ministry performed its duty under the legislative head, hence, performing a quasi-legislative function. Then came the 2006 EIA Notification which replaced the 1994 notification, and is currently in force in India. The 2020 Notification, which is highly criticized by the public, is still in an initial state. All the above three notifications are issued by the Central Government which derives this power from theEnvironment (Protection) Act, 1986 itself, to make a framework that safeguards the environment from heavy projects. All three follow the same method- before the commencement of any work, all policies and operations undertaken, need to undergo an examination and get approval from the relevant authority that could be either the environmental ministry or a specifically constituted authority for respective states.**[5]**

Environment Impact Assessment is an operation taken up in which the effectiveness of a project undertaken is evaluated, keeping in mind its environmental impact on the socio-economic conditions, cultural effects, and human health impacts, both in an advantageous and noxious manner. United Nations Environment Program (UNEP) has defined Environment Impact Assessment as - 'a tool which determines the environmental, social, and economic impacts of a project before decision-making.'[6]

EIA helps to make environmentally sound decisions, warns about the projects' harmful effect on the environment, and identifies and adapt methods to prevent such damage.[7] Here, one estimates that whether the project and developmental activities undertook should get an Environmental Clearance (EC) certificate from the concerned authority or not, that is, the project does satisfy or not, the requirements necessary for it to be qualified as a project for beneficial purposes. The impact of the proposed new project on the environment, people, and sustainable development of the economy will be assessed and finally, the issuance of an EC will be contemplated. Through this, the state will try to maintain a harmonious balance among them.[8]

In the present scenario, there are ongoing debates concerning whether to accept this 2020 EIA Notification or not. It carries a lot of aspects which will debilitate the environment more instead of improving its quality. Public participation and involvement in assessing the impact of the project on environmental conditions are very much required. Fostering public participation in environmental decision making at every stage will help the lawmakers in coming up with more refined environmental laws. A wider room for public consultation should be always be exercised before the final decisions are taken.[9]

Though these are increasingly accepted as crucial,[10] the Draft has many democratic fall-backs such as the reduction in the time of public response, public participation which could not be efficiently handled because of the unparalleled pandemic, and public hearing which was also hampered. Our paper mainly focuses on the impact of public participation and involvement in the current EIA Draft Notification 2020, and for deepening the democratization of environmental governance in India.[11]

2. KEY CHANGES IN THE BILL

The Draft 2020 aims to make certain changes with regards to what was there in the previous draft, Environment Impact Assessment Notification 2006. People condemn that instead of strengthening the provisions in the 2006 notification, the 2020 draft seeks to worsen the already impaired environment. The draft finds its major flaw because it is not consistent with the parent act, Environment Protection Act, 1986 that gives

existence to the by-law.[12] The different aspects of the proposed new draft 2020 and key changes from the previous notification are explained below.

Environmental Clearance

The chief change of draft 2020 is one can obtain EC post operations. This means "ex-post facto approval". The project, if found detrimental to the environment and its species, violative of established principles of law, can pay some monetary fine and then resume its work. This goes against the existing legal framework of 2006 where stringent actions are taken against any violation of the environment and there is no scope for any remediation plan also.[13]

The draft has made it easy for the businesses and industrialists to obtain an EC certificate from the Environment Ministry or the concerned regulatory authority. The violation of the provisions of the Environmental Protection Act, 1986 which are probable if the proposed project is initiated, is ignored and in some cases let go of with monetary compensation. The ratio between the positive and negative impact of the operation, though taken out, still carries on even if there are more adverse impacts on the environment, population, natural resources, and economy. Many projects get approval with either light scrutiny or are let free without any scrutiny, as against the 2006 notification where the strictest form of scrutiny was implemented. Hence, the Environmental Impact Assessment is losing its importance.

There are several projects which operate without an EC. One such example is the *LG Polymers in Vishakhapatnam* which had obtained no EC before its operations and its gaseous leakage in May 2020 had a huge cost on the environment. LG Polymers acted on the Amnesty Scheme which regularises the projects that haven't obtained an EC before starting its operations. This acts as an inducement for the industrialists to escape the violation of laws by paying some monetary fine. The 2006 notification extends this scheme for six months but the 2020 draft plans to make it a permanent one.[14]

In the absence of an EC, no measures will be taken to safeguard the environment and the construction and development work will continue to harm the environment

and its citizens. If an EC is refused, irreparable harm will be caused to the environment.[15]

Public Involvement

The basic value of any democratic society is to invite and include the local people in the decision-making process at the ground-level where the decisions are going to affect their daily lives and their inputs influencing the outcome of the process.[16]

The present Draft in conflict has reduced the time to twenty days for the public to submit their written responses concerning the environmental laws and the policies as opposed to the current 2006 notification period of thirty days.[17] The environment ministry has sought public comments on the introduceddraft with a time frame of sixty days from the date of issuance amidst this severe pandemic. This has brought strong backlash from the civil society. It was very difficult on their part to get involved in this consultation process when the country was under a severe lockdown due to the pandemic. The democratic country is falling where the public involvement is put forward as a mere formality to satisfy the papers,[18] where the public is unable to exercise their rights reasonably and to the full extent. The draft tries to defeat the purpose of public consultation. Public hearing is also reduced to forty days as compared to the present forty-five days in 2006 notification. A grievance report is submitted to the Board by the local people where an industry is planned to be set up. The 2020 draft seeks to reduce this time too to forty days.[19] What was the purpose of bringing out the notification and inviting changes from the public and stakeholders when the whole world was going through a severe economic loss and will not be able to contribute to decision making!

In the case of Vikrant Tongad v. Union of India, Delhi High Court decided on 30th June 2020 the final date for submitting responses and public comments, and their opinions were extended till the 11th of August, 2020 as opposed to the earlier periods of sixty days and another one of 30th June, 2020 decided by the Ministry of Environment, Forests and Climate Change (MoEFCC).*[20]*

Projects kept under the category of B2 like irrigation, acid manufacturing, chemical fertilizers, production of halogens, biomedical waste treatment facilities, construction, elevated roads and flyovers, area development, highways or expressways are exempted from public consultation.[21] And this list of exemption goes on expanding over the years.

A citizen's power can be seen in his or her participation in the decision-making process, including everybody to decide the future of the environment by taking care of it, not destroying the natural resources instead of conserving it, and inducing significant social reform for a more affluent and better society.[22]

We are the ones who will be suffering the repercussions of the industrial activities and projects under construction if proper scrutiny of the same is not done.

Weak Compliance and Monitoring Mechanism

A strict monitoring mechanism should be adhered to in the EIA 2020 Draft, but it is not as such. The 2006 notification stated that within every six months a compliance monitoring report of the project has to be submitted to the concerned authorities but the scene is different in the case of the draft currently in conflict. It has relaxed the submission of the report to one year.[23] This helps the project leader to gain more and take more advantage out of the activities, gives them ample amount of time to submit reports of the working of the project. Instead of involving the affected communities in the panelist for monitoring and taking transparent decisions, the government institutes of national repute are rather involved. This right of citizens is also not provided in the draft.[24] Through regular monitoring of the projects, things can be kept in control and adverse impacts can be avoided which might entrench hard consequences in the nature. Poor monitoring compliance by the regulatory authorities and administrative agencies is leading to more deterioration of the environment.

Re-Categorisation Of Projects

The categorisation of projects marks the category and thereby justifying the extent to which it will be scrutinized and how the appraisal of the respective project undergoes from the appropriate authorities.[25]

The 2020 Draft has re-categorised the project into 3 groups - Category A, B1, and B2 based on their potential, social, and environmental impacts and the geographical or areal stretch of these impacts. Projects and activities which include theproduction of drugs in bulk and intermediates for several ailments were re-categorised from Category A to Category B2. But in the 2006 notification, the projects in Schedule 1 were divided into two categories- (a) Category A which requires a National level appraisal, and (b) Category B which requires a State level appraisal. National and State Level Environment Impact Assessment Authority are responsible for regulation respectively.[26] They hold a unanimous meeting for assessing the projects.

Unless specifically mentioned, it is stated under the 2020 Draft that a project listed under the B2 Category does not have to be appraised or assessed. The project proponent submits an Environment Management Plan (EMP) with other asked documents which are assessed by the Authorities before granting an Environment Permission (EP) to the specific project. But, it does not require an Environment Clearance (EC) from the Authorities. Public consultation is also not allowed for Category B2 projects. These projects have got a kind of relaxation. Hence, the impacts on the environment by these projects which come under Category B2 do not go through the same degree of scrutiny,[27] hence neither the dangers nor the concerns come to light.

Environment Clearance Process

The 2020 Draft has changed the clearance process. Category A and B2 projects comprise of a 5 stage process- (i) Scoping (ii) Preparation of EIA draft (iii) Public Consultation (iv) Preparation of Final EIA report (v) Appraisal. Category B2 projects require appraisal and are laid down before the appraisal committee. The steps are- (i) Preparation and appraisal of Environment Management Plan (ii) Verification of its completeness by the Authority appointed (iii) Grant/rejection of clearance. The projects which come under Category B2 and do not require appraisal will follow only the last two steps.[28]

Whereas, in the 2006 notification, it was a 4 stage process- (i) Screening (ii) Scoping (iii) Public hearing (iv) Appraisal. Category A projects are mandatorily required

to go through the environment clearance and there is no screening process for it. A Category B project to determine whether they belong to the B1 or B2 category will have to go through the screening project. Category B2 is exempted from EIA.[29]

Provision For Appeal Against Prior-EC

This is one of the positive changes put forth in the draft that is giving legal assistance to the local people. In the 2020 Draft, an appeal can be made to the National Green Tribunal (NGT) that provides a chance to people that they can address legal issues relating to Prior-Environment Clearance. The appeal has to be made within thirty days from the date of the decision. But neither the 1994 nor 2006 notification stated about this new concept.[30] This is a good initiative taken in the 2020 Draft as this provides for a second chance to the project proponent to review its operations. This keeps a check on the arbitrary use of powers by the Authorities.[31] National Green Tribunal considers post-facto clearance as ultra vires to its parent act which significantly makes the current draft go against an important principle laid in the quasi-judicial decision.[32]

Projects Do not Require Prior-EC

Forty projects have been relaxed from receiving a prior Environment Clearance (EC) or Environment Permission (EP). Removing sand deposits that are set after the flood in the agricultural field and manual removal from the earth for the community works do not require a prior EC or EP.[33] The new Draft also states that the construction of buildings below 150,000 square meters (the size of a small airport or stadium) does not require an assessment. The projects can be granted EC after inspection by the State level appraisal committee. But in the 2006 notification, the construction of projects below 20,000 square meters or above was exempted. The industries are slowly finding a bypass from the stringent rules which the law itself is paving for them by plundering the general principles and avoiding the purpose of the policies. The 2020 Draft provides 'strategic projects' labelled by Government, national highways, and inland waterways projects to be exempted from EIA. Such projects shall not be placed in the public domain

either.[34] The government work is completely opaque and discretionary in nature. Projects such as solar thermal power plants, making the foundation of buildings or extraction of clay and sand or digging wells, and common effluent treatment plants are exempted from prior EC or EP.

The Centre for Science and Environment in 2015 had reported that due to large amounts of carbon emission, generation of waste, and effluents let into water bodies which pollute the environment caused because of large-scale construction in India, is making the municipalities unhealthy to live in and is detrimental to the environment.[35]

3. PUBLIC INVOLVEMENT OR EXCLUSION OF PUBLIC

Post-Facto Clearance

One of the major drawbacks of the draft is the allowance of 'post-facto clearance'. The notification facets to give projects approval of environmental clearance after they have started or are in the working phase. The draft allows post-assessment of projects and giving them an environmental clearance after the project has started and if any ecological damage is found, would be advised with some remedial terms and conditions.[36]

This not only risks the environment by giving bypass to the violent project if it causes any harm but also violates the principle of 'polluter pays'. The 'principle of polluter pays' has been explained by the Hon'ble Supreme Court interpreted as an absolute liability of the violator for causing harm to the environment and the citizens. It makes the violator compensate for the citizens and restore the disintegration caused to nature.[37] Further, the allowance of post-facto clearance violates the 'precautionary principle', which is based on the idea of preventing or prohibiting something beforehand that might pose danger to the environment. The principle suggests the anticipation of harm that could be caused to the environment and using the least harmful way, with proper calculation of risk and scientific analysis.[38] The draft might allow projects which are violent in nature or can cause ecological damage after its commencement with specific measures. But this defeats the whole purpose of the environmental assessment program with an irony. The point of holding this impact assessment of

projects and development programs is to recognize and scrutinize the possible effects of the same of our nature, keeping in eye the effects on economics and health of the citizens. It allows the projects to take place without scrutinizing the violent impact on the environment and then helps it to get legalized with measures.

Recently, the Hon'ble Supreme Court has opined in a case that the environmental clearance could only be granted after proper analysis of the project, which will take place as it may lead to irreparable damage or damage to the environment, which may take many years to get revived. Therefore, environmental law and jurisprudence do not at all recognize the retrospective view of environmental clearance.[39]

In the present scenario, parts of India have been facing issues and impacts of such violent projects which have created a fear in public about the legalization of such projects through the EIA. For instance, the opencast coal mining project in DehingPatkai by the state-owned companies of Coal India Limited has been alleged as an illegal mining project in one of the elephant reserves of the Assam.[40] Due to such illegal coal mining, biodiversity and fauna face a lot of damages because of pollution. This draws the important factor to the light that the judiciary had fixated on the point of how violation of anti-pollution laws and enforcement of laws that infringes our rights is not only contributing to degrading our quality of life, rather also makes the environment unfit for the upcoming generations.[41] This becomes a gross and long-term violation of the right to life of human beings.

Public Consultation

Publics' concern and their opinions are one of the integral steps through which projects have to be passed to get to know how the project might affect the public and the citizens. It refers to the concerns of the people who might have a stake in the environment clearance project. The draft has diluted this very important procedure which is an integral part of any policy that is to be implemented in the country. It has made the consultation, the reviews, and the concerns of the public irrelevant.

The public consultation for linear projects within 100 kilometers near the Border Areas like the construction of

roads, dams, irrigation, widening of national highways, roadways, building constructions has been completely exempted. In clause 14, the projects of 'strategic consideration to the Government' are exempted from the public's knowledge. This points to the fact that now the officials might list projects as strategic ones and restrict the public opinions about the same and in clause 5(7) no information about such projects will be given or released in the public domain from scrutiny by the victims themselves. The 2006 Draft only allowed an exemption of projects related to national security and defense which is understandable and on-point for the security reasons of the nation, but the present one has stretched to blanket 'strategic projects' also. As nowhere mentioned, what type of projects will be coming under the strategic head for the government, this creates a void which may lead to the arbitrary use of the discretionary power given to the administration.

The public won't be able to put forward their opinions about these matters even if they are affected by the same. If the process is not put through the consultation of the public, the matter will be in many ways remain unsettled from the side of the public.[42] Keeping the public opinions open allows the people to shed light on concerns about the social and health impact of a proposed project. The idea behind public consultation is that it maintains transparency in a proposed project and thereby provides true information to the society about the project.[43] This takes away the free speech and expression of opinion of the maybe-affected communities about the projects.

Public Hearing Process

In this timeline, an expansion project of the aluminium smelter was to be done in Jharsuguda, Odisha. The number of individuals residing in the vicinity was about 10,000. A public meeting was conducted for a few minutes with only 90 of them involved. The High Court of Odisha left the matter to the District Magistrate for scrutiny as to fresh public hearing should be held or not.[44] To understand the various legal and scientific aspects of a project that will take place, the general people might require a good amount of time. The public hearing is a process that is to be effective so the opinions and concerns of the public are properly understood and

taken into consideration for the development constructively. The draft also minimizes the public response period to twenty days and the whole process to forty days. However, the previous draft which has thirty days period was also, in-practice, not adequate. In a case before the High Court of Gujarat, the court had focused on a minimum of thirty days for the public consultation for projects.[45] The present draft has reduced it to twenty days whereas the judiciary has practically recognized even thirty days are at least and sometimes are not enough. Including the communities in the decision-making is as important as making the process of discussion making effective and fruitful.[46] Cutting off days for such an important step is indirectly curtailing the rights of such groups from speaking up for their environmental issues. The provisions made in the newer draft nowhere seem to aim at having an effective meeting with the locals. And, the public hearing process has never been given much importance before as there are no such provisions which regard the representation of these local groups in front of the officials and in the meeting about the groups.

Further, the Rio Declaration on Environment and Development has affirmed and made the stand and views of the public a principle, very important by including the public in the decision-making process and making them aware of the projects and its foreseeable consequences.[47] The public hearing is a part of the official process since the Environmental Assessment has come into force as it is the only possible way to include the people, closely associated with the environment, who are harmed by the industrial projects and take their issues into account before the starting off the project.[48] As a signatory and a civilized nation, it is very important to adhere to the international provisions that we have ratified and incorporated the same in our impact assessment provisions. India's valuable inputs to the Rio +20 should be brought into light wherein the nation had opined that it is very important to build mechanisms that enforce the effective participation of individuals thereby making the local governments stronger.[49]

4. CONCLUSION

A newer law should always aim to be more developed

than the previous one. Even though this draft has brought several positive changes like giving the power to move to the Tribunal against prior-EC, it not only failed in filling the potholes but rather dug them deeper. Thereby, the law is divesting itself from its purpose. Even in the initial stage itself, the provisions seem to be erroneous for the environment and the communities living close to it. With the world moving faster and our country being signatories to various international treaties that make the parties obliged to protect nature, we should aim to shape our environmental laws greener and protective of the public. Removing smaller projects from people's scrutiny just by assuming that they have not harmed the public in past is not based on the correct experience. This will show far negative results in the long run. It completely detaches the law from the public.

There is a need to include a panel of experts, scientists, and specialists, to understand the essentials of environment assessment, its technical and legal aspects, keeping in mind the right to voicing opinions of the general public, especially the indigenous groups and communities. Heavy importance should be put on the utilization of proper data because of global warming. To keep track of the dynamic changes and what measures are to be taken, the draft should ask to collect data every changing season.

The draft has already eroded the rulings about post-facto clearance. The provisions must be taken down wholly and the legal point of view should be widened. The public should be granted more areas where they can move to the NGT for their issues and for getting knowledge about every project taking place in their regions. The information that is sensitive and contributes to national security can be excluded. Public consultation should be given much importance, revising and explaining the projects to the people and a special hearing period should be made stretching for thirty-forty days. This will give the public ample amount of time to understand the aspects of the project and recognize the problems they might come across, draft the same, and file in a proper manner. This stage is often skipped over the general fact that it might slow down the project establishment process. But, gathering ground-level data is as important as the scientific data collected digitally which will lead to

better decision making regarding the issues.[50]

To gather proper data from these local individuals, it is very important to incorporate provisions and give them legal representation in the public hearing processes and meetings. A concept of an independent assembly, which will carry out these meetings effectively, making the people involved in the same should be established in the law. Not only the lawmaking, but the implementation also has to be scrutinized heavily. The Expert Appraisal Committee (EAC) should be independent and free from any kind of political pollution and should consider the public's opinion while assessing the impacts of every project. It should be provided with proper time to study the public's opinions better while deciding the path of the project and should highlight the same in their project.

To maintain a healthy relationship between industrial development and environment protection, the public needs to be included and heard. Strong environmental governance putting emphasis and making the laws, more people and nature-centric is required. The preliminary draft should be extensively studied and revamped. The perspective should be changed and sustainable development should be kept in mind while shaping the laws.

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LIGHT POLLUTION: A NEED FOR LEGISLATIVE INTEND AND JUDICIAL INTERVENTION TO PROTECT THE ENVIRONMENT AND LIVING ORGANISMS

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Abstract
What considered being a greatest invention in the history turns out to be worrisome now. The developed nations started witnessing the excessive light as environmental pollutants disturbing the ecological equilibrium. The darkness is necessitous as much as the brightness in the environment, the disorganization in the dark sky has led to the beginning of Light pollution. Importantly, the problem of light pollution has not attained legal significance. There are no laws at the International, National and Regional level to address the problem of light pollution. The objective of this paper is to highlight the need for laws to address the issue of light pollution. In this regard, the paper has apportioned into three sections. The first section sets out the tone by detailing the light pollution and its impact on the living organisms. The second segment of this paper lays down a Model Lighting Ordinance that needs to stringently adopt by the states to protect the environment from the light pollution. The final portion delves into the need of recognizing to live in a light pollution free environment as a Right to life under Article 21 of the Indian Constitution.

Keywords
Artifical Lights at Night; Dark Sky; Light Pollution; Module Lighting Ordinance

I. Introduction

Light is essential for human existence. The question here arises is how much light is sufficient for human survival. For ages the man survived without artificial lights. Initially, the broad day sunlight was utilized by the man in the daytime and in the night time he lighted up his home with the help of fire and wood. That light was controllable and at the same time dangerous. Later he invented few controlled lighting set ups including oil lamps, gas lamps and candles but the luminous efficacy

was low.[1] That's the reason why only certain important buildings and places were illuminated. With the invention of electric bulb in the 19th century a new radical thinking about the night light began. Now the electric bulbs were considered as significant and powerful as much as the sun. Lighting up one's home with these electric bulbs were considered as a cultural practice and pride. Sooner, the entire city was illuminated; you could see every building, street and public places being lighted up.[2] Too much of anything is good for nothing, lately it was observed that the over lighting affects the environment. Over lighting is one of the most underestimated environment pollutants. This led to the emergence of a newer problem and challenge to the Nations, called as the "Light Pollution".

Light pollution, is the pollution caused due to the excessive brightening of the night sky by the artificial lights. Initially it was the professionals and amateur astronauts who founded the unprecedented effects of the light pollution in the sky.[3] They observed that the excessive sky glow causes the absence of the dark sky and it hinders the ability to view the stars cape above. As the problem worsened constellation of stars vanished and most importantly it caused a hindrance to the astronomical research and observation. Few decades later, the Environmentalist started addressing this issue as one of the major environmental crisis and challenges of the 21st century. The effects of the light pollution are hazardous to the human, animals and environment. It affects the circadian rhythm of the human beings, birds and animals.[4] In the case of birds and animals it's even more dangerous, as they do not have the possibility to escape light pollution.

Undoubtedly, the importance for environmental protection has adequately developed among the international communities. The Environmental education among the masses is progressing and international cooperation for conserving and protecting the environment is governed by the International environmental laws.[5] The Nations are towards a phase called sustainable development and efforts at the international and regionals levels are made to attain this goal.[6] At this transition of the society, a newer challenge emerges before the Nations, What was invented to ease

the life of the human communities now has disrupted the ecological balance.

II. Light Pollution: An overview of the International Dark Sky Association definition and categorization

However, this term does not have a concrete or a unanimous global definition. The International Dark Sky Association has defined it as “"any adverse effect of artificial light including sky glow, glare, light trespass, light clutter, decreased visibility at night, and energy waste."[7] The metropolises contribute huge to the light pollution. The excessive lights used in the buildings, billboards, streets luminaries and similar lighting installations turned on during the night time create excessive unwanted lights.[8] The term light pollution is broader in its ambit and all kinds of light pollution are considered to be unappealing, unwanted or over illuminous in nature. Significantly, the International Dark Sky Association has identified light pollution into certain categories: Light trespass, glare, clutter and sky glow.[9]

Light Trespass, it occurs when an unwanted light enters into your premises. It could be some light entering through your windows and causing you disturbance. The question is whether the light trespass violates the fundamental right enshrined in Article 21 of the Indian Constitution.[10] Mere light is not the problem, over illumination accounts to an issue. Most of the metropolises are lighted too much than the required level. There are no more nights in countries like Singapore, they nights are brighter than the day.[11] It also creates inequality in sharing of the energy resources.[12] There are still places in the world lacking proper lighting facilities. Over illumination is mere waste of energy resources which are distributed unevenly.[13]

The Glare is excessive brightness that causes visual discomfort. The light is so bright and scattered that it directly affects the eyes. These glares can cause discomfort, disability and blindness to the eyes. Glare is very common in the city traffics; there are no proper rules and regulations for fixing the standard for the lights utilized in the vehicles by the automobile industries. The Clutter refers to excessive unorganised grouping of lights. Often, this can be seen in the roads, where the streets

lights are designed poorly and it collides with the vehicle or traffic lights. These clutters create a lot of confusion and distraction and can lead to unwanted accidents. Sky glow refers to the "glow" effect that can be seen in over populated areas. It is the combination of all light reflected from what it has illuminated escaping up into the sky and from all of the badly directed light in that area that also escapes into the sky, being scattered by the atmosphere back toward the ground.

III. The hazardous impact of light pollution and its repercussion on Humans and Animals

Visual discomfort and disability is one of the known effects of light pollution on human beings. There are other barely noticeable consequences of the light pollution. It affects the inner clock present in the living organism called as the circadian rhythm.[14] The circadian rhythm regulates the production of certain hormones in the human body at specific duration in the day time or like the process of photosynthesis in the plants.[15] The inner clocks that determine the circadian rhythm gets manipulated by the different levels of brightness produced in the form of light pollution and it leads to decrease the secretion of a hormone called Melatonin**.[16]**The Melatonin hormone in the living organism is responsible for synchronizing the rhythm between the day and night. As mentioned above, it adjusts the circadian clock in the cells, tissues and organism and regulates other processes like the reproduction. Apart from this modern medical studies have shown that the decrease in secretion of the melatonin leads to breast cancer among women.[17] The women working in late nights shifts in the Industries have been vulnerable and victim of this hormonal secretion dysfunction**.[18]**

In contrast to the humans the animals especially the birds cannot escape light pollution. For thousands of years the animals and birds have relied upon the Earths predictable rhythm of day and night in their DNA.[19] The excessive light pollution resulted by the unneeded human advancement and development has disrupted the biological rhythm in these animals. The life sustaining activities of the plants and animals like photosynthesis, reproduction, sleep and protecting it from the predators

are dependent on the Earths light and dark rhythm.[20] One of the best example of this process are sea turtles, the sea turtles moves out of the ocean to the shore for some time and get backs to the ocean, it is a biological process. Due to the excessive lighting in the sky or the navigational ability of the sea turtle gets fragile; it causes visual discomfort and impairment to the sea turtles. The studies show that thousands and thousands of sea turtle are a victim to this man-made disaster.[21]

Energy waste is another detrimental effect of light pollution in the energy sector. Still there are small towns in countries, deprived of adequate light facilities in homes, schools and hospitals.[22]The high rate of emission of light pollution in metropolises is absolute recklessness. The poorly designed outdoor lightings not only cause sky glow but also a sheer waste of depleting energy resources. Wasting energy resources in this way has huge economic and environmental consequences. Lights left over nights while we are sleeping like lights in the office building, malls, bill boards and hoardings leads to wastage of energy resources and also contributes huge to the sky glow. That does not mean dark sky is associated with no lighting, it is associated with the adequate level of lighting in the cities or neighbourhoods. It also increases the carbon footprints; there has been an increasing level of carbon emissions in the atmosphere by the states.[23] Light pollution increases the carbon emissions to a larger extent, it contributes mainly to the climate change and it increases our dependency on the energy.[24]

IV. Model Lighting Ordinance: A recommendation to resolve the light pollution

In the 1980's the researcher's and astronauts identified light pollution and later a lot of organisations like the International Dark Sky Association advocated saving the Dark sky and combating against the issue. Almost even after four decades, there are no significant legislations for monitoring and reducing the light pollution at an International level. Notably, if we see the other side of the problem, most of the corporates use these lights as a deceiving tool to lure their customers and audiences. Malls, buildings, motels, hotels are illuminated than the required standards. One of the main reasons for the

issue of light pollution is that it lacks codes, rules, regulations, standards in terms of maintaining the lighting standards. Further, this is taken as an advantage by these corporates and a huge pollution is emitted. Fewer countries like the USA and France have passed light pollution controlling rules.[25] However, the efficacy level of these laws is below the required and precautionary standards.[26] There are no binding obligations in these laws and they considerably vary in the language, technical quality and stringency. A uniform law for the metro cities should be promoted. Much of these laws are confusing for the engineers, designers and officials to adhere. In reducing the light pollution the contribution of the engineers and designers are more effective than the public. The lack of a clear and common basis prevents the development of standards and achieving the goal in fixed time scale.

The International Dark Sky Association and Illuminating Society of North America (IES) have come with a Model Lighting Ordinance (MLO). Indian researchers have less exposed to the harmful effects of the light pollution and India has not even recognized light pollution as an environmental pollution and a modern time threat to the humans and animal. The Model Lighting ordinance must also be adopted in India and the states should implement it in a stringent manner. Light pollution in India is an unwanted and unwise problem as a large populationof India does not have access to the basic light requirements at their homes, workplace, hospitals and schools.[27] India should not afford to waste its energy resources for the reasons of improper and inefficient town planning. This Model Lighting ordinance would help India to build a path towards sustainable light and energy management.[28] The MLO aims strategically to reduce the emissions; the following ways should be followed by India.

Creation of lighting zones- Different lighting zones can be created having consideration with the needs of that locality. Ultimately, this would cut off the unwanted lights and promote sustainable energy. The MLO have recommended five lighting zones namely LZ-O, LZ-1, LZ-3, LZ-4 and LZ-5.[29] The LZ-0 should be recommended in areas where permanent lighting is not required and when used limited lighting is enough for convenience purposes.

This includes the wildlife forest, wilderness areas, underdeveloped rural open space, astronautical laboratories and significant places where protection of dark environment is needed. This is a twofold strategy, it prevents the light pollution and it protects the nocturnal species and the amphibians.[30] The LZ-1 is recommended to areas that desire low ambient lighting levels it includes the rural areas and areas with low density population. The rural areas lack the proper light quality standards and it causes harmful effects the huge population of birds and animals in the courtsides. In the cities this zone should be adopted among single and two family residential buildings. It may also include the public park and other places.[31] The LZ-2 is recommended to areas with moderate ambient lighting levels. It includes multi-family residential uses, industrial uses, recreational centres, schools, hospitals, hotels and motels. The LZ- 3 is recommended to areas with moderately high lighting levels. It includes the commercial corridors, high intensity sub urban commercial areas, shipping and rail yards with high night time activity, high use recreational fields and playing fields.[32] The LZ-4 is recommended to areas with very high ambient lighting levels. It is used for only special purposes and is not appropriate for the cities. Like the heavy industrial areas. Apart from this dimming of lights should be at every lighting zone.[33]

There are certain general requirements that apply to the states in order to make the ordinance effective. The Ordinance should be given retrospective effect, when and where required remodelling and repairing of the existing lights should be done. For this, the states shall make this model ordinance as a guide and make it compulsory to the other municipal jurisdictions called as the adopting jurisdictions.[34] The adopting jurisdiction should use their existing policies and define what constitutes public monuments, temporary and/or permanent lighting. The community and traditional attitudes of the population should be taken into account in regulating seasonal lightings. A country like India has different occasions and festivals because of its diversity. There are festivals which emit a lot of light and lot of smoke, all this precedent should be considered to make the practical implementation the ordinance.

Additionally the states also requires a Street light

ordinances and stricter implementation of this ordinance. Across the world, there are no rules to monitor the street light limits and it leads to severe pollution. Dimming of the street lights is a wiser solution as it will equip with the required level of lighting and cut off the unnecessary light. One more crucial step would be repairing of the existing lights placed in the public places. Especially in India,the street lights are poorly designed and maintained, replacing of all them will require huge budget which can be managed and substituted with repairing the old and unmaintained lights.

Additionally, introducing the penal provisions will be helpful in effective implementation of the laws. The light pollution is a serious environmental pollutant and awareness should be created among the people. Awareness should be created with the partnership of the print and visual media.[35] The public places such as bus stands, railway stations, airports, cinema halls and any other place of public importance. The awareness should be created so that the general public can contribute in mitigating the pollution. The next step should be implementing penal provisions for the violators. Even after creating adequate awareness among the public and other industrial domains, the violation should not be permissible. There should stringent fines to an extent of cancellation of license to the industrial units. The wrongdoers among the public should be charged under the provisions of the **public** nuisance.[36]

V. Right to clean environment includes living in light pollution free environment: Article 21 of the Indian Constitution

The concept of Environmental protection and Right to live in a clean environment is relatively not a newer phenomenon. The United Nations Conference on the Human Environment[37] and the subsequent United Nation conferences like the Rio Declaration[38], The Johannesburg Declaration[39] and Rio +20[40] has given signification global importance to protect the Environment, managing the natural resources, creating environmental education, promoting sustainable development, building global partnership to conserve and protect the environment and to make effective

legislations to address the newer environmental issues. As the human and environment are co extensive, the rights pertaining to them are correlative and parallel. The subject of Environmental Rights and Human Rights are correlated. A citizen has both a right and duty towards the environment, protecting the natural environment is the duty vested on him by the state and the states are duty bound to provide a clean environment to its citizen.[41]

In the recent years the Right to life under Article 21 of Indian constitution has widened its scope and ambit. The Right to live in a clean and pollution free environment is a fundamental Right guaranteed under Article 21[42]. However, the judicial precedents have acknowledged the water and air pollution as one of the most harmful pollutants for the human environment. There are other modern day pollutions which are yet to receive judicial acknowledgments The Noise pollution is one such pollution, however the noise pollution has rules to maintain the decibel standards pertaining to different zones.[43] But, the Light pollution in India though being very prominent in the metro cities like the Mumbai, and Bengaluru has not received any legal recognition to resolve the issue. This urges the need to enacting the light pollutions in India. Though, it is a developing country, the metropolises have developed to global standards and a plethora of environmental issues and concerns are ongoing these areas. Implementing light pollution laws in the cities in India at this phase will be precautionary step. The States need to prevent the light pollution before it appears at a massive scale and become severe environmental crises.

VI. Conclusion

This paper has revealed the need of light pollution laws at International, National and Regional level. The challenge, however, is to comply the states with these laws. The States must ensure drafting of light pollutions and incorporate those laws in true substance and spirit. The states should also establish pollution control boards and authorities at various levels to improve and maintain the efficacy of those laws. Not considering or being negligent about the increasing light pollution will create

monstrous ecological imbalance by effecting the environment and to all the living organisms on the earth. In reality the states are parting away from the sustainable development goals and encouraging carbon emission, energy depletion, exploitation of natural resources disguised in the name of development and progress.

Through this doctrinal study, the author is recommending the States to recognize light pollution as one of the hazardous pollutant and take immediate measures to resolve the issue. By a way of creating awareness among the people, enacting laws, establishing pollution control boards at different levels, enforcing the laws with penalties will be practically easier for India to address the Light pollution.

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[36] Indian Penal Code, Section 268, 1860, Act No. 10 of 1860.
[37] Supra 5.
[38] Supra 6.
[39] The World Summit on Sustainable Development, 2002, UN Docs (A/CONF.199/20).
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[42] Consumer education and research forum v. Union of India., AIR 2001 SC 1948.

[43] The Noise Pollution (Regulation and Control) Rules 2000, S.O. 123(E), dated 14.2.2000 (India).

THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019 AND THE CONTINUED PROTESTS: WHAT CHANGES ARE REQUIRED?

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ABSTRACT: ***The Unacknowledged Community***
India, a nation that follows democracy as the root for governance, focuses that every citizen in the country is given equal rights and that they are provided justice through the means of the judiciary. If we read the laws mentioned in the Constitution of India, it can be cleared that the regulations are framed in a gender-neutral format. Indeed, even after taking these precautions, there were certain marginalized communities that were affected and were isolated from the society. The transgender community in India has faced and is still facing inequality in comparison to the binary genders.

In antiquated Hindu sacred writings, the transgender community were known as 'hijra' in India and they were referred to as 'demigods' as it is written in different Hindu scriptures, yet with time, regard was lost and presently they need to carry on with a clandestine life (Tripathi 2019).[1] Indian culture has held this strain, on one hand that they needed their endowments in various services and then again, they excluded them in everyday life, driving them into prostitution and begging in the city (Pathak 2019).[2] It was a direct result of this; the community became alienated from the rest of the nation.

With time, people started to change their ideologies by becoming more understanding of the fact that there can be exceptions to the norms that the society mentions. Leaders wanted to make the transgender community more visible and therefore, certain bills were introduced in the Parliament. Deliberations and discussions took place, and finally, the Transgender Persons (Protection of Rights) Act, 2019 came into being. The authors intend to discuss the objectives and controversies related to the Act.

History of Legislations Presented for the Transgender Community:

The transgender community are also valuable citizens of

the country and they should be given the due respect and privileges as everyone else. Legislations for the community have always been in deliberations in the Parliament. There were several bills that were initiated in the lower house, but the leaders did not discuss them. It all started when the Supreme Court of India brought out a judgment in the case of *NALSA v. Union of India*[3] in April 2014, where it was stated that the transgender people, eunuchs and hijras will be given the title of the 'third gender'.[4] They would not be required to classify themselves according to the binary gender norms. The judgment provided a legal right to them to determine their 'self-identified' gender (Kolluru 2020).[5] It also asked the Central and State Government to ensure reservations being given to their community in places of education and public employment. There were guidelines to maintain proper health care services that looked after the HIV related treatment especially for the transgender group. Unfortunately, despite the fact that the Court requested the execution of these guidelines, a lot of States did not execute the guidelines and consequently the community could not take benefits of the rights given to them.

Tiruchi Siva, a Member of Parliament from the DravidaMunnetraKazagham party, tried to introduce a bill in 2014. It was known as 'Transgender Persons Bill, 2014' and it covered various aspects that would have helped the people belonging to the same group.[6] It provided certain important points that could raise their status. These were:

1. It provided for 2% of reservation in the educational institutions in all levels as well as reservation in the employment sector was provided with the help of government aid.
2. It mentioned that proper punishment to be given in cases of sexual harassment of the transgender persons. In the Indian Penal Code, it is stated that an individual will be imprisoned for up to 7 years or more in cases of sexual harassment (Sehgal 2021).[7]

These were the major amendments along with the other recommendations that should have been provided to the people. This Bill was introduced by a private member and not the government, therefore the party politics

intervened in its discussion and the LokSabha did not pass it. Even though it was just a Bill in deliberation, it was applauded by the Transgender Community because of the various advantages it was giving it to them. The equal treatment with reservation and the formation of public toilets for them were few of the reasons for its popularity. The Government decided to introduce a new bill called Transgender Persons Bill in 2016.[8] Ministers said that since the Government has taken out a new Bill on the same topic then the private member will have to withdraw his Bill due to Order of Precedence. It states that the Government will discuss its own Bill first before any other Bill is passed. After the Bill was passed in 2016, it was condemned as it stated the definition of 'transgenders' in the wrong approach. Finally, in 2019 a new bill for transgender persons was introduced (Lalwani 2018).[9]

Transgender Persons (Protection of Rights) Act, 2019 and the Controversies Related to It:

This bill was introduced in the Parliament on 19 July 2019 on behalf of the Ministry of Social Justice and Empowerment by Mr. ThaawarchandGhelot. The RajyaSabha also agreed to the Bill and therefore it was passed from there on 26 November 2019, then the President also gave his approval making the Bill an Act.[10] This Act mentions various provisions in favor of the Transgender Community which are:

1. It provides a meaning as to who all will come under the category of 'transgender'.
2. There will be no discrimination done towards them in places of education institutions, public employment, public places, healthcare, etc.
3. They will have the right to be included in their family households.
4. They are given the right to 'self-identify' themselves as mentioned in the NALSA judgment.
5. A National Council for Transgender Persons will be created so that it can monitor and advise on the schemes and policies created for the protection of their rights.
6. They will be required to provide a certificate of proof by the District Magistrate stating that they belong to the transgender group.

7. It provides punishment for offences against the transgender people based on sexual harassment. The minimum time a person can be imprisoned is 6 months and maximum limit is given as 2 years (PRS 2019).[11]

These provisions are made to keep the community safe and inclusive, but the Government failed to understand this particular perspective and they saw it from the common gender norms that the society accepts. It shows that the citizens of the country do not have the right to claim their own bodies and it will only see it from a generalized manner, just how the Government wants to show (EPW 2019).[12] This Act has gathered many controversies because of the biased behavior of the authorities.

A transgender individual needed to complete their clinical exam to prove their identity to the District Magistrate. This is embarrassing since, supposing that they don't complete it, they won't be qualified for the rights they are qualified for. The public authority would not ask an ordinary young lady or a boy to demonstrate their personality to the general public, why is this segregation done here? They will be available to despise from the general public and conceivable provocation should likewise be possible towards them. It is significant that a change is made in this matter.

Another issue is that there is no reservation provided for the people belonging to the transgender group. Even if they get selected for an interview in an educational institution, there is a high possibility that a person who is a male or a female is selected. It did not adhere to the guidelines that were given the court in the NALSA case and therefore, a small percentage of reservation should be provided.

Finally, the punishment for offenses, for example, assault and other sexual maltreatment offenses for transgender identified in the act is of maximum 2 years whereas in the IPC it is mentioned that if a person is sexually harassed then the imprisonment will be of minimum 7 years and maximum it is unlimited. Again, a discrimination is made by reducing the punishment in case of the community (Tarnekar 2020, Verma 2020).[13]

The government has not provided any explanations for such biased provisions and it fails to listen to the people

from the community, about their demands and what would protect them. There are issues in matters related to public toilets when it comes to the transgender people. Even there is no policy in regard to the adoption of children for transgender. People from the community say that there is still a long road that is to be covered because the perception of the society never changes.

Propositions Required for the Transgender Persons:

Certain solutions that are needed to keep this group as a priority in front of the Government.

The proper arrangement is to give a reservation to transgender in government employment opportunities. On the off chance that these people secure monetary strength, it will be the initial step to their government assistance. Along with that educational institutions should also provide reservations so that they can study and appear for the Government exams like UPSC, NDA, etc. They can aspire to become self-sufficient so that the society would not look down on them. Some of the famous people from the community who studied and became lawyer, lecturer and news anchor are: Sathyashri Sharmila, Dr. Manabi Bandopadhyay and Padmini Prakash respectively (Saavriti 2020).[14]

There is a need to make changes in the present documentation process where the authorities should for a proof or certificate from a transgender individual. It is highly humiliating and brings them in the danger of discrimination. The proof method should be removed and instead of that a simple measure of putting a third gender option can also be seen as progress. Proper measures and procedures for surgeries should also be laid down. A consensus or suggestion should be taken from the Transgender Community as to how they would like to identify themselves.

The new generation should be guided from the beginning to respect the trans community. This can be achieved by organizing sensitization drives and awareness camps in schools. Students should also be able to understand the difference between sexuality and gender. This will also help in reducing the taboo that is present in our society as well as reduce the chances of people becoming homophobic and transphobic.

There is a requirement for a law that forces stringent punishment for oppression of transgenders. The

discipline should set a model for other people. People should respect everybody equally and that should be instilled through the punishment (Singh 2020).[15]

If we compare the society from 1700s and 1900s to the 21st century, it can be specified that individuals have broaden their thought process. They are ready to understand the perspective of other people as well. A country like India, which is known for patriarchy and conservatism, has made progress when it comes to deliberate about the non-binary people (Harvard Divinity School 2018).[16] It is necessary that the Government and the Supreme Court make regulations for the protection of the third gender so they can legal security.

The people belonging to the community are furious because the Act humiliates them by asking for a certificate of identification. They argue that people from the community were not asked about their needs rather, this Act is being forced on them. A trending hashtag got started on twitter called '#stoptransbill2019' by the people to show their disagreement on the Act.

Jessica Hinchy, who is a historian tweeted that the Transgender Bill 2019 will act like a barrier for transgender people as they will not be able to express themselves even if they want to. It will be like colonial rule but for the Hijras as it was criminalized at that time.[17]*MeeraSanghamitra* argued that the community has done everything to protect themselves but now it is time for allies to help who can defend for the rights of the Transgenders.[18]*Megh*, an HR Consultant from Bengaluru claimed that this Bill is violating their basic rights and that everybody has the right to speak. Protesting for the Bill is under their rights and they should not be denied of them (R. 2019).[19]

There were many authors who provided their opinions and suggestions through many articles and interviews. Ajita Banerjee, in an article written for the Indian Express states her dissatisfaction by saying that the Government has failed to provide the criteria for what constitutes as discrimination against the Transgender community. She adds that the Bill has made mockery of the Transgender Persons' lives and let down the people who have fought for their rights for decades (Banerjee 2019).[20]

Transgender Kanmani Ray, in a video by Newslaundry

states that the language of the Act reinforces the gender binary norms.[21] The Act is also discriminating towards the people of the community when it asks for a certificate of identification from them (Tarshi 2020).[22] She also mentions that the Government should have asked the people first for their needs and according to that they should have made regulations. She adds that gender is a spectrum and people should have the right to self-identification in terms of it.

It is important that we make India a safe place for all types of individuals to live in. The country should gather knowledge from different nations as well to have brief about the rights of the transgender people. It will take time to change the notions of people in a conformist society but constant changes in protecting the LGBTQ+ community can help change the nation.

Conclusion:

The Transgender Persons (Protection of Rights) Act, 2019 is considered as bane for the community. Even though it provides for facilities for those people but at the same time it also discriminates against them. It does not clarify certain aspects which are important to the group like adoption, surgeries, reservations, etc. It is important that the Government should make amendments in the said Act to benefit the people belonging to the Transgender Community. A proper way for this would be if there are people from the Transgender Community in the Parliament. They will be able to put forth their grievances through their representative. Government can also ask them to fill in yearly surveys, stating the pros and cons of the Bill. India, as a democracy runs to gather votes from people, and it has been two years that they took action for them. Even during the Covid 19 Pandemic, the community was not offered help. They had to struggle to take treatments. Our Constitution gives us the Right to Life and Right to Live with Human Dignity, therefore the Government should aim at guarding those rights for all genders.

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REGISTRATION OF A NOT-FOR PROFIT ASSOCIATION AS A COMPANY: A COMPARATIVE ANALYSIS WITH OTHER AVAILABLE OPTIONS

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Abstract
3.3 million NGOs registered in India, implying one NGO for every 400 Indian citizens [1]. With the number of NGOs surpassing hospital beds and schools in India, it is imperative to understand the legal structures an NGO can opt into. This paper begins by analysing the existing literature review and the corresponding research gap. Building on this, the research seeks to explore registration of not-for-profit organizations as a company under Section 8 of the Companies Act, 2013 primarily; followed by other options ranging from trusts, societies (co-operative, multi-state co-operative), trade unions and foundations. A comparative analysis of the key options is sought along with its advantages and disadvantages. The contemporary trends are highlighted with legal framework available in USA. Forming a base with doctrinal data, empirical research is conducted to get insight into the practical usages. While concluding, the paper provides suggestions based on the research findings.

Keywords: NGO, company, Section 8, trust, society

Literature Review & Research Gap

SN	Research Paper	Literature Review	Research Gap
1	The Hidden Universe of Non-Profit Organisations in India - Rajesh Tandon[2]	Exploring a Supreme Court case, the author analyses the legal framework of NGOs. With various definitions, the paper builds a structure to legal	The scope of the paper is limited as it neglects the legal requirements of registration and incorporation. Additionally, the work merely Look at already existing

		recognition provided through societies, trusts, cooperative societies, trade unions and companies. Through statistics, it provides insight into the framework and accountability in the legal sphere. Diverting from other papers, it looks at religious entities in India also as NPOs.	facts, failing tocover analysis and recommendationsfor existing frameworks.
2	Analysis of Current Legal Framework for Civil Society in India - NoshirDadrawala[3]	On a wide range of issues, the paper covers: general laws, establishment requirement registration, incorporation, barriers and state supervision with regard to NGOs. The paper is set apart by its research in foreign NGOs set up in India.	Despite covering a range of objectives surrounding NGOs it merely skims through them, lacking in-depth research. Dominantly it loses sight of the contemporary trend of NGO-business partnerships for CSR.
3	An Opinion Study on NGO-Business Partnership for a Better	The author looks at the emerging trends with NGO partnering with business corporations to	Lacking a basis for the legal viewpoint of registration, structure, form and establishment

	Corporate Social Responsibility - NampallySneha and S Rachel[4]	fulfil the requirement of Corporate Social Responsibility provided in the new Companies Act, 2013. It explores the challenges, needs and effectiveness of this set-up.	of this new set-up, it fails to analyze the legal status, compliance and authority of this arrangement.

Issues

1. To assess registration of NPOs as a company
2. To analyze the legal recognition, incorporation, registration and establishment of NPO under its various structures
3. To provide a comparative analysis of the various options (company, trust, society) available to NGOs
4. To highlight in brief the new trends of NGO-business partnership under Companies Act
5. To seek contrast between legal framework for NGO forms in USA

NGO as a Company

An NGO is typically a not-for-profit group found on regional, national or international forums aiming to address issues for public good[5]. Every citizen in India is guaranteed the right to form association and union under Article 19(1)(c) under the Constitution[6]. NPO registered as a company is dealt with under the Indian Companies Act, 2013, specifically Section 8[7]. It basically permits for-profit structures to obtain the not-for-profit form, which indulges in promoting art, science, religion, commerce, charity, environment or any such public objectives[8]. The entity may not pay dividend to its members, instead use the income or profits generated for public objectives[9]. The law requires at least 3 people to form this company. Application needs to be made to the Regional Director of the Company Law Board by the founder/promoter. For internal governance, it has members and is managed by directors/governing council/managing committee elected by the members[10]. The company may be dissolved and if so, the debts and

liabilities are settled, while the leftover funds and properties of the company may not be distributed among the members; rather transferred or amalgamated with a Section 8 company with similar objectives[11]. The central government can revoke the license if the company violates the provisions, indulges in fraudulent manner or violates any objectives[12]. In case of default, the company is liable between 10 lakhs to 1 crore; and the director if liable imprisoned up to 3 years, and/or fine from 25,000 up to 25 lakhs[13].

Section 8 company is different from other companies[14]-

1. Appointment of Company secretary not required[15]
2. Payment of up share capital done away with[16]
3. 14 days prior minimum notice rather than 21 days[17]
4. Minutes of meeting to be sent within 30 days[18]
5. Financial statement to be provided within 14 days to shareholders
6. Application and qualification of director not applicable[19]. But at least 1 director needs to reside in India for at least 182 days prior[20]; and non-executive director liability[21].
7. Quorum - 8 members or 25% instead of 1/3rd or at least 2 directors
8. No provision for nomination or remuneration
9. Disclosure by director when transaction more than 1 lakh

Other Legal Options

1. **Trust** - Basically incorporated for addressing poverty, health, recreation facilities, education, all in lines with public benefit and social welfare (exception - religious teaching and worship). A public charity trust needs to be registered with the Charity Commissioner having jurisdiction. The Indian Trusts Act, 1882 exists but is limited in the aspect of NGO registration as a trust. Individual state specific Public Trusts Acts look into this regime.
2. **Societies** - Registered under the Society of Registration Act, 1860, it provides establishment of a democratic form of organization. It has broad membership where individual members can elect a body to manage and govern the affairs of the body. Members with voting rights can demand accountability and reports for inspection. The society is required to annually file a list

of names and details of the governing body. Section 20 of the Act provides for societies which can be registered[22]:

1. Charitable societies
2. Purpose to promote literature, fine art, science, or any such educational lines
3. Public art museums or galleries

3. **Trade Union** - Employers of the NGO can form trade unions and shall be governed by the Trade Union Act, 1926. Any 7 people can apply for the registration of it and it typically governs the combination relations between employer and employees, or between employees/employers exclusively.
4. **Co-operative societies** - Based on certain set principles, this form is usually taken up to support the economic status of the marginalized. It provides for an equal opportunity of shareholding and decision making to every member. They are established to eliminate the middleman in the existing chain.
5. **Multi-State Co-operative society** - When a co-operative societies' objective spreads over a number of states, which is governed by the Multi-State Co-operative Societies Act, 2002. For registration of individuals, the application needs to be signed by at least 50 persons of each state; while for societies, by representatives of at least 5 societies in different states.
6. **Foundation (Independent, Cooperative, Community/Public)** - NGO which looks into charitable activities towards common aim which is generally created by endowments, making grants with income earned and investment from endowments.

Parameter	Trust	Society	Company
Complexity of formation	Easy	Simple	Bit difficult
Document	Trust deed	Memorandum of Association	Memorandum of Association
Jurisdiction	Charity Commissioner	Registrar of Societies	Registrar of Companies
Law	State Trust Act	Societies Registration Act, 1860	Indian Companies Act, 2013
Objective	Social benefit + charity	Literary, charity, scientific, research	Non-profit activity
Minimum and maximum members	2, no limit	7, no limit	7, no limit
Stamp Duty	4% of trust property value	None	None
Management	Trustees	Governing body	BOD + Managing committee
Succession	Appointment	Election	Appointment
Legal status	Limited	Limited	Full
Transfer Membership	No	Easy	Free desire
Statutory regulation	Nominal	Limited	Exhaustive
Payment	As in trust deed	Not restricted	As approved by registrar and company
Dissolution by take over	Possible	Possible	Difficult + risky

Comparison to USA

NPOs in the USA are set up with similar purposes of charity, religion, literature, education and public wellbeing[25]. The Internal Revenue Code forms the federal code for tax exemptions similar to the India's Income Tax Act, 1961.

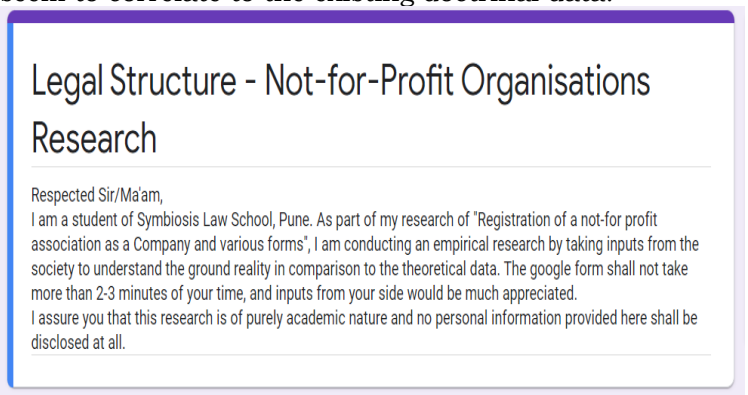
The legal structure options available to NPOs there are: public charitable/religious organisations/trust, social welfare organization, labor union, trade/professional organisations, business foundations, unincorporated association, limited liability company (LLC) and veteran organisations. Conditions for NPOs to be registered as LLC–

1. Based on at least 1 objective of tax exemptions[26]

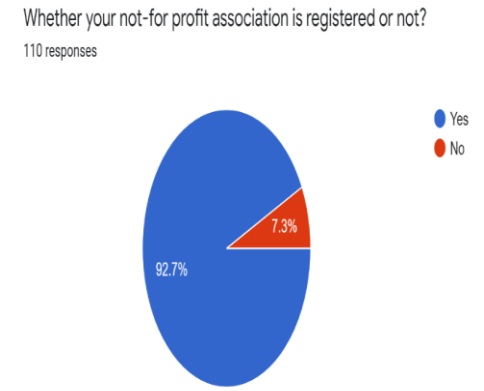
2. Operates on charitable purposes
3. Members are from government, 501(c)(3) of IRC or wholly owned state agencies.
4. Prohibit transfer of member interest to another non-government unit
5. If dissolved, assets shall be aimed towards charitable purposes
6. LLC shall not merge, convert or become for-profit
7. Not distribute interests to members who have left the LLC

Empirical Research

A questionnaire was prepared and circulated via google form to not-for-profit associations across the nation. The survey received 110 respondents, who were questioned about their association being registered/not, reasons for the same, structure of NGO and awareness about the corresponding legal framework. The results of the empirical research are displayed below and after analysis seem to correlate to the existing doctrinal data.


Legal Structure - Not-for-Profit Organisations Research

Respected Sir/Ma'am,
I am a student of Symbiosis Law School, Pune. As part of my research of "Registration of a not-for profit association as a Company and various forms", I am conducting an empirical research by taking inputs from the society to understand the ground reality in comparison to the theoretical data. The google form shall not take more than 2-3 minutes of your time, and inputs from your side would be much appreciated.
I assure you that this research is of purely academic nature and no personal information provided here shall be disclosed at all.


Whether your not-for profit association is registered or not?
110 responses
Yes
No
7.3%
92.7%

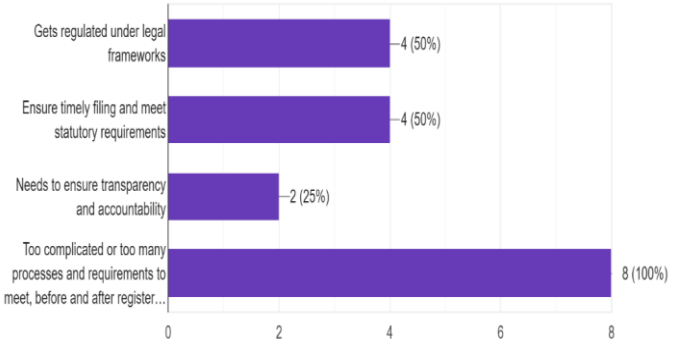

If yes, the reasons why you choose to have the not-for profit association registered?
102 responses
Credibility to organisation
38 (37.3%)
Strengthen identity considering...
56 (54.9%)
Increase opportunity for collabo...
45 (44.1%)
Legal status to interact with the...
40 (39.2%)
Own bank account and financia...
45 (44.1%)
Limited liability of membership
37 (36.3%)
Eligibility for funds and financial...
49 (48%)
Tax exemptions, concessions a...
58 (56.9%)
Possibility of longevity and cont...
27 (26.5%)
0
20
40
60

If yes, the reasons why you choose to have the not-for profit association registered?

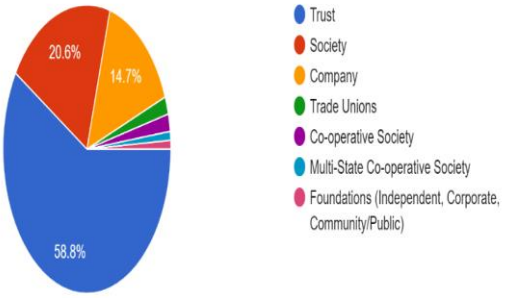
- [ ] Credibility to organisation
- [ ] Strengthen identity considering its goals and missions
- [ ] Increase opportunity for collaboration
- [ ] Legal status to interact with the government
- [ ] Own bank account and financial transactions
- [ ] Limited liability of membership
- [ ] Eligibility for funds and financial assistance
- [ ] Tax exemptions, concessions and related assistance
- [ ] Possibility of longevity and continuity for organization
- [ ] Other...

If no, the reasons why you choose to not have the not-for profit association registered?

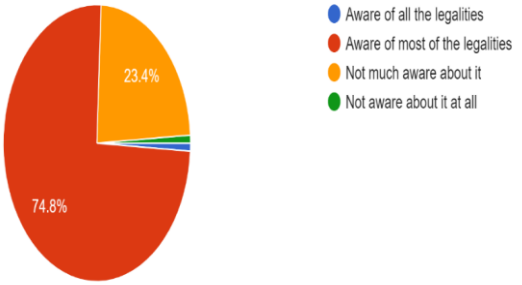
8 responses



What is the form of your not-for profit association?
102 responses



To what extent are you aware of the legal framework corresponding to your structure of not-for-profit organisations?
107 responses



Conclusion

Research concludes the need for more reformed, institutionalized legal framework for registration, institution, reporting and management of NPOs as companies. The Planning Commission in 1989 tried proposing new laws for NPO. [27] In 1995, UNDP along with the government modernized registration structures for for-profit companies, although a similar attempt was made for NPOs, the success was not quite evident. Later in 2002, a study [28] along with the Law Commission Report by KC Pant encouraged the need for institutional reforms. During Narendra Modi's tenure, the government

tried associating not-for-profit organisations with the legal form of a company as a means to supplement Ease of doing business.[29] Despite numerous attempts, the doctrinal as well as empirical research arrives at the conclusion of not having much regard of NPOs as companies and rather opting for NPOs as trusts and societies. This highlights the dire need to provide greater benefits and lesser legal complications involved in registering NPOs as companies.

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CORPORATE OFFENCES IN INDIA: TO CRIMINALISE OR NOT TO CRIMINALISE?

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ABSTRACT
The word crime mostly invokes a tachistoscopical visual of murder, theft, robbery, dacoity, rape or assault etc in our minds. However the problem with limiting the perception of crime to the conscience is that society fails to acutely acknowledge the white collar crimes specifically economic and corporate offences due to their technical nature and also on the grounds that there is no physical presence required in commission of white collar crimes. Australian criminologist, John Braithwaite simply defines corporate crimes as "The conduct of corporation or of employees acting on behalf of a corporation, which is proscribed and punishable by law." Corporate crimes have an indirect concerning effect on the public, and dealing with cases of corporate crimes in court is also a tedious task as it is confounding to decide how to penalize corporate. This paper contemplates the position of Indian jurisprudence on corporate offences and its decriminalization. Authors through this paper also discuss the affect corporate crimes have on general public and the role corporate governance plays in the commission and prevention of corporate crimes.

Keywords: - *Corporate crimes, The Companies Act, 2013, The Companies (amendment) Act,2020, Corporate Governance, civil wrong.*

INTRODUCTION

"The grandeur of thieving falsity is larceny, the fall of cities."[1]

The word crime mostly invokes a tachistoscopical visual of murder, theft, robbery, dacoity, rape or assault etc in our minds and perhaps the most probable reason for this peculiarity is that the above-mentioned activities feel daunting to mankind and are immediately discerned as something morally wrong by our conscience. People collective as a society feel an urge to curb them and therefore these kind of horrendous activities have been penalized by the laws of nation. However the problem

with limiting the perception of crime to the conscience is that society fails to acutely acknowledge the white collar crimes specifically economic and corporate offences due to their technical nature and also on the grounds that there is no physical presence required in commission of white collar crimes. These economic miscreants are usually savvier than their street crime counterparts. Monetary offenses are undeniably more alarming for general public as enormous companies have become a kind of private government, for their activities and strategies have impact on zillions of individuals and networks. Also not to mention corporations have the ability to influence a region's economy and politics thus making corporate crimes a major problem.[2]

Common public bears financial consequences of corporate and economic crimes, which are largely indirect, such as the loss of resources due to tax evasion and public frauds, which affect spending on public amenities and services. For instance the major capital market scam done by Harshad Mehta in 1992 amounted to total sum of rs.4,000 crores[3] which was followed by another capital market scam done by C R Bhansali that took place in the same time period was of worth rs.1,200 crores resulting in siphoning a sum of total rs.5,200 crores from market. If we take a closer look at the money sanctioned by union government of India for rural development program in the budgetof 1992 and then again looking back at money lost in capital market scam, it can be concluded that union government allocated rs.2,610 crores for rural development program whereas the capital market scam was of worth rs.5,200 crores which is nearly double of what union government gave for rural development program. Additionally these fiscal affect foundations of small financial backers can endure an extraordinary loss, including mental agony brought about by the deficiency of resources and monetary stability.

AFFECTS OF CORPORATE CRIMES

Earlier in the paper authors gave a mere glimpse of what corporate crimes can do to society and people, for instance people are affected by health and safety concerns resulting from the disregard for regulations, which include industrial operations such as construction sites where passers-by are harmed by risky practises.

Residents and people have been killed and injured in explosions, as well as being harmed by toxic chemicals released, the most well-known of which occurred in Bhopal, India where 3000-5000 people were killed and many more were affected by the leak of methylisocyanate in the air.[4]

According to the World Health Organization, more than 138 million people have died as a result of medical negligence, which includes things like hospital workers giving the wrong therapy to patients, injecting the wrong medicine into a victim, and so on. Another sort of hospital negligence is the incorrect and unlawful dumping of medical waste, which causes problems for persons as well as the environment due to its hazardous qualities.[5] As indicated by the World Health Organization (WHO), improper clinical garbage removal (mostly the utilization of tainted hypodermic needles and needles) brought about 21 million diseases of Hepatitis B, 2 million contaminations of Hepatitis C, and 260,000 instances of HIV in the year 2000. White collar crimes were clearly visible during the serious condition of covid-19, many people took advantage of pandemic in pharmaceutical and medical industry which affected the public at large which also raises questions about the government. For instance Himachal PPE Scam is one of the scams in which political parties were also involved in order to profit from the provision of PPE rather than taking remedial actions.[6]

Many places of recreation are likewise affected by white-collar crime. Consumers may suffer financially as a result of having to pay higher costs as a consequence of fraud in sports, and the 'quality' of sport may suffer indirectly as a result of corruption. Many consumer frauds take place at recreational facilities, such as overcharging for beverages at large-scale gatherings when it is expected that people will be less watchful.

Companies are now involved in a considerably broader spectrum of crimes than previously thought. Price fixing, stock market manipulation, insider trading, anticompetitive market manipulations, the formation of illegal cartels, the manufacture of highly dangerous products, employment offences, bribery, tax evasion, industrial espionage, and now even corporate manslaughter[7].

ON PENALIZATION OF CORPORATE OFFENCES

"Unhindered corporate force creates exorbitant social harm."

Since organizations are more powerful than people, it has been determined that organizations can do more prominent damage than people acting individually. Australian criminologist, John Braithwaite simply defines corporate crimes as "The conduct of corporation or of employees acting on behalf of a corporation, which is proscribed and punishable by law."[8] Although corporate offences are not authentically defined anywhere under Indian laws, its elemental structure is derived from Section 11 of Indian Penal Code, 1860 which states that *"the word person includes any Company or Association or a body of persons, whether incorporated or not."*[9] *Implicating the idea that businesses shall be penalized in the same way as a natural person. Although it is very obscure to understand that how a business (unit) can be imprisoned as a natural person.*

The aforementioned fallacy of Indian jurisprudence on penalization of corporate illegalities was addressed in the judgment of The Assistant Commissioner v. M/S. Velliappa Textiles Ltd. & Anr by Hon' Justice B. N. Srikrishna, he stated that "The first respondent is a company, a juristic person, and therefore, incapable of being punished with a sentence of imprisonment, which is mandatory under the provisions of Sections 276C and 277. Hence, the prosecution under these Sections against a juristic person like a company is not maintainable, even if by reason of Section 278B some other persons connected with it and responsible for running the business of the company can be held liable for the offence."[10] *This legal difficulty arising in penalization of corporate offences was also noticed by Law Commission of India and in its 41st report suggestion for amendment of section 62 of IPC was made. The law Commission recommended adding the following lines in section 62 of IPC* "In every case in which the offence is only punishable with imprisonment or with imprisonment and fine and the offender is a company or other body corporate or an association of individuals, it shall be competent to the court to sentence such offender to fine only."[11] To clarify this subject a bit more, Law Commission again in its 47th report recommended via paragraph 8 that: In many of the Acts relating to

economic offences, imprisonment is mandatory. Where the convicted person is a corporation, this provision becomes unworkable, and it is desirable to provide that in such cases, it shall be competent to the court to impose a fine. This difficulty can arise under the Penal Code also, but it is likely to arise more frequently in the case of economic laws. We, therefore, recommend that the following provision should be inserted in the Penal Code as, say, Section 62:-

"(1) In every case in which the offence is punishable with imprisonment only or with imprisonment and fine, and the offender is a corporation, it shall be competent to the court to sentence such offender to fine only.

(2) In every case in which the offence is punishable with imprisonment and any other punishment not being fined, and the offender is a corporation, it shall be competent to the court to sentence such offender to fine.

(3) In this section, 'corporation' means an incorporated company or other body corporate, and includes a firm and other association of individuals."[12]

Relying on these recommendations by Law Commission of India Supreme Court in the landmark judgment of Standard Chartered Bank & Ors v. Directorate of Enforcement & Ors [13] said that there is no blindfold immunity for any organization from the prosecution of offenses in light of the fact that the offence committed requires a mandatory imprisonment. The apex court hereby concluded that in instances of offenses which command both detainment and fine, the corporate shall be liable for the payment of fine only. This historic judgment set the precedent for all forthcoming cases against corporate crimes in India, until recently in 2019 when Ministry Of Corporate Affairs decriminalized 16 out of 81 compoundable offences listed under Companies Act, 2013[14] through the Companies (amendment) Act, 2020. To further decriminalize Company offences following changes were also made under Companies (amendment) Act, 2020:-

· 23 offences that related to minor illegalities were re-categorized from criminal offences to issues that can be resolved by In-House Adjudication Mechanism.

· 7 offences were omitted from the Companies Act as they were better dealt by other provisions of law.

· 11 offences that have subjective determination and are not of very grievous nature may contain the penalty of just offence rationalized fine.

Even though these latest amendments in Companies Act, 2013 decriminalized most of the offences listed under the act. Offences which are non-compoundable and grave in nature still attract criminal liability.

The issue of criminalization of illegal acts of corporations has always been of controversial nature and with ever evolving status of Indian jurisprudence; corporate criminal liability has always attracted conflict of opinions among legal fraternity. Enforcement of Companies (amendment) Act, 2020 by Government of India has again ignited a spark in the contemporary debate that should a company be penalized under criminal laws of India or should its offences be treated as civil breaches of law as company is not a real person and it cannot be imprisoned.

Authors further in paper discuss pros and cons of decriminalization of corporate offences.

Arguments in favor of decriminalization of corporate offences:-

· **Easing the workload of Indian Judicial Forum**

Disproportionate ratio between numbers of cases per court has left Indian justice system overwhelmed with plethora of pending cases. According to data collected by National Judicial Data Grid (NJDG) in June, 2021 a ginormous total of 2, 85, 23,812 [15]criminal cases still remain pending before Indian courts. To lighten the burden on judicial forums and to ensure speedy trials to corporate, Companies (amendment) Act, 2020 under section 454 introduced In-house Adjudication Mechanism (IAM)[16].

According to the IAM Framework, a mediating official ("AO") is giver authority to settle offenses by charging the applicable penalty from the defaulting organizations and additionally from officials' in-default. Orders of the AO are appealable to the local chief ("RD") of the MCA. NON-compliance of such orders (of the AO or the RD) draws in criminal consequences. As a compelling obstruction, rehashed defaults within a period of 3 (three) years from the date of settlement under the IAM Framework attract higher penalty.

Legislative introduction of IAM has reduced the burden

on special courts such as NCLT by eliminating minor and technical offences such as non-maintenance of registers[17], etc from their jurisdiction. This framework also provides cost and time effective disposal of cases as opposed to traditional prosecution method.

· **Civil prosecution of company offences would be more proficient.**

A few professionals contend for corporate criminal offenses to be totally replaced by civil prosecution as criminal trials are complex and time consuming and it is very strenuous to establish corporate criminal liability. Essential pre conditions for a criminal trial are presence of mens rea i.e. guilty mind and actus reus i.e. the wrongful act. As for manifesting corporate criminal liability prosecutors and the authorities struggle to demonstrate mens rea of a non natural person, a company. Therefore imposition of a civil suit for procedural defaults of a company benefits organizations as well as the controllers, since it would eliminate the necessity of demonstrating mens rea which is a precondition in criminal trials. In Director of Enforcement v. MCTM Corporation [18] Supreme Court held that civil liability is imposed for 'blameworthy conduct' and that guilty intention is not a *sine qua non*. In addition, the threshold for burden of proof is higher for criminal offences, which must be proved 'beyond all reasonable doubt' whereas it is sufficient to establish 'preponderance of probability' for imposing civil liability.

· **Ease of doing business**

The main raison d'être of government behind decriminalization of offences under company law is to attract foreign investments and promote small businesses growth through relaxed and liberalized business laws. The ambiguity and tediousness of lengthy court procedure required for doing business in India has been a major discouragement for foreign investors establishing business in India. The agitation of attracting criminal ramifications for minor and frivolous matters among the business owners additionally go against the policy of ease of doing business. Decriminalization of such matters will fundamentally urge business owners and probable investors to undertake business ventures in the nation, without dreading of any criminal consequences.

Arguments against decriminalization of corporate offences:-

· **Scrapping of criminal sanctions may increase corruption.**

The existence of stringent penal provisions keep corporate sector of the nation in check. Decriminalization of company wrongs and replacing rigor punishments with mere fine may adversely affect corporate responsibility towards state and public. It could likewise trigger intentional infringement of law with the agreement that the punishment forced would be significantly less than the benefit acquired from the law breaking.

Fixed penalties are prejudiced towards businesses with huge turnover.

India is a land of diverse businesses with different turnovers, ranging from rupees fifty thousand to fifty thousand crores and imposition of a fixed penalty on companies of varying sizes is restrictive and arbitrary in nature. As Supreme Court pointed out in Adamji Umar Dalal v. State of Bombay [19] situations related with the incident of wrongdoing ought to be considered while choosing a specific punishment for a offense. If not, there can be cases with extraordinary conditions, which if not considered would prompt an inordinate punishment being forced, accordingly making colossal damage to an indivisual. Imposition of fine for commission of crimes is only beneficial if it has repercussions. A company with huge turnover suppose of twenty million may consider payment of rupees 1 lakh as penalty a minimal fee it has to pay for achieving its desired objective. While on the other hand a penalty of 1 lakh may make a company with turnover of rupees 50 thousand bankrupt. Moreover imposition of a fixed penalty may have adverse effect on investors and financers of a company contradicting the basic aim of attracting foreign investors.

ROLE OF CORPORATE GOVERNANCE IN CORPORATE CRIMES

Corporate crimes have an indirect concerning effect on the public, and dealing with cases of corporate crimes in court is also a tedious task as it is confounding to decide how to penalize corporate. As an outcome, the quote

"prevention is better than cure" holds relevance over here and how corporate governance should be given high priority in order to prevent corporate crimes.

Corporate governance in a concise way can be defined as a framework for managing and supervising companies.[20] In this sense, corporate governance is a set of processes that allow a corporation to function where ownership and management are separate, it establishes a framework within which the company's goals are set, methods for achieving them are developed, and the owner's oversight of the company's operations is exercised. If the corporate governance structure is sound, it will provide effective incentives to achieve the objectives in the company's and hold shareholders' best interests. This in turn will help to improve the efficiency of operations oversight, which as a consequence will have a direct impact on resource utilization.

Corporate governance is the way in which the shareholders, directors, management, and suppliers, as well as employees, primary clients engage with one another in a limited liability corporation. Corporate governance principles, both formal and informal, can be found in every nation's legal, institutional, and regulatory structure. Great corporate governance ought to give legitimate incentives to the Board of Directors and the executives for accomplishing goals that are to the greatest advantage of the firm and its investors, and make management activities simpler and more proficient

Corporate governance is subject to a steady and proficient general set of laws just like an institutional climate that takes into consideration the arrangement of organizations and their suitable activity. In any case, such an atmosphere might be set up by sure turn of events, which will prevent abuse of power, and speculations won't be made until enterprises are sure that the undertaking's danger and the "state's" hazard are both reasonable.

Considering the corporate governance framework, the OECD recommended (1998) to national governments and other relevant international institutions such as the World Bank and the private sector to define corporate governance rules and principles. The principles constitute a broad framework that governments consider essential for the development of good governance

practices. They should be concise, comprehensible, and accessible to the international community, and they should concentrate on the following:

1. Establishing a foundation for effective corporate governance
2. Shareholder rights and their involvement
3. Transparency
4. Board responsibility [21]

However weak corporate governance can create frictionless way for corporate crimes. One such paradigm of weak corporate governance can be seen in the case of *'Satyam Scam'*. Satyam scam was India's largest corporate fraud carried out by manipulating the company's income statements, cash flows, and balance sheet for over seven years as admitted by B. Ramalinga Raju, the founder and chairman of Satyam Computer services.

Overstated revenues and earnings were part of the $1.47 billion fraud on Satyam's balance sheet, which was conducted by the company's founder and his brother, the CEO, in order to attract more business and avert a hostile takeover. "It was like being on a tiger and not knowing how to get off without getting eaten," said Raju in his confession statement[22]. Satyam had been widely praised for exceptional corporate governance, and Raju had been regarded as a role model for successful business and entrepreneurship. The founder and his co-conspirators recorded fraudulent cash deposits, misstatements of accounts receivables and payables, understated liabilities, and exaggerated assets; these deceptions were only exposed when Raju attempted to buy two additional family-owned businesses. Shareholders were outraged by the proposed acquisition because they saw it as an attempt to prop up other struggling family firms by siphoning funds from the thriving software company.

Indian shareholders have already lost more than $2 billion in corporate crimes and weak governance since 2003,[23] even before the Satyam affair broke. Only 4 out of 68 Indian companies were found to adhere to "highly desirable" disclosure standards in a report released on January 7, 2009 by an analyst at one of India's leading investment houses; more than half of the companies on the list that did not make the grade were well-known

companies with significant global presence.[24]

In all authors contend that corporate government has a major role to play in a company illegal activities. Ethical governance may keep irregulaties on part of the firm under check while bad corporate governance with rampant opportunist behavior may feloniously affect company activities.

CONCLUSION

Corporate offences and government efforts to curb them are not new in India. What started with liberalization policy in 1991 is being carried forward with CAA, 2020. The motive of government behind all the efforts to decriminalize the offences of corporations is to de clog the justice system and to increase growth of businesses in India. The maxim lex non cogit ad imposibilia i.e. law does not contemplate which cannot be done precisely defines the situation of Indian courts on criminal liability of corporate units.

Keeping in view the above stated legal maxim authors of this paper believe that Companies Act (Amendment), 2020 with help of good corporate governance can curtail corporate offences to a great extent.

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ELECTORAL SYSTEM UNDER CONSTITUTIONAL SURVEILLANCE IN INDIA: COMPARATIVE ANALYSIS WITH U.S.A AND U.K

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ABSTRACT
Elections are the heart and soul of the democratic form of government which determines not just the candidate who is going to take charge for the governmental activities, but also the will, dreams, ambitions of the citizens and their expectations from the elected candidate. The Indian Democratic system is the largest democracy in the world where Indian voters are given supreme authority to nominate or withdraw the candidate who will inevitably raise hands for all the country's governmental duties.
On this note, this paper shall be analysing the prevailing laws including Article 324-329 of the Indian Constitution and policies pertaining to the electoral system in India. The paper would also focus upon the various legislations like, The Representation of People Act, 1951, Conduct of Election Rules, 1961 and Anti-Defection Law, 1985, etc., along with the examination of various increasing challenges before the Election Commission of India. Further, the paper would compare the electoral laws and policies of India with those of U.S.A and U.K. Finally, the paper would suggest necessary modifications to reform the existing Electoral System in India.
Keywords:-*Elections, Election Commission of India, Indian Constitution, The Representation of People Act, 1951, Constitutional Surveillance.*

ELECTORAL SYSTEM UNDER CONSTITUTIONAL SURVEILLANCE IN INDIA: COMPARATIVE ANALYSIS WITH U.S.A AND U.K

"My notion of democracy is that under it the weakest shall have the same opportunities as the strongest... no country in the world today shows any but patronizing regard for the weak... Western democracy, as it functions today, is

diluted fascism... true democracy cannot be worked by twenty men sitting at the centre. It has to be worked from below, by the people of every village."[5]

ELECTIONS: HEART AND SOUL OF DEMOCRACY

Elections are a necessary part of India's democracy; without them, the country's government would not be able to function properly. Elections are the beating heart of the democratic system of government, determining not just the candidate who will lead the government, but also the citizens' will, their hopes and ambitions, and their expectations of the chosen candidate. The Indian democratic system is the world's largest democracy, with Indian voters having the power to select or remove the candidate who will ultimately raise hands to perform all of the country's governmental functions.

India, as a democratic country, is primarily run to hold free and fair elections in which residents elect their own candidate to assume responsibility for all governmental tasks and to provide citizens with just, fair, and equal treatment in society. The electoral system should be free of all constraints and allow individuals to fully enjoy their social and political rights, but such rights must be exercised within the confines of the country's legal framework. Religion, caste, creed, sex, and other factors should not be used to choose political parties or candidates.

India's election system is overseen completely by the Election Commission of India to make and develop election systems for successful governance throughout the country and which are addressed in Articles 324-329 of the Indian Constitution.[6] It is also inherent in the constitutional structure that this sort of body be entrusted with the responsibility of holding elections, and that it be free of any external influences from the ruling party and the government, so that it may organise elections throughout India in a fair and just way.[7]

The ECI is responsible for ensuring fair elections in India, but there are some obstacles in the way, such as bribing voters before elections, exploiting media reports, misappropriating funds, and forming alliances or coalitions of governments to support a single contesting candidate.[8] The ECI would function as a zealous watchdog to put a stop to these actions, ensuring complete compliance with election laws and the Model

Code of Conduct. The Constitution of India grants ECI vast powers, well above those generally provided to the government which ensures free and fair elections in India.[9]

CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK OF ELECTIONS

Members of Parliament/ State Legislatures

Article 52-71 of the Indian Constitution deals with the way in which the President and Vice-President are elected, whilst Article 80 and Article 83 deal with the compositions and periods of the Rajya Sabha and Lok Sabha. In the Rajya Sabha, one-third of the members retire every two years, but in the Lok Sabha, members serve for five years from the date of their election.[10]

Article 84 of the Constitution states that members of Parliament must be a) citizens of India, b) have achieved the age of 25 years in the Lok Sabha and 35 years in the Rajya Sabha, and c) possess any other requirements established by legislation from time to time. Article 102, on the other hand, deals with the disqualification of members of Parliament for reasons such as a) holding a profit-making post within the Indian government, b) declaring insolvent, c) declaring a person of unsound mind, and d) voluntarily acquiring citizenship of a foreign nation. Article 168-173[11] and Article 190-192[12] talks about the similar grounds of qualification and disqualification for the State Legislatures.[13] Any disagreement about a member's qualification or disqualification in the Chamber of Commons or the State legislature will be resolved by the Chairman or Speaker of the appropriate house.[14]

Legislative Backing

The Representation of People Act, 1951[15]*:-*.The legislation largely addresses the acts of candidates running for election to the House of Commons and state legislatures, as well as qualification, disqualification, and offences. It also mandates that all candidates register with ECI, and that ECI then conducts an eligibility check on those candidates.[16]

Conduct of Election Rules, 1961[17]*:-* These regulations cover each and every stage of the election process. It is responsible for the issuance of writs, the vetting of nominations, and the withdrawal of candidates, among other things.

Election Symbols Order, 1968[18]:- This is the order which empowers the ECI to recognize political parties and allot them symbols.
Anti-Defection Law, 1985[19]:-This legislation covers the scenario of defection, which occurs when a member of a political party willingly leaves the party or votes or abstains from voting against the party's wishes, or when an independent member joins a political party after the election. The necessity for this rule was recognised after a Haryana legislator named "Gaya Lal" switched parties three times in a fortnight, and it pushed parliament to approve this legislation, which took nearly 17 years to come into effect.[20]

Election Commission of India
The drafters of Indian Constitution focused on the fact that elections should be conducted independently through electoral machinery.[21] The Fundamental Rights Sub-Committee stated that the executive should not interfere with legislative functions, and that: 1) The Constitution must grant universal adult franchise; 2) Elections should be free, secret, and periodic; and 3) Elections should be managed by an independent commission established under Union Law.[22]
Constitution of India, under its Article 324,[23] talks about the appointment and powers of the Election Commission of India consisting of Chief Election Commissioner (CEC) and other commissioners. This body is an independent Constitutional body authorized to regulate the elections and related disputes throughout the country. The Commission is in charge of all matters relating to elections in which the enacted laws are insufficient to regulate, but the Commission's autonomous nature has a low level of public confidence, owing to the appointment of a large number of retiring government officials to the position of Chief Election Commissioner (CEC). This gives the impression that there is prejudice against the current government, even if there is none.

Powers and Functions of ECI
Advisory jurisdiction for deciding the qualification or disqualification of members of Parliament is one of ECI's powers. All malpractice cases are referred to ECI, and

ECI's rulings are binding even on the President and Governor of the jurisdiction in question. ECI also has the authority to keep or shorten any member's disqualification.[24]
In terms of functions, ECI is responsible for ensuring that elections are conducted in a free and fair manner. It guarantees that the Model Code of Conduct (MCC), which are set regulations guiding the conduct of political parties during elections, is strictly followed. ECI also administers Elections funding and keeps track of finances.

Model Code of Conduct

In India, the ECI serves as a watchdog for free and fair elections. ECI issues the MCC in order to achieve the goal of holding elections. The MCC was first used in 1971, and it has been updated several times since then to meet the evolving demands of the election. This guideline lays down the groundwork for political parties and candidates' behaviour during elections.[25]
Despite political parties' acceptance of MCC, severe abuses of the system have occurred, in which parties abuse their political and financial power and engage in unethical behaviours. Not only that, but the ECI also poses a number of additional issues, which will be described in the next sections of this chapter.

ELECTORAL SYSTEM IN U.S.A AND U.K

In a democratic setup, direct or indirect elections are two forms of option. The former applies to citizens who are being able to communicate their will directly to public or social issues, and the latter is where the state's will is conceived and articulated not directly by the people themselves, but by their representatives.[26] .

Comparative Analysis with USA

Election is an expression of people's sovereignty or will. Both India and U.S.A have consolidated Preamble which begins with "We, the people". The voting system in U.S.A is a two party system where the U.S House of Representatives are the members elected by plurality of votes in single district.[27] The President of the country is elected as chief executive by simple plurality under the method of separation of powers provided in their

respective Constitutions. He is the leader of majority and has utmost superior authority than any other person empowered under the Constitution.[28] He plays a considerable role in the politics of America, as he always frames the national policy in public interest.

When designing the American Constitution, the framers were eager to secure a position that would be totally detached from politics for the President. The President is only elected by the majority of states and not by the majority of the country as a whole. However, the 15th Amendment in the American provisions gave clarity that right of adult franchise is not a constitutional right. Although Constitution prohibits discrimination against Negros for his race, religion, caste or color but it does not grant a confirmative right to vote anyone and the States are empowered to make discriminatory policies as per their discretion for the right to vote.[29] If the Federal Constitution forbids nobody but states to vote, it may be analyzed that they have residual powers with regard to tax payments, welfare or other stuff. A major drawback in the American Constitution, however, lies in the fact that there is no standard federal election mode.[30]

After independence in 1947, India's electoral laws developed for the development of the diversified society, while US electoral laws developed to maintain central powers and control in the hands of a single authority. At present in India, ECI is obliged for free and fair administration of elections. It ensures that there should be strict adherence to the Model Code of Conduct (MCC)[31] , which are the defined rules governing the actions of political parties during elections, administering electioneering or limiting excessive control during elections at the time of election campaigns. [32]

After the fixation of dates for election campaign, the Election Commission has exclusive power to deal with any complaint or cancel the election and even the court cannot intervene. [33]Only after the declaration of official results, the Election Commission's power is ceased and the Court may take necessary action on petitions challenging violation of election laws.[34] India follows a centralized structure for electoral administration and affairs unlike US which follows a decentralized structure.

Unlike America, where the Election Commission is only obliged to optimize voter access, the Election Commission

of India is obliged to hold elections, control campaigns, maximize voter access, verify voter qualifications and preserve electoral rolls.[35] The Election Commission in India is also granted exceptional powers to temporarily confiscate the arms or pro active arrest of officials if there is anticipation of danger in control or maintenance of order.[36] Moreover, the commitments made by Election Commission in reference to voting or standards set up as prognosis under the Indian electoral laws are remarkable in contrast to U.S electoral laws which needs to constitute Election Commission as part of electoral reform in the country so as to analyze the drawbacks and politicization of elections.[37]

Comparative Analysis with U.K.

In the UK, the conventional method of voting is replaced by the parliamentary form of government. It is maintained on the basis of a simple plurality, often referred to as the proportional majority. As a plurality to govern and as a minority to criticize, the English electoral system is split into two halves.[38] The principle of proportional representation in the electoral system can be achieved either through Single Transferable Vote or through List system. The prior scheme provides the voters to choose between a numbers of candidates who shall be representatives and the latter is the cabinet form of government formed as a committee of Privy Council.[39]

The British Constitution does not make all the officials swim and sink together but only imposes liability on higher authorities who are heads of the department. The British Prime Minister's position under the Constitution is equivalent to the President of America whereby the people vote for him along with his government to function effectively and the Prime Minister with his cabinet is both individually and collectively answerable.[40] This indeed calls for a general election after five years if in any case the ministers are either to resign or to dissolve the parliament.[41]

The election process of UK is based on completely disproportional First Past the Post (FPTP) majority system whereas Indian electoral process is a combination of British electoral system along with some constituents of democracy. [42] In Britain, electors are allowed to vote for candidates who are party members, but in India,

voters elect a single candidate who is the party's personal representative. An ideal competent democratic country is Britain and not India because it has complex democratic elections with immense influence of races, languages and caste system.[43]

However, India stands in a better position because neither the electoral laws of U.K is stringent with particular set of rules nor the Election Commission has power to give directions but it is only constituted to guide and monitor the performance of election officials and to publish reports related to electoral events.[44] In contrast to India where Election Commission has supreme powers to conduct elections once the dates for election are fixed till the elections end.[45] The U.K follows de-centralized electoral process where the Election Commission is the central authority

At present, U.K's electoral reforms have become a debatable issue because few British parties have recommended replacing the FPTP system of general elections with any effective method. [46]The new coalition government created a referendum on voting reforms in the general elections where the voters were given choice to either switch to Alternative Vote system or to continue with the ongoing system.[47] Majority voters did not accept the proposed new system but the Law Commission recommended for new electoral laws to be framed in reference to this issue.

MAJOR CHALLANGES IN ELECTORAL SYSTEM

Elections in India are no longer a real gauge of people's power on a genuine representation of their choice, notwithstanding the best intentions of the Indian Constitution's founding architects. They are an outward embodiment of money, muscle, and mafia power, and if the ballot box does not instill trust in voters, there is a good danger that people may lose faith in India's democratic process. *Pollock* stated that *"unless public elections are conducted with accuracy and efficiency, not only the public services are discredited but the whole democratic system is endangered."*[48]

In recent decades, electoral issues in India have taken on new shapes. Bribing voters and using the media have become common tactics for young politicians to influence the people and gain seats. Over the previous several

years, corruption charges have been more common, with major parties diverting cash from public to private use, resulting in theft of funds and a severe halt in development operations. Furthermore, the age of foreign finance and coalition administrations has emerged in the States and the Centre, where people's representatives can easily accept money to support a single contending candidate. The Indian Constitution offers voters the power to pick a government that will be responsible to the people once it is in power. Unlike Switzerland, where such a right exists since the country is officially democratic, voters have no power to recall an elected representative if they are unable to hold their post afterwards.

According to the Vohra Committee Report, these acts are undermining the entire purpose of holding elections and eroding residents' trust.[49] In light of these issues, our country's key electoral reforms, including as the Electronic Voting Machine, which ensures election transparency, the Universal Adult Franchise, and the Anti-Defection Law, have been implemented.[50]which restricts such practices. Section 58A has also been added in Representative of People's Act[51] Due to booth capture, the elections must be adjourned or revoked. Although the government has attempted continual improvements in order to achieve an ideal democratic election framework by comparing other nations, nothing has proven useful to yet.

The Indian Election Commission has always been a proactive actor in ensuring free and fair elections, but there are a number of concerns that raise doubts about its integrity.[52] For instance, several times during the 2019 General Elections, the Election Commission's competence to take action against infractions of the Model Code of Conduct ("MCC") was questioned.

EC has failed to match up to the expectation of citizens in the light of the recent incident of hate speech where EC submitted before the Supreme Court[53] that it has limited power in such matters. Constitution of India, under its Article 324, states that the ECI holds authority for "Superintendence, direction and control of elections".[54] Supreme Court in the case of *Mohinder Singh Gill v. Chief Election Commissioner*,[55] while dealing with these words, observed that such words are neither

defined by the Constitution nor it has been cleared by the Commission thus, calling for judicial intervention.[56]

Appointment and Removal of Member of ECI

The Election Commission of India is a self-governing legislative body tasked with overseeing elections and related conflicts across the country. During campaigns, the Commission assumes authority for all problems for which the laws that have been adopted are insufficient to control. However, the Commission's autonomy causes public distrust since various government officials who have departed from their positions have been nominated to the position of Chief Election Commissioner, eroding public trust. In 2018, a bill was introduced in lower house proposing the nomination of members of the EC by a collegium of four Prime Minister's appointees. The bill, however, was not authorised by the Upper House and was thus rejected.

The process for removing the Chief Election Commissioner is the same as that for removing a Supreme Court judge, but the only requirement for removing any other member of the Election Commission is the recommendation of the Chief Election Commissioner, whose credibility is called into question here, and due to the autonomous vast powers in the hands of the CEC and the lack of serious protection for the other members, it calls into question the individuality of the Election Commission.

In the case of *TN Seshan, Chief Election Commissioner v. Union of India*[57] , "In comparison to the other members of the commission, the Chief Election Commissioner does not have higher power, but it is nothing more than a "first among equals," according to the Supreme Court. In the case of *S.S. Dhanoa v. Union of India,*[58]"When such tremendous powers are possessed by an institution without any responsibility, it is wise to hand up authority to more than one hand to its affairs," the Supreme Court reasoned. It ensures objectivity and the absence of irrationality. However, even when there are more than one person, man and organisation, their tasks must be clearly defined if the institution's functioning is to be successful."

Model Code of Conduct: A Toothless Tiger

The Model Code of Conduct (MCC) establishes the rules

by which political parties and politicians must conduct themselves throughout campaigns. There is no legal underpinning for this Code, but it is a moral obligation for all political parties to obey it. This suggests that India's Election Commission simply lacks apparatus to monitor the behavior of rival parties and candidates throughout elections.[59] Hon'ble Supreme Court has time and again asked ECI for their opinion regarding the strict implementation of MCC but EC has just said that it does not have authority above than issuing notices, advisories to the violators of MCC. This reply caused the Supreme Court to comment that the EC "can bark but not bite".[60] There is a simple reason behind the EC's reply and lack of regulatory machinery that there is absence of any statutory backing to MCC[61] and since there is no statutory backing, the code is not judicially enforceable.[62]

Lack of Trust in ECI

ECI is obliged for free and fair administration of elections and to keep regular checks on the affairs of political parties but the trust of citizens over ECI has got limited in it terms when EVM[63]/VVPAT[64] is introduced in India and EC was in a dormant position to take any actions against the leaders of ruling party. This issue concerned many bureaucrats which lead them to write a letter to the President saying that ECI;s credibility is in stake.[65] The EC was also criticised for dismissing allegations against Prime Minister Narendra Modi and Home Minister Amit Shah. In each of the allegations levelled against the PM and Mr. Shah, they were awarded a clean bill of health.[66] These difficulties raise serious doubts about the independence of such a powerful EC and undermine the fundamental purpose of holding elections in India.

CONCLUSION

State is the amalgamation of individuals where one is governed by another. If such power is not effectively exercised then it will contaminate the whole governance of the nation. As previously quoted, free and fair Elections are the heart and soul to the effective democracy, particularly in a country where we have such an exhaustive administrating "watch dog", i.e., Constitution. Effective democracy is important to teach

people the essential concept of civility, but at the same time, there should be an idea of self-government and constructive involvement in order to maintain the spirit of democracy. The long term goal of improving electoral processes can only be achieved by strengthening institutional structures such as the Election Commission which should be able to crystallize the difference between partial and impartial and should be able to unearth anti-electoral activities of politics. This would be similar to Federal Election Commission of United States which plays its role strictly and obligated to scrutinize mal-practices.

SUGGESTIONS

· Public education is one of the most essential facets for electoral reform. There should be an electoral awareness amongst voters by way of organizing literacy camps from time to time.

· The Independent and impartial nature of Election Commission should not be put at stake in any situation. The Law Commission in its 255threport[67] recommended that: Firstly, there should be constitutional protection to the removal of EC members. Secondly, altering the appointment system of EC member from unilateral to consultative. Lastly, for creating a permanent, independent secretariat of the EC

· Value based politics can only be created if political parties strictly follow the Model Code of Conduct and this can be done only by legislative backing.

· The Election Commission of India should adopt effective measures to curb money power in election leading to minimization of election expenses.

· There is an urgent requirement for establishment of special courts which would have jurisdiction for electoral offences.

· Lastly, the citizens should also have right to recall if the party fails to fulfill their electoral promises and manifestos towards the voters.

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ANALYSIS OF 161ST PARLIAMENTARY REPORT ON THE TRADEMARK REGIME IN INDIA

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Abstract
The code of Intellectual Properties in India, like every other legislative statute, needs to be polished at regular intervals in order to keep it at par with the emerging societal needs and technological trends. They have to be amended in such ways that it can help produce an intellectually healthy and prospering ecosystem for innovations as well as research and development. For the same, it is the responsibility of the concerned parliamentary committees and departments to organise and carry out meetings for deliberating the above and more issues circling IP rights and its role in country's economy by making a blanket encyclopaedic study with respect to its success and adherence in local and regional communities, national, and international dimensions.
The author, through the study made in the following paper, compiles and thereafter analyses the suggestions submitted by different departments, and recommendations made by the Department Related Parliamentary Standing Committee on Commerce to the respective authorities regarding the regime of trademark laws in India. It aims to deliver a thorough examination of the concerns put forward by the DPIIT, Ministry of Commerce and Industry, and other prominent law firms as well as departments of India regarding the legal framework of Trademarks in India and the necessary modernization required in the selective sections and clauses of the respective act.

INTRODUCTION

The Parliament of India, through its One Hundred and Sixty First report provides a 'Review of the Intellectual Property Rights Regime in India'. The report was presented and laid before the Rajya Sabha and Lok Sabha respectively on 23rd July 2021. A rigorous review of the different categories of IPR legislations in India was taken up and presented before the parliament. The Department Related Parliamentary Standing Committee on Commerce prepared and presented the 161st report on

Review of IPRs in India, headed by Dr. V. Vijayasai. Reddy.

Various issues were taken up in the IPR policy review. Of the major heads, some of them were the contribution of different categories of intellectual properties in the country's economy, the IPR regime in India as compared to USA and China, lack of awareness about different kinds of IPRs in the country, the amalgamation of IPR and Artificial Intelligence, role played by the DPIITs (Department for Promotion of Industry and Internal Trade), Confederation of Indian Industry (CII); legal associates i.e. Amarjit & Associates, Ajay Sahni & Associates, and Subramaniam & Associates; Department of Pharmaceuticals, Ministry of Chemicals & Fertilizers; Department of Agriculture Research and Education, Ministry of Agriculture and Farmers' Welfare and Federation of Indian Chambers of Commerce and Industry (FICCI), scrutinising the role played by the IPR in the pharmaceutical industries in India, etc. The departments provided an in-depth analysis for the successful examination of the subject matter, i.e., a comprehensive review of the IPR regime in India. The information regarding the current position and progress of the various IPR statutes, were put forward to the committee and through it, to the lawmakers of the country by DPIIT, Ministry of Commerce and Industry and all other organizations invested in IP rights and law firms.

Report of the committee on Trademarks and the Trademarks Act of 1999

On the inquiry about the functioning of the Trademark Act of 1999, the committee was informed that the amendment in the rules resulted in simplification of the procedures under the act, for instance, it has been made user friendly and compatible for e-transactions, 74 forms under the Trademark rules have been replaced with 8 consolidated forms, a single application can be filed for all kinds of trademark, express provisions have now been laid down for filing applications for sound marks. With respect to needing any modifications in the act, the committee was informed about the following:

1. The committee was apprised by the department that better and more elaborate classifications of

trademark is necessary, especially in case it is synchronised with the MSME (Micro, Small and Medium Enterprises Development) Act 2006. Further, the three categories of classification, i.e, Manufacturing, Retail, and Services should be clearly provided for in the act. The committee requested the department to work on the inclusion of the above-mentioned classifications keeping in mind the requirements of trade and industry, along with their detailed specifications.

Whether a particular sign that is being used as a trademark is for the purpose of manufacturing of plastic bottles or for the sale of those plastic bottles should be clarified and the same can be done if there are classes and categories provided to distinguish between them. For instance, manufacturing bottles can fall into category/class 12 of a trademark and sale of bottles can fall into 21. With the help of different categories of trademarks, the application and registration process, difference between different services can be smoothly figured out and the consumers would have ab easy approach while buying for products. Since trademarks help in distinguishing one product or service from another, classification of trademarks into different categories would help further simplify the process of differentiating that will help the MSMEs promote their business with ease. The definite categories would provide intelligible differentia that can help the MSMEs in defending their products against the harsh competitive market and yet, safely be a part of it.

Also, as mentioned in the report by the concerned departments that there is a lack of awareness as well as appreciation for IPRs amongst the MSME sectors, specifically about the procedural aspects to obtain patents, proceeding with the trademark registrations, etc., the above classification of the trademarks in order to decrease the intensity of the trademark registration, can surely ease the burden on the people carrying out small scale businesses. This could prevent the hostile takeover of such small enterprises and generate a sense of safeguard amongst them from further such similar threats.

2. The committee, on the information provided by the department with respect to the reduction of time period in order to grant speedy trademark registration, recommended the department to reduce the time period from four to two months during which the application remains public and open for them to oppose it on reasonable grounds.

The longer the application stays open for opposition by the public, the more complaints it is likely to receive for it and the longer it will take to conduct the entire process of trademark opposition including the checking of veracity of the opposition filed, reply on the opposition by the trademark applicant, scrutinising both the opposition and the reply, resolution process, etc. Many might even wait for the last month to initiate an opposition in order to delay the trademark registration process. Therefore, the lesser the time for trademark opposition, the lesser the unreasonable inconsistencies can be found to waste time and stall.

3. The Committee recommended the Department to take steps in modernization of trademark offices by undertaking digitalization of work processes and facilitating e-services for speedy redressal of work.

Digitalisation is dynamic and being adopted across countries like the banking industry, shopping industry, pharmaceutical industries, etc. It has proved to be the biggest and strongest asset for the people in the era of pandemic so much so that even roadside vendors accept digital payments now. The same has high possibility of easing the process of filing for trademark registration, its opposition, etc. Digitalisation could help ease the process of receiving information of the potentially similar trademark applications at the click of a button. The oppositions can be filed online as well and the process of trademark opposition can be sped up, helping reduce the time period for trademark opposition filings from four months to two.

Currently, in the digitization field, the end-to-end encryption tools are dominating the factor of privacy of a conversation. These tools, along with other such

digitalised tools would further help in keeping the conversation between the registry office and the concerned individual away from the prying eyes of any possible saboteur. It can help secure the exchange of sensitive data and personal details of both the officer at the trademark registry office and the applicant. The same can help keep the exchange of pieces of evidence between the Police department or officer and the office of Registrar.

4. Section 115(4) of the trademarks act provides for the power of a police officer, not lower than the rank of a DSP (Deputy Superintendent of Police) to take cognizance of any risk or infringement of trademark and enforce necessary actions. In such cases, as put forward by the department it can be observed that no assistance is taken from the Registrar of Trademark and a senior rank officer like the DSP itself is overwhelmed with such responsibility which makes it tedious to dispose off the dispute in a timely manner. The committee was apprised by the department that an amendment should vest a lower rank officer, with better understanding of such specific and technical matters, with such responsibility under section 115(4) of the act.

Further, the mandatory provision of seeking an official opinion of the Registrar by the concerned Police Officer before conducting search and seizure should be reduced from 7 days to 48 hours so that prompt action can be taken up by the P.O. without losing time to acquire critical evidence, and also the allow the aggrieved right holder to directly seek the participation of the Registrar. The committee recommended that depending on the size and ongoing commercial activity of the district, one or more well-trained police officer specialized in tackling IP crimes should be deployed in place of a high-ranking officer. The recommendations to the department further included the setting up of a mechanism monitoring the delay by requesting and accepting the opinion of the Registrar within the time frame of 48 hours. The committee also the held the view that digitalisation between the P.O. and the Registrar can help speed up the permission process for search and seizure and can keep

the information of the investigation safe from any leak with the help of end-to-end encryption.

The WhatsApp messaging application has been providing for an end-to-end encryption for the conversation between two contacts, since a few years that most of us heard about and come across its application. The end-to-end encryption feature of the app keeps the conversation safe from the prying eyes of a dishonest third party and honest keeps it hidden from WhatsApp itself. The messages can be opened and read only by the two people/parties between whom the conversation took place as the messages we send is first is encrypted on our own personal device, after sending the message, it passes through network and a whole bunch of servers, thereafter, it reaches to the device of the person for whom the message was created, and finally, it is decrypted on that person's device, after it receives the message.[2] Basically, the message that we write, send and receive is the form of words only, meanwhile, when it travels through these series of servers, it is converted in numerical form which can't be read by the authorities at WhatsApp and again, it is converted into alphabets and words once it reaches its destination. Similarly, the highly confidential information exchanged between the Registrar and P.O. will be safe and shared on an end-to-end encrypted platform.

5. The Committee recommended that the Department should make a separate category for EoU products so that they are prioritised in getting the trademarks and can contribute in the national economy by exporting the products in time.

Export Oriented Units (EoU) make powerful and hefty addition to a country's economy. It increases the foreign earning of a country and is responsible for generating significant employment opportunities in the country by selling their entire production of goods to foreign countries. EOUs can engage in manufacturing, services, development of software, repair, remaking, reconditioning, re-engineering including making of gold/silver/platinum jewellery and articles. Further, units involved in agriculture, agro-processing,

aquaculture, animal husbandry, biotechnology, floriculture, horticulture, pisciculture, viticulture, poultry, sericulture and granites can also obtain the status of EOU.[3] Since the scheme of EoU has such extensive reach in the market, delay in the trademark registration of the same could cost the units major amount of their investment. In case where an EoU is being setup for departments like the weapons, narcotics, defence, etc., the unit needs to obtain a special license for the establishment and further export of the same. If there is a delay in obtaining trademark for the same, there will be delay in applying and obtaining for the special license and consequently, the units might not be able to start their assignment on time, leading to delay in delivery of those products. This delay would then reflect upon the country's export and IPR policies, resulting into the decline in the country's rank and position in terms of export in the world. Therefore, instead of treating EoUs at par with any other product in line for trademark registration, it would be highly beneficial to set up a different department concentrating solely on the matters concerning EoUs.

Conclusion

Outdated welfare policies and legislations can cause the country suffer on a larger scale than it is made out. They may not be able to welcome the new technologies that have already made its firm foothold in the everyday lives of the citizens and the pace at which they are spreading their wings further confirms their long running and uninterrupted future in the society. Amendment, meaning modifications or changes in the statutes or current legal policies is often a change for better and therefore, there should be enough space in the present statutes for introducing and permitting such modifications. It is only prudent to analyse the success rate of the present important aspects of IPR regulations in order to help the country not lose its hard-earned position in the list of world innovators and encourage the country in reaching for top positions in the list. The same will have a motivating effect within the country and the nationals would be driven more by the idea of bringing about innovations in the world instead of abandoning their involvement in research and development for these

innovations.

The legal codes can be considered similar to a property that is ripe for a renovation to continue to stand up for fair share of future years and survive any major structural damages due to natural calamities or cause the minimum damage to the property due to such disasters. The renovations offer more durability and solidness to the base upon which the house has been built while simultaneously updating the building with the latest technological trends. Amongst the many other reasons for renovating a house, enhancing the living conditions for the people living inside the house and help the owners build a decent impression of themselves in their neighbourhood, are the foremost reasons for renovating one's house.

Similarly, the amendments not only honour the existing legal principles present in the statutes, they also help the concerned departments to look into the future facet of the intellectual property issues that the statutes aim to safeguard its citizens from. Such amendments help create a progressive and vigorous climate for the people of the country that help them realise the cultural and economic benefits of the IP rights and regime available to them in the country.

Regular scrutinization of the IPR regime in the country will help in strengthening the legal code and assist in converting it in a robust statute, ready to cover any losses and provide the most profitable options to the parties concerned. It makes the legislators aware of challenges that is being faced by the people within and outside the country due to the current regime and prepare guidelines and maintain standard procedures for circumventing the possibility of any future similar battles. The amendments or modifications help the authorities in delivering the most profitable environment to the people seeking the shelter of the legislations. It aims at converting the statutes into a safe haven for the credible innovators and inventers. And at the core, the reviews and subsequent improvements also provides the countrymen with a sure sense of confidence in them towards their leaders that should be the final aim of the legislators.

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CASE COMMENT
AARON C. BORING, CHRISTINE BORING *VS.* GOOGLE INCORPORATION (2009)

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CHAPTER – 1 ABSTRACT:

The word "Tort" has evolved from the French word "Tortem", which literally means "a twisted conduct" and gives reference to all the tortious behaviour that we observe in our society. Historically, the principles that lay down the evolution of this concept, come from the English common law. According to the definition, tort is explained as, "a wrongful act, not including a breach of contract or trust, that resultsin injury to another'sperson, prope rty, reputation, or the like, and forwhich the injured party is entitled to compensation."[2] "Trespass" is known to be the earliest "wrongful act" which was recognized as a "tort" around the thirteenth century. Over the years, its meaning has seen a significant transformation and the sphere of its jurisdiction has expanded remarkably.

According to the definition, trespass is"an unlawful act causing injury to the person, prop erty, or rights of another, committed with force or v iolence, actual or implied."[3]

However, this case involves the modified concept of "Virtual Trespass". It is a comparatively modern interpretation of the law of torts, and its implication has been seen increasingly significant over the last decade. With the advent of technological advancement, the scope of trespass has broadened and the laws are now dealing with the virtual forms of trespass.

KEYWORDS- *"Torts", "A Wrongful Act", "Actual or Implied", "Injury/Loss", "Virtual Trespass"*

CHAPTER – 2: LEGAL PRINCIPLES

"Tort" has been popularly defined as a civil wrong, which

is caused due to the breach of a *"Duty of Care"* owed to the Plaintiff by the Defendant. The legal injury caused in such cases, are compensated through the provisions of *"liquidated damages"*, which are determined using the theory of commoditization of losses, which is the underlying principle in the economic theory of approximating the damages.

The legal principles underlying the tort of trespass are as follows:

"*A **Trespass** is the doing of unlawful act or of lawful act in unlawful manner to injury of another's person or property."*[4]

To be held liable as the tortfeasor for the *"tort of trespass"*, especially in the context of trespass to property, the following fundamental elements are pre-requisite:

1. ***DUTY OF CARE*:** It refers to the duty owed by the defendant to the plaintiff in correspondence to his legal rights.
2. ***BREACH OF DUTY*:** The breach caused due to the conduct of the defendant.
3. ***CAUSATION:*** The act or omission of the act was the direct cause of the injury caused to the plaintiff.
4. ***PROXIMATE CAUSE:*** It refers to the reasonable foreseeability of the injury caused by the defendant actions.
5. ***INJURY:*** The damages caused to the plaintiff as a direct consequence of the defendant's act or omission of acts.

The general defences available to the defendant, in cases of the tort of *"trespass"* are as follows:

1. ***NECESSITY AS A PRIVILEGE:*** In cases of trespass, the defence of necessity is considered as valid. The circumstances leading to the strict necessity of the defendant to commit the act of trespass, may give him the privilege of using this argument as a defence against the tort action suit.

2. ***CONSENT:*** The direct or implied consent, may become a valid defence in cases of trespass, if the defendant can prove that there was no malicious

intentions behind the commission of his acts. Moreover, there should be a lawful justification and basis behind his conduct.

3. ***PRIVILEGED INVASION:*** This defence is valid in some cases where the act of trespass is subject to the recovery of personal possessions (Movable/Immovable) by the defendant. However, the defendant must prove the authenticity of his claim, and must be the rightful owner of the concerned property.

CHAPTER -3: BACKGROUND

The case "*Boring Family versus Google Incorporation*" is a unique concept that has arrived on the horizon of the law of torts, and there is not much precedence for the judges. However, there are other similar cases that have been filed in this context,

1. Jeffrey Marder vs. Niantic Inc. , The Pokémon Company, & Nintendo Ltd.[5]

This classic lawsuit has been filed in the district court of Northern California. The Plaintiff claims legal injuries due to the shortcomings of the recent "Pokémon Go App" developed by the Niantic Inc. , violating his private rights and the rights of the people of his town. The Plaintiff argues that there has been a *"virtual trespass"* to his property and demands compensation and a valid legal remedy. He claims that there has been an unlawful interference without any lawful justification to his private property. The Nintendo Ltd. hasn't yet acknowledged the law suit, however the judgement of this case would be a landmark judgement in the evolution of this concept.

2. United States vs. Seidlitz[6]

The case basically deals with another form of *"virtual trespass"* which comes under the principles of cyberspace laws. The defendant has been accused of stealing important software from the computer system of a previous employee working in the same company. The intrusion upon the computer system of the plaintiff was regarded as a proximate action and it directly violated his property and personal rights. The virtual interference and damages caused to the plaintiff were recognised by the court, and the concept of *"virtual trespass"* was upheld in this scenario.

CHAPTER – 4: FACTS OF THE CASE

Google has established itself as the pioneer *"search engine"* in the international domain and is known to be the most favoured interface in most of the countries across the world. The facility of Google Maps was provided by the company along with the other utility based apps. In May 2007, Google introduced "Street View" which enabled the Google maps app to navigate 360 degree through the streets of many cities, including Pittsburgh.

The Borings, who lived in the north of the city of Pittsburgh, discovered a *"coloured imagery"* of their house building, swimming pool and driveway, on the *"street view"* app without any authorisation or consent from their part. The street of their residence has enough *"NO TRESPASSING"* signs to ensure safety from such activities. Hence, the rights of the Boring family were violated, and they demanded legal remedies under the following underlying counts of the law of torts,

The lawsuit was filed on 17th February, 2009 in the United States District Court, W.D. Pennsylvania. (Civil Action No. 08-694)

In accordance with the Civil Procedure Code of the United States of America,

1. Count- 1 – Invasion of privacy
2. Count-2 - Trespass
3. Count-4 – Negligence
4. Count- 5 – Conversion

The plaintiff made the following claims against the defendant for compensation,

· Intrusion ***upon Seclusion:*** *"Liability attaches only when the intrusion is substantial and would be highly offensive to `the ordinary reasonable person."*[7] Moreover, the intrusion was into the private property without legitimate authority.

· Publicity ***given to Private Life:*** The photographs of the private property were made public which is the direct violation the privacy and is a danger to the security of the concerned party.

· ***The Negligence Claims:*** The plaintiff claims negligence as, there is *"a causal connection between the breach of duty and the resulting injury."*[8]

· ***The Claim for Unjust Enrichment:*** The defendant has accepted unjustified benefit by violating the rights of the plaintiff. Also, there is no direct or implied consent on the behalf of the plaintiff. Hence, the defendant must compensate the damages incurred by his actions.

· ***The Request for Injunctive Relief:*** *"Injunction is an extraordinary remedy that should be issued with caution, only where the rights and equities of the plaintiff are clear and free from doubt, and where the harm to be remedied is great and irreparable".*[9]

CHAPTER-5: JUDGEMENT

The judgement revolves around the following salient features of the legal interpretation,

· The facts were unable to establish the fact that the intrusion made by the *"street view"* feature of Google Maps App into the property of the Boring Family, constituted *"Private Information".* The disclosed information was already available in the public domain through tax records and maps. Hence, the court disregarded this claim due to these shortcomings.

· *"The determination of whether a duty exists in a particular case involves the weighing of several discrete factors",*

1. The relationship between the parties
2. The social utility of the actor's conduct
3. Forseeabilty of the harm incurred
4. The overall public interest

· *"The Borings' negligence claim is also problematic in that it is grounded, in part, on damages attributable to mental suffering. Hence, the judge downrightly rejected the claim for punitive damages by the plaintiff."*

Also, *"Recovery for emotional distress stemming from a defendant's negligence is available only where the claim includes physical injury to the plaintiff or, in limited circumstances, where the plaintiff witnesses injury to another."****[10]***

· The Court disagrees with the Defendant's argument that diminution in the value of property is not recoverable in negligence. Pennsylvania's economic loss doctrine *"prohibits plaintiffs from recovering in tort economic losses to which their entitlement flows only from a contract."* [11]

· The court established the concept of *"Quantum Meruit"*, which refers to "as much as deserved". The definition states that, "It measures recovery under implied contract to pay compensation as reasonable value of services rendered." [12]

· The court also recognized that the, *"Recovery for unjust enrichment would not, in any event, exceed the particular photographs' value to Google. In framing their demand for restitution, the Plaintiffs ignore the meaning of quantum meruit, arguing that they are entitled to recover all profits made by Google as a result of its decision not to implement controls that would prevent inclusion of imagery of private property, and the amount of reduction in costs realized by Google by failing to implement control measures."****[13]**

· The court urged the conclusion, which granted the Boring family a net compensation worth 1$ (One dollar) as they were unable to prove any type of *"Real Distress"* caused to them by the actions of the defendant. The virtual element of the damages and the lack of strong evidence led to this final judgement of the court.
"Of course, it may well be that, when it comes to proving damages from the alleged trespass, the Borings are left to collect one dollar and whatever sense of vindication that may bring,"*[14]*

CHAPTER – 6: ANALYSIS

The concerned case falls in the territory of *"Rarest of the rare cases"*, and has added many new perspectives to the interpretation of the laws of trespass. If we analyse the step by step proceedings of the court, we will come to realise that the court has very objectively identified the claims of the plaintiff, and has come out with a remarkable implementation of the related laws. The following case has also questioned the individual's right

to privacy and the laws that govern its boundations. There has been a very long debate about including "Right to Privacy" as a fundamental right in the indianconstitution. There have been recent developments in the judgements of the earlier privacy cases in India like *Kharak Singh vs. State of UP*[15]and *Gobind vs. State of MP*[16] and has led to the supreme court order of setting up a nine-judge bench to pass laws on the privacy issues. It is in wake of the privacy concerns caused due to the Aadhar Card Databases misuse and exploitation. In this case , The claim for intrusion was disregarded on grounds that the plaintiff has not claimed for an injunction to remove the *"street view images"* of their property from the internet and have been insufficient to substantiate their damages. However, the court had clearly observed the defendant's negligence in not properly utilizing the internal controls and trespassing the private property of the plaintiff through online mapping, which is a notable development in the evolution of the laws of trespass. The claim for unjust enrichment was firmly debated by both the counsels, however, the court upheld the notion that although there is no quasi-contractual relationship between the two parties, but the restatement of the tort laws urge that a contractual relationship is not necessary in claiming damages. The salient features of this case underline the important precedence for future cases of "virtual trespassing". These include the perspectives with which the court defines the real and virtual damages, the principles with which the court upholds the claims of negligence and breach of privacy, and the application of the doctrine of "*Quantum Meruit",* which means *"as much as deserved"*. Also, the court highlighted the failure of the plaintiff in not being able to procure an *"injunctive relief"* against the defendant, which in turn resulted in the court disregarding the demand for punitive damages and only awarded a total compensation of $1 (One Dollar) to the Boring family.

CHAPTER – 7: CONCLUSION

After the substantive analysis of the case facts and judgements, the conceptualisation of "*virtual trespassing"* has led to the strengthening of its legal interpretations in

the law and social awareness amongst the people of the society. It is a very unique law suit, which has opened doors to a large number of cases which are being filed in the courts across the globe. However, on critically viewing the proceedings of the court, it can be concluded that the implications of *"Real damages"* through virtual acts has not been explained comprehensively and thus, not recognized by the law. Moreover, the intrusions upon privacy and the negligence of the Google Incorporation can be very well comprehended through the arguments put forward by the plaintiff's lawyer. Although, the compensation given by the district court of Pennsylvania is much less as compared towards the seriousness of this wrongful act but, the remarkable thing to notice is the addition of a whole new dimension to the law of torts.

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